Catholic University Law Review

Volume 50
Issue 2 *Winter 2001*

Article 3

2001

# The International Personality and Sovereignty of the Holy See

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# ARTICLES

# THE INTERNATIONAL PERSONALITY AND SOVEREIGNTY OF THE HOLY SEE

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*"Go therefore and make disciples of all nations . . . ."*[1]
*"Go into all the whole world and proclaim the good news to the whole creation."*[2]

*"And I tell you, you are Peter, and on this rock I will build my church, and the gates of Hades will not prevail against it. I will give you the keys of the kingdom of heaven, and whatever you bind on earth will be bound in heaven, and whatever you loose on earth shall be loosed in heaven."*[3]

*"[I]t must not be forgotten that the Church has the right and the duty not only to safeguard the principles of ethics and religion, but also to intervene authoritatively with Her children in the temporal sphere, when there is a question of judging the application of those principles to concrete cases."*[4]

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1. *Matthew* 28:19 (New International).

2. *Mark* 16:15 (New International) (footnote omitted). In his October 4, 1965 address to the United Nations in New York, His Holiness, Pope Paul VI, relied on this scripture in the beginning of his address when he said: "[H]ere 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.*

3. *Matthew* 16:18-19 (New International); *see also* SIDNEY EHLER, TWENTY CENTURIES OF CHURCH AND STATE: A SURVEY OF THEIR RELATIONS IN PAST AND PRESENT 30-32 (1957) (explaining this passage commissioning Saint Peter as the principal disciple amongst the others).

4. Pope John XXIII, *Pacem in Terris: Encyclical Letter On Establishing Universal Peace in Truth, Justice, Charity and Liberty* (Apr. 11, 1963) (on file with *Catholic University Law* Review) [hereinafter *Pacem in Terris*].

## I. INTRODUCTION

Within the realm of international order, the concepts of statehood, international personality, and sovereignty are generally well understood. Yet evidence of disagreement and debate exists. Each of these subjects is characterized by some measure of variety in its 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.[5] However, it would seem that the most essential 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.[6] 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.[7] 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 essay focuses on the Holy See, and with this subject traditional categories of sovereignty and personality seem to falter. When the Holy See is the subject of discussion, a variety of perspectives concerning its sovereignty and personality emerge.[8] One common concern involves the

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5. *See* Montevideo Convention on Rights and Duties of States (Inter-American), Dec. 26, 1933, art. 1; *see also* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 201 (1986).

6. *See* discussion *infra* Part III.

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

8. *See generally* JOSEPH BERNHART, THE VATICAN AS A WORLD POWER (George N. Shuster, trans.) (1939); HYGINUS EUGENE CARDINALE, THE HOLY SEE AND THE INTERNATIONAL ORDER (1976); CARL CONRAD ECKHARDT, THE PAPACY AND WORLD AFFAIRS (1937); ROBERT A. GRAHAM, S.J., VATICAN DIPLOMACY: A STUDY OF CHURCH AND STATE ON THE INTERNATIONAL PLANE (1959); ERIC O. HANSON, THE CATHOLIC CHURCH IN WORLD POLITICS (1987); J. DEREK HOLMES, THE PAPACY IN THE MODERN WORLD (1981); JACQUES MARITAIN, THE THINGS THAT ARE NOT CEASAR'S (J.F. Scanlan, trans., French ed.) (1930); CHARLES PICHON, THE VATICAN AND ITS ROLE IN WORLD AFFAIRS (Jean Misrahi, trans.) (1950); *see also generally* CHURCH AND STATE THROUGH THE CENTURIES: A COLLECTION OF HISTORIC DOCUMENTS WITH COMMENTARIES (Sidney Z. Ehler, LL.D. & John B. Morrali, trans. & eds.) (1954) [hereinafter CHURCH AND STATE] (containing an anthology of documents and commentary on the general themes of this essay). A work not 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).

person and status of the Pope. Another concern includes the position of the Vatican City State. A third concern 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.[9]

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*[10] 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.[11] Its import, in essence, transcends the restraint of geographic location. Consequently, deciphering the nature of the Holy See's personality and the sovereignty it 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

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9. The 1917 Code of Canon Law (Codex luris Canonici (1917)) states that:

> In 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.

1917 CODE c.7. The 1983 Code of Canon Law in (Codex luris Canonici (1983)) 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. 1917 CODE c.100. Nonetheless, these two moral persons are United by the Roman Pontiff who heads each respectively. Canon 113, section 1 of the 1983 Code states that "[t]he Catholic Church and the Apostolic See have the nature of a moral person by the divine law itself." 1983 CODE c.113, § 1. Both of these entities, the Catholic Church and the Apostolic (Holy) See, constitute distinct *juridical* persons.

10. The original Latin term *Sancta Sedes* is therefore translated as "Holy See." CASSELL'S LATIN DICTIONARY 533, 543 (5th ed. 1968).

11. *See generally* 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); Gordon Ireland, *The State of the City of the Vatican,* 27 AM. J. INT'L L. 271 (1933).

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 article attempts to explain why this position inaccurately characterizes the Holy See's nature and identity. This article demonstrates why the Holy See is a subject of international law, which possesses a recognized personality and exercises sovereignty in the law of nations. Part II 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 III examines the general principles of international law that define the concepts of international personality and sovereignty and how the Holy See's circumstances fall within the relevant criteria. Part IV 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 V responds to questions about the status of the Holy See at the United Nations.

## II. 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.[12] 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.[13] The 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

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

13. 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."

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

world.[14] 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.[15]

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.[16] 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 finally, (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.[17]

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14. *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).

15. *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).

16. *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.

17. *See generally* 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 generally* JOSEPH LECLER, S.J., THE TWO SOVEREIGNTIES: A STUDY OF THE RELATIONSHIP BETWEEN CHURCH AND STATE (1952) (providing a more detailed, historical perspective about the transformation of the Christian church).

The rise of the Church's role became evident through the convocation of a series of important councils that addressed issues over which the universal Church expressed concern.[18] These councils were not simply concerned with spiritual and Church issues, but 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.[19] 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.[20] 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,[21] it is evident that the Holy See began to acquire territory on the Italian peninsula during the reigns of Pepin and Charlemagne.[22] These territories eventually enabled the Holy See to resemble other temporal powers with few interruptions from the 8th century until 1870.[23] 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 was protecting these territories and the rest of Christendom from the invasions of non-Christians from the North and East.[24]

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18. *See generally* New Advent, *General Councils* (visited Mar. 30, 2000) <http://www.newadvent. org/cathen/04423f.htm>.

19. *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. *See id.*

20. *See* CARDINALE, *supra* note 8, 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.*

21. *See* CHURCH AND STATE, *supra* note 8, at 15-22 (discussing the "Donation of Constantine" along with a reproduction of the text).

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

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

24. *See* THOMAS F. X. NOBLE, THE REPUBLIC OF ST. PETER: THE BIRTH OF THE PAPAL STATE 680-825, at 9 (1984) ("From the time of Pope Gregory I [590-604] the Church had become de facto the key power in Italy."). Noble writes: "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 11th century and the Reforms of Pope Gregory VII transformed the exercise of papal power and the authority of the Holy See.[25] While the position of temporal sovereigns, including the Holy Roman Emperor, waxed and waned, the Pope's power grew and stabilized with few exceptions.[26] At the dawn of the Second Millennium, Europe essentially functioned as a Christian realm united in faith under the Papal tiara.[27]

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 15th century.[28] Although he would ultimately prevail over Pope Gregory, Emperor Henry IV succumbed to and dealt with papal authority for some years.[29] For example, in October 1076, Henry declared his obedience to the Holy See before God, Pope, and empire.[30] 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.[31] A further illustration of the Holy See's position emerges from

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25. *See generally* Ehler, *supra* note 3, at 23-37; *see also generally* 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).

26. *See generally* 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).

27. *See id.*

28. *See* Philip Hughes, *The International Action of the Papacy—Introductory: Before the Reformation, in* THE TABLET, Nov. 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.

29. *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).

30. 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* (visited Oct. 16, 2000) <http://www.yale. edu/lawweb/avalon/medieval/inv07.htm>.

31. The Pope asserts papal primacy over temporal primacy in the "two swords"

events in 1155 when Pope Adrian IV issued a papal bull that empowered King Henry II to conquer Ireland.[32]

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 his 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.[33] 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

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doctrine. at His Holiness Pope Boniface VIII, *Unam Sanctam*, (visited Oct. 12, 2000) ‹http://www.newadvent.org/docs/bo08us.htm›. Boniface stated that "[w]e are informed by the texts of the gospels that in this Church and in its power are two swords; namely, the spiritual and the 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 . . . ."). 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* EHLER, *supra* note 3, 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). For further discussion see Pope Leo XIII, *Immortale Dei: Encyclical Letter On the Christian Constitution of States* (Nov. 1, 1885), *reprinted in* THE PAPAL ENCYCLICALS 1878-1903, Nos. 11-13, (1990) [hereinafter *Immortale Dei*], where the Pope addresses the Church's powers and sovereignties in a more contemporary light.

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

33. Pope Gregory X, *Papal Protection of the Jews* (visited Aug. 28, 2000) <http://www.us-israel.org/jsource/anti-semitism/Papal_Protection_of_the_ Jews.html>. However, 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 Christian communities. *See* His Holiness Pope Benedict XIV, *A Quo Primum, Encyclical on Judaism in Poland* (visited July 25, 2000) <http://www.newadvent.org/docs/be14aq.htm>. 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 October 28, 1965, which repudiated past actions and attitudes against the Jewish people.

protect Jews from persecution and forced conversion.[34] The Holy See, through this declaration, began its efforts to 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.[35] 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 which separated the zones of colonial exploration between then-great world powers, Portugal and Spain.[36]

### *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

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34. As Pope Gregory X 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 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 . . . .

