

THE HOLY SEE—INTERNATIONAL PERSON AND SOVEREIGN¹

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INTRODUCTION

The Holy See, often in international law circles erroneously referred to as the Vatican, is a unique sovereign that enjoys and exercises international personality. Within the ambit of international order, the concepts of statehood, international personality, and sovereignty are generally well understood. Each of these subjects is characterized by essential components as defined by international law. For example, the essential criterion for the constitutive elements of statehood are often considered to be: (1) a permanent population, (2) a defined territory, (3) a government, and (4) the capacity to enter into relations with other states.² However, it would seem that the critical component includes the existence of a government. The other three elements follow this element and fall into place. In addition, the matter of what constitutes a subject under international law was also examined and debated.³ Finally, the matter of sovereignty not only involves the authority of the government, but the authority of the people in the exercise of their self-determination.⁴ Despite this variety regarding particular issues, there is general agreement on the definition of a State, what constitutes international personality and the elements of sovereignty.

This article concerns the Holy See, and with this subject traditional categories of sovereignty and personality falter. When the Holy See is the subject of discussion, a variety of perspectives concerning its sovereignty and personality emerge.⁵ One common concern involves the person and status of

1. This article is a revision and update of an essay previously published under the title *The International Personality and Sovereignty of the Holy See*, 50 *Cath. U. L. Rev.* 291 (2001).

2. See Article 1, Convention on Rights and Duties of States (Inter-American), Dec. 26, 1933 [Montevideo Convention of 1933]; see also Restatement (THIRD) of the Law, Foreign Relations, § 201 (1986).

3. See discussion *infra* Part III.

4. See, e.g., ANTONIO CASSESE, *SELF-DETERMINATION OF PEOPLES: A LEGAL REAPPRAISAL* (1995).

5. See generally, JACQUES MARITAIN, *THE THINGS THAT ARE NOT CEASAR'S* (J.F. Scanlan, trans., French ed.) (1930); CARL CONRAD ECKHARDT, *THE PAPACY AND WORLD AFFAIRS* (1937); JOSEPH BERNHART, *THE VATICAN AS A WORLD POWER* (George N. Shuster, trans.) (1939); CHARLES PICHON, *THE VATICAN AND ITS ROLE IN WORLD AFFAIRS* (Jean Misrahi, trans.) (1950); ROBERT A. GRAHAM, S.J.,

the Pope. Another issue includes the position of the Vatican City State. A third issue may entail a synthesis of the two, i.e., their relationship to one another and to the Church as a whole. The Holy See, the Pope, and the Vatican City State do not conveniently fall within traditional explanations of statehood, international personality, or sovereignty. In fact, the Holy See is a unique entity, which needs further explanation.⁶

The term “Holy See” is frequently used in the worlds of international law and international relations. The word “see” derives from the Latin word *sedes*⁷ and refers to the seat or chair of Saint Peter. All subsequent Popes, who are successors of Peter, occupy this seat or chair. The Holy See also refers to the residence of the Pope along with the Roman Curia and the central administration of the Catholic Church. This term, however, is not synonymous with Rome, the Vatican, or the Vatican City State.⁸ Its import, in essence transcends the restraint of geographic location. Consequently, deciphering the nature of the Holy See’s personality and the sovereignty it

VATICAN DIPLOMACY: A STUDY OF CHURCH AND STATE ON THE INTERNATIONAL PLANE (1959); HYGINUS EUGENE CARDINALE, THE HOLY SEE AND THE INTERNATIONAL ORDER (1976); J. DEREK HOLMES, THE PAPACY IN THE MODERN WORLD (1981); ERIC O. HANSON, THE CATHOLIC CHURCH IN WORLD POLITICS (1987); *see also* CHURCH AND STATE THROUGH THE CENTURIES: A COLLECTION OF HISTORIC DOCUMENTS WITH COMMENTARIES (1954) (Sidney Z. Ehler, LL.D. & John B. Morralli, M.A., PH.D trans. & eds.) [hereinafter CHURCH AND STATE] (containing an anthology of documents and commentary on the general themes of this essay). A work not yet published in English that contains significant insight on the general topic is: RICHARD ARÈS, S.J., L’EGLISE CATHOLIQUE ET L’ORGANISATION DE LA SOCIÉTÉ INTERNATIONALE CONTEMPORAINE (1949).

6. 1917 Code c.7. states that: “[i]n the Code, by the term ‘Holy’ or ‘Apostolic See’ is meant not only the Roman Pontiff but also, unless a different meaning appears from the very nature of the matter or the context itself, the congregations, tribunals and offices which the same Roman Pontiff is accustomed to make use of in affairs concerning the Church as a whole.”

1983 Code c.361 now states:

In this Code the term “Apostolic See” or “Holy See” applies not only to the Roman Pontiff, but also to the Secretariat of State, the Council for the Public Affairs of the Church, and other institutions of the Roman Curia, unless the nature of the matter or the context of the words makes the contrary evident.

1983 Code c.361: Canon 100 of the 1917 Code refined the notion of the Holy See by distinguishing between itself and the Church—the two are distinct juridical entities with their own separate juridical personalities. Nonetheless, these two moral persons are united by the Roman Pontiff who heads each respectively. Canon 113, § 1 of the 1983 Code states that “The Catholic Church and the Apostolic See have the nature of a moral person by the divine law itself.” Both of these entities, the Catholic Church and the Apostolic (Holy) See constitute distinct *juridical* persons.

7. The original Latin term *Sancta Sedes* is therefore translated as “Holy See.” *See* CASSELL’S LATIN DICTIONARY 533, 543 (5th ed. 1968).

8. *See* C.G. Fenwick, *The New City of the Vatican*, 23 AM. J. INT’L L. 371 (1929) (distinguishing between the Holy See and the Vatican City State); *see also* Gordon Ireland, *The State of the City of the Vatican*, 27 AM. J. INT’L L. 271 (1933).

exercises illustrates that the Holy See is a unique entity in both regards. It does not, and cannot, fit comfortably within the criteria of State sovereignty and personality.

The unique nature of the Holy See often causes it to be misunderstood. In some instances, the desire to simplify the Holy See's essential characteristics shows that it is simply a religion and not an international personality able to exercise sovereignty. However, this conclusion is flawed and erroneous. This paper attempts to explain why this position inaccurately characterizes the Holy See's nature and identity. This paper also seeks to demonstrate why the Holy See is a subject of international law, which possesses a recognized personality and exercises sovereignty in the law of nations.

Part I provides a brief historical background of the evolution of the papacy's sovereignty and the Holy See's participation in international affairs and diplomatic relations. Part II examines the general principles of international law that define the concepts of international personality, sovereignty, and how the Holy See's circumstances fall within the relevant criteria. Next, Part III assesses the manner in which state practice, state custom, and treaty law regard the Holy See as a unique subject of international law. Finally, Part IV explains the status of the Holy See at the United Nations.

I. HISTORICAL BACKGROUND

The quotations cited in the beginning of this essay set the stage for the historical background needed to understand the role of the Holy See in world affairs.⁹ History plays an essential role in comprehending the participation and evolution of the Holy See in international affairs and relations. The first quotation comes from St. Matthew's Gospel, wherein Jesus commissioned his apostles—the predecessors of the college of bishops—to continue His work in the world by bringing the Good News to those they met.¹⁰ The

9. See *THE CATHOLIC CHURCH IN WORLD AFFAIRS*, (Waldemar Gurian & M.A. Fitzsimons eds.) (1954) (providing an overview of essays focusing on the Twentieth Century).

10. Francois Guizot has offered one explanation of this exhortation:

Christianity considered all men, all peoples as bound together by other bonds than force, by bonds independent of the diversity of territories and governments While working to *convert* all nations, Christianity wished also to *unite* them, and to introduce into their relations principles of justice and peace, of law and mutual duties. It was in the name of the Faith, and of the Christian law that the Law of Nations was born in Christendom.

second quotation points to St. Mark's counterpart passage found at the end of his Gospel, which emphasizes the universal mission of teaching God's commandments throughout the world.¹¹ The third quotation comes from Jesus's commission of Peter as His principal follower and successor, wherein Peter receives the keys of the Kingdom of Heaven [a symbol of the papacy], and the conferral of Peter's primacy among the college of apostles.¹²

These ancient exhortations represent the origins of the apostolic mission in the undertakings of the Holy See and the Roman Pontiff, which continue to this day. From the beginning of the Church's history, the Holy See and the Papacy actively participated in international relations.¹³ Although categories may distinguish an ongoing work that began almost two thousand years ago, these categories provide some structure in the evolution of the Holy See's work. The work may be categorized as follows: (1) the early years of persecution and the Christianization of Rome; (2) the medieval era; (3) the period of European exploration and colonization; (4) the era of the Reformation, Post-Reformation, the Enlightenment, and Revolution; (5) the Italian Unification and the loss of the Papal States; and (6) the Contemporary Era.

A. *The Early Years of Persecution and the Christianization of Rome*

In its early years, the Christian Church received little recognition from the Roman Empire or local authorities. That trend began to change, however, during the Valerian persecutions of the Christians; the Church was no longer ignored. Once the Christian community became the target of persecution, Christians, particularly the successors of Peter, found it difficult to engage in relations that would confer an international personality recognized by sovereign powers. The conversion of the Emperor Constantine caused the Church's presence in the world to change for the better.¹⁴

John K. Cartwright, *Contributions of the Papacy to International Peace*, 8 CATH. HIST. REV. 157, 159 (1928) (quoting Francois Guizot).

11. See CATECHISM OF THE CATHOLIC CHURCH, § 869 (explaining that Peter, the remaining apostles, and their successors, the Pope and bishops, have continued to preach this message).

12. See *id.* § 553 (noting that Peter's succession included the authority to govern the Church, to absolve sins, to pronounce doctrine, and to exercise discipline within the Church).

13. See generally Philip Hughes, *The International Action of the Papacy*, THE TABLET, Nov. 2, 1940 at 345-346; Nov. 9, 1940 at 365-366; Nov. 16, 1940 at 386-387; and Nov. 23, 1940 at 405-407.

14. See Francis X. Murphy, *Vatican Politics: The Metapolitique of the Papacy*, 19 CASE W. RES. J. INT'L L. 375 (1987) (reviewing the Church's history in the realm of international politics and relations); see also JOSEPH LECLER, S.J., THE TWO SOVEREIGNTIES: A STUDY OF THE RELATIONSHIP BETWEEN

The rise of the Church's role became evident through the convocation of a series of important councils that addressed issues about which the universal Church expressed concern.¹⁵ These councils were not simply concerned with spiritual and Church issues. They also considered the Church's relationship with persons and entities that exercised temporal sovereign power. In this regard, Pope Leo the Great sent emissaries to both Church councils and to the courts of temporal sovereigns.¹⁶ These early legations did not represent the purely spiritual sovereignty of the Holy See, but a temporal sovereignty whose voice would be heard throughout the world's political communities.¹⁷ As the secular authority of the Empire reinforced the Church's position, the Church, the papacy, and the Holy See began to acquire territory. Although the legend of the Donation of Constantine has proven to be false,¹⁸ it is evident that the Holy See began to acquire territory on the Italian peninsula during the reigns of Pepin and Charlemagne.¹⁹ These territories eventually enabled the Holy See to resemble other temporal powers with few interruptions from the Eighth Century until 1870.²⁰ These territories never proved to be essential in preserving the sovereignty of universal spiritual leadership. During this early period of territorial possession, one of the Holy See's major preoccupations with the temporal world comprised protecting these territories and the rest of Christendom from the invasions of non-Christian intruders from the North and East.²¹

CHURCH AND STATE (1952) (providing a more detailed, historical perspective about the transformation of the Christian church).

15. See generally THE CATHOLIC ENCYCLOPEDIA, General Councils <http://newadvent.org/cathen/04423f.htm> (last visited Mar. 30, 2000).

16. See *id.*; J.N.D. KELLY, OXFORD DICTIONARY OF POPES 44 (1986). Pope Leo the Great sent an emissary to the Council of Calcedon in 453. See *id.* He also sent Julian of Cos as his legate to the Emperor in Constantinople to serve as the Pope's representative at court.

17. See CARDINALE, *supra* note 5, at 34-35. To this day, the Holy See continues to be in, but not of, the political world. It does so principally through Papal diplomacy, serving as an arbitrator or mediator in disputes between other sovereigns; entering into treaties, concordats, or other international agreements; and, participating in International Organizations. See *id.*

18. See CHURCH AND STATE, *supra* note 5, at 15-22 (discussing the "Donation of Constantine" along with a reproduction of the text).

19. See L. DUCHESNE, THE BEGINNINGS OF THE TEMPORAL SOVEREIGNTY OF THE POPES: A.D. 754-1073 (1908).

20. See discussion *infra* Part II.E.

21. See THOMAS F. X. NOBLE, THE REPUBLIC OF ST. PETER: THE BIRTH OF THE PAPAL STATE 680-825 (1984) at 9 (noting that "[f]rom the time of Pope Gregory I [590-604] the Church had become de facto the key power in Italy"). Noble continues: "Gregory I accelerated and expanded the scope of previously secular business handled by the Church as no other pope in history. *He did this not as a grasping politician but instead as a pastor with a profound sense of his responsibilities.*" *Id.* at 10 (emphasis added).

B. *The Medieval Era*

The arrival of the Eleventh Century and the Reforms of Pope Gregory VII transformed the exercise of papal power and the authority of the Holy See.²² While the position of temporal sovereigns, including the Holy Roman Emperor, waxed and waned, the power of the Pope grew and stabilized with few exceptions.²³ At the dawn of the Second Millennium, Europe essentially functioned as a Christian realm united in faith under the Papal tiara.²⁴

The Holy See wielded considerable influence throughout this period because Western Europe remained largely a Catholic world under the spiritual and temporal authority of the popes until the end of the Fifteenth Century.²⁵ Although he would ultimately prevail over Pope Gregory, Emperor Henry IV succumbed to and dealt with papal authority for some years.²⁶ For example, in October of 1076, Henry declared his obedience to the Holy See before God, Pope, and empire.²⁷ While the temporal authorities expected him to bend to the wishes of temporal authorities, Boniface VIII advanced the formidable papal European presence and papal primacy against King Phillip the Fair of France in 1302.²⁸ A further illustration of the Holy

22. See generally CHURCH AND STATE, *supra* note 5, at 23-37; see also WALTER ULLMANN, THE GROWTH OF PAPAL GOVERNMENT IN THE MIDDLE AGES: A STUDY IN THE IDEOLOGICAL RELATION OF CLERICAL TO LAY POWER (1955); R. F. WRIGHT, MEDIEVAL INTERNATIONALISM: THE CONTRIBUTION OF THE MEDIEVAL CHURCH TO INTERNATIONAL LAW AND PEACE (1930).

23. See I. S. ROBINSON, THE PAPACY 1073-1198: CONTINUITY AND INNOVATION (1990) (providing a detailed introduction to this growth of the Papacy's influence in the western world during this era).

24. See *id.*

25. Philip Hughes, *The International Action of the Papacy—Introductory: Before the Reformation*, THE TABLET, November 2, 1940, at 346. For a useful understanding of the relationship between the exercise of Papal and temporal authority during the Medieval era, see Walter Ullmann, *The Development of the Medieval Idea of Sovereignty*, ENG. HIST. REV., 1 January 1949, no. CCL.

26. See BRIAN TIERNEY, THE CRISIS OF CHURCH AND STATE 53-73 (1980) (discussing the dispute between Gregory VII and Henry IV in which the latter prevailed).

27. As King Henry stated:

Being admonished to do so by the counsel of our faithful ones, I promise to observe in all things the obedience due to the apostolic see and to thee, Pope Gregory, and will take care devoutly to correct and render satisfaction for anything whereby a derogation to the honour of that same see, or to shine, has arisen through us.

(The Avalon Project at the Yale Law School, *Documents Relating to the War of the Investitures: Convention of Oppenheim; October 1076* <http://www.yale.edu/lawweb/avalon/medieval/inv07.htm> (last visited Oct. 16, 2000).

28. See Papal Bull *Unam Sanctam*, promulgated on Nov. 18, 1302, available at <http://www.newadvent.org/docs/bo08us.htm> (last visited Oct. 12, 2000) in which the Pope asserted papal primacy over temporal primacy in the “two swords” doctrine. Boniface stated that: “We are informed by the texts of the gospels that in this Church and in its power are two swords; namely, the spiritual and the

See's position emerges from events in 1155 when Pope Adrian IV issued a papal bull that empowered King Henry II to conquer Ireland.²⁹

The Holy See also began to demonstrate more clearly that its international mission, regardless of territorial holdings, was not a duplication of those held by temporal leaders. Rather, its mission should establish a moral voice in the realm of international relations. The Holy See began to express to a skeptical world a sense of mutually shared rights and dignities for every person regardless of race, ethnicity, or religion. For example, while anti-Semitism surfaced in Western Europe, Pope Gregory X, in 1272, exhorted the Christian world to acknowledge the rights of self-determination and existence of the Jewish people.³⁰ The Holy See made its moral voice known in an area that would later be known as international human rights by directing "faithful Christians" to protect Jews from persecution and forced conversion.³¹ The Holy See, through this declaration, began its efforts to

temporal." *Id.* "Certainly the one who denies that the temporal sword is in the power of Peter has not listened well to the word of the Lord. . . ." *Id.* The Pope continued by saying:

Both [swords], therefore, are in the power of the Church, that is to say, the spiritual and the material sword, but the former is to be administered *for* the Church but the latter *by* the Church; the former in the hands of the priest; the latter by the hands of kings and soldiers, but at the will and sufferance of the priest.

Id.; see also CHURCH AND STATE, *supra* note 5, at 3-37 (explaining the "two swords" theory in an historical context); OTTO GIERKE, POLITICAL THEORIES OF THE MIDDLE AGES (1959) (analyzing the relationship between the spiritual and temporal powers). See also Pope Leo XIII's, *Immortale Dei*, [Encyclical Letter on the Christian Constitution of States] ¶ 11-13 (1885) where the pope addresses, in a more contemporary light, the Church's powers and sovereignties.

29. See Pope Adrian IV, *The Bull of Pope Adrian IV Empowering Henry II to Conquer Ireland. A.D. 1155*, The Avalon Project, Yale Law School <http://www.yale.edu/lawweb/avalon/medieval/bullad.htm> (last visited Sept. 25, 1999).

30. Pope Gregory X, *Papal Protection of the Jews* promulgated on Oct. 7, 1272, The Jewish Student Online Resource Center, http://www.us-israel.org/jsource/anti-semitis/Papal_Protection_of_the_Jews.html (last visited Aug. 28, 2000). Not all popes shared Pope Gregory's sentiments. For example, on June 14, 1751, Pope Benedict XIV issued an encyclical *A Quo Primum* that addressed Judaism in Poland and identified potential threats that the Jewish people allegedly posed to the Christian communities. See *A Quo Primum*, <http://www.newadvent.org/docs/be14aq.htm> (last visited July 25, 2000). Throughout its history, members of the Church mistreated Jewish people. Consequently, the Church has sought atonement and forgiveness over the last several decades. For example, during the Second Vatican Council, the Church fathers issued the Declaration on the Relationship of the Church to the Non-Christian Religions [*Nostra Aetate*] on Oct. 28, 1965, which repudiated past actions and attitudes against the Jewish people. See also *We Remember: A Reflection on the Shoah*, promulgated on Mar. 16, 1998 by the Commission for Religious Relations with the Jews.

31. As this Pope exhorted:

We decree . . . that no Christian shall compel [the Jews] or any one of their group to come to baptism unwillingly. But if anyone of them shall take refuge of his own accord with Christians, because of conviction, then, after his intention will have been manifest, he shall be

protect human rights well before the enactment of the Universal Declaration of Human Rights of 1948.

The Papacy also mediated conflicts among rival temporal powers. This enterprise enabled the Holy See to prevail over potential belligerents to avoid war or at least delay it in some instances.³² On other occasions, the Holy See resolved disputes among world powers before the disputes became hostile. For example, Pope Alexander VI established the Line of Demarcation that separated the zones of colonial exploration between the then great world powers, Portugal and Spain.³³

C. *The Period of European Exploration and Colonization*

The end of the medieval period and the rise of European global exploration and colonization introduced a new role for the Holy See to play in the international world. As feudal Europe collapsed and strong nation-states emerged, the Holy See and the Roman Pontiff remained crucial members of a world that no longer considered itself a flat disk surrounded by an immense void. Exploration strengthened of national monarchs and their temporal sovereignty. National challenges arose against the Holy Roman Emperor and the Papacy. The Holy See also participated in the quest of strong monarchs for new empires by bringing the message of Christ to those who had not yet heard of Him. Some commentators believe that the Church either participated or acted as a silent bystander in the brutal exploitation of

made a Christian without any intrigue. . . . Moreover, no Christian shall presume to seize, imprison, wound, torture, mutilate, kill or inflict violence on them. . . . We decree in order to stop the wickedness and avarice of bad men, that no one shall dare to devastate or to destroy a cemetery of the Jews or to dig up human bodies for the sake of getting money. . . . Moreover, if anyone, after having known the contents of this decree—which we hope will never happen—attempt audaciously to act contrary to it, then let him suffer punishment in his rank and position, or let him be punished by the penalty of excommunication, unless he makes amends for his boldness by proper recompense. . . .

