

THE HOLY SEE IN THE CONTEMPORARY INTERNATIONAL RELATION.
A JURIDICAL APPROACH FOLLOWING THE INTERNATIONAL LAW AND PRAXIS

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Summary: 1. Introduction. -2. Notes on the international legal personality of the Holy See. -3. The Vatican City State. -4. Relations between international law and the Holy See's internal law: a) General principles of international law; b) Custom; c) Treaties; d) Norms adopted by Intergovernmental Organisations; e) International judicial decisions. -5. Relations between the Holy See and Intergovernmental Organisations.

1. *Introduction.*

It does not escape anyone who might set themselves the task of examining more deeply the presence of the Holy See in the sphere of international law, that it is a theme which is both broad and complex and, in some cases, might even seem incomprehensible. The latter reaction arises especially if, when facing this question, what we might call “party criteria” are used. With this expression we intend to refer not only to certain types of prejudice (philosophical, ideological, religious ...), but also, in the specific context of juridical analysis, to the exclusive use of the conceptual and methodological frameworks of any given discipline.¹

An approach made under the internationalist profile is therefore called upon not to forget those concurring elements of other branches of law which are essential to grasp the more precise breadth of the question, above all the nature proper to the subject of the investigation.

The Holy See, in fact, albeit enumerated among the subjects of the international order, remains primarily the “government” of the Catholic Church: that is, of a “Community of believers” present in the world with its spiritual and societal aspects inseparably connected. This bond is evident not only as regards its inner life, but also when it is engaged in the particular context of international relations. Hence our attempt to begin from elements which directly concern the juridical institutions and praxis proper to international law, while keeping in mind the need to conjugate these elements with those more immediately related to the reality of the juridical order of the Church, its norms and above all its sources and foundation.²

Therefore, even if we leave aside those aspects which are more directly theological and doctrinal – but which remain presupposed, or to which reference is made – it becomes clear how the presence of the Holy See in international relations has implications not only of a *juridical* order, but also of a different kind, which we could define as the *political* order.³

¹ One only needs to consider the diversified, and often contradictory, visions of the question proposed by the analyses carried out by experts of canon law, ecclesiastical law and international law respectively.

² Without a doubt, for the international order, the reference to such elements could appear superfluous for the purposes of rendering evident and evaluating the presence of the Holy See, as is also the case for all subjects of that same order. But, within the scope of the present contribution, it would seem highly reductionistic to leave aside the *nature proper* to the subject “Holy See” which, as will be seen, inspires its conduct in international relations: such conduct pursues the goals proper to the international Community, and hence recurs, just as other subjects do, to the instruments established by international law.

³ We use the term in its etymological sense as government of the “polis”, in this case the international

As regards the juridical profile, the analysis of such implications can take two directions; i.e. towards two distinct orders: the *canonical* (internal order) and the *international*.

As regards the political profile, this can be delimited and thus understood by means of the reciprocal relationship Church-World, clearly outlined in our time by Vatican II. Hence, by this expression, on the one hand, is understood the interest of the Church and of its mission in the international Community, particularly its interest in the “facts” which take place in the international Community; on the other hand, there is the interest which the International Community, its members and its forms of organization show in the mission of the Church.

From a methodological point of view, we will proceed in the exposition of this question by touching three distinct aspects which are generally speaking the points of major interest for jurists:

- a) the international subjectivity of the Holy See, as the central governing or “exponential” organ of the Church;
- b) the reception of international norms by the Holy See and its juridical order and its contribution to the maturing of contemporary international law;
- c) the relations of the Holy See with intergovernmental Organizations, its presence at international Conferences and the problems in discussion.

Obviously, this is an attempt to sum up a very broad scope of material, and it will be done by using a special “key of interpretation” taken from international law: the so-called *principle of effectiveness*. In other words, we will evaluate whatever effectively exists and happens in the presence of the Holy See in international relations and in its relationship with the international Community.⁴

One is not therefore starting from the formulation of the principle or of the juridical institution; rather, these are discovered by analyzing the praxis. This approach is based methodologically on two grounds. First of all, the special nature of the international juridical order which is characterized by a decentralisation of its functions, the precise opposite of what happens in internal orders, including the canonical one; this is what is expressed by the principle *superiorem non recognoscentes* which regulates juridical situations within the international Community. The second ground is the nature proper to the Holy See, both in its internal order and in its manner of involvement in the dynamics of international relations.

2. *Notes on the international legal personality of the Holy See.*

The theme of the international personality of the Holy See has become a “classic”, to the point of being strongly debated and becoming the object of multiple research and studies which

Community, and hence without any other overtones.

