The Church Abuse Scandal: Processing the Pope Before the International Criminal Court

Benjamin David Landry
The Church Abuse Scandal: Prosecuting The Pope Before The International Criminal Court

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Abstract

In the early 2000s, the Catholic Church was revealed to have been involved in a pattern of sexual abuse of children. The Church's internal policies allowed members to cover up the abuse by swearing victims to secrecy and refusing to report the abuse to authorities. This routine arguably enabled further abuse by providing abusers with continued access to children. Due, in part, to the hierarchical structure of the Church, commentators argued for the prosecution of Church leadership. Commentators focused on Cardinal Joseph Ratzinger, now Pope Benedict XVI, who was, from 1971 to his elevation to the Holy See in 2005, the individual in the Catholic Church directly responsible for handling accusations of sexual abuse. In April 2010, United Nations Judge Geoffrey Robinson suggested that the Pope be prosecuted before the International Criminal Court for "crimes against humanity" for his role in the scandal. This Comment analyzes the viability of a potential prosecution, considering not only the substantive legal grounds of such a prosecution, but defenses, jurisdictional obstacles, and meaningful outcomes for victims as well. While this Comment concludes that, legally, a prosecutor could make a compelling and potentially successful case, there are political and practical obstacles to obtaining jurisdiction over the Pope that will likely preclude a case from ever moving forward.

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I. INTRODUCTION

In the years immediately following the turn of the century, evidence began to emerge of endemic sexual abuse by Catholic priests of children in their care.¹ When Church leaders became aware of the abuse, their policy was to swear the victims to secrecy and temporarily suspend or transfer accused priests to new parishes without notifying authorities. Many commentators, including members of the Catholic clergy, argue that this pattern of concealing abuse from civil authorities and allowing offenders to remain members of the clergy enabled

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¹ See generally Thomas G. Plante, ed, Sin against the Innocents: Sexual Abuse by Priests and the Role of the Catholic Church (Praeger 2004); The Investigative Staff of The Boston Globe, Betrayal: The Crisis in the Catholic Church (Little Brown 2003).
more abuse.2 This policy was disseminated and enforced by Cardinal Joseph Ratzinger, whom, since 2005, we know as Pope Benedict XVI. From 1981 to his elevation to the Holy See, Cardinal Ratzinger was the leader of the Congregation for the Doctrine of Faith (CDF), in which capacity he was responsible for addressing accusations of sexual abuse by Catholic priests worldwide.3

On May 18, 2001 (the eve of the sexual abuse going public), Cardinal Ratzinger sent a letter to all bishops citing a then-secret 1962 Church document outlining the Church’s policy on the sexual abuse of minors, the Crimen Sollicitationis.4 The Crimen Sollicitationis required the internalization of sexual abuse claims and demanded strict secrecy regarding the proceedings of the Church’s ecclesiastical court, although it did not directly mandate secrecy regarding the underlying events.5 Its procedure involved swearing victims to an oath of secrecy.6 It required that “matters be pursued in a most secretive way,” that information regarding cases “be restrained by a perpetual silence,” and that “each and everyone pertaining to the [internal] tribunal in any way or admitted to knowledge of the matters because of their office, . . . observe the strictest secret . . . under penalty of excommunication”7 among other ecclesiastic punishments.8

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2 See, for example, Plante, Sin Against the Innocents (cited in note 1); Joan Chittister, Divided loyalties: an incredible situation, National Catholic Reporter (Mar 17, 2010), online at http://ncronline.org/blogs/where-i-stand/divided-loyalties-incredible-situation (visited Apr 8, 2011).
5 John L. Allen, Jr, 1962 document orders secrecy in sex cases; Many bishops unaware obscure missive was in their archives, (National Catholic Reporter, Aug 7, 2003), online at http://www.nationalcatholicreporter.org/update/bn080703.htm (visited Apr 8, 2011) (“[Canon lawyers] say[| secrecy in canonical procedures should not be confused with refusal to cooperate with civil authorities. The 1962 document would not have tied the hands of a bishop, or anyone else, who wanted to report a crime by a priest to the police.”).
7 Crimen Sollicitationis ¶ 11 (cited in note 4).
8 Id ¶ 13 and 70.
In his 2001 letter, Cardinal Ratzinger cited and referenced the *Crimen Sollicitationis* in summarizing the Church's policy. The letter also introduced several new norms, particularly, that his office (the CDF) would have exclusive competence regarding allegations of the sexual abuse of minors, which meant that Ratzinger was in complete control of the Church's response to the abuse. The *Crimen Sollicitationis* policy was enforced by Cardinal Ratzinger throughout his time as leader of the CDF, and now in his capacity as the Pope.

The Pope's actions have prompted some commentators to argue that his role in the pattern of covering up and enabling the sexual abuse amounts to "crimes against humanity," one of the crimes prosecutable in the International Criminal Court (ICC). The ICC was created by the United Nations in 1998 and entered into force July 1st, 2002. "The ICC is the first permanent and universal international criminal court." It prosecutes individuals for a limited number of crimes set out in its Statute. In its history, the ICC has initiated an extremely small number of proceedings, due in large part to the number of important states who are not parties—notables on the list include China, Iran, Japan, Pakistan, Russia, and the US. As of April 2011, the Court has only opened investigations into six situations: Uganda, the Democratic Republic of the Congo, Darfur, the Central African Republic, the Republic of Kenya, and Libyan Arab Jamahiriya (regarding Muammar al Gaddafi).

This Comment will provide a legal analysis of the viability of prosecuting the Pope in the ICC for crimes against humanity for his conscious disregard of

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12 Id.


14 Id.

15 *Situations and Cases*, (International Criminal Court), online at http://www.icc-cpi.int/Menus/ICC/Situations+and+Cases/ (visited Apr 8, 2011); Statement of the Prosecutor on the opening of an investigation into the situation in Libya, International Criminal Court, (Mar 3, 2011), online at http://www.icc-cpi.int/menus/icc/structure%20of%20the%20court/offic%20of%20the%20prosecutor/reports%20and%20statements/statement/statement%20of%20the%20prosecutor%20on%20the%20opening%20of%20the%20investigation%20into%20the%20situation%20in%20Libya?lan=en-GB (visited Apr 8, 2011).
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the sexual abuse of children by Catholic priests under the power of the Catholic Church. It will proceed in four Sections, analyzing first whether the Pope has committed crimes against humanity pursuant to the ICC definition; second, whether the Pope has any viable defenses; third, how the ICC could obtain jurisdiction over the Pope and any issues it may have in doing so; and, fourth, what the possible outcomes of such a prosecution could be.

It is important to establish from the start that this Comment does not suggest that the Pope should be prosecuted, or argue one way or the other; rather, the intent is to analyze, objectively, in light of the ICC Statute and the known evidence, whether the Pope could be prosecuted. I shall leave arguments of morality and philosophy to those better suited.

II. Culpability

The ICC Statute defines crimes against humanity as one of eleven acts “committed as a part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack.” The first element deals directly with the Pope’s actions (and therefore requires evidence of the Pope’s conduct in relation to the abuse), while the second, third and fourth deal with the nature of the abuse itself (and therefore require evidence of the abuse by Catholic priests worldwide).

A. The Act

Article 7 of the Statute enumerates eleven acts, any one of which may qualify for a finding of crimes against humanity. The seventh listed act is “[r]ape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity.” The sexual abuse of children by Catholic priests will almost certainly qualify under rape and will likely come under the umbrella of the catchall “any other form of sexual violence of comparable gravity.”

There is no evidence to suggest that the Pope ever personally abused a child. That being the case, the question then becomes, as a non-actor, is the Pope liable? Individual criminal responsibility is defined in Article 25 and the responsibility of commanders and other superiors in Article 28.

