

## Jesus Wept: The Roman Catholic Church, Child Sexual Abuse and Transitional Justice

James Gallen\*

### <A>ABSTRACT

This article considers the range of issues involved in pursuing justice for the sexual and institutional abuse of children by the Roman Catholic Church. It examines whether the framework of transitional justice discourse and practice should be used to analyze how individuals, communities, states and the global Roman Catholic Church can and should respond to the church's legacy of widespread child sexual abuse committed by priests and religious individuals. It interrogates whether transitional justice should be employed in a novel non-armed conflict setting and argues that measures taken to date fail to reflect key insights of transitional justice that could be usefully applied to the church's response to this pattern of abuse.

<A>Keywords: clerical child sexual abuse, Roman Catholic Church, non-armed conflict, restorative versus transitional justice, Holy See

### <A>INTRODUCTION

If anyone causes one of these little ones – those who believe in me – to stumble, it would be better for them to have a large millstone hung around their neck and to be drowned in the depths of the sea.<sup>1</sup>

In this article I examine whether transitional justice should operate as an analytical framework for responding to a legacy of child sexual abuse in the Roman Catholic Church. In particular, I interrogate whether transitional justice should be employed in this non-armed conflict, non-postauthoritarian setting. In recent years, the application of transitional justice discourse and practice has extended beyond its paradigmatic context of postconflict or postauthoritarian societies to consider other large-scale or systematic human rights abuses in historical, colonial-era contexts

\* Lecturer, School of Law and Government, Dublin City University, Ireland. Email: james.gallen@dcu.ie

<sup>1</sup> Jesus Christ, Gospel of Matthew 18:6, New International Version.

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or in modern peaceful consolidated democracies. I consider how the issue of clerical child sexual abuse could fit within this expansionary trend and interrogate how distinctive challenges may emerge in applying transitional justice norms and practices to this context. In addition, I identify the potential for victims of child sexual abuse to experience similar forms of harm and unmet expectations as victims in postconflict or postauthoritarian contexts if their needs and priorities do not drive processes of addressing past abuse. This new area of analysis can inform transitional justice scholars and practitioners about further opportunities and obstacles in responding to large-scale or systematic human rights abuses. In the next section I unpack the extent of child sexual abuse in the Roman Catholic Church across several jurisdictions, involving thousands of victims over several decades and including allegations of superior responsibility for high-ranking Vatican officials. I then consider such abuse in the context of overlapping but contested discourses of restorative and transitional justice, arguing that both conceptions of justice can profitably be employed to offer a holistic and coherent manner of addressing this pattern of abuse. Thereafter I apply this framework to the issue of child sexual abuse across the areas of truth, prosecutions, reparations and institutional reform.

## **<A>CHILD SEXUAL ABUSE IN THE ROMAN CATHOLIC CHURCH: THE EMERGENCE OF GROSS VIOLATIONS OF HUMAN RIGHTS**

Child sexual abuse can be defined as an adult using a minor for sexual stimulation, including rape, indecent exposure and child pornography, and can be distinguished from nonsexual, institutional abuse within religious institutions.<sup>2</sup> 'Child sexual abuse' encompasses several violent sexual offences familiar to international criminal law and is recognized as a serious human rights violation. The Convention on the Rights of the Child provides that children should be protected from sexual exploitation and acts of torture or cruel, inhuman or degrading treatment or punishment. The UN's Committee on the Rights of the Child (CRC) recognizes the 'devastating impact of violence against

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<sup>2</sup> Claire McLoone-Richards, 'Say Nothing! How Pathology within Catholicism Created and Sustained the Institutional Abuse of Children in 20th Century Ireland', *Child Abuse Review* 21(6) (2012): 394–404.

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children.<sup>3</sup> The European Court of Human Rights has held states liable for failing to prevent child sexual abuse, including in the home and in church-managed schools.<sup>4</sup> The Council of Europe also has a specific Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse.<sup>5</sup>

Victims/survivors of child sexual abuse can suffer profound psychological damage, including posttraumatic stress disorder, substance abuse or depression.<sup>6</sup> Child sexual abuse is also destructive of victims/survivors' trust in others, especially those who failed to prevent the abuse.<sup>7</sup> The UN and civil society organizations have been highly critical of how governments and the Roman Catholic Church have addressed the issue, despite the prohibition of child sexual abuse in international law and its devastating impact on individuals. Although domestic criminal justice systems, mental health agencies and victim/survivor interest groups have all been involved to date,<sup>8</sup> no overarching framework has been employed to address the range of moral, legal, policy and psychological issues relevant to this abuse. The distinct advantage of a transitional justice approach is that it enables a comprehensive and coherent assessment of the issues involved in responding to a past legacy of violence.

Evidence of child sexual abuse by Catholic clergy has emerged globally. In the US, the issue found nationwide prominence in the 1990s and early 2000s. A series of grand jury investigations, state- and diocesan-level investigations, litigation and criminal prosecutions followed.<sup>9</sup> In Canada, commissions of inquiry formed in 1989/1990 investigated physical and

<sup>3</sup> 'General Comment No. 13: The Right of the Child to Freedom from All Forms of Violence,' UN Doc. CRC/C/GC/13 (18 April 2011), paras. 4, 26.

<sup>4</sup> *Z and Others v. United Kingdom* (2002) 34 EHRR 97; *O'Keeffe v. Ireland* (2014) ECHR 96.

<sup>5</sup> Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse, Lanzarote, Spain, 25 October 2007.

<sup>6</sup> From here onwards I use the term 'victim/survivor' to enable individuals who have experienced serious harm to self-identify in their own manner.

<sup>7</sup> Paul Rock, 'On Becoming a Victim,' in *New Visions of Crime Victims*, ed. Carolyn Hoyle and Richard Wilson (Oxford: Hart Publishing, 2002); M. Fitzpatrick, A. Carr, B. Dooley, R. Flanagan-Howard, E. Flanagan, K. Shevlin, K. Tierney, M. White, M. Daly and J. Egan, 'Profiles of Adult Survivors of Severe Sexual, Physical and Emotional Institutional Abuse in Ireland,' *Child Abuse Review* 19(6) (2010): 387-404; Stephen J. Rossetti, 'The Impact of Child Sexual Abuse on Attitudes towards God and the Catholic Church,' *Child Abuse and Neglect* 19(12) (1995): 1469-1481.

<sup>8</sup> Marie Keenan, 'Systematic Interventions with Men Who Have Sexually Abused Children,' *Feedback* 18(1) (1997): 11-15.

<sup>9</sup> *Report of the April 'E' 2002 Westchester County Grand Jury Concerning Complaints of Sexual Abuse and Misconduct against Minors by Members of the Clergy* (19 June 2002); *Grand Jury Report, Suffolk County (New York) Supreme Court* (6 May 2002); Office of the Attorney General, *Report on the Investigation of the Diocese of Manchester* (3 March 2003); Office of the Attorney General, *The Sexual Abuse of Children in the*

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sexual violence against children. The more recent Canadian Truth and Reconciliation Commission (TRC) examined child sexual abuse as part of a larger pattern of abuse of aboriginal children in residential schools between the 1800s and the 1980s.<sup>10</sup> Similarly, in Australia both regional and national governments have established commissions of inquiry into child sexual abuse in government- and church-run institutions.<sup>11</sup> In Ireland, four commissions of inquiry examined child sexual abuse and the response of church and state authorities.<sup>12</sup> Similar commissions were established in the UK, Austria, Belgium and the Netherlands.<sup>13</sup> In 2014, the CRC expressed grave concern that the Holy See, the internationally recognized sovereign entity representing the Catholic Church, had neither acknowledged the extent of nor sufficiently addressed the crimes committed, but had adopted policies and practices which have led to its continuation and to impunity for perpetrators.<sup>14</sup>

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*Roman Catholic Archdiocese of Boston* (23 July 2003); Report of the Philadelphia Grand Jury, *In Re County Investigating Grand Jury*, MISC. No. 01-00-89444 (26 September 2001); Report of the Grand Jury, *In Re County Investigating Grand Jury*, MISC. No. 03-00-239 (17 September 2003); John Jay College of Criminal Justice, *The Nature and Scope of the Problem of Sexual Abuse of Minors by Catholic Priests and Deacons in the United States, 1950–2002* (2004); John Jay College of Criminal Justice, *The Nature and Scope of the Problem of Sexual Abuse of Minors by Catholic Priests and Deacons in the United States, 1950–2002: Supplementary Data Analysis* (March 2006); John Jay College of Criminal Justice, *The Causes and Context of Sexual Abuse of Minors by Catholic Priests in the United States, 1950–2010* (18 May 2011).

