

The Legal Status of the Holy See

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Abstract

The Holy See enjoys rights under international law that few, if any, non-State actors (excluding intergovernmental organizations) enjoy: it has joined various intergovernmental organizations, it is a party to a substantial number of bilateral and multilateral treaties, it sends and receives diplomatic representatives, is said to enjoy immunity from jurisdiction, and has been granted permanent observer status at the United Nations. However, unlike the Vatican City State, the Holy See is not to be characterized as a State, given that it has a global spiritual remit and that it can act internationally without a territorial base. Instead, it is a *sui generis* non-State international legal person which borrows its personality from its 'spiritual sovereignty' as the center of the Catholic Church.

A. Introduction

The Holy or Apostolic See (*Sancta Sedes*) is the seat of the bishops of Rome, and the governmental center of the Catholic Church. The Holy See is headed by the Supreme Pontiff or the Pope, who, in his administration of the Church, is assisted by the Roman *Curia*.

Since mediaeval times, the Holy See has been considered as enjoying international legal personality. At the time, however, the Supreme Pontiff was also the temporal sovereign of the Pontifical (or Papal) States in Italy, so that the question of the legal status of the Holy See as a non-State international religious organization rarely arose. Only after the Holy See lost its territorial base in 1870 was this question brought into starker relief: could its international activities, such as sending and receiving legations, be explained by the enjoyment of a certain measure of international legal personality? The answer to this question was complicated by the Holy See regaining a tiny territorial basis in Rome, an enclave of 110 acres called the 'Vatican City', pursuant to the 1929 Lateran Treaties with Italy (which eventually solved the 'Roman Question').

In the first section of this contribution, an attempt is made at disentangling the relationship between the Holy See and the Vatican. Being headed by the same (absolute) monarch, these entities have seemingly entered into an almost personal union with each other. Still, for international legal purposes, they can be said to remain two separate international legal persons, with the Vatican qualifying as a (mini-)State and the Holy See as a

sui generis non-State actor which nevertheless enjoys a panoply of rights that possibly no other non-State actor enjoys.

The precise rights enjoyed by the Holy See in the international legal order are the subject of the second section of this contribution. This section examines in particular the Holy See's participation in (and influence on) intergovernmental organizations, multilateral treaties and conferences, and its right of legation.¹

The Holy See's bilateral treaty-making power will be discussed in the third section, which studies in particular the 'concordats' concluded between the Holy See and various (Catholic) States. Concordats are treaties that regulate the position of the Catholic Church in the temporal order of the State. This section will specifically address the exact relationship between, on the one hand, the concordats and the canonical legal order to which they refer, and, on the other, the constitutional and human rights protections that are applicable in the temporal order of the State and that may clash with the provisions of the concordat.

A fourth section addresses the Holy See's role in international dispute settlement. This section will not so much tackle the question of whether the Holy See has been, or can be, a party to an international dispute and whether it can bring a case before a dispute-settlement mechanism. After all, the Lateran Conciliation Treaty obliges the Holy See to distance itself from temporal rivalries. Rather, it will be ascertained whether the Holy See has served as a dispute-settlement mechanism in its own right. In particular, its role as an international mediator will be explored, a role that may suit the Holy See rather well in its capacity as a supposedly neutral religious organization that stands above temporal rivalries.

A fifth section examines a last indication of an entity's international legal personality: its immunity from legal process. On the basis of an analysis of a number of domestic court decisions, it will be shown that a determination of the immunity of the Holy See hinges either on the qualification of the Holy See as a State or at least a State-like entity, or, in the specific case of Italy (the Holy See being 'headquartered' in Rome) on the interpretation of the Lateran Conciliation Treaty. Also, as the Holy See ultimately remains a non-State actor, it is likely that the constitutionally and internationally guaranteed individual right to a remedy may play a greater

¹ Our approach will be legal. See for a more policy-oriented approach: Fondazione La Gregoriana & F. Imoda (eds), *The Catholic Church and the International Policy of the Holy See / L'Église catholique et la politique internationale du Saint-Siège* (2008).

role in restricting any immunities to which it might be entitled under international law.

Section G concludes by emphasizing how the Holy See has successfully carved out a legal position for itself, as a non-State actor, in an international legal order dominated by States.

B. The Vatican v. the Holy See

There is a considerable amount of confusion as to the exact legal characterization of the Holy See and the Vatican. Although most scholars would agree that the Holy See and the Vatican are different legal persons,² legal opinion on their, in the words of Crawford, “unique and complex”³ interrelationship, differs widely.

At one end of the spectrum are those who equate the Vatican and the Holy See. As will be set out in the section on immunity, U.S. courts in particular have broadly treated the Vatican and the Holy See as one legal person, and have even considered both of them as ‘States’ for purposes of the U.S. Foreign Sovereign Immunities Act (FSIA).⁴

There is however a substantial amount of agreement on the lesser international status of the Vatican City *vis-à-vis* the Holy See. Duursma and Martinez observed that the Vatican City is subordinated to the Holy See,⁵ while Arangio-Ruiz even went as far as to state that the Vatican “qualifies *de facto*, for international legal purposes, not as a separate person”, and that from the “viewpoint of international law, the status of the Vatican City does not differ from the status of a province or any other subdivision of a State”⁶.

² J. Duursma, *Fragmentation and the international relations of micro-states* (1996), 387; L. C. Martinez, ‘Sovereign Impunity: Does the Foreign Sovereign Immunities Act Bar Lawsuits Against the Holy See in Clerical Sexual Abuse Cases?’, 44 *Texas International Law Journal* (2008) 123, 144-155.

³ J. Crawford, *The Creation of States in International Law* (2006), 223 (also characterizing this relationship as the “chief peculiarity of the international status of the Vatican City”).

⁴ The Holy See and the Vatican themselves have influenced this identification with a view to having the Holy See fall within the scope of application of the FSIA.

⁵ Duursma, *supra* note 2, 386.

⁶ G. Arangio-Ruiz, ‘On the Nature of the International Personality of the Holy See’, 29 *Revue Belge de droit international* (1996), 354, 354.

The Vatican City was indeed only created by the Lateran Treaty in 1929⁷ to provide a territorial basis for the Holy See – which predates the Vatican City by many centuries – that could guarantee its independence.⁸ This independence was compromised due to the Roman Question: after having exercised temporal powers in the Pontifical States since the 8th century,⁹ the Holy See lost its territory to the Italian State in 1870. Only in 1929 did the Italian State, by virtue of the Lateran Treaties, return a portion of this territory to the Holy See, at which time the Holy See also received financial compensation as reparation for the “immense damage sustained by the Apostolic See through the loss of the patrimony of S. Peter constituted by the ancient Pontifical States, and of the Ecclesiastical property”¹⁰. It is noted, in passing, that this financial settlement could be seen as an indication of the Holy See’s international legal personality in two ways: the treaty-making capacity of the Holy See as well as the right to bring a claim against another international legal person.

The Vatican City State as created in 1929 could duly be characterized as a State, as it satisfies the three *Montevideo* criteria for statehood: territory, population, government.¹¹ Possibly, as Harris observed, it is the “only state that is generally recognised by the international community that

⁷ *Lateran Conciliation Treaty*, 11 February 1929, Art. 3, 130 BSP 791, *Gazzetta Ufficiale*, Suppl Ord, 5 June 1929, No. 130, reprinted in S. Berlingò & G. Casascelli (eds), *Codice del diritto ecclesiastico*, 3rd ed. (1993), 211.

⁸ *Lateran Conciliation Treaty*, *supra* note 7, Art. 4: “The sovereignty and exclusive jurisdiction over the Vatican City, which Italy recognizes as appertaining to the Holy See, forbid any intervention therein on the part of the Italian Government, or that any authority other than that of the Holy See shall be there acknowledged.”; *Fundamental Law of the Vatican City State*, 26 November 2000, preamble: “the State, which exists as an appropriate guarantee of the freedom of the Apostolic See and as a means of assuring the real and visible independence of the Roman Pontiff in the exercise of his mission in the world”.

⁹ T. F. X. Noble, *The Republic of St. Peter: The Birth of the Papal State 680-825* (1984), xxix, 374.

¹⁰ *Financial Convention annexed to the Lateran Treaty* (1929), preamble. Article 1 of the Convention stipulated that “Italy, on the exchange of ratifications of the Treaty, shall pay to the Holy See the sum of Italian lire 750,000,000”. According to the preamble, the Pope “taking into consideration the present financial condition of the State and the economic condition of the Italian people, especially after the war, has deemed it well to restrict the request for indemnity to the barest necessity”.

¹¹ *Montevideo Convention on Rights and Duties of States*, 26 December 1933, 165 L.N.T.S. 19. See M. N. Bathon., ‘The Atypical International Status of the Holy See’, 34 *Vanderbilt Journal of Transnational Law* (2001), 597, 608-615.

is not a member of the United Nations”¹². The Vatican has a fixed territory (however small it may be) with fixed boundaries,¹³ a small population of clerics¹⁴ (that may however not have the capacity for self-perpetuation),¹⁵ and a government.