32. See John Keating Cartwright, *Contributions of the Papacy to International Peace*, 8 CATH. HIST. REV. 155, 160 (1928); F. Matthews-Giba, O.F.M., *Religious Dimensions of Mediation*, 27 FORDHAM URB. L.J. 1695 (2000).

33. See Edward G. Bourne, *The Demarcation Line of Alexander VI: An Episode of the Period of Discoveries*, 1 YALE REVIEW 35, 55 (1892). Bourne states:

Men now smile when they read or hear Alexander Sixth to divide the undiscovered world between Spain and Portugal, but what single Act of any Pope in the history of the Church has exercised directly and indirectly a more momentous influence on human affairs than this last reminder of the bygone world-sovereignty of the Holy See?

Id. at 55 (footnote omitted). The text of the Bull *Inter Caetera Divinae* promulgated on May 4, 1493, reprinted in CHURCH AND STATE, *supra* note 5, at 155-59.

native peoples. However, the voice of Francisco de Vitoria, a Spanish Dominican priest, paved the way for the Holy See to advocate the rights of native peoples.³⁴ This development set the stage for Pope Paul III of the Papal Brief's *Sublimus Dei*, which urged that native peoples be recognized by European colonialists not as objects for enslavement, but as fellow human beings.³⁵

At the end of the Sixteenth Century, permanent diplomatic representatives of the Holy See replaced the earlier temporary legations and were stationed in capitols and in the courts of Catholic temporal sovereigns.³⁶ These legations included those at Venice, Naples, Tuscany, Savoy, Spain, France, Portugal, Belgium, The Holy Roman Empire, Cologne, Switzerland [Como, Graz, and Lucerne], and Poland.³⁷ Unmistakably, this early stable diplomatic presence reflected the attitudes of temporal sovereigns toward the Holy See's personality as a participant in the world of diplomatic relations despite the dissolution of the European Catholic World.

While this voice in the international community contrasted with those of the temporal powers vying for new lands, resources, and riches, a new voice began to materialize—one that questioned papal authority. The Protestant Reformation consequently created a new role for the Holy See and altered its presence in the international world.

34. See generally JAMES BROWN SCOTT, THE SPANISH ORIGIN OF INTERNATIONAL LAW 22-59 (1928); JAMES BROWN SCOTT, THE CATHOLIC CONCEPTION OF INTERNATIONAL LAW (1934); JAMES BROWN SCOTT, THE SPANISH ORIGIN OF INTERNATIONAL LAW: FRANCISCO DE VITORIA AND HIS LAW OF NATIONS (1934).

35. Pope Paul III, *Sublimus Dei*, promulgated May 29, 1537, available at <http://www.newadvent.org/docs/pa03sd.htm> (Oct. 12, 2000). While noting that Jesus encouraged Christians to go and teach all nations, Pope Paul III stated that in any missionary activities, Christians must acknowledge that "the Indians are truly men and that they are not only capable of understanding the Catholic Faith but, according to our information, they desire exceedingly to receive it." *Id.* He added that "the Indians and all other people who may later be discovered by Christians, are by no means to be deprived of their liberty or the possession of their property . . . and that they . . . should, freely and legitimately, enjoy their liberty and the possession of their property. . . . *Id.* He concluded by saying that the Indians should not be in any way enslaved; should the contrary happen, it shall be null and have no effect." *Id.* Other Popes reiterated Paul III's concerns during their pontificates. More specifically, in 1435, Eugene IV condemned the Canary Islands' slave trade. Subsequent popes, such as Urban VIII's Bull of Apr. 22, 1639, Benedict XIV's Bull of Dec. 20, 1741, and Gregory XVI's Constitution Against the Slave Trade of Nov. 3, 1839, did the same. See John Eppstein, THE CATHOLIC TRADITION OF THE LAW OF NATIONS 418-26 (1935).

36. Joseph J. Murphy, *The Pontifical Diplomatic Service*, 41 THE ECCLESIASTICAL REV. 1 (1909).

37. See CARDINALE, *supra* note 5, at 70.

D. *The Era of the Reformation and Post-Reformation, Enlightenment, and Revolution*

The Act of Succession, enacted under the reign of King Henry VIII, asserted a new vitality in the temporal sovereigns' power against, and conflicts with, the Holy See.³⁸ The Peace of Augsburg in 1555,³⁹ the Edict of Nantes in 1598,⁴⁰ and the Peace of Westphalia in 1648,⁴¹ decreased the likelihood of papal restoration of the *Respublica Christiana*. By the early Seventeenth Century it became apparent that Europe, insofar as it was a Christian region, was no longer unified by ties to Rome and the Holy See. Neither rivalry nor competition within the Christian world eliminated the Holy See's presence and voice from the nascent world of international law. While the American and French Revolutions increased the authority of the secular and temporal ruler or government, the European powers and the Congress of Vienna in the early Nineteenth Century recognized that the Holy See was still a sovereign they were required to engage.⁴²

E. *The Italian Unification and the Loss of the Papal States*

The Nineteenth Century brought serious and material challenges to the Holy See. For example, in the early part of this century, Napoleon Bonaparte briefly incarcerated the Pope and the Papal States remained under French control from 1809 to 1814.⁴³ The movement toward Italian unification posed another critical, but ultimately successful threat to the temporal sovereignty of the Holy See based upon the existence of the Papal States. On December 8, 1849, Pope Pius IX issued the encyclical *Nostis Et Nobiscum* regarding the increasing tension regarding secularism in Italy and threats to the security of the Papal States.⁴⁴ The actual invasion of Rome by unification troops and the occupation of the Papal domain in 1870 prompted Pius IX to issue his encyclical *Rescriptes*, which registered the Holy See's protest to and condemnation of the confiscation of the Pontifical territories. The Holy See

38. See CHURCH AND STATE, *supra* note 5, at 163-64.

39. *Id.* at 166-73.

40. *Id.* at 184-88.

41. *Id.* at 190-93.

42. See discussion *infra* notes 255-57 and accompanying text.

43. See LASSA FRANCIS LAWRENCE OPPENHEIM, INTERNATIONAL LAW: A TREATISE 251 n. 1 (Lauterpacht ed., 8th ed. 1955).

44. Pope Pius IX, *Nostis Et Nobiscum* [Encyclical Letter On the Church in the Pontifical States] (1849).

did not disappear as a subject of international law nor did it lose its international personality due to the loss of Papal States in 1870.⁴⁵

Even without territorial possession, the Holy See increased the number of States with which it exchanged legations.⁴⁶ New diplomatic missions continued to arise during this era.⁴⁷ As one observer of this period noted, “Governments which had no relations have established them. Governments that had broken off relations have restored them. Governments which had second-class relations have raised them to first class.”⁴⁸ Moreover, this

45. See generally S. WILLIAM HALPERIN, *ITALY AND THE VATICAN AT WAR: A STUDY OF THEIR RELATIONS FROM THE OUTBREAK OF THE FRANCO-PRUSSIAN WAR TO THE DEATH OF PIUS IX* (1939); see also LILLIAN PARKER WALLACE, *THE PAPACY AND EUROPEAN DIPLOMACY—1869-1878* (1948).

46. See ROBERT A. GRAHAM, S.J., *THE RISE OF THE DOUBLE DIPLOMATIC CORPS IN ROME: A STUDY IN INTERNATIONAL PRACTICE (1870-1875)* 1 (1952). Father Graham illustrates that sovereign States recognized the need to have two distinct legations in Rome—one to represent itself before the new unified Italian State and one to represent the Holy See. *Id.* at 97. As Father Graham points out, this situation developed in stages. *Id.* at 97. The diplomatic exchange with the Holy See became significantly more important during this era. As the author notes:

In the following decades [after 1870] the growing European rivalries inevitably had their repercussions in the Vatican and made this diplomatic post more important than it had ever been when the Pontiff's were in peaceful possession of the Temporal Power. The outbreak of the first World War only confirmed this trend.

Id. at 101.

47. See, e.g., Josef Kunz, *The Status of the Holy See in International Law*, 46 AM. J. INT'L L. 308, 311 (1952).

[A]fter the first World War more states established diplomatic relations with the Vatican than prior to 1914. The states did so because they recognized that the Vatican is a unique diplomatic observation point. In 1930 about thirty states were diplomatically represented at the Vatican and the Vatican in about forty states.

Kunz notes that by the end of 1951, the number of states with which the Holy See had diplomatic relations totaled 43. See *id.* at 314 n.27.

See also LUKE LEE, M.A., LL.B., PH.D., *VIENNA CONVENTION ON CONSULAR RELATIONS* 176 n.18 (1966). Lee points out that:

It should be emphasized that, between 1870 and 1929, the diplomatic corps accredited at the Vatican was not only not dissolved, but also increased through the years, except for a period just before World War I. Thus, there were 18 permanent diplomatic missions at the Vatican in 1890. The number was dropped to 14 on the eve of World War I, but rose to 24 in 1921. At the time of the Lateran Treaty in 1929, there were 27 permanent diplomatic missions at the Vatican.

LEE, *supra* note 47 at 176 n.18.

48. L. J. S. Wood, *Vatican Politics and Policies*, 128 ATLANTIC MONTHLY 398, 404 (1921).

growth in diplomatic relations was “not with Catholic princes, but with ‘democratic’ states, represented by parliaments and prime ministers.”⁴⁹

Even without territorial sovereignty, other states called upon the Holy See for assistance in a variety of ways, and the Holy See maintained its involvement in international mediation and arbitration. For example, in 1885 Germany and Spain engaged in one of the better known dispute resolutions, and the parties requested that the Holy See mediate their competing claims for the Caroline Islands.⁵⁰ Other states, in Europe, Latin America or elsewhere, followed suit and requested that the Holy See arbitrate or mediate their disputes.⁵¹ Some of the requesting countries were not traditionally Catholic countries such as Great Britain, the United States, and Germany.⁵² States have also relied upon the neutrality and unique moral voice of the Holy See for an amicable resolve of their international disputes.⁵³ The United States turned to the Holy See for assistance in settling land disputes in the Philippine Islands about ecclesiastical property, which stemmed from the Spanish-American war. Governor Taft traveled to Rome during the summer of 1901 in an effort to resolve these disputes. While one commentator suggested that the Taft mission essentially constituted negotiations with a private owner of property rather than a sovereign with international personality,⁵⁴ other commentators argued the contrary.⁵⁵

49. *Id.* at 405. (Interestingly, this same commentator speculated about a rapprochement between the Holy See and Italy). *Id.* at 403-04. (This reconciliation came about eight years later with the Lateran Treaty of February 11, 1929).

50. JAMES BROWN SCOTT, *SOVEREIGN STATES AND SUITS BEFORE ARBITRAL TRIBUNALS AND COURTS OF JUSTICE* 95 (1925). Scott stated that the “case of the Carolines [between Spain and Germany] is very famous, and shows that the role of the Papacy in the settlement of disputes is not ended, if it be desired, as it was frequently and to good effect in times past.” *Id.* Scott further details that the Pope “gladly complied with their request to mediate between them, and in 1885 proposed a method of adjustment which, accepted by both and incorporated in a treaty, ended the difficulty.” *Id.* at 96.

51. *See* Eppstein, *supra* note 35, at 470-74 (cataloguing 30 instances in which the Holy See either mediated or arbitrated disputes between rival States).

52. *See* CARDINALE, *supra* note 5, at 89.

53. *See id.* at 88-89.

54. *See* Simon E. Baldwin, *The Mission of Gov. Taft to the Vatican*, 12 *YALE L.J.* 1 (1902). The author minimizes the Taft Mission by stating that Governor Taft simply acted as a messenger with no official credentials from the United States Department of State, and any negotiations must be followed by a binding act of the U.S. Congress. *See id.* at 3. Baldwin fails to mention that Article II of the U.S. Constitution requires Senate confirmation in order to approve treaties. U.S. CONST. art. II, §2, cl.2. Even when the agreement is not an Article II treaty, Congress must approve an international agreement, particularly when monies must be authorized to conclude the agreement. U.S. CONST. art.I, § 9, cl. 10. The author continues to suggest that the Cardinal Secretary of State “may be pardoned for not always noting—perhaps for not always caring to note—these subtle distinctions, belonging to the American system of constitutional government, with its formal division of sovereign powers.” BALDWIN, *supra*, at 5. It may also be said that Mr. Baldwin neglected to understand the intricacies of Papal diplomacy

In the late Nineteenth Century, Pope Leo XIII, without the benefit of a territorial sovereignty, reminded the world of the Holy See's international personality and its status as a subject of international law:

It cannot be called in question that in the making of treaties, in the transaction of business matters, in the sending and receiving ambassadors, and in the interchange of other kinds of official dealings [temporal rulers] have been wont to treat the Church as with a supreme and legitimate power. And assuredly, all ought to hold that it was not without a singular disposition of God's providence that this power of the Church was provided with a civil sovereignty as the surest safeguard of her independence.⁵⁶

This Pope, along with his successors in the Twentieth Century, understood that peace in the world must be accompanied by justice on a domestic and an international level. Leo XIII also acknowledged this principle in his encyclical *Rerum Novarum*.⁵⁷ This same pontiff also instructed that while no particular form of government is outright condemned,⁵⁸ the mutual goal of every political structure is the fostering of the common good.⁵⁹

involving the instructions needed to be sent from Rome to the Apostolic Delegate assigned to the Philippines. *See id.* at 1-2.

55. For a different perspective on the significance of the Taft Mission and the extremely delicate issue of the presence of Spanish clergy in the Philippines, see Edward F. Gross, S.J., *The Taft Commission to the Vatican, 1902*, 45 REC. AMER. CATH. HIST. SOC'Y 184 (1935); *see also* John T. Farrell, *Background of the 1902 Taft Mission to Rome*, 36 CATH. HIST. REV. 1 (1950). Chile and Argentina, in the early 1980's, made one of the most recent requests for the Holy See to resolve a boundary dispute between them. I will discuss this situation in greater detail during the discussion on treaties.

56. Pope Leo XIII, *Imortale Dei* [Encyclical Letter on the Christian Constitution of States] ¶ 12 (1885).

57. *See Rerum Novarum* [Encyclical Letter on the Condition of Workers] (1891). Succeeding popes, recalled and renewed this encyclical in Pius XI, *Quadragesimo Anno* [Encyclical Letter on Social Reconstruction] (1931); Paul VI, *Octogesima Adveniens*, [Apostolic Letter] (1971); and John Paul II, *Centesimus Annus* [Encyclical Letter] (1991). Each statement called attention to the domestic and international consequences of failing to respond to the needs of people and to advance the common good.

58. *See Immortale Dei*, *supra* note 28, at ¶ 36.

59. *See id.* at No. 18. Philip Hughes notes that Leo "understood that, to save the world, the Church must consent to remain in the world, to make all possible contacts with the world, and to explain itself to the world in the only language that the world now understood." Hughes, *The International Action of the Papacy: The New Papacy—1878-1940*, THE TABLET, November 23, 1940, at 406. The social teachings of the Church and in the pronouncements of the Holy See frequently confront the theme of common good. *See generally* Jacques Maritain, THE PERSON AND THE COMMON GOOD (1948).

F. *The Contemporary Era—The Twentieth Century and Beyond*

Lack of territory did not permanently prevent the Holy See from exercising its distinctive sovereignty as a subject of international law during the first three decades of the Twentieth Century. As one commentator suggested in 1920:

Governments are striving, each from its own centre, to control the world, and are keenly realizing how powerless they are in the confusion of things—how their writ does not run far or effectively beyond their own realm; whereas the Vatican, which has no territorial realm, which has only a centre, has its spiritual kingdom everywhere.⁶⁰

However, a need to make clear its role as a non-territorial sovereign possessing international personality still existed. While it was not concerned about purely temporal matters,⁶¹ the Holy See viewed itself as an essential component of international discussions and action taken concerning peace in the world.⁶²

60. Sisley Huddleston, *The Vatican's New Place in World Politics*, 13 CURRENT HISTORY, November 1920, at 200. Huddleston continued by saying:

It will be observed that there is, in spite of the alleged loss of temporal, or rather of territorial power, a State Department at the Vatican to which are attached Ambassadors. Now, it is precisely the number of Ambassadors or other Ministers attached to the Holy See which will serve to prove the reality of the diplomatic power of the Pope and the extent of that power.

Id. at 202; see also HUMPHREY JOHNSON, *VATICAN DIPLOMACY IN THE WORLD WAR* (1933); EMIL GUERRY, *THE POPES AND WORLD GOVERNMENT* (1964) (providing a general overview of the Holy See's rule in Twentieth Century international relations).

61. See also Robert A. Graham, S.J., *The Vatican in World Diplomacy: France, AMERICA*, November 10, 1951, at 149 (discussing the "unique blend" of the temporal sovereignty and religious and moral authority of the Holy See in the context of restoring diplomatic relations with France).

62. See, e.g., Editorial Comments, *The British Mission to the Vatican*, 9 AM. J. INTL. L. 206, 208 (1915). The author states:

In a material world we are over inclined to underestimate the force of spiritual power and of spiritual agencies [T]he spiritual power of the Pope stands out in broad relief untrammelled and unspotted by temporal connections, and there is reason to believe that the Pope as the spiritual head of the Church can exercise a greater and a more beneficent influence in the world at large in the future than in the past.

Id. at 208; see also Bishop Frederick William *The Neutrality of the Holy See*, 157 THE DUBLIN REVIEW 134, 138 (1915). Bishop Frederick William describes the Holy See's neutrality in World War I as:

is poles asunder from cold indifference or inactivity [The Pope] has spared no pains, and has shrunk from no humiliations in his persistent endeavors to arrange mutual concessions on behalf of all the victims of war without distinction Perhaps these are not very great achievements. But no other Power has achieved or even attempted anything.

Id. at 138.

William Montavon points out that:

[W]ith the new freedom which will flow from the [Lateran] Treaty and the openly accepted sovereignty of the Holy See, it requires no flight of fancy to vision in Vatican City a diplomatic corps, composed of men not immersed in the intrigues and bargaining of a materialistic world, whose activities will centre around the higher interests of the soul and be devoted to the promotion of international peace, of justice, of the well-being of man based on international cooperation and not on international rivalry.

William Montavon *The Italian-Vatican Agreement*, 30 CURRENT HISTORY 541, 544 (1929). With the ascent of fascism in Italy, Max Ascoli indicated that:

[T]he Church knows how to make good out of evil. When her territorial power was crushed, her spiritual power was immensely increased all over the world. At the present moment her loss of direct political influence in certain European countries is perhaps giving her an even greater advantage: the Church is put out of politics in the countries where politics are banished for every group but one. She can keep her hands clean from political contamination and enjoy the privilege of being the one solidly organized spiritual power that modern Caesarisms have to respect.

Max Ascoli, *The Roman Church and Political Action*, 13 FOREIGN AFF. 441, 449-50 (1935). Luigi Sturzo has pointed out, neutrality and justice can be siblings. See Luigi Sturzo, *The Vatican's Position in Europe*, 23 FOREIGN AFF. 211, 220 (1945). Sturzo notes that:

The papacy cannot blindly follow the flags of the victors, even when they are the victors in a just cause as the United Nations will be. The Pope must act as a mediator in a suffering world. This does not mean that justice be not applied to enemies and that the precautions necessary for the maintenance of peace should not be taken. But should the Allies deem Germans guilty as a people and embark upon a policy of their destruction as a people, the voice of the Pope will not fail to impress upon them the need of observance of Christian duties even in political life.

Pius XII has repeatedly pointed out the basis of a sound international order. The five points of his Christmas speech of 1939 anticipated the Atlantic Charter by almost two years and still remain the keystone of any lasting international structure.

STURZO, *supra*, at 62.