<sup>10</sup> Royal Commission of Inquiry into the Response of the Newfoundland Criminal Justice System to Complaints, *Volume 1: Report* (1991); Archdiocese of St. John's, Newfoundland, *The Report of the Archdiocesan Commission of Enquiry into the Sexual Abuse of Children by Members of the Clergy* (1990); Schedule N of the Indian Residential Schools Settlement Agreement (8 May 2006).

<sup>11</sup> Commission of Inquiry into Abuse of Children in Queensland Institutions, *Report of the Commission of Inquiry into Abuse of Children in Queensland Institutions (1998–1999)* (31 May 1999) [hereinafter 'Forde Inquiry']; Family and Community Development Committee, *Betrayal of Trust: Inquiry into the Handling of Child Abuse by Religious and Other Non-Government Organisations* (2013); 'Royal Commission into Institutional Responses to Child Sexual Abuse,' <http://www.childabuseroyalcommission.gov.au> (accessed 2 January 2016).

<sup>12</sup> Francis D. Murphy, Helen Buckley and Larain Joyce, *The Ferns Report* (Dublin: Government Publications, 2005); Department of Justice, Equality and Law Reform, *Report by Commission of Investigation into the Handling by Church and State Authorities of Allegations and Suspicions of Child Abuse against Clerics of the Catholic Archdiocese of Dublin* (2009) [hereinafter 'Murphy Report']; Commission to Inquire into Child Abuse, *Report of the Commission to Inquire into Child Abuse* (Dublin: The Stationery Office, 2009) [hereinafter 'Ryan Report']; Commission of Investigation, *Report into the Catholic Diocese of Cloyne* (Dublin: Department of Justice and Law Reform, 2011).

<sup>13</sup> Cumberlege Commission, 'Nolan Review: Final Report,' <http://www.cathcom.org/mysharedaccounts/cumberlege/finalnolan1.htm> (accessed 2 January 2016); Inquiry into Historical Institutional Abuse Act (Northern Ireland) 2013; Commission for the Treatment of Complaints of Sexual Abuse in a Pastoral Relationship, *Committee Report for Handling Complaints of Sexual Abuse in a Pastoral Relationship* (2010); Commission of Inquiry, *Sexual Abuse of Minors in the Roman Catholic Church* (Amsterdam: Uitgeverij Balans, 2011).

<sup>14</sup> 'Concluding Observations on the Second Periodic Report of the Holy See,' UN Doc. CRC/C/VAT/CO/2 (31 January 2014) [hereinafter 'Concluding Observations']. See also, 'Concluding Observations on the Initial Report of the Holy See,' UN Doc. CAT/C/VAT/CO/1 (17 June 2014) [hereinafter 'Observations on the Initial Report'].

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While these national investigations emerged in the last 30 years, most of the alleged abuse dates from the late 1950s and mid-1970s.<sup>15</sup> In explaining the delay in reporting or alleging this abuse, several national-level investigations confirm the practice of transferring well-known child sexual abusers from parish to parish or to other countries in an attempt to cover up such crimes.<sup>16</sup> The historical nature of this pattern of abuse also makes it difficult to reach accurate estimates about the number of victims/survivors and perpetrators involved. The Holy See asserted before the UN Committee against Torture that it had confirmed 3,420 credible allegations of sexual abuse by priests between 2004 and 2013, resulting in the defrocking of 848 priests and disciplining of 2,572 others.<sup>17</sup> However, national-level investigations by states and civil society and victim organization figures suggest that significantly more victims/survivors and priests were involved. One estimate suggests that there may be a total of 100,000 victims.<sup>18</sup>

Although it remains the case even on more expansive figures that child sexual abuse is perpetrated by a minority of all priests and church leadership, the issue is now recognized as occurring in a variety of jurisdictions and involving offences of both individual commission and superior responsibility, the latter through the transfer of alleged abusers from one diocese or jurisdiction to another. Diverse national approaches, discussed below, highlight the limited international legal regulation of the issue. Despite these national-level inquiries, the issue has not been framed around the relevant international legal norms described above, at least not until the 2014 examination of the Holy See before UN organs. The scale of abuse revealed by existing national inquiries suggests that international legal norms should not position the issue as merely isolated or individual incidents of child sexual abuse. Rather, it is possible to characterize the pattern of abuse revealed by these inquiries as a 'gross violation of human rights.' While this term remains without formal definition in international law, it can be understood to include the types of violations that qualitatively and quantitatively affect the core rights of human beings, notably the

<sup>15</sup> Karen J. Terry, 'Stained Glass: The Nature and Scope of Child Sexual Abuse in the Catholic Church,' *Criminal Justice and Behavior* 35(5) (2008): 549–569.

<sup>16</sup> Concluding Observations, supra n 14.

<sup>17</sup> Observations on the Initial Report, supra n 14 at para. 14.

<sup>18</sup> John Allen Jr., 'Vatican Abuse Summit: \$2.2 Billion and 100,000 Victims in U.S. Alone,' *National Catholic Reporter*, 8 February 2012, <http://ncronline.org/blogs/ncr-today/vatican-abuse-summit-22-billion-and-100000-victims-us-alone> (accessed 3 January 2016).

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rights to life and to physical and moral integrity of the person.<sup>19</sup> The scale and the pattern of abuse in existing inquiries support this characterization, but also raise the question of what conception of justice should inform any response.

## <A>CHILD SEXUAL ABUSE AND CONCEPTIONS OF JUSTICE

The nature of child sexual abuse in the Catholic Church challenges the assumption that such abuse should be addressed as a series of individual isolated offences. While it has been suggested that restorative justice or transitional justice should inform a response to this abuse, it may be more profitable to think of both conceptions supporting a holistic response to the harm experienced by victims/survivors. Transitional justice can be understood as the full range of processes and mechanisms employed by a society to reckon with a past legacy of gross violations of human rights, especially genocide, war crimes and crimes against humanity.<sup>20</sup> A number of structural similarities exist in definitions of the transitional justice field, notably the pursuit of distinct value goals that are responsive to a legacy of gross violations of human rights, the establishment of formal institutions and/or informal mechanisms designed to achieve those goals, and the need for a distinctive approach in a post-armed conflict or postauthoritarian period.<sup>21</sup> For Ruti Teitel, transitional justice is a particular socially constructed form of justice, necessitated by the existence of radical social violence and distinct because institutions struggle between simultaneous adherence to established convention and radical transformation.<sup>22</sup> She defines transitional justice as 'the conception of justice associated with periods of political change, characterised by legal responses to confront the wrongdoings of repressive predecessor regimes.'<sup>23</sup>

In contrast, for Pablo de Greiff,

<sup>19</sup> Theo van Boven, 'Victims' Rights to a Remedy and Reparation: The New United Nations Principles and Guidelines,' in *Reparations for Victims of Genocide, War Crimes and Crimes against Humanity: Systems in Place and Systems in the Making*, ed. Carla Ferstman, Mariana Goetz and Alan Stephens (Leiden: Martinus Nijhoff, 2009).

<sup>20</sup> 'The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies,' UN Doc. S/2004/616 (23 August 2004).