The government of the Vatican City is regulated by the Fundamental Law of Vatican City State, promulgated by Pope John Paul II on 26 November 2000, which entered into force on 22 February 2001, and replaced the Fundamental Law of Vatican City of 7 June 1929. This Fundamental Law can be considered as a constitution that was, in the words of its preamble, adopted “to give a systematic and organic form to the changes introduced in successive phases in the juridical structure of Vatican City State” and “to make it correspond always better to the institutional purposes of the State”. It vests all power exercised in the Vatican City State in the Pontiff,¹⁶ and reaffirms or establishes a number of governmental institutions, such as the College of Cardinals,¹⁷ the Secretariat of State,¹⁸ the

¹² D. J. Harris, *Cases and Materials on International Law* (2004), 99.

¹³ This territory consists of the Vatican City (cf. Article 3, para. 2 of the Conciliation Treaty: “The boundaries of the said City are set forth in the map called Annex I of the present Treaty, of which it is forms an integral part.”) and a number of extraterritorial possessions, including the Castel Gandolfo (Articles 13-14 of the Conciliation Treaty).

¹⁴ Lateran Conciliation Treaty, *supra* note 7, Art. 9, para. 1: “In accordance with the provisions of International Law, all persons having a permanent residence within the Vatican City shall be subject to the sovereignty of the Holy See. Such residence shall not be forfeited by reason of the mere fact of temporary residence elsewhere, unaccompanied by the loss of habitation in the said City or other circumstances proving that such residence has been abandoned”. See also Holy See Press Office, ‘Vatican Citizenship’ (31 December 2005) available at http://www.vatican.va/news_services/press/documentazione/documents/sp_ss_scv/informazione_generale/citadini-vaticani_en.html (last visited 3 January 2012): “As of December 31st 2005, there were 557 persons having the Vatican citizenship, of which 58 Cardinals, 293 of the Clergy having status as members of the Pontifical Representations, 62 other members of the Clergy, 101 members of the Pontifical Swiss Guard and 43 other lay persons. The persons authorized to reside in the Vatican City maintaining their original citizenship were 246, of the aforementioned numbers. The persons residing in buildings outside of the Vatican City in buildings exempt from expropriation and taxation were 3,100 on the above mentioned date”.

¹⁵ Bathon, *supra* note 11, 611.

¹⁶ Art. 1, para. 1 Fundamental Law of the Vatican City State: “The Supreme Pontiff, Sovereign of Vatican City State, has the fullness of legislative, executive and judicial powers”.

¹⁷ This institution has the same powers as the Pontiff during an interregnum. Cf. Art. 1, para. 2 of the Fundamental Law.

Pontifical Commission¹⁹ and its President,²⁰ the Secretary General,²¹ the Council of Directors,²² the Councilor General and the Councilors of the State,²³ a number of judicial institutions,²⁴ and a Labor Office.²⁵

The Fundamental Law of the Vatican City State also provides for the representation of the Vatican City State in relations with foreign nations and other subjects of international law, for the purpose of diplomatic relations and the conclusion of treaties. Pursuant to Article 2, this representation is reserved to the Supreme Pontiff himself, who exercises this right by means of the Secretariat of State. On the basis of this article, the Vatican participates in international relations, but to a lesser extent, or at least in a different fashion, than the Holy See.

The Vatican acts internationally in the field of more technical matters that are closely tied to the practical needs of the Vatican City State. In contrast, the international competence in spiritual and value-laden matters, e.g., human rights and peace and security, belongs rather to the Holy See. This explains why the Vatican State rather than the Holy See is a member of the International Telecommunications Union (ITU), the Universal Postal Union (UPU), the International Telecommunications Satellite Organization (INTELSAT), EUTELSAT, UNIDROIT, the World Intellectual Property Organization (WIPO) and the International Grain Council, whereas the Holy See rather than the Vatican is a member of the Organization for Security and Co-operation in Europe (OSCE), the United Nations Conference on Trade and Development (UNCTAD), the International Atomic Energy Agency (IAEA), the Comprehensive Nuclear Test Ban Treaty Organization, the Preparatory Commission for the Comprehensive Test Ban Treaty, the Organization for the Prohibition of Chemical Weapons and – also – the

¹⁸ Which can be considered as the Pontiff's foreign ministry pursuant to Art. 2 of the Fundamental Law.

¹⁹ Which exercises legislative power pursuant to Art. 3 of the Fundamental Law.

²⁰ Who exercises executive power pursuant to Art. 5 of the Fundamental Law, and emergency legislative powers pursuant to Art. 7.

²¹ Who exercise administrative power pursuant to Art. 9.

²² Which has a role in the preparation and the study of accounts and other affairs of a general order concerning the personnel and activity of the Vatican, pursuant to Art. 11.

²³ Who have the responsibility to offer their assistance in the drafting of Laws and in other matters of particular importance, pursuant to Art. 13.

²⁴ Art. 15 Fundamental Law of the Vatican City State.

²⁵ Which hears controversies concerning labor relations between the employees of the State and the Administration, pursuant to Art. 18.

WIPO.²⁶ As the example of WIPO membership illustrates, the distinction between technical and non-technical matters is not watertight, however, and in any event, the Holy See construes its spiritual mandate rather broadly, by including the non-proliferation of weapons of mass destruction therein.²⁷

The Holy See plays the more important role in international affairs. This was already reflected in the 1929 Conciliation Treaty, which stipulated in Article 12 that “Italy recognizes the right of the *Holy See* to passive and active Legation, according to the general rules of *International Law*”²⁸. The diplomatic activity of the Holy See predates the diplomatic activity of the Vatican by many centuries. In fact, the Pontiff’s legations were among the first diplomatic missions in the world.²⁹ The autonomous character of the Holy See’s international activities is further reflected by the fact that in the period of the territorial interregnum (1870-1929), the Holy See did not stop sending diplomatic representatives to a number of States (active legation) and States continued to be represented at the Holy See (passive legation).³⁰ As of this writing, the diplomatic representatives of the Holy See represent both the Vatican City State *and* the Holy See,³¹ but they formally maintain diplomatic relations in the name of the Holy See and not in the name of the Vatican State,³² thereby illustrating the pre-eminent role of the Holy See in international relations, as compared to the role of the Vatican.

The international and transnational role of the Holy See, which serves the adherents of the Roman Catholic faith spread over the entire world, complicates the quest for a precise legal characterization of the Holy See. What is clear is that the Holy See is not simply the government of the territorially delimited Vatican City, but the governance center of the Roman Catholic Church, or as the U.S. Court of Appeals for the Second Circuit

²⁶ G. Westdickenberg, ‘Holy See’, *Max Planck Encyclopaedia of Public International Law* (June 2006) available at http://www.mpepil.com/subscriber_article?script=yes&id=/epil/entries/law-9780199231690-e1052&recno=1&author=Westdickenberg%20%20Gerd (last visited 3 January 2012), paras 10-11.

²⁷ *Id.*, para. 11.

²⁸ Emphasis added.

²⁹ Martinez, *supra* note 2, 149.

³⁰ T. Maluwa, ‘The Holy See and the Concept of International Legal Personality: Some Reflections’, 19 *Comparative and International Law Journal of Southern Africa* (1986) 1, 3; Crawford, *supra* note 3, 226.

³¹ Maluwa, *supra* note 30, 3.

³² K. Martens, ‘De positie van de Heilige Stoel in het volkenrecht’, 55 *Ars Aequi* (2006) 2, 104. Conversely, foreign diplomats are accredited with the Holy See and not with the Vatican.

stated in 2009 the “Holy See is the ecclesiastical, governmental, and administrative capital of the Roman Catholic Church. Defendant Holy See is the composite of the authority, jurisdiction, and sovereignty vested in the Pope and his delegated advisors to direct the world-wide Roman Catholic Church”³³.

While the Holy See has been characterized as a State, although perhaps an unusual or anomalous one (e.g., in an immunities context),³⁴ the better view is that it is a *sui generis* entity that enjoys far-reaching international legal personality, but that falls short of statehood. It would indeed be a stretch to consider the Holy See as having a territory. If one were to affirm that the Vatican City State is the Holy See’s territory, then *a contrario* the disappearance of this territory would imply the loss of statehood and thus a transformation of its international legal personality. However, as became clear after the Pontiff’s loss of the Papal States, during the territorial interregnum between 1870 and 1929, the Holy See continued to exercise the powers it had, but without a territorial base. This suggests the existence of an international legal personality that is independent of territory. Obviously, the existence of a territorial base may safeguard the independence of the Holy See *vis-à-vis* existing States – which was precisely the goal of the Lateran Treaties in 1929 – but it is not constitutive of the Holy See’s international legal personality. Secondly, while it can be argued that the inhabitants of the Vatican City State constitute the population of the Holy See, and that dual nationality (of both the Vatican State and the Holy See) is not prohibited under international law, it appears rather odd that the citizenship of two States would be wholly identical. In addition, the “population” served by the Holy See may be said to extend well beyond the tiny number of 500 clerics located at the Vatican. After all, Catholics make up a population of almost 1.2 billion souls (if all criteria for statehood were met, this would make the Holy See the second most populous nation in the world after China)³⁵. Thirdly, and related to the criterion of population, the governmental institutions of the Holy See, such

³³ *Doe v. Holy See*, CV-02-00430 MWM, United States Court of Appeals for the Ninth Circuit, 3 March 2009, 2551.