35. *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).

36. *See* Edward G. Bourne, *The Demarcation Line of Alexander VI: An Episode of the Period of Discoveries*, 1 YALE REV. 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); *see also* CHURCH AND STATE, *supra* note 8, at 155-59 (providing the text of the Bull *Inter Caetem Divinae* promulgated on May 4, 1493).

monarchs and their temporal sovereignty. National challenges arose against the Holy Roman Emperor and the Papacy. The Holy See also participated in the quest for 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 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.[37] 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.[38]

At the end of the 16th 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.[39] 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.[40] 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

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

38. His Holiness Pope Paul III, *Sublimus Dei* (visited Oct. 12, 2000) <http://www.newadvent. org/docs/pa03sd.htm>. 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 April 22, 1639, Benedict XIV's Bull of December 20, 1741, and Gregory XVI's Constitution Against the Slave Trade of November 3, 1839, did the same. *See* JOHN EPPSTEIN, THE CATHOLIC TRADITION OF THE LAW OF NATIONS 418-26 (1935).

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

40. *See* CARDINALE, *supra* note 8, at 70.

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.

### *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.[41] The Peace of Augusburg in 1555,[42] the Edict of Nantes in 1598,[43] and the Peace of Westphalia in 1648[44] decreased the likelihood of a papal restoration of the *Respublica Christiana*. By the early 17th 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 recognized in the early 19th century that the Holy See was still a sovereign they were required to engage.[45]

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

The 19th century brought serious and material challenges to the Holy See. For example, in the early part of the century, Napoleon Bonaparte briefly incarcerated the Pope and the Papal States remained under French control from 1809 to 1814.[46] 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 surrounding secularism in Italy and threats to the security of the Papal States.[47] The

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41. *See* CHURCH AND STATE, *supra* note 8, at 163-64.
42. *See id.* at 166-73.
43. *See id.* at 184-88.
44. *See id.* at 190-93.
45. *See* discussion *infra* notes 254-59 and accompanying text.
46. *See* OPPENHEIM, INTERNATIONAL LAW: A TREATISE 251 n.1 (Lauterpacht ed., 8th ed. 1955).
47. The English translation of this encyclical's title is "On the Church in the

actual invasion of Rome by unification troops and the occupation of the Papal domain in 1870 prompted Pius IX to issue his encyclical *Respicientes*, which registered the Holy See's protest to and condemnation of the confiscation of the Pontifical territories. The Holy See 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.[48]

Even without territorial possession, the Holy See increased the number of states with which it exchanged legations.[49] New diplomatic missions continued to arise during this era.[50] As one observer of this period noted, "[g]overnments which had no relations have established them. Governments which had broken off relations have restored them.

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Pontifical States."

48. *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); LILLIAN PARKER WALLACE, THE PAPACY AND EUROPEAN DIPLOMACY—1869-1878 (1948).

49. *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. *See id.* at 97. As Father Graham points out, this situation developed in stages. *See id.* 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 Pontiffs were in peaceful possession of the Temporal Power. The outbreak of the first World War only confirmed this trend.

*Id.* at 101.

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

> [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.

*Id.* Kunz notes that by the end of 1951, the Holy See had diplomatic relations with 43 states. *See id.* at 314 n.27; *see also* LUKE LEE, 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.

*Id. See also* Treaty of the Lateran, Feb. 11, 1929, Italy-Vatican City, O.V.T.S. 161, Eur. T.S. No. 590019 [hereinafter Lateran Treaty].

Governments which had second-class relations have raised them to first class."[51] Moreover, this growth in diplomatic relations was "not with Catholic princes, but with 'democratic' states, represented by parliaments and prime ministers."[52]

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.[53] Other states in Europe, Latin America, or elsewhere followed suit and requested that the Holy See arbitrate or mediate their disputes.[54] Some of the requesting countries were not traditionally Catholic countries, such as Great Britain, the United States, and Germany.[55] States have also relied upon the neutrality and unique moral voice of the Holy See for an amicable resolve of their international disputes.[56] 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,[57] other commentators argued the contrary.[58]

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

52. *Id.* at 405. Interestingly, this same commentator speculated about a rapprochement between the Holy See and Italy. *See id.* at 403-04. This reconciliation came about eight years later with the Lateran Treaty of February 11, 1929. *See generally* Lateran Treaty, *supra* note 50.

53. *See* 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.

54. *See* EPPSTEIN, *supra* note 38, at 470-74 (cataloguing 30 instances in which the Holy See either mediated or arbitrated disputes between rival States).

55. *See* CARDINALE, *supra* note 8, at 89.

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

57. *See generally* Simon E. Baldwin, *The Mission of Gov. Taft to the Vatican*, 12 YALE L.J. 1 (1902). Baldwin 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.

In the late 19th 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.[59]

This Pope, along with his successors in the 20th century, understood that peace in the world must be accompanied by justice on a domestic and an international level. Leo XII also acknowledged this principle in his encyclical *Rerum Novarum*.[60] This same pontiff also instructed that while no particular form of government is outright condemned,[61] the mutual goal of every political structure is the fostering of the common

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Congress. *See id.* at 3. Baldwin fails to mention that Article II of the U.S. Constitution requires Senate confirmation in an 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. *See* 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 Baldwin neglected to understand the intricacies of Papal diplomacy involving the instructions needed to be sent from Rome to the Apostolic Delegate assigned to the Philippines. *See id.* at 1-2.

58. 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) and 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.

59. *See Imortale Dei, supra* note 31, at No. 12.

60. *See* Pope Leo XIII, *Rerum Novarum: Encyclical Letter on the Capital and Labor* (May 15, 1891), *in* THE PAPAL ENCYCLICALS 1878-1903 (1990). Succeeding popes, such as Pius XI, recalled and renewed this in *Qaudragesimo Anno: Encyclical Letter on Reconstruction of the Social Order* (May 15, 1931), *in* THE PAPAL ENCYCLICALS 1878-1903 (1990); Paul VI in his Apostolic Letter *Octogesima Adveniens* (May 14, 1971), *in* 16 CHURCH DOCUMENTS Q. 137 (1971); and John Paul II, *Centesimus Annus: Encyclical Letter* (May 1, 1991), in THE ENCYCLICALS OF JOHN PAUL II (1981). 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.

61. *See Immortale Dei, supra* note 31, at No. 36.

good.[62]

### F. The Contemporary Era—The 20th 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 20th 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.[63]

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,[64] the Holy See viewed itself as an essential component of international discussions and action taken concerning peace in the world.[65]

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62. *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, Nov. 23, 1940, at 406. The Church's social teachings of the Holy See's pronouncements frequently confront the theme of common good. *See generally* JACQUES MARITAIN, THE PERSON AND THE COMMON GOOD (1948).

63. Sisley Huddleston, *The Vatican's New Place in World Politics*, 13 CURRENT HISTORY, Nov. 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 generally* EMIL GUERRY, THE POPES AND WORLD GOVERNMENT (1964) (providing a general overview of the Holy See's rule in 20th Century international relations); HUMPHREY JOHNSON, VATICAN DIPLOMACY IN THE WORLD WAR (1933).

64. *See* Robert A. Graham, S.J., *The Vatican in World Diplomacy: France*, AMERICA, Nov. 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).

65. *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 Untrammeled 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 DUBLIN REV. 134, 138 (1915). Bishop Frederick William describes the Holy See's neutrality in World War I as:

> [P]oles 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 HIST. 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 is 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). As Luigi Sturzo has pointed out, neutrality and justice can be siblings. *See* Luigo 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.

*Id.* at 220. 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

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.[66] 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 16th century,[67] he issued an encyclical exhorting Latin Americans to act more justly in the social and economic spheres, especially with regard to native peoples.[68] Specifically, he spoke about the outrageous practice of trafficking women and children for pecuniary benefit.[69] 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."[70]

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.[71] 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

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> 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.

*Id.* As Francis Murphy has pointed out, "[w]hatever 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." Murphy, *supra* note 17, at 384.

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

67. *See supra* note 38 and accompanying text.

68. *See* Pope Pius X, *Lacrimabili Statu: Encyclical Letter on the Indians of South America* (June 7, 1912), *in* THE PAPAL ENCYCLICALS 1903-1939, at 178 (1990) [hereinafter *Lacrimabili Statu*].

69. *See id.* at No. 2. The Second Vatican Council reiterated this concern among with many others. *See Pastoral Constitution on the Church in the Modern World (Gaudium et Spes), in* THE DOCUMENTS OF VATICAN II, 199, 226 (1962) (stating, in pertinent part, that "whatever insults human dignity, such as ... the selling of women and children ... are infamies indeed"). Interestingly, many years later the drafters of the Statute for the International Criminal Court, acknowledged these concerns as crimes against humanity. *See* Statute of the International Criminal Court, Article 7.1(c) (noting that Article 7.2(c), which deals with crime against humanity specifically addresses enslavement, trafficking in persons, particularly women and children).

70. *Lacrimabili Statu, supra* note 58, at No. 5.

71. *See, e.g.*, Pope Benedict XV, *Ad Beatissimi Apostolorum: Encyclical Letter Appealing for Peace* (Nov. 1, 1914), *in* THE PAPAL ENCYCLICALS 1903-1939, at 180 (1990).

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."[72] The Popes of the 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 of armed conflict.

Pope Benedict also took steps to relieve the victims of the war's devastation—especially children.[73] 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.[74] The second encyclical called all individuals to practice forgiveness and reconciliation.[75] 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."[76] 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.[77]

Benedict also encouraged others to join the Holy See in providing humanitarian aid to the many innocent people victimized by the war.[78] His understanding of the importance of diplomatic relations and its contribution toward world peace caused him to increase the number of

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72. Benedict XV, *Pacem, Dei Munus Pulcherrimum: Encyclical Letter On Peace and Christian Reconciliation* (May 23, 1920), No. 16, *in* THE PAPAL ENCYCLICALS 1903-1939 (1990); *see also generally* Denis Gwynn, *Vatican Diplomacy and Peace,* 413 DUBLIN REV. 233 (1940).

