Hard Cases

'Fail Better' or 'Fail Worse Again'? Reflections on the Holy See, Access to Justice, and *JC* v *Belgium*

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Abstract

In this paper the findings of the European Court of Human Rights in *JC* v *Belgium* are examined against the background of foreign state immunity for the Holy See. The Strasbourg court found that no breach of complainants' right of access to justice within the Belgian courts had occurred as a consequence of foreign state immunity having been granted in Ghent. Here it is argued that even if foreign state immunity may properly be granted to the Holy See by national courts, in such cases the well recognised territorial tort exception to such immunity provides for process within the forum to proceed to the merits.

I. Introduction

In his fantasy of wish-fulfillment *Hadrian the VII* first published in 1904 the eccentric and impecunious English aesthete Frederick Rolfe explored the geopolitical possibilities of the throne of St Peter. With somewhat more attention to detail than mediaeval popes with their freewheeling Iberian allocations of *terra incognita*, Rolfe's Hadrian carries out 'a re-arrangement of various spheres of (global) influence' preparatory to divesting the papacy of its accumulated wealth.[1] In Hadrian's manifesto, Italy under its Savoyard monarchy was identified as one of only five nations worthy of true independence, along with 'England' (sic), the USA, Japan and Germany. San Marino, confirmed as a republic, was to continue as one of a second class of sovereign states. The King of Italy, Victor Emmanuel III, moreover was to become one of two Emperors in a new Roman Empire, namely the Southern Emperor, empowered to form a confederation out of the European lands south of the Pyrenees, the Alps and the Danube, and including Greece, Albania and Montenegro. In this way the King of Italy would take his place alongside the King of Prussia as dual sovereigns of the whole of Europe barring Britain which itself acquired Africa, Oceania and Asia (except for Siberia allocated to Japan). 'Thus the Supreme Arbitrator provided the human

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[1] F.W. Rolfe, *Hadrian the VII* (Ware: Wordsworth, 1993), 326.

race with scope and opportunity for energy'.[2]

While Rolfe's Pope Hadrian is a creature of fantasy the role of pope as arbitrator of the aspirations of secular sovereigns is of course not. The capacity of the papacy over the centuries to control or even strongly influence the conduct of Christian (and other) Princes has waxed and waned and was already a capacity to plead rather than to command at the time of the Crusades.[3] Yet the state-like entity ruled by the papacy, an entity whose geographical extent has also waxed and waned over the centuries, has enjoyed remarkable longevity as an international actor. In contemporary times it is the global reach of the religious organisation headquartered at the Vatican that most often manifests this papal influence. The Vatican is situated in a zone that since 1929 has been treated by the Kingdom of Italy (and its republican successors) as distinct from Italy as such and is referred to in that context as Vatican City. Concerns expressed by individuals relating to the effects of global papal and otherwise Catholic influence on their lives, frequently take the form of the naming of the Holy See as a defendant in civil litigation initiated within the legal system (national forum) of the complainant. Occasionally decisions taken or omitted to be taken by named officials within the Vatican itself, are called into question. A procedural hurdle identified by many courts across the world, responds to the claim of an immunity from jurisdiction raised by defendants or declared by the court *proprio motu*, based on some kind of sovereign independence and/or statehood.

This paper reflects on the causes and consequences of a state or quasi-state status for the Holy See or for the Vatican City (whether or not those institutions can meaningfully be separated), with especial focus on the associated protections claimed by those institutions against judicial processes taking place in bounded jurisdictions. For the practice of courts around the world, especially in the USA and Europe, demonstrates the widespread acceptance of a foreign sovereignty claim based on sovereignty or statehood. Against this background the 2021 decision of the European Court of Human Rights (ECHR) in *JC et Autres* v *Belgique* (*JC*) will be examined below.[4] The facts of *JC* have been reported and the reasoning analysed by well-informed commentators.[5] It will be treated in the below as a paradigm case of the deference of the judiciary worldwide to the status of a nebulous but puissant entity that fully justifies the term so often applied to it by international lawyers, *sui generis*.[6] From the perspective of

[2] ibid 328.

[3] P. Wilson, The Holy Roman Empire: A Thousand Years of Europe's History (London: Penguin, 2016), 66.

[4] Eur. Court H.R., *JC et Autres* v *Belgique,* Judgment of 12 October 2021, available at https://tinyurl.com/mvbkvk3p (last visited 31 December 2022).

[5] C. Ryngaert, 'The Immunity of the Holy See in Sexual Abuse Cases,'available at https://tinyurl.com/4xp7hsp6 (last visited 31 December 2022); N. Zambrana-Tévar, 'The International Responsibility of the Holy See for Human Rights Violations' 13 *Religions*, 520 (2022).