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16 Rome Statute at Art 7(1).  
17 Id.  
18 Id at Art 7(1)(g).  
19 However, the phrase “any other form of sexual violence of comparable gravity” has not yet been defined by the Court.
1. Article 25.

Article 25(2) states that “[a] person who commits a crime within the jurisdiction of the Court shall be individually responsible and liable for punishment in accordance with this Statute.” \(^{20}\) Section 25(3) enumerates four specific circumstances under which a person will be individually criminally liable:

- (a) Commits such a crime, whether as an individual, jointly with another or through another person, regardless of whether that other person is criminally responsible;
- (b) Orders, solicits, or induces the commission of such a crime which in fact occurs or is attempted;
- (c) For the purposes of facilitating the commission of a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission;
- (d) In any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either: (i) Be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the Court; or (ii) Be made in the knowledge of the intention of the group to commit the crime.\(^{21}\)

I will analyze the Pope’s potential culpability with respect to each.

a) Co-perpetrator. Subsection (a) establishes liability as a co-perpetrator. One will be liable if he or she “[c]ommits [one of the enumerated acts], whether as an individual, jointly with another or through another person, regardless of whether that other person is criminally responsible.” \(^{22}\) Here, because the Pope did not personally abuse any child, either by himself or jointly with another, he will not be liable as a co-perpetrator.

b) Orders, solicits or induces. Subsection (b) establishes liability for an individual who “[o]rders, solicits or induces the commission of such a crime which in fact occurs or is attempted.” The strongest argument under this subsection is that the Pope “induc[ed]” the abuse. Certainly, the Pope did not “order” the abuse, as there is no evidence of purposeful intent. It would be equally unsubstantiated to suggest that he “solicited” the abuse. However, it is arguable that the Church’s policy induced the abuse insofar as it enabled its continuation. The question then becomes what mental state is required to establish “induced”?

Article 30 of the ICC Statute provides the definitions of intent and knowledge and serves as the default rule for all crimes within the jurisdiction of

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\(^{20}\) Rome Statute at Art 7(2).

\(^{21}\) Id at Art 25(3) (cited in note 13).

\(^{22}\) Id.
the Court unless otherwise provided.23 "Consequently, it must be established that the material elements of the respective crime were committed with 'intent and knowledge,' unless the Statute or the Elements of Crimes require a different standard of fault."24 Article 30(2) states that "a person has intent where: (a) In relation to conduct, that person means to engage in the conduct; [or] (b) In relation to a consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events."25 Article 30(3) states that "[f]or the purposes of this article, 'knowledge' means an awareness that a circumstance exists or a consequence will occur in the ordinary course of events."26 The ICC has explained that, "[w]ith respect to . . . recklessness or any lower form of culpability, the Chamber is of the view that such concepts are not captured by article 30 of the Statute."27 This means that in order to have knowledge, or intent with respect to the consequence, the Pope needed to have been virtually certain or practically certain "that the consequence will follow, barring an unforeseen or unexpected intervention that prevent[s] [sic] its occurrence."28

On the known evidence, it is arguable that the Pope knew providing abusive priests continued access to children would, in the ordinary course of events, result in further abuse.29 In this way, an argument could be made that the Pope had Article 30(2)(b) intent and Article 30(3) knowledge. This argument, as stated above, depends upon a showing that the Pope was "aware[] that [abuse would] occur in the ordinary course of events"30 if he kept incidents of abuse secret and allowed priests to continue working with children. This will not be an easy showing.

The Pope could argue that he truly believed the internal policies of the Crimen Sollicitationis would end the abuse—in fact, in his 2001 letter, Cardinal Ratzinger concludes by saying "[t]hrough this letter . . . it is hoped [] that more

23 Id at Art 30.
24 Prosecutor v Jean-Pierre Bemba Gombo, Case No ICC 01/05-01/08, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, ¶ 136 (June 15, 2009), online at http://www.icc-cpi.int/iccdocs/doc/doc699541.pdf (visited Apr 8, 2011) ("Bemba Confirmation Decision").
25 Rome Statute at Art 30(2).
26 Id at Art 30(3).
27 Bemba Confirmation Decision, ¶ 360 (cited in note 24).
28 Id ¶ 362.
30 Rome Statute at Art 30(3).
grave delicts will be entirely avoided.”

This defense, however, is particularly weak given the Church’s recent, and numerous, acknowledgments that it mishandled the scandal, and the mounting evidence of the attempts to cover up the abuse (particularly in Ireland).

In addition to the burden of making this showing, a potential prosecutor may be faced with the possibility that the term “induces” could be construed to imply a further positive step of either persuading or affirmatively influencing someone to act or to bring about the conduct, which the Pope is certainly not guilty of doing. On balance, subsection (b) liability for “orders, solicits or induces” is unlikely to be the avenue a potential prosecutor pursues given the alternative avenue under Article 28, discussed in Section A.2, and the potential additional step required by “induces.”

c) Derivative oraccessorial liability. Subsection (c) establishes “a mode of derivative or accessorial liability.” A person will be criminally liable if that person, “[f]or the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission.” Here, the Pope’s conduct certainly assisted in the commission of the crime insofar as his failure to report abuse, hold abusers accountable, and keep abusers from interacting with children allegedly enabled more abuse to occur. But his actions were not made “[f]or the purpose of facilitating the commission of such a crime.” This will likely preclude culpability under this section.

d) Group crimes. Subsection (d) establishes accessorial liability for “group crimes.” It states that a person will be criminally liable if that person:

[i]n any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either: (i) Be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the

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31 Ratzinger, Congregation for the Doctrine of Faith Letter (cited in note 4).
33 “Induces” has not yet been defined by the Court, and as such, this argument is purely anticipatory.
34 Rome Statute at Art 25(b)(3).
36 Proof of the nexus between the Pope’s conduct and the crimes is dealt with in Sections II.B–D.
37 Burchard, 8 J Intl Crim Just at 943 (cited in note 35).
jurisdiction of the Court; or (ii) Be made in the knowledge of the intention
of the group to commit the crime.\textsuperscript{38}

Here, the alleged actor need only "contribute" to the crime, a broad term
that may "encompass[] the facilitation of merely contextual and general
conditions that ultimately feed into the commission of a crime by a group," rather than taken to assist a particular crime.\textsuperscript{39} Romanettes (i) and (ii) establish an
additional mental element—that the alleged accessory’s intentional “contribution . . . (i) Be made with the aim of furthering the criminal activity . . . or (ii) Be
made in the knowledge of the intention of the group to commit the crime.”
Again, because the Pope did not act “with the aim of furthering the criminal
activity,” he will not be liable under (i). Proving that the act was “made in the
knowledge of the intention of the group to commit the crime” will require a
showing that (1) Cardinal Ratzinger knew that his actions would cause more
abuse and that (2) the Catholic Church as a group intended to abuse children.
The fact that the Catholic Church, as a group, did not intend to universally abuse
children will almost certainly bar liability under this subsection.

2. Article 28.

Article 28 allows for a \textit{respondeat superior} type of criminal liability. The
general idea is:

a person who has neither the subjective element of a crime (mens rea), nor
participates in the objective element (actus reus), but is a superior of a
perpetrator may be criminally responsible if he knew his subordinate was
about to commit a crime and failed to take necessary and reasonable
measures to prevent it or, having reason to know that a crime was
committed, failed to investigate or punish his subordinate.\textsuperscript{40}

This is the most likely avenue a potential persecutor would take in
prosecuting the Pope as it is the one most clearly satisfied. Article 28 states:

a superior shall be criminally responsible for crimes within the jurisdiction
of the Court committed by subordinates under his or her effective authority
and control, as a result of his or her failure to exercise control properly over
such subordinates, where: (i) The superior knew, or consciously disregarded
information which clearly indicated, that the subordinates were committing
or about to commit such crimes; (ii) The crimes concerned activities that
were within the effective responsibility and control of the superior; and (iii)
The superior failed to take all necessary and reasonable measures within his

\textsuperscript{38} Rome Statute at Art 25(3)(d).