⁴ This principle must not at all be confused with an approach that might be considered as characteristic of positivism or mere pragmatism or historicism (*verum est factum*). It rather aims at grasping the reality of the facts and events of international relations; this “reality” is to be understood, not so much as the locus of the necessary coexistence of States, but more as the sphere which “realises” the coexistence between entities -the subjects of the international Community- who bear the authority of peoples and persons and who pursue the attainment of the common good of the universal human family. This approach can be found, for example, in the first formulation of the *ius gentium* as modern international law by the 15th century Spanish neo-scholastics (cf. for example F. DE VITORIA, *Relectiones de Indiis*, 1496), taken up by later reflections on the international Community and its law (cf. e.g. L.TAPARELLI D'AZEGLIO, *Saggio teoretico sul diritto naturale appoggiato sul fatto*, 1896; J. EPPSTEIN, *Catholic Tradition of the Law of Nations*, London 1935) and present in the contemporary vision of the magisterium of the Church (cf. e.g. H. DE RIEDMATTEN, *Le catholicisme et le développement du droit international*, in «Recueil des cours» 151 (1976/III), pp.115-160).

highlight what are often irreconcilable positions, albeit formally valid in themselves.⁵ This situation is first of all the result of the implications arising from the relationship or *rapport* existing between the Holy See, the Catholic Church and the Vatican City State. In the context of the legal sciences, and depending on which approach is adopted, the international subjectivity, or some such capacity, is attributed to all three of these realities, individually or collectively. At any rate, it is a relationship which is difficult to grasp, since it implies the concurrence not only of international law, but also of the Holy See's internal law.⁶

Wide interest in the question therefore permits us to refrain from referring to all the theoretical and doctrinal aspects already dealt with there so as to try and highlight those elements which can be related to international praxis.

It is peculiar to the international order that its norms are not the result of the activity of a “Legislator”, but essentially of the conduct and will of the subjects who are simultaneously “legislators” and “holders” of the norms. In this sense it must be added that the very *juridical capacity* and the *capacity to act*, which are two institutions which characterize the operative nature of internal juridical orders, are superimposed and not directly separable precisely because of the nature of the international order which shows the absence of a central power and of centralized functions.⁷

According to international law, a subject of the international order is a *sovereign entity* with *autonomy* which is manifest in its own *power of self-organization*, and therefore with the *capacity* to realize internationally relevant juridical acts and the corresponding capacity to be the *holder* of the norms of the said order.

It is not without relevance that the growth of international law which has taken place in the past half-century has contributed to the widening of the applicability of the very concept of international subjectivity; indeed, this is now referable not only to States, as happened traditionally, but also to other international entities. Such is the case of intergovernmental Organizations which, while they do not have the constitutive elements of a State -in accordance with the formula: people, territory and sovereignty- do have their own autonomy, power of self-organization and capacity to realize internationally relevant acts as well as to be holders of international norms.⁸

The evolution of the characteristics of international subjectivity, favoured by the debate initiated by the United Nations itself, came to affect the very concept of State, understood more and more as «an accepted member of the international community»⁹. This interpretation was also favoured by the indifferent usage made by the UN Charter of the terms *State*, *Government*

⁵ In this respect, see the very full bibliography, in different languages, of S.FERLITO, *L'attività internazionale della Santa Sede*, Milano 1988, especially Chapter 1.

⁶ Cf. P. CIPROTTI, *La posizione internazionale della Santa Sede alla luce di recenti documenti inediti*, in «La Comunità Internazionale», XXIX (1974), p. 413 ff.

⁷ To this is added the problem of the *recognition* of one subject by other pre-existing subjects, held historically as a constitutive element of that subjectivity. This approach was then abandoned after the second world war and by the praxis of decolonization. Whilst now considered an exclusively historical problem, it has been repropounded recently in situations like that of the ex-Yugoslavia and of the ex-USSR.

⁸ There is a very full bibliography on this theme, but in the effort to follow international praxis in this sense, it is significant that the relevant doctrine has developed along the lines of the consultative opinion given by the International Court of Justice in 1949 (on damages suffered at the service of the United Nations) concerning the case of Count Bernardotte, envoy of the UN to Palestine, who was killed in the exercise of his functions.

⁹ *Yearbook of the International Law Commission, 1949*, New York 1956, p.62.

and *Nation* to express the same concept.¹⁰ Gradually, in the United Nations System the tendency was consolidated whereby, when the State is spoken of, one underlines the «capacity» of an *international entity* «to enter into relations with other States¹¹» rather than referring to the people or the territory, often controversial in its definition¹².

Hence from the point of view of international subjectivity, the assimilation is rather between State and Government, the latter being understood as the expression of an autonomous sovereignty manifested by means of the realization of acts with relevance to the international order: viz. the establishment of diplomatic relations, negotiation, the concluding of treaties and the assumption of the obligations or rights deriving there from, performing the task of mediation or arbitration, becoming members of intergovernmental organisations. These latter elements affect directly the international position of the Holy See.

Evidently, the parameters given by international law to ascertain the existence of international subjectivity, need to be viewed on two separate levels:

a) that of the internal order: viz. the elements of sovereignty, autonomy of internal legal order, self-organization, juridical capacity and thus population and territory;

b) that of the international order: viz. the independence and the capacity to enter into relations with other subjects which shows itself in the realization of *juridically relevant* acts, in adhering to rules arising from covenant or customary procedures and in being holders of general international norms.

If the aforesaid parameters are applied to the Church and/or the Holy See¹³ one fact immediately comes to the fore: it has always been the Holy See who has been «present»¹⁴ in the context of the international order, never the Church as such. This observation could permit the immediate exclusion of the Church from the present study, and thus make exclusive reference to the Holy See and to its juridical order. However, to make an analysis from this kind of perspective alone highlights some problems which are resolved differently by canonists and ecclesiologists, and differently again by internationalist scholars¹⁵.

One fact remains, however, certain: under its societal profile, and hence because of the nature proper to it, the Catholic Church has always been held as a *societas perfecta*¹⁶; this

¹⁰ Cf. *ibid.*, p.67.