[6] J. Crawford, *Brownlie's Principles of Public International Law* (Oxford: Oxford University Press, 9th ed, 2019), 114.

justice for the complainants, that is to say juridical scrutiny of their primary complaints, is *JC* two steps forward if one back – 'failing better' – or one step forward and two back – 'failing worse again'?[7]

The immediate finding of the Strasbourg bench in *JC* was that the Belgian Courts' reliance on a foreign state immunity, did not disproportionately limit applicants' right of access to justice under the European Convention on Human Rights (EConvHR). The question of denial of access to justice as a complaint against one's state of citizenship – as provided under EConvHR or other instruments – is itself a contested topic. Recourse to the claim of denial of access to justice in one's home state (the forum state) has been challenged both as strategy and in terms of principle. Thus, long before *JC*, it was cogently argued that as a claim under the international law of human rights it runs the risk of constituting something of a distraction in international legal terms. This is despite the understood frustration of litigants looking to in effect or obliquely appeal their national court's decision to foreclose process.[8] But in any event O'Keefe's argument is a more general one since the grounds for the argument by complainants, as here at Strasbourg, that is to say for the granting of state immunity in the forum state to be seen as a disproportionate restriction of right of access to justice, are in essence the same as the grounds for state immunity to be seen as inappropriate within the first instance forum itself.[9] Indeed it can be said that immunity for a foreign entity in the courts of the forum, will always run counter to the interests of native legal persons (corporate or natural) in access to justice; this is the salient clash of norms.[10]

In other words for disproportionate denial of access to justice to be retrospectively identified would seem to call in effect for a substantive reconsideration of the statehood based immunity in relation to those entities. Some aspects of that more general argument will therefore be considered below. Importantly the examples on which O'Keefe focused his attention are cases in which allegations made by the nationals of a forum court, concern ill-treatment at the hands of state officials in a foreign country.[11] Those cases may well be wrongly strategized in the sense urged by O'Keefe, for such actions might distract from the pressing for direct responsibility of the foreign state in its own legal system or, convergently, the pressing for more assertive representation of the complainant by their own state as such, against the foreign state, that is to say raising the matter up to the level of an inter-state dispute.

[7] The apposite Beckettian terminology is due to R. O'Keefe, 'State Immunity and Human Rights: Heads and Walls, Hearts and Minds' 44 *Vanderbilt Journal of Transnational Law*, 999, 1002 (2011).

[8] ibid 1007.

[9] ibid 1040.

[10] P. Rossi, International Law Immunities and Employment Claims: A Critical Appraisal (Oxford: Hart, 2021), 14.

[11] R. O'Keefe, n 7 above, 1039.

The harms alleged in *JC* and in comparable cases elsewhere, however, do not refer to such 'overseas' harms but to harms inflicted within or at least having their harmful effects within the forum state (Belgium in this case). The international dimension and the question of a statehood-based immunity, here arise from the asserted culpability of the worldwide organisation of the Roman Catholic Church especially as comprehended under the term the Holy See. There is considerable merit in O'Keefe's (extrapolated) recommendation that Belgium (in this case) might better take up the complaint on behalf of its nationals rather than leaving the action to them – with the purpose of pressing the Holy See to get its own house in order and perhaps to compensate those harmed by its decisions. However the force of O'Keefe's argument that any litigation at a national level would better take place in the overseas forum of the occurrence of the (alleged) harm, rather than the forum of the nationality of complainants, now operates in the other direction. Harm occurring in Belgium points precisely to judicial enquiry within Belgium as the default forum. This would take place under applicable Belgian law although it is of course important to observe that international law in some form or forms, might well have a role to play conditional on forum constitutional arrangements.

Analysis of this important decision is deferred until some preliminary considerations have been set out. For the decisions made at Ghent and endorsed at Strasbourg, was that the Holy See may not be required to defend its conduct having effects within Belgium in the Belgian courts, because an applicable statehood-derived immunity against suit cloaks the Holy See. When analysis proceeds to the details and the reasoning of *JC*, it will be argued that the Ghent courts were incorrect in their assertion or acceptance of this doctrine so that the complainants at Strasbourg should have been validated in their claim that access to justice under EConvHR had been denied them by their home state. The claim to immunity should have been more fully tested at Ghent, from first principles, as a preliminary step in seizing the dispute. It might be suggested that the immunities routinely granted by national courts to defendant entities or persons with sufficiently close connections to a foreign, sovereign state, however well-founded in the case of genuine states, should be withdrawn from entities that can be shown to fall short of that criterion. Forum courts could then go ahead and scrutinise evidence.

Reasons for denying the protections of immunity from suit to the Holy See are reviewed below. Doubtless, to assert that the wholesale sceptical argument rehearsed above should prevail with respect to the Holy See is to court scholarly resistance and even invective. But in any event an important alternative to what might be thought of as such a bold, high road radical reform, if such would be a denial of immunity based on general principles, would be the closer examination of the exceptions to immunity. If on the facts alleged or other grounds a statehood based immunity is on its face justified, or is maintained through juridical

inertia, then a more pragmatic and likely more realistic low road may beckon. One reason for examining *JC* is its contribution to the jurisprudence of recognized exceptions to statehood based immunities from forum jurisdiction. In particular the so-called territorial tort exception is raised. And here it should be observed that exceptions to immunity are at the same time reaffirmations of forum jurisdiction.[12] The low road and the high road may join up further along.