\textsuperscript{39} Burchard, 8 J Intl Crim Just at 942 (cited in note 35).

\textsuperscript{40} Dermot Groome, \textit{The Church Abuse Scandal: Were Crimes Against Humanity Committed?}, 11 Chi J Intl
L 439, 470 (2011).
or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.41

I will address each element in turn.

a) Knew or consciously disregarded. With respect to (i), the Pope clearly knew about the endemic abuse, evidenced directly by his 2001 letter in response to the rising number of sexual abuse cases.42 Additionally, in its 2005 Decision on the Confirmation of Charges in Prosecutor v Jean-Pierre Bemba Gombo (Bemba Confirmation Decision) the ICC stated that "[a]ctual knowledge may be also proven if, 'a priori, [a military commander] is part of an organised structure with established reporting and monitoring systems.'"43 Although the Pope is not a military commander, his role as the leader of the CDF, set forth in the Crimen Sollicitationis and his 2001 letter, involves obtaining direct reports of abuse and then monitoring and responding to them. In this way, his role is similar to that of a military commander as described by the Court above.

Additionally, it is arguable that the Pope consciously disregarded information (reports of abuse he received in his capacity as leader of the CDF) that clearly indicated subordinates were about to, or would continue to, commit such acts.44 This conclusion is supported by evidence of the Church acknowledging its errors,45 although this theory will require a showing that the Pope was virtually or practically certain that further abuse would occur. The operative evidence, however, is the Pope’s direct knowledge of the abuse, which will satisfy the “knew or consciously disregarded”46 language.

41 Rome Statute at Art 28.
43 Bemba Confirmation Decision, ¶ 431 (cited in note 24).
44 See David Gibson, What Did the Pope Know, and When Did He Know It?, (Politics Daily, Mar 25, 2010), online at http://www.politicsdaily.com/2010/03/25/what-did-the-pope-know-and-when-did-he-know-it/ (visited Apr 8, 2011):

The most problematic case thus far for Benedict concerned his 1977-1982 tenure as archbishop of Munich, when he accepted a priest, Father Peter Hullermann, into the diocese for psychological evaluation and treatment after Hullerman had sexually abused a number of children. The priest was soon reassigned to a parish, where he went on to abuse more children for years, even after Ratzinger left to become a top doctrinal official at the Vatican.

46 Rome Statute at Art 28(b)(1).
b) Responsibility and control. As the leader of CDF, then-Cardinal Ratzinger was responsible for addressing accusations of sexual abuse by priests worldwide. Quoting canonical law, Ratzinger writes, in his 2001 letter:

[The Congregation for the Doctrine of Faith] examines delicts against faith and more grave delicts both against morals and committed in the celebration of the sacraments which have been reported to it and, if necessary, proceeds to declare or impose canonical sanctions according to the norm of common or proper law.47

The 2001 letter also gives the CDF exclusive competence to handle cases of sexual abuse, which means “the crimes and activities” were well “within” his “responsibility and control”—indeed, they were his direct responsibility.48

c) Measures to prevent, repress, or report. The ICC clarified subsection (iii) of Article 28(b) in its Bemba Confirmation Decision. That case dealt with Article 28(a), which covers military commanders, while the case at hand deals with Article 28(b), which covers superiors. Subsection 28(a)(ii) and 28(b)(iii), however, are identical, which makes the Court’s clarification persuasive. Article 28(a)(ii) and (b)(iii) read: “[That] superior [military commander or person] failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.”49 The Court said:

[T]he failure of a superior to fulfil [sic] his duties during and after the crimes can have a causal impact on the commission of further crimes. As punishment is an inherent part of prevention of future crimes, a commander’s past failure to punish crimes is likely to increase the risk that further crimes will be committed in the future.50

The Court continued in the next paragraph:

There is no direct causal link that needs to be established between the superior’s omission and the crime committed by his subordinates. Therefore, the Chamber considers that it is only necessary to prove that the commander’s omission increased the risk of the commission of the crimes charged in order to hold him criminally responsible under article 28(a) of the Statute.51

Therefore, it is unnecessary to prove that the Pope’s policy de facto caused the continued abuse, only that it “increased the risk of the commission of the crimes.” The Pope, factually, failed to both “take all necessary and reasonable measures . . . to prevent or repress [the] commission” of the acts, evidenced by

47 Ratzinger, Congregation for the Doctrine of Faith Letter (cited in note 4) (alteration in original).
48 Id.
49 Rome Statute at Arts 28(a)(ii) and 28(b)(iii).
50 Bemba Confirmation Decision, ¶ 424 (cited in note 24) (internal citations omitted).
51 Id ¶ 425.
the fact that abuse continued almost unimpeded, and "to submit the matter to the competent authorities for investigation and prosecution," evidenced by his adherence to and enforcement of the *Crimen Sollicitationis*. Under the ICC's *Bemba* Confirmation Decision rationale, the Pope's "omission[s] increased the risk of the commission of the crimes." This is the strongest argument for the Pope's individual criminal liability, especially in light of the Church's recent acknowledgments that it made "sins of omission" in handling the abuse.

B. Widespread or Systematic Attack

"[P]art of a widespread or systematic attack" is not further defined in the Statute. While "attack" historically required an element of armed conflict, today an attack on a civilian population may occur in peacetime.

"Widespread and systematic are considered to be alternative requirements." The Court has defined widespread as "massive, frequent, large scale action, carried out collectively with considerable seriousness and directed against a multiplicity of victims" and systematic as "thoroughly organized and following a regular pattern on the basis of a common policy involving substantial public or private resources." This definition is supported by both the International Criminal Tribunal for Rwanda (ICTR) and the International Criminal Tribunal for the former Yugoslavia (ICTY). The defining element of

52 Rome Statute at Art 28(a)(ii).
54 *Bemba* Confirmation Decision, ¶ 425 (cited in note 24).
56 Rome Statute at Art 7(1).
59 Chesterman, 10 Duke J Comp & Intl L at 315 (cited in note 57). See also *Bemba* Confirmation Decision, ¶ 82 (cited in note 24).
60 *Bemba* Confirmation Decision, ¶ 83 (cited in note 24).
both “widespread” and “systematic” arises from a nexus between the core crime and a policy of some government or organization to perpetuate those crimes.63

In March 2009, the ICC issued an Arrest Warrant in the case of *The Prosecutor v Omar Hassan Ahmad Al Bashir (Al Bashir Arrest Warrant)* for, *inter alia*, crimes against humanity. The Court provided the following:

> ... there are reasonable grounds to believe that the unlawful attack on the above-mentioned part of the civilian population of Darfur was (i) widespread, as it affected, at least, hundreds of thousands of individuals and took place across large swaths of the territory of the Darfur region; and (ii) systematic, as the acts of violence involved followed, to a considerable extent, a similar pattern.64

The Court considered the multiplicity of victims and geographic reach of the attack with respect to “widespread” and the similarity in pattern with respect to “systematic.”

In the case at hand, evidence of abuse is extensive. As recently as 2010, news sources have commented that “[t]he spread of hundreds of sex-abuse allegations across Europe . . . has cut into the church’s credibility in former Catholic strongholds.”65 I will briefly outline some of the evidence of abuse in Ireland and the US.