73. *See, e.g.*, Pope Benedict XV, *Paterno Iam Diu: Encyclical Letter on the Children of Central Europe* (Nov. 24, 1919), *in* THE PAPAL ENCYCLICALS 1903-1939, at 184 (1990).

74. *See* Pope Benedict XV, *Quod Iam Diu: Encyclical Letter on the Future Peace Conference* (Dec. 1, 1918), *in* THE PAPAL ENCYCLICALS 1903-1939, at 182 (1990).

75. *See* Pope Benedict XV, *Pacem, Dei Munus Pulcherrimum: Encyclical Letter Peace, the Beautiful Gift of God* (May 23, 1920), Nos. 8, 14, *in* THE PAPAL ENCYCLICALS 1903-1939, at 185 (1990).

76. *Id.* at No. 17.

77. *Id.*

78. *See* ECKHARDT, *supra* note 8, at 260-61.

diplomatic exchanges from fourteen to twenty-six during his pontificate.[79] 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.[80] However, these efforts to ignore the Holy See's 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 20th century involved the great efforts of Pius XI and Pius XII to avoid the Second World War and the Holocaust.[81] 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.[82] 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.[83] 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.[84]

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

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79. *See* 2 NEW CATHOLIC ENCYCLOPEDIA 280 (1967).

80. *See* CARDINALE, *supra* note 8, at 88.

81. *See generally* 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 20th century).

82. Pope Pius XI, *Ubi Arcano Dei Consilio: Encyclical Letter on the Peace of Christ in the Kingdom of Christ* (Dec. 23, 1922), No. 7, *in* THE PAPAL ENCYCLICALS 1903-1939, at 192 (1990).

83. *See id.* at No. 25.

84. *See* Christopher Dawson, *Religion and the Totalitarian State,* 14 CRITERION 1 (1934). The author concludes with the reflection that "[t]he 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).

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.[85] 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.[86]

Several years later, the horrifying developments in Nazi Germany compelled Pius XI to promulgate his encyclical *Mit Brennender Sorge*.[87] The publication of this encyclical in Germany proved to be difficult and entailed great risk that produced devastating consequences, which the Nazis realized countered their immediate interests.[88] In the Concordat of 1933, Pius catalogued the abuses of the Third Reich,[89] the threats to religious freedom,[90] and the persecution of certain groups of people such as those belonging to the Jewish faith.[91] 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.[92]

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.[93] 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.[94] The Pope considered the mounting hostilities between

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85. *See* Pope Pius XI, *Non Abbiamo Bisogno: Encyclical Letter on Catholic Action in Italy* (June 29, 1931), *in* THE PAPAL ENCYCLICALS 1903-1939, at 210 (1990) [hereinafter *Non Abbiamo Bisogno*]. 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).

86. *See Non Abbiamo Bisogno*, *supra* note 85, at No. 22.

87. Pope Pius XI, *Mit Brennender Sorge: Encyclical Letter on the Church and the German Reich* (Mar. 14, 1937), *in* THE PAPAL ENCYCLICALS 1903-1939, at 218 (1990) [hereinafter *Mit Brennender Sorge*].

88. *See* CHURCH AND STATE, *supra* note 8, at 518-19.

89. *See Mit Brennender Sorge*, *supra* note 87, at Nos. 5-6.

90. *See id.*

91. *See id.* at Nos. 8, 10, 23.

92. *Id.* at Nos. 15-17, 23.

93. *See generally* Gwynn, *supra* note 72.

94. Pope Pius XII, *Summi Pontificatus: Encyclical Letter on the Unity of Human Society* (Oct. 20, 1939), *in* THE PAPAL ENCYCLICALS 1903-1939, at 222 (1990) [hereinafter *Summi Pontificatus*]. 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: The International Situation*, N.Y. TIMES,

Germany and Poland,[95] and noted that the underlying cause of evil in the world included "the denial and rejection of a universal norm of morality as well for individuals as for international relations."[96] 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.[97] 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."[98] The Pope cautiously highlighted the grave dangers posed by national socialism which elevated the State and certain groups as "the last end of life."[99]

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."[100] German policies that considered "the State as something ultimate to which everything else

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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*, 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 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. *Pope Is Emphatic About Just Peace*, N.Y. TIMES, Mar. 14, 1940, at 1.

95. *See Summi Pontificatus*, *supra* note 94, at No. 22.

96. *Id.* at No. 28. The Pope spoke diplomatically when he addressed the evils of National Socialism as "signs of a corrupt and corrupting paganism." *Id.* at No. 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 No. 31.

97. *Id.* at No. 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 No. 48; *see also Colossians* 3:10-11.

98. *Summi Pontificatus*, *supra* note 94, at No. 52 (describing how a state may attribute to itself the power that belongs to God and how this practice grates the Christian conscience).

99. *Id.* at No. 53.

100. *Id.* at No. 59. Pope Pius XII 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.*

should be subordinated and directed" threatened the international prosperity of all persons, especially those in Europe.[101] 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.[102]

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.[103] 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.[104] The Western press saluted this bold initiative and Pius

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101. *Id.* at No. 60.

102. *Id.* at No. 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 No. 74. In fact, they require "fidelity to compacts agreed upon and sanctioned in conformity with the principles of the law of nations." *Id.* at No. 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 No. 108.

103. 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 analyzed major themes presented by the Pope during a period of great turmoil throughout the world. Second, it clarified the contribution that Pope Pius XII has made to international order and world peace. *See* GUIDO GONELLA, THE PAPACY AND WORLD PEACE: A STUDY OF THE CHRISTMAS MESSAGES OF POPE PIUS XII (A.C.F. Beales & Andrew Beck, eds. & Venerable English College trans., 1945).

104. *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

XII for placing "himself squarely against Hitlerism."[105] 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.[106] 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 conflict.[107] The influential press repeatedly acknowledged the Pope's public efforts to assist the victims of the atrocities of National Socialism, including the Jewish people.[108] Shortly after the conclusion of hostilities, Pope Pius quickly mustered the world's attention to the plight of destitute children victimized by the

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> from its subjects a loyal fulfillment of those obligations which are common to all citizens.

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

105. *Pope Broadcasts Five Peace Points*, *supra* note 104, 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.*

106. *See, e.g.*, Pius XII, *Christmas Message* (1942), *in* PAPAL PRONOUNCEMENTS ON THE POLITICAL ORDER 209 (Francis J. Powers 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.*

107. *See id.* On Christmas Day 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.*

108. *See, e.g.*, *Pope Is Said To Plead for Jews Listed for Removal from France*, N.Y. TIMES, Aug. 6, 1942, at 1; *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; *Vichy Seizes Jews; Pope Pius Ignored*, N.Y. TIMES, Aug. 27, 1942, at 1. 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, Mar. 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) (relying 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).

war.[109] 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."[110]

Pius's successor, Pope John XXIII, was no stranger to the world of international affairs, as he served as a papal diplomat for many years.[111] Pope John XXIII dealt with the Cold War among the nuclear powers, and plead for peace and international security of the human family in his encyclical *Pacem in Terris*.[112] This important declaration, which was filled with references to the common good, drew attention to the interrelated rights and responsibilities of individuals and nations.[113] Perhaps one of the most important elements of this encyclical acknowledges the role of the United Nations in achieving the common good for all people.[114] 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."[115] This declaration restrictively interprated Article 24 of the Lateran Treaty, which suggested that the Holy See would not involve itself in the affairs of the temporal world.[116] Legal commentary, however, has noted that this did

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109. *See* Pope Pius XII, *Quemadmodum Encyclical Letter on the Care of the World's Destitute Children* (Jan. 6, 1946), at 230 (on file with *Catholic University Law Review*).

110. *Id.* at No. 6.

111. *See* KELLY, *supra* note 19, at 320-21.

112. *Pacem in Terris*, *supra* note 4.

113. In his earlier encyclical *Mater et Magistra* [Mother and Teacher], the Pope stated that:

> 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.

Pope John XXIII, *Encyclical Letter on on Christianity and Social Progress* (May 15, 1961), at No. 80, *in* MATER ET MAGISTRA (William J. Gibbons, S.J. trans., 1961).

114. *See Pacem in Terris*, *supra* note 4, at Nos. 142-145.

115. *Id.* at 160. Pope John called attention to the encyclicals of his predecessors Leo XIII [*Immortale Dei*] and Pius XI [*Ubi Arcano*], which were discussed earlier. *See supra* notes 31 and 82 and accompanying text.

116. 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

not prevent the Holy See, *sua sponte*, from speaking out on right and wrong in the realm of international affairs—especially in times of armed conflict.[117]

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 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.[118]

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.[119] His

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case be considered neutral and inviolable territory.

Lateran Treaty, art. 24, *supra* note 50, art. 50.

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

118. Pope Paul VI Address 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 U.N. *Id.* The Pope's U.N. address reflected the Pastoral Constitution on the Church in the Modern World. *See generally Gaudium et Spes*, *supra* note 69, 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*, *supra* note 69, at No. 42.

119. 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

message also offered hope to a world filled with human-generated misery.[120] 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 promulgated his apostolic letter on the duties of papal representatives sent into the world of diplomacy.[121] 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."[122] 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 U.N. deliberations affecting peace and the common

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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." Editorial, *To the World*, THE TIMES (London), Oct. 5, 1965.

120. About a year and a half after his U.N. address, Pope Paul VI issued his encyclical *Populorum Progressio* (On the Development of Peoples) Pope Paul VI, *Populorum Progressio: Encyclical Letter on the Development of Peoples* (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. *Id.* at. Nos. 81-84.