³⁴ E.g., M. Black, ‘The Unusual Sovereign State: The Foreign Sovereign Immunities Act and Litigation Against the Holy See for Its Role in the Global Priest Sexual Abuse Scandal’, 27 *Wisconsin International Law Journal* (2009), 299, 299: “The Holy See is the world’s [*sic!*] smallest nation-state”.

³⁵ According to the Vatican Statistical Yearbook 2008, there were 1,166 million Catholics in the world.

as the Congregations and Tribunals (including the Roman Rota), do not administer the territorially delimited entity of the Vatican but instead the religious affairs of the worldwide Catholic Church's members, who are residents and nationals of foreign nations.

Thus, the Holy See's governance, jurisdiction or authority is not based on territorial sovereignty but rather on *spiritual sovereignty*.³⁶ The dominant conception of statehood does not accommodate such a manifestation of sovereignty, although in the literature the older statehood theory of 'dynastic succession' has been invoked so as to buttress the Holy See's authority and sovereign status in international law.³⁷ The international legal personality of the Holy See can however best be conceived as 'unique', *sui generis*, and based on a spiritual mandate that knows no borders. The Holy See shares this unique status with perhaps only one other entity widely recognized as enjoying international legal personality: the Sovereign Military Order of St. John of Jerusalem, of Rhodes, and of Malta (the Order of Malta), which, like the Holy See, also has the right of legation and has observer status at the UN General Assembly (although, unlike the Holy See, it lacks a territorial basis).³⁸

³⁶ See also A. D. Hertzke, 'The Catholic Church and Catholicism in Global Politics', in J. Haynes (ed.), *Routledge Handbook of Religion and Politics* (2009), 48 (naming the Holy See's "spiritual sovereignty" an important power base that should not be underestimated). Compare the Great Commission, Matthew: 28:16-20 (New International Version): "Then the eleven disciples went to Galilee, to the mountain where Jesus had told them to go. When they saw him, they worshiped him; but some doubted. *Then Jesus came to them and said, 'All authority in heaven and on earth has been given to me. Therefore go and make disciples of all nations, baptizing them in the name of the Father and of the Son and of the Holy Spirit, and teaching them to obey everything I have commanded you. And surely I am with you always, to the very end of the age.'*" (emphasis added).

³⁷ Martinez, *supra* note 2, 149, arguing that "[t]he role of the Holy See at the apex of the worldwide Catholic Church is dependent on the special authority of the apostle Peter, an authority which Catholic doctrine and canon law asserts is passed on through an unbroken line of succession of the popes".

³⁸ Cf. F. Gazzoni, 'Malta, Order of', *Max Planck Encyclopaedia of Public International Law* (January 2009) available at http://www.mpepil.com/subscriber_article?script=yes&id=/epil/entries/law-9780199231690-e958&recno=1&author=Gazzoni%20%20Francesco (last visited 3 January 2012). Since 1834, the Order is based in Rome (para. 4).

C. The Holy See in International Relations

In the previous section, to illustrate the distinct personality of the Holy See and the Vatican City State, it has been argued that, compared with the Vatican City State, the Holy See has the upper hand in conducting international relations. It was noted that the Holy See is a member of a number of international organizations and that it sends and receives legations. Importantly, the Holy See also has treaty-making capacity, as is epitomized by its practice of concluding ‘concordats’ with various States (see the next section), by its conclusion of the Lateran Treaties with Italy in 1929, and by its accession to a number of multilateral conventions, such as the Geneva Conventions on the Law of War (1949), the Convention relating to the Status of Refugees (1951),³⁹ the Vienna Convention on Diplomatic Relations (1961), the Vienna Convention on Consular Relations (1963), the International Convention on the Elimination of All Forms of Racial Discrimination (1966), the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984),⁴⁰ the Convention on the Rights of the Child (1989) and its Optional Protocols, and the Convention on Cluster Munitions.⁴¹

One of those multilateral conventions, the Vienna Convention on Diplomatic Relations (VCDR), makes two special references to the Holy

³⁹ It is noted, however, that the Holy See has declared with respect to this Convention that “the application of the Convention must be compatible in practice with the special nature of the Vatican City State”. Cf. *Convention Relating to the Status of Refugees*, 28 July 1951, reservation by the Holy See, 189 U.N.T.S. 137. This may suggest that where the Holy See becomes a party to a treaty, the Vatican will also be bound by that treaty, even though it is technically a separate legal person.

⁴⁰ Also with respect to this Convention has the Holy See made a declaration: “The Holy See, in becoming a party to the Convention on behalf of the Vatican City State, undertakes to apply it insofar as it is compatible, in practice, with the peculiar nature of that State”. Cf. *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1984, 1465 U.N.T.S. 85, Declaration by the Holy See. It may seem that this declaration points to the same peculiarity as the earlier declaration with respect to the Convention relating to the Status of Refugees, inasmuch as the Holy See would appear to be the contracting party, but the Vatican is assumed to be bound as well. Thanks to the reviewer for drawing my attention to both declarations.

⁴¹ As regards other conventions, it has been observed that the Holy See “endorses the aims of these international conventions in principle, but that they either do not suit the specific status of the Holy See in international law or that these conventions do not allow for reservations”. See Westdickenberg, *supra* note 26, para. 12.

See's legation practice in Articles 14 and 16. Article 14(1) VCDR equates apostolic nuncios (the Holy See's diplomatic representatives) with ambassadors, i.e., the first class of heads of mission. Article 16, which deals with the precedence of diplomatic representatives, provides in paragraph 3 that it "is without prejudice to any practice accepted by the receiving State regarding the precedence of the representative of the Holy See"⁴². Thereby, it affirms the continued application of existing customary (law) practices between the Holy See and the receiving State.

The Holy See has accreditation as a permanent observer at the United Nations, at many of its specialized agencies, and at a number of regional intergovernmental organizations.⁴³ It is, as noted above, a member of other international organizations, but it has never pressed its case to join the UN as a full-fledged member (neither has the Vatican for that matter, although it is a State).⁴⁴ However, the Holy See has not excluded that in the future it may request UN membership instead of permanent observer status.⁴⁵

⁴² According to Article 16 VCDR, "1. Heads of mission shall take precedence in their respective classes in the order of the date and time of taking up their functions in accordance with article 13. 2. Alterations in the credentials of a head of mission not involving any change of class shall not affect his precedence".

⁴³ See for an overview notably the fourth preambular paragraph of UN Doc A/58/314 (16 July 2004) on the Participation of the Holy See in the work of the United Nations (listing the Food and Agriculture Organization of the United Nations, the International Labour Organization, the World Health Organization, the United Nations Educational, Scientific and Cultural Organization, the United Nations Industrial Development Organization, the International Fund for Agricultural Development and the World Tourism Organization, as well as the World Trade Organization, the Council of Europe, the Organization of American States and the African Union).

⁴⁴ See on joining the League of Nations: Duursma, *supra* note 2, 399. On the Holy See/Vatican joining the UN, the following statement of Cordell Hull (1944) is illuminating: "It would seem undesirable that the question of the membership of the Vatican State be raised now. As a diminutive state the Vatican would not be capable of fulfilling all the responsibilities of membership in an organization whose primary purpose is the maintenance of international peace and security. [...] Membership in the organization would not seem to be consonant with the provisions of Article 24 of the Lateran Treaty, particularly as regards spiritual status and participation in possible use of force. Non-membership would not preclude participation of the Vatican State in social and humanitarian activities of the organization nor impair its traditional role in promotion of peace by its usual influence", quoted in Crawford, *supra* note 3, 156.

⁴⁵ See notably the statement of Archbishop Migliore, the Holy See's UN representative, on the occasion of the adoption of UN Doc A/58/314 (16 July 2004), the UNGA resolution reaffirming the Holy See's permanent observer status at the UN: "We have no vote because this is our choice". But this resolution "is a fundamental step that does not close any path for the future. The Holy See has the requirements defined by

The Holy See was granted permanent observer status at the UN in 1964.⁴⁶ The rights that flow from that status were strengthened by UN General Assembly Resolution 58/314 (2004). This resolution provides that “the Holy See, in its capacity as an Observer State, shall be accorded the rights and privileges of participation in the sessions and work of the General Assembly and the international conferences convened under the auspices of the Assembly or other organs of the United Nations, as well as in United Nations conferences as set out in an annex”⁴⁷. It is conspicuous that the UN General Assembly does not characterize the Holy See as a non-State actor, but as an observer *State*.⁴⁸

In practice, the Holy See has the right to participate in the general debate of the UN General Assembly (GA), the right of inscription on the list of speakers under agenda times at any plenary meeting of the GA, the right to make interventions, the right of reply, the right to have its communications circulated as official documents relating to the sessions and work of the GA or international conferences issued and circulated directly as official documents of the GA or those conferences, the right to raise points of order relating to any proceedings involving the Holy See, and the right to co-sponsor draft resolutions and decisions that make reference to the Holy See.⁴⁹ However, not being a member State, it does not have the right to vote or to put forward candidates in the GA.⁵⁰

The Holy See also enjoys rights of participation at other principal UN organs. At the United Nations Economic and Social Council (ECOSOC), it has the right to attend all meetings and to make proposals and policy

the UN statute to be a member state and, if in the future it wished to be so, this resolution would not impede it from requesting it”, quoted in ‘Vatican’s Role at UN Unanimously Endorsed by General Assembly’, 7 *Catholic Family and Human Rights Institute* (9 July 2004).