Beginning in 1999, the Irish Government investigated the extent of the abuse of children by the Catholic Church operating in Ireland from 1936 to 2009, publishing its results in 2009 (commonly known as The Ryan Report or The Ryan Commission).66 The investigation “found that [abuse was] systematically covered up and perpetrators who were also permanently professed members of the Congregation were recklessly allowed continued access to children in order to protect the Congregation from scandal and those permanent members from criminal prosecution.”67 In fact, “the Commission found that this

63 Chesterman, 10 Duke J Comp & Ind L at 317 (cited in note 57).
66 See generally Ryan Report vol 1, ch 1 (cited in note 29) (establishing the Commission).
67 Groome, 11 Chi J Intl L at 502–03 (cited in note 40); Geoffrey Robertson, *Prosecute the Pope*, 1 (The Daily Beast, Apr 1, 2010), online at http://www.thedailybeast.com/blogs-and-stories/2010-04-01/take-him-to-court/ (visited Apr 8, 2011) (stating that the finding of the Ryan Report “was not merely that ‘sexual abuse was endemic in boys’ institutions,’ but that the church hierarchy protected the perpetrators and, despite knowledge of their propensity to reoffend, allowed them to take up new positions teaching other vulnerable children after their victims had been solemnly sworn to secrecy”).
‘policy facilitated further abuse when offenders were transferred within the Congregation or permitted to leave in good standing.’

Abuse has also been prevalent in the US. A Report from the John Jay College of Criminal Justice (John Jay Report) surveyed Catholic priests in the US. The report found 11,000 allegations of sexual abuse, 6,700 (61 percent) of which were substantiated (3,300 were not investigated due to the priest’s death). While the number of priests that abused children was only 4,450 (4.0 percent), which is relatively small, the fact that the Report was a survey means that it arguably suffers from a reporting bias (abuse may not have been reported). Additionally, the Report found that while most accused priests were accused of a single event of abuse, 1,823 (40.9 percent) had two or more allegations. The Report gave five factors that it believed contributed to the problem: (1) failure by the hierarchy to grasp the seriousness of the problem, (2) overemphasis on the need to avoid a scandal, (3) use of unqualified treatment centers, (4) misguided willingness to forgive, and (5) insufficient accountability. Allegations of abuse have also been made in Africa (Kenya), Asia (Philippines), Europe (Austria, Belgium, France, Germany, Italy,

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69 Robertson, Prosecute The Pope (cited in note 67) (claiming that 11,750 allegations of US child sex abuse have been featured in actions settled by the archdioceses). See also John Fiala, Texas Priest, Charged With Hiring Hitman To Kill Teen Who Accused Him Of Sexual Abuse, Associated Press (Nov 23, 2010), online at http://www.huffingtonpost.com/2010/11/23/john-fiala-texas-priest-hitman-charge_n_787877.html (visited Apr 8, 2011) (reporting on a Catholic priest in Texas who was arrested on November 2010 for hiring a hitman to kill a teenager who accused him of rape).
71 Id.
72 Id.
73 Id.
75 Philippines Church apologizes for sex abuse, BBC News (July 8, 2002), online at http://news.bbc.co.uk/2/hi/asia-pacific/2116134.stm (visited Apr 8, 2011).
Malta, Norway, Poland, Sweden, Great Britain, North America (Canada, Mexico), Australia, and South America (Argentina, Brazil, Chile).

79 Sonia Phalnikar, ed, Abuse allegations mount at German Catholic Church, Deutsche Welle (Feb 7, 2010), online at http://www.dw-world.de/dw/article/0,,5224213,00.html (visited Apr 8, 2011).
82 Corrected: Norwegian bishop who resigned in 2009 was Abuser, Reuters (Apr 7, 2010), online at http://www.reuters.com/article/idUSTRE6362KE20100407 (visited Feb 25, 2011).
86 William Blakeney, Vicarious Conclusion, Canadian Underwriter (May, 2004), online at http://www.canadianunderwriter.ca/issues/story.aspx?aid=1000156187 (visited Apr 8, 2011) (discussing the Canadian Supreme Court case, Doe v Bennett, which found the Catholic Church guilty of sexual abuse).
One could persuasively argue that the Church’s conduct constituted “massive, frequent, large scale action, carried out collectively with considerable seriousness and directed against a multiplicity of victims.” The large geographical and temporal reach of the abuse weighs in favor of this conclusion. However, the relatively small percentage of priests who were inflicting the abuse (for example, 4.0 percent in the US according to the John Jay Report) swings the pendulum back. In light of the body of allegations, the multiplicity of victims, and the consistency with which the attacks occurred globally, it seems likely that the sexual abuse was “widespread.” This argument runs parallel to the Court’s rationale in the Al Bashir Arrest Warrant, quoted above, which makes it particularly persuasive.

A less persuasive argument could be made that the conduct was “systematic” or “thoroughly organized and following a regular pattern on the basis of a common policy involving substantial public or private resources.” The policy of covering up the abuse and allowing the abusers to reoffend by placing them with more children lends itself to the “systematic” nature of the attack, although this is a slightly more attenuated argument given that there certainly was no underlying policy requiring or directing the priests to sexually abuse children. The cover-up was certainly “thoroughly organized and followed a regular pattern on the basis of a common policy,” but the abuse itself was not. It seems unlikely that the cover-up, which is not one of the enumerated acts, would qualify now under the “systematic” requirement. Further, the extent to which the attacks “involv[ed] substantial public or private resources” is questionable. An argument could be made, however, that the use of Church locations, time (insofar as the priests were employees or agents of the church), and influence satisfy this requirement.

Ultimately, the satisfaction of both widespread and systematic is not necessary—a successful prosecution would only need to prove one. The obstacle for a prosecutor will be proving that the relatively small percentage of priests offending amounts to a widespread attack, as “widespread” is the most viable avenue for prosecution.

C. Directed Against a Civilian Population

The ICC has explained the “directed against any civilian population” language, stating that:

- the underlying offences defined in article 7(1) of the Statute[[rape]] must be directed against “any civilian population” to constitute crimes against humanity . . . this requirement means that the civilian population must be the primary object of the attack and not just an incidental victim of the attack.

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... [T]he Chamber is of the view that the Prosecutor must demonstrate that the attack was such that it cannot be characterised as having been directed against only a limited and randomly selected group of individuals.93

"Directed against any civilian population" is further defined in Article 7(2)(a) 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."94 The ICC has confirmed that "article [7(2)(a)] specifies that the two cumulative elements, i.e. the multiple commission of acts and the attack being pursuant to or in furtherance of a State or organizational policy to commit such attack, should also be present."95

There are four distinct questions, each of which will be answered in turn: (1) whether the children constitute a civilian population, (2) whether the Church’s actions were directed against that civilian population, (3) whether there existed a “multiple commission of acts” and (4) whether the attack was made “in furtherance of a State or organizational policy.”

1. Civilian population.

There is a strong argument for the successful classification of the children as a civilian population:

The findings of the Ryan Commission establish that over the course of sixty years, thousands of children were placed in Christian Brothers’ institutions and became victims of widespread physical and sexual abuse. . . . [T]he sheer number of children and the broad time period of the crimes suggest at least the potential that children committed by courts to the care of religious congregations constitute a civilian population that meets the threshold established by international law.96

As a footnote to the quotation above, author Dermot Groome writes,

The Ryan Commission examined institutions operated by seven other religious congregations . . . . Ryan Report, vol 2 §§1-16[.] Each of these congregations was under the direct supervision of the Vatican. While it is beyond the scope of this paper, if there is evidence establishing coordination and cooperation in the violence propagated in these other institutions they may be considered part of the same attack for the purposes of this element.97

The evidence of coordination is the Pope’s global policy, which enabled abuse to continue against the children, as evidenced by the Crimen Sollicitationis and the 2001 letter. Groome’s scholarship considers sexual and non-sexual abuse

94 Rome Statute at Art 7(2)(a).
95 Bemba Confirmation Decision, ¶ 80 (cited in note 24).
96 Groome, 11 Chi J Intl L at 455 (cited in note 40).
97 Id at 455 n 86.
of children. Although the non-sexual physical abuse is beyond the scope of this Comment, the global coordination of sexual abuse policy will likely be enough—it will allow the various attacks to be considered part of the same attack against a civilian population.