Remaining neutral while speaking about justice is not an easy task. See D. A. Binchy, *The Vatican and International Diplomacy*, 22 INT'L AFF. 47, 51 (1946). Binchy remarks that while it labors to help others avoid armed conflict:

[T]he Vatican tries to observe an attitude of strict neutrality [when war breaks out]. Indeed it adopts an attitude, not merely of neutrality, but of extreme reserve; it has to be even more careful than usual about what it says, so as to avoid giving offence to either side It is quite true, too, that papal pronouncements sometimes reflect the varying fortunes of war In 1939 the Pope spoke out strongly indeed against the attack on Poland, but after some months he was informed by the German Minister to the Vatican that if his advocacy of the rights of Poland did not cease, measures would be taken against his spiritual subjects not merely in Poland itself but also in Germany Yet, even if one makes allowance for such considerations of expediency, there are fairly clear signs of the sympathies of the Vatican in the present war.

As Francis Murphy has pointed out, "Whatever else it may stand for in the international order, Vatican diplomacy has been in favor of peace and against violence since at least the start of the modern age."

As a result of rising tensions in Europe, Pius X sent a letter concerning world peace to the Holy See's Apostolic Delegate in Washington, D.C., that the secular and the religious worlds noticed.⁶³ However, Pius X also expressed concern about global issues that did not focus on the growing tensions within Europe. Following in the footsteps of his remote predecessor, Paul III of the Sixteenth Century,⁶⁴ he issued an encyclical exhorting Latin Americans to act more justly in the social and economic spheres, especially with regard to native peoples.⁶⁵ Specifically, he spoke about the outrageous practice of trafficking women and children for pecuniary benefit.⁶⁶ He further noted that Christian charity required Catholics to "hold all men, without distinction of nation or color, as true brethren. . . . [T]his charity must be made manifest not so much by words as by deeds."⁶⁷

Benedict XV, Pius X's immediate successor, faced the events preceding, during, and following World War I. Initially, he eloquently and painstakingly attempted to counsel parties against war.⁶⁸ While his efforts to avert war proved unsuccessful, they may have delayed the commencement of hostilities. At the conclusion of the First World War, Pope Benedict advanced his views concerning international peace when he stated, "We seize this opportunity to renew for the same reasons the protests which Our Predecessors have several times made, not in the least moved thereto by human interests, but in fulfillment of the sacred duty of their charge to defend the rights and dignity of this Apostolic See."⁶⁹ The Popes of the

MURPHY, *supra* note 14, at 384.

63. See Editorial Comment, *The Pontifical Letter of June 11, 1911, on International Peace*, 5 AM. J. INT'L L. 707, 708 (1911).

64. See discussion *supra* note 35 and accompanying text.

65. See POPE PIUS X, *Lacrimabili Statu* [On the Indians of South America], promulgated on June 7, 1912.

66. See *id.* at No. 2. The Second Vatican Council reiterated this concern among many others. See VATICAN II, *Gaudium et Spes*, PASTORAL CONSTITUTION ON THE CHURCH IN THE MODERN WORLD *in*, THE DOCUMENTS OF VATICAN II, 199, 226 (1965) (stating in pertinent part, "whatever insults human dignity, such as . . . the selling of women and children"). Interestingly, many years later the drafters of the Statute for the International Criminal Court, acknowledged these concerns as crimes against humanity. See Rome Statute of the International Criminal Court, art. 7.1(c), July 1, 2002, 2187 U.N.T.S. 90 (noting that Article 7.2(c), which deals with crime against humanity specifically addresses enslavement, trafficking in persons, particularly women and children).

67. *Lacrimabili Statu*, *supra* note 65, at No. 5. *Id.* at No. 5.

68. See, e.g., Pope Benedict XV, *Ad Beatissimi Apostolorum* [Encyclical Letter on Appealing for Peace] (1914).

69. Benedict XV, *Pacem, Dei Munus Pulcherrimum* [Encyclical Letter on Peace and Christian Reconciliation], ¶16 (1920). See also Denis Gwynn, *Vatican Diplomacy and Peace*, 413 DUBLIN REV., 233 (April 1940).

Twentieth Century reiterated this sacred duty time after time. The aftermath of the war generated concern in Benedict XV, and he consequently pursued concrete measures to avoid and minimize armed conflict.

Pope Benedict also took steps to relieve the victims of the war's devastation—especially children.⁷⁰ Pope Benedict also sought permanent peace and devised measures necessary to implement this peace. As a result, he issued two encyclicals on the issues during his pontificate. The first exhorted the worldwide community to participate in an international conference that would guarantee peace.⁷¹ The second encyclical called all individuals to practice forgiveness and reconciliation.⁷² It also urged all States to put aside mutual suspicion and unite in one league or a family of peoples “calculated both to maintain their own independence and safeguard the order of human society.”⁷³ States, through the establishment of an “association of nations,” could:

Abolish or reduce the enormous burden of the military expenditure which [they] can no longer bear, in order to prevent these disastrous wars or at least to remove the danger of them as far as possible. So would each nation be assured not only of its independence but also of the integrity of its territory within its just frontiers.⁷⁴

Benedict also encouraged others to join the Holy See in providing humanitarian aid to the many innocents victimized by the war.⁷⁵ His understanding of the importance of diplomatic relations and its contribution toward world peace caused him to increase the number of diplomatic exchanges from fourteen to twenty-six during his Pontificate.⁷⁶

At the League of Nations Conference, States such as Germany wanted the Holy See to assist in resolving some of their disputes. Italy, however, objected—most likely on the grounds that papal participation would create an international status for the Holy See, which the Italian government was not yet prepared to confer.⁷⁷ However, these efforts to ignore the Holy See's

70. See, e.g., Pope Benedict XV, *Paterno Iam Diu* [Encyclical Letter on the Children of Central Europe] (1919).

71. See Pope Benedict XV, *Quod Iam Diu* [Encyclical Letter on the Future Peace Conference] (1918).

72. See Pope Benedict XV, *Dei Munus Pulcherrimum* [Encyclical Letter on the Peace, the Beautiful Gift of God] ¶¶ 8 and 14 (1920).

73. *Id.* ¶ 17.

74. *Id.*

75. See ECKHARDT, *supra* note 5, at 260-61.

76. See 2 NEW CATHOLIC ENCYCLOPEDIA 280 (1967).

77. See CARDINALE, *supra* note 5, at 88.

international personality did not interfere with its contributions to the causes of international and domestic peace and justice.

Some of the most important aspects of the Holy See's work during the Twentieth Century involved the great efforts of Pius XI and Pius XII to avoid the Second World War and the Holocaust.⁷⁸ Shortly after he was installed as Pope, Pius XI noted in his 1922 encyclical *Ubi Arcano Dei Consilio* that individuals, classes of societies, and the nations of the world had not found "true peace" since the close of World War I.⁷⁹ This encyclical elaborated on and warned about continuing tensions that endangered global and regional stability and a just peace. This exercise of sovereignty allowed Pius XI to encourage nations to avoid the type of ardent nationalism that insulates one group of people from others.⁸⁰ This encyclical catalyzed Pius XI's goals of avoiding war and maintaining peace. As time passed, Pius XI recognized that not all temporal leaders—particularly the German and Italian leaders had accepted the wisdom of his moral teaching, which contained essential elements for global justice and peace.⁸¹

Pius XI, in an extraordinary measure, addressed two subsequent encyclicals to Italy and Germany because he perceived correctly that their actions threatened peace in the world. Also, he issued these encyclicals in the language of each country, instead of the customary manner of issuing them in Latin, to avoid any mistake about his intentions. In *Non Abbiamo Bisogno*, Pius spoke out against two matters: (1) the restrictions that Fascist Italy had imposed on Italy's flourishing Christian political and social movements, and (2) the attacks on the Church, clergy, and faithful.⁸² As the Pope publicly raised his concerns, he also judiciously noted that his voice and the moral and sovereign authority for which it spoke transcend all party politics.⁸³

78. See ANTHONY RHODES, *THE VATICAN IN THE AGE OF DICTATORS: 1922-1945* (1973) (investigating how the Holy See dealt with the totalitarian States during the first half of the Twentieth Century).

79. See Pope Pius XI, *Ubi Arcano Dei Consilio* [Encyclical Letter on the Peace of Christ in the Kingdom of Christ] ¶ 7 (1922).

80. See *id.* ¶ 25.

81. See Christopher Dawson, *Religion and the Totalitarian State*, 14 *CRITERION* 1, (1934). The author concludes with the reflection: "The Church exists to be the light of the world . . . A secularist culture can only exist . . . in the dark. It is a prison in which the human spirit confines itself when it is shut out of the wider world of reality." *Id.* at 16; see also Douglas L. Reed, *The German Church Conflict*, 13 *FOREIGN AFF.* 483 (1935).

82. See Pope Pius XI, *Non Abbiamo Bisogno* [Encyclical Letter on Catholic Action in Italy] (1931). Professor Binchy offers one of the most detailed studies of the relationship between Fascism and the Holy See. See generally D. A. BINCHY, *CHURCH AND STATE IN FASCIST ITALY* (1941).

83. *Non Abbiamo Bisogno*, *supra* note 82, ¶ 22.

Several years later, the horrifying developments in Nazi Germany compelled Pius XI to promulgate his encyclical *Mit Brennender Sorge*.⁸⁴ The publication of this encyclical in Germany proved to be difficult and entailed great risk that produced devastating consequences, which the Nazis realized would adversely affect their immediate interests.⁸⁵ In the Concordat of 1933, Pius catalogued the abuses of the Third Reich,⁸⁶ the threats to religious freedom,⁸⁷ and the persecution of certain groups of people such as those belonging to the Jewish faith.⁸⁸ His simple, but unmistakable references to the Old Testament and the “so-called myth of race and blood” called attention to the plight of the Jewish people.⁸⁹

On the eve of the Second World War, Pope Pius XI died and his Secretary of State, Eugenio Cardinal Pacelli quickly succeeded him. Pius XII inherited the challenges of global and regional unrest that faced his immediate predecessor.⁹⁰ Within several months of ascending to the Throne of Peter on March 2, 1939, Pius XII, through his first encyclical letter, *Summi Pontificatus*, acknowledged the need to address the growing military tension that began to consume Europe and the rest of the world.⁹¹ The Pope considered the mounting hostilities between Germany and Poland,⁹² and noted that the underlying cause of evil in the world, and in Europe, included “the denial and rejection of a universal norm of morality as well for

84. See Pope Pius XI, *Mit Brennender Sorge* [Encyclical letter on the Church and the German Reich] (1937).

85. See CHURCH AND STATE, *supra* note 5, at 518-19.

86. *Mit Brennender Sorge*, *supra* note 84, ¶¶ 5-6.

87. See *id.*

88. See *id.* ¶¶ 8, 10, 23.

89. See *id.* ¶¶ 15-17, 23.

90. See generally Gwynn, *supra* note 69.

91. Pope Pius XII, *Summi Pontificatus* [Encyclical letter On the Unity of Human Society] (1939). A week after the Pope issued this encyclical, *The New York Times* published an article under the common banner, *Pope Condemns Dictators, Treaty Violators, Racism; Urges Restoring of Poland* on Saturday, October 28, 1939. *Pope Condemns Dictators, Treaty Violators, Racism; Urges Restoring of Poland: The International Situation*, N.Y. TIMES, Oct. 28, 1939, at 1 [hereinafter *Pope Condemns Dictators*]. The first article, entitled, *The International Situation* stated that “[i]n the first encyclical of his reign Pope Pius XII delivered a powerful attack upon totalitarianism and racism.” *Pope Condemns Dictators*, *supra* note 91, at 1. A front page article in *The New York Times* revealed the beginning of the brutal deportations in Poland in which “Jews and Poles [we]re being herded into separate ghettos, hermetically sealed and pitifully inadequate for the economic subsistence of the millions destined to live there.” *Vatican Denounces Atrocities in Poland; Germans Called Even Worse Than Russians*, N.Y. TIMES, Jan. 23, 1940, at 1, 5. *The New York Times* also announced, on March 14, 1940, that the Pope in “burning words,” spoke to the Third Reich’s Foreign Minister von Ribbentrop about religious persecution and defended the Jews in Germany and Poland. See generally, *Pope is Emphatic About Just Peace*, N.Y. TIMES, Mar. 14, 1940.

92. See *Summi Pontificatus*, *supra* note 91, ¶ 22.

individuals as for international relations.”⁹³ He pointed out two “pernicious errors” that played a part in corrupting Germany. First, “that law of human solidarity and charity which is dictated and imposed by our common origin and by the equality or rational nature in all men” had been betrayed.⁹⁴ The second error incorporated “those ideas which do not hesitate to divorce civil authority from every kind of dependence upon the Supreme Being . . . and from every restraint of a Higher Law derived from God.”⁹⁵ The Pope cautiously highlighted the grave dangers posed by national socialism which elevated the State and certain groups as “the last end of life.”⁹⁶ Pope Pius XII further noted that states must “control, aid and direct the private and individual activities of national life [so] that they converge harmoniously towards the common good.”⁹⁷ German policies that considered “the State as something ultimate to which everything else should be subordinated and directed” threatened the international prosperity of all persons, especially those in Europe.⁹⁸ If one state were to control others, corrosion of the mutual independence of all peoples who are “bound together by reciprocal ties . . . into a great commonwealth directed to the good of all nations” would result.⁹⁹

93. *Id.* at 28. The Pope spoke diplomatically when he addressed the evils of National Socialism as “signs of a corrupt and corrupting paganism.” *Id.* ¶ 30. Further, the Pope lamented over the number of people abandoning the teachings of Christ and “being led astray by a mirage of glittering phrases” who failed to foresee the consequences of “bartering the truth that sets free, for error which enslaves.” *Id.* at 31.

94. *Id.* at 35. The Pope elaborated on the meaning of our “common origin” when he quoted from St. Paul’s letter to the Colossians, which asserted that, “there is neither Gentile nor Jew, circumcision nor uncircumcision, barbarian nor Scythian, bond nor free.” *Id.* at 48; *Colossians* 3:10-11.

95. See *Summi Pontificatus*, *supra* note 91, at ¶ 52 (describing how a State may attribute to itself the power that belongs to God and how this practice grates the Christian conscience).

96. *Id.* at 53.

97. *Id.* at 59. He also suggested that the common good “can neither be defined according to arbitrary ideas nor can it accept for its standard primarily the material prosperity of society, but rather it should be defined according to the harmonious development and the natural perfection of man.” *Id.*

98. *Id.* at 60.

99. *Id.* at 72. As one trained in the law, Pope Pius XII understood the principles of international natural law as those that “regulate [peoples’] normal development and activity” and “demand respect for corresponding rights to independence, to life and to the possibility of continuous development in the paths of civilization.” *Id.* at 74. In fact, they require “fidelity to compacts agreed upon and sanctioned in conformity with the principles of the law of nations.” *Id.* at 74. Pius envisioned the Church’s role in this struggle as one that would inform consciences so:

that the truth which she preaches, the charity which she teaches and practices, will be the indispensable counselors and aids to men of good will in the reconstruction of a new world based on justice and love, when mankind, weary from its course along the way of error, has tasted the bitter fruits of hate and violence.

Id. at 108.

Pope Pius XII issued the customary Christmas messages on the state of the world and the presence or absence of the spirit of the Prince of Peace.¹⁰⁰ Pope Pius issued one of his most significant Christmas messages in 1941, in which he called attention to Europe's plight and spoke against "oppression of minorities"—a careful, but obvious reference to the Jewish people.¹⁰¹ The Western press saluted this bold initiative and Pius XII for placing "himself squarely against Hitlerism."¹⁰² In subsequent Christmas messages, Pope Pius delivered equally blunt messages about those responsible for the suffering of millions of the Second World War's innocent victims.¹⁰³ Pius XII wisely maintained neutrality once hostilities commenced, but his prudence did not signify that the Holy See would be neutral on the moral issues surrounding

100. See GUIDO GONELLA, *THE PAPACY AND WORLD PEACE: A STUDY OF THE CHRISTMAS MESSAGES OF POPE PIUS XII* (A.C.F. Beales & Andrew Beck, A.A. eds., Venerable English College trans., 1945). Guido Gonella, a former philosophy professor at the University of Rome who was removed from his post during the Fascist regime in Italy, has studied Pope Pius XII's annual Christmas messages. Professor Gonella's work made several important contributions. First, it analyzes major themes presented by the Pope during a period of great turmoil throughout the world. Second, it clarifies the contribution that Pope Pius XII has made to international order and world peace.

101. See *Pope Broadcasts Five Peace Points: Condemns Aggression, Curbs on Minorities, Total War and Persecutions*, N.Y. TIMES, Dec. 25, 1941, at 1 [hereinafter *Pope Broadcasts Five Peace Points*]. The publishers, in that same edition, stated that, "[t]he voice of Pius XII is a lonely voice in the silence and darkness enveloping Europe this Christmas." *Id.* at 24. Further, this editorial acknowledged that the Pope's words "sound[ed] strange and bold in . . . Europe . . . and we comprehend the complete submergence and enslavement of great nations, the very sources of our civilization, as we realize that *he is about the only ruler left on the Continent of Europe* who dares to raise his voice at all." *Id.* (emphasis added). Pope Pius XII also spoke about the treatment of minorities:

Within the limits of a new order founded on moral principles there is no place for open or secret oppression of the cultural and linguistic characteristics of national minorities . . . for the limitation or abolition of their natural fertility [(a reference to genocide)]. The more consciously the government of a State respects the rights of minorities, the more confidently and the more effectively can it demand from its subjects a loyal fulfillment of those obligations which are common to all citizens.

Pope Pius XII, *Christmas Message (1941)*, in *PAPAL PRONOUNCEMENTS ON THE POLITICAL ORDER* 200-01 (Francis J. Powers ed., 1952).

102. See *Pope Broadcasts Five Peace Points*, *supra* note 101, at 24. This editorial concluded by noting that the Pope "left no doubt that the Nazi aims are also irreconcilable with his own conception of a Christian peace. 'The new order which must arise out of this war,' [the Pope] asserted, 'must be based on moral principles,' and that implies only one end to the war." *Id.*

103. See, e.g., Pope Pius XII, *The Internal Order of States and People (Christmas Message 1942)*, in *PAPAL PRONOUNCEMENTS ON THE POLITICAL ORDER* 209 (Francis J. Powers, C.S.V. ed. 1952). The Pope declared that while the Church does not intend to take sides during the conflict, it "cannot renounce her right to proclaim to her sons and to the whole world the unchanging basic laws, saving them from every perversion, frustration, corruption, false interpretation and error." *Id.*

conflict.¹⁰⁴ The influential press repeatedly acknowledged the Pope's public efforts to assist the victims of the atrocities of National Socialism, including the Jewish people.¹⁰⁵ Shortly after the conclusion of hostilities, Pope Pius quickly mustered the world's attention to the plight of destitute children victimized by the war.¹⁰⁶ He reminded all people of good will that "these children will be pillars of the next generation and . . . it is essential that they grow up healthy in mind and body if we are to avoid a race infected with sickness and vice."¹⁰⁷

Pius' successor, Pope John XXIII, was no stranger to the world of international affairs since he served as a papal diplomat for many years.¹⁰⁸ Pope John XXIII dealt with the Cold War among the nuclear powers, and pleaded for peace and international security of the human family in his encyclical *Pacem in Terris*.¹⁰⁹ This important declaration, which was filled with references to the common good, drew attention to the interrelated rights and responsibilities of individuals and nations.¹¹⁰ Perhaps one of the most

104. See *Id.* On Christmas Eve 1942, the Pope declared that the Church "does not intend to take sides for any of the particular forms in which the several peoples and States strive to solve the gigantic problems of domestic order or international collaborations, as long as these forms conform to the law of God." *Id.*

105. See, e.g., *Pope Is Said to Plead for Jews Listed for Removal from France*, N.Y. TIMES, Aug. 6, 1942, at 1; *Vichy Seizes Jews*; *Pope Pius Ignored*, N.Y. TIMES, Aug. 27, 1942, at 1, 3; *Pope Said to Help In Ransoming Jews*, N.Y. TIMES, Oct. 17, 1943, at 1; *Vatican Scores Germans: Denounces Decision to Intern and Strip All Jews in Italy*, N.Y. TIMES, Dec. 5, 1943, at 3. Some 55 years later, however, *The New York Times* printed an editorial, which commented:

John Paul, however, has resisted a critical look at the Catholic response to the Holocaust and has defended the silence of Pope Pius XII during the Third Reich The document does not even mention Pope Pius's failure to speak out against Nazi atrocities

It now falls to John Paul and his successors to take the next step toward full acceptance of the Vatican's failure to stand squarely against the evil that swept across Europe.