121. *See* Apostolic Letter of Pope Paul VI, *Sollicitudo Omnium Ecclesiarum* (June 24, 1969), No. 310, *in* CARDINALE, *supra* note 8, at 309-18 [hereinafter *Sollicitudo Omnium Ecclesiarum*].

122. *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 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 organise an activity truly salutary for all.*

*Id.* (emphasis added)

good.[123]

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.[124] He also identified two services that the exchange of legations could accomplish. First, the exchange could search for better solutions to contemporary world issues, including détente, disarmament, peace, justice, humanitarian measures, aid, and development.[125] 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."[126]

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

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123. *See* CARDINALE, *supra* note 8, 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.*

124. *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 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.*

125. *See id.*

126. *Id.* at 199.

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.[127] 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.[128] His 1995 address focused on universal human rights, the rights of nations, and the search for freedom and moral truth.[129] 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."[130]

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 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.[131]

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127. *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.

128. *See* discussion *supra* note 118 and accompanying text.

129. *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), *in* ORIGINS, Oct. 19, 1995, at 293.

130. *The Fabric of Relations Among Peoples*, ORIGINS, Oct. 19, 1995, at 299; *see also* Lateran Treaty, *supra* note 50 art. 24 (demonstrating that Popes did not consider themselves prohibited from participating in discussions regarding important international issues).

131. *See* 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.

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.[132] 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.[133] 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," and that 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."[134] 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 172 in 2000.[135] Many of the more recent diplomatic exchanges involved States that are neither traditionally Catholic nor Christian.[136]

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.

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132. *See* John Paul II, Address of the Holy Father to the New Ambassador of New Zealand to the Holy See (May 25, 2000), *in* L'OSSERVATORE ROMANO, May 31, 2000, at 5.

133. *See* 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, Mar. 22, 2000, at A8 (detailing the Pope's trip to the Middle East, which focused on reconciling Israel-Palestinian relations).

134. John Paul II, Address of the Holy Father to the New Ambassador of the Hellenic Republic to the Holy See (May 6, 2000), *in* L'OSSERVATORE ROMANO, May 31, 2000, at 6.

135. *See* ANNUARIO PONTIFICIO 1110-1150 (1979); *Bilateral and Multilateral Relations of the Holy See* (visited Mar. 23, 2001) <http://www.vatican.va/roman_curia/. . .0010123_holy-see-relations_en.html> [hereinafter *Multilateral Relations*]. The Holy See has diplomatic relations with the European Union and the Sovereign Order of Malta. *See id.* It also has relations of a special nature with the Russian Federation and with the Palestine Liberation Organization. *See id.*

136. *See* 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* George Huntston Williams, *John Paul II's Relations with Non-Catholic States and Current Political Movements*, 25 J. CHURCH & STATE 13, 13 (1983).

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.

## III. 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.[137] This perspective continues, in part, because only States can bring cases before the International Court of Justice.[138] The conventional understanding of statehood in international law[139] requires four elements: (1) a permanent population; (2) a defined territory; (3) a government; and (4) the capacity to enter into relations with other States.[140] 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.[141] 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]

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

138. *See* Statute of the International Court of Justice, art. 34.1 (1945). 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).

139. *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.*

140. *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 (1986).

141. *See* L. OPPENHEIM, 1 INTERNATIONAL LAW: A TREATISE § 169 (H. Lauterpacht ed., 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 Leichtenstein." *Id.* § 108.

territorial and personal supremacy . . . ."[142] The ability to enter into treaties or other agreements with other States is an integral component of international relations.[143] 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. In the context of formal, juridical structures, it is noted that a State has the capacity to bring a claim against another State.[144] 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.[145] 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.

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142. *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 as a sovereign state.

REBECCA WALLACE, INTERNATIONAL LAW 64 (3d ed. 1997).

143. *See* WALLACE, *supra* note 142, 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.*

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

145. *See* BROWNLIE, PRINCIPLES, *supra* note 142, 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." *Id.*

### *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 Professor Rebecca Wallace suggests, "[t]he concept of international personality is neither static nor uniform . . . ."[146] 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.[147] 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.[148] 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.[149]

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. 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 the 5th 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."[150]

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.[151] Often the best evidence of such acceptance is the

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146. WALLACE, *supra* note 142, at 59.

147. *See, e.g.*, BROWNLIE, PRINCIPLES, *supra* note 142, at 61-62.

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

149. *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.*

150. Lateran Treaty, *supra* note 50 art. 2; *see also* THOMAS EWING MOORE, PETER'S CITY: AN ACCOUNT OF THE ORIGIN, DEVELOPMENT AND SOLUTION OF THE ROMAN QUESTION 209, 210 (1930) (reprinting the Lateran Treaty).

151. *See generally* 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

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."[152] 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 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.[153] 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,"[154] an "atypical

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1970's, Dr. Chris Okeke engaged in the fascinating and timely study of evolving and contentious subjects of international law. *See generally 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." *Id.* at 68-69. The Lateran Treaty of 1929, however, granted the Holy See personality under international law. *See id.*

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

153. *See supra* notes 118, 119, & 127, and accompanying texts.

154. WALLACE, *supra* note 142, at 76.

organism,"[155] or is an entity *sui generis*.[156] 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.[157] 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.[158]

While the Holy See's status may be an anomaly or unique, the statehood-like status of the Holy See cannot be denied.[159] As Professor Crawford has affirmed, "recognition by other States is of considerable importance especially in marginal or borderline cases."[160] Currently, the Holy See is recognized through the diplomatic exchange by 172 States, which clearly makes the point.[161]

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.[162] Just prior to the confiscation of the Papal States, the Italian

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155. CARDINALE, *supra* note 8, at 80-81. Archbishop Cardinale suggests that:

> As 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.*

156. *See* BROWNLIE, PRINCIPLES, *supra* note 142, 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).

157. *See* OPPENHEIM, *supra* note 141, §§ 106, 107.

158. *Id.* § 107.

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

160. *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.*

161. *See Multilateral Relations*, *supra* note 135; *see also supra* note 135 (noting the relations with the European union, the Sovereign Order of Malta, the Russian Federation, and the Palestine Liberation Organization).

162. *See* LaPiana, *supra* note 152, at 406. As this author argued, "[t]he only usefulness of the creation of an independent Vatican City is in meeting the objection of

sovereign acknowledged the independence of the Holy see as "outside the imperium of 'any human power.'"[163] A significant number of states maintained diplomatic relations with the Holy See which was "for various purposes treated as an international person."[164] Notwithstanding the Lateran Treaty's recognition of the Vatican City State,[165] some authorities contend that the States[166] were increasingly recognizing the non-territorial sovereignty of the Papacy.[167] For example, the Czar of Russia asked for Papal support and involvement in the 1898 Hague peace initiative.[168] After the First World War, Germany asked the Holy See to participate in and become a member of the League of Nations. Italian opposition, however, may have prevented this participation.[169]

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."[170] Full diplomatic relations between

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those who deny the possibility of a sovereignty existing without a territory . . . ." *Id; see also* CRAWFORD, *supra* note 159, 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.*

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

164. BISHOP, *supra* note 139, at 218; *see also* BROWNLIE, PRINCIPLES, *supra* note 142, at 64.

165. *See* Lateran Treaty, *supra* note 50, arts. 3, 4.

166. For example, in a 1935 decision (*Nanni and Others v. Pace and the Sovereign Order of Malta*) of the Italian Court of Cassation 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., 1963).

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

168. *See* CARDINALE, *supra* note 8, at 88.

169. *See id.*

170. *Municipality of Ponce v. Roman Catholic Apostolic Church in Porto Rico,* 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

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.'"[171] The Philippines Supreme Court, in a 1994 decision, similarly acknowledged the international personality of the Holy See and its status as a foreign sovereign.[172]

A commonly held view is that the Holy See, without interruption, has

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> 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.

171. I JOHN BASSETT MOORE, A DIGEST OF INTERNATIONAL LAW 39 (1906) (quoting Dispatch of Mr. Bayard, Secretary of State to Mr. Dwyer (Nov. 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 also* 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 reestablished full diplomatic relations. Court challenges based on the First Amendment of the U.S. Constitution to the reestablishment 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 27 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* 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 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 50, at 308.

172. *See* The Holy See v. Starbright Sales Enterprises, Inc., 102 I.L.R. 163 (1994). The Court, in an opinion by Quiason, 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).

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."[173] In his 1934 lectures at Oxford University, Professor Mario Falco reached similar conclusions.[174] The crux of his argument concentrated on the relationship between the rights of an entity and its status of international personality. As 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.[175]

Professor Tiyanjana Maluwa pursued another and more recent investigation of the legal status of the Holy See.[176] Like Professor Falco's work of fifty years earlier, Professor Maluwa's is careful and exacting. It is familiar with the long history of the Papacy and its diplomatic exchanges. Like others,[177] Professor Maluwa acknowledged the general

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173. Kunz, *supra* note 50, at 309.

174. *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).

175. *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; 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.

*Id.* at 16.

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

177. *See* BROWNLIE, PRINCIPLES, *supra* note 142, at 57-58. While agreeing that this concept of legal personality is standard, Professor Brownlie points out that it is circular and explains in depth what it means. *See id.*

legal principle that personhood or personality is defined in terms of capacity to have rights and shoulder duties.[178] While also recognizing the circular danger that imperils some conventional analyses of the Holy See's legal status, Professor 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.[179]

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."[180] 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.[181]

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."[182] After scrutinizing the "constitutional" and "inter-state systems" of international personality over the centuries, Professor 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."[183] Arangio-Ruiz believes that the Holy See's unique or *sui generis* personality is not restricted to purely spiritual or religious matters.[184] Although the Holy

178. *See* Maluwa, *supra* note 176, at 7.

179. *See id.* at 11.

180. *Id.* at 12.