⁴⁶ See for the activities of the Holy See’s mission at the United Nations: <http://www.holyseemission.org> (last visited 3 January 2012).

⁴⁷ UN Doc A/58/314 (16 July 2004), para. 1.

⁴⁸ This characterization may be confirmed by the Holy See’s rate of assessment for its financial contribution to the general administration of the UN: this is the rate of assessment for a non-member *State*. GA Res. 58/1 B (3 March 2004). That being said, the fact that the UN set the Holy See’s financial contribution parallel to that of a non-member State need not necessarily mean that the UN really referred to the Holy See as a non-member State; analogous use is equally plausible. And even if the UN considered the Holy See to be a state, this may only reflect the UN’s inability to adequately deal with ‘irregular’ entities like the Holy See.

⁴⁹ GA Res. 58/314 16 July 2004, paras 1-9.

⁵⁰ *Id.*, para. 10.

statements regarding all issues that are of its concern. It can also attend the sessions of ECOSOC's regional commissions on an equal footing with those State Members of the United Nations which are not members of those regional commissions.⁵¹ To coordinate its activities at ECOSOC, the Holy See has established a permanent mission in Geneva.⁵² At the UN Security Council, the Holy See has occasionally made a statement, e.g., on the situation between Iraq and Kuwait,⁵³ on the regulation and reduction of armaments,⁵⁴ and on the protection of civilians in armed conflicts.⁵⁵

The Holy See's rights of participation at the UN go well beyond the rights that are granted to NGOs as UN observers. An NGO, Catholics for Choice, denounced this state of affairs, and, between 1999 and 2004, lobbied in favor of downgrading the Holy See's status at the UN to regular NGO status, a status enjoyed by other religious organizations and bodies, such as the World Council of Churches.⁵⁶ This lobbying effort failed, however. In 2004, the Holy See's participation rights at the UN were even upgraded (see above for the details).

The Holy See typically uses its participation rights to press a moral agenda at the UN. For instance, the Holy See was instrumental in the adoption of the UN Declaration banning all forms of Human Cloning in 2005,⁵⁷ and in the *prevention* of the adoption of a proposed resolution on sexual orientation and gender identity.⁵⁸ In a 2010 speech to the Diplomatic Corps, the Pontiff emphasized the protection of the environment as one of the Holy See's major global points of interest.⁵⁹ So far, three Popes have addressed the General Assembly.⁶⁰

⁵¹ ECOSOC decision 244 (LXIII) (1977).

⁵² This mission has an up-to-date website: <http://www.holyseemissiongeneva.org> (last visited 3 January 2012).

⁵³ UN Doc S/PV.4709 (Resumption 1), 19 February 2003, 33-34.

⁵⁴ UN Doc S/PV.6017 (Resumption 1), 19 November 2008, 12-13.

⁵⁵ Statement of 14 January 2009, UN Doc S/PV.6066 (Resumption 1), 14 January 2009, 36-37.

⁵⁶ Catholics for Choice, *See Change: the Catholic Church at the United Nations*, 2001. See for a similar argument, Y. Abdullah, 'The Holy See at United Nations Conferences: State or Church?', 96 *Columbia Law Review* (1996) 7, 1835, 1875.

⁵⁷ GA Res. 59/280, 23 March 2005. See UN Doc A/C.6/59/SR.11, 15 January 2005, 10-11.

⁵⁸ See UN Doc A/63/PV.71, 18 December 2008, 2 for the statement of the Holy See delegation at the 63rd session of the General Assembly of the United Nations on the Declaration on Human Rights, Sexual Orientation and Gender Identity.

⁵⁹ Address of his Holiness Pope Benedict XVI, 'To the Members of the Diplomatic Corps for the Traditional Exchange of new Year Greeting' (11 January 2010)

The Holy See has also actively used its participation rights at international *conferences*. At the Rome Conference for the establishment of an International Criminal Court (1998), where the Holy See was accredited, it successfully lobbied, amongst other things, for the inclusion of sexual crimes in the Statute. At the Rome Conference, the contribution of the Holy See may have been labeled as rather ‘positive’,⁶¹ but the contribution of the Holy See to other conferences was decidedly more critically received, e.g., its contribution to the 1994 United Nations International Conference on Population and Development held in Cairo, or to the 1995 Fourth World Conference on Women held in Beijing.⁶²

At the bilateral level, the Holy See entertains diplomatic relations with an impressive 176 States, the European Union, and the Sovereign Military Order of Malta. It has relations of a special nature with the Russian Federation and the PLO.⁶³

available at http://www.vatican.va/holy_father/benedict_xvi/speeches/2010/january/documents/hf_ben-xvi_spe_20100111_diplomatic-corps_en.html (last visited 3 January 2012).

⁶⁰ Address of Paul VI to the UN General Assembly, UN Doc A/PV.1347, 4 October 1965, 2-5; Address of John Paul II to the UN General Assembly, UN Doc A/34/PV.17, 2 October 1979, 349-353 (as delivered), A/34/566 (full printed version); Address of John Paul II to the UN General Assembly, UN Doc A/50/PV.20, 5 October 1995, 2-6; Address of Benedict XVI to the General Assembly, UN Doc A/62/PV.95, 18 April 2008, 3-6.

⁶¹ See J. van der Vyver, ‘Contributions of the Holy See to the refinement of the Rome Statute of the International Criminal Court’, in *Canonical Testament: Mgr W. Onclin Chair 2004* (2004), 46. Its role in the addition of Article 7 (3) to the Rome Statute on the definition of gender has provoked some criticism in interested circles, however. See V. Oosterveld, ‘The Definition of “Gender” in the Rome Statute of the International Criminal Court: A Step Forward or Back for International Criminal Justice?’, 18 *Harvard Human Rights Journal* (2005), 55, 65. See below note 62 on the Holy See’s views on gender.

⁶² Abdullah, *supra* note 56, 1875. See for the Holy See’s views: Report of the Fourth World Conference on Women, Beijing, 4–15 September 1995, *Addendum*, Annex IV, U.N. Doc. A/CONF.177/20/Rev.1, U.N. Sales No. 96.IV.13 (1996), 164 (Holy See understanding the term ‘gender’ ‘as grounded in biological sexual identity, male or female’ and thus excludes ‘dubious interpretations based on world views which assert that sexual identity can be adapted indefinitely to suit new and different purposes.’).

⁶³ See for an overview provided by the Holy See Press Office: http://www.vatican.va/news_services/press/documentazione/documents/corpo-diplomatico_index_en.html (last visited 3 January 2012).

D. Concordats

The treaty-making power of the Holy See is not only exemplified by its accession to major multilateral treaties, but also by its practice of concluding ‘concordats’ with various States. A concordat is a specific bilateral treaty entered into between the Holy See and a State, which regulates the religious affairs and activities of the Catholic Church in that State.⁶⁴ Typically, it governs individuals’ right to exercise the Catholic religion, financial and property matters, confessional teaching, the civil effects of marriages under canonical law, State subsidies to the Church, and the Pontiff’s right to appoint bishops.

In the past, there was a lively doctrinal discussion as to the exact legal characterization of concordats. Some authors claimed that a concordat was a unilateral act done by the State, which thereby granted certain rights and privileges to the Catholic Church, while others claimed that a concordat had no legal value at all.⁶⁵ As we write, however, a consensus has crystallized that concordats are binding international agreements – treaties – that are concluded between equal parties.⁶⁶

While some treaties may be concluded by the Holy See on behalf of the Vatican, the ‘technical’ treaties in particular, this does not hold true for concordats. If concordats were concluded on behalf of the Vatican, the disappearance of the latter as the territorial base of the Holy See would result in the concordat no longer being in force between the Holy See and States, a result which cannot be considered as acceptable. Accordingly, the provisions of the Vienna Convention on the Law of Treaties (VCLT) cannot as such be applied. While the Holy See has ratified the VCLT, it can only have done so on behalf of the Vatican State, not for itself, as it lacks statehood. That said, the provisions of the VCLT can be applied to concordats to the extent that they reflect customary international law.⁶⁷

⁶⁴ See also H. Köck, *Die völkerrechtliche Stellung des Heiligen Stuhls* (1975), 316-318. It is noted that the Holy See also entered into a concordat with two (other) non-state actors: the Palestine Liberation Organization (PLO) and the African Union.