¹¹ *Ibid.*, p.68.

¹² One need only note how in many publications of the United Nations there appears the following note: «The designations employed and the presentation of the material in this publication do not imply the expression of any opinion whatsoever on the part of the Secretariat of the United Nations concerning the legal status of any country, territory, city or area, or of its authorities, or concerning the delimitation of its frontiers or boundaries».

¹³ It is possible in this context to make a prejudicial reflection: the kind of parameters offered by international law are conceived for subjects belonging to the «type» of that order, i.e. States. Hence there may be some difficulty in applying them *in toto* to the subject «Holy See».

¹⁴ Put more precisely: it is the Holy See who is the subject of rights and duties, who has the juridical capacity and the capacity to act, and who carries out internationally relevant acts.

¹⁵ The bibliography on the different approaches is varied and multiple: cf. E. CARDINALE, *The Holy See and International Order*, London 1976; amongst the latest research on the issue S. FERLITO, *L'attività internazionale della Santa Sede*, op.cit.; F. PETRONCELLI HÜBLER, *Chiesa cattolica e Comunità internazionale: riflessione sulle forme di esperienza*, Napoli 1989; J.-B. D'ONORIO (ed.), *Le Saint-Siège dans les relations internationales*, Paris 1989; G. LINGUA, *La posizione giuridica e l'apporto della Santa Sede nelle Conferenze di codificazione del diritto diplomatico*, Pontificia Università Lateranense (Doctoral thesis), Rome 1992.

¹⁶ Cf. amongst others, the classic treatise: A. OTTAVIANI, *Institutiones iuris publici ecclesiastici*, vol. II, 4th

expression can be conceptually rendered as a primary and original juridical order. That is to say, the Church is understood as a Community of persons united by the bond of baptism: this image expresses not only the autonomy of the aims and authority vis-à-vis powers external to the Church (her sovereignty), but also her very own institutional physiognomy (her self-organization) structured upon the basis of an ensemble of juridical regulations produced internally (her originality): the Church would thus be a “puissance”, in the typical expression applied by international law to its subjects¹⁷.

Turning to the canonical order the Holy See appears as a *sovereign entity*; indeed, it is the central organ of government of the Church. This is the idea which emerges from can. 361 of the *Codex Iuris Canonici* (CIC) or from can. 48 of the *Codex Canonum Ecclesiarum Orientalium* (CCEO). Thus far this perception presents no problem at all for international law: the Holy See is the «government» of the Catholic Church, i.e. of an entity which, as has been seen, is by its very nature sovereign, original, with an autonomous capacity and powers of self-organization.

But precisely by reading on the canonical order there appear some aspects which result at least “unusual” for international law¹⁸.

First of all, from a reading of can. 361 CIC and can. 48 CCEO¹⁹, the “Holy See” can have a double connotation: in the *strict sense* (the office of the Roman Pontiff) and in the *broad sense* (the Roman Pontiff «sed etiam ... aliaque Romanae Curiae instituta»). It is thus necessary to clarify that the one who acts at an international level under the name of the Holy See is in any case the Roman Pontiff²⁰; this is so for reasons of a juridical order -both canonical and,

ed., 1958, pp.357 ff.

¹⁷ Cf. in this vein the position of G. ARANGIO-RUIZ (jr.), mentioned recently in *Note sulla personalità internazionale della Santa Sede*, in G. BARBERINI (ed.), *La politica internazionale della Santa Sede 1965-1990*, Napoli 1992, pp.24-38. In the same volume, the critical observations of G.BADIALI are interesting, *Il tema di personalità internazionale della Santa Sede*, *ibid.*, pp.119-122. One application of the concept of “Puisseance” to the Holy See shown in its international activity, is contained in Y.-M. LEROY DE LA BRIÈRE, *La condition juridique de la Cité du Vatican*, in «Recueil des Cours», 1930 (III), pp. 160 ff.

¹⁸ Of course, this observation concerns almost exclusively the theoretical side of the question, since in practice (i.e. in accordance with the principle of effectiveness) the question refers to very secondary issues, to the point of becoming outright inexistent.

¹⁹ Between the two canons there is a difference which is motivated exclusively by a criterion of time, i.e. because of the later promulgation of the CCEO. In fact, as far as specifying just what the Holy See is in the *broad sense of the term*, the CIC speaks of «Dicasteria aliaque Curiae Romanae Instituta» instead of «Secretaria Status, Consilium pro publicis Ecclesiae negotiis, aliaque Romanae Curiae Instituta», whilst in the CCEO this list is absent because of the intervening reform of the Roman Curia by the Apostolic Constitution *Pastor Bonus* of 1988 [in AAS 80 (1988), pp. 841-934]. Furthermore, in can. 48 of the CCEO the formulation of the CIC of 1917 is taken up again: «nisi aliter iure caveatur».

²⁰ This is the classical position both of the canonists (cf. for all of them, F.X. WERNZ, *Ius Decretalium*, II, 2, Romae 1906, p.336 ff.) and of the international law experts who dealt with the problem (cf. for all of them, Y.-M. LEROY DE LA BRIÈRE, *La condition juridique de la Cité du Vatican*, *op.cit.*, pp.113-165).