<sup>21</sup> Nicola Henry, 'From Reconciliation to Transitional Justice: The Contours of Redress Politics in Established Democracies,' *International Journal of Transitional Justice* 9(2) (2015): 199–218.

<sup>22</sup> Ruti Teitel, *Transitional Justice* (Oxford: Oxford University Press, 2000).

<sup>23</sup> Ruti Teitel, 'Transitional Justice Genealogy,' *Harvard Human Rights Journal* 16 (2003): 69.

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transitional justice articulates the requirements of a general understanding of justice when applied to the peculiar circumstances of a very imperfect world, that is, a world characterized by massive rule breakdown and great risks to the institutions that attempt to overcome such breakdowns.<sup>24</sup>

De Greiff contends that the definitional debate concerns the *application* of justice, 'in the ... fundamental sense of coming to an understanding of what it is reasonable to expect the principles in question to imply under specific circumstances.'<sup>25</sup> His approach emphasizes that the goals of transitional justice, such as truth, criminal accountability, reparation or institutional reform, are interdependent and best pursued holistically through shared necessary conditions of civic trust and recognition of human dignity. What makes de Greiff's approach preferable is its recognition that

measures that are weak in relation to the immensity of the task that they face are more likely to be interpreted as *justice* initiatives if they help to ground a reasonable perception that their coordinated implementation is a multi-pronged effort to restore or establish anew the force of fundamental norms.<sup>26</sup>

This approach conceives of transitional justice relative to the immensity of the harm to which it responds. It captures the postconflict or postauthoritarian contexts but is not necessarily limited to them, and as a result better captures the recent expansion of the field.

In recent years transitional justice scholarship has considered its potential for evaluating and guiding responses to other large-scale or systematic human rights abuses. Patricia Lundy and Mark McGovern argue that the paradigm of transitional justice 'ignores the problem that human rights abuses may continue to take place in circumstances where, in theory at least, the norms of liberal democratic accountability prevail.'<sup>27</sup> Christine Bell contends that 'little attempt has been made to define a concept of transition that would place limitations on when transitional justice can legitimately be applied.' She thus conceives of transitional justice as a cloak 'that aims to

<sup>24</sup> Pablo de Greiff, 'A Normative Conception of Transitional Justice,' *Politorbis* 50(3) (2010): 19; Pablo de Greiff, 'Theorizing Transitional Justice,' in *Transitional Justice: Nomos LI*, ed. Melissa Williams, Rosemary Nagy and Jon Elster (New York: New York University Press, 2012).

<sup>25</sup> De Greiff, 'Theorizing Transitional Justice,' supra n 24 at 64.

<sup>26</sup> De Greiff, 'A Normative Conception,' supra n 24 at 20.

<sup>27</sup> Patricia Lundy and Mark McGovern, 'The Role of Community in Participatory Transitional Justice' in Kieron McEvoy and Lorna McGregor (eds), *Transitional Justice from Below: Grassroots Activism and the Struggle for Change* (Oxford: Hart Publishing, 2008), 99-120, 101; Whose Justice? Rethinking Transitional Justice from the Bottom Up, *Journal of Law and Society* 35(2) (2008): page of quote.

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rationalize a set of diverse bargains in relation to the past' rather than as a coherent field.<sup>28</sup> As a result, the application of the field now extends to transitions that do not always conclude with the paradigm of a liberal society.<sup>29</sup> There has also been consideration of transitional justice in contemporary settled democracies.<sup>30</sup> Recent scholarship has examined the application of transitional justice to historical, colonial-era injustices.<sup>31</sup> This expansionary trend suggests that the application of transitional justice to nonparadigmatic issues is possible where, in de Greiff's account, the measures can be assessed around their contribution to restoring the currency of basic norms that have been violated, despite the absence of a transition from armed conflict or authoritarian rule.<sup>32</sup> There is thus potential to consider the issue of child sexual abuse in the Roman Catholic Church.

It has also been suggested that restorative justice values should inform societies' and states' responses to child sexual abuse.<sup>33</sup> Although highly contested, restorative justice can be conceived of as diverse processes

whereby all parties with a stake in a particular offence come together to resolve collectively how to deal with the aftermath of the offence and its implications for the future.<sup>34</sup>

Debate continues as to whether restorative justice constitutes a process or an outcome, what practices should be included and whether it should be located within established criminal justice. In addition, restorative justice emphasizes crime primarily as a breakdown in private

<sup>28</sup> Christine Bell, 'Transitional Justice, Interdisciplinarity and the State of the "Field" or "Non-field"', *International Journal of Transitional Justice* 3(1) (2009): 23, 6.

<sup>29</sup> Dustin Sharp, 'Emancipating Transitional Justice from the Bonds of the Paradigmatic Transition,' *International Journal of Transitional Justice* 9(1) (2015): 150–169.

<sup>30</sup> Fionnuala Ní Aoláin and Colm Campbell, 'The Paradox of Transition in Conflicted Democracies,' *Human Rights Quarterly* 27(1) (2005): 172–213; Kim Stanton, 'Canada's Truth and Reconciliation Commission: Settling the Past?' *International Indigenous Policy Journal* 2(3) (2011): 1–18.

<sup>31</sup> Rosemary Nagy, 'The Scope and Bounds of Transitional Justice and the Canadian Truth and Reconciliation Commission,' *International Journal of Transitional Justice* 7(1) (2013): 52–73.

<sup>32</sup> De Greiff, 'A Normative Conception,' *supra* n 24 at 27. ~~Please add De Greiff cite.~~

<sup>33</sup> Jennifer Llewellyn, 'Dealing with the Legacy of Native Residential School Abuse in Canada: Litigation, ADR, and Restorative Justice,' *University of Toronto Law Journal* 52(3) (2002): 253–300.

<sup>34</sup> Tony Marshall, *Restorative Justice: An Overview* (London: Home Office, 1999), 5. Practices include mediation, restorative circles and conferencing. See, Paul McCold, 'The Recent History of Restorative Justice: Mediation, Circles, and Conferencing,' in *Handbook of Restorative Justice: A Global Perspective*, ed. Dennis Sullivan and Larry Tiff (London: Routledge, 2006).

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relationships between the victim, the offender and the community.<sup>35</sup> Some conceptions of restorative justice do not address whether or not a crime occurred, but instead focus on a response after a perpetrator's admission of an offence.<sup>36</sup> The use of restorative justice in cases of sexual violence is controversial. Some argue that it may trivialize violence against women, revictimize the vulnerable and endanger the safety of victims/survivors.<sup>37</sup> Alternatively, Anne-Marie McAlinden suggests its application to child sexual abuse may represent a wider and more holistic response to such abuse than traditional retributive measures, which make up the current criminal justice response to sexual offences.<sup>38</sup>

Both restorative justice and transitional justice espouse values such as truth, accountability, reparation and reconciliation and criticize exclusively retributive and adversarial justice approaches.<sup>39</sup> While the cross-fertilization of these discourses might broadly be welcomed, there is an inherent danger in applying concepts that are underrefined and underdeveloped from one setting to another.<sup>40</sup> For instance, reconciliation, which underlies restorative justice, can imply an absolute agreement among all social actors, including victims and perpetrators, which can be challenging to accept or implement in a postconflict context.<sup>41</sup>

The relationship between the two conceptions should therefore be carefully considered in addressing child sexual abuse in the context of a 'transition' in contemporary settled democracies.<sup>42</sup> A key difference in this context is the absence of an explicit dissociation from or

<sup>35</sup> Jonathan Doak and David O'Mahony, 'In Search of Legitimacy: Restorative Youth Conferencing in Northern Ireland,' *Legal Studies* 31(2) (2011): 305–325.

<sup>36</sup> Kathleen Daly, 'The Limits of Restorative Justice,' in *Handbook of Restorative Justice: A Global Perspective*, ed. Dennis Sullivan and Larry Tift (London: Routledge, 2006).

<sup>37</sup> Liz Kelly, 'What's in a Name? Defining Child Sexual Abuse,' *Feminist Review* 28 (1988): 65–73.