II. A Kind of State or A State of Mind? The Papacy, the Vatican and a Contested Statehood *Sui Generis*

Much academic ink has been spilled over the contested question of the international legal personhood of the Holy See or Vatican 'City State.' Thus for Cismas, an holistic combination or 'construct' of the Vatican City and Holy See amounts since 1929, to an entity with 'the resemblance to statehood'.[13] That is to say the Lateran Accords of 1929 by which the Kingdom of Italy under Mussolini reached a cohabitation agreement with the papacy, including the definition of an independent Vatican City located within Rome, enable the Holy See as a non-territorial administrative mechanism to achieve substantive international legal status as an independent actor. For Morss, the interconnectedness of the various institutions points to the opposite conclusion with respect to statehood.[14] For Tzouvala, whose focus is in particular on worldwide obligations under the UN Convention on the Rights of the Child (UNCROC), Vatican City and the Holy See are instead distinct legal persons on the international stage. From this perspective the former, as a territorial entity, is a state.[15] The Holy See is itself not a state and is of a dual nature, being both the government of that state, and at the same time, a non-territorial international legal person which 'represent(s) the Catholic Church around the globe'.[16] It is the Holy See that is the named

[12] P. Rossi, n 10 above, 22; Id, 'Italian Courts and the Evolution of the Law of State Immunity: A Reassessment of Judgment No 238/2014' 94 *Questions of International Law*, 41, 45 (2022); for a thorough analysis of the legal accountability of the Roman Catholic Church for clerical abuse of children, with especial reference to the USA and Australia, see M. Edelman, 'Judging the Church: Legal Systems and Accountability for Clerical Sexual Abuse of Children', available at https://tinyurl.com/4vnyu858 (last visited 31 December 2022).

[13] I. Cismas, *Religious Actors and International Law* (Oxford: Oxford University Press, 2014), 155.

[14] J.R. Morss, 'The International Legal Status of the Vatican/Holy See Complex' 26 *European Journal of International Law*, 927, 930 (2015).

[15] N. Tzouvala, 'The Holy See and Children's Rights: International Human Rights Law and Its Ghosts' 84 *Nordic Journal of International Law*, 59, 66 (2015).

[16] ibid 67; as Tzouvala observes, commitment to the purposes of UNCROC as understood by the Holy See overwhelmingly refers to the worldwide practices of the Catholic Church, rather than conduct within the environs of Vatican City itself. Correspondingly, the Holy See's reservations to UNCROC concerned family life and education: W. Worster, 'The Human Rights Obligations of the Holy See under the Convention on the Rights of the Child' 31 *Duke Journal of Comparative& International Law*, 351, 391 (2021). Also see K. Ważyńska-Finck

party to UNCROC. To the extent there is substance to the distinction between a (territorial) Vatican City and a (non-territorial but globally effective) Holy See, it would thus be logical to conclude that any obligations flowing from UNCROC would correspondingly accrue to the Holy See. Broadly agreeing with Tzouvala, for Ryngaert the Holy See 'is not to be characterized as a state (…) (however) it can act internationally without a territorial base'.[17] More recently Ryngaert has reiterated that 'the Vatican' is a state but the Holy See is not.[18]

For Worster, in some ways broadly concurring with Tzouvala and with Ryngaert, it is essential to differentiate the Holy See from the Vatican City as international legal actors. But Worster goes further. While for Worster the Vatican City controls territory and is a state, '(t)he Holy See is the sovereign of (that) state' and is also 'a unique non-state actor in international law'.[19] Importantly, while for Worster Vatican City is a state, the pope is thus not its Head: the pope is instead 'an organ of the Holy See'.[20] For Worster the Holy See is 'an entity that includes the office of the Pope, the College of the Cardinals and other bodies as its organs or offices'.[21] It 'has no territory' so therefore cannot be a state.[22] Worster's concern here, somewhat like that of Tzouvala, is to define the jurisdictional domain of the Holy See as party to UNCROC, and in this context he proposes that a de facto 'extraterritorial' jurisdiction (giving rise to obligations under UNCROC) can be discerned for the Holy See. Evaluation of this project, designed to shed light on global obligations for the Holy See under UNCROC, leads Worster to somewhat expand the usual understanding of extraterritorial jurisdiction and in any case raises issues outside the scope of this article. In any event in highlighting the reluctance of the Holy See to accept obligations under a treaty to which it is apparently a party, Worster is echoing and corroborating the conclusions of Cismas and of Tzouvala.

Converging with Worster on this point, Nicolás Zambrana-Tévar defines the Holy See as an international actor distinct from Vatican City and possessing some kind of sovereignty. While it is not a state there is a basis for the grant of sovereign independence to the Holy See as such in its worldwide spiritual mission which requires such status.[23] Zambrana-Tévar's argument is more of a

and F. Finck, 'The Holy See, Human Rights Obligations and the Question of Jurisdiction,' available at https://tinyurl.com/cfrjwnnx (last visited 31 December 2022).

[17] C. Ryngaert, 'The Legal Status of the Holy See' 3 *Göttingen Journal of International Law*, 829, 859 (2011).

[18] C. Ryngaert, 'The Immunity of the Holy See' n 5 above.

[19] W. Worster, n 16 above, 351.

[20] ibid 377; while beyond the scope of this paper, Worster's argument clearly casts doubt on any claim to Head of State immunity for the pontiff under either Customary International Law or the statutes of a forum state.

[21] ibid 357.