Editorial, The Vatican's Holocaust Report, N.Y. TIMES, March 18, 1998, at A20. Perhaps those responsible for drafting this editorial lacked familiarity with the newspaper's earlier editorials, which reported Pope Pius XII neither remained silent nor failed to stand against Nazi atrocities. For detailed discussions of Pope Pius XII's role during the Holocaust, see PIERRE BLET, S.J., *PIUS XII AND THE SECOND WORLD WAR* (Lawrence J. Johnson trans., 1999); SAUL FRIEDLÄNDER, *PIUS XII AND THE THIRD REICH: A DOCUMENTATION* (Charles Fullman trans., 1966), which relies principally upon German sources of the era; PINCHAS LAPIDE, *THREE POPES AND THE JEWS* (1967); and RONALD J. RYCHLAK, *HITLER, THE WAR AND THE POPE* (2000).

106. See Pope Pius XII, *Quemadmodum* [Encyclical Letter Pleading for the Care of the World's Destitute Children] (1946).

107. *Id.* at 6.

108. See KELLY, *supra* note 16, at 320-21.

109. See Pope John XXIII, *Pacem in Terris* [Encyclical Letter on Establishing Universal Peace in Truth, Justice, Charity, and Liberty] (1920).

110. See generally Pope John XXIII, *Mater et Magistra* [Encyclical Letter on Christianity and Social Progress] (1961). In this earlier encyclical, Pope John XXIII stated:

important elements of this encyclical acknowledges the role of the United Nations in achieving the common good for all peoples.¹¹¹ The Holy See's particular role "safeguarded the principles of ethics and religion, but also . . . intervene[d] authoritatively with Her children in the temporal sphere, when there is a question of judging the application of [principles of the natural law] to concrete cases."¹¹² This declaration restrictively interpreted on Article 24 of the Lateran Treaty, which suggested that the Holy See would not involve itself in the affairs of the temporal world.¹¹³ Legal commentary, however, has noted that this had not prevented the Holy See, *sua sponte*, from speaking out on right and wrong in the realm of international affairs—especially in times of armed conflict.¹¹⁴

Pope John's immediate successor, Pope Paul VI, left the Vatican, in October 1965, to proclaim his version of this same message before the United Nations. In the first papal address made before the General Assembly, Pope Paul VI commented on his role and the presence of the Holy See in the world community:

He is your brother, and even one of the least among you, representing as you do sovereign States, for he is vested—if it please you so to think of Us—with only a mute and quasi-symbolic temporal sovereignty, only so much as is needed to leave him free to exercise his spiritual mission and to assure all those who treat with him that he is independent of every worldly sovereignty. He has no temporal power, no ambition to compete with you. In point of fact, We have nothing to ask for, no question to raise; at most a

As regards the common good of human society as a whole, the following conditions should be fulfilled: that the competitive striving of peoples to increase output be free of bad faith; that harmony in economic affairs and a friendly and beneficial cooperation be fostered; and, finally, that effective aid be given in developing the economically underdeveloped nations.

Id. at 80.

111. See *Pacem in Terris*, *supra* note 109, at 142-145.

112. *Id.* at 160. Pope John XXIII called attention to the encyclicals of his predecessors Leo XIII [*Immortale Dei*] and Pius XI [*Ubi Arcano*], which were discussed earlier. See *supra* notes 28 and 79 and accompanying text.

113. Article 24 of the Lateran Treaty states:

The Holy See in relation to the sovereignty it possesses also in the international sphere, declares that it wishes to remain and will remain extraneous to all temporal disputes between States and to international congresses held for such objects, unless the contending parties make concordant appeal to its mission of peace; at the same time reserving the right to exercise its moral and spiritual power. In consequence of this declaration, Vatican City will always and in every case be considered neutral and inviolable territory.

114. See MARJORIE M. WHITEMAN, 1 DIGEST OF INTERNATIONAL LAW 591 (1963).

wish to express and a permission to request: to serve you, within Our competence, disinterestedly, humbly and in love . . . Whatever your opinion of the Roman Pontiff, you know Our mission: We are the bearer of a message for all mankind.¹¹⁵

In essence, Pope Paul's address delivered a message of peace to the whole world, and spoke on the obvious issues as well as the subtle.¹¹⁶ His message also offered hope to a world filled with human-generated misery.¹¹⁷ Approximately four years after his UN address, Pope Paul VI specified further details about the Holy See's role in the international order when he

115. *Address of Pope Paul VI to the United Nations*, Oct. 4, 1965. The Pope continued by saying that:

We have been carrying in Our heart for nearly twenty centuries [a wish]. We have been on the way for a long time and We bear with Us a long history; here We celebrate the end of a laborious pilgrimage in search of a colloquy with the whole world, a pilgrimage which began when We were given the command: 'Go and bring the good news to all nations.' And it is you who represent all nations.

Id. Pope Paul noted that the Holy See's position as an "expert in humanity" provided the foundation for the "moral and solemn ratification" of the UN. *Id.* The Pope's UN address reflected the Pastoral Constitution on the Church in the Modern World [*Gaudium et Spes*], which was to be promulgated at the end of the Second Vatican Council on December 7, 1965. While noting that Christ did not give the Church a "proper mission in the political, economic or social order," the Pastoral Constitution also acknowledged that the Church functioned as "a light and energy which can serve to structure and consolidate the human community. As a matter of fact, when circumstances of time and place create the need, she can and indeed should initiate activities on behalf of all men." *Gaudium et Spes*, at No. 42.

116. *Id.* For example, Pope Paul eloquently pronounced the need to end armed conflict once and for all when he declared: "never again one against another, never, never again! Is it not to this end above all that the United Nations was born: against war and for peace? . . . Never again war, war never again! Peace, it is peace, which must guard the destiny of the peoples and of all mankind." *The New York Times*, in an editorial, labeled the Pope's critique of artificial birth control as irrational and "an unnecessarily narrow, old-fashioned interpretation of natural law doctrine," but nonetheless argued that the address "remains a compelling document. It happily mingles old wisdom and fresh moral urgency . . . His own speech does much to advance that universal conversation on the most imperative theme—peace." *Editorial, The Pope's Message*, N.Y. TIMES INT'L EDITION, Oct. 6, 1965, at 4. The Times [London], in another editorial, remarked that the Pope's "noble address . . . has brought the United Nations face to face with its charter, and so, collectively and individually, with its conscience." *See Generally, Editorial, To the World*, THE TIMES, Oct. 5, 1965.

117. About a year and a half after his UN address, Pope Paul VI issued his encyclical *Populorum Progressio* [On the Development of Peoples], promulgated on March 26, 1967. Pope Paul VI described society as ill, and attributed that illness to the "lack of brotherhood among individuals." *Id.* at No. 66. The Pope relied on the work of John XXIII in *Pacem in Terris* and further defined peace as not the absence of war, but as "something that is built up day after day, in the pursuit of an order intended by God, which implies a more perfect form of justice among men." *Id.* His conclusion addressed Catholics, Christians, and all men of good will and exhorted them to define the respective and complementary roles of the laity whose "own proper task [is] the renewal of the temporal order" and the Church's role as teacher who interprets authentically "the norms of morality to be followed" in the temporal world. *Populorum Progressio*, at Nos. 81-84.

promulgated his apostolic letter on the duties of papal representatives sent into the world of diplomacy.¹¹⁸ The major purpose for continuing the practice of active and passive diplomatic exchange embraced an open dialogue on the “good of the individual and of the community of peoples.”¹¹⁹ Accordingly, in 1964, Pope Paul took the initiative to send an Observer of the Holy See to the United Nations. The Holy See’s “supra-national” voice would become a part of the global dialogue in the UN deliberations affecting peace and the common good.¹²⁰

Pope John Paul I’s month-long papacy failed to give Paul VI’s immediate successor much time to define or to implement the Holy See’s sovereignty or to exercise its international personality. In an address to the diplomatic corps accredited to the Holy See, John Paul I provided some insight on the Holy See’s role in world affairs. The Pope commented on the uniqueness of the Holy See’s mission and its competence as an international person.¹²¹ He also identified two services that the exchange of legations

118. See Pope Paul VI, *Sollicitudo Omnium Ecclesiarum* [Apostolic Letter on The Care of all the Churches] (1969), reprinted in CARDINALE, *supra* note 5, at 309-18.

119. *Id.* at 312. Pope Paul also observed that:

[W]hile this dialogue aims at guaranteeing for the Church free exercise of its activity so that it may be able to fulfill the mission entrusted to it by God, it ensures the civil authority of the always peaceful and beneficial aims pursued by the Church, and offers the precious aid of its spiritual energies and of its organisation [sic] for the achievement of the common good of society. *The trusting colloquy which thus begins when there exists between the two societies and official relationship sanctioned by the body of habits and customs collected and codified in international law makes it possible to establish a fruitful understanding and to organize [sic] an activity truly salutary for all.*

Id. (emphasis added).

120. See CARDINALE, *supra* note 5, at 93-94. Archbishop Cardinale explains an important point:

In recent years one finds the term supra-national often used as an attribute of the Church and the Holy See. This is to be understood in an entirely different sense from the meaning of the word used in a political context, where it is perfectly homogeneous. For this reason such an attribute should be applied sparingly and cautiously to religious bodies [They] are often referred to as supra-national rather than international entities in the sense that by their very nature they are not tied to any particular people, nation or form of political government but carry out a spiritual mission that is universal, i.e. directed to all mankind without distinction.

Id.

121. See *Pope John Paul: Purposes of Vatican Diplomacy*, ORIGINS, Sept. 14, 1978, at 198. The Holy Father elaborated:

Obviously we have no temporal goods to exchange, no economic interests to discuss, such as your States have. Our possibilities for diplomatic interventions are limited and of a special character. They do not interfere with purely temporal, technical and political affairs, which are matters for your governments. In this way, our diplomatic missions to your highest civil authorities, far from being a survival from the past, are a witness to our deep-seated respect for

could accomplish. First, the exchange could search for better solutions to contemporary world issues including détente, disarmament, peace, justice, humanitarian measures and aid, and development.¹²² Second, John Paul I suggested developing the consciences of people “regarding the fundamental principles that guarantee authentic civilization and real brotherhood between peoples. These principles . . . help peoples and the international community to ensure more effectively the conditions for the common good.”¹²³

The present pontiff, John Paul II, is no stranger to the exercise of sovereignty and projecting the Holy See’s presence in the world. He first visited the United Nations on October 2, 1979, when he addressed the General Assembly as his predecessor, Paul VI, had done fourteen years earlier. A few years later, on June 7, 1982 he sent a message to the General Assembly stressing the immediate need to concentrate on the interrelation of peace and disarmament.¹²⁴ His second appearance before the General Assembly occurred on the thirtieth anniversary of Paul VI’s October 4, 1965 appearance and speech at the UN.¹²⁵ His 1995 address focused on universal human rights, the rights of nations, and the search for freedom and moral truth.¹²⁶ John Paul II followed his predecessors lead when he noted that he spoke “not as one who exercises temporal power . . . nor as a religious leader seeking special privileges . . . [but] as a witness . . . to human dignity, a witness to hope, a witness to the conviction that the destiny of all nations lies in the hands of a merciful Providence.”¹²⁷

Some may describe John Paul as a frequent pastoral visitor throughout the world, and he regularly participates in international dialogue and diplomatic conversation. Throughout his pontificate, he followed the

lawful temporal power, and to our lively interest in the humane causes that the temporal power is intended to advance On both sides there is presence, respect, exchange and collaboration, without confusing competences.

Id.

122. *See id.* at 198.

123. *See id.* at 199.

124. *See* John Paul II, *Message to the General Assembly of the United Nations* (June 7, 1982), reprinted in ORIGINS, June 24, 1982, at 81. The Pope used moral arguments when he noted that the production and possession of both nuclear and conventional arms reflected “an ethical crisis gnawing into society in all directions, political, social and economic. Peace . . . is the result of respect for ethical principles.” *Id.* at 86.

125. *See* discussion *supra* note 115 and accompanying text.

126. *See* John Paul II, Address of His Holiness Pope John Paul II to the Fiftieth General Assembly of the United Nations Organization, (Oct. 5, 1995), reprinted in ORIGINS, Oct. 19, 1995, at 293.

127. *See The Fabric of Relations Among Peoples*, reprinted in 25 ORIGINS, Oct. 19, 1995, 1, 299; *see also* Lateran Treaty, *supra* note 113, art. 24 (demonstrating that Popes did not consider themselves prohibited from participating in discussions regarding important international issues).

practice initiated by Pope Paul VI and has issued a World Day of Peace Message on the first of the New Year. Shortly after New Year's Day, he convenes the Diplomatic Corps accredited to the Holy See for discussions on contemporary issues of international concern. In May 2000, he observed several important things about the nature of the Holy See in addresses to new ambassadors who were presenting their credentials. The Pope reiterated the unique status of the Holy See in international affairs in his address to the new Ambassador from the Republic of Ghana. He also pointed out that the Holy See engages the political community to foster solidarity, humanitarian missions, and many forms of cooperation and mutual support.¹²⁸ In his May, 2000 address to the ambassador from New Zealand, the Pope commented that the Holy See's position enables it to share with other sovereigns its unique perspective on international issues such as the dignity of the human person, the notion of a freedom that is linked to truth, and the pursuit of the common good.¹²⁹ The Pope greeted the new ambassador from Kuwait by expressing his hope for peace in the Middle East and stressing the need for dialogue between Muslims and Christians to encourage harmony and a lasting peace.¹³⁰ John Paul commented to the new ambassador from Greece that the supra-national interests of the Holy See enable it to focus on the "loving concern for the common good of all peoples and nations." The Holy See's diplomatic efforts seek to help others embrace the dignity and inalienable rights of every individual, "especially the weakest and most vulnerable."¹³¹ During the reign of this pontiff, the number of the Holy See's diplomatic exchanges had grown from 86 in 1979 (the first full year of his pontificate) to 178 in 2011.¹³² Many of the more recent

128. See Pope John Paul II, Address of the Holy Father to the New Ambassador of the Republic of Ghana to the Holy See (May 25, 2000), reprinted in *L'Osservatore Romano*, May 31, 2000, at 4, 5.

129. See Pope John Paul II, Address of the Holy Father to the New Ambassador of New Zealand to the Holy See, (May 25, 2000), reprinted in *L'Osservatore Romano*, May 31, 2000, at 5.

130. See Pope John Paul II, Address of the Holy Father to the New Ambassador of Kuwait to the Holy See (May 25, 2000); see also Alessandra Stanley, *Pope Arrives in Israel and Gets Taste of Mideast*, N.Y. TIMES, March 22, 2000, at A8 (detailing the Pope's trip to the Middle East, which focused on reconciling Israel-Palestinian relations).

131. Pope John Paul II, Address of the Holy Father to the New Ambassador of the Hellenic Republic to the Holy See, (May 6, 2000), reprinted in *L'Osservatore Romano*, May 31, 2000, at 6.

132. See ANNUARIO PONTIFICIO 1110-1150 (1979); *Bilateral and Multilateral Relations of the Holy See*, http://www.vatican.va/roman_curia/...0010123_holy-see-relations_en.html. The Holy See has diplomatic relations with the European Union and the Sovereign Order of Malta; it also has relations of a special nature with the Russian Federation and with the Palestine Liberation Organization. *Id.*

diplomatic exchanges involved States that are neither traditionally Catholic nor Christian.¹³³

As this discussion comes to a close, it should be apparent that the Holy See's traditional exercise of sovereignty, while diversified, frequently emphasizes peace, human dignity, human rights, and the common good. The Holy See also actively participates with other sovereigns in negotiating and formulating international legal instruments that are the principal means for achieving specific goals relating to global affairs. Part IV will examine in greater detail the Holy See's participation in the formation of bilateral and multilateral treaties and concordats, which provide additional evidence of its attempt to incorporate involvement in peace, human dignity, and the common good into international affairs. Prior to this examination, it would be beneficial to obtain an understanding of the international personality and sovereignty as these concepts are generally understood in international law, and how the Holy See relates to them.

II. INTERNATIONAL PERSONALITY AND SOVEREIGNTY AND THE HOLY SEE

A. *The Traditional Understanding of Personality*

Traditionally, States were viewed as the only subjects of international law.¹³⁴ This perspective continues, in part, because only States can bring cases before the International Court of Justice.¹³⁵ The conventional understanding of statehood in international law¹³⁶ requires four elements: (1)

133. ANNUARIO PONTIFICIO 1398-1457 (2000). These States include most of the traditionally non-Catholic and non-Christian States of the world. In addition, States with traditional ties to Islam or connections with various types of Eastern religions also participated in these diplomatic exchanges. See generally George Huntston Williams, *John Paul II's Relations with Non-Catholic States and Current Political Movements*, 25 J. CHURCH & STATE 13 (1983).

134. See L. OPPENHEIM, INTERNATIONAL LAW (2d ed. 1912), reprinted in REBECCA WALLACE, INTERNATIONAL LAW 59 (2d ed. 1992).

135. See Statute of the International Court of Justice, art. 34.1, June 26, 1945, (1945). (indicating that only States may be parties in cases before the Court). The Statute of the Permanent Court of International Justice contained a similar provision: "[o]nly States may be parties in cases before the Court." Statute of the Permanent Court of International Justice, art. 34 (1946).

136. See WILLIAM BISHOP, JR., INTERNATIONAL LAW 209 (2d ed. 1962). Professor Bishop recognized that "[u]nder the generally recognized theories of international law, this system of law applies only to states, and more recently to international organizations, as the 'persons' who have rights and duties under international law." *Id.*

a permanent population; (2) a defined territory; (3) a government; and (4) the capacity to enter into relations with other states.¹³⁷

The number of persons in the population and the size of the defined territory, however, does not exclude those entities with small populations or small territories.¹³⁸ The capacity to enter into relations with other States would not be limited to the exchange of diplomatic missions, but may include recognition of the State's "equality, dignity, independence, [and] territorial and personal supremacy"¹³⁹ The ability to enter into treaties or other agreements with other states is an integral component of international relations.¹⁴⁰ This concept suggests something about the sovereignty of the state as a self-governing entity—the third traditional criterion of a State.

Sovereignty, or the capability to govern, includes two dimensions. The first is "negative" in the sense that the State must be independent of all others. The second is "positive" in that the State executes ministerial functions through its officials as it deems proper.

137. See Pan American Convention on the Rights and Duties of States of 1933, Dec. 26, 1933, art. I, reprinted in 49 Stat. 3097, 3100; see also RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 201 (1987).

138. See L. OPPENHEIM, INTERNATIONAL LAW § 169 (8th ed. 1955). The author noted that "[a] State without a territory is not possible, although the necessary territory may be very small, as in the case of the Vatican City, the Principality of Monaco, the Republic of San Marino, or the Principality of Liechtenstein." *Id.* § 108.

139. See *id.* § 113. Ian Brownlie has suggested that the key formal contexts surrounding the issue of international personality are: "capacity to make claims in respect of breaches of international law, capacity to make treaties and agreements valid on the international plane, and the enjoyment of privileges and immunities from national jurisdictions." IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 57 (5th ed. 1998) [hereinafter BROWNLIE, PRINCIPLES]. Professor Rebecca Wallace has remarked that:

An entity which possesses the ability to conduct foreign relations does not terminate its statehood if it voluntarily hands over all or part of the conduct of its foreign relations to another state, for example San Marino (Italy), Monaco (France). Another "mini" European state is Liechtenstein, which operates within the Swiss economic system and has delegated a number of sovereign powers to Switzerland, but nevertheless is still recognised [sic] as a sovereign state.

REBECCA WALLACE, M.A., LL.B., PH.D., INTERNATIONAL LAW 64 (3d ed. 1997).

140. See *id.* at 71. Professor Wallace notes that:

While treaty-making power is evidence of international personality, a general treaty-making power should not be deduced from the possession of some degree of personality. In other words, entities having a treaty-making capacity possess some international personality, but not all international entities necessarily possess a general treaty-making capacity.

Id. at 71.

In the context of formal, juridical structures, it is noted that a State has the capacity to bring a claim against another State.¹⁴¹ This suggests that States as international persons or subjects have rights to bring claims against other States and duties or responsibilities to refrain from those actions or failures to act against which another State may seek legal redress.¹⁴² Although the traditional understanding of personality may be attractive to some, it is clear that the meaning of “international personality” has changed. States are no longer the only entities recognized with international personality or regarded as subjects of the law.