If we follow through with an analysis of the praxis, it can be seen how the international presence of the Holy See in recent times has tended to become «specialized», i.e. the different Dicasteries and institutions of the Roman Curia have increasingly concurred in the said presence according to their own competence. In other words, there would be the taking shape of an international presence of the Holy See in the *broad sense of the term*. This is clearly an element with an exclusively internal relevance for the Holy See and without any influence whatsoever in the international order. Something analogous takes place in States whose international activity, which is proper to its executive power, is no longer exercised exclusively by the Ministry of Foreign Affairs, but with the concurrence of individual Ministries according to their competence.

indirectly, international- and not only for motives of a historical nature²¹.

A second point arises from can 113 §1 of the CIC which, on the basis of divine law - itself the foundation of the canonical order- attributes a “moral” personality both to the Catholic Church and to the Holy See in the canonical order. Given the constitutional nature of the Church it could not be otherwise, even if the Holy See is clearly understood in this case in the *strict sense*, i.e. as the Roman Pontiff. From an external point of view, where we want to apply the categories of the general theory of law, it would seem that *sovereignty* is present both in the Church and in the Holy See (authoritative doctrine would speak of a *double subjectivity*): hence the rapport existing between the subject (in the case of the Church) and its central government (the Holy See) is not rendered very explicit.

Both these observations give rise to a first serious problem as regards the subject upon whom to confer, and/or to recognize²² as, the subjectivity of international law. One possible solution could be that in concurring to reach the aims proper to the international order -or in using its institutions and rules to obtain its aims- the Holy See has never made a problem for itself of the “attribution of subjectivity”. Similarly, there has always been an analogous attitude on the part of the international Community and its corresponding order.²³

From the canonical side, one attempt to clarify the problem of international subjectivity was the hypothesis of the *Lex Ecclesiae Fundamentalis* which, in its last draft, in can. 54 §1, attributed this international personality to the Catholic Church²⁴. Following this line of

The matter is different for the Secretariat of State which, on the basis of the dispositions of *Pastor Bonus*, takes the form of the curial organism which directly «assists the Supreme Pontiff more closely in the exercise of his supreme mission» (art.39), including, therefore, in international activity. In fact, in this sense operate the two Sections which presently constitute the Secretariat of State: but whilst the First Section has responsibilities directly inherent to the *ius legationis* -active and passive- of the Roman Pontiff (cf. art.41, §1: «The First Section has the responsibility [...] of regulating the function of the Representatives of the Holy See and their activity, especially as far as the particular Churches are concerned. It is its responsibility to deal with all that regards the Representatives of States accredited to the Holy See»), there seems to prevail in the Second Section a competence for those areas which directly concern the international relations of the Holy See (cf. artt.45-46). On these points see: V. BUONOMO, *La Segreteria di Stato. Competenze nella funzione diplomatica*, in P. BONNET - C.GULLO (ed.), *La Curia Romana secondo la Costituzione Apostolica «Pastor Bonus»*, Città del Vaticano 1990, pp.177-188.

²¹ Such motives, notwithstanding their obvious importance, cannot be used to limit the international presence itself of the Holy See to its historical links with Christian States which themselves arose out of the dissolution of the medieval *Respublica Christiana*; or indeed, to limit it to the recognition of the international personality of the Apostolic See by Christian States. This thesis is refuted by the historical facts themselves: for example, the international relations -diplomatic and contractual- established by the Holy See even with non-Christian States and, more generally, by reason of the a-confessional principle which characterizes the contemporary international Community.

²² The term “recognize” is used with reference to the listed categories which the order in question foresees as necessary for subjectivity and juridical personality. Hence, there is no reference whatsoever to the controversial, international, legal institution of recognition as it is used when new subjects appear on the international scene (cf. note 8 above).

²³ It is interesting to note what is stated in the quoted study by Y.-M. DE LA BRIÈRE: «Le titre fondamental du Saint-Siège apostolique à exercer dans la communauté internationale une prérogative d'indépendance temporelle, juridiquement reconnue et garantie, n'est autre que son pouvoir religieux de Suprême Pasteur de l'Eglise catholique. Non pas, à vrai dire le pouvoir religieux et pastoral considéré en lui même, mais le rayonnement historique, social et temporel de ce pouvoir religieux et pastoral» (p.161).

²⁴ «Having a juridical personality in the universal Society of Nations, the Church within that society, together with civil societies joins its forces to foment justice, cooperation, concord and peace among all Nations» (text in «Il Regno-Documentazione», 21 (1978), p.488). It should be remembered that the expression «personam ... in societate gentium universali» remains unchanged from the first Draft of the *Lex Ecclesiae Fundamentals* (LEF) of 1970

argument, the Holy See would find itself exercising an international sovereignty which would not be proper to it in itself, but which rather comes to it from the fact of being the supreme organ of government of the Church; this is a conclusion reached by the majority of authorities in this question, and is corroborated by an international praxis consolidated throughout history. Of course, even in the face of this affirmation upheld by [the principle of] “effectivity”, the position of the canonical order as it is found today in can. 113 §1 of the CIC cannot be forgotten: i.e. the rapport between the Church and the Holy See cannot simply be put on the same level as that existing between a State and its Government, insofar as, in the constitutional physiognomy of the Church, the Holy See is not a function similar to the executive function exercised by a Government, but is a constitutive element of the Church²⁵.