[22] ibid

[23] N. Zambrana-Tévar, 'Reassessing the Immunity and Accountability of the Holy See in Clergy Sex Abuse Litigation' 62 *Journal of Church and State*, 26, 35 (2020).

teleological or 'top-down' argument than Worster's, and thus it is a position closer to that of the Holy See itself in its official statements that for Zambrana-Tévar '(t)he existence of the VCS merely guarantees the independence of the Holy See vis à vis other states'.[24] From that perspective the Holy See is the more important, persisting or central international actor, with Vatican City a token concession to the narrow, Vattelian worldview of secular sovereigns. Indeed, '(t)he Church makes use of the juridical means necessary and useful for carrying out her mission'.[25] Consistent with this evaluation of Vatican City as secondary, from the perspective of the mission of the Roman Catholic Church, Zambrana-Tévar suggests that the Holy See is 'much more of a sovereign and a subject of international law than VCS'.[26] The inferiority in status of Vatican City to the extent it can be differentiated from the Holy See, should be noted. This inferiority is of course in a sense manifest in the history of Vatican City: to the extent the Holy See is separate from Vatican City, the former long preceded the existence of the latter.

In international law it is well established that relationships between sovereigns operate as between those sovereigns, now understood as states, not as between governments. Governments come and go in a qualitatively different manner from the existence of states. Government is always inferior to statehood. It will already be apparent then that there is something strange in treating an entity which is in some respects comparable to a government – the Holy See – as of higher international status than the entity that it may be said to (among other functions), govern. This problem is not clarified, it is in fact made more puzzling, by arguments that (as for Zambrana-Tévar and for Tzouvala), the Holy See has dual capacities in respect both of governance of Vatican City and worldwide authority over the Catholic Church.[27]

To sum up this argument so far: it can be said with confidence that to the extent that (for the purposes of national legal systems) the Holy See is distinct from Vatican City, it may possess some poorly defined international legal personality but it cannot be said to possess statehood.[28] It would therefore have no claim to statehood-based immunities in national courts. From this standpoint, as noted the Holy See is superior in status to Vatican City; the latter serves the larger mission of the former. But the governance and administrative role of the Holy See (again presuming distinctiveness) vis à vis Vatican City points to a status

[24] ibid 34.

[25] Compendium of the Social Doctrine of the Church, Pontifical Council for Justice and Peace (fn 444), available at https://tinyurl.com/2p8uvnwz (last visited 31 December 2022).

[26] N. Zambrana-Tévar, 'Reassessing' n 23 above, 35.

[27] ibid 35.

[28] This can be said in spite of the remarkable extent to which entities in possession of myriad characteristics, have from time to time been recognised as states for particular purposes; the field of ad hoc statehood is admirably documented by W. Worster, 'Functional Statehood in Contemporary International Law' 46 *Brooklyn Journal of International Law*,39 (2020); Id, 'Territorial Status Triggering a Functional Approach to Statehood' 8 *Penn State Journal of Law & International Affairs*, 118 (2020).

under international law inferior to the status of the latter. (Vatican City might at any time experience a coup at the hands of disgruntled gardeners.) From the perspective of international law, including international law as assimilated into national legal systems, a government as such cannot seek foreign state immunity. Moreover the subjugation of Vatican City to the Holy See would seem to negate the independence that is connoted by sovereignty.

Perhaps it is incorrect to treat the Holy See and Vatican City as distinct. As foreshadowed above, it has been argued that the pursuit of distinctiveness between the Holy See and Vatican City is a red herring from the perspective of international law.[29] For its purposes there is a conglomerate or a holistic effect of Holy See, Vatican City, the curia, papacy and so on. These purposes include the international law manifested or generated in national court decisions on state immunities. For the perspective of international law gratefully evades questions about internal arrangements of entities, the relationships of governmental to constitutional or identitarian parameters and so on. Seen from the outside or from above in that dualistic sense, the Holy See, the Vatican City and the institutional leadership of the Roman Catholic Church are in many ways interchangeable.[30]

From this holistic point of view, the best evidence of a sovereign or of a statehood character is to be found in two ways: the party-hood to various international agreements, and the sending and reception of representatives as a form of diplomacy. Yet as to the first, actors entitled neither to statehood nor to sovereign independence may be parties to some varieties of international agreements. Their international personality is thus severely attenuated and might be best thought of as an aggregate of ad hoc bilateral arrangements. Such a fragmented and distributed personality would seem very far from the aspirations of the Catholic Church; yet it seems that humility is called for in this respect.[31] As to the second, the role of what corresponds to diplomacy among states, which manifests a reciprocal and equal interchange between sovereigns, differs markedly from the mission and the function both of the (outgoing) papal nuncio and of the (incoming) foreign state ambassador to the Holy See.[32] The

[29] J.R. Morss, n 14 above.

[30] Both the Holy See and the Vatican City State appear as named parties to various international agreements with no clear pattern to the choice. Thus there seems little weight to a supposed distinction to the effect that the Holy See is party to (non-territorial) human rights agreements and Vatican (City) is party to territorially bound or technical agreements: N. Tzouvala, n 15 above, 71. There is inconsistency bordering on absurdity for both 'Vatican City' and 'the Holy See' to have been at different times named as party to the World Intellectual Property Organization; and for those entities to be thought of as distinct internationally when the Vatican is party to the International Wheat Agreement but the Holy See is party to the International Grains Convention. 'In some cases, the Holy See entered into a treaty as one entity and ratified an amendment to the treaty as the other': W. Worster, 'The Human Rights Obligations' n 16 above, 383.

[31] 'Probably the personality of political and religious institutions of this type can only be relative to those states prepared to enter into relations with them on the international plane': J. Crawford, n 6 above, 114.