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

182. Gaetano Arangio-Ruiz, *On the Nature of the International Personality of the Holy See*, 29 REVUE BELGE DE DROIT INT'L [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.*

183. *Id.* at 360.

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

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. As 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."[185]

In this context, it should be recalled that the Pope, as the head which directs the Holy See, sits upon the chair of Peter, and he is the vicar of Christ.[186] 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 sovereignty is not restricted by a specific territory.[187] The places 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."[188] However, the "supra" does not equate to superiority, but rather 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

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185. *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.

*Id.* 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.

186. *See* CATECHISM OF THE CATHOLIC CHURCH §§ 881-882 (1994); *Lumen Gentium* (The Dogmatic Constitution of the Church. (Nov. 21, 1964), Nos. 22-23.

187. *See* BROWNLIE, PRINCIPLES, *supra* note 142, at 98-117.

188. *See* CARDINALE, *supra* note 8 at 93-94 (discussed at *supra* note 123 and accompanying text).

on minimal territorial dimensions guaranteeing a basis of autonomy for the pastoral ministry of the Sovereign Pontiff.'"[189] Yet, it would be a mistake to conclude that the Holy See does not view itself as 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.[190] This point was made in Pope Paul's October 4, 1965 address before the United Nations General Assembly.[191]

In addition, the Second Vatican Council advanced a similar argument 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

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189. SHAW, *supra* note 156, at 172 (quoting the joint 11th and 12th Reports to the United Nations Committee on the Elimination of Racial Discrimination, UN Doc. CERD/C/226/Add.6,(1993)); *see also* Summary Record of the 991st Meeting of the Committee on the Elimination of Racial Discrimination, UN 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.

FALCO, *supra* note 174, at 17-18.

190. See Kunz, *supra* note 50, 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].

191. *See supra* notes 118-119 and accompanying texts.

its witness . . . ."[192] Nonetheless, the Council hastened to add that due to its teaching authority and moral vision for all people throughout the world:

> [I]t 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.[193]

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.

## IV. 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.

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192. *Gaudium et Spes*, *supra* note 69, at No. 76.

193. *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.

Lateran Treaty, *supra* note 50, art. 24.

### *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.[194] 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.[195] In 1979, Pope John Paul II first visited the United Nations 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.[196]

In 1995, when the Pope made his second trip to the U.N. and again delivered an address to the General Assembly, the numbers of active and passive legation had grown to 156 and 157 respectively.[197] Most recently, this number again increased to the point where the Holy See has diplomatic relations with 172 states.[198] Examination of various States' approaches in dealing with the Holy See in diplomatic and other relations deepens the understanding of the latter's international personality.[199]

#### *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 11th century to the present day.[200] Even without exchange of first class

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

195. *See* ANNUARIO PONTIFICIO 1048-80 (1972).

196. *See* ANNUARIO PONTIFICIO 1110-1150 (1979).

197. *See* ANNUARIO PONTIFICIO 1294-1344 (1995).

198. *See Multilateral Relations*, *supra* note 135.

199. 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 civilized nations" can be a source of law upon which the Court may rely in deciding disputes brought before it.

200. *See, e.g.*, OWEN CHADWICK, BRITAIN AND THE VATICAN DURING THE SECOND WORLD WAR (1986); Gordon Albion, *England and the Holy See: A Survey of Diplomatic Relations,* THE MONTH, Jan. 1939, at 74-78; Sir Stephen Gaselee, *British Diplomatic Relations with the Holy See,* 204 DUBLIN REV. 1 (1939); William A.

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.[201]

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 Napolean's rise to power, Napolean kidnapped the Pope and confiscated the Papal States. However, the Holy See attempted to continue diplomatic exchange during this era.[202] In 1905, France enacted legislation essentially secularizing the State.[203] As a consequence, diplomatic relations were temporarily broken off with the Holy See. These relations were ultimately restored in 1921.[204]

*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

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Hinnebusch, *Diplomatic Activities of the English Dominicans in the Thirteenth Century,* 28 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 DUBLIN REV. 338 (1939); Sir Alec Randall, *British Diplomatic Representation at the Holy See,* 37 BLACKFRIARS 356 (1956); H. A. Smith, *Diplomatic Relations with the Holy See, 1815-1930,* 48 LAW Q. REV. 374 (1932); Harold Temperley, *George Canning, the Catholics and the Holy See,* 193 DUBLIN REV. 1 (1933); Dorothy M. Williamson, *Some Aspects of the Legation of Cardinal Otto in England, 1237-41,* 64 ENG. HIST. REV. 144 (1949). For a history of an important period in British-Rome relations, see generally JOHN TRACY ELLIS, CARDINAL CONSALVI AND ANGLO-PAPAL RELATIONS 1814-1824 (1942).

201. *See The British Mission to the Vatican, supra* note 65, at 206-208.

202. *See* Robert Noakes, *Cardinal Erskine and Napoleon,* 206 DUBLIN REV. 101, 102-14 (1940).

203. *See* CHURCH AND STATE, *supra* note 8, at 355-71.

204. *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 February 11, 1906, and *Une Fois Encore* (On the Separation of Church and State), promulgated on January 6, 1907; *see also* Abbe Felix Klein, *Breaking and Renewing Diplomatic Relations Between France and the Holy See,* 112 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 few years later by enacting secularizing legislation that separated the relation between Church and State, Pius X promulgated *Iamdudum* (On the Law of Separation in Portugal) on May 24, 1911.

sovereign.[205] 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.[206] 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.[207]

*3. The United States*

The legal relationship between the United States and the Holy See was addressed previously.[208] As was mentioned earlier, the U.S. and the Holy See had engaged in diplomatic exchanges up until 1870.[209] Subsequently, the U.S. sent the Holy See a "personal representative of the President" during Word War II.[210] When efforts were made to reestablish diplomatic relations after the Lateran Treaty entered into force, opposition within the United States was raised.[211] Some of this opposition suggested that the Establishment Clause of the First Amendment to 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

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

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

207. *See* Agreement between Chile and Argentina, June 1, 1979, UNT.S. 17838; Agreement between Chile and Argentina, Oct. 26, 1982, UNT.S. 21289.

208. *See supra* note 170 (indicating that the U.S Supreme Court took judicial notice of the status of the Holy See's international personality); *supra* 57-58 and accompanying text (regarding 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).

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

210. *See supra* note 171 and accompanying text.

211. *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 the Holy See, Professor 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.

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 to the Constitution.[212] However, other voices demonstrated why these concerns were immaterial and should not prevent the exchange.[213] The Reagan Administration proceeded with its plan, and the two sovereigns established diplomatic relations once again on January 10, 1984.[214]

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 to the Constitution.[215] The district court dismissed the complaint on two grounds. First, the court concluded that the plaintiffs lacked standing,[216] and second, the court deduced that the case was nonjusticiable because the question posed in the complaint was a political one falling outside the jurisdiction of the court.[217] The Court of Appeals for the Third Circuit affirmed the district court's decision.[218] In Kansas. the Tenth Circuit

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212. *See generally* 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); 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). Objections were also raised on theological groUNds. *See generally* James Coriden, *Diplomatic Relations Between the United States and the Holy See,* 19 CASE W. RES. J. INT'L L. 361 (1987).

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

214. 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 leve 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 and State v. Reagan, 607 F. Supp. 747, 748 (E.D. Pa. 1985).

215. *See id.* at 748-49.

216. *See id.* at 751.

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

218. *See* Americans United for Separation of Church and State v. Reagan, 786 F.2d 194, 196 (1986). The Third Circuit noted that:

Court of Appeals reached similar conclusions.[219]

Although it is not the purpose of this article to engage in a protracted examination of these 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 to Islam,[220] Judaism,[221] or Christianity.[222]

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

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 172 States.[223] Recently, the Holy See has had two major diplomatic encounters with Israel and the Palestinian Liberation Organization (PLO). The 1993 agreement and

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> 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.

219. *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 Id.*

220. *See, e.g.*, BAHR. CONST., art. 1 ("Bahrain is an Arab Islamic State.") and art. 2 ("Islam shall be the religion of the State; Islamic Shariah (Islamic Law) a main source of legislation."); IRAN CONST. preamble (noting the strong nexus between the State and Islamic principles); KUWAIT CONST., art. 2 (stating that the Islamic Shariah is a source or basis of legislation); OMAN CONST., art. 2 (same); SAUDI ARABIA CONST., arts. 1, 6-8 (indicating similar ties between the State, Islam, the Holy Koran, and Islamic Shariah).

221. 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." *Id.* 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).

222. 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, "[t]he 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."

223. *See supra* note 135 and accompanying text.

diplomatic recognition with Israel,[224] and the Basic Agreement with the PLO demonstrate a contemporary renewal of a long-standing interest by the Holy See in this region of the world.[225] 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.[226] 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, 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 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 State's parties.[227]

The Holy See has a long history of negotiating international agreements including treaties.[228] These agreements fall into two categories: (1) treaties and agreements dealing with conventional topics entered by States, and (2) concordats.[229]

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

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

226. Basic Agreement Between the Holy See and the Palestine Liberation Organization, Feb. 15, 2000, preamble, <http: www.vatican.va/gi_bin/w3>.

227. 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. S. AFR. 155 (1987).

228. *See* Geoffrey R. Watson, *Progress for Pilgrims? An Analysis of the Holy See-Israel Fundamental Agreement,* 47 CATH. U. L. REV. 497, 500-501 (1998).

229. Concordats are agreements between the Holy See and another sovereign that address issues concerning the Church in that State. They have been defined as, "[p]ublic 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

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 just 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.[230] 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.[231]

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 in Washington, D.C. from November 12, 1921 to February 6, 1922.[232] After the Lateran Treaty, the Holy See became involved with international agreements on both bilateral and multilateral levels.[233]

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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. *See id.* For a classic and insightful treatment of concordats and their role in international law, see generally 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). Msgr. Minnerath 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.*

230. *See* CHURCH AND STATE, *supra* note 8, at 48-49.