Therefore the subjectivity and the personality of the Holy See, as well as its juridical capacity and its capacity to act in the international order -with the rights and duties which derive therefrom- have never been confronted with the internal law of the latter by the international order. Nor would that be necessary given the nature of the international order and, in particular, its activity in recognizing the existence of *agents* within itself. It could be said that international law takes cognizance of the fact that the Apostolic See inserts itself within the international order and takes note that it has the capacity to do so. This is historically true, right from the formative phase of the modern international order during the historic period of the *Respublica Christiana* (from X-XI century) which saw the self-definition of some of the basic institutions of modern international law²⁶.

3. *The Vatican City State*

Into this whole issue there is yet another element to be inserted, which contributes to making the international presence of the Church even more complex: i.e. the effective exercise of a function of territorial government which the Holy See has over the Vatican City State.

Instituted in 1929, as the direct consequence of the definition of the “questione romana”, settled *de iure* with the stipulation of the Lateran Treaty between Italy and the Holy See, the

(can.94), and is confirmed by the second Draft of the LEF of 1971 (can.95). This approach has undoubted value for the canonical order - linked moreover to the value of the as an effort to clarify the difference between constitutional norms and ordinary norms- and takes up again the traditional canonistic doctrine of the *societas perfecta* applied to the Church, which manifests itself also in the international dimension. At the same time, however, this does not resolve those *difficulties* which appear to arise in the contemporary system of international relations and which can be synthesised in a few questions: from what would the recognition of the international subjectivity of the Catholic Church derive? Only from historical grounds and, at that, from those limited to the area, first of all, of Europe and, then, to Catholic States? Since we are dealing with a religion and a “community of believers”, ought not the Church to be considered as other religions or communities are? For example, should the presence of the Church at an international level not be considered like that of a non-governmental Organization, on the same footing as other religious confessions (from the World Council of Churches to the World Jewish Association ...)?

If we look exclusively at historical praxis, the Roman Pontiff (hence the Holy See) has always and uninterruptedly exercised, and quite differently from the thrust of these questions, the prerogatives proper to a subject of international law: from the right of active and passive legation to the *ius contrahendi* in the area of treaties, to mediation and arbitration, to the assumption and respect of the general obligations of the international order.

²⁵ Cf. can. 331 of the CIC.

²⁶ Cf. also J. KUNZ, *The status of the Holy See in International Law*, in «American Journal of International Law», 46 (1952), p.309 ff., who makes an apparently unique attempt to define the relationship existing between the Catholic Church, the Holy See and the Roman Pontiff as a contribution to clarifying the “entity” which acts internationally. He does this by using the distinction, borrowed from English law, between «Crown» and «King».

Vatican City State does not represent a “beginning” of the temporal government exercised by the Holy See. The experience, which obtained historically until 1870, of the existence of a territory defined as the *Patrimonium Sancti Petri* and then as the *Papal States or the States of the Church* saw the Holy See directly involved in activities proper to civil authorities insofar as the government of a people on a determined portion of territory was concerned. This “link” was never confused, however, with the precise meaning of the presence of the Holy See in the international Community, as is indeed demonstrated by the fact that the end of the Papal States in 1870²⁷ through “debellatio”, did not deprive the Holy See of the sovereign prerogatives proper to any subject of international law: i.e. from the concluding of international agreements²⁸ to the exercise of the right of active and passive legation with other States, including interventions aimed at finding peaceful solutions to international controversies²⁹.

The Vatican State was born as a “true” State from a formal point of view, and therefore with the attributions proper to a State, including the existence of its own juridical order as distinct from the canonical order (that is the legal system of the Catholic Church), albeit based on the latter and strongly limited by it³⁰. Despite all this, the function of this state entity is to be

²⁷ It may be interesting to note that there had already been “interruptions” in the exercise of the territorial sovereignty of the Holy See, as happened in 1798 with the experience of the Roman Republic, which ended in 1801, or again, with the occupation of the Papal States by Napoleon from 1809 to 1814.

²⁸ Cf. in this context H. LAUTERPACHT, *International Law*, vol.2, Part 1, Cambridge 1975, p.495. Examples of such Agreements are the following: with the Government of Russia (1882), the Concordat with Guatemala (1884), the Conventions with Switzerland for the Canton Ticino (1884-1888) and for the Diocese of Basilea (1886), the Concordat with Portugal on royal investiture in the East Indies (1886), the Concordat with Montenegro (1886), with Colombia (1887), the Agreements with Great Britain over the Island of Malta (1890), the Concordat with Ecuador (1890), the Convention with Spain (1904), the Concordat with Serbia (1914), the Concordats with Lettonia (1922), Bavaria (1924), Poland (1925), Romania (1927), and Lithuania (1927), the Modus vivendi with Czechoslovakia (1927), the Conventions with Portugal for the East Indies (1928), and with Colombia (1928).