⁶⁵ S. Ferrari, ‘Concordats’, *Max Planck Encyclopaedia of Public International Law* (July 2006) available at http://www.mpepil.com/subscriber_article?script=yes&id=/epil/entries/law-9780199231690-e1382&recno=1&author=Ferrari%20%20Silvio (last visited 3 January 2012), para. 4.

⁶⁶ *Id.*

⁶⁷ R. Haule, *Der Heilige Stuhl/Vatikanstaat im Völkerrecht* (2006), 196.

The Holy See has not concluded concordats with all States with which it maintains diplomatic relations.⁶⁸ Also, while all concordats address the same subject-matter (the position of the Church in the contracting State), the Church's rights and privileges that are stipulated in the various concordats differ. The exact scope of these rights and privileges is in the final analysis dependent on the actual bargaining power of the Holy See *vis-à-vis* the contracting State. The relativity of the Holy See's bargaining power also explains why, for political reasons, concordats may bear other names, such as 'agreement'.⁶⁹ The term 'concordat' may indeed be objected to by States with a strong secular tradition. Also, in some quarters it may have received a negative connotation after the conclusion of concordats with Nazi Germany (*Reichskonkordat* of 20 July 1933)⁷⁰ and Franco's Spain (27 August 1953). In the absence of a concordat, the affairs of the Catholic Church are regulated by domestic law. This is the case in most States.

But even concordats have become subject to the writ of domestic law, or to international law as it plays out in the domestic legal order. Technically, this issue may be foreign to the issue of the standing of the Holy See, but a brief discussion of it appears justified in that it nicely illustrates the interplay between the concordats, as treaties with a particular relevance to domestic affairs, with domestic law.

In particular, the application of concordats has been challenged on constitutional or human rights grounds in various States, e.g., in Spain,⁷¹

⁶⁸ See for an overview: www.concordatwatch.eu (last visited 3 January 2012). See for a discussion of concordats concluded between 1963 and 2004: P. Petkoff, 'Legal Perspectives and Religious Perspectives of Religious Rights under International Law in the Vatican Concordats (1963-2004)', 158 *Law and Justice: the Christian Law Review* (2007), 30.

⁶⁹ See, e.g., the 'Agreement between the Holy See and the Federal Republic of Brazil on the legal status of the Catholic Church in Brazil' (13 November 2008) available at <http://www.concordatwatch.eu/topic-37261.843> (last visited 3 January 2012). The recent concordats with Portugal (18 May 2004) and Poland (28 July 1993) bear the name 'concordat', however.

⁷⁰ Online available at <http://www.ibka.org/artikel/ag97/reichskonkordat.html> (last visited 3 January 2012). See for a discussion: J. J. Hughes, 'The Reich Concordat 1933: Capitulation or Compromise?', 20 *Australian Journal of Politics & History* (1974) 2, 164.

⁷¹ J. Bastante, 'Un juez cuestiona la legalidad del Concordato ante el TC', *Publico*, (9 May 2009) available at <http://www.publico.es/espana/224345/un-juez-cuestiona-la-legalidad-del-concordato-ante-el-tc> (last visited 3 January 2012): lower judge raising the constitutionality of the concordat's provisions on religious education before the Spanish Constitutional Court, which had not yet issued a ruling at the time of writing.

Germany,⁷² and in the Dominican Republic, where, as early as 1961, the Supreme Court of Justice, sitting as the Court of Cassation, ruled that a judge could defy the 1954 Concordat of the State with the Holy See by refusing to give civil effect to a decree of annulment of marriage issued by ecclesiastical tribunals.⁷³ The Court admitted that canonical marriages did have civil effects under the Concordat and that the Concordat granted jurisdiction to canonical tribunals to pronounce on the annulment of canonical marriages, but emphasized that “[n]o provision of the Concordat which infringed the principles that formed the basis of the Constitution could be applied by Dominican courts”⁷⁴. Relying on the Constitution, it ruled that “the jurisdictional power of the state could not be delegated”, and “only civil courts had jurisdiction to pronounce on the civil aspects of an annulment of marriage”.⁷⁵

Rulings that declare provisions of concordats inapplicable on constitutional grounds, could be considered as giving rise to a breach of the concordat as, pursuant to Article 27 VCLT, “[a] party may not invoke the provisions of its internal law as justification for its failure to perform a treaty”. Yet undoubtedly, they bring pressure to bear on the Holy See and the contracting State to ensure that the substantive provisions of the concordat are in accordance with constitutional protections.

That being said, the text of most concordats already bears out that no islands of unfettered ecclesiastical power within the contracting State are carved out. In respect of a number of issues, concordats assert the primacy of the temporal order, or at least provide for mechanisms of State control and review in case, on the basis of the concordat, canonical decisions can be

⁷² Bayerischer Verwaltungsgerichtshof, 4 May 2009, 7 CE 09.661 und 7 CE 09.662. In this case, a number of non-Catholics complained that they were being discriminated against in that, on the basis of the concordat between Bavaria and the Holy See, they could not apply for a Concordat Chair at the University of Erlangen-Nürnberg. The tribunal dismissed the complaint on a technicality, on the ground that the hiring decision – in which the bishop participated – had not yet been taken and could thus not be challenged. See for an indirect challenge before the Federal Constitutional Court, judgment of 26 March 1957, published in BVerfGE 6, 309 available at <http://www.servat.unibe.ch/dfr/bv006309.html>: court denying that the Constitution imposed any obligation on the German states (Länder) *vis-à-vis* the federation to comply with the Concordat, and holding that the only obligation of compliance was one under international law.

⁷³ *Re Polanco and Brito*, Appeal judgment, (1961) BJ 606.49; ILDC 1205 (DO 1961).

⁷⁴ ILDC 1205 (DO 1961), H3; para. 16.

⁷⁵ ILDC 1205 (DO 1961), H2; para. 14.

enforced in the temporal order. In turn, these temporal mechanisms are subject to their own review mechanisms, e.g., to the jurisdiction of the European Court of Human Rights (ECHR). As a result, while the Holy See, as a non-State actor, is not a party to the European Convention on Human Rights (ECHR), the canonical decisions of its administration and courts can indirectly be reviewed by the ECHR. This is exemplified by the case of *Pellegrini v. Italy*, decided by the ECHR in 2001.⁷⁶

The applicant, Ms Pellegrini, had married her husband in a religious ceremony which was also valid in the eyes of Italian law pursuant to Article 8.1 of the concordat between Italy and the Holy See. The civil effect of the religious marriage is a typical privilege that States grant to the Holy See in concordats. This privilege is logically accompanied by the privilege of State enforceability of ecclesiastical courts' judgments *annulling* the marriage, a privilege that, as regards Italy, was provided for in Article 8.2 of the concordat. This article stipulates that an Italian court of appeal could make the ecclesiastical marriage annulments enforceable in the Italian legal order, but requires that the court of appeal, amongst other things, ascertain that 'during the proceedings before the ecclesiastical court the parties had been assured the right to sue and to defend themselves in court in a way which does not differ from the fundamental principles of Italian law'.⁷⁷

In 1987, an Italian ecclesiastical court had annulled Ms Pellegrini's marriage on the ground that it was within the prohibited degrees of consanguinity. The judgment was upheld in 1988 by the Roman *Rota* (the superior ecclesiastical review body of the Roman Curia), which subsequently referred the case to the Florence Court of Appeal for a declaration that the judgment could be enforced under Italian law.⁷⁸ The Court of Appeal declared the judgment enforceable in 1988. An appeal by the applicant with the Italian Court of Cassation was dismissed in 1995, upon which Ms Pellegrini filed an application against Italy with the European Court of Human Rights. She claimed that Italy had violated Article 6.1 of the ECHR, by insufficiently satisfying itself that, before authorizing the enforcement of the decision annulling the marriage, the

⁷⁶ *Pellegrini v. Italy*, ECHR (2002) Application no. 30882/96. It is observed that the ECHR speaks throughout of the Roman *Rota* as a court of the Vatican, whereas that it is actually a court of the Holy See. See also Lord Carswell (*Government of the United States of America v. Montgomery (No 2)* [2004] UKHL 37, [2004] 1 WLR 2241, para. 19.

⁷⁷ Article 8.2(b) of the concordat between Italy and the Holy See.