<sup>38</sup> Anne-Marie McAlinden, 'Are There Limits to Restorative Justice? The Case of Child Sexual Abuse,' in *Handbook of Restorative Justice: A Global Perspective*, ed. Dennis Sullivan and Larry Tift (London: Routledge, 2006).

<sup>39</sup> Jonathan Doak and David O'Mahony, 'Transitional Justice and Restorative Justice,' *International Criminal Law Review* 12(3) (2012): 305–311.

<sup>40</sup> Jonathan Doak and Kerry Clamp, 'More Than Words: Restorative Justice Concepts in Transitional Justice Settings,' *International Criminal Law Review* 12(3) (2012): 339–360.

<sup>41</sup> David Crocker, 'Truth Commissions, Transitional Justice, and Civil Society,' in *Truth v. Justice: The Morality of Truth Commissions*, ed. Robert Rotberg and Dennis Thompson (Princeton, NJ: Princeton University Press, 2000).

<sup>42</sup> Anne-Marie McAlinden, 'An Inconvenient Truth: Barriers to Truth Recovery in the Aftermath of Institutional Child Abuse in Ireland,' *Legal Studies* 33(2) (2013): 189–214.

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settlement with a former regime.<sup>43</sup> In Teitel's account, the primacy of state transition remains the key distinguishing feature between 'ordinary' and transitional justice.<sup>44</sup> However, several arguments demonstrate the relevance of transitional justice and the potential for continuity rather than a false dichotomy with restorative justice.

First, alternative, broader conceptions of transitional justice enable its application in nonparadigmatic, non-armed conflict or non-postauthoritarian settings. In de Greiff's account, transitional justice could accommodate the expansionary trend in recent practice and include child sexual abuse. It could do so by operating an analytical framework which assesses the extent of breakdown in basic norms such as recognition of human dignity, civic trust and the rule of law, as well as the contribution of a particular justice mechanism, such as a commission of inquiry or reparations, to the overall conception of justice pursued.<sup>45</sup> Similarly, Jennifer Balint, Julie Evans and Nesam McMillan conceive transitional justice as a 'justice model' that is concerned with the importance and mechanics of recognizing and redressing widespread and state-sanctioned harm through using political-legal initiatives such as trials, truth commissions, apologies and reparations to achieve goals like accountability and reconciliation.<sup>46</sup> This approach is harm-centric and serves as a justification for implementing various justice strategies in new contexts,<sup>47</sup> and could therefore incorporate child sexual abuse.

It may be profitable to think of an examination of child sexual abuse, as a nonparadigmatic instance of transitional justice, on a spectrum between transitional justice as traditionally understood and questions of criminal and restorative justice for isolated individual offences in peaceful consolidated democracies. Martha Minow describes the legal responses to violence against children as a 'middle case' between interfamilial adult violence and intergroup violence.<sup>48</sup>

<sup>43</sup> Johanna Sköld, 'Historical Abuse – A Contemporary Issue: Compiling Inquiries into Abuse and Neglect of Children in Out-of-Home Care Worldwide,' *Journal of Scandinavian Studies in Criminology and Crime Prevention* 14 (Sup. 1) (2013): 5–23.

<sup>44</sup> Teitel, *supra* n 22.

<sup>45</sup> De Greiff, 'A Normative Conception,' *supra* n 24, at 29. Add de Greiff cite.

<sup>46</sup> Jennifer Balint, Julie Evans and Nesam McMillan, 'Rethinking Transitional Justice, Redressing Indigenous Harm: A New Conceptual Approach,' *International Journal of Transitional Justice* 8(2) (2014): 194–216.

<sup>47</sup> Henry, *supra* n 21.

<sup>48</sup> Martha Minow, 'Between Intimates and between Nations: Can Law Stop the Violence,' *Case Western Reserve Law Review* 50(4) (2000): 855.

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Child sexual abuse, although hugely important, would remain on the periphery of an accepted transitional justice paradigm.<sup>49</sup>

In arguing for the relevance of transitional justice to child sexual abuse, Johanna Sköld distinguishes it from restorative justice for contemporary crimes, preferring a combination of restorative/transitional justice processes for addressing past abuses that would not necessarily have been regarded as crimes at the time of the events.<sup>50</sup> Similarly, Kathleen Daly notes that when discussing responses to sexual violence, restorative justice scholars and advocates often focus on an *individual* context of violence.<sup>51</sup> In doing so, other contexts of violence are overlooked, such as when individuals use positions of occupational or organizational power, or when sexual victimization occurs in closed institutions or communities. In this regard, transitional justice, with a public dimension, seems preferable to restorative justice, which may be considered a private engagement between stakeholders. The personal interaction between stakeholders is hugely important, but could usefully be combined in a transitional justice approach with consideration of the institutional and international legal responsibility of the Holy See.

Second, transitional justice may serve a cohering or unifying function by bringing together discourses that exist on child sexual abuse across different jurisdictions, academic disciplines and fields of practice.<sup>52</sup> In this regard, transitional justice and restorative justice may overlap in providing normative guidance on specific components of a response to the pattern of harm involved in child sexual abuse. Rather than choosing either transitional justice or restorative justice to assess the present issue of child sexual abuse, it would be useful to consider the benefits of a combined approach.

Third, Daly suggests that analysts can employ a transitional justice approach to offer sociopolitical analysis of the potential for change in state–citizen or state–church–citizen relations. Transitional justice has special relevance where the abuse of children is part of a broader claim for

<sup>49</sup> Dustin Sharp, 'Interrogating the Peripheries: The Preoccupations of Fourth Generation Transitional Justice,' *Harvard Human Rights Journal* 26 (2013): 149–178.

<sup>50</sup> Sköld, *supra* n 43.

<sup>51</sup> Kathleen Daly, "Sexual Violence and Justice: How and Why Context Matters" in Anastasia Powell, Nicola Henry, and Asher Flynn (eds.), *Rape Justice: Beyond the Realm of Law* (London: Palgrave Macmillan, 2015) 36-52, 37. ~~insert a Daly cite please. Or is this supra n 36?~~

<sup>52</sup> Henry, *supra* n 21.

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realigning or transforming state–citizen and majority–minority group relations.<sup>53</sup> Similarly, Stephen Winter argues that redress activity generally undertaken in established democratic states can be seen as a form of transitional justice because such measures aim to contribute to the delegitimation of the state as a result of past historical injustices.<sup>54</sup> McAlinden suggests the ‘regime change’ that has been thrown up by Irish inquiries into institutional abuse of children is a ‘defining moment in Irish political and legal history’ because it ‘offers a unique opportunity to make a permanent break with the past,’ from an ‘amorphous or undefined’ relationship to one of greater state control of church authority.<sup>55</sup> Not every jurisdiction in which child sexual abuse occurs presents this level of shift in church–state relations. However, the nature of the ‘transition’ for the church can be viewed more generally. The conditions in which child sexual abuse has arisen – the limited governance and oversight in Catholic institutions – have been exported by Catholic organizations from one country to another.<sup>56</sup> The crisis in the church’s legitimacy and credibility caused by this is immense. In a recent Pew Research Center survey, Catholics in the US viewed the child sexual abuse scandal as the most important problem facing their church today.<sup>57</sup> The crisis may thus require the church to undergo a radical transformation of its governance and perhaps its theology. In the words of one Canadian archbishop, child sexual abuse has led to the need for ‘the founding, the re-founding of our church.’<sup>58</sup> Consideration of child sexual and institutional abuse in the Roman Catholic Church thus constitutes a novel application of transitional justice. This article therefore continues a trend of recent scholarship that seeks to expand transitional justice’s application as an analytical framework for addressing the nature, extent and impact of historical abuses and their contemporary effects.

<sup>53</sup> Kathleen Daly, ‘Conceptualising Responses to Institutional Abuse of Children,’ *Current Issues in Criminal Justice* 26(1) (2014): 5–29.