B. *A Contemporary Understanding of Personality*

During the last several decades, developments beyond the traditional understanding of international personality and subjects of international law emerged. As Prof. Rebecca Wallace suggests, “The concept of international personality is neither static nor uniform”¹⁴³ For example, governments-in-exile, regional conferences of States such as the European Union, national liberation movements, and even organizations such as the United Nations enjoy non-State international personality.¹⁴⁴ Hugo Hahn analyzed the European Atomic Energy Community (Euratom) and concluded that such an entity must be included amongst those having some type of international personality.¹⁴⁵ Hahn made the important point that it is in the exercise of their sovereignty that States can, through their recognition, confer a type of international personality on non-State entities.¹⁴⁶

Arguably, with the signing of the Lateran Treaty between Italy and the Holy See in 1929, Italy conferred upon the Holy See its international personality.¹⁴⁷ However, is this truly the case? Regardless of Italy’s actions in 1929, the Holy See enjoyed status as a subject of international law since

141. See *Reparation for Injuries Suffered in the Service of the United Nations*, 1949 I.C.J. 174, 177.

142. See BROWNLIE, *supra* note 139, at 57. Professor Ian Brownlie argues that the contention that a subject of international law is any entity which has international rights and duties and has the ability to protect its rights by pursuing international claims, while “conventional” is “circular.” See *id.*

143. See WALLACE, *supra* note 139, at 59.

144. See, e.g., BROWNLIE, *PRINCIPLES*, *supra* note 139, at 61-62.

145. See generally Hugo J. Hahn, *Euratom: The Conception of an International Personality*, 71 HARV. L. REV. 1001 (1958).

146. See *id.* at 1050. As Hahn argued, “International organizations, then, are derivative, not original, members of the international community. They derive their international personality from the assent of the original subjects of international law as the need or the inclination of the latter may be” *Id.*

147. See Lateran Treaty, It.-Holy See, art. 2, June 7, 1929 reprinted in THOMAS EWING MOORE, *PETER’S CITY: AN ACCOUNT OF THE ORIGIN, DEVELOPMENT AND SOLUTION OF THE ROMAN QUESTION* 209, 210 (1930).

the Fifth Century. As a consequence, the Holy See already enjoyed uninterrupted personality under the law of nations. Advocates of this position point to Article II of the Lateran Treaty of 1929 which states, "Italy recognizes the sovereignty of the Holy See in the international field as an inherent attribute of its nature, in conformity with its tradition and the exigencies of its mission in the world."

Under international law, however, no State can confer sovereignty on another entity that is binding on other States. The relevant point is that these other States must themselves accept the sovereignty of the entity in question.¹⁴⁸ Often the best evidence of such acceptance is the establishment of diplomatic relations. Another important indicator is the invitation of the entity to diplomatic conferences and treaty negotiations as an equal. The sovereignty and personality of the Holy See "[are] not created by the states through their recognition of it, but exists independently from the recognition of the states."¹⁴⁹ This is manifest by the continued exercise by the Holy See of its sovereign authority without a territory, service as an international mediator, and the increased number of diplomatic exchanges in the period from 1870 to 1929.

These points raise several questions about the status of the Holy See. Is it a State? Is it a lesser entity which may still enjoy international personality of the sort that can be conferred by one or several States? Or, is it a unique entity that escapes characterization under conventional norms used to determine if the entity is a subject of international law, but that nonetheless has the corresponding personality acknowledged under this law?

The answers to these questions inhabit the reality of international affairs as practiced by sovereign States throughout the world. Inevitably, one reaches the inescapable conclusion that the Holy See has international personality and is a subject of international law. This also demonstrates that the Holy See has a sovereignty that can be and is recognized under international law. However, its personality as a subject of international law

148. See CHRIS N. OKEKE, *CONTROVERSIAL SUBJECTS OF CONTEMPORARY INTERNATIONAL LAW: AN EXAMINATION OF THE NEW ENTITIES OF INTERNATIONAL LAW AND THEIR TREATY-MAKING CAPACITY* (1974). In the early 1970's, Dr. Chris Okeke engaged in the fascinating and timely study of evolving and contentious subjects of international law. See *id.* Dr. Ekeke argued that the power to enter international agreements is "one of the most effective and important evidences of personality in international law." *Id.* at 65. However, he also posited that during the period from 1870 to 1929 the Holy See "possessed a doubtful legal personality and sovereignty in the international sphere." The Lateran Treaty of 1929, however, granted the Holy See personality under international law. *Id.* at 68-69.

149. See G. LaPiana, 25 AM. J. INT'L. L. 405, 406 (1931) (reviewing LOUIS LEFOR, *LESAINT-SIEGE ET LE DROIT DES GENS* (1929)).

and the sovereignty it exercises are not precisely those of other subjects of the law of nations.

C. *The Unique Legal Status of the Holy See Under International Law*

It is generally understood that the Holy See's international personality materializes from its religious and spiritual authority and mission in the world as opposed to a claim over purely temporal matters.¹⁵⁰ This is an incomplete understanding, however, of the grounds on which its claim as a subject of international law can be justified. In partial explanation of its status as a subject of the law of nations enjoying international personality, it is said that the Holy See is an "anomaly,"¹⁵¹ an "atypical organism,"¹⁵² or is an entity *sui generis*.¹⁵³ Some commentators questioned the status and international personality of the Holy See during the period from 1870 to 1929 when it held no territorial sovereignty.¹⁵⁴ Such critics concede that:

[its] international personality is here recognised [sic] to be vested in an entity pursuing objects essentially different from those inherent in national States A way is thus opened for direct representation in the sphere of International Law of spiritual, economic, and other interests lying on a plane different from the political interests of States.¹⁵⁵

While the Holy See's status may be an anomaly or unique, the statehood-like status of the Holy See cannot be denied.¹⁵⁶ As Prof. Crawford has affirmed, "recognition by other States is of considerable importance

150. See discussion *supra* notes 115, 116, & 124, and accompanying texts.

151. WALLACE, *supra* note 139, at 76.

152. See CARDINALE, *supra* note 5, at 80-81. Archbishop Cardinale suggests that,

[a]s a subject of international law, the Catholic Church is an atypical organism. That is to say, considering her particular purpose, the social means she employs to further this purpose and her peculiar nature and social structure, the Church cannot be put on exactly the same level as a State, or any other subject of international law. Hence her position is analogous to, but not identical with, that of a national State.

Id.

153. See BROWNLIE, *supra* note 139, at 64; accord MALCOLM SHAW, INTERNATIONAL LAW 172 (Cambridge, 4th ed. 1997); Finn Seyersted, *International Personality of Intergovernmental Organizations: Do Their Capacities Really Depend Upon Their Constitutions*, 4 INDIAN J. INT'L L. 1, 42, 61 (1964).

154. See OPPENHEIM, 1 INTERNATIONAL LAW §§ 106, 107 (Lauterpacht ed., 8th ed. 1955).

155. *Id.* at § 107.

156. See JAMES CRAWFORD, THE CREATION OF STATES IN INTERNATIONAL LAW 154 (1979).

especially in marginal or borderline cases.”¹⁵⁷ Currently the Holy See is recognized through the diplomatic exchange by one hundred and seventy-six States, which makes the point clearly.¹⁵⁸

It has been amply demonstrated that the Holy See’s sovereignty was not adversely affected by the loss of temporal power when the Papal States were confiscated by and absorbed into the Italian unification of 1870.¹⁵⁹ Just prior to the confiscation of the Papal States, the Italian sovereign acknowledged the independence of the Holy see as “outside the imperium of ‘any human power.’”¹⁶⁰ A significant number of states maintained diplomatic relations with the Holy See, which was “for various purposes treated as an international person.”¹⁶¹ Notwithstanding the Lateran Treaty’s recognition of the Vatican City State,¹⁶² some authorities contend that the States¹⁶³ were increasingly recognizing the non-territorial sovereignty of the Papacy.¹⁶⁴ For example, the Czar of Russia asked for Papal support and involvement in the 1898 Hague peace initiative.¹⁶⁵ After the First World War, Germany asked

157. *Id.* In the context of the Holy See, Crawford explains that, “[t]he chief peculiarity of the international status of the Vatican City is not size or population — or lack of them—but the unique and complex relation between the City itself and its government, the Holy See.” *Id.*

158. See *Bilateral and Multilateral Relations of the Holy See*, http://www.vatican.va/roman_curia/...0010123_holy-see-relations_en.html. See, John Paul II *supra*, note 131 concerning the relations with European Union, the Sovereign Order of Malta, the Russian Federation, and the Palestine Liberation Organization.

159. See LaPiana, *supra* note 149, at 406. As this author argued, “The only usefulness of the creation of an independent Vatican City is in meeting the objection of those who deny the possibility of a sovereignty existing without a territory” *Supra*. See also Crawford, *supra* note 156, at 157. Crawford argues:

[T]hough some writers denied that the Holy See had any international standing at all after 1870, the true position is that it retained after the annexation of the Papal States what it had always had, a degree of international personality, measured by the extent of its existing legal rights and duties, together with its capacity to conclude treaties and to receive and accredit envoys.

Id.

160. Horace F. Cumbo, *The Holy See and International Law*, 2 INT’L L. Q. 603, 607 (1948-1949).

161. BISHOP, *supra* note 136, at 218; accord BROWNLIE, *supra* note 139, at 64.

162. See Lateran Treaty of 1929, art. 3 and 4.

163. For example, in a 1935 decision of the Italian Court of Cassation (*Nanni and Others v. Pace and the Sovereign Order of Malta*) noted that independence and sovereignty were never denied to the Holy See even prior to the existence of the Lateran Treaty of 1929. See 1 DIGEST OF INTERNATIONAL LAW 42 Whiteman, ed., (U.S. Dept. of State, 1963).

164. See ROBERT GRAHAM, S.J., VATICAN DIPLOMACY: A STUDY OF CHURCH AND STATE ON THE INTERNATIONAL PLANE 201-02 (1959).

165. See CARDINALE, *supra* note 5, at 88.

the Holy See to participate in and become a member of the League of Nations. Italian opposition, however, may have prevented this participation.¹⁶⁶

Though the United States allowed diplomatic relations with the Holy See to expire in the 1870s, some of its government organs still recognized the Holy See as an international personality of note. In 1908, the United States Supreme Court, observing that the U.S. and the Holy See maintained diplomatic relations until 1870, acknowledged that the Holy See “still occupies a recognized position in international law, of which the courts must take judicial notice.”¹⁶⁷ Full diplomatic relations between the Holy See and the United States were not restored until 1984, yet the U.S. Secretary of State observed in an 1887 dispatch that, “[w]hile the probabilities seem to be almost entirely against the possibility of the restoration of any temporal power to the Pope, he is still recognized as a sovereign by many powers of the world With all such arrangements this Government abstains from interference or criticism.”¹⁶⁸ The Philippines Supreme Court, in a 1994

166. *See id.*

167. *Municipality of Ponce v. Roman Catholic Church*, 210 U.S. 296, 318 (1908). The Court then stated:

The Pope, though deprived of the territorial dominion which he formerly enjoyed, holds, as sovereign pontiff and head of the Roman Catholic Church, an exceptional position. Though, in default of territory, he is not a temporal sovereign, he is in many respects treated as such. He has the right of active and passive legation, and his envoys of the first class, his apostolic nuncios, are specially privileged His relations with the Kingdom of Italy are governed, unilaterally, by the Italian law of May 13, 1871, called ‘the law of guarantees,’ against which Pius IX and Leo XIII have not ceased to protest.

Id. at 318-19.

168. I JOHN BASSETT MOORE, A DIGEST OF INTERNATIONAL LAW 39 (1906) (quoting Dispatch of Mr. Bayard, Secretary of State to Mr. Dwyer (November 7, 1887)). The dispatch continued with instruction that should a diplomat of the United States be at a court in which the Holy See is also represented, it is the “duty” of the American diplomat to observe those conventions extended to the Papal representative due to the 1815 agreements emerging from the Congress of Vienna. *See id.* *See* discussion *infra* Part IV.A.3 (discussing the history of past and present relations between the Holy See and the United States). In 1984, the Holy See and the United States re-established full diplomatic relations. Court challenges based on the First Amendment of the U.S. Constitution to the re-establishment of diplomatic relations were dismissed. *See* discussion *infra* notes 216-220 and accompanying text. During World War II, Presidents Roosevelt and Truman sent Mr. Myron Taylor as a “personal representative” of the President of the United States to the Holy See from 1939-1949. Mr. Taylor held the title of “Ambassador.” *See generally* WARTIME CORRESPONDENCE BETWEEN PRESIDENT ROOSEVELT AND POPE PIUS XII (1947); CORRESPONDENCE BETWEEN PRESIDENT TRUMAN AND POPE PIUS XII. The first collection contains twenty-seven letters exchanged between President Roosevelt and Pope Pius XII from December of 1939 to November of 1944. The neutrality of the Holy See during the War did not preclude this warm exchange between two world leaders who were both in search of peace in the world. *See also* Marian Nash Leich, *International Status of States—The Vatican (Holy See)*, 78 AM. J. INT’L L. 427 (1984). In a widely cited article appearing in 1952 in THE AMERICAN JOURNAL OF INTERNATIONAL LAW, Josef Kunz commented that, “[t]he protests in the United States against the nomination by the President of

decision, similarly acknowledged the international personality of the Holy See and its status as a foreign sovereign.¹⁶⁹

A commonly held view is that the Holy See, without interruption, has been a subject of international law and has lawfully exercised the attendant rights and duties of an international personality. The contention that the Holy See had no international personality from 1870 to 1929 is “wholly untenable in the light of the practice of states.”¹⁷⁰

In his 1934 lectures at Oxford University, Prof. Mario Falco reached similar conclusions.¹⁷¹ The crux of his argument concentrated on the relation between the rights of an entity and its status of international personality. He argued:

[W]herever there are rights there is a person or subject of rights; hence it follows that, if positive international law recognizes in the Holy See one or more international rights, then the Holy See is a legal person in international law. The existence of some such right . . . is necessary, but it is also sufficient; it is sufficient because the holder’s status as a subject of rights is not enhanced or diminished according to the quantity of rights held, and so the fact that the Holy See happens to enjoy a lesser quantity of international rights than is enjoyed by states has no importance. Now the international rights which the predominant doctrine recognizes in the Holy See are the active and passive right of legation and the right of concluding concordats.¹⁷²

an American Ambassador to the Vatican reveal an astonishing lack of knowledge and understanding of the legal problem of the status of the Holy See in international law.” Kunz, *supra* note 47, at 308.

169. See *The Holy See v. Starbright Sales Enter. Inc.*, 102 I.L.R. 163 (1994). The Court in an opinion by Quason, J., stated:

Inasmuch as the Pope prefers to conduct foreign relations and enter into transactions as The Holy See and not in the name of the Vatican City, one can conclude that the Pope’s own view, it is The Holy See that is the international person. The Republic of the Philippines has accorded The Holy See the status of a foreign sovereign. The Holy See, through its Ambassador, the Papal Nuncio, has had diplomatic representations with the Philippine Government since 1957. This appears to be the universal practice in international relations.

Id. at 169-70 (citation omitted).

170. Kunz, *supra* note 47, at 309.

171. See generally, MARIO FALCO, THE LEGAL POSITION OF THE HOLY SEE BEFORE AND AFTER THE LATERAN AGREEMENTS: TWO LECTURES DELIVERED AT THE UNIVERSITY OF OXFORD (1935).

172. *Id.* at 15. Falco continues:

In reality the attitude of states in general towards the Holy See proves that they have recognized in the person of the Pope the supreme head of the Catholic religion, who as such possesses not only the highest moral authority but also exceedingly great political influence;

Another and more recent investigation of the legal status of the Holy See was pursued by Prof. Tiyanjana Maluwa.¹⁷³ Like Prof. Falco's work of fifty years earlier, Prof. Maluwa's work is careful and exacting. It is familiar with the long history of the Papacy and its diplomatic exchanges. Like others,¹⁷⁴ Prof. Maluwa acknowledged the general legal principle that personhood or personality is defined in terms of capacity to have rights and shoulder duties.¹⁷⁵ While also recognizing the circular danger that imperils some conventional analyses of the Holy See's legal status, Maluwa pushed the investigation further and ultimately reached a novel conclusion: the Holy See's international personality, while it may be *sui generis*, is based on social need—that is, the needs of the community—rather than a conventional application of personality accorded to states.¹⁷⁶

Maluwa suggested that an entity such as the Holy See, which is neither strictly a state nor an international organization, derives its international personality by executing functions “recognized as significant for the international community.”¹⁷⁷ The definition of international personality depends on the answer to this important question: does such an entity as the Holy See engage in functions or activities that are useful in serving the interests of the international community? Maluwa's answer was in the affirmative and relied on the evidence of the utility of the Holy See's participation in the creation of international agreements and other legal instruments, its exchange in diplomatic relations, and its involvement in and contribution to various international organizations.¹⁷⁸

A recent investigation of the Holy See's status of international personality declared: “[o]f course, nobody nowadays doubts that the Roman Church is endowed with an international legal personality.”¹⁷⁹ After

hence they have recognized in the Pope one who has the capacity of willing and acting not only in the spiritual sphere but also in the sphere of temporal interests and inter-state relations—an international person.

FALCO, *supra* note 171, at 16.

173. See Tiyanjana Maluwa, *The Holy See and the Concept of International Legal Personality: Some Reflections*, 19 COMP. & INT'L L.J. OF S. AFR. 1 (1986).

174. See BROWNIE, *supra* note 139, at 57-58. While agreeing that this concept of legal personality is standard, Prof. Brownlie points out that it is circular and explains in depth what it means. See *id.*

175. See Maluwa, *supra* note 173, at 7.

176. See *id.* at 11.

177. *Id.* at 12.

178. See *id.* at 23-24, 26.

179. Gaetano Arangio-Ruiz, *On the Nature of the International Personality of the Holy See*, 29 REVUE BELGE DE DROIT INTERNATIONAL [R.B.D.I.] 354 (1996). Arangio-Ruiz hastens to add that the relationship amongst the Church, the Holy See, and the Vatican City State creates some ambiguities and doubts. See *id.*

scrutinizing the “constitutional” and “inter-state systems” of international personality over the centuries, Prof. Arangio-Ruiz recognized that the Holy See was a part of evolving law since before the creation of strong nation-states. He concluded that, “international personality . . . has thus been maintained by the Holy See without interruption from the time of the inception of the rules governing international relations up to the present time. It has never been seriously contested and it seems very unlikely that it ever would be.”¹⁸⁰ Arangio-Ruiz believes that the Holy See’s unique or *sui generis* personality is not restricted to purely spiritual or religious matters.¹⁸¹ Although the Holy See does enjoy roles that are a part of the sovereignty it exercises, there is considerably more that makes it a “power” in the world of international relations. He states:

The truth seems to me to be that the Holy See has become a power among the powers: where by power I understand any entity factually existing as a sovereign and independent unit and participating as such in international relations. This concept has nothing to do with any major or superior military, economic, and/or political power. Despite the lack of “divisions” the Roman Church appears to be, as a moral power, far more powerful than many if not most States.¹⁸²

In this context, it should be recalled that the Pope, as the head that directs the Holy See, sits upon the chair of Peter, and he is the Vicar of Christ.¹⁸³ As a result, it is not essential in the exercise of sovereignty to preside over a specific territory with an identifiable population. Unlike most, this

180. *Id.* at 360.

181. *See id.* at 362-363.

182. *Id.* at 364-365. Professor Arangio-Ruiz continues by saying,

It is hardly necessary to add that, just as there is no real foundation for the alleged “specialty” of the Holy See’s personality there is no foundation for the alleged limitations of the Holy See’s legal capacity mentioned by some scholars. If the Holy See has ceased, for example, to participate in military operations, it is because of its lofty inspiration, its own constitution and legal order and its choices, not because of any international legal incapacity.

ARANGIO-RUIZ, *supra* at 365-66.

I suggest that this certainly goes to the heart of sovereignty: each entity having international legal personality, each subject of international law exercises its own identity formed by its self-determination. In the exercise of its rights and obligations under international law, it looks to no other entity for permission or approval in determining who it is and how it operates within the rule of international law. It alone makes that determination and, as the next discussion illustrates, that is what the Holy See has done.

183. *See* CATECHISM OF THE CATHOLIC CHURCH §§ 881-882, and *Lumen Gentium* [The Dogmatic Constitution of the Church, promulgated on November 21, 1964], at Nos. 22 and 23.

sovereignty is not restricted by a specific territory.¹⁸⁴ The place where the Holy See exercises its sovereignty transcends a particular territory because it is exercised throughout the world. This is why the sovereignty of the Holy See has sometimes been described as “supra-national.”¹⁸⁵ However, the “supra” does not equate to superiority, but rather to something along the lines of being different.