2. Directed against.

With respect to whether the Church’s actions were directed against the civilian population, recall that the ICC requires the “civilian population be the primary object of the attack, and not just an incidental victim.” The ICC has also stated that it is “the underlying offences defined in article 7(1) of the Statute, and not the Article 28 superior conduct, that must be directed against ‘any civilian population’ to constitute crimes against humanity.” The prosecutor, then, would have to argue that the policy disseminated by the Church to the abusers enabled the abusers to carry out attacks without fear of outside interference or punishment—thereby allowing the abuse itself, and not just the cover-up, to be directed against the children.

The Church’s argument would likely be that the victims were simply incidental and that there was no intent to isolate the victims as a class. The problem is that not only is the class of victims exclusive (children), but the Church’s documents discuss children specifically and aim to avoid scandal at the expense of the children (or more accurately, at the expense of the children’s ability to seek outside help). This means that abusers were directed by the policy to cover-up abuse, which created an environment enabling further abuse against children. In this way it could be argued that the children were the primary object of the attack.

While this argument stretches the traditional conception of “directed against” (insofar as there was no cooperative effort to abuse children, but merely an effort to cover it up at the expense of enabling more), there is an argument for accepting it. The initial sexual abuse of children was not an attack directed at them. But after the Vatican (lead by Cardinal Ratzinger) became aware of the widespread sexual abuse described in the Ryan Report is clearly a purposeful practice of covering up criminal acts to protect religious congregations and their permanent members, it is not so clearly a purposeful attack directed at children. That such egregious conduct could have such grave consequences for a civilian population raises the question of whether an attack against a civilian population that is the result of negligent or reckless conduct could satisfy the contextual requirements of a crime against humanity.
conduct and the grave effect that the policy would have on children, and nevertheless enacted and followed it, the Vatican could be said to have purposefully directed an attack against the children.\(^{102}\) When abusers then received the policies and followed them, they too participated in the direct attack. This argument turns on whether the Court is willing to allow the Church’s conscious disregard of risk to trickle down to the actual abusers, which is likely given that all priests knew about the policies. As discussed above, the Article 30 definitions of intent, which allow a conscious disregard of mental state, also lend support to this conclusion.\(^{103}\)

In order to satisfy the “direct against” language of the Statute a prosecutor will need to show that (a) the children were the primary object of the attack and (b) that the conduct of the actual abusers was directed at the children.

3. Multiple commissions of acts.

The ICC has further articulated the showing required to satisfy (3), whether there existed a “multiple commission of acts.” The Court stated that “[t]he legal requisite of ‘multiple commission of acts’ means that more than a few isolated incidents or acts as referred to in article 7(1) of the Statute have occurred.”\(^{104}\) This element requires a showing similar to the one required for “widespread or systematic.” “More than a few isolated incidents or acts” is, however, a very low bar and will almost certainly be met by the evidence set forth in Section II.B.

4. State or organizational policy.

With respect to (4), whether the actions occurred as a part of a “state or organizational policy,” the ICC has stated that:

Such a policy may be made by groups of persons who govern a specific territory or by any organization with the capability to commit a widespread or systematic attack against a civilian population. The policy need not be formalised. Indeed, an attack which is planned, directed or organized—as opposed to spontaneous or isolated acts of violence—will satisfy this criterion.\(^{105}\)

The Akayesu case, before the ICTY, provides further articulation, stating that “[t]here is no requirement that this policy must be adopted formally as the policy of a state. There must however be some kind of preconceived plan or policy.”\(^{106}\) The two questions here are (a) whether the “state or organizational policy” applies to non-state actors, like the Catholic Church, and (b) whether the

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\(^{102}\) Id.

\(^{103}\) Rome Statute at Art 30.

\(^{104}\) Bemba Confirmation Decision, ¶ 81 (cited in note 24).

\(^{105}\) Id.

\(^{106}\) The Akayesu Case, 1998 ICTR-96-4-T ¶ 6.4 (cited in note 61).
conduct of the Church was “planned, directed or organized” and made pursuant to, or constitutes, a “preconceived plan or policy.”

a) Non-state actors. With respect to (a), the operative language in Article 7(2)(a) is “state or organizational policy,” which on its face would seem to include an organization like the Catholic Church. Indeed, the ICC follows this same interpretation. In its Decision on the Confirmation of Charges in the Prosecutor v Katanga case (Katanga Confirmation Decision), the Court stated:

Such a policy may be either by groups of persons who govern a specific territory or by any organisation with the capability to commit a widespread or systematic attack against a civilian population. The policy need not be explicitly defined by the organisational group.

The Court followed this approach after the Katanga Confirmation Decision, for example, in the Bemba Confirmation Decision.

Interestingly, however, the chair of the ICC drafting committee has stated that:

Article 7 does not bring a new development to crimes against humanity, namely, its applicability to non-state actors. . . . The text clearly refers to state policy, and the words “organizational policy” . . . do not refer to the policy of an organization, but the policy of a state.

Despite the chair’s comment that a facial interpretation would “bring a new development to crimes against humanity,” his position is contrary to customary international law, which has no such requirement, evidenced by numerous ICTY cases. Although the chair’s statement casts some doubt over whether an organization can satisfy Article 7, the ICC’s acceptance of non-state organizations in its cases is persuasive. Further, the Catholic Church is a multinational religious organization spanning the globe, and it would be difficult to question its “capability to commit a widespread or systematic attack.”

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110 Id.

111 Groome, 11 Chi J Intl L at 457 n 94 (cited in note 40).

112 Bemba Confirmation Decision, ¶ 81 (cited in note 24) (“Such a policy may be made by groups of persons who govern a specific territory or by any organization with the capability to commit a widespread or systematic attack against a civilian population.”).

b) "Preconceived plan or policy" and "planned, directed, or organized." Under the ICTY language of "preconceived plan or policy," the Church’s formal policy outlined in the Crimen Sollicitationis and Ratzinger’s letter will likely satisfy this requirement.114 Groome summarizes the conclusion of the Ryan Report:

The Commission found that the predominant consideration in dealing with sexual abuse was to protect the institution from the perceived harm that would result if the allegations became public . . . [and] that this "policy facilitated further abuse when offenders were transferred within the Congregation or permitted to leave in good standing."115 Certainly the Church’s formalized and implemented policy satisfies the "preconceived plan or policy" language.

The sufficiency of the Church’s policy is less clear when considered in light of the ICC’s comment in the Bemba Confirmation Decision: “Indeed, an attack which is planned, directed or organized—as opposed to spontaneous or isolated acts of violence—will satisfy this criterion.”116 In our case, the attacks followed a regular pattern (abuse, cover-up, no accountability) and were certainly more than spontaneous or isolated. Section II.C.2 (discussing whether the attack was “directed against” the children) outlined a theory in which the superiors’ conscious disregard of the Policy’s risks constituted a direct attack against the children. This theory also suggests that a conscious disregard mental state could trickle down to the individual abusers who were made aware of the policy and then abused children. Applying that same theory here would mean that the Policy was not only planned and organized, but directed against the children.

Satisfying the various elements of “[d]irected against any civilian population” will be the other evidentiary obstacle, next to proving that the attack was “widespread”—both of which will be the lynchpins of proving crimes against humanity. Still, like the “widespread” requirement, there seems to be enough evidence to support colorable arguments.

5. With knowledge of the attack.

In the Bemba Confirmation Decision, the ICC stated:

88. The perpetrator must be aware that a widespread attack directed against a civilian population is taking place and that his action is part of the attack. However, . . . the element “with knowledge” “should not be interpreted as requiring proof that the perpetrator had knowledge of all characteristics of

114 Crimen Sollicitationis ¶ 11 (cited in note 4); Ratzinger, Congregation for the Doctrine of Faith Letter (cited in note 4); Kung, Ratzinger’s Responsibility (cited in note 4).
116 Bemba Confirmation Decision, ¶ 81 (cited in note 24).
the attack or the precise details of the plan or policy of the State or organization.”  