[32] W. Worster, 'The Human Rights Obligations' n 16 above, 364, 410.

asymmetry between the sending out and the receiving of representatives, in the case of the Holy See, would itself appear to distort these foundations of diplomacy; and the status of a papal representative among any body of diplomats as first among those who are among each other equals except as for date of accreditation, again reminds us that papal diplomacy is special.[33] In effect these arguments for a state-like status to a combined Vatican/Holy See entity, adequate to meet the high threshold for foreign state immunity from forum jurisdiction, are little more than circular or question-begging.

It might be suggested that a third source of legitimacy for a statehood status for a combined Holy See/Vatican City effect or construct lies in the Lateran agreements themselves. Those agreements might be said to constitute a recognition by Italy of an independent state in its midst and perhaps cession of territory to it. It is true that Italian courts have approached disputes involving the Holy See or Vatican as calling for interpretation and application of those agreements.[34] For example the Italian Supreme Court in 2003 confirmed that harm to Italian nationals in Italy (specifically in parts of Rome) had occurred as a consequence of electromagnetic emissions emanating from within the Vatican City.[35] In making this finding the Supreme Court found that the operation of Radio Vaticana was not such as to attract special dispensation under the Lateran agreements of 1929 in the way that other kinds of activity would have done.[36]

The upshot of all these considerations is the sceptical view that no statehood based immunity should be seen to accrue to the Holy See as defendant or respondent in the judicial proceedings of national courts. To the extent the Holy See is substantively separable in international law from the Vatican City the point seems straightforward. Even if some international legal personality be granted, such a distinct Holy See has no substantive claim to the 'level playing field' or garden-variety statehood on which immunity might arise.[37] It should

[33] Vienna Convention on Diplomatic Relations, 1961, entered into force 1964, Art 16(3).

[34] See P. Rossi, 'Migliorini v Pontifical Lateran University, No 21541/2017, ILDC 2887 (IT 2017)', available at https://tinyurl.com/334p346m (last visited 31 December 2022).

[35] The Vatican Radio 'electro-smog' case is discussed by N. Zambrana-Tévar, 'Reassessing' n 23 above, 37; Corte di Cassazione 21 May 2003 no 22516, *Rivista di Diritto Internazionale*, 821 (2003).

[36] The dependence of Vatican City daily life on its Italian substrate and infrastructure recalls the otherwise vastly dissimilar creation of dependent 'Bantustans' by the apartheid regime of South Africa, rather more than it recalls the creation *ex nihilo* of a new independent sovereign state: J.R. Morss, n 14 above, 943. The *ex nihilo* may be avoided by treating Vatican City as the continuation of an earlier entity, the Papal States, but only at the cost of more difficulties.

[37] Participation among sovereigns as equals, either formal or substantive, would seem to be inconsistent with the mission of the Roman Catholic Church with which the temporal activities of the Holy See, Vatican officials and so on, are so closely interwoven. While there are many degrees of difference in political, economic and military might between ordinary sovereigns, the difference with the Holy See, Vatican City or pope as sovereign is qualitative not quantitative. The global task of the Church and its human instruments both individual and collective, may be thought of as an uphill struggle, or there may be a sense of looking down on the secular world with its petty divisions; but the field is assuredly not a level one.

be noted that complaints laid by individuals against the conduct of priests and concerning the institutional administration of the Church, are typically expressed in terms of the Holy See. If it is deemed by a forum court that the Holy See and Vatican City are to be treated as a package deal, with the entire entity benefitting from any privileges obtaining for any of its components, then it is submitted that relevant considerations still do not add up to an argument adequate to the blocking of the right of access to justice.

III. *JC et Autres* v *Belgique*

As noted above the dispute between complainant *JC* and others, and the state of Belgium, was framed as a complaint under the European Convention on Human Rights. The complainants included Belgian, French and Dutch survivors of abuse by Catholic priests when they were children. They had issued complaints in the Belgian courts against Belgian archbishops, bishops and superiors of religious orders, under the Belgian Civil Code Arts 1382 and 1384. Complaints had also been made against the Holy See. In the courts of Ghent at both first instance and at appeal, it was found that the Holy See was recognised by Belgium as having foreign sovereign status under Customary International Law. Statehood based immunity from jurisdiction in Belgium was therefore applicable. It was also found by the Court of Appeal that none of the recognised exceptions to such immunity, was applicable. The disappointed complainants were advised that the Court of Cassation of Belgium would be unlikely to hear an appeal and hence recourse was made to Strasbourg where the claim was articulated that rights of access to justice guaranteed to them by EConvHR Art 6 had been denied them by Belgium.

The overwhelming majority of the Strasbourg bench rejected the argument that considerations of statehood based immunity by the Belgian courts constituted disproportionate interference with the complainants' right of access to justice provided under the Convention. The grounds on which they did so took account of the substance of the complaint against the Holy See as well as the legitimacy of a statehood based immunity being invoked for that entity.