⁷⁸ *Pellegrini v. Italy*, *supra* note 76, paras 11-23.

proceedings before the ecclesiastical tribunals fulfilled the guarantees for a fair trial. In particular, she complained that, in the proceedings before the ecclesiastical tribunals, she had not been informed in detail of her ex-husband's application to have the marriage annulled, had not had access to the case file, and was not assisted by a lawyer.⁷⁹

The ECHR duly noted that “[t]he Vatican has not ratified the Convention and, furthermore, the application was lodged against Italy”, and “[t]he Court's task therefore consists not in examining whether the proceedings before the ecclesiastical courts complied with Article 6 of the Convention”.⁸⁰ The Court instead proceeded to review whether the Italian courts had complied with Article 6 ECHR when examining whether the proceedings before the ecclesiastical courts ‘fulfilled the guarantees’ of Article 6.⁸¹ But indirectly, of course, the ECHR claimed review powers over ecclesiastical proceedings, insofar as the temporal enforcement of these proceedings depends on a decision of an ECHR Contracting State. It appears that these review powers are absolute, and thus that the ECHR does not review the Article 6 compatibility of ecclesiastical proceedings with a light touch: the Court needed only a few lines to find that Italian courts had breached their duties under the ECHR by insufficiently satisfying themselves that the applicant knew what the case before the ecclesiastical courts was about and that she was informed of the possibility of being assisted by a lawyer.⁸²

The ECHR did not apply the standard of mere ‘equivalent protection’, which it employs as regards proceedings before domestic courts against international organizations (another category of non-State actors).⁸³ This may be explained by the direct reference in Article 8.2(b) of the concordat with Italy to a right to a fair trial in ecclesiastical proceedings that “does not differ from the fundamental principles of Italian law”, combined with the direct effect of the ECHR in the Italian legal order. Set agreements with international organizations typically exclude State review powers over

⁷⁹ *Id.*, paras 24-29, 42.

⁸⁰ *Id.*, para. 40.

⁸¹ *Id.*

⁸² *Id.*, paras 44-47.

⁸³ *Beer and Regan v. Germany*, ECHR (1999), Application no. 28934/95, para. 59; *Waite and Kennedy v. Germany*, ECHR (1999), Application no. 26083/94, para. 68; *Bosphorus v. Ireland*, ECHR (2005), Application no. 45036/98, 30 May 2005, para. 155.

decisions of organizations, and do not tie this grant of immunity to the compliance of those decisions with the right to a fair trial.

Clearly, judicial proceedings under the Holy See's authority are less insulated from State and international review powers than quasi-judicial proceedings conducted by dispute-settlement mechanisms of international organizations. This differential treatment between two categories of non-State actors may be explained by the waning political power of the Holy See *vis-à-vis* the State since the early 20th century, as contrasted with the steep ascendancy of international organizations and their attendant emancipation from the State. Be that as it may, domestic case law indicates in any event that, at least in some jurisdictions, concordats, and the canonical law and practice to which they refer, are considered as reviewable in light of constitutional and human rights protections.

E. International Dispute Settlement

International dispute-settlement is concerned with the enforcement of international law. An entity's role in international dispute-settlement is therefore an important attribute or indication of its international legal personality.

Since the loss of the Papal States, and especially since the Lateran Conciliation Treaty, the Holy See is no longer expected to become involved in disputes with or between States. However, the Conciliation Treaty allowed the Holy See to continue to play its historical role as a prominent neutral arbitrator of international disputes between States.⁸⁴

Just like the Holy See was one of the first entities to send and receive legations, it was also one of the first mechanisms of peaceful international dispute settlement. An early manifestation of its mediation powers was its role in resolving the dispute between Spain and Portugal over the division of the newly discovered Americas. That dispute, which had in fact been exacerbated by earlier, hardly neutral papal interventions, was finally resolved by the Treaty of Tordesillas, and sanctioned by the papal bull *Ea*

⁸⁴ Cf. Lateran Conciliation Treaty, *supra* note 7, Art. 23: "In regard to the sovereignty appertaining to it also in the international realm, the Holy See declares that it desires to remain and will remain outside of any temporal rivalries between other states and the international congresses to settle such matters, unless the contending parties make a mutual appeal to its mission of peace; it reserves to itself in any case the right to exercise its moral and spiritual power".

quae in 1506.⁸⁵ But it was especially after the Holy See lost its temporal powers in 1870 that it became widely solicited as a mediator. In a remarkable appeal, an editorial comment in the *American Journal of International Law* of 1915 called on the Catholic nations “to accept that standard of conduct which substitutes spirituality for materialism and which prefers settlements of international disputes according to law and justice to the settlement of disputes by the brutal arbitrament of the sword”⁸⁶. In the period before the First World War, the Holy See’s intervention was sought by such Catholic States as Spain, Portugal and various Latin American States, and even States with only a Catholic minority, such as the United Kingdom, the United States, and Germany.⁸⁷ After the First World War, however, the Holy See lost its prominent role as a mediator.

More recently, however, the Holy See mediated successfully in the *Beagle Channel* dispute between Chile and Argentina after Argentina had rejected the 1977 arbitral award, and both parties requested Holy See mediation in 1979.⁸⁸ Pio Laghi, the Holy See’s nuncio in Argentina at the time, and one of the Holy See’s mediators in the *Beagle Channel* dispute, later went on to become the first papal nuncio in the U.S. after the U.S. established diplomatic relations with the Holy See. In that capacity, he pled,

⁸⁵ F. Gardiner Davenport & C. O. Paullin (eds), *European Treaties Bearing on the History of the United States and Its Dependencies to 1648* (1917), 107–111. H. HARRISSE, *The Diplomatic History Of America: Its First Chapter 1452-1493-1494* (1897).

⁸⁶ Editorial Comment, ‘The British Mission to the Vatican’, 9 *American Journal of International Law* (1915), 206, 208. See also Martinez, *supra* note 2, 146.

⁸⁷ See for a fine overview: Köck, *supra* note 64, 459-478; Westdickenberg, *supra* note 26, para. 15.

⁸⁸ Cf. *Beagle Channel Arbitration between the Republic of Argentina and the Republic of Chile*, Report and Decision of the Court of Arbitration, 18 February 1977; *Act of Montevideo by which Chile and Argentina request the Holy See to act as a mediator with regard to their dispute over the Southern region and undertake not to resort to force in their mutual relations (with supplementary declaration)*, 8 January 1979, 1088 U.N.T.S., 135; *Papal proposal of 12 December 1980*; *Joint Declaration on Peace and Friendship between Argentina and Chile of 23 January 1984*, *Treaty of Peace and Friendship signed between the Republic of Chile and the Republic of Argentina*, 29 November 1984, 1399 U.N.T.S., 23392. All these materials are reproduced in *Reports of International Arbitral Awards*, Dispute between Argentina and Chile concerning the Beagle Channel, 18 February 1977, *R.I.A.A.* XXI, 53-264.

unsuccessfully however, with U.S. President George W. Bush to reconsider his decision to go to war with Iraq in 2003.⁸⁹

Apart from serving as a mediator, the Holy See also has a tradition of condemning the persecution of Catholics, or even Christians of other denominations, in States where these form a minority. This has occasionally led to accusations of meddling in the internal affairs of States or other religions. Recently, for instance, the Grand Sheikh of Al-Azhar, an Egyptian cleric, termed the Pope's call for world leaders to defend Christians after a car bomb killed scores of Egyptian Copts in Alexandria, an "unacceptable interference in Egypt's affairs"⁹⁰. Criticism of the Pope's calls for world leaders to express solidarity with persecuted Christians in Iraq was much more muted, however.⁹¹

F. Immunity

As explained in the third section, the Holy See's power of concluding concordats has diminished. Only a limited number of States have entered into a concordat with the Holy See, and States that have concluded concordats claimed review powers of their own as regards ecclesiastical practices. As is explained in this section, the diminishing autonomy of the Holy See *vis-à-vis* States is also exemplified by domestic courts' reluctance to grant the Holy See immunity from jurisdiction.

Immunity cases do not only arise in Italy, where the Holy See has its seat. In various States, and in particular the United States, sex abuse scandals in the Church have recently given rise to legal proceedings against the Holy See on the basis of the latter's vicarious liability for the Catholic clergy or its negligence in the face of the abuses.⁹²

⁸⁹ 'Vatican to Bush: Iraq war would be 'disaster'', *CNN* (5 March 2003) available at http://articles.cnn.com/2003-03-05/politics/sprj.irq.bush.vatican_1_vatican-envoy-iraq-war-cardinal-pio-laghi?_s=PM:ALLPOLITICS (last visited 3 January 2012).

⁹⁰ 'Azhar Top Cleric Accuses Pope Benedict XVI of Meddling', *Daily News Egypt* (3 January 2011) available at <http://www.thedailynewsegypt.com/azhar-top-cleric-accuses-pope-benedict-xvi-of-meddling.html> (last visited 3 January 2012).

⁹¹ R. Donadio, 'Pope blesses Christians in Iraq, peace in Mideast', *New York Times* (26 December 2010) available at http://articles.sfgate.com/2010-12-26/news/26287049_1_urbi-orbi-pope-benedict-xvi (last visited 3 January 2012).