<sup>54</sup> Stephen Winter, ‘Towards a Unified Theory of Transitional Justice,’ *International Journal of Transitional Justice* 7(2) (2013): 224–244.

<sup>55</sup> McAlinden, *supra* n 42 at 213.

<sup>56</sup> David Pilgrim, ‘Child Abuse in Irish Catholic Settings: A Non-Reductionist Account,’ *Child Abuse Review* 21(6) (2012): 405–413.

<sup>57</sup> Pew Research Center, ‘U.S. Catholics See Sex Abuse as the Church’s Most Important Problem, Charity as Its Most Important Contribution,’ 6 March 2013, <http://www.pewforum.org/2013/03/06/us-catholics-see-sex-abuse-as-the-churchs-most-important-problem-charity-as-its-most-important-contribution/> (accessed 4 January 2016).

<sup>58</sup> Archbishop Anthony Mancini, quoted in Sheila Redmond, ‘Fear and Denial at the Crossroads? Where Is the History of the “Child Abuse Scandal” within the Roman Catholic Church?’ *Historical Papers: Canadian Society of Church History* (2012): 151.

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## <A>APPLYING TRANSITIONAL JUSTICE TO CLERICAL CHILD SEXUAL ABUSE

These areas of transitional justice discussed below, truth, prosecutions, reparations, and institutional reform, are selected because they reflect customary international law,<sup>59</sup> but also because in de Greiff's conception of transitional justice, they share two mediate goals (providing recognition to victims and fostering civic trust) and two final goals (contributing to reconciliation and democratization).<sup>60</sup> These areas are also reflected in the position of the UN in soft law.<sup>61</sup> By addressing child sexual abuse through the pursuit of goals of truth, accountability, reparation and institutional reform, a transitional justice approach recognizes the systemic and complex nature of the offences, including institutional cover-ups, and seeks to acknowledge and respond to the diverse priorities and needs of victims/survivors of that abuse.

### <B>Truth

National-level investigations of clerical child sexual abuse perform a similar function to TRCs by narrowing the range of permissible lies regarding past human rights abuses.<sup>62</sup> The church has often denied and minimized its knowledge of the issue and isolated the problem to individual cases, arguing that there was no significant contemporary awareness of such abuse. However, the number of victims revealed by the national investigations removes any doubt that a widespread

<sup>59</sup> Kai Ambos, 'The Legal Framework of Transitional Justice: A Systematic Study with a Special Focus on the Role of the ICC,' in *Building a Future on Peace and Justice: Studies on Transitional Justice, Peace and Development: The Nuremberg Declaration on Peace and Justice*, ed. K. Ambos, J. Large and M. Wierda (Berlin: Springer-Verlag, 2009); 'Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law,' UN Doc. A/RES/60/147 (21 March 2006) [hereinafter 'Basic Principles'].

<sup>60</sup> De Greiff, 'A Normative Conception,' supra n 24.

<sup>61</sup> 'Study on the Right to the Truth: Report of the Office of the United Nations High Commissioner for Human Rights,' UN Doc. E/CN.4/2006/91 (8 February 2006) [hereinafter 'Study on Right to Truth']; 'Right to the Truth,' UN Doc. A/HRC/5/7 (7 June 2007) [hereinafter 'Right to the Truth']; 'Rule of Law Tools for Post-Conflict States: Truth Commissions,' UN Doc. HR/PUB/06/1 (2006) [hereinafter 'Truth Commissions']; 'Rule-of-Law Tools for Post-Conflict States: Mapping the Justice Sector,' UN Doc. HR/PUB/06/2 (2006); 'Rule of Law Tools for Post-Conflict States: Monitoring Legal Systems,' UN Doc. HR/PUB/06/3 (2006); 'Rule of Law Tools for Post-Conflict States: Prosecution Initiatives,' UN Doc. HR/PUB/06/4 (2006); 'Rule of Law Tools for Post-Conflict States: Vetting: An Operational Framework,' UN Doc. HR/PUB/06/5 (2006); 'Rule of Law Tools for Post-Conflict States: Reparations Programmes,' UN Doc. HR/PUB/08/1 (2008) [hereinafter 'Reparations Programmes']; 'Rule of Law Tools for Post-Conflict States: Maximizing the Legacy of Hybrid Courts,' UN Doc. HR/PUB/08/2 (2008); 'Rule-of-Law Tools for Post-Conflict States: Amnesties,' UN Doc. HR/PUB/09/1 (2009); 'Rule-of-Law Tools for Post-Conflict States: National Consultations on Transitional Justice,' UN Doc. HR/PUB/09/2 (2009); 'Analytical Study on Human Rights and Transitional Justice,' UN Doc. A/HRC/12/18 (6 August 2009).

<sup>62</sup> Michael Ignatieff, 'Articles of Faith,' *Index on Censorship* 25(5) (1996): 110–122.

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problem exists.<sup>63</sup> In the US, child sexual abuse between 1950 and 2010 was examined. A total of 17,259 cases had been reported to dioceses at the time of writing, with 4,300 priests accused of abuse.<sup>64</sup> In 1998, the Australian Commission of Inquiry concluded that between 1911 and 1998 'considerable numbers of children, many who were indigenous, were subjected to inexcusable physical, emotional and sexual abuse.' The Commission's report recognized 'systemic abuse.'<sup>65</sup> Estimates from a 2012 Australian inquiry suggest that several thousand victims had been criminally abused over a period of 70 years.<sup>66</sup> In Ireland, commissions of inquiry revealed that sexual abuse was 'endemic' in religious institutions throughout Ireland, with more than 1,000 former pupils alleging physical and sexual abuse.<sup>67</sup>

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Each report also reveals broad historical and cultural factors related to such patterns of abuse. Several reports affirm that the primary concern of church officials in responding to the abuse was to protect the church's reputation and the careers of its bishops and priests – not the best interests of the child.<sup>68</sup> The CRC affirmed that the lack of mandatory reporting requirements on clergy also facilitated the scale of the abuse.<sup>69</sup> There is a risk that the causes of the abuse will not be comprehensively considered if only individual perpetrators or specific institutional structures are blamed. In the US, for example, a 2004 report stated that,

The problem facing the Church was not caused by Church doctrine, and the solution does not lie in questioning doctrine ... the Board has not attempted to conduct a comprehensive analysis of factors that may have made sexual abuse of minors more or less likely in a particular environment, or to develop an empirically-based profile of a typical sexual abuse offender.<sup>70</sup>

David Pilgrim argues that the origins of the crisis must include the power adults hold over children, especially given victimized Catholic children's perception of religious personnel as God's

<sup>63</sup> Redmond, supra n 58.

<sup>64</sup> John Jay College of Criminal Justice, 2004, supra n 9 at 4.

<sup>65</sup> Forde Inquiry, supra n 11 at 287.

<sup>66</sup> Family and Community Development Committee, supra n 11, 6.

<sup>67</sup> Ryan Report, supra n 12.

<sup>68</sup> Report of the Philadelphia Grand Jury, supra n 9; Ryan Report, supra n 12.

<sup>69</sup> Concluding Observations, supra n 14.

<sup>70</sup> United States Conference of Catholic Bishops, 'A Report on the Crisis in the Catholic Church in the United States,' 27 February 2004, <http://www.bishop-accountability.org/usccb/causesandcontext/2004-02-27-CC-Report.pdf> (accessed 4 January 2016), 7–8.

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representatives on earth.<sup>71</sup> The impact of specific Catholic doctrines, such as the celibacy of religious personnel and the mortification of the flesh, should also be examined. Finally, the relationship between church and state and the degree of knowledge and acquiescence in the face of abuse allegations from police and state officials should also be considered.