231. *See* CARDINALE, *supra* note 8, at 275-94.

232. *See Neutrality in Naval and Aerial War*, 33 AM. J. INT'L L. 550 (1939).

233. 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

On the multilateral level, the Holy See participated in negotiations leading to some of the principal 20th century international legal instruments. For example, it signed or 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 into 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 Sweden[234] and Israel.[235] 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

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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 generally* OLIVER EARL BENSON, VATICAN DIPLOMATIC PRACTICE AS AFFECTED BY THE LATERAN AGREEMENTS (1936).

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

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

agreement is to be regarded as a treaty and that that is the intention of the parties concerned."[236]

Due to their significance, two recent instruments involving the Holy See as one of the parties must be mentioned. The first is the December 30, 1993 agreement between Israel and the Holy See 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.[237] In accordance with this agreement, Israel and the Holy See entered diplomatic relations under article 14 of the Agreement.[238] As Professor Marshall Breger points out, "[t]he Vatican-Israel Accord of 1993 was clearly a political document—one undertaken between two sovereign states."[239] 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.[240]

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 dialogue, the respect for a status quo concerning Christian holy places, the freedom of the Catholic Church to carry out its mission, and

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236. WALLACE, *supra* note 142, at 221; *see also* Article 102.2 of the United Nations Charter ("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.").

237. Basic Agreement Between the Holy See and the State of Israel, Dec. 30, 1993, Vatican-Isr., 33 I.L.M. 153 (1994).

238. *Id.*

239. 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, 369 (1998).

240. *See* Alessandra Stanley, *Pope Arrives in Israel and Gets Taste of Mideast Politics,* N.Y. TIMES, March 22, 2000, at A8. As *The New York Times* reported during 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.

*Id.* For an important discussion on the Holy See's role in the Middle East, see generally IRANI, *supra* note 226.

the Catholic Church's right to its legal personality.[241] The Holy See's participation as becoming a party to these agreements with many States demonstrates an important point: that 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.[242] 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."[243] When carefully examined, their content frequently covers issues typical of any agreement between two sovereigns.[244] It is argued 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 of 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.[245] Through a comparison of concordats with bilateral 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:

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241. Basic Agreement Between the Holy See and the Palestine Liberation Organization, Feb. 15, 2000.

242. See OPPENHEIM, *supra* note 141, at 252 n.2.

243. *See* Cumbo, *supra* note 163, at 608.

244. *See, e.g.*, Fundemental Agreement Between the Holy See and the State of Israel, Dec. 30, 1993, Vatican-Isr., 33 I.L.M. 153 (1994).

245. *See supra* note 229, at 467. 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.

*Id.*

> 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.[246]

Although detailed discussion could be pursued regarding the similarities and differences between concordats and treaties, an important study by Professor Maluwa cogently demonstrates why any distinction between concordats and other treaties is artificial and lacks substance.[247]

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,[248] 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."[249]

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 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

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246. 1983 CODE c.365, §§ 1-2.

247. *See* Maluwa, *supra* note 176, at 162-74.

248. *See supra* note 203 and accompanying text.

249. 1983 CODE c.365, § 1. 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 that:

> [I]t 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.

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.[250]

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*. . . .[251]

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: "The phrase 'other subjects of international law' is primarily intended to cover international organizations, to remove any doubt about the Holy See and to leave room for more special cases such as an insurgent community to which a measure of recognition had been accorded."[252]

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250. *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, UN Doc. A/LN.4/SER.A/1959/ADD.1 (1959); *see also* CRAWFORD, *supra* note 159, at 158-160 (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.

251. Vienna Convention on the Law of Treaties, Mar. 23, 1969, art. 1 commentary, 1155 UNT.S. 331 (entered into force Jan. 27, 1980) (emphasis added).

252. *Id.* art. 3 commentary.

### *C. 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 States[253] agreed upon a regulation concerning the precedence of Diplomatic Agents.[254] 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, includes "ambassadors, legates or nuncios."[255] 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.[256] The second point is taken from article 2, which equates the status of nuncios with ambassadors.[257] 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.[258]

The significance and effect of these regulations concerning diplomatic relations continue to this day. The categories of diplomats, and the precedence that could be given to Papal representatives were largely incorporated into the Vienna Convention on Diplomatic Relations of April 14, 1961.[259] As with the 1815 Regulations from the Congress of

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

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

255. 64 THE CONSOLIDATED TREATY SERIES 1 (Clive Parry ed. 1815).

256. *See* THE CATHOLIC ENCYCLOPEDIA DICTIONARY 687 (1941); *see also Sollicitudo Omnium Ecclesiarum*, *supra* note 121, at No. 10.

257. *See* THE CONSOLIDATED TREATY SERIES, *supra* note 256, at 2.

258. *See id.*

259. 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.

Vienna, the Vienna Convention on Diplomatic Relations divides diplomatic missions into three classifications, the first of which includes ambassadors or nuncios.[260] 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.[261] 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."[262]

The consequence of these practices, which spanned almost 200 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. Although it holds Observer rather than State member status at the United Nations, 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 acknowledge no impediment in the Holy See's unique 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.

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260. Vienna Convention on Diplomatic Relations, Apr. 18, 1961, 23 U.S.T. 3227, 500 UNT.S. 95, art. 14.1(a) [hereinafter Vienna Convention on Diplomatic Relations]. 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), *available 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." EILEEN DENZA, DIPLOMATIC LAW: COMMENTARY ON THE VIENNA CONVENTION ON DIPLOMATIC RELATIONS 58 (1976).

261. Vienna Convention on Diplomatic Relations, *supra* note 261, art. 16.1

262. Vienna Convention on Diplomatic Relations, *supra* note 261, art. 16.3. 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].

DENZA, supra note 261, 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.

## V. 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,[263] Myron C. Taylor, was approached by the Holy See to inquire about the status of smaller States joining the new organization.[264] 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 U.N. would be obliged to honor.[265]

Notwithstanding these observations made by U.S. Secretary of State Cordell Hull, the Holy See was invited to participate in U.N. 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.[266] The Holy See was one of these fifteen entities appointed to this advisory group.[267] In addition, the Holy See was invited to the Conference of Plenipotentiaries "to consider the draft Convention Relating to the Status of Refugees and the draft Protocol Relating to the Status of Stateless Persons" that was also held in

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263. Mr. Myron Taylor, who was the personal representative of President Franklin Roosevelt continued in that capacity under President Truman. *See supra* note 171.

264. *See* RUTH B. RUSSELL, A HISTORY OF THE UNITED NATIONS CHARTER: THE ROLE OF THE UNITED STATES 1940-1945, at 509 (1958).

265. *Id.* These concerns expressed by the United States in the earliest stages of the U.N. 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, "[n]ormally however, observers from *States* [after mentioning Liechtenstein, the German Republics, and the Holy See) are fully accepted by U.N. Members; they enjoy the usual diplomatic status, and there are no problems of representativity involved." *Id.* at 325.

266. *See* 1951 UNY.B. 527, UN Sales No. 1952.1.30.

267. *See id.*

1951.[268] Moreover, the Holy See participated in several charter and treaty organizations of the United Nations including the Food and Agriculture Organization (1948), the World Health Organization (1951), and the United Nations Educational, Scientific, and Cultural Organization (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.[269] 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.[270] The Holy See also became an Observer to the U.N.'s Economic and Social Council (ECOSOC) in 1956.[271]

### *B. The Status of Permanent Observer*

Although some of these States who previously held Permanent Observer Status have subsequently joined the United Nations as member States,[272] Switzerland and the Holy See remain non-member States who participate in the UN's work through the Status of Permanent Observer.[273] 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."[274] As the discussion in Parts II and IV demonstrates, these purposes are consistent with and complementary to the mission that the Holy See has exercised in international affairs for

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268. *Id.* at 520.

269. *See* Henri de Riedmatten, *Présence du Saint-Siège dans les Organismes Internationaux*, at 73 (on file with the *Catholic University Law Review*); *see also* CARDINALE, *supra* note 8, at 233.

270. *See* Riedmatten, *supra*, note 269, at 73-74.

271. See 1951 U.N.Y.B. 532, U.N. Sales No. 1952.1.30.

272. *See infra* note 289 and accompanying text.

273. *See Non-Member States Maintaining Permanent Observer Missions at UN. Headquarters* (visited Aug. 15, 2000)<http://www.UN.org/Overview/missions.htm#nperm>. The Holy See joined the United Nations as a Permanent Observer on March 21, 1964. *See Id.*

274. U.N. CHARTER art. 1.

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 peaceloving states."[275] This same provision goes on to indicate that it is necessary for the U.N. itself to conclude that, in its judgment, the State that is applying for membership will "carry out these obligations."[276] 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 peaceloving; (2) the U.N. 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 U.N. 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.[277] He noted that a crucial element of statehood is the entity's independence as evidenced by its own self-governing autonomy.[278] In addition, there are the traditional requirements under international law, which include "a defined territory, a permanent population, and an independent government."[279]

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.[280] 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

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275. *See Id.* art. 4.1.

276. *Id.* Article 4.2 goes on to state that: "[T]he admission of any such state to membership . . . will be effected by a decision of the General Assembly upon the recommendation of the Security Council." *Id.* art. 4.2.

277. *See* THE CHARTER OF THE UNITED NATIONS: A COMMENTARY 162-66 (Bruno Simma ed., 1994) [hereinafter COMMENTARY].

278. *See id.* at 162.