²⁹ A list of some of these acts realised by the Holy See are recorded by J. EPPSTEIN, *Catholic tradition ...*, op.cit., pp.470-474. A classification of these can be attempted on the basis of the institutions proper to international law which are applicable to the sphere of the peaceful resolution of controversies:

a) *good offices*: in the controversy over the borders of the Congo which arose between Great Britain and Portugal (1890); appeal to the Emperor Menelik of Ethiopia for the prisoners of war of the conflict with Italy (1896); to forestall the conflict between the United States and Spain over Cuba (1898);

b) *mediation*: to prevent the war between France and Prussia (1870); the request from Great Britain and Venezuela to define the borders of Guyana (1894);

c) *arbitration*: the controversy over the Caroline Islands which opposed Germany and Spain (1885): the delimitation of the borders between Ecuador and Perù (1893); the delimitation of the borders between Haiti and Santo Domingo (1895); the delimitation of the borders between Argentina and Chile (1900-1903); the delimitation of the borders between Ecuador and Colombia (1906): the controversy over the possession of goldmines between Brazil and Bolivia (1909) and Brazil and Perù (1910); offer of arbitration to Argentina, Chile and Brazil (1914). Also to be remembered is the specific treaty concluded between Colombia and Perù in 1905 according to which both parties decided to submit to the arbitration of the Holy See all future controversies, with the exception of those controversies concerning national independence and honour which did not require an immediate solution.

³⁰ This limiting function of the canonical order will be returned to later. In the meantime a few observations can be made:

1) the reference to the legislative power which the Roman Pontiff -and in *sede vacante* the Sacred College- exercises over the Vatican State; this is prescribed by the *Fundamental Law of the Vatican City* (recently revised and adopted on November 26, 2000 and entered in force on February 22, 2001), n.I, art.1, and by the *Law on the sources of law*, n. II, art.1, b). This power cannot derogate canonical norms, be they general or ordinary, nor *a fortiori* the principles of divine law which constitute the basis of the canonical order;

2) the explicit reference made in general [to the canonical order] by the *Law on the sources of law*, n.II, art. 1 a); and [the same reference] made more specifically in different articles of the said *Law*.

guarantor of the independence of the Holy See which is called to exercise its own “sovereignty” over it. This is by reason of two different normative dispositions: international law - the Lateran Treaty - and the internal law of the Vatican State itself³¹.

Certainly in the context of the international order, the exercise of territorial sovereignty is more customary, or at least so it was in 1929³²; now there is the evolution determined by the institution of intergovernmental organizations whose subjectivity is certainly not territorial, even if it can develop also on a territory, or in function of one.

In fact, the power exercised over the Vatican by the Holy See is comparable to that which a government exercises over a territory and a population within it. But this attribution contrasts strongly with the universality of the mission proper to the Holy See, given its nature and its primary function which then merge with that of the Church. In this sense we see further explained the subjective juridical qualification of “neutrality” as it is affirmed of the Vatican State in the Lateran Treaty³³, as a consequence of the international obligation voluntarily assumed³⁴ by the Holy See to “remain extraneous to any temporal competition between States and to international congresses convoked for such a purpose”³⁵.

It remains, however, a fact that the Vatican State, while possessing a clearly delineated State physiognomy³⁶, exercises a special function insofar as it cooperates towards the obtaining of the aims which are proper to the Church and the Holy See³⁷, to the point that it can appear among the ensemble of those structures indicated by the term Holy See in its *broad sense*³⁸. In

³¹ Cf. Lateran Treaty, art.26; *Fundamental Law* n.I, artt. 1 and 2.

³² Along these lines Pope Pius XI said on the day after the signing of the Lateran Agreements of 11 February: « ... there being unknown to the world, at least until today, any form of true and proper sovereignty except, indeed, the territorial form» [in AAS, 21 (1929), p.105].

³³ Art. XXII. It is to be noted that, to the neutrality proclaimed by the Holy See, there corresponds an obligation *erga omnes* as regards the “inviolability” of the territory of the Vatican State by other subjects of the international order. This interpretation is now established in the contemporary praxis of International Community: i.e. the inscription in 1960 of the whole Vatican City in the *Register of Cultural Property under special protection in the event of armed conflict* which is deposited with the UNESCO; the conclusion on 1972 of the *Safeguard Agreement* between the Holy See and IAEA, as a consequence of the ratification by the Holy See of the *Nuclear non-proliferation Agreement*.

³⁴ This is a real case of self-limitation, understood as a right inherent to international sovereignty, as also seems evident from the disposition of art. XXII of the Treaty: «The Holy See, in relation to the sovereignty which it possesses also in the international sphere ...»

³⁵ That this is a question of self-limitation and not of external limitation, nor of an imposed obligation, is evident from the same article which also envisages the inefficacy of the very same obligation whenever «parties in conflict make an agreed appeal to its (the Holy See's) mission of peace; in that moment it reserves the right to exercise its moral and spiritual power». In this sense see the invitation to the Holy See to take part since the 1971, as a *full member*, in the diplomatic consultation preparing the *Conference on Security and Cooperation in Europe* and the *Helsinki Final Act* of 1975.

³⁶ There remain of course some special data represented not only by the smallness of the territory, but also for example by the special nature of its citizens and residents (because of a kind of *ius officii* which has no equivalent elsewhere).

³⁷ Hereby underscoring the differences with the pre-existing territorial sovereignty exercised by the Roman Pontiff until 1870. The Lateran Treaty makes reference to the nature of “State-instrument” proper to the Vatican City, to assure the full independence of the mission exercised by the Holy See in the government of the universal Church (cf. art. 3,22,24).