⁹² It is noted that in late 2010, two Belgian lawyers announced that they planned to file suit in the Belgian courts against the Pope for his role in keeping the abuses in the Church secret. Cf. 'Waarom de paus nog niet veroordeld is', *De Standaard*

The immunity of the Holy See in Italy is purportedly regulated by Article 11 of the Lateran Conciliation Treaty (1929), which provides that “[a]ll central bodies of the Catholic Church shall be exempt from any interference on the part of the Italian State (except as provided by Italian law with regard to acquisition of property made by recognized public bodies (*corpi morali*), and with regard to the conversion of real estate)”⁹³. Italian courts have traditionally given this provision a broad interpretation. In a 1987 case, for instance, the Italian Court of Cassation granted immunity from criminal jurisdiction to three high officials of the Vatican Bank accused of complicity in the fraudulent bankruptcy of the Banco Ambrosiano, on the basis of Article 11 of the Conciliation Treaty.⁹⁴ Along similarly liberal lines, the Court of Cassation held in 1982 that the Vatican Radio enjoyed immunity from jurisdiction as it was a central body of the Catholic Church.⁹⁵

The liberal interpretation of Article 11 of the Conciliation Treaty was rejected in 2003, however. In the *Tucci* case, the Court of Cassation, drawing on Article 31 of the VCLT (which lays down the rules of treaty interpretation), held that the Holy See’s immunity from jurisdiction could not be inferred from the obligation of non-interference enshrined in the Lateran Treaty:

“The obligation set out in Article 11 of the Lateran Treaty not to interfere with activities of the central bodies of the Catholic Church could not be considered in any way as equivalent to immunity from jurisdiction. Indeed, while the latter would have required the Italian State to waive its jurisdictional authority, no such limitation was implied when abiding by the obligation of non-interference. The obligation in question was not tantamount to a general waiver by Italy of its sovereignty and, in particular, to the exercise of jurisdiction. It only aimed at protecting the independent performance of the activities connected with the Magisterium of the Catholic Church.

(24 December 2010) available at <http://www.standaard.be/artikel/detail.aspx?artikelid=NR347176> (last visited 3 January 2012).

⁹³ Lateran Conciliation Treaty, *supra* note 7.

⁹⁴ Decision of the Court of Cassation, fifth criminal section, decision no 3932, 17 July 1987, *Marcinkus*. A Constitutional Appeal was rejected by Sentenza N.609, 6 June 1988.

⁹⁵ Decision of the Court of Cassation, all civil sections, 5 July 1982, no 4005.

The right to invoke immunity from jurisdiction must be stated expressly and could not be inferred from a provision dealing with non-interference. As the immunity imposed heavy limitations on state sovereignty, it had to be provided for by special rules not subject to an extensive interpretation. The fact that immunity from jurisdiction could not be inferred from the obligation of non-interference, was confirmed by Article 31(1) of the Vienna Convention on the Law of Treaties (23 May 1969) 1155 UNTS 331; 8 ILM 679 (1969); 63 AJIL 875 (1969), entered into force 27 January 1980, which considered the textual criterion to be the general rule of interpretation of treaty provisions.

While undertaking the obligation not to interfere, and recognizing the absolute sovereignty and independence of the Catholic Church, the Italian State had, at the same time, maintained its own sovereignty in the *temporal* order.”⁹⁶

Importantly, the Court of Cassation considered the Lateran Treaty as a self-contained *régime* concerning the relationship between the Italy and the Holy See; only in passing did it note that the Holy See did not enjoy immunity from jurisdiction under customary international law.⁹⁷

As regards the particular facts of the *Tucci* case, in which private citizens and environmental organizations sought redress from three managers of the Vatican Radio for alleged damage sustained as a consequence of electro-magnetic radiation emanating from plants situated on the territory of the Holy See, the Court’s rejection of the Holy See’s immunity reinstated the full sovereignty of Italy over (environmental) crimes of which the effects were felt in Italian territory:

“Italy could fully exercise its competence to punish criminal offences that, although committed on the territory of the Holy See, caused harmful effects within the national territory. The exercise of Italian jurisdiction was subject to the sole condition

⁹⁶ Public prosecutor, *Rome Tribunal v. Tucci and others*, Appeal judgment, Decision on Preliminary Question, no 22516; 295 ILDC (2003), 86 *Rivista di diritto internazionale* (2003) 3, 821 (in Italian), 21 May 2003, ILDC H1-H3, paras 5, 7 and 9 of the judgment.

⁹⁷ *Id.*, ILDC H4, para. 4.

of a causal link between those harmful effects and the illicit act committed on the territory of the Holy See.”⁹⁸

It is of note that, in the Court’s view, human rights, constitutional protections, and the individual’s right to an (effective) remedy corroborated the restrictive interpretation of Article 11 of the Lateran Treaty, and the resulting rejection of immunity.⁹⁹ It was precisely the Court’s failure to consider such protection in its 1980s case law that led to fierce criticism of the Court’s interpretation of Article 11 at the time.¹⁰⁰

Regardless of the restrictive interpretation of Article 11 of the Lateran Treaty and the Court’s unwillingness to equate the principle of non-interference with the notion of immunity, also after the *Tucci* case immunity continues to flow *de facto* from Article 11 to the extent that harmful acts emanate from a ‘central body’ of the Catholic Church, i.e., a body of the Roman Curia (which the Vatican Radio was not according to the Court).¹⁰¹ It would indeed be difficult to fathom how a jurisdictional assertion over the Roman Curia on the part of Italian courts could not amount to interference with the (spiritual) activities of the Holy See.

In States that have not entered into a bilateral agreement with the Holy See – indeed the great majority of States – any immunity that could accrue to the Holy See is to be derived from domestic law, international law, or a combination of both. In practice, while States have enacted legislation regulating the affairs of the Catholic Church, they have not enacted legislation addressing the legal status of the Holy See within their territory or before their courts. Nor may there be a clear principle that the Holy See,

⁹⁸ *Id.*, ILDC H3, para. 7 of the judgment.

⁹⁹ *Id.*: “This conclusion also respected the right of individuals, provided for both by statutory and constitutional rules, to receive full judicial protection of their rights and interests in civil as well as in criminal matters”.

¹⁰⁰ *Id.*, Comment M. Iovane, A1.

¹⁰¹ *Id.*, ILDC H5, para. 3 of the judgment: “The Vatican Radio was not a ‘central body’ of the Catholic Church. This expression referred only to the entities constituting the Roman Curia, namely those taking part in the supreme and universal government of the Catholic Church and carrying out its spiritual mission worldwide. The Vatican Radio did not directly participate in the governmental organization of the Holy See. In fact, its main activity of propagating the evangelical message was only instrumental to the universal mission. Moreover, canon law itself expressly excluded the Vatican Radio from the central bodies of the Catholic Church. Article 186 of the Constitution, 1988 (Apostolic) (Holy See) considered the Radio as an institution which was ‘only connected’ to the Holy See without being part of the Roman Curia. (paragraph 3)”.

as a *sui generis* international legal person that differs from States, is entitled to immunity under general international law in ways similar to the immunity of States.

Still, U.S. courts have treated the Holy See as a sovereign for purposes of applying the U.S. Foreign Sovereign Immunities Act (FSIA), although, technically speaking, the act only applies to foreign *States* and their political subdivisions, agents, and instrumentalities.¹⁰² This may be explained by the fact that the U.S. and U.S. courts consider the Holy See and the Vatican City State as interchangeable, or the Holy See as representing the Vatican City State.¹⁰³

Plaintiffs suing the Holy See have made the most forceful argument against the characterization of the Holy See as a State for purposes of FSIA application in the case of *O'Bryan v. Holy See* (2009), which concerned the Holy See's liability for sex abuses committed by U.S. Catholic clergy in Kentucky. They asked a Kentucky District Court, and on appeal the Court of Appeals for the 6th Circuit, to conceive of the Holy See as two separate entities: one being identifiable with the Vatican as a foreign sovereign recognized as such by the U.S. Government, and another being the 'unincorporated head of an international religious organization', namely the Roman Catholic Church, which "has no defined territory and no permanent population, and thus does not satisfy the definition of 'foreign state' under the Restatement's [Third, of U.S. Foreign Relations Law 1987] standard", and that is "wholly distinct and separate from its role and activities as a sovereign".¹⁰⁴

The plaintiffs' argument in *O'Bryan* was rejected by the courts, however. The District Court held that the plaintiffs "cite no authority for the proposition that the Holy See may be sued in a separate, non-sovereign function as an unincorporated association and as head of an international religious organization"¹⁰⁵. The Court of Appeals affirmed, citing other U.S. courts' case law, and held that the status of the Holy See as a "parallel non-

¹⁰² 28 U.S.C. § 1603 (a)-(b).

¹⁰³ *Dale and ors v. Colagiovanni and ors*, Appeal judgment, 443 F3d 425 (5th Cir 2006); ILDC 714 (US 2006); *O'Bryan v. Holy See*, 556 F.3d 361, 369 (6th Cir. 2009): "The Holy See is both a foreign state and an unincorporated association and the central government of an international religious organization, the Roman Catholic Church. The United States has recognized the Holy See as a foreign sovereign since 1984".

¹⁰⁴ Plaintiffs' arguments as related in *O'Bryan v. Holy See*, 556 F.3d 361, 373 (6th Cir., 2009).