Systematic empirical, psychological and historical work is needed to clarify the range of factors that contributed to the emergence of the crisis. One advantage of employing a transitional justice discourse in this context would be the ability to articulate multilayered conceptions of truth and responsibility, as is typical of truth commission reports. Kieron McEvoy writes that 'a focus on individual responsibility fails to take proper account of the complex collective factors which contribute to violence.'<sup>72</sup> Sheila Redmond suggests there is a need to examine primary materials throughout church history, focusing on the relationships of these documents to the sexual abuse of children. Only in this way will the role played by historical circumstances and the development of Christian theology clarify the church's reticence in monitoring the sexual behaviour of its clerics.~~in the church's inability to understand the sexual behaviour of its clerics become clear.~~<sup>73</sup>

The church's response demonstrates an unwillingness to comprehensively or transparently address the allegations of abuse. In Canada, no action was taken in response to initial complaints, either because of a conspiracy to keep allegations quiet or a ready acceptance of the alleged perpetrator's denial.<sup>74</sup> In Germany, the church was criticized for being disinterested in the victims' fate and reluctant to face the issue.<sup>75</sup> In Ireland, between 1975 and 2004 four Dublin archbishops effectively turned a blind eye to abuse cases.<sup>76</sup> In 2011, a Philadelphia grand jury detailed the 'careful methods by which the Archdiocese accomplished its concealment of ... crimes.'<sup>77</sup>

<sup>71</sup> Pilgrim, supra n 56.

<sup>72</sup> Kieron McEvoy, 'Letting Go of Legalism: Developing a "Thicker" Version of Transitional Justice,' in *Transitional Justice from Below: Grassroots Activism and the Struggle for Change*, ed. Kieron McEvoy and Lorna McGregor (Oxford: Hart, 2008), 43.

<sup>73</sup> Redmond, supra n 58.

<sup>74</sup> Archdiocese of St. John's, supra n 10.

<sup>75</sup> Westpfahl, Spilker and Wastl, 'Sexual and Other Physical Assaults by Priests, Deacons and Other Pastoral Workers in the Field of Jurisdiction of the Archdiocese of Munich and Freising between 1945 and 2009,' 2 December 2010, <http://www.erzbistum-muenchen.de/media/media14425720.PDF> (accessed 4 January 2016).

<sup>76</sup> *Murphy Report*, supra n 12.

<sup>77</sup> Report of the Grand Jury, supra n 9.

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Furthermore, several inquiries can be criticized for failing to adopt transitional justice best practices regarding TRCs, as proposed by the UN.<sup>78</sup> While TRCs now often provide for public hearings, only some child sexual abuse inquiries did so, with several holding hearings in private.<sup>79</sup> The Forde Inquiry in Queensland, Australia, justified this approach due to the risk of prejudicing contemporary litigation and criminal proceedings.<sup>80</sup> Practice with TRCs in transitional justice demonstrates that commissions can be designed to address these concerns.<sup>81</sup> In Ireland, one key difference from traditional TRCs was the lack of direct confrontation between perpetrators and survivors.<sup>82</sup> Although there are situations involving victims of sexual abuse which may warrant private hearings, these risks of retraumatization have been managed in other TRCs.<sup>83</sup>

In addition, the terms of reference for several inquiries involved long historical mandates, with several stretching back to the 1940s and 1950s. Despite this, the terms of reference of two Irish commissions were nonetheless narrowly framed. They were tasked with examining allegations of abuse as reported to them, and the relevant authorities' responses to those allegations, rather than the truth of the allegations and whether sexual abuse actually took place. They also failed to examine the nature and extent of state involvement and knowledge.<sup>84</sup> This is in contrast to Canadian investigations, which highlighted failures of police investigation procedures in cases of child sexual abuse.<sup>85</sup> Further nonlegislative investigations have been unable to compel testimony or order the production of documents.<sup>86</sup> Relatedly, unlike several recent TRCs, a number of investigations have not named the perpetrators of child sexual abuse.<sup>87</sup> Not naming perpetrators

<sup>78</sup> Study on Right to Truth, supra n 61; Right to the Truth, supra n 61; Truth Commissions, supra n 61.

<sup>79</sup> Archdiocese of St. John's, supra n 10.

<sup>80</sup> Forde Inquiry, supra n 11.

<sup>81</sup> Mark Freeman, *Truth Commissions and Procedural Fairness* (Cambridge: Cambridge University Press, 2006).

<sup>82</sup> Carol Brennan, 'Facing What Cannot Be Changed: The Irish Experience of Confronting Institutional Child Abuse,' *Journal of Social Welfare and Family Law* 29(3/4) (2007): 245–263.

<sup>83</sup> Joanna R. Quinn and Mark Freeman, 'Lessons Learned: Practical Lessons Gleaned from inside the Truth Commissions of Guatemala and South Africa,' *Human Rights Quarterly* 25(4) (2003): 1117–1149.

<sup>84</sup> McAlinden, supra n 42.

<sup>85</sup> Royal Commission of Inquiry into the Response of the Newfoundland Criminal Justice System to Complaints, supra n 10.

<sup>86</sup> Archdiocese of St. John's, supra n 10.

<sup>87</sup> Matt James, 'Uncomfortable Comparisons: The Canadian Truth and Reconciliation Commission in International Context,' *Les Ateliers de l'Éthique/The Ethics Forum* 5(2) (2010): 24–35; Michael Murray and David Gibson v. The Commission to Inquire into Child Abuse, the Minister for Education and Science, Ireland and the Attorney General, unreported (17 October 2003).

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renders it difficult to develop an interrelationship between these investigations and criminal prosecutions or vetting procedures in the church's canon law.

While national-level investigations have developed valuable detailed accounts, an international mechanism established by the Holy See could reflect that this pattern of abuse is not isolated in individual countries and could establish the patterns of abuse across borders, including any form of cover-up or transfer of perpetrators between dioceses and nations. Such a commission or mechanism could be effective in linking all cases to give an overall picture of the nature, culture and context of violations.

### <B>Prosecutions

Criminal prosecutions of priests who abuse children have been used to hold individual perpetrators accountable for their crimes. In Ireland, between 2009 and 2011 only 11 criminal cases were forwarded to the Director of Public Prosecutions based on the Commission to Inquiry into Child Abuse reports of inquiry.<sup>88</sup> In 2010, the German media reported that more than 94 clerics and laymen had so far been investigated over sexual abuse allegations since 1995. However, because of statutes of limitations only 30 had actually been prosecuted.<sup>89</sup> In the US, it is estimated that of the 3,400 priests alleged to have committed child sexual abuse between 1950 and 2010, only 384 were charged.<sup>90</sup> In Australia between 1993 to present, there have been over 100 cases of Catholic priests charged with sexual offences against children.<sup>91</sup> In addition, the Survivors Network of Those Abused by Priests unsuccessfully petitioned the Office of the Prosecutor (OTP) at the International Criminal Court (ICC), alleging that Vatican officials had superior responsibility for consciously disregarding information that showed subordinates were committing or about to

<sup>88</sup> Carole Holohan, 'In Plain Sight: Responding to the Ferns, Ryan, Murphy and Cloyne Reports,' September 2011, [http://www.amnesty.ie/sites/default/files/file/INPLAINSIGHT\\_28\\_11\\_11\\_SINGLE\\_PAGES.pdf](http://www.amnesty.ie/sites/default/files/file/INPLAINSIGHT_28_11_11_SINGLE_PAGES.pdf), (accessed 4 January 2016).

<sup>89</sup> Deutsche Welle, 'Abuse Allegations Mount at German Catholic Church,' 7 February 2010, <http://www.dw.de/abuse-allegations-mount-at-german-catholic-church/a-5224213> (accessed 4 January 2016); Westpfahl, Spilker and Wastl, supra n 75.

<sup>90</sup> John Jay College of Criminal Justice, 2004, supra n 9 at 59.

<sup>91</sup> Broken Rites Australia, 'Black Collar Crime,' <http://brokenrites.org.au/drupal/node/235> (accessed 4 January 2016).