The substance of the complaint against the Holy See was that the Holy Office in Rome had in 1962 circulated a policy document or 'Instruction', under the title *Crimen Sollicitionis*, which prescribed what has been termed a 'code of silence' for clergy in relation to reports of abuse.[38] This policy was said by the complainants to have been in effect reaffirmed in 2001 with *Sacramentorum Sanctitatis Tutela*.[39] The majority found that the existence of these documents was inadequate to demonstrate a causal connection between the actions or

[38] See N. Zambrana-Tévar, 'Reassessing' n 23 above, 45.
[39] I. Cismas, n 13 above, 204.

omissions of the Holy See as such, and harms inflicted in Belgium. Nor was a substantive relationship of principal and agent found as between the Holy See and the bishops in Belgium. Instead, as found by the Court of Appeal of Ghent, the diocesan bishop was found to possess autonomous decision-making power, possibly highlighting his own responsibility for local conduct but undermining any civil claim against the Holy See based on control from a distance or from above.

In combination with these findings on the complainants' position, the Strasbourg bench reflected that while it had not previously examined the status of the Holy See in the context of state immunity as such, it had previously ruled in other contexts in the affirmative on the international legal status of the Holy See.[40] These decisions were both related to employment rights. One had arisen in the context of a married priest hired to teach in a public funded Catholic school in Spain, and subsequently dismissed.[41] The other arose from the dismissal of a divorced lay teacher of religious education from employment in Catholic schools in Croatia.[42] In *Fernández Martínez* weight was placed on an Agreement between the Holy See and Spain, setting out relationships of responsibility for the Church in Spain.[43] In *Travaš,* an Agreement again played a role in defining the role of State authorities in upholding the requirements of the Church with respect to hiring teachers. Reliance on a canonical mandate issued by the diocesan bishop (as a precondition of relevant employment) was written into the Agreement.[44] Conduct of the Croatian State consistent with this Agreement, was found by the Strasbourg bench not disproportionate in relation to its effects on the complainant's rights. The Strasbourg bench in *JC* was therefore unwilling to entertain the argument of the complainants that the Court of Appeal of Ghent was incorrect in its finding that the Holy See is a state enjoying immunity from jurisdiction.[45] The Strasbourg court also rejected the complainants' plea that state immunity if otherwise valid, is displaced when the conduct complained of is inhuman or degrading. In line with its own previous position no such conditionality was identified.[46] In any event the delinquency alleged against the Holy See does not concern torture but rather an omission to take measures to prevent or repair acts which the complainants characterised as inhuman treatment.[47] An extra

[40] Also, the majority in *JC* refers to the provisions of the Lateran accords as having the status of an international treaty as between Italy and the Holy See: *JC et Autres* v *Belgique* n 4 above, 18.

[41] Eur. Court H.R. (GR), *Fernández Martínez* v *Spain*, Judgment of 12 June 2014, Reports of Judgments and decisions 2014-II, 449

[42] Eur. Court H.R., *Travaš* v *Croatia*, Judgment of 4 October 2016, available at https://tinyurl.com/4vrs4stw (last visited 31 December 2022)

[43] For those judges dissenting in *Fernández Martínez*, the intervention by the Spanish authorities was not proportionate; thus for Sajo J, 'Church autonomy does not mean public recognition of a sovereign religious legal regime': *Fernández Martínez* n 41 above, 506.

[44] *Travaš* n 42 above, para 90.

[45] *JC* n 4 above, para 44.

[46] ibid para 64.

[47] ibid para 65.

step would be needed in order to reverse the immunity otherwise obtaining:

> 'La Cour estime qu'il faudrait un pas additionnel pour conclure que l'immunité juridictionelle des États ne s'applique plus à 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]

The Court did not elaborate on whether the additional step is a conceptual one, as in the recategorization of genres of delict and their consequences for immunity, or an empirical one which might arise from a novel fact scenario. The disclaimer concerning contemporary state practice may suggest the former however the hypothetical possibility of the latter might clearly be entertained.

It should also be observed that the formula here used to express the complaint is '*une omission de prendre des mesures pour prévenir ou réparer des actes* (…)'.[49] This strongly connotes the tort or delict of negligence. It is in this context that established exceptions to state immunity grounded in personal injury were enquired into. Thus with respect to a civil claim in its own terms, the Strasbourg bench made various observations on the alleged liability of the papacy and of the Holy See. It found that neither was in control of day-to-day conduct of priests or bishops in Belgium.[50]

More specifically, neither had acted in such a way as to bring their own conduct within the scope of one of the relevant exceptions to state immunity recognised by international law. Having founded its endorsement of the Belgian courts' immunity decision on international law, the Strasbourg bench was thus checking that in its view, recognised exceptions to immunity under international law were inapplicable.

In defining potential exceptions to immunity, the bench focused on the so-called 'territorial tort' exception codified as Art 12 in the UN Convention on Jurisdictional Immunities of States and their Property (CJISP).[51] CJISP articulates various exceptions to immunities otherwise provided for States.[52] Those

[48] ibid; the form of words in the Press Release appears to be an adequate translation of the first sentence: 'The Court considered that it would require an additional step before it could conclude that the jurisdictional immunity of States no longer applied to such alleged failures:' Press Release ECHR 301 (2021), available at https://tinyurl.com/2p8zw7m2 (last visited 31 December 2022). The second sentence might be translated as 'Current practice of states does not justify the conclusion that this step has been taken.'

[49] ibid; 'an omission to take measures to prevent or repair (certain) acts (…)'.

[50] ibid para 69.