In the exercise of its international personality, the Holy See identifies itself as possessing an “exceptional nature within the community of nations; as a sovereign subject of international law, it has a mission of an essentially religious and moral order, universal in scope, which is based on minimal territorial dimensions guaranteeing a basis of autonomy for the pastoral ministry of the Sovereign Pontiff.”¹⁸⁶ Yet, it would be mistaken to conclude that the Holy See does not view itself having a role in the world of international order concerned with issues of peace, the common good, and the general welfare of all men, women, and children.¹⁸⁷ This point

184. See generally BROWNLIE, *supra* note 139, at 98-117.

185. See *supra* note 120 and accompanying text.

186. SHAW, *supra* note 153, at 172 (quoting the Joint 11th and 12th Reports to the United Nations Committee on the Elimination of Racial Discrimination, U.N. Doc. CERD/C/226/Add.6,(1993)); *accord* Summary Record of the 991st Meeting of the Committee on the Elimination of Racial Discrimination, U.N. Doc. CERD/C/SR.991 (1993). The Summary Record of the Committee states in part: “As the supreme governing body of the Catholic Church, the Holy See was recognized as a sovereign subject of international law. Its territory, the Vatican City State, was very small, its only function being to guarantee its independence and the free exercise of its religious, moral and pastoral mission. Its participation in international organizations, most notably the United Nations, and its accession to international conventions such as the Convention on the Elimination of All Forms of Racial Discrimination differed profoundly from those of States which were communities in the political and temporal sense.” *Id.* at No. 2. Professor Falco noted that, “It may seem paradoxical, but, although the Church has always taught that sovereignty does not belong to states alone and that spiritual sovereignty is superior to temporal sovereignty, yet the Holy See has never abandoned the principle that a basis of territorial sovereignty is absolutely necessary to it in order to make its independence absolute and visible. Moreover, the Holy See has never been willing to admit that its status and the inviolability and immunity of the Popes could rest upon Italian municipal law, that is to say, upon a unilateral act. For these reasons the Holy See never ceased after 1870 to claim restoration of the temporal power and the settlement of its status by means of a convention.” See Falco, *The Legal Position of the Holy See*, *supra* note 171, at 17-18.

187. See Kunz, *The Status of the Holy See in International Law*, *supra* note 47, at 310, where Mr. Kunz noted that,

The Holy See is . . . a *permanent* subject of *general* customary international law *vis-à-vis* all states, Catholic or not. That does not mean that the Holy See has the same international status as a sovereign state. But the Holy see has, under general international law, the capacity to conclude agreements with states . . . [be they concordats or general international treaties].

Id. (citations omitted).

was made in Pope Paul's October 4, 1965 address before the United Nations General Assembly.¹⁸⁸

In addition, a similar argument was advanced by the Second Vatican Council, stating that the Church, and therefore the Holy See, is not only concerned with, but also involved in, the affairs of the world as a consequence of its spiritual and religious mission. As the Council noted in the Pastoral Constitution on the Church in the Modern World, the Holy See "does not lodge its hope in privileges conferred by civil authority. Indeed, it stands ready to renounce the exercise of certain legitimately acquired rights if it becomes clear that their use raises doubt about the sincerity of its witness"¹⁸⁹ Nonetheless, the Council stated that:

[It] hastened to add that due to its teaching authority and moral vision for all people throughout the world, it is always and everywhere legitimate for her to preach the faith with true freedom, to teach her social doctrine, and to discharge her duty among men without hindrance. She also has the right to pass moral judgments, *even on matters touching the political order*, whenever basic personal rights or the salvation of souls make such judgments necessary . . . [h]olding faithfully to the gospel and exercising her mission in the world, the Church consolidates peace among men, to God's glory. For it is her task to uncover, cherish, and ennoble all that is true, good, and beautiful in the human community.¹⁹⁰

188. See *supra* notes 115-116 and accompanying texts.

189. *Gaudium et Spes*, *supra* note 66, at No. 76.

190. *Id.* (emphasis added). Toward the conclusion of the Pastoral Constitution, the Council stated that,

In pursuit of her divine mission, the Church preaches the gospel to all men and dispenses the treasures of grace. Thus, by imparting knowledge of the divine and natural law, she everywhere contributes to strengthening peace and to placing brotherly relations between individuals and peoples on solid ground. Therefore, to encourage and stimulate cooperation among men, *the Church must be thoroughly present in the midst of the community of nations*. She must achieve such a presence both through her public institutions and through the full and sincere collaboration of all Christians

Id. at No. 89 (emphasis added). The views of the Council would thus tend to alter the meaning and the impact of Article 24 of the Lateran Treaty which states:

The Holy See, in relation to the sovereignty it possesses also in the international sphere, declares that it wishes to remain and will remain extraneous to all temporal disputes between States and to international congresses held for such objects, unless the contending parties make concordant appeal to its mission of peace; at the same time reserving the right to exercise its moral and spiritual power. In consequence of this declaration, Vatican City will always and in every case be considered neutral and inviolable territory.

Id.

At this stage in the investigation, it would be useful to take account of how the Holy See has featured in several areas relevant to the task of defining the nature of the Holy See's international personality: (1) State practice and custom and (2) treaty law.

III. STATE PRACTICE, CUSTOM, AND TREATY LAW

The roles of State practice, custom, and treaty law have already been alluded to in assessing the status of the Holy See's international personality. However, I shall provide more structure to the previous examination.

A. *State Practice and Custom*

The past two sections of the article have dealt with an overview of how temporal States have dealt with the Holy See as an international person. In essence, the practice of the States confirmed the status of the Holy See's uninterrupted international personality, even during the period of 1870-1929.¹⁹¹ Formal diplomatic exchanges with States at the ambassadorial level have grown since the first exchanges of the 1500's. In 1972, the Holy See sent first class representatives to sixty-eight states. In return, it received sixty-five representatives who held the title of Ambassador.¹⁹² In 1979, Pope John Paul II first visited the United Nations (UN) headquarters in New York and delivered an address to the General Assembly. That same year, the Holy See sent first class representatives to eighty-six states and received eighty-seven in return.¹⁹³

In 1995, when the Pope made his second trip to the UN and again delivered an address to the General Assembly, the numbers of active and passive legation had grown to one hundred and fifty-six and one hundred and fifty-seven respectively.¹⁹⁴ Most recently, this number again increased to the point where the Holy See has diplomatic relations with one hundred and seventy-six states.¹⁹⁵ Examination of the approach of various States in dealing with the Holy See in diplomatic and other relations deepens the understanding of the latter's international personality.¹⁹⁶

191. See 1 DIGEST OF INTERNATIONAL LAW 58 (U.S. Dept. of State, 1963, Whiteman, ed.).

192. See ANNUARIO PONTIFICIO 1048-80 (1972).

193. *Id.* at 1110-1150 (1979).

194. *Id.* at 1294-1344 (1995).

195. *Bilateral and Multilateral Relations of the Holy See*, THE VATICAN, http://www.vatican.va/roman_curia/...0010123_holy-see-relations_en.html (last visited Jan. 24, 2010).

196. State practice can be a source of international law. See Article 38.1(c) of the Statute of the International Court of Justice, which acknowledges that "the general principles of law recognized by

1. *European Illustrations*

England has a long history of diplomatic exchange with the Holy See. Select periods of its history witnessed withdrawal of diplomatic relations as a result of the establishment of the Church of England, yet diplomatic exchanges between the two sovereigns have been chronicled from the Eleventh Century to the present day.¹⁹⁷ Even without exchange of first class legations, these two sovereigns found it necessary to engage one another as sovereigns would typically do to discuss issues of mutual concern, especially during times of international armed conflict.¹⁹⁸

Like Great Britain, France also has a long history of diplomatic exchange with the Holy See. However, two major stormy periods occurred when relations between the two sovereigns were discontinued by France. With the French Revolution and Napoleon's rise to power, Napoleon kidnapped the Pope and confiscated the Papal States. However, the Holy See attempted to continue diplomatic exchange during this era.¹⁹⁹ In 1905, France enacted legislation essentially secularizing the State.²⁰⁰ As a consequence, diplomatic relations were temporarily broken off with the Holy See. These relations were ultimately restored in 1921.²⁰¹

civilised [sic] nations" can be a source of law upon which the Court may rely in deciding disputes brought before it. Statute of the International Court of Justice, 1947 I.C.J. Acts & Docs. 38.1(c), available at http://www.icj-cij.org/documents/index.php?p1=4&p2=2&p3=0#CHAPTER_II.

197. See, e.g., Gordon Albion, *England and the Holy See: A Survey of Diplomatic Relations*, THE MONTH, Jan. 1939, at 74-78; Dorothy M. Williamson, *Some Aspects of the Legation of Cardinal Otto in England*, 1237-41, 64 THE ENG. HIST. REV. 144 (1949); William A. Hinnebusch, *Diplomatic Activities of the English Dominicans in the Thirteenth Century*, 28 THE CATH. HIST. REV. 309 (1942) (demonstrating how the Order of Preachers was used as legates of the temporal sovereign in addition to providing some history of Rome's diplomatic exchanges with England); Robert Noakes, *Cardinal Erskine's Mission*, 1793-1801, 204 THE DUBLIN REV. 338 (1939); Sir Stephen Gaselee, *British Diplomatic Relations with the Holy See*, 204 THE DUBLIN REV. 1 (1939); Harold Temperley & George Canning, *The Catholics and the Holy See*, 193 THE DUBLIN REV. 1 (1933); H. A. Smith, *Diplomatic Relations with the Holy See, 1815-1930*, 48 THE LAW Q. REV. 374 (1932); Sir Alec Randall, *British Diplomatic Representation at the Holy See*, 37 BLACKFRIARS 356 (1956); OWEN CHADWICK, *BRITAIN AND THE VATICAN DURING THE SECOND WORLD WAR* (1986). For a history of an important period in British-Rome relations, see JOHN TRACY ELLIS, *CARDINAL CONSALVI AND ANGLO-PAPAL RELATIONS 1814-1824* (1942).

198. See *The British Mission to the Vatican*, *supra* note 62, at 206-208.

199. See Robert Noakes, *Cardinal Erskine and Napoleon*, 206 THE DUBLIN REV. 102, 102-14 (1940).

200. See *CHURCH AND STATE*, *supra* note 5, at 355-71.

201. See Raymond L. Buell, *France and the Vatican*, 36 POL. SCI. Q. 30 (1921). As a result of the movement toward secularization, Pope Pius X issued the encyclicals *Vehementer Nos* (On the French Law of Separation) promulgated on Feb. 11, 1906, and *Une Fois Encore* (On the Separation of Church and State) promulgated on Jan. 6, 1907. See also Abbe Felix Klein, *Breaking and Renewing Diplomatic Relations Between France and the Holy See*, 112 THE CATH. WORLD 577 (1921). For an interesting legal case involving the display of the Vatican Flag in France during this era see Editorial Comment, *The Papacy in International Law*, 8 AM. J. INT'L L. 864 (1914). When Portugal followed France's example a

2. *Central and South America*

While many of the States of Central and South America are traditionally Catholic, their past diplomatic relations with the Holy See have been characterized by periods of exchanges followed by termination of diplomatic relations on the part of the temporal sovereign.²⁰² The restoration of better and meaningful relations with various states was demonstrated by the Holy See's assistance to the government of Peru during the 1997 take-over of the Japanese embassy by rebel forces.²⁰³ Another important Latin American illustration concerns both the involvement as a mediator and as a signatory of the 1980's mediation during the tense border dispute between Chile and Argentina.²⁰⁴

3. *The United States*

The legal relationship between the United States and the Holy See was addressed previously.²⁰⁵ As was mentioned earlier, the U.S. and the Holy See had engaged in diplomatic exchanges up to 1870.²⁰⁶ Subsequently, the U.S. sent the Holy See a "personal representative of the President" during World War II.²⁰⁷ When efforts were made to reestablish diplomatic relations after the Lateran Treaty entered into force, opposition within the United States was raised.²⁰⁸ Some of this opposition suggested that the

few years later by enacting secularizing legislation that separated the relation between Church and State, Pius X promulgated *Iam dudum* (On the Law of Separation in Portugal) on May 24, 1911.

202. See, e.g., J. Lloyd Mechem, *The Papacy and Spanish-American Independence*, 9 THE HISP. AM. REV. 154 (1929); Almon R. Wright, *Argentina and the Papacy, 1810-1827*, 18 THE HISP. AM. HIST. REV. 15 (1938). Dr. Mechem has chronicled these situations in greater detail in his *CHURCH AND STATE IN LATIN AMERICA: A HISTORY OF POLITICO-ECCLESIASTICAL RELATIONS* (1966).

203. See Gabriel Escobar, *Peru Softens Stance on Rebels: Lima Proposes Special Commission*, available at 1997 WL 2245980.

204. See Act of Montevideo, Chile-Arg., Jan. 8, 1979, U.N.T.S. 17838; Chile-Arg., Oct. 26, 1982, U.N.T.S. 21289.

205. See *supra* note 167 concerning the U.S. Supreme Court taking judicial notice of the status of the Holy See's international personality, and *supra* notes 57 & 58 and accompanying text concerning the importance of stabilizing the relationship between the United States and the Philippines after the Peace of Paris and the conclusion of hostilities between Spain and the United States.

206. See generally Howard R. Marraro, *The Closing of the American Diplomatic Mission to the Vatican and Efforts to Revive It, 1868-1870*, 33 THE CATH. HIST. REV. 423 (1948) and Martin Hastings, *United States-Vatican Relations*, 69 REC. OF THE AM. CATH. HIST. SOC'Y OF PHILADELPHIA 20 (1958) (for a general overview of the periods of diplomatic exchanges and those times in which they were suspended).

207. See *supra* note 168 and accompanying text.

208. See, e.g., John H. Wigmore, *Should A Papal State Be Recognized Internationally by the United States?*, 22 ILL. L. REV. 881 (1928). While objecting on other grounds, including the status of statehood of

Establishment Clause of the First Amendment of the Constitution would be violated should diplomatic relations be restored. Apparently, this constitutional issue was not a concern prior to 1870. Presidents Eisenhower and Nixon, like Presidents Roosevelt and Truman, continued to send “personal representatives” to the Holy See during their administrations.

When President Reagan proposed reestablishment of diplomatic exchange with the Holy See, questions were again raised about the legality of such action. One problem concerned the possible constitutional implications of the Establishment Clause of the First Amendment of the United States Constitution.²⁰⁹ However, other voices demonstrated why these concerns were immaterial and should not prevent the exchange.²¹⁰ The Reagan Administration proceeded with its plan, and the two sovereigns established diplomatic relations once again on January 10, 1984.²¹¹

Shortly after the restoration of the exchange, several lawsuits were filed in federal court challenging the renewal of diplomatic relations. Several groups and individuals, including the Americans United for Separation of Church and State, based their complaint on a number of grounds including violations of the First and Fifth Amendments of the United States Constitution.²¹² The District Court dismissed the complaint on two grounds. First, the Court concluded that the plaintiffs lacked standing.²¹³ Second, the Court deduced that the case was unjusticiable because the question posed in the complaint was a political one falling outside the jurisdiction of the Court.²¹⁴ The Court of Appeals for the Third Circuit affirmed the District

the Holy See, Prof. Wigmore was particularly concerned about the exchange of diplomatic representatives and the ensuing “power and influence” that Vatican representatives could have on the United States. *Id.* at 883.

209. See, e.g., Mark Thomas Van Der Molen, Note, *Diplomatic Relations Between the United States and the Holy See: Another Brick from the Wall*, 19 VAL. U. L. REV. 197 (1984); Maria Louisa Hekker, Note, *Constitutional Issues Raised by Diplomatic Relations Between the United States and the Holy See*, 15 HASTINGS CONST. L.Q. 101 (1987). Objections were also raised on theological grounds. See, e.g., James Coriden, *Diplomatic Relations Between the United States and the Holy See*, 19 CASE W. RES. J. INT'L L. 361 (1987).

210. See Samuel W. Bettwy and Michael K. Sheehan, *United States Recognition Policy: The State of Vatican City*, 11 CAL. W. INT'L L.J. 1 (1981).

211. On January 10, 1984, the U.S. Department of State issued a formal announcement stating: “The United States of America and the Holy See, in the desire to further promote the existing mutual friendly relations, have decided by common agreement to establish diplomatic relations between them at the level of embassy on the part of the United States, and Nunciature on the part of the Holy See, as of today, January 10, 1984.” *Americans United for Separation of Church & State v. Reagan*, 607 F. Supp. 747 (E.D. Pa. 1985).

212. *Id.* at 748-49.

213. See *id.* at 751.

214. See *id.* at 751-52.

Court's decision.²¹⁵ The Tenth Circuit Court of Appeals reached similar conclusions in a challenge filed in federal court in Kansas.²¹⁶

While it is not the purpose of this article to engage in a protracted examination of these United States constitutional issues, it does address the impact of any successful court challenge to the diplomatic exchange between the Holy See and the United States. Any ruling in favor of those challenging this exchange would jeopardize diplomatic relations with, and foreign aid to, a host of other states with explicit connections with Islam,²¹⁷ Judaism,²¹⁸ or Christianity.²¹⁹

4. *Non-Christian State and Other Recognitions of the Holy See*

As mentioned above, the magnitude of diplomatic exchanges with other sovereigns has grown dramatically over the centuries. As demonstrated, the Holy See presently engages in active legation with one hundred and seventy-six States.²²⁰ Two recent, major diplomatic encounters between the Holy See

215. See *Americans United for Separation of Church and State v. Reagan*, 786 F.2d 194, 196 (1986). The Third Circuit noted that, "The State of the City of the Vatican is a territorial sovereignty, however small its size and population. The head of the Roman Catholic Church controls the government of that sovereign territory. No other religious organization that is a plaintiff, or in which individual plaintiffs are members, is similarly situated. If the Roman Catholic Church's unique position of control of a sovereign territory gives it certain advantages that other religious organizations do not enjoy, those advantages cannot be the concern of the constitutional provisions upon which the plaintiffs rely." *Id.* at 198.

216. See *Phelps v. Reagan*, 812 F.2d 1293, 1294 (1987). In a brief opinion, the Tenth Circuit noted its agreement with the Third Circuit in *Americans United for Separation of Church and State v. Reagan*. See *Phelps*, 812 F.2d at 1294.

217. For example, Article 1 of the Bahrain Constitution states that, "Bahrain is an Arab Islamic State," and Article 2 indicates that, "Islam shall be the religion of the State; Islamic Shariah (Islamic Law) a main source of legislation." See [CONSTITUTION] art.1-2 (Bahr.); Articles 1, 6, 7, and 8 of the Constitution of Saudi Arabia indicate similar ties between the State, Islam, the Holy Koran, and Islamic Shariah. See [Constitution] art. 1, 6-8 (Saudi Arabia); Article 2 of the Constitutions of both Oman and Kuwait state that Islamic Shariah is a source or basis of legislation. See [CONSTITUTION] art. 2 (Oman) and [CONSTITUTION] art. 2 (Kuwait). The Preamble of the Iranian Constitution similarly notes the strong nexus between the State and Islamic principles. See [CONSTITUTION] (Iran).

218. Section 1a of the Basic Law of Israel states, "The purpose of this Basic Law is to protect human dignity and liberty, in order to anchor in a Basic Law values of the State of Israel as a Jewish and democratic state." For a different perspective on the meaning of Israel as a Jewish State, see Ruth Lapidoth, *Freedom of Religion and of Conscience in Israel*, 47 CATH. U. L. REV. 441, 443-444 (1998).

219. Section 2 of both the Maltese and Argentine Constitutions indicate that Roman Catholicism is the religion of the domain. In the case of the Maltese Constitution, further provisions mandate the teaching of this faith in all State schools "as a part of compulsory education." While Article 2 of the Norwegian Constitution provides for the free exercise of religion, it also declares that, "The Evangelical-Lutheran religion shall remain the official religion of the State. The inhabitants professing it are bound to bring up their children in the same."

220. See CARDINALE, *supra* note 5.

and others include those with Israel and the Palestinian Liberation Organization (PLO). The 1993 agreement and diplomatic recognition with Israel²²¹ and the Basic Agreement with the PLO²²² demonstrate a contemporary renewal of a long-standing interest by the Holy See in this region of the world.²²³ The significance of these agreements is the formal recognition that the Holy See extended to Israel as a State and to the PLO as the representative of the Palestinian people. In the latter case, the Holy See and the PLO entered into “official relations” on October 26, 1994.²²⁴ The formal agreements indicate that the Holy See and these two entities recognize the importance of formal relations in order to discuss peace in a troubled region of the world, in addition to religious rights and freedom of conscience, protection of sacred areas of interest to the three monotheistic religions of the world, and the advancement of other human rights.