The question is whether the Article 28 superior (the Pope) or the Article 7(1) abusers are the ones who must have acted “with knowledge of the attack.” In that same opinion, concerning Article 28 liability, the ICC continued by stating that:

89. The Chamber notes that the mode of responsibility concerning [the superior] is dealt with separately . . . at this point, the Chamber confines its examination to the contextual element of crimes against humanity “with knowledge of the attack” which pertains to the knowledge of the attack by the alleged direct perpetrators.  

This means that we must analyze the knowledge of the actual abusers for purposes of this section. The Pope’s individual culpability has been dealt with in Section II.A.  

The Church itself has acknowledged that it made “sins of omission in handling sexual-abuse cases.” The abusers were made aware that “a circumstance exist[ed]” when they either read directly or were directed to adhere to the Church’s policy set forth in the 2001 letter and Crimen Sollicitationis. Further, after receiving that information, and complying, they would arguably have been aware of the widespread nature of the abuse and of their part in the attack. Further, the ICC’s clarification that “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” makes this argument more persuasive.  

D. Conclusion on Culpability

The preceding analysis suggests that a prosecution of the Pope is plausible. Sexual abuse is one of the enumerated “acts” under the Statute. Article 28’s respondeat superior individual criminal liability covers the Pope’s position in the CDF and his actions. The large temporal and global span of abuse suggests that the incidents were “widespread.” While the abuse is less likely to qualify as “systematic,” a prosecutor need only satisfy widespread or systematic, not both. The victims, the children, will very likely qualify as a civilian population. The Church’s conscious disregard for the safety of the children, and their policies of hiding the allegations, arguably amount to an attack “directed against” a civilian

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117  Id ¶ 88.
118  Id ¶ 89.
119  Meichtry, Pope Convenes Cardinals On Response to Sex Abuse, Wall St J at A12 (cited in note 32) (internal quotations omitted).
120  Bemba Confirmation Decision, ¶ 88 (cited in note 24).
population” that can trickle down to the individual abusers. Finally, the abusers' knowledge of the attack and their participation in enabling further abuse will likely satisfy the knowledge requirement.

Moreover, a potential prosecutor would almost certainly reference the Preamble to the ICC Statute, in which the state parties acknowledge that they are “mindful that during this century millions of children, women, and men have been victims of unimaginable atrocities that deeply shock the conscience of humanity,” and the State parties “affirm[] that the most serious crimes of concern to the international community as a whole must not go unpunished[.]” The purposes of the ICC run parallel to the type of abuse involved in the Church scandal, which lends weight to a potential prosecutor’s argument. Although there are some obstacles in terms of legal definitions and evidentiary showings, a potential prosecutor has colorable arguments for culpability.

III. DEFENSES

The question now turns to whether the Pope has any viable defenses. The primary, and likely only, substantive defense will be that the Pope is due head of state immunity.

Head of state immunity is an immunity that applies to the actions of a head of state or high ranking government official under the rationale that “[those] official acts of a head of state [should be] treated as those of the state,” which are immune from foreign adjudication. Although one could argue that the Vatican is not a state, a discussion would be onerous, and likely inconclusive for the purposes of determining whether it satisfies the customary definition of the immunity. Moreover, the focus of the debate will likely be whether or not the immunity is recognized (or applicable) in the ICC. As such, I will assume that the Vatican is a State and that the immunity would apply to the Pope under customary international law.

The ICC Statute very clearly does not recognize head of state immunity. Article 27, titled “Irrelevance of official capacity,” states:

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121 Rome Statute at Preamble.

122 Aust, Handbook of International Law at 177 (cited in note 11).

123 Id (internal citations omitted):

As a result of the Lateran Treaty 1929 between the Holy See and Italy, and recognition and acquiescence by states, the Vatican City (albeit tiny in area and with resident population of papal functionaries) would seem to be a state even though its sole purpose is to support the religious and moral purposes of the Holy See. It has permanent observer status in the United Nations, is a full member of some other international organizations, and is a party to multilateral treaties.
(1) This Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence. (2) Immunities or specific procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person.\textsuperscript{124} Accordingly, the immunity is not only prohibited, but, importantly, subsection (2) precludes any customary international law from preemptsing that prohibition.

The ICC itself has adhered to this prohibition by continuing proceedings against multiple individuals in high-ranking military and head of state positions.\textsuperscript{125} In the pending prosecution of Sudanese President Al Bashir, the ICC has twice (in 2009 and 2010) continued the prosecution of, and indeed issued arrest warrants for, the current head of state.\textsuperscript{126} In fact, the ICC has just recently opened an investigation into the conduct of Muammar Al Gaddafi in Libya.\textsuperscript{127} The current position of the ICC shows that it is willing to prosecute heads of state.\textsuperscript{128}

Nonetheless, several commentators argue that the ICC’s position is wrong. Some commentary argues that regardless of the ICC Statute, the Court should recognize the immunity to keep the Statute from conflicting with international customary law.\textsuperscript{129} Arguing along similar lines, the Pope could claim that head of state immunity is de facto absolute in all international criminal proceedings.\textsuperscript{130} Dapo Akande makes this argument, citing the International Court of Justice’s (ICJ)
**Arrest Warrant Case** in support. The ICJ is, similar to the ICC, an international court created by the UN, but it is an entirely distinct entity. The ICJ does not have jurisdiction over individuals, corporations, or organizations, but exclusively countries, which must consent to the Court’s jurisdiction (compared to the ICC, which hears exclusively individual criminal disputes). In the **Arrest Warrant Case**, the ICJ held that:

the issue of a warrant for the arrest of a foreign minister for war crimes and crimes against humanity . . . [was a] coercive measure[] that violated his inviolability and absolute immunity from criminal jurisdiction under customary international law for all acts, public or private, committed while in office or before.

After **The Arrest Warrant Case**, and under its articulation of customary international law on head of state immunity, the Pope, either in his present capacity or his previous capacity as the leader of the CDF, qualifies for head of state immunity. Further, because the Pope’s promulgation and enforcement of the policy was done in his “public capacity” and not as a “private act,” he would be immune from prosecution relating to it even after he has left office (which is mostly irrelevant given the Popes’ historical tendency to leave office exclusively through death).

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131 Id, citing Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium), 2002 ICJ 4, online at http://www.icj-cij.org/docket/index.php?p1=3&p2=3&k=36&case=121&code=cobe&p3=4 (visited Apr 8, 2011) (“The Arrest Warrant Case”): These immunities are absolute in the case of criminal proceedings. In other words there are no exceptions to the immunity. The International Court of Justice’s decision in the Arrest Warrant Case (Congo v Belgium) 2002 confirms that this type of immunity continues to apply even when it is alleged that the head of State has committed international crimes. So an allegation that the Pope may be responsible for crimes against humanity will not suffice to defeat his immunity.


133 Id at 451.

134 Rome Statute at Art 1.


136 Aust, *Handbook of International Law* at 177–78 (“This decision necessarily applies also to heads of state and heads of government, and may apply to other senior officials such as defense ministers.”), citing Colin Warbrick, ed, *Current Developments: Public International Law*, 53 Intl & Comp L Q 769, 771–74 (2004).

137 Aust, *Handbook of International Law* at 178 (“But, once such a person has left office, can he be arrested and prosecuted for a crime committed while in office? He would have continuing immunity for private crimes, but the Arrest Warrant judgment suggests that he would have continuing immunity for crimes committed in his public capacity.”) (emphasis in original, internal citations omitted).
The problem with this argument is that *The Arrest Warrant Case* judgment was before the ICJ, not the ICC. The ICJ has no clause prohibiting the use of head of state immunity and its sources of law differ from the ICC’s. The ICJ Statute Article 38 lists, in no hierarchical order, “(a) [i]nternational conventions . . . (b) [i]nternational custom . . . (c) [t]he general principles of law recognized by civilized nations.” Subsections (b) and (c) include the customary international principle of head of state immunity. So in the *Arrest Warrant Case*, head of state immunity was not only not prohibited, but it was a legitimate source of law for the court. This means that it was not, as Akende says, *absolute* (that is, it did not preempt a contrary statutory prohibition) but rather, it came from the Statute’s sources of law, unimpeded.