279. *See id.* This author observes that the suggestion of the Legal Counsel of the U.N. to provide for associate membership in the organization was not pursued. *See id.*

280. *See id.* at 168.

observers rather than members.[281] The text of the convention states that observer missions[282] accomplish several vital roles. First, the permanent observer mission represents the State that sends it and safeguards the State's interests with the Organization.[283] Second, the observer mission enables the observer state to understand the work of the Organization and keeps its government informed of such work.[284] Third, the observer mission provides a structure for cooperation and negotiation between the observer state and the Organization.[285]

Several publicists involved with the 1994 compilation of the commentary on the United Nations charter[286] identified, in their essays, a number of subjects that elected, at least for a time, the status of permanent observers.[287] As of the summer of 2000, however, only two of these subjects, Switzerland and the Holy See, remain permanent observers, whereas the others have petitioned and been admitted as member states.[288] 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 U.N. 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."[289]

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

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

282. 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." *Id.* at 731.

283. *See id.* at 734 (discussing article 7(a)).

284. *See id.* (discussing article 7(b)).

285. *See id.* (discussing article 7(c)).

286. *See generally* COMMENTARY, *supra* note 277.

287. *See id.* at 169 (commentary by Professor Ginther) and 363 (commentary by Professor Schaefer).

288. Nauru on September 14, 1999, Tonga on September 14, 1999, Monaco on May 28, 1993, and Kiribati was admitted on September 14, 1999.

289. 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 U.N. *See 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).

considering and granting these requests.[290] 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."[291] Switzerland's 1946 request 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.[292] 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.[293] 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 U.N., which include maintaining international peace and security, developing friendly relations, achieving international cooperation, and promoting and encouraging respect for human rights and fundamental freedoms.[294]

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 U.N. activities. Secretary General Trygve Lie's approval was previously discussed,[295] and Secretary General U Thant observed that, in the interest of keeping

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290. *See generally* SYBESMA-KNOL, *supra* note 265; 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 generally* Mower *supra* note 289.

291. Mower, Jr., *supra* note 289, at 266.

292. *See id.* at 271; *see also* Suy, *supra* note 290, at 91, 94. In a 1962 opinion, the Office of Legal Affairs of the U.N. 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).

293. *See supra* note 65.

294. *See* U.N. CHARTER art. 1.

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

peace—a frequent activity of the Holy See[296] and a fundamental purpose of the U.N. [297]—non-member states should be "'encouraged to maintain observers at [the] United Nations . . . .'"[298] 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."[299] When the Holy See 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.[300] Members of the Soviet Bloc did not exchange diplomatic relations with the Holy See at that time;[301] however, by the same token, no Soviet Bloc member objected 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.[302] As already stated, today the Holy See enjoys diplomatic relations with most of the member states of the United Nations and with the other permanent observer, Switzerland.[303]

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.[304] The Office of Legal Affairs acknowledged that there "are no specific

296. *See generally supra* Part II.F (discussing the 20th century Popes in their various peace initiatives).

297. U.N. CHARTER art. 1.

298. Mower *supra* note 289, at 277.

299. *Id.* at 273.

300. *See* ANNUARIO PONTIFICIO 949-71 (1964); 1964 U.N.Y.B. 579-80, U.N. Sales No. 65.I.1.

301. *See* GRAHAM, *supra* note 8, at 349-384; *see also* OKEKE, *supra* note 151, at 70-72.

302. *See* GRAHAM, *supra* note 8, at 381 n.20.

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

304. *See* 1962 U.N. Jurid. Y.B. 236 (Provisional Edition). It states:

In deciding whether or not to accord certain facilities to a Permanent Observer, it has been the policy of the Organization [U.N.] 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.

*Id.*

provisions relating to Permanent Observers" in the Charter, Headquarters Agreement, or in the General Assembly resolution of December 3, 1948, addressing Permanent Members.[305] 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 permanent observers; consequently, the granting of this status "rests purely on practice as so far followed."[306]

The Holy See has been a member of specialized agencies and organizations.[307] 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 Prticipates in the following international organizations in the specificied 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 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 FAO (Food and Agriculture Organization), the ILO (International Labour Organisation), the IOM (International Organization for Migration), the UNDCP (UN International Drug Control Programme), UNEO (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).[308] 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.[309]

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.[310] In this context, the Holy See, along with the

305. *See id.*
306. *Id.*
307. *See, e.g.*, *supra* note 271 and accompanying text.
308. *See Multilateral Relations*, *supra* note 135.
309. ANNUARIO PONTIFICIO 1428 (2000).
310. Mower *supra* note 289, at 278.

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 York since the 1998 Rome Diplomatic Conference of Plenipotentiaries for the International Criminal Court.[311] 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, and 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.[312]

### *C. Recent Critiques of the Holy See's Status at the United Nations*

Until the late summer of 1995, few, if any, questions had were raised or challenges made about the status of the Holy See's Permanent Observer Mission at the United Nations. However, in September of 1995, a petition was circulated at the Fourth World Conference on Women held in Beijing, China, amongst participating delegates by an organization calling itself *Catholics for a Free Choice* (CFFC).[313] The petition questioned the Holy See's status at the United Nations and demanded that the United Nations "evaluate the appropriateness of allowing the Holy See, a religious entity, to act on a par with states."[314] In its conclusion, the petition stated that:

> [I]t is highly inappropriate for the Roman Catholic Church to participate as a voting member in UN Conferences—something it can do only by virtue of its UN status as a Non-Member State Permanent Observer. The United Nations has an ethical obligation to be neutral regarding religion. The privileges now granted to the Roman Catholic Church under the auspices of the Holy See violate such impartiality and, in the interest of fairness, should be revoked.[315]

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311. 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.

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

313. *See* Yasmin Abdullah, *The Holy See at United Nations Conferences: State or Church?*, 96 COLUM. L. REV. 1835, 1835 (1996); *see also generally* Rishona Fleishman, *The Battle Against Reproductive Rights: The Impact of the Catholic Church on Abortion Law in Both International and Domestic Arenas*, 14 EMORY INT'L L. REV. 277 (2000).

314. Abdullah, *supra* note 313, at 1835.

315. *Id.* at 1836 n.8.

The United Nations has taken no such action since this petition was circulated five years ago; however, several groups established a campaign to lobby the United Nations to eject the Holy See.[316] It should be noted

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316. Two organizations have been outspoken in this campaign. CFFC claims responsibility for initiating the petition circulated at the Fourth Women's Conference in Beijing in 1995. *See The Holy See, Vatican City, and the Roman Catholic Church* (visited Aug. 17, 2000) <http://www.seechange.org/faq.htm>. CFFC has been declared not to be a part of the Catholic Church by a U.S. Bishops conference. As the National Conference of Catholic Bishops stated in their May 10, 2000 press release:

> [A] group calling itself Catholics for a Free Choice (CFFC) has been publicly supporting abortion while claiming it speaks as an authentic Catholic voice. That claim is false. In fact, the group's activity is directed to rejection and distortion of Catholic teaching about the respect and protection due to defenseless unborn human life . . . CFFC is, practically speaking, an arm of the abortion lobby in the United States and throughout the world. It is an advocacy group dedicated to supporting abortion. It is funded by a number of powerful and wealthy foundations, mostly American, to promote abortion as a method of population control.

*NCCB/USCC President Issues Statement on Catholics for a Free Choice* (visited May 11, 2000) <http://www.nccbuscc.org/comm/archives/00-123.htm>; *see also* Anika Rahman, *The Questionable Status of the Holy See at the United Nations: A Church Disguised as a Nation* (visited Aug. 17, 2000) <http://www.crlp.org/pr_99_0419holysee.html>. The CFFC President, Frances Kissling identifies the organization as follows:

> In the early days, CFFC leaders simply wanted to ensure some public recognition of the existence, in substantial numbers, of prochoice Catholics. In its earliest formulations, the emphasis was on the right to make the choice, not the choice itself. In its approach to the issue, the organization relied on the Declaration on Religious Freedom, the Second Vatican Council's endorsement of the separation of church and state, pluralism, and the primacy of conscience. It was a question of the rights of all Catholics, not just the rights of women. But CFFC then began to focus on lobbying and had to articulate thorough answers to the questions legislators and the press were asking. Through researching church history and theology, a new perception emerged: The objections church officials raise to legal abortion are not defensible in terms of church teaching related to fetal life. It became apparent that what we were dealing with was sexism and outmoded attitudes toward sexuality. At the same time, by the late 1970s and early '80s, the secular women's movement had generated a feminist movement within religion, further encouraging our own woman-centered focus. In 1979, Pat McMahon became the executive director . . . . [She] went to Ireland on vacation, and was shocked by the horrible conditions of women's lives—conditions imposed by the church's anti-woman, anti-contraception mentality. When she returned to the States, her passion was so strong that she persuaded the CFFC board to hire her. Pat did a number of crucial things: She understood that CFFC's principal niche was not lobbying, but education, and that achieving our goals would require well-produced materials. Two, she shifted CFFC's legal status from a lobby to an educational association, making us eligible for tax-exempt status, which would lead to foundation support.

*A Mouse That Roars Turns 25: An Interview with CFFC President Frances Kissling* (visited Aug. 17, 2000) <http://www.catholicsforchoice.org/aboutus.htm>. The Center For Reproductive Law and Policy defines its mission as legal and "dedicated to promoting women's . . . reproductive rights." CRLP (visited Aug. 17, 2000) <http://www.crlp.org>.

that the claims alleged in the petition are erroneous in fact and law. First, as mentioned earlier, there is an inherent nexus between religion and many Member States of the United Nations.[317] Consequently, it would be impossible for the United Nations to have an ethical obligation to be neutral regarding religion. Carried to its logical conclusion, this neutral position would have to be applied to many Arab States, Malta, Argentina, Israel, and others. In addition, the petitioners' demand, in the exercise of "impartiality" and "in the interest of fairness," would also have to be applied to States which have an established religion regardless of whether such States guarantee freedom of religion.[318] After all, if these States are not impartial when it comes to religion, should not their membership in the U.N. be revoked in the interest of fairness? A revocation of the Holy See's status at the United Nations would require a revocation of the status of many other Member States of the United Nations in order to be fair and consistent.