³⁸ Cf. in this sense P. CIPROTTI, *Diritto ecclesiastico*, 2^a, Padova 1964, p.106, with respect to the different

the same way, therefore, as the structures proper to the Roman Curia³⁹, the Vatican City State assists the Roman Pontiff in the tasks connected to his office and hence in his activities, even in those which are properly speaking international⁴⁰ in which the existence of a territorial type of sovereignty, or even a connection with it, is rendered necessary⁴¹. This latter link may be dictated by the attitude of other subjects of the international Community -albeit ever more rarely⁴²- or above all by the object proper to the international activity or sphere in which the Holy See is operating in a given moment⁴³.

Essentially, a subjectivity of the Vatican State which would be an end in itself -that is to say, for the attainment of the aims proper to a State, viz., to guarantee by the exercise of its sovereignty the ordered coexistence of a people situated on a territory- such a subjectivity would not have had the meaning or interest for the Holy See in 1929 that it has today. In this sense the territorial nature of the sovereignty exercised today over the Vatican State is certainly not comparable to that exercised until 1870 over the Papal States; the characteristics of the latter belong rather to the configuration proper to an effective sovereignty of a state kind⁴⁴.

«organs of the Church» which, as well as the Roman Pontiff, exercise a function in the juridical order of the Vatican State.

³⁹ Undoubtedly, in the light of existing canonical legislation, the inclusion of the structures proper to the Vatican State among those of the Roman Curia, is to be excluded; cf. in this regard can. 354 of the CIC. This is a distinction which was certainly not obvious before 1870 since the structures of the government of the Pontifical States were an integral part of the Roman Curia.

⁴⁰ In this perspective is to be read art.2 of the *Fundamental Law of the Vatican City*; it reserves to the Roman Pontiff the «representation of the State ... in diplomatic relations and in the conclusion of treaties ».

⁴¹ This position seems to be in line with the one traditionally expressed by canon law doctrine. It considered the territorial sovereignty (the so-called «temporal power») exercised by the Holy See «ut medium providentia ad ipsius Ecclesiae et Sedis Apostolicae independentiam ostendendam» (M. CONTE, A. CORONATA, *Institutiones Iuris Canonici - Introductio: Ius publicum ecclesiasticum*, Taurini-Romae 1949, p.60).

⁴² It will be recalled in this context what was said by Paul VI on 4 October 1965 before the General Assembly of the UN: «... you have before you a man like you: he is your brother, and among you, representatives of sovereign States, one of the smallest, invested he too, if thus it pleases you to consider Us, with a minuscule, almost symbolic temporal sovereignty, all that he needs to be free to exercise his spiritual mission, and to assure whoever deals with him, that he is independent of every type of sovereignty of this world» (original French text in AAS, 57 (1965), p.754 ff.). Indeed, even part of international legal doctrine sees in the Vatican State the «means» by which a State can enter into relations with the Holy See -and therefore with the Church- without recognizing its peculiar nature because it would be contrary to its own inspiration, ideology or religion (cf. for example P.REUTER, *Institutiones internationales*, Paris 1972⁷, p. 173 ff.).

⁴³ Think for example of the conclusion of international agreements which imply a reference of a territorial order for their execution. A typical case is the above mentioned *Safeguard Agreement* stipulated on 26 June 1972 by the Holy See with the International Atomic Energy Agency as the obligation arising from the ratification of the Treaty of nuclear non-proliferation (TNP) of 1971. While the ratification of the TNP was motivated by reasons of an ethical-moral order -that is full support for the actions of States to avoid the nuclear arms race- the conclusion of the *Safeguard Agreement* seems effectively superfluous in its substance (the impeding of the production and the displacement of nuclear arms on Vatican territory) but necessary in its form insofar as it represents the fulfilment of an obligation deriving from the TNP itself. Other examples can be given with regard to the ratification of some Conventions in monetary, postal and telecommunications issues.

⁴⁴ One example can be mentioned here: the citizenship which is acquired in the Vatican State is almost exclusively on the basis of a *ius officii*, without being more closely linked to aspects of presence on the territory, as was the case in the Papal States. In the latter case citizenship was also acquired on the basis of the traditional criteria of the *ius solii* and/or the *ius sanguinis*.

It can thus be concluded that the Holy See, understood as the office of the Roman Pontiff -hence, taken in the *strict sense*- exercises an international sovereignty also in its capacity as government of a territorial entity similar to a State. It is a sovereignty which is different from the one previously described with respect to the Church, but, undoubtedly, with aims which are not dissimilar. Indeed, even although the double title of sovereignty exercised is obvious from a reading both of the praxis and of the acts carried out in relation to it, there can never be a different aim for the activity of the Holy See which is not by reason of the «mission of the Church in the world», for whose *service* the Vatican State itself was created and to whose *interest* every act of the Holy See responds.

4. *Relations between International Law and the Internal Law of the Holy See.*

Having established that the Holy See, while operating as the central organ of government of two sovereign entities, finds itself acting in two different -albeit, as we have seen, inseparably connected- «internal» orders, it is now necessary to tackle the problem of the relations which run between these orders and the international order.

This is an attempt to carry the investigation into the perspective of international law, exclusively on the basis of the principle of effectiveness and, therefore, taking the point of departure from an international praxis which has been consolidated. Indeed, while it has always been clear that *de iure* the Holy See must specify under which guise she acts on a case by case basis, as the supreme organ of government of two entities -Church and Vatican State-, the praxis becomes aware of the action of the Apostolic See at an international level without being excessively worried about such specifying.