In the ICC, on the other hand, the Statute states that “[t]he Court shall apply: (a) In the first place, this Statute, Elements of Crimes and its Rules of Procedure and Evidence; (2) In the second place, where appropriate, applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict.” The language “in the first place” and “in the second place” indicates that the ICC Statute preempts “principles and rules of international law.” Additionally, the language “where appropriate” suggests that those instances when customary international law applies is limited. And contravening a clear prohibition on head of state immunity would not qualify as a “where appropriate” circumstance. The defense of head of state immunity will almost certainly fail.

As a note, Article 98 of the Statute prohibits the court from proceeding with a request for surrender that would require the requested state to act contrary to international obligations or agreements it has with a third party state. This means that, should the court request that a state surrender the Pope, that requested state is not required to violate an international law or obligation it has with the Vatican in arresting and surrendering the Pope. While this presents a potential barrier to invoking jurisdiction, it (a) has no bearing on whether the ICC recognizes the immunity as a defense in trial and (b) has recently been called into question by ICC cases and state party action. This

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138 League of Nations, Statute of the Permanent Court of International Justice (Dec 16, 1920), Art 38(1), 1155 UNTS 331.
139 Rome Statute at Art 21(1)(a)-(b).
140 Id at Art 98.
141 Compare Rome Statute at Art 98 with Akande, *Can the Pope Be Arrested in Connection with the Sexual Abuse Scandal* (cited in note 130). Akande’s article focuses on the practicalities of physically obtaining the Pope, and while those considerations are important to obtaining jurisdiction over the Pope, it does not follow that they provide a defense for the Pope once jurisdiction is obtained. A thorough analysis is provided in Section IV.C.4.
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issue will be dealt with in more detail in Section IV.C.4. Article 98 is only one of the several jurisdictional obstacles that may stand in the way of a prosecution.

IV. JURISDICTION

Obtaining jurisdiction over both the Pope and the conduct giving rise to a claim presents some serious challenges for a prosecutor. Although they are not "defenses" in the sense that they would be brought up in trial, jurisdictional issues would likely be hotly contested issues in pre-trial proceedings. The first question is whether the Statute’s double jeopardy provision will be triggered by previous and future cases (because the Pope has not yet been charged) in which the Pope has been named as a defendant. The second is whether the Pope's conduct comes within the temporal jurisdiction of the ICC. And the final is whether, and by what method, the case could be referred to the ICC (a corollary of which is how the Pope himself could be arrested and surrendered). Each will be addressed in turn.

A. Double Jeopardy Preemption

The complementary principle (or, as it is commonly referred to, double jeopardy preemption) prohibits an individual from standing trial for crimes that have already been adjudicated, usually as a matter of comity. Article 17(1)(b) of the ICC Statute states:

the Court shall determine that a case is inadmissible where: . . . (b) The case has been investigated by a State which has jurisdiction over it and that State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute.142

Article 20(3) states:

No person who has been tried by another court for conduct also proscribed under article 6, 7 or 8 shall be tried by the Court with respect to the same conduct unless the proceedings in the other court: (a) Were for the purpose of shielding the person from criminal responsibility for crimes within the jurisdiction of the Court; or (b) Otherwise were not conducted independently or impartially in accordance with the norms of due process recognized by international law and were conducted in a manner which, in the circumstances, was inconsistent with an intent to bring the person concerned to justice.143

So, the first question is: has the Pope already been tried?

142 Rome Statute at Art 17(1)(b).
143 Id at Art 20(3).
In a 2005 Texas case, *Doe v Roman Catholic Diocese of Galveston-Houston*, the plaintiff named the Pope as a defendant, and the court granted a motion to dismiss based on head of state immunity.\(^{144}\) Although the Pope was not tried for “crimes against humanity” (which does not exist under US law), he could argue that the impetus for both charges is the same *conduct*. Indeed, the plaintiffs in that case relied upon exactly the same evidence that an ICC prosecutor would rely upon (the 2001 letter and the *Crimen Sollicitationis*).\(^{145}\) The problem for the Pope is that the decision in Texas was not made upon the court’s legal determination that the Pope was due immunity. Rather, the court held that “[i]n this case, the United States, through its Suggestion of Immunity and letter from the Department of State Legal Advisor, has explicitly requested that [the Pope] be dismissed from this lawsuit on the basis of head of state immunity.”\(^{146}\) The decision was, therefore, not based upon any substantive legal basis, but, as the court stated:

> [o]nce the State Department has determined that immunity is warranted, and has submitted that ruling to the court through a suggestion, *the matter is for diplomatic rather than judicial resolution*. . . . The executive’s determination is not subject to additional review by a federal court. . . . After a suggestion of immunity is filed, *it is the “court’s duty” to surrender jurisdiction*.\(^{147}\)

This means that the state (in this case, the US) was unwilling to genuinely prosecute—a trigger for the exception in Article 17(1)(b). Additionally, the proceedings could easily be said to have been “conducted in a manner which, in the circumstances, was inconsistent with an intent to bring the person concerned to justice.”\(^{148}\) Having triggered exceptions to the complementary principle embodied in the Statute, it is unlikely that the *Roman Catholic Diocese* proceedings will preclude an ICC prosecution. While suits may have been and may continue to be filed naming the Pope as a defendant, any in which the Pope is granted head of state immunity will likely fail to estop an ICC prosecution for the reasons *Roman Catholic Diocese* does not—because the ICC does not recognize the immunity, and because its application evidences an unwillingness to bring the Pope to justice.

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\(^{145}\) *Roman Catholic Diocese of Galveston-Houston*, 408 F Supp 2d at 276.

\(^{146}\) Id at 279.

\(^{147}\) Id at 278 (internal citations omitted) (emphases added).

\(^{148}\) Rome Statute at Art 20(3).
B. Non-retroactivity Ratione Personae

The ICC entered into force on July 1, 2002.149 The ICC Statute does not hear disputes over crimes committed before its entry into force. Article 11(1) states that “[t]he Court has jurisdiction only with respect to crimes committed after the entry into force of this Statute.”150 Article 24(1) states that “[n]o person shall be criminally responsible under this Statute for conduct prior to the entry into force of the Statute.”151 The particular conduct surrounding a potential claim is the enactment, by then Cardinal Ratzinger, of the enhanced Crimen Sollicitationis and its subsequent implementation. The first clear event, which manifests the primary piece of evidence, was the original letter Cardinal Ratzinger sent to the bishops in 2001. This conduct is outside the jurisdictional scope of the ICC. However, the 2001 letter merely established the policy. The Pope continued to follow and enforce the policy after July 1, 2002.152 The same crime Cardinal Ratzinger was guilty of in 2001 he was guilty of from 2002 forward. The letter was simply the first, official articulation of the Vatican’s policy.