Second, the demand for review of the Holy See's status as necessitated by the United Nation's ethical obligation to be neutral regarding religion violates international law and rights protected thereunder. The interesting but flawed claim that there is an "ethical obligation" toward neutrality conflicts with the UDHR, which declares that religious rights are protected when practiced "alone or in community with others."[319] While the UDHR is not a legal instrument, one of its progeny, the International Covenant on Civil and Political Rights [ICCPR] of 1966 is legally binding.

As a normative text that generates legal obligations for over 140 States,[320] the ICCPR served as the basis for the ongoing recognition of the legal status of religion and the protection of its practice under international law.[321] Although the ICCPR acknowledges that some

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Its goals include promoting access to contraception, ensuring access to abortion, and supporting privacy rights concerning reproductive health care. *See* CRLP, *Our Mission* (visited Aug. 17, 2000) <http://www.crlp.org/aboutcrlp.html>.

317. *See supra* notes 221-23 and accompanying texts.

318. *See supra* notes 221-23 and accompanying texts. The United Kingdom still has an established Church as do Norway [Article 2 of the Norwegian Constitution provides for the establishment of the Evangelical Lutheran religion] and Denmark [Section 4 of the Danish Constitution provides for the establishment of the Evangelical Lutheran Church]. However, these three countries do permit freedom of religion.

319. UNIVERSAL DECLARATION OF HUMAN RIGHTS, art. 18, 1958-49 U.N.Y.B 536, U.N. Sales No. 1950.I.II.

320. Not every State party to one of these conventions is automatically a party to the other. Each convention requires its independent ratification.

321. It appears that no state made a reservation or offered a declaration that would restrict the meaning of the term "self-determination," with the exception of India's

restrictions on protected rights may be necessary during times of "public emergency,"[322] no State, organization, or person has the "right to engage in any activity or to perform any act aimed at the destruction of any of the rights or freedoms recognized [by the ICCPR]."[323] However, it must also be noted that the exercise of religious rights under article 18 of the ICCPR is non-derogable even in "public emergency" circumstances.[324] Most of the States in the world are parties to the ICCPR; thus, a majority of States have an obligation to respect the fundamental precepts of human rights, specifically the individual and communal rights regarding religion.[325]

A third legal conflict emerges from the views of CFFC and the Center for Reproductive Law and Policy (CRLP) concerning abortion. A major thrust of their attack on the Holy See is due to its anti-abortion position.[326] Both the CFFC and the CRLP are advocates for the availability of abortion and contraception.[327] In essence, the Holy See and the principals involved in the campaign to remove the Holy See's Permanent Observer Status hold opposing views on these issues. It would seem, therefore, that the goal of the CFFC and the CRLP is to silence the Holy See's views by removing it from the sort of deliberations in which Permanent Observers can participate.

Putting aside for the moment the fact that, if successful, the CFFC and the CRLP would undermine long established principles of international

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declaration that the right of self-determination "applied only to peoples under foreign domination and that these words did not apply to sovereign independent States or a section of a people or nation, which [is] the essence of national integrity." *Press Release HR/CN/770 21 March 1997* (visited Aug. 17, 2000) <http://www.UN.org>. France, Germany, and the Netherlands responded with objections to the Indian declaration. *See id.*; *see also* Robert McCorquodale, *Negotiating Sovereignty: The Practice of the United Kingdom in Regard to the Right of Self-Determination*, 1995 BRIT. YR. INT'L L. 281.

322. Article 4.1. For an important discussion of this issue, see JAIME ORAÁ, HUMAN RIGHTS IN STATES OF EMERGENCY IN INTERNATIONAL LAW (1992), where the author addresses violations of basic human rights in times of emergency and derogation Under both treaty and customary law; notwithstanding derogation provisions and provisions of customary law, there remain obligations concerning the protection of basic rights.

323. Article 5.1.

324. Article 4.2. Note, however, that religious rights are subject to the provisions of Article 18.3.

325. *See* Article 18.

326. *See* Pope John Paul II, THE GOSPEL OF LIFE 103-04 ((1995); *Gaudium et Spes, supra* note 69, at Nos. 27, 51; *see also* THE CATECHISM OF THE CATHOLIC CHURCH 547-48 (1994). There was of course a time when influential papers such as *The New York Times* shared the anti-abortion view of the Holy See. For example see *The Evil of the Age*, N.Y. TIMES, Aug. 23, 1871, at 6, which stated in part, due to abortion "thousands of human beings are . . . murdered before they have seen the light of this world."

327. *See supra* note 318.

law, their crusade would also conflict with the legal obligations of an important multilateral treaty. The American Convention on Human Rights, to which twenty-four States are parties, declares that "[e]very person has the right to have his life respected" and "[t]his right shall be protected by law, and, in general, *from the moment of conception.*"[328] This provision of treaty law reflects the view of the Holy See.[329] Should the petitioners, CFFC and the CRLP, prevail in their movement to revoke the Holy See's permanent observer status, their success will have definite implications on the rule of law and the rights and obligations generated by the American Convention on Human Rights.

A final but essential matter must be raised about United Nations conferences, and who is invited to attend and participate in them. In spite of the Holy See's status as a Permanent Observer, it is entitled to attend and participate fully in U.N. conferences and other meetings, such as the International Conference on Population and Development (Cairo, 1994), the Fourth World Conference on Women (Beijing, 1995), and the United Nations Diplomatic Conference on Plenipotentiaries on the Establishment of An International Criminal Court (Rome, 1998). The capacity to attend and participate in these conferences and other meetings is provided through invitations of the General Assembly "to all States" (not simply Member States), or "to all States Members," to "members of specialized agencies," and to members "of the International Atomic Energy Agency." As previously demonstrated, the Holy See, keeping in mind its unique juridical status, exercises sovereignty that parallels that enjoyed by a State;[330] moreover, it is a member of several specialized agencies of the United Nations and the International Atomic Energy Agency.[331] Consequently, its position presented by these memberships, rather than its status as a Permanent Observer, entitles it to participate fully in conferences and other meetings convened by the United Nations Organization. Therefore, even if it did not exercise Permanent Observer status, the Holy See would still be invited as a participant because of its membership in the specialized agencies and the IAEA.

In summation, the views advanced by the CRLP, the CFFC, and their fellow petitioners[332] are inconsistent with international law. Their

328. Article 4.1 (emphasis added).

329. *See supra* note 328.

330. *See supra* Part III.C. (discussing the Holy See's unique legal status).

331. *See supra notes* 308-09 and accompanying text.

332. A large number of the signatories are pro-abortion and family planning associations. However there are some other groups and organizations who have lent their

opposition to the Holy See's presence at the UN is based not on legal argument. Rather, their opposition is based on the desire to silence views that these autonomous organizations, who are accountable to no one but themselves and their contributors, find objectionable. This latter point raises another challenge to international law, namely, the right to freedom of expression which these organizations wish to silence.[333]

Furthermore, the campaign to remove the Holy See as a permanent observer is supported by the argument that it is essentially a non-governmental organization. However, this argument fails to acknowledge the parallels and similarities that the Holy See shares with States as elaborated in Parts II, III, and IV of this essay. The petitioners seeking removal of the Holy See also argue that it is something of a "spoiler" in achieving global consensus at various U.N. conferences. As one commentator whose views reflect those of the petitioners commented:

> At international conferences, the United Nations prefers to operate by consensus, rather than relying upon votes, in adopting the Programs of Action. As a result, the Holy See has a stronger voice in proceedings than its one vote might otherwise suggest. Indeed, the UN's commitment to consensus provides the Holy See with a quasi-veto at conferences: the adoption of any measure is substantially contingent upon Vatican approval. The practice of operating by consensus provides the Holy See with considerable power in shaping the final document which is adopted at the conference. The Holy See, even if not supported in its position by any other state, has the ability to prevent a consensus from forming at the conference.[334]

While it may be possible for the Holy See to prevent a consensus on a particular issue, this ability does not provide the Holy See with extraordinary power. The same prerogative belongs to any delegation at all U.N.-sponsored conferences. Every State has the same, equal voice as the Holy See. Every State retains this same quasi-veto. Every State possesses the same considerable power that is curiously attributed only to the Holy See. Any State, in short, has the ability to prevent a consensus from forming on any issue.

Upon reviewing the record of the Holy See, the impartial examiner

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voice to this cause. Some of these groups include FLOCK (For Love of Cats & Kittens) and Dirty Dirt & The Dirts—USA (copy on file with the *Catholic University Law Review*).

333. Article 19, ICCPR.

334. Abdullah, *supra* note 313, at 1844.

will conclude that the Holy See's role in the advancement of peace, the common good, and the achievement of human dignity for many forgotten persons is significant. In light of this record, many States support the Status of the Holy See at the United Nations.[335] They do not perceive it as a non-governmental organization or a purely religious group. Many states accept the Holy See as an equal sovereign, as is evident from the ongoing exchange of diplomats at a bilateral level.

## VI. 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 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

335. A recent illustration of this point occurred in the United States Congress. On February 16, 2000, a concurrent resolution was introduced before the House of Representatives expressing a sense of objection to efforts to expel the Holy See as a Permanent Observer in the United Nations. *See* H.R. Con. Res. 253, 106th Cong. (2000). Amongst other things, the concurrent resolution recognized the international legal personality of the Holy See and concluded that the Holy See's expulsion or change of status "would seriously damage the credibility of the United Nations by demonstrating that its rules of participation are manipulable for ideological reasons . . . ." *Id.* A counterpart resolution was introduced in the Senate. *See* S. Con. Res. 87, 106th Cong. (2000).

a presence that brings light to the world.[336]

336. *See John* 1:5.