B. *Treaty Law*

Several important subjects require examination of the Holy See’s international personality in the context of treaty law. The first entails the participation by the Holy See in treaties (both bilateral and multilateral) and concordats. The second concerns the substance of multilateral treaties that address the status of the Holy See. In both cases, the Holy See has exercised and been accorded the status of an international person, capable of negotiating and entering treaties as an equal with States’ parties.²²⁵

1. *Treaties and Concordats*

The Holy See has a long history of negotiating international agreements, including treaties.²²⁶ These agreements fall into two categories: (1) treaties

221. See *infra* note 239 and accompanying text.

222. See BASIC AGREEMENT BETWEEN THE HOLY SEE AND THE PALESTINE LIBERATION ORGANIZATION, The Vatican, http://www.vatican.va/roman_curia/secretariat_state/2000/documents/rc_seg-st_20000215_santa-sede-olp_en.html (lasted visited Feb. 15, 2000).

223. For a detailed analysis of the Holy See’s religious and other interests in this region, see GEORGE E. IRANI, *THE PAPACY AND THE MIDDLE EAST: THE ROLE OF THE HOLY SEE IN THE ARAB-ISRAELI CONFLICT, 1962-1984* (1986).

224. BASIC AGREEMENT BETWEEN THE HOLY SEE AND THE PLO *supra* note 222 at Preamble.

225. For a helpful and careful analysis of the Holy See’s exercise of treaty-making authority, see Tiyanjana Maluwa, *The Treaty-Making Capacity of the Holy See in Theory and Practice: A Study of the Jus Tractum of a Non-State Entity*, 20 COMP. & INT’L L.J. OF SO. AFR. 155 (1987).

226. See Geoffrey R. Watson, *Progress for Pilgrims? An Analysis of the Holy See-Israel Fundamental Agreement*, 47 CATH. U. L. REV. 497, 500-01 (1998).

and agreements dealing with conventional topics entered by States and (2) concordats.²²⁷

With regard to conventional treaties and other international agreements, the Holy See has participated in the negotiating, signing, and ratification of major international agreements prior to 1870, during the period of 1870-1929, and after 1929. The Concordat of Worms between Pope Calixtus II and King Henry V, concluded in 1122, was between sovereigns and involved more than simply church relations. In addition, it dealt with issues of temporal sovereignties and became something of a customary law that was followed by succeeding popes and temporal leaders.²²⁸ There are many other illustrations of negotiations between the Holy See and temporal sovereigns with respect to formulating treaties and other agreements, including consular matters.²²⁹

The Holy See's participation in international agreements and understandings has taken other forms. For example, The Holy See became an "adhering State" and was bound by the agreement reached at the Conference on the Limitation of Armament (Washington, D.C.) from

227. Concordats are agreements between the Holy See and another sovereign that address issues concerning the Church in that State. They have been defined as, "Public treaties or agreements, with the force of international law, between the Church and states, regulating relations in areas of mutual concern." J. A. Abbo, 4 NEW CATHOLIC ENCYCLOPEDIA 117 (1981). They have "as their object civil or religious or, more commonly, mixed matters (*res mixtae*) compounded of both elements, hence subject to both authorities." *Id.* at 118. The contracting parties are "the universal Church—personified by the Holy See—and a sovereign state." *Id.* When duly ratified and promulgated, a concordat immediately becomes civil as well as Canon law. *Id.* For the classic and insightful treatment of concordats and their role in international law, see HENRI WAGNON, CONCORDATS ET DROIT INTERNATIONAL (1935). Dr. Wagnon's remarkable work was reviewed in English by C. G. Fenwick, who states that the author traces a close parallel "between the law of concordats and the general law of treaties" because the Holy See "has the requisite capacity to enter into agreements valid at international law." C. G. Fenwick, 30 AM. J. INT'L L. 568, 569 (1936) (book review). See also Msgr. Roland Minnerath, The Position of the Catholic Church Regarding Concordats from a Doctrinal and Pragmatic Perspective, Address Before the Symposium at the Catholic University of America, Columbus School of Law (Apr. 8, 1997), in 47 CATH. U. L. REV. 467, 476 (1998), who notes that,

By establishing concordats with all types of states, common principles have arisen and are being enforced as conforming to the self-understanding of the Church and the demands of states under the rule of law. There is no question anymore of privileges, but strictly of human rights. Thus, the international character of the Holy See indirectly confers to the parallel agreements concluded between states and other religious communities, the support of an international treaty, as it is the first duty of the state to treat all its citizens equally.

Id.

228. See CHURCH AND STATE, *supra* note 5, at 48-49.

229. See CARDINALE, *supra* note 5, at 275-94.

November 12, 1921, to February 6, 1922.²³⁰ After the Lateran Treaty, the Holy See became involved with international agreements on both bilateral and multilateral levels.²³¹

On the multilateral level, the Holy See participated in negotiations leading to some of the principal Twentieth Century international legal instruments. For example, it signed, ratified, or acceded to such agreements as: The Geneva Conventions of August 12, 1949 (along with the two additional Protocols of 1977); the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958; two of the Law of the Sea Conventions of 1958; the Vienna Convention on Diplomatic Relations of April 18, 1961; the Vienna Convention on Consular Relations of April 24, 1963; the Vienna Convention on the Law of Treaties of May 23, 1969; the Vienna Convention on Succession of States with Respect to Treaties of August 22, 1978; the International Convention on the Elimination of All Forms of Racial Discrimination of December 21, 1965; the Convention on the Rights of the Child of November 20, 1989; the Convention Relating to the Status of Refugees of April 22, 1954; the Convention on Long-Range Transboundary Air Pollution of November 13, 1979; and the Ottawa Convention (Convention on the Prohibition of the Use, Stockpiling, Production, and Transfer of Anti-Personnel Mines and on Their Destruction) of March 1, 1999. In addition, the Holy See has also assisted in drafting and signing the 1975 Final Act (Helsinki Accords) of the Conference on Security and Co-Operation in Europe (now the Organization for Security and Co-Operation in Europe), and it is a member of the Organization. The Holy See is also a signatory to the Vienna Convention on the Representation of States in Their Relations with International Organizations of a Universal Character of March 14, 1975.

On a bilateral level, the Holy See and Spain entered a variety of treaties involving common interests in the Holy Land (December 21, 1994), economic issues (October 10, 1980 and January 3, 1979), religious assistance to the Spanish armed forces (August 5, 1980), and education and cultural matters (January 3, 1979). Noted elsewhere are the agreements with

230. *Draft Convention on Rights and Duties of Neutral States in Naval and Aerial War, with Comment*, 33 AM. J. INT'L L. SUP 167, 550 (1939).

231. In 1936 an American doctoral candidate at the University of Geneva completed his dissertation on the impact of the Lateran Treaty on the Holy See's treaty and concordat-making power and diplomatic practice. Whilst the author's work contained in his published thesis is somewhat dated, it nonetheless provides an important contemporary insight into the impact of the 1929 Agreement between the Holy See and Italy. See Oliver Earl Benson, *Vatican Diplomatic Practice as Affected by the Lateran Agreements*, (1936) (Imprimerie Georges Thone, Liege).

Sweden²³² and Israel.²³³ Each of these three State sovereigns registered their respective agreements with the Holy See with the United Nations. The act of registration suggests that the instrument has legal implications and provides “tangible evidence that the agreement is to be regarded as a treaty and that that is the intention of the parties concerned.”²³⁴

Due to their significance, two recent instruments involving the Holy See as one of the parties need to be mentioned. The first is the agreement between Israel and the Holy See of December 30, 1993, addressing the issues of freedom of religion and conscience, condemnation of anti-Semitism, protection of sacred places and pilgrims, cultural exchanges, freedom of expression, freedom to carry out charitable works, and provisions addressing property, economic, and fiscal matters.²³⁵ In accordance with this agreement, Israel and the Holy See entered diplomatic relations under Article 14 of the Agreement.²³⁶ As Marshall Breger points out, “[t]he Vatican-Israel Accord of 1993 was clearly a political document—one undertaken between two sovereign states.”²³⁷ As with his many other official visits abroad, the Pope was received by Israel as a head of State during his Middle East visit during March 2000.²³⁸

A second recent bilateral agreement deserving of attention is the understanding signed by the Holy See and the Palestine Liberation Organization addressing the questions of human rights and inter-religious

232. See *infra* note 264 and accompanying text.

233. See *infra* note 239 and accompanying text.

234. See, e.g., WALLACE, *supra* note 139, at 221. See also Article 102.2 of the United Nations Charter which states that, “No party to any such treaty or international agreement which has not been registered . . . may invoke that treaty or agreement before any organ of the United Nations.”

235. 33 I.L.M. 153 (1994).

236. *Id.*

237. Marshall J. Breger, *Introduction to The Fundamental Agreement Between the Holy See and the State of Israel—A Symposium*, 47 CATH. U. L. REV. 369 (1998).

238. See Alessandra Stanley, *Pope Arrives in Israel and Gets Taste of Mideast Politics*, N.Y. TIMES, March 22, 2000, at A8. As was reported by the New York Times upon the arrival of Pope John Paul II in Israel,

The import of John Paul’s visit to Israel, the first by a pope officially as a head of state, was underscored by the welcome he received at Ben Gurion International Airport. He was greeted by President Weizman, Prime Minister Ehud Barak and several Cabinet ministers—though no ultra-Orthodox government minister attended The pope hopes to use his visit to Israel to promote interfaith reconciliation and lend his moral authority to the quest for peace. But his unique international stature is equally coveted by Israelis, who want him to reinforce their sovereign rights, and by Palestinians, who hope his visits to Palestinian leaders and a Palestinian refugee camp . . . will lend legitimacy to their cause.

For an important discussion on the Holy See’s role in the Middle East, see IRANI, *supra* note 223.

dialogue, the respect for a status quo concerning Christian holy places, the freedom of the Catholic Church to carry out its mission, and the Catholic Church's right to its legal personality.²³⁹ The Holy See's participation as becoming a party to these agreements with many States, demonstrates an important point: most States consider the Holy See a necessary international personality to participate with the sovereign States of the world in the development and codification of international law.

With regard to concordats, some commentators suggest that these are not international agreements equivalent to treaties or other instruments indicative of international personality of the contracting parties. However, other commentators are persuaded by the force of judicial argument.²⁴⁰ A further view compares concordats to general conventions "by which one State obtains from another an agreement to refrain or limit the exercise of its jurisdiction over its own citizens."²⁴¹ When carefully examined, their content frequently covers issues typical of any agreement between two sovereigns.²⁴² The argument is made that concordats cover issues which are solely of concern to the Catholic Church of the State in which the other contracting party is located. However, concordats include issues that cover not only internal Church matters but also those addressing morality, religion and its observance, education, matrimony, and other family issues identified in the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and the International Covenant of Economic, Social, and Cultural Rights. Moreover, concordats frequently address issues of State aid to Church affiliated hospitals and schools in addition to the resolution of property disputes.²⁴³ Through a comparison of concordats with bilateral

239. Basic Agreement Between the Holy See and the Palestine Liberation Organization, February 15, 2000.

240. See OPPENHEIM, *supra* note 43, at 252 n.2 and the discussion of the 1934 Bavarian Supreme District Court decision in the case, *In Re A Nun's Dress*, where the court expressed its view that concordats "had the same internal validity as treaties."

241. See Cumbo, *supra* note 160, at 608.

242. See, e.g., Fundamental Agreement Between the Holy See and the State of Israel.

243. See Roland Minnerath, The Position of the Catholic Church Regarding Concordats from a Doctrinal and Pragmatic Perspective, Address Before the Symposium at the Catholic University of America, Columbus School of Law (Apr. 8, 1997), in 47 CATH. U. L. REV. 467 (1998). As Msgr. Minnerath has stated in regard to their being agreements of international law:

[T]hese instruments have all the same legal force. They are treaties between two subjects of international law, each one sovereign in its own sphere: spiritual and political. They are negotiated, signed, and ratified according to current international practice. Under the regime of the League of Nations, some concordats were even registered in the Record Book of International Treaties in Geneva.

treaties between States, there is little distinction between many of the topics addressed. As one commentary to the 1983 Code of Canon Law mentions about concordats:

The interests of the Holy See can be of a purely religious or moral nature, such as questions of justice, development of peoples, world peace, etc. They can also be of a material nature, ranging from seeking aid for needy areas and relief for disaster victims to special support for the Church in its ministry and various apostolates.²⁴⁴

While detailed discussion could be pursued regarding the similarities and differences between concordats and treaties, an important study by Dr. Tiyanjana Maluwa cogently demonstrates why any distinction between concordats and other treaties is artificial and lacks substance.²⁴⁵

One final consideration on the international significance of concordats is their status in the context of Canon Law. While some States unilaterally walked away from concordat responsibilities and broke off diplomatic relations with the Holy See,²⁴⁶ the Holy See observed and practiced the legal principle *pacta sunt servanda*. Consequently, the 1983 Code of Canon Law expressly states that any provision in the Code, even though it is the most serious of Church law, cannot “abrogate or derogate from the pacts [concordats, treaties, other international agreements, etc.] entered upon by the Apostolic See with nations or other political societies.”²⁴⁷

Before concluding this discussion, we should consider the position of the International Law Commission (ILC) regarding the Holy See’s status as an international personality competent to negotiate and enter treaties and other

Id.

244. See Commentary, 1983 CODE c.365.

245. See MALUWA, *supra* note 225, at 162-74.

246. See *supra* note 201 and accompanying text.

247. 1983 CODE c.3. This same canon continues by stating, “[these pacts] therefore continue in force as presently, notwithstanding any prescriptions of this Code to the contrary.” *Id.* The Commentary to this canon states that the Code only regulates the “internal life” of the Church, and

it does not apply to international legal relations. The activities of the Church among the family of nations and its participation in international organizations are subject to the general norms of international law. Since the Holy See is an international juridic person, it has the capacity to conclude agreements with other such persons, i.e., all sovereign states and international associations and organizations formed by them Should there ever be a conflict between the canons and the pacts, the pacts must stand.

Id. In addition, Canon 365 reminds pontifical legates that they must act in accordance with the “norms of international law.” 1983 CODE c.354.

international agreements with temporal sovereigns. When the Vienna Convention on the Law of Treaties was in its early drafting stages in 1959, the ILC made a number of significant observations about the Holy See:

[I]t has always been a principle of international law that entities other than States might possess international personality and treaty-making capacity. An example is afforded by the Papacy particularly in the period immediately preceding the Lateran Treaty of 1929, when the Papacy exercised no territorial sovereignty. The Holy See was nevertheless regarded as possessing international treaty-making capacity. Even now, although there is a Vatican State . . . under the territorial sovereignty of the Holy See, treaties . . . are . . . entered into not by reason of territorial sovereignty over the Vatican State, but on behalf of the Holy See, which exists separately from that State.²⁴⁸

The ILC reexamined the status of the Holy See a few years later as the drafting of the Convention resumed. When deliberations continued, the ILC noted that:

The term “treaty” as used in the draft article covers only international agreements made between two or more States or other subjects of international laws. The phrase “other subjects of international law” is designed to provide for treaties concluded by: . . . (b) the Holy See, which enters into treaties *on the same basis as states*²⁴⁹

In its commentary on Article 3 of the Convention on the Law of Treaties which addresses “other subjects of international law,” the ILC hastened to add that, “[t]he phrase ‘other subjects of international law’ is primarily intended to cover international organizations, to remove any doubt about the

248. See *Documents of the Eleventh Session including the Report of the Commission to the General Assembly*, [1959] 2 Y.B. Int'l L. Comm'n 96, ¶ 7 UN Doc. A/CN.4/SER.A/1959/Add.1 (commentary to Art. 2 of the Vienna Convention on the Law of Treaties), see also CRAWFORD, *supra* note 156, at 158-60 (explaining the relation between the Holy See and the Vatican City State). As Professor Crawford suggests:

To some extent the desire to particularize or categorize the relationship between the two entities reduces itself to a semantic dispute The position would appear to be that the relation is one of State and government, but with the peculiarity that the government in question, the Holy See, has an additional non-territorial status, which is in practice more significant than its status *qua* government of the City of the Vatican.

Id. at 159-60.

249. *Documents of the Fourteenth Session including the Report of the Commission to the General Assembly*, [1962] 2 Y.B. Int'l L. Comm'n 162, ¶ 8, UN Doc. A/CN.4/SER.A/1962/Add.1 (commentary to Art. 1 of the Law of Treaties) (emphasis added).

Holy See[,] and to leave room for more special cases such as an insurgent community to which a measure of recognition had been accorded.”²⁵⁰

2. *Specific Treaty Provisions Addressing the Status of the Holy See*

After the Congress of Vienna in 1815, several important multilateral treaties specifically acknowledged the role and status of the Holy See as a subject of international law. The treaty references are compelling evidence demonstrating that the State members of the international community did not question the status of the Holy See as a subject of international law but openly accepted this status as a fact of international law.

At the conclusion of the Congress of Vienna, the eight States²⁵¹ agreed upon a regulation concerning the precedence of Diplomatic Agents.²⁵² These regulations of March 19, 1815, while brief, revealed several critical points regarding the legal status of the Holy See. The first point is found in Article 1, which states that there are three classes of diplomatic agents, and the first, or highest level, include “ambassadors, legates[,] or nuncios.”²⁵³ Nuncios are those representatives of the Holy See who are permanent representatives of the Pope vested with both political and ecclesiastical authority and accredited to the court or government of a sovereign State.²⁵⁴ The second point is taken from Article 2, which equates the status of nuncios with ambassadors.²⁵⁵ The third point comes from Article 4, which states that the precedence or rank given to diplomats based on the date of assuming official duties (usually involving the presentation of credentials) would not in any way prejudice the precedence accorded to Papal representatives.²⁵⁶

The significance and effect of these regulations concerning diplomatic relations continue to this day. The categories of diplomats, and the

250. *Id.* at 164, ¶ 2.

251. The eight states were: Great Britain, Austria, France, Portugal, Prussia, Russia, Spain, and Sweden. *See* 1 MAJOR PEACE TREATIES OF MODERN HISTORY: 1648-1967 519 (Fred L. Israel, ed., 1967).

252. *See Id.* at 570. Annex VII of the Congress of Vienna refers to these regulations of March 19, 1815. *Id.* at 575. Interestingly, the Congress in Article 103 restored the Papal States which had briefly been confiscated by Napoleon. *Id.* at 565.

253. *See* 64 THE CONSOLIDATED TREATY SERIES 1 (Clive Parry ed., 1964). Article 1, *Règlement sur le Rang entre les Agents Diplomatiques*, which states in pertinent part, “Les Employés Diplomatiques sont partagés en trois Classes. Celle des Ambassadeurs, Legats ou Nonces.” *Id.* at 2.

254. *See* THE CATHOLIC ENCYCLOPEDIA DICTIONARY 687 (1941); *see also Sollicitudo Omnium Ecclesiarum*, Apostolic Letter of Pope Paul VI, promulgated 24 June 1969, *supra* note 118, at No. 10.

255. *See* THE CONSOLIDATED TREATY SERIES, *supra* note 253, at 2.

256. *See id.* The original text of Article 4 reads, “Les Employés Diplomatiques prendront Rang entre eux dans chaque Classe, d’après la Date de la Notification officielle de leur Arrivée. Le présent Règlement n’apportera aucune innovation relativement aux Représentans du Pape.” *Id.*

precedence that could be given to Papal representatives, were largely incorporated into the Vienna Convention on Diplomatic Relations of April 14, 1961.²⁵⁷ As with the 1815 Regulations from the Congress of Vienna, the Vienna Convention on Diplomatic Relations divides diplomatic missions into three classifications, the first of which includes ambassadors or nuncios.²⁵⁸ Like the 1815 Regulations, the 1961 Vienna Convention also specifies that precedence (given in the respective classes) is based on the order in which representatives assumed their posts and presented their credentials.²⁵⁹ However, as with the 1815 Regulations, the 1961 Convention does not discriminate or interfere with “any practice accepted by the receiving State regarding the precedence of the representative of the Holy See.”²⁶⁰

The consequence of these practices, which spanned almost two hundred years, is that notwithstanding its status as a unique person in international law, the Holy See deals with virtually all other sovereign States in the world today as a co-equal. While it holds Observer rather than State member status at the United Nations, the final topic that will be examined in Part V, the Holy See is respected by the international community of sovereign States and treated as a subject of international law having the capacity to engage in diplomatic relations and to enter into binding agreements with one, several, or many States under international law. It is unequivocal that the sovereign States of the world do acknowledge no impediment in the Holy See’s unique

257. Over 170 States are parties to this convention. The Holy See is a party and ratified the convention on April 17, 1964. The convention entered into force on April 24, 1964.