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commit sexual violence.<sup>92</sup> The OTP rejected the request on the basis of lack of jurisdiction and because some of the allegations concerned events prior to the ICC's founding in 2002.<sup>93</sup> While the Holy See is not an ICC member state and the prosecutor therefore does not have automatic jurisdiction, the complaint listed allegations of abuse involving nationals in many countries which do accept the ICC's jurisdiction.

The approaches taken to date in relation to prosecutions raise several issues. First, most prosecutions for clerical child sexual abuse have proceeded solely in the order in which complaints were received. A prosecution strategy that concentrates on the proper identification of patterns of victimization would minimize victims' and witnesses' exposure to repeated procedures. Second, under the case-by-case approach, individuals bearing the greatest responsibility may end up escaping prosecution, as it is difficult to establish links between the different cases, identify patterns of violations and ascertain chains of command.<sup>94</sup>

Third, the difficulties of prosecution demonstrate the need for a coherent approach to the crisis predicated on acknowledging de Greiff's view that components of a justice response are interconnected. Difficulties in reporting and investigating child sexual abuse have resulted in limited prosecutions, with several cases excluded on the grounds of delay or the statute of limitations.<sup>95</sup> While impeded by limitations to the initial investigations, failure in the area of prosecutions in turn affects the perception that child sexual abuse is addressed as a whole. This may generate the perception that compensation paid by church institutions constitutes 'blood money' in the absence of accountability.<sup>96</sup> The absence of effective prosecutions also damaged the perceived

<sup>92</sup> 'Victims' Communication Pursuant to Article 15 of the Rome Statute Requesting Investigation and Prosecution of High-Level Vatican Officials for Rape and Other Forms of Sexual Violence as Crimes against Humanity and Torture as a Crime against Humanity,' ICC File No. OTP-CR-159/11, 13 September 2011, <http://nationbuilder.s3.amazonaws.com/snap/pages/795/attachments/original/FINALSNAPWORD.pdf?1315913668> (accessed 4 January 2016).

<sup>93</sup> Letter from Office of the Prosecutor, dated 31 May 2013, [http://d3n8a8pro7vymx.cloudfront.net/snap/pages/795/attachments/original/1372188351/ICC\\_letter\\_from\\_Prosecution.pdf?1372188351](http://d3n8a8pro7vymx.cloudfront.net/snap/pages/795/attachments/original/1372188351/ICC_letter_from_Prosecution.pdf?1372188351), (accessed 4 January 2016).

<sup>94</sup> 'Report of the Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-Recurrence,' UN Doc. A/HRC/27/56 (27 August 2014), paras. 36, 42.

<sup>95</sup> Sinéad Ring, 'Beyond the Reach of Justice? Complainant Delay in Historic Child Sexual Abuse Cases and the Right to a Fair Trial,' *Judicial Studies Institute Journal 2* (2009): 162–203.

<sup>96</sup> De Greiff, 'A Normative Conception,' *supra* n 24.

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effectiveness of the TRCs in Liberia and South Africa.<sup>97</sup> In addition, as the pool of perpetrators of historical sexual abuse becomes older, the ethics and effectiveness of prosecutions may change, a debate familiar to transitional justice prosecutions.

### <B>Apologies, Memorials and Reparations

Extensive national civil litigation against the perpetrators of child sexual abuse and against churches through vicarious liability has provided compensation to victims/survivors, but fails to reflect some of the values and processes associated with reparations in transitional or restorative justice.

The US Catholic Church has paid \$2.5–3 billion in compensation to victims and their families.<sup>98</sup> In Canada, a compensation scheme for physical and sexual abuse in residential schools was criticized for a lack of munificence and for failure to recognize broader harms such as emotional loss, loss of family life, forced labour or loss of language and culture.<sup>99</sup> A 2006 Indian Residential Schools Settlement Agreement provided for a Common Experience Payment for all former students (CAD\$10,000 for the first year and an additional CAD\$3,000 for each subsequent year spent in residential school), an Individual Assessment Process for compensation for sexual and physical abuse, and funds for healing and commemoration. The adversarial procedure of eligibility assessment has been criticized for pursuing inappropriate retributive rather than restorative norms and for arising from a desire from the Canadian government to minimize the extent and cost of its liability.<sup>100</sup>

In Ireland, the Residential Institutions Redress Act 2002 established a compensation scheme for victims of sexual and institutional abuse. Religious congregations contributed €128 million to its funding, in return for which the government granted an indemnity 'not based on any

<sup>97</sup> Jonny Steinberg, 'Liberia's Experiment with Transitional Justice,' *African Affairs* 109(434) (2009): 135–144; François du Bois and Antje du Bois-Pedain, eds., *Justice and Reconciliation in Post-Apartheid South Africa* (Cambridge: Cambridge University Press, 2009).

<sup>98</sup> Bishop Accountability, 'Data on the Crisis,' <http://www.bishop-accountability.org/AtAGlance/data.htm#settlements> (accessed 4 January 2016).

<sup>99</sup> Nagy, *supra* n 31.

<sup>100</sup> Melanie Laing, 'An Analysis of Canada's Indian Residential Schools Truth and Reconciliation Commission,' *Undergraduate Transitional Justice Review* 4(1) (2013): 34–50.

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apportionment of responsibility for abuse.<sup>101</sup> Total compensation paid to victims amounted to about €1.2 billion, and while religious institutions increased their contribution, the state remains the primary contributor to victim compensation. By 2013 the Belgian Catholic Church had administered €850,000 in compensation.<sup>102</sup> In 2011, the German Bishops' Conference announced a standardized compensation of €5,000 to be paid to all victims of clerical abuse by the German Catholic Church.<sup>103</sup> In contrast, Poland's Catholic Church has said it will not pay compensation to victims of priests who sexually abused children, asserting that the wrongdoer alone should pay compensation.<sup>104</sup> The Dutch Catholic Church has paid almost €14 million to sexual abuse victims, averaging €30,700 to 448 victims.<sup>105</sup> Australia's Royal Commission into child sexual abuse estimated 65,000 people may be entitled to further compensation, with an average payment of A\$65,000. The total cost of such redress would be approximately A\$4,378 billion.<sup>106</sup>

One of the major failures of the approach to compensation to date is the lack of acknowledgement of wrongdoing, especially in out-of-court settlements. This approach contrasts significantly with best practice for reparations for gross violations of human rights, which recognizes the need for acknowledgement of responsibility as a key component.<sup>107</sup> Settlements enable perpetrators and the church to prevent their crimes from becoming public, to avoid trials and to circumvent the disclosure of internal documents. In 2002, it was revealed that some bishops in Boston had facilitated compensation payments to victims on condition that the allegations remained secret. The CRC recommended that the Holy See provide compensation to victims of sexual abuse committed by individuals and institutions under the Holy See's authority without

<sup>101</sup> Evidence to Ryan Tribunal, vol. 1, p. 12. Residential Institutions Redress Act, No. 13 of 2002; Indemnity Agreement, <http://www.connect.ie/secret.pdf> (accessed 4 January 2016); *Ryan Report*, supra n 12.

<sup>102</sup> Child Rights International Network, 'Child Sexual Abuse and the Holy See: The Need for Justice, Accountability and Reform,' [http://tbinternet.ohchr.org/Treaties/CAT/Shared%20Documents/VAT/INT\\_CAT\\_CSS\\_VAT\\_17113\\_E.pdf](http://tbinternet.ohchr.org/Treaties/CAT/Shared%20Documents/VAT/INT_CAT_CSS_VAT_17113_E.pdf) (accessed 19 January 2016), 14.

<sup>103</sup> Claudia Keller, 'Katholische Kirche gibt jedem Missbrauchsoffer bis zu 5000 Euro,' *Der Tagesspiegel*, 2 March 2011, <http://www.tagesspiegel.de/politik/katholische-kirche-gibt-jedem-missbrauchsoffer-bis-zu-5000-euro/3904972.html> (accessed 4 January 2016).