¹⁰⁵ *O'Bryan v. Holy See*, 490 F.Supp.2d 826, 830 (W.D. Ky. 2005).

sovereign entity” was “conjured up by the plaintiffs”.¹⁰⁶ This determination did not come as a surprise, as the U.S. Government had intervened as an *amicus curiae* in the case supporting the position of the Holy See regarding its status as a foreign sovereign for purposes of the FSIA.¹⁰⁷ In our view, however, plaintiffs’ argument *was* convincing, since, as argued above, the Holy See should not always be considered as representing its territorial base, the Vatican State. When supervising priests, it acts in its capacity as a non-State religious organization rather than as a State.

In any event, since U.S. courts have considered the Holy See as a State for purposes of the FSIA, immunity disputes involving the Holy See have not revolved around the question of whether the FSIA is applicable in the first place, but around the question of whether exceptions to the FSIA were triggered in specific cases pending before the U.S. courts. For instance, in the case of *Dale v. Colagiovanni*,¹⁰⁸ the latter being an agent of the Holy See who was sued for having participated in an international insurance fraud scheme,¹⁰⁹ the Court ruled that the commercial activity exception did not apply, on the ground that the agent had only acted with ‘apparent’ and not the ‘actual’ authority of the Holy See.¹¹⁰ In the recent sexual abuse cases of *O’Bryan* and *Doe v. Holy See*, the question was whether the tortious and commercial activity exceptions to the FSIA applied. Various courts came to divergent conclusions on the application of these exceptions, and the

¹⁰⁶ *O’Bryan v. Holy See*, 556 F.3d 361, 373 (6th Cir. 2009), citing *Dale*, 337 F.Supp.2d at 832; *English v. Thorne*, 676 F.Supp. 761, 764 (S.D.Miss.1987); *Doe v. Holy See*, 434 F.Supp.2d 925, 933 (D.Or.2006).

¹⁰⁷ *O’Bryan v. Holy See*, 556 F.3d 371.

¹⁰⁸ *Id.*

¹⁰⁹ Colagiovanni was a Roman Catholic ‘monsignor’, a judge *emeritus* of the *Tribunal della Rota Romana* (the ‘Rota’), one of the Vatican’s three appellate courts, and a professor at the *Studio Rotale*, a graduate programme connected to the Rota. Colagiovanni was also a senior member of the ‘Curia’, the Vatican’s government, and was the President of the *Monitor Ecclesiasticus* Foundation (the ‘MEF’), an autonomous entity that published a journal of canon law. Cf. para. 2 of the judgment, as renumbered by ILDC 714 (US 2006).

¹¹⁰ It is noted that the immunity of the sovereign extends to his agents and instrumentalities pursuant to 28 U.S.C., para. 1603(a). The outcome of the case was well received in the literature. Cf. B. Borsare, ILDC 714 (US 2006), A3: “The opposite conclusion would broaden the commercial activities exception considerably by subjecting a foreign sovereign to suit whenever anyone purported to act with the authority of that state—whether authorized or not”.

exceptions to the exceptions,¹¹¹ but the U.S. Supreme Court refused to grant certiorari on 28 June 2010.¹¹² U.S. case law regarding the exceptions to the application of the FSIA is not further discussed here, as it has no particular relevance for the subject of our study (the legal status of the Holy See under international law).

In the author's view, consistent State practice in favor of granting immunity to the Holy See may be lacking (it may be observed that U.S. courts have conferred immunity on the Holy See under the FSIA, a domestic law instrument, rather than under international law). Furthermore, in light of the increasing importance of individuals' right to access to a court, immunities ought to be interpreted restrictively, all the more so if the beneficiary of the immunity is not a State but a non-State actor.¹¹³ It is recalled in this respect that international organizations, another category of non-State actors, do not enjoy immunity under general international law, but only on the basis of particular treaties. Even if treaties confer immunity on international organizations, domestic courts, at least in the ECHR area, will only uphold such immunity if it is compatible with the right to access to a court (Article 6(1) ECHR).¹¹⁴ Finally, as far as the immunity from jurisdiction of *functionaries* of the Holy See (possibly including every Catholic cleric) is concerned, the immunity *ratione personae* of the Pope and possibly the Cardinal Secretary of State, representatives of the Vatican City State, appears as self-evident, at least if one accepts the statehood of

¹¹¹ *O'Bryan v. Holy See*, 490 F.Supp.2d 826 (W.D. Ky. 2005); *O'Bryan v. Holy See*, 556 F.3d 361 (6th Cir. 2009); *Doe v. Holy See*, 434 F.Supp.2d 925, 933 (D.Or.2006); *Doe v. Holy See*, 557 F.3d 1066 (9th Cir. 2009). See for a discussion: Martinez, *supra* note 2; Black, *supra* note 34.

¹¹² *Holy See v. John Doe*, Case nos. 06-35563, 06-35587.

¹¹³ See with respect to States: *Al-Adsani v. United Kingdom*, Appl ECHR (2001) Application No. 35763/97, para. 54: "The Court must first examine whether the limitation [on access to a court, based on the law of sovereign immunity] pursued a legitimate aim. It notes in this connection that sovereign immunity is a concept of international law, developed out of the principle *par in parem non habet imperium*, by virtue of which one State shall not be subject to the jurisdiction of another State. The Court considers that the grant of sovereign immunity to a State in civil proceedings pursues the legitimate aim of complying with international law to promote comity and good relations between States through the respect of another State's sovereignty."

¹¹⁴ See for an overview of recent trends, with a particular focus on the tension between immunities and the right to a remedy: C. Ryngaert, 'The Immunity of International Organizations before Domestic Courts: Recent Trends', 7 *International Organizations Law Review* (2010) 1, 121.

the Vatican.¹¹⁵ A more difficult question, however, is whether functionaries of the Catholic Church (or possibly every bishop or Cardinal) enjoy immunity *ratione materiae* for acts that were committed in sufficient proximity to the culprit's office, i.e. 'under color of authority' or by use of official resources.¹¹⁶ All charges of abuse, or of covering up cases of abuse, would then be covered by immunity *ratione materiae*. Against this it may be argued that offences committed in the forum State may *not* attract immunity.¹¹⁷ But more importantly, if the view is taken that the Holy See (unlike the Vatican City State) does not enjoy immunity under general international law, then logically its functionaries cannot enjoy immunity either, as in international law, the immunity of officials is derived from the immunity of the entity which they serve.

G. Concluding Observations

This contribution has not only discussed the legal personality of a non-State actor – the Holy See – but also the *statehood* of another, closely related, actor, the Vatican. This mini-State, however, has a *status aparte* in international law, as in fact it merely exists as a territorial basis guaranteeing the independence of a *non-State* actor, the Holy See. The Holy See is to be conceived of as a *sui generis* non-State international legal person which borrows its personality from its 'spiritual sovereignty' as the center of the Catholic Church, one of the world's major religious organizations.

The Holy See enjoys rights under international law that few, if any, non-State actors (excluding intergovernmental organizations) enjoy. It has joined various intergovernmental organizations, it is a party to a substantial number of bilateral and multilateral treaties, it sends and receives diplomatic representatives, is said to enjoy immunity from jurisdiction, and has been

¹¹⁵ See, however, G. Robertson, 'The Case against Vatican Power', *New Statesman* (8 September 2010) available at <http://www.newstatesman.com/law-and-reform/2010/09/vatican-rights-state-italy> (last visited 3 January 2012), and the lively discussion to which this gave rise: D. Akande, 'Geoffrey Robertson Responds on the Statehood of the Vatican' (13 October 2010) available at <http://www.ejiltalk.org/geoffrey-robertson-responds-on-the-statehood-of-the-vatican/> (last visited 3 January 2012).

¹¹⁶ Thanks to the reviewer for pointing this out to me.

¹¹⁷ *Bat v. Investigating Judge of the German Federal Court*, [2011] EWHC 2029 (Admin), para. 70, holding that "there is a dearth of cases which have decided that an official acting on behalf of a State is entitled to immunity from criminal prosecution in respect of an offence committed in the forum state".

granted permanent observer status at the United Nations that has come with rights that are normally reserved to (non-member) States only. Still, it is notable that in some jurisdictions, domestic courts have attempted to restrict these rights: some concordats have been reviewed in light of constitutional protections, and some immunity claims have been rejected.

Given the peculiar relationship between the Vatican and the Holy See – two international legal persons that share some institutions, the Supreme Pontiff himself to begin with – and the rights under international law accruing to the Holy See, it is understandable that in some quarters the Holy See is considered as a State in its own right. This is an idea that is in fact propagated by the Holy See itself, in its quest to strengthen its immunity claims in domestic courts and to reserve its rights for a future application for full-fledged UN membership.

It is the author's view, however, that the Holy See is not to be characterized as a State, given that it has a global spiritual remit and that it can act internationally without a territorial base, as was made clear in the period between 1870 and 1929. The implications thereof are few, however, as there may be few legal institutions left that are wholly reserved for States, not even membership of international organizations. The Holy See has demonstrated that it is a master at navigating the waters of the international legal order, which has in turn accommodated its rights and interests remarkably well. If anything, this account of the Holy See's participation in international law shows that a non-State actor, drawing on its moral authority, can easily manipulate the at first sight inflexible features of the State-centered international legal system to its own advantage.