258. Vienna Convention on Diplomatic Relations, Article 14.1(a). The second class includes envoys, ministers, and internuncios. Article 14.1(b). Internuncios are in the order of pontifical diplomats who are equivalent to the ministers of the second class. *See* Legates, THE CATHOLIC ENCYCLOPEDIA (1910) at <http://www.newadvent.org/cathen/09118a.htm>. Eileen Denza has noted that, “Articles 14 to 16, and Article 18 of the Vienna Convention are a restatement in modern terms of the rules enunciated in 1815 by the eight signatories of the Regulation of Vienna: Austria, Spain, France, Great Britain, Portugal, Prussia, Russia, and Sweden.” *See* EILEEN DENZA, DIPLOMATIC LAW: COMMENTARY ON THE VIENNA CONVENTION ON DIPLOMATIC RELATIONS 58 (1976).

259. Vienna Convention on Diplomatic Relations art. 16.1, Apr. 18, 1961, 500 U.N.T.S. 95.

260. Vienna Convention on Diplomatic Relations art. 16.3, Apr. 18, 1961, 500 U.N.T.S. 95. As Eileen Denza points out,

At the Vienna Conference an amendment introduced by the Holy See replaced the word ‘existing’ by ‘accepted’, so making clear that States were entitled if they wished to adopt in the future the practice of giving precedence to the representative of the Holy See. This was opposed . . . only by representatives of the Communist states . . . who abstained in the voting in Committee on this amendment. *See* DENZA, *supra* note 258, at 97. The amendment of the Holy See was accepted as the final text indicates; moreover, the concerns of “Communist delegations” after 1990 would have begun to disappear.

status that would deprive it of the ability to exercise fully its membership in the community of sovereigns who are subjects of the law of nations.

IV. THE STATUS OF THE HOLY SEE AT THE UNITED NATIONS

A. *The History of the Holy See at the United Nations*

Although the Holy See became a Permanent Observer at the United Nations in March of 1964, its role and participation in the work of this international organization began shortly after the United Nations was founded in 1945. When plans for the United Nations were first discussed at the Dumbarton Oaks conference, President Truman's personal representative to the Holy See,²⁶¹ Myron C. Taylor, was approached by the Holy See to inquire about the status of smaller States joining the new organization.²⁶² At that time, the United States Department of State took the position that it would discourage membership of entities that were "too small to be able to undertake the responsibilities, such as participation in measures of force to preserve or restore peace," that the members of the UN would be obliged to honor.²⁶³

Notwithstanding these observations made by U.S. Secretary of State Cordell Hull, the Holy See was invited to participate in UN activities shortly thereafter. In 1951, the Economic and Social Council, through Resolution 393B (XIII) asked fifteen States to serve as members of an Advisory Committee on Refugees.²⁶⁴ The Holy See was one of these fifteen entities appointed to this advisory group.²⁶⁵ In addition, the Holy See was invited to the Conference of Plenipotentiaries "to consider the draft Convention

261. Mr. Myron Taylor, who was the personal representative of President Franklin Roosevelt continued in that capacity under President Truman. *See supra*, note 168.

262. *See* RUTH B. RUSSELL & JEANNETTE E. MUTHER, A HISTORY OF THE UNITED NATIONS CHARTER: THE ROLE OF THE UNITED STATES 509 (1958).

263. *Id.* These concerns expressed by the United States in the earliest stages of the UN have disappeared. Moreover, Secretary Hull was concerned about the ability of a State to contribute military assistance to peacekeeping activities. But an entity can contribute many other services to peacekeeping besides military personnel and hardware, and the Secretary's statement does not take account of this. *See* R. G. SYBESMA-KNOL, THE STATUS OF OBSERVERS IN THE UNITED NATIONS 324-25 (1981). The author points to the different circumstances of Liechtenstein, Germany after the Second World War, and the Holy See, but concludes that an important factor in granting Permanent Observer status is "international (political) standing." *Id.* She concludes by stating that, "Normally however, observers from States [after mentioning Liechtenstein, the German Republics, and the Holy See] are fully accepted by UN Members; they enjoy the usual diplomatic status, and there are no problems of representativity involved." *Id.* at 325.

264. *See* 1951 U.N.Y.B. 36, 527 n.55, U.N. Sales No. 1952.1.30.

265. *Id.*

Relating to the Status of Refugees and the draft Protocol Relating to the Status of Stateless Persons” that was also held in 1951.²⁶⁶ Moreover, the Holy See participated in several Charter and Treaty organizations of the United Nations including the Food and Agriculture Organization (observer) (1948); the World Health Organization (observer) (1951); and the United Nations Educational, Scientific, and Cultural Organization (observer) (1951). In 1955, the Holy See, at the request of the Secretary General, Dag Hammarskjöld, was invited to the conference that established the International Atomic Energy Agency (IAEA).²⁶⁷ Since the goal of the IAEA was to ensure the peaceful use of atomic energy, it was believed by the Secretary General and others that the Holy See’s presence at the conference and participation in the Agency would be vital to the organization’s success.²⁶⁸ The Holy See also became an Observer to the UN’s Economic and Social Council (ECOSOC) in 1956.²⁶⁹

On March 21, 1964, the Holy See joined the United Nations as a Permanent Observer. While some of these States who previously held Permanent Observer Status have subsequently joined the United Nations as Member States,²⁷⁰ the Holy See remains as non-Member State who participates in the UN’s work through the Status of Permanent Observer.²⁷¹

B. *The Status of Permanent Observer*

Article 1 of the United Nations Charter declares that the purposes of the United Nations include: (1) maintaining international peace and security; (2) developing friendly relations amongst nations “based on respect for the principle of equal rights and self-determination of peoples; and (3) achieving international cooperation to solve “international problems of an economic, social, cultural, or humanitarian character” and promoting and encouraging “respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion.” As the discussion in Parts II and IV demonstrates, these purposes are consistent with and

266. *Id.* at 520.

267. See, Henri de Riedmatten, *Présence du Saint-Siège dans les organismes internationaux*, at 73 (copy on file with the *Catholic University Law Review*); see also, CARDINALE, *supra* note 5, at 233.

268. See, RIEDMATTEN, *supra*, note 267, at 73-74.

269. See U.N.Y.B. *supra* note 264, at 532.

270. See *infra* note 286 and accompanying text.

271. See *Permanent Missions to the United Nations—List of Non-Member States Maintaining Permanent Observer Missions at UN Headquarters*, <http://www.un.org/en/members/nonmembers.shtml> (last visited Aug. 15, 2000).

complementary to the mission that the Holy See has exercised in international affairs for many centuries.

Articles 3 and 4 of the Charter address membership in the United Nations. While Article 3 largely deals with the original membership of the organization, Article 4 concerns membership in general and begins by stating that membership in the UN “is open to all other peace-loving states.”²⁷² This same provision goes on to indicate that it is necessary for the UN itself to conclude that, in its judgment, the State that is applying for membership will “carry out these obligations.”²⁷³ In essence, for a petitioning State to be admitted as a member of the United Nations, three things must occur: (1) a conclusion is made that the petitioning State is peace-loving; (2) the UN is satisfied that the petitioner accepts the obligations of membership as defined by the Charter; and (3) the General Assembly approves the recommendation of the Security Council to admit the applicant.

Neither the Charter nor any other official document of the UN defines what a State is for purposes of membership application. Professor Konrad Ginther, however, has provided some commentary on the membership criteria of Article 4.²⁷⁴ He noted that a crucial element of statehood is the entity’s independence as evidenced by its own self-governing autonomy.²⁷⁵ In addition, there are the traditional requirements under international law: “a defined territory, a permanent population, and an independent government.”²⁷⁶

However, those States which have elected to be permanent observers are not regulated by the same norms as those with member status. The procedures regulating participation and status of the permanent observer states developed through the practice of the Secretary General and the General Assembly.²⁷⁷ Although the Vienna Convention on the Representation of States in Their Relations with International Organizations of a Universal Character has not entered into force, its text provides some insight into the relationship between international organizations, such as the United Nations, and states which elect to be observers rather than

272. U.N. Charter art. 4, para. 1.

273. *Id.* U.N. Charter art. 4, para. 2 goes on to state that, “The admission of any such state to membership . . . will be effected by a decision of the General Assembly upon the recommendation of the Security Council.”

274. See THE CHARTER OF THE UNITED NATIONS: A COMMENTARY 162-66 (Bruno Simma et. al eds. 1994) [hereinafter Commentary].

275. *Id.* at 162.

276. *Id.* This author observes that the suggestion of the Legal Counsel of the UN to provide for associate membership in the organization was not pursued. *Id.*

277. *Id.* at 168.

members.²⁷⁸ The text of the convention states that observer missions²⁷⁹ accomplish several vital roles. First, the permanent observer mission represents the State that sends it and safeguards the State's interests with the Organization.²⁸⁰ Second, the observer mission enables the observer state to understand the work of the Organization and keeps its government informed of such work.²⁸¹ Third, the observer mission provides a structure for cooperation and negotiation between the observer state and the Organization.²⁸²

Several publicists involved with the 1994 compilation of the commentary on the United Nations charter²⁸³ identified, in their essays, a number of subjects that elected, at least for a time, the status of permanent observers.²⁸⁴ As of today, the Holy See remains the only permanent observer state observer, whereas the others have petitioned and been admitted as member states.²⁸⁵ It is important to understand that throughout the history of the United Nations, there have been permanent observer missions present at and taking part in UN activities. For example, in 1949, the Secretary General stated that Italy, the Republic of Korea, and Switzerland "had appointed observers to follow the work of the United Nations . . . [and] the Secretary-General reported that he had welcomed the observers and had given their missions every possible facility, though their status had not yet been determined."²⁸⁶

Although a number of states petitioned for and received observer status, the United Nations never developed a formal policy for considering and

278. See *Official Documents—United Nations Conference on the Representation of States in Their Relations with International Organizations*, 69 AM. J. INT'L L. 730 (1975).

279. *Id.* at 731. Article 1(8) defines "permanent observer mission" as "a mission of permanent character, representing the State, sent to an international organization by a State not a member of the Organization."

280. *Id.* at Article 7(a).

281. *Id.* at Article 7(b).

282. *Id.* at Article 7(c).

283. See COMMENTARY, *supra* note 274.

284. See COMMENTARY, *supra* note 274, at 169 (commentary by Professor Ginther) and at 363 (commentary by Professor Schaefer).

285. Nauru on September 14, 1999; Tonga on September 14, 1999; Monaco on May 28, 1993; and Kiribati on September 14, 1999. Switzerland as of September 10, 2002.

286. See 1948-49 U.N.Y.B. 973, U.N. Sales No. 1950.1.11. The Secretary General also indicated that Albania had informed him of its wish to send an observer to the UN. *Id.* Other observer States have included the Federal Republic of Germany, the Republic of Vietnam, Austria, Finland, Japan, and Spain. See A. Glenn Mower, Jr., *Observer Countries: Quasi Members of the United Nations*, 20 INT'L ORG. 266, 266-67 (1966).

granting these requests.²⁸⁷ Permanent observer status has been described as “an institutional device . . . unplanned and vaguely defined [that] has permitted states not Members of it to enjoy a meaningful relationship to the Organization.”²⁸⁸ Switzerland’s request, in 1946, to be an observer rather than a member, appears to have been motivated by its desire to maintain its neutrality without sacrificing some relevant level of participation in an international organization destined to become an important arena for international relations.²⁸⁹ Of course, as previously discussed, the Holy See also exercised neutrality for many years *vis-à-vis* certain issues, so that it might be able to discuss peace with the belligerents involved in any armed conflict.²⁹⁰ In short, observer status provides a useful mechanism that allows neutral international personalities to refrain from participation that would compromise their neutrality. Nevertheless, such entities are presented with ample opportunities to contribute to the general purposes and goals of the UN which include: maintaining international peace and security, developing friendly relations, achieving international cooperation, and promoting and encouraging respect for human rights and fundamental freedoms.²⁹¹

It is essential to consider several important factors that legitimate the status of State Observer. First, no state member objected to permanent observers through formal United Nations channels or procedures. Second, several Secretaries-General have approved and encouraged the participation of permanent observers in prominent UN activities. Secretary-General Trygve Lie’s approval was previously discussed.²⁹² Secretary General U Thant observed that, in the interest of keeping peace — a frequent activity of the Holy See²⁹³ and a fundamental purpose of the UN²⁹⁴ — non-member

287. See generally, Erik Suy, *The Status of Observers in International Law*, 160 COLLECTED COURSES OF THE HAGUE ACADEMY OF INTERNATIONAL LAW 1978 II (RECUEIL DES COURS) (1979); see also MOWER, JR., *supra* note 286.

288. MOWER, JR., *supra* note 286, at 266.

289. *Id.* at 271; see also SUY, *supra* note 287, at 91, 94. In a 1962 opinion, the Office of Legal Affairs of the UN pointed out that, “A Permanent Observer was designated by the Government of Switzerland in the summer of 1946 and the practice of designating such Observers has been followed by Switzerland since that time. Observers were subsequently appointed by certain States which later became Members of the United Nations, including Austria, Finland, Italy and Japan.” 1962 U.N. Jurid. Y.B. 263 n.1 (Provisional Edition). As previously noted, Switzerland became a State Member of the United Nations in 2002.

290. See *supra* note 65.

291. U.N. Charter art. 1.

292. See *supra* note 290 and accompanying text.

293. See generally, Part II.F and the activities of the Twentieth Century popes in their various peace initiatives.

294. UN Charter, Article 1.

states should be “encouraged to maintain observers at [the] United Nations”²⁹⁵ In 1960, Secretary-General Dag Hammarskjöld mentioned that he would continue to accept the presence and participation of observer states “where the country in question is recognized diplomatically . . . by a majority of United Nations Members.”²⁹⁶ In the case of the Holy See, when it became a permanent observer in March of 1964, it had diplomatic relations with thirty-eight of the existing one hundred and fifteen Members of the United Nations.²⁹⁷ Members of the Soviet Bloc did not exchange diplomatic relations with the Holy See at that time.²⁹⁸ However, by the same token, no member of this bloc raised an objection to the Holy See participating as a permanent observer. The Soviet Bloc did not protest the Holy See’s participation in the 1949 Geneva diplomatic conference; consequently, the Holy See participated in the negotiations that led to the four Geneva Conventions of 1949. Moreover, even though the Soviet Union, and states subjected to its influence, did not engage in diplomatic relations with the Holy See for many years, Soviet diplomats nonetheless recognized the Holy See as a world power despite its lack of territory.²⁹⁹ As already stated, today the Holy See enjoys diplomatic relations with most of the member states of the United Nations.³⁰⁰

In an opinion prepared by the UN’s Office of Legal Affairs, another factor considered in a request by a non-member to be a permanent observer, is whether it is a member of any specialized agency or other international organization affiliated with the United Nations.³⁰¹ The Office of Legal Affairs acknowledged that there “are no specific provisions relating to Permanent Observers” in the Charter, Headquarters Agreement, or in the General Assembly resolution of December 3, 1948, addressing Permanent Members.³⁰² While taking into account the words and actions of the Secretary-General, the Office of Legal Affairs further noted that no action of the General Assembly, or any express legal provision, addresses the status of

295. MOWER, JR., *supra* note 286, at 277.

296. *Id.* at 273.

297. ANUARIO PONTIFICIO 949-71 (1964); 1964 U.N.Y.B. 579-80, U.N. Sales No. 65.I.1.

298. *See* GRAHAM, *supra* note 5, at 349-384; *see also* Okeke, *supra* note 148, at 70-72.

299. GRAHAM, *supra* note 5, at 381 n. 20.

300. *See supra* note 198 and accompanying text.

301. *See* 1962 U.N. Jurid. Y.B. 236 (Provisional Edition) (stating: “In deciding whether or not to accord certain facilities to a Permanent Observer, it has been the policy of the Organization [UN] to make such facilities available only to those appointed by non-members of the United Nations which are full members of one or more specialized agencies and are generally recognized by Members of the United Nations.”).

302. *Id.*

permanent observers; consequently, the granting of this status “rests purely on practice as so far followed.”³⁰³

The Holy See has been a member of specialized agencies and organizations.³⁰⁴ In addition to being a Permanent Observer at the United Nations headquarters in New York and the United Nations offices in Geneva and Vienna, it participates in the following international organizations in the specified manner: it is a member of the CTBTO (Comprehensive Nuclear Test Ban Treaty Organization Preparatory Commission); the IAEA; the ICMM (International Committee of Military Medicine); the OPCW (Organization for the Prohibition of Chemical Weapons); UNCTAD (UN Conference on Trade and Development); UNHCR (UN High Commissioner for Refugees); UNIDROIT (International Institute for the Unification of Private Law); and the WIPO (World Intellectual Property Organization). It holds observer status in: the FAO (Food and Agriculture Organization); the ILO (International Labour Organisation); the IOM (International Organization for Migration); the UNDCP (UN International Drug Control Programme); UNEP (UN Environment Programme); UNESCO; UNIDO (UN Industrial Development Organization); the WFP (World Food Programme); the WHO (World Health Organization); and the WTO (both the World Trade Organization and the World Tourist Organization).³⁰⁵ Under the charge of the Holy See, the Vatican City State is a regular member of the Universal Postal Union, the International Telecommunications Union, the International Wheat Council, INTELSAT, EUTELSAT, and the European Conference for the Administration of Postal and Telecommunications.³⁰⁶

A final illustration of the significance of the Holy See’s permanent observer status is demonstrated by its “voluntary contributions” to the Organization’s work.³⁰⁷ In this context, the Holy See, along with the United Kingdom and Norway, recently contributed to a trust fund enabling some of the “least developed countries” to participate in the work of the Preparatory Commission for the International Criminal Court that has convened in New

303. *Id.*

304. *See supra* note 271 and accompanying text.

305. *Bilateral and Multilateral Relations of the Holy See*, http://www.vatican.va/roman_curia/...0010123_holy-see-relations_en.html.

306. ANNUARIO PONTIFICIO *supra* note 132, at 1428.

307. MOWER, JR., *supra* note 286, at 278.

York since the 1998 Rome Diplomatic Conference of Plenipotentiaries for the International Criminal Court.³⁰⁸

Finally, the Holy See's position as a permanent observer at the United Nations is not a unique circumstance. Furthermore, its status is in accordance with all established norms. The Holy See's presence has been accepted by the other sovereign States. Through their acceptance of the Holy See, these member states recognize and publicly acknowledge its many contributions to the purposes and goals of the United Nations.³⁰⁹

In 2004, after a series of fruitful discussions including the Holy See, United Nations officials, and consultations with various Member States, the General Assembly adopted GA resolution 58/314 on July 16, 2004, formalizing the participation of the Holy See in the work of the United Nations. This resolution formally acknowledged the Holy See as an Observer State rather than some other kind of legal entity. The rights and privileges of the Holy See include the right to participate in the general debate of the General Assembly; the right to be inscribed on the speakers' list; the right to make interventions like other States; the right of reply; the right to have its communications circulated directly among the Member States of the organization; the right to raise points of order relating to any proceedings involving the Holy See; the right to co-sponsor draft resolutions and decisions that make reference to the Holy See; and the right to be seated after the final State Member and before other observers when it participates as a non-Member State observer.³¹⁰

This resolution dealing with the rights of State Observers is believed to be the first of its kind within the United Nations organization. A copy of this resolution appears at the end of this essay as Appendix I.

CONCLUSION

The Holy See is a unique entity amongst other subjects of international law. Notwithstanding its uniqueness, the Holy See enjoys an international personality similar to that of other States. Its ancient existence as a sovereign

308. Proceedings of the Preparatory Commission at its fourth session (13-31 March 2000), PCNICC/2000/L.1, 30 March 2000; and Proceedings of the Preparatory Commission at its fifth session (12-30 June 2000), PCNICC/2000/INF/3, 6 July 2000.

309. *See supra* Part V.B. and related text concerning the purposes of the United Nations Organization.

310. When an "all States" formula is used to convene any gathering sponsored by the United Nations, e.g., a diplomatic conference working on a treaty, the Holy See is a full Member of such a gathering and is seated in alphabetical order with other States.

transcends territorial possession. It is a truly international person because its presence, unlike that of individual States, is universal.

Due to its uniqueness, it often seems to be an entity that defies understanding. Yet, with a patient examination of the extensive history of its participation in the international realm, the essential nature of the Holy See can be understood. The inquirer reaches the inevitable conclusion that the Holy See is not simply a religion, but an international personality that exercises sovereignty as any subject of international law. These conclusions are supported by the history of longevity and participation in international affairs and diplomatic relations. This essay has also demonstrated that the Holy See meets the relevant criteria that define international personality and sovereignty under international law. It illustrates how State practice, custom, and treaty law treat the Holy See as a subject of international law. Lastly, this essay has met and answered the questions raised regarding the status of the Holy See at the United Nations.

In essence, the Holy See has been and remains a vibrant part of the international realm. Its voice in this realm speaks not just for some, but for all of humanity. Although some may prefer to remove this voice, it is a presence that brings light to the world.³¹¹

311. *John* 1:5.