[51] ibid para 68; despite the fact that CJISP is not yet in force, at the ECHR it has been suggested that CJISP in its entirety corresponds to Customary International Law in relation to the rights and obligations that it expresses: Eur. Court H.R., *Oleynikov* v *Russia*, Judgment of 14 March 2013, available at https://tinyurl.com/t5n3ym7s (last visited 31 December 2022); on the application of the territorial tort exception see N. Zambrana-Tévar, 'Reassessing' n 23 above, 39.

[52] R. O'Keefe, 'Article 3', in R. O'Keefe and C. Tams eds, *The United Nations Convention on Jurisdictional Immunities of States and Their Property: A Commentary* (Oxford: Oxford University Press, 2013), 73.

exceptions include commercial transactions; contracts of employment; dealing in moveable and immoveable property; intellectual and industrial property; and participation in certain collective bodies.[53] At Art 12, immunity is displaced or reversed in the case of

> 'Pecuniary compensation for death or injury to the person (…) caused by an act or omission (…) attributable to (a) State (which) 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.'[54]

For the majority in *JC,* reporting and endorsing what the Ghent Court of Appeal had said,

> '(L)es fautes reprochées directement au Saint-Siège, (…) n'avaient pas été commises sur le terrritoire belge mais à Rome'
>
> and,
>
> 'ni le Pape ni le Saint-Siège n'étaient présents sur le territoire belge quand les fautes reproches aux dirigeants de l'Eglise en Belgique auraient été commises'.[55]

The statement that the pope was not present in Belgium at the relevant time is made as a matter of evidence by way of judicial notice. As a natural human person this is undeniable yet the authority of the pope is not geographically territorial in the sense usually understood by international or municipal law.[56] Given the potential importance of a territorial tort exception, the assertions that the acts or omissions of the Holy See were committed in Rome not Belgium, and (correspondingly) that the Holy See 'was not present on Belgian territory' at the relevant time, requires interrogation as broached in the sole dissent of Pavli J.

For the majority in *JC*, being adequately based on international law the application of statehood-based immunity by the Belgian courts could not have been in itself disproportionately constraining of Convention rights, nor was the application arbitrary or unreasonable. In the sole dissent Pavli J argued that the

[53] CJISPArts 10, 11, 13-15.

[54] CJISPArt 12; see J. Foakes and R. O'Keefe, 'Article 12', in R. O'Keefe and C. Tams eds, n 52 above, 209.

[55] *JC* n 4 above, para 10, para 69: the form of words in the Press Release appears to be an adequate translation thereof: the relevant acts 'had not been committed on Belgian territory but in Rome (…) neither the Pope nor the Holy See had been present on Belgian territory when the misconduct attributed to the leaders of the Church in Belgium had been committed': Press Release ECHR 301 (2021), n 48 above.

[56] Under Canon Law 331, the Pope is 'Pastor of the universal Church on earth; therefore, (…) he enjoys supreme, full, immediate and universal ordinary power in the Church' and 'can always freely exercise' his universal power, suggesting an administrative effect beyond mere temporal borders: I. Cismas, n 13 above, 206.

precision of the reasoning of the Ghent courts had not been adequate to dispel the possibility of a disproportionate limitation of access to justice under the Convention having occurred.

More concretely Pavli J reached a different conclusion to the majority on the applicability of the 'territorial tort' exception to statehood-based immunity as codified in Art 12 CJISP. For Pavli J, that exception to immunity was applicable on the facts insofar as 'a cause of action under the territorial exception must relate to the occurrence or infliction of physical damage occurring in the forum state'.[57] The Belgian courts were for Pavli J in error in applying to the benefit of the Holy See, an exception or carve out from that exception to immunity based on the nature of the acts. Such a carve out for sovereign conduct (acts *jure imperii*) as contrasted with commercial acts broadly defined (*jure gestionis*), had in the reasoning of the Belgian court, the effect of bringing the conduct back into the protected zone, other things being equal. As Pavli J correctly pointed out, it is the case that injury caused to civilians in time of war or otherwise at the hands of foreign military forces, and otherwise tortious, has often been treated as protected by foreign state immunity. The sovereign nature of such acts has been precisely called upon in such contexts.[58] This manifestation of state immunity certainly raises technical difficulties in the context of CJISP because the articulation of such an immunity with Art 12 in particular, remains murky.[59] But the distinction between acts *jure imperii and* acts *jure gestionis* is not applicable to Art 12 CJISP which is concerned with territorial location.[60] Conduct otherwise falling under a form of application of Art 12 cannot be 'saved' in this manner. There is no doubt that Pavli J's analysis is correct on that point.

Importantly, Pavli J raises the possibility that vicarious liability as understood by the law of tort, may apply in the context of Art 12. Thus for Pavli J, the courts in Ghent had failed to adequately address the phrase 'attributable to' in the context of an exception to immunity under Art 12.[61] A relationship of principal and agent should therefore have been examined more carefully in terms of the influence of the Holy See over Belgian Church officials. Finally, Pavli J pointed to the fundamental importance of the location of harms under Art 12, that is to

[57] *JC*, n 4 above, 21, dissenting opinion of Pavli J.

[58] International Court of Justice, *Germany* v *Italy (Greece intervening)*, Judgment of 3 February 2012, Report of the International Court of Justice2012, 37; here the finding applies to conduct of foreign armed forces strictly during war-time.