<sup>104</sup> 'Catholic Church "Will Not Pay" Child Sex Victims,' *Irish Examiner*, 5 October 2013, <http://www.irishexaminer.com/world/catholic-church-will-not-pay-child-sex-victims-245295.html> (accessed 4 January 2016).

<sup>105</sup> 'Dutch Catholic Church Has Paid Almost €14m to Sexual Abuse Victims,' *Dutch News*, 1 July 2014, [http://www.dutchnews.nl/news/archives/2014/07/dutch\\_catholic\\_church\\_has\\_paid/](http://www.dutchnews.nl/news/archives/2014/07/dutch_catholic_church_has_paid/) (accessed 4 January 2016).

<sup>106</sup> 'Australia "Faces A\$4bn" Child-Abuse Compensation Bill,' *BBC News*, 30 January 2015, <http://www.bbc.com/news/world-asia-31052631> (accessed 4 January 2016).

<sup>107</sup> Basic Principles, supra n 59.

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imposing any obligation of confidentiality on the victims.<sup>108</sup> While there have been significant cash payments to victims of child sexual abuse, it is far from clear whether criteria suggested by the UN, such as acknowledgement and the comprehensiveness or coherence of such reparations, were taken into account in all court or legislatively ordered compensation packages.

There have also been apologies in several national jurisdictions for child sexual abuse from respective governments and/or national churches.<sup>109</sup> While there have been statements of apology from the leadership of the Catholic Church, victim organizations remain dismayed at the failure of the Vatican to admit its role in covering up repeated allegations of abuse. Publicly affirming the wrongfulness of the crimes and attempts to prevent their disclosure is a very important aspect in reaffirming victims' dignity and reinforcing the fact that they were not at fault or responsible for the harm they endured.<sup>110</sup> It would be useful to see an acknowledgement of the causes of the abuse integrated into any future reparations or apologies. How can the church offer meaningful apology and acknowledgement of its failure if it is unable or unwilling to address the causes of the harm itself?

Other forms of reparation may be appropriate to ensure the physical and psychological recovery and social reintegration of victims of abuse. These may include restitution, especially where victims or whistleblowers have been excommunicated; rehabilitation focusing on victims' psychological needs; other forms of satisfaction, such as memorials to awaken the public consciousness and to serve as physical and public recognition and reminders of the past; and guarantees of nonrepetition. Further comparative and empirical analysis is needed to assess the redress given to such victims to date through reference to criteria for reparations of gross violations of human rights.<sup>111</sup> Such complex reparations would in turn require a reform of the church's canon law, which contains no provision for the protection, support, rehabilitation and compensation of child victims.<sup>112</sup>

<sup>108</sup> Concluding Observations, supra n 14.

<sup>109</sup> The Honourable Jane Stewart, Minister of Indian Affairs and Northern Development, on the occasion of the unveiling of Gathering Strength: Canada's Aboriginal Action Plan, 7 January 1998; Pope Benedict XVI's address to the Bishops of Ireland (28 October 2006) and his Pastoral Letter to the Catholics of Ireland (19 March 2010).

<sup>110</sup> Luke Moffett, *Justice for Victims before the International Criminal Court* (London: Routledge, 2014).

<sup>111</sup> Reparations Programmes, supra n 61.

<sup>112</sup> Observations on the Initial Report, supra n 14 at para. 18.

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## <B>Institutional Reform

In addition to international law and the law of domestic jurisdictions, the Holy See has its own religious legal system, canon law, that operates concurrently with states' national jurisdictions and can lead to formal penalties, including dismissal from the clerical state.<sup>113</sup> Despite this concurrent jurisdiction, cooperation between canon law and states' attempts to address child sexual abuse has been limited. Since 2001, the Holy See has directed all bishops worldwide to inform the Congregation for the Doctrine of the Faith (CDF) if they receive an allegation of child sexual abuse by a cleric. Church authorities are prohibited from taking any action beyond a preliminary investigation without further direction from the CDF.<sup>114</sup> Documents of an investigation are to be kept in a secret archive and outcomes of canon trials are to be kept secret. In addition, there is no express obligation in canon law to report cases of child sexual abuse to civil authorities.<sup>115</sup>

The secrecy and uncooperative nature of the process is not only victim unfriendly but also impedes any meaningful coordination or awareness of the issue with civil police authorities. The CRC is concerned that addressing child sexual abuse under canon law has allowed the vast majority of abusers and almost all those who concealed child sexual abuse to escape judicial proceedings in states where abuses were committed. Additionally, due to a code of silence imposed on all members of the clergy under penalty of excommunication, cases of child sexual abuse have hardly ever been reported to the law enforcement authorities in the countries where such crimes occurred, as reporting to national law enforcement authorities has never been made compulsory. Finally, the CRC is particularly concerned that the Holy See has consistently placed the preservation of its reputation and protection of the perpetrators above children's best interests, a trend confirmed by several national commissions of inquiry.<sup>116</sup> Despite significant evidence of the

<sup>113</sup> 'Code of Canon Law,' [http://www.vatican.va/archive/ENG1104/\\_INDEX.HTM](http://www.vatican.va/archive/ENG1104/_INDEX.HTM) (accessed 4 January 2016), canon 1395, para. 2; 'Consideration of Reports Submitted by States Parties under Article 44 of the Convention,' UN Doc. CRC/C/VAT/2 (22 October 2012).

<sup>114</sup> John Paul II, *Sacramentorum sanctitatis tutela*, 30 April 2001, sent by letter of the Congregation for the Doctrine of the Faith to all Catholic bishops in the world on 18 May 2001, [http://www.vatican.va/roman\\_curia/congregations/cfaith/doc\\_dis\\_index.htm](http://www.vatican.va/roman_curia/congregations/cfaith/doc_dis_index.htm) (accessed 4 January 2016).

<sup>115</sup> 'Code of Canon Law,' supra n 113 at canons 1339, 1719; 'Guide to Understanding Basic CDF Procedures Concerning Sexual Abuse Allegations,' [http://www.vatican.va/resources/resources\\_guide-CDF-procedures\\_en.html](http://www.vatican.va/resources/resources_guide-CDF-procedures_en.html) (accessed 4 January 2016).

<sup>116</sup> Concluding Observations, supra n 14.

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church's failure to prevent child sexual abuse, there is no evidence of a systemic attempt to reform the church's canon law, governance or theology based on an assessment of the causes of child sexual abuse.

## <A>CONCLUSION

In 2013, Pope Francis established a pastoral Commission for the Protection of Minors to improve efforts for care of abuse victims around the world.<sup>117</sup> By addressing the scale and pattern of child sexual abuse as a question of transitional justice, this Commission could reflect the multijurisdictional nature of the abuse and the fundamental need for reform and response to rebuild the legitimacy of the church. Diverse national experiences and the limitations of pursuing truth, accountability and reparations affirm the need for a cross-cutting discourse to compare and examine the impact of institutional designs and practices in responding to the scale and pattern of child sexual abuse in the Catholic Church.

In particular, current church and state responses to child sexual abuse do not model a victim-centred approach to the violence, as found in transitional justice discourse and practice. The lack of meaningful consultation in the design, implementation and impact of investigations, as well as of meaningful coordination between investigations, prosecutions and compensation initiatives, risks victims/survivors feeling unheard, being treated arbitrarily or lacking their preferred form of redress. A comprehensive cross-country analysis of the causes and nature of the abuse, including levels of state knowledge and consideration of the impact of Catholic theology and doctrine, could reflect a commitment from the church to take the interests of victims/survivors seriously. The present lack of connection between these initiatives reveals a lack of transparent and public policy coherence in the treatment of perpetrators, from those investigated to those prosecuted, vetted or 'defrocked' from the church. Employing transitional justice to address this abuse offers a coherent and clarifying analytical framework to pursue these challenging and pressing goals.

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<sup>117</sup> 'Pope Francis Establishes Commission on Protection of Minors,' *News.VA*, 5 December 2013, <http://www.news.va/en/news/pope-francis-establishes-commission-on-protection>, (accessed 4 January 2016).

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