In fact, the plaintiffs in Roman Catholic Diocese argued that “[the 2001] document demonstrates an ongoing conspiracy, fraud, fraudulent concealment, misrepresentation, and conspiracy to commit and conceal the fact that members of the clergy sexual abused minors by the Catholic hierarchy.”153 The plaintiffs further alleged that a “[2002] letter combined with the Crimen Sollicitationis and other proclamations by Pope Benedict, further demonstrates the ongoing conspiracy that both victimized plaintiffs and prevented them from filing this lawsuit earlier.”154 After the scandal broke in early 2002, the Vatican did not take any decisive steps to stop or prevent abuse, but relied upon Ratzinger’s policies.155 Furthermore, “[a] national survey of Catholics released in November 2002 asked whether the scandal was ‘about acts which occurred a long time ago,

149 When did the Rome Statute of the International Criminal Court enter into force? (International Criminal Court) online at http://www.icc-cpi.int/menus/icc/about%20the%20court/frequently%20asked%20questions/when%20did%20the%20rome%20statute%20enter%20into%20force (visited Apr 8, 2011).
150 Rome Statute at Art 11(1).
151 Id at Art 24(1).
152 Allen, 1962 document orders secrecy in sex cases (cited in note 5) (describing the continuing nature of the abuse); Barnett, Vatican told bishops to cover up sex abuse (cited in note 6).
153 Roman Catholic Diocese of Galveston-Houston, 408 F Supp 2d at 276.
154 Id.
or are these acts still occurring today? Over two-thirds answered 'still occurring today.' Even as recently as November 2010 the Church has acknowledged the continued nature of abuse and its "sins of omission." These continued instances of adherence to the policy amount to culpable conduct occurring after July 1st, 2002. Likely, this conduct will satisfy the ICC's temporal jurisdiction requirements.

C. Invoking Jurisdiction

Article 13 provides three ways for jurisdiction to be invoked: (1) by state party referral; (2) by UN Security Council referral; or (3) by the prosecutor initiating an investigation on its own. Indeed, the ICC has invoked jurisdiction by each of these methods. I shall address each in turn.


The first method, under Article 13(a), allows for jurisdiction if a state party refers an alleged crime to the prosecutor. Pursuant to Article 12, for a party to be eligible to refer a case, the conduct must have occurred in the territory of that State, and that State must be party to the ICC. In cases of superior liability, like the Pope's, there are two classes of conduct: the abuse, and the cover-up by the superior. The Article 7(1) conduct is almost certainly the relevant conduct, and the list of qualified states is long. Any state party where abuse occurred will be eligible—namely, Ireland (as the US is not a party to the ICC). If the relevant conduct is the cover-up, or the enactment of the policy embodying the cover-up, and if that conduct cannot be said to have occurred globally (which, given the fact that it was disseminated and enforced globally, it likely can), the CDF is located in the Vatican, which is not a party to the ICC.


The second way to invoke jurisdiction, found in Article 13(b), is by a reference from the UN Security Council, acting under Chapter VII of the UN

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156 Id at 53.
157 Meichtry, Pope Convenes Cardinals On Response to Sex Abuse, Wall St J at A12 (cited in note 32) (internal quotations omitted).
158 Rome Statute at Art 13(a)-(c).
159 Situations and Cases (cited in note 15).
160 Rome Statute, Art 13(a) ("A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by a State Party in accordance with article 14.").
161 Id at Art 12(2).
Charter. This, however, is highly unlikely. The US is on the Security Council and has strongly opposed the ICC (indeed, it is not a party). The US would probably veto any proposed reference in this case. This is particularly likely given the US’s refusal to prosecute the Pope domestically in Roman Catholic Diocese, discussed in Section IV.A.

3. Proprio motu.

The third way to obtain jurisdiction, which can be found in Article 13(c), is for the prosecutor to initiate an investigation on its own (proprio motu). Here, subject to the same Article 12 requirement that the conduct occur on the territory of a state party, the prosecutor could initiate an investigation. This is the most likely and easiest avenue for invoking jurisdiction, as it requires no state party action.

4. Article 98.

As mentioned in Section III on head of state immunity, Article 98 prohibits the court from issuing a request for surrender:

which would require the requested State to act inconsistently with its obligations under international law [or international agreements] with respect to the State or diplomatic immunity of a person or property of a third State, unless the Court can first obtain the cooperation of that third State for the waiver of immunity.

This is important because the ICC has no enforcement mechanism and must rely on arrest and surrender at the national level, which Article 98 seems to regulate. If a state recognizes the immunity, or is under an obligation to recognize such an immunity pursuant to an international agreement, the consent of the Vatican would be necessary to the Pope’s arrest and surrender. The Vatican will certainly refuse to cooperate with any proceeding against the Pope, and, therefore, the requested State would have to be one that does not recognize the immunity and is under no obligation to do so. Overcoming Article 98 (that is, finding a State that is not prohibited from surrendering the Pope) is a major obstacle in physically obtaining him—a necessary element to his prosecution.

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162 Id at Art 13(b) ("A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations.").

163 Aust, Handbook of International Law at 280-81 (cited in note 11). However, the Security Council’s recent referral of the situation in Libya suggests that the US is not opposed to the ICC in all cases. See Situations and Cases (cited in note 15).

164 Rome Statute at Art 98.


166 Rome Statute at Art 63(1) ("The accused shall be present during the trial.").
The Court has not directly addressed the tension between Article 98 and Article 27's prohibition on head of state immunity. The question is whether Article 27’s prohibition applies only during trial or at the national level (which would mean that state parties could ignore head of state immunity, effectively rendering Article 98 meaningless). Although the latter is a strange argument to accept, the practice of the parties to the ICC seems to suggest that this is so. “A number of states have adopted domestic implementing legislation which implicitly or explicitly take[s] the view that officials of other states may not be entitled to international law immunity from arrest when a request for arrest has been made by the ICC.” This means that at least some state parties believe they are obligated under Article 27 to ignore head of state immunity and would consent to surrendering a head of state despite Article 98. There is an alternate theory as well, suggesting that Article 98 only applies to non-party states (which would include the Vatican and the Pope). The actions of the Court (in not precluding the issue of arrest warrants for Al Bashir despite Article 98) and the actions of state parties indicate that Article 98 may not preclude the arrest and surrender of the Pope by states that might otherwise recognize or have an obligation to recognize head of state immunity. Until the Court directly addresses the tension between Articles 27 and 98, it will be unclear how Article 98 would affect the potential arrest and surrender of the Pope.

V. Outcomes

Article 77 sets forth the applicable penalties, which include prison sentences, fines, and the forfeiture of property. A more realistic and ideal penalty would be the creation of a trust fund under Article 79 “for the benefit of victims of crimes within the jurisdiction of the Court, and of the families of such victims . . . [using] money and other property collected through fines or forfeiture.” Indeed this was one of the reasons UN Judge Robertson originally proposed prosecuting the Pope before the ICC—to get more money for victims. Obtaining a constructive outcome will likely be the most persuasive argument for initiating a prosecution (or invoking jurisdiction). States will certainly be hesitant to pursue a penalty against the Pope involving punitive

167 Akande, 7 J Intl Crim Justice at 338 (cited in note 165).
168 Id.
170 Rome Statute at Art 77.
171 Id at Arts 77, 79(1)—(2).
172 Susan Yoshihara, PhD, UN Judge Says Pope Should be Prosecuted at International Criminal Court, 13 Catholic Family & Human Rights Institute 17, ¶ 6 (Apr 8, 2010), online at http://www.c-fam.org/publications/id.1606/pub_detail.asp (visited Apr 27, 2011).
damages, especially given the contentious nature of prosecuting the Pope in the first place. Creating a fund for the benefit of the victims will encourage more abuse to come to light and will allow the Church to take an affirmative step in redressing its omissions.

VI. CONCLUSION

The Church abuse scandal prompted cries for justice. The lack of accountability within the Church and its failure to take any meaningful action frustrated Christians, victims, and the general public. This analysis suggests that a prosecution of the Pope before the ICC for crimes against humanity is viable. Some important questions need to be answered, particularly with respect to legal definitions and tensions between various articles, which have not yet been further defined by precedent. The very young age of the ICC and the few proceedings that have taken place provide a vague-at-best baseline for interpreting some of that language. Still, after analyzing the current cases before the Court and the evidence available, it is clear that there exists at least room for a prosecutor to argue for the Pope's culpability. Whether or not a state party or the prosecutor will make the political move to refer this case is a much more difficult question to answer.