[59] R. O'Keefe, 'The "General Understandings" ', in R. O'Keefe and C. Tams eds, n 52 above, 22; J. Foakes and R. O'Keefe, n 54 above, 215. The issue of foreign military conduct may best be thought of as an extrinsic limit on the application of Art 12.

[60] J. Foakes and R. O'Keefe, n 54 above, 209. For an innovatory intervention into the larger debate see A. Orakhelashvili, 'Jurisdictional Immunity of States and General International Law – Explaining the *Jus Gestionis v Jus Imperii* Divide', in T. Ruys et al eds, *The Cambridge Handbook of Immunities and International Law* (Cambridge: Cambridge University Press, 2019), 105.

[61] *JC* n 4 above, para 13. On these issues reference should be made to the nuanced analysis of J. Foakes and R. O'Keefe, n 54 above, 215, 220.

say location within the forum state (in this case, Belgium). That criterion was undeniably met. For Pavli J, the term 'author' in the requirement of author to be present in Art 12, refers to agents as well as principals and in that respect the Belgian Church officials constituted 'authors' whose conduct could be attributed to the Holy See.[62]

The strength of Pavli J's dissenting remarks is in his highlighting of the *prima facie* applicability of an exception to statehood based immunity derived from the location of harms. Even if a form of sovereign independence generative of immunity be identified in civil complaints against the Holy See (a point about which Pavli J does not quibble), reference to the spirit at least of Art 12 CJISP suggests scope for judicial examination of facts, that is to say, proceeding toward a merits decision in a manner unhindered by a claim to state immunity. There is some evidence of such a trend in recent US cases.[63]

Moving to the merits would not guarantee the outcome desired by complainants to the extent the Holy See, or Vatican-based officials, are named as defendants. The close connections of local supervisory influence identified by Pavli J as emanating from Rome, which might well assist with a claim in tort, were not found by the Strasbourg majority or by the Belgian courts and such close connections have generally not been found in the USA.[64] Even if systemic connections have not been found, sufficient to ground a claim in tort, connections on the facts may fall to be discerned in future cases. In any event *JC* is an important reminder of the need for a conceptual 'turning onto its feet' of the exceptions to immunity – of treating the exception to immunity not as a disturbance of normality but rather as a restoration of the status quo.[65] Viewed in this way, the claim of a defendant party to immunity from national legal process properly calls for a high bar.

IV. Conclusions

The fundamental issues raised here are incisively expressed by O'Keefe, who has called for:

> 'reflection on whether the territorial conditions found in the exceptions to state immunity generally recognized in national and international law are merely pragmatic, comity-inspired limitations on the forum state's exercise of jurisdiction over another state's non-sovereign acts or instead

[62] *JC* n 4 above, (18) Pavli J; the 'author present' clause is for Pavli J provided mainly to exclude such 'over the fence' trans-border events as the export of fireworks or the firing of weapons across a border. Also see C. Ryngaert, n 5 above.

[63] *Robles* v *Holy See* (State of Vatican City; The Vatican) & ors, 1-20-CV-2106 (VEC) (December 2021) (SDNY).

[64] N. Zambrana-Tévar, 'Reassessing' n 23 above, 27.

[65] P. Rossi, 'Italian Courts' n 12 above, 45.

> manifestations of a positive concern for the territorial sovereignty of the forum state that is perhaps as essential a justification for the restrictive doctrine of state immunity as the non-sovereign character of certain foreign-state activity and use of property'.[66]

Perhaps it may be said that territorial sovereignty with respect to the Holy See, begins 'at home.' Thus the Italian courts have indicated that even constrained as they are by the Lateran agreements, Italian jurisdiction extends at least in some respects to institutions administered under the aegis of the Holy See. The Pontifical Lateran University in Rome (and not within Vatican City) has no 'extraterritorial' status, and nor is it a 'central body' of the Holy See specially protected under the Lateran framework.[67] An employment related decision over one of that University's employees is no more the 'imperial' conduct of a foreign state than is the electromagnetic intensity of the broadcasting of Vatican Radio. Both fall to be evaluated under Italian law. Both *Tutti* and *Migliorini* may be thought of as paradigm cases. As an action in tort, *JC* is conceptually closer to the former. We may now see that activity or conduct that takes place within the geographical limits of Vatican City may on the facts be found to have caused harm beyond those limits. In principle, having crossed a supposed, treaty-based jurisdictional border between Vatican City and Italy proper, the crossing of more orthodox national borders all the way to France or Belgium might be envisioned. The jurisprudential Rubicon, if there is one, so to speak runs around the walls of Vatican City, but it is running dry. For any conduct, whether an act or an omission, the question would then be as it was for the Italian Supreme Court, about the causal links between the conduct and the harm. In other words the question would take the familiar and mundane form of a claim in tort. So the consequences of *JC* remain somewhat in the balance: more than one path of future development can be discerned. What kind of failure it was, will become clear with hindsight. For the present all that one can say is that the struggle continues; in the words of Sam Beckett, 'Go for good'.[68]

[66] R. O'Keefe, 'Review of Tom Ruys and Nicolas Angelet (eds)', Luca Ferro (ass ed), 'The Cambridge Handbook of Immunities and International Law' 32 *European Journal of International Law*,709, 711 (2021).

[67] See P. Rossi, 'Migliorini' n 34 above.

[68] S. Beckett, 'Worstward Ho', in *Nohow On* (London: Alma Books, 1992).