Following this logic, therefore, the expression *internal law/order of the Holy See* can be used to mean not only the canonical order, but also that of the Vatican State: this is said without wishing in any way to put in question the original character, or the autonomy and juridical nature proper to these orders when taken individually.

A second preliminary aspect needs to be noted in order above all to be able to assess its limits: even recent study of the internal law of the Holy See has never dealt organically with its relations with the international order. Indeed, with the exception of that aspect which is relative to the law of concordats, which has been abundantly studied and clarified, as well as -from at least a general point of view- all that relates to the Vatican State, there are only partial references to that which concerns the reception or the eventual adaptation of international norms⁴⁵.

In proceeding to analyse the criteria of the relationship existing between international law and the orders -canonical and Vatican- in whose sphere the Holy See operates, it is possible to conduct an investigation with two main objectives in mind:

a) assess the type of position which the international norm comes to assume in internal law;

b) consider the effective reception and thus the applicability of international law of any kind or source (general, covenant, customary, that which results from the normative activity of intergovernmental Organizations or the jurisprudential) to the internal law.

Methodologically, and due also to the limited attention given to the issue by the relevant doctrine, the elements proper to the general theory of law will be points of reference as far as the reception of international law into internal law is concerned; as for the relationship between juridical orders (the so-called private international law) and the specific case under examination

⁴⁵ Such for example are the references to the principle of *good faith* or *pacta sunt servanda* which the commentators of the CIC 1917 already referred to in the analysis of can.3, equal in tenor to the analogous canon of the present CIC. On this question, cf. also S. FERLITO, *op.cit.*, p.94 ff.

we will consider what can be taken from the *theory of the canonisation* of civil laws⁴⁶.

It must be recalled that in the type of relationship between internal and international orders which operates for the juridical orders of the State and culminates in that type of procedure called «adaptation» of internal law to international law, it is easier just to proceed to a reading of the facts. Not only the structure and the aims proper to State orders -which are very different from the canonical- help in this reading, but also the existence in recent times of explicit norms for questions of a constitutional level, including the provision of special norms on juridical production which are of direct interest to the reception of international norms.

Moreover, in the specific case of the juridical order of the Holy See, the self-imposed limits to the introduction into the said order of norms coming from other orders are to be considered. The limits imposed by divine law (natural and positive) and by canon law itself have already been explicitly mentioned in relation to juridical production in the Vatican State order, but this state of affairs also applies to international norms. Clearly of course the issue broadens out into considering the more general aim of the Church and of its juridical order, and hence of the presuppositions of the latter⁴⁷.

This aspect is also the direct object of attention of the canonical legislator when he affirms in can.22 of the CIC or in can.1504 of the CCEO that the reference back to *civil* norms «in iure canonico eisdem con effectibus servetur, quatenus iure divino non sint contrariae et nisi aliud iure canonico caveatur». Although this disposition is included within the context of the norms on ecclesiastical laws, it assumes the importance of a general principle in our reasoning: the very intention of the Legislator himself testifies to this when he uses the term *ius civile* which, in can.1504 of the CCEO, substitutes the more circumstantial *leges civiles* of can. 22 of the CIC⁴⁸.

Hence such a principle cannot be limited to what is included in the State juridical order, but rather extends to all those norms which are part of the *ius Ecclesiae* but which are produced in other juridical orders, come into contact with the *ius Ecclesiae*, or are adapted to it, recalled by it or constitute a point of reference for it.

As regards the general limits on the reception of international law, it needs to be remembered that the appeal to divine law does not constitute something *atypical* for the Holy See as a subject, but is rather to be translated into the international order in terms of recourse to *domestic jurisdiction* which every subject of the international order considers as that sphere of its own juridical order precluding every intervention by external orders, beginning with the international one⁴⁹.

Undoubtedly, to grasp fully the question of the procedure of adaptation it is necessary to refer to the international order globally. One can therefore distinguish, for the purposes of the present considerations, between the relations which run between the internal law of the Holy

⁴⁶ With this phrase is meant the action of the legislator of the Church who «makes reference to civil norms so as to receive into his order norms which, as a whole or in part, are identical to others existing in civil orders; in other words the content of these norms is assumed as the content of canonical norms» (P.CIPROTTI, *Le «legge civili» nel nuovo Codice di Diritto Canonico*, in «Apollinaris» LVII (1984), p.287).

⁴⁷ Cf. in this context the clear and exhaustive observations of P. CIPROTTI, *Contributo alla canonizzazione delle leggi civili*, Roma 1941, and, by the same author, the more recent work, *Le «leggi civili» nel nuovo Codice di Diritto Canonico*, art. cit., pp.282-293.

⁴⁸ This is true also in the traditionally accepted meaning of the term *ius civile* by the canonical authors.

⁴⁹ It is not possible here to go further into this complex and interesting area. Suffice it to recall that one is faced with a principle which is even «codified» by the Charter of the United Nations when it refers to those general principles of the international order which are now established in the conduct of its subjects (cf. art. 2 §7).

See and the following: the general principles of law, international customs, international treaties, the norms of intergovernmental Organisations and international jurisprudence.

a) *General principles of international law*

As far as the *general principles of international law* are concerned, it must first be pointed out that their importance among the sources of international law has been gradually affirming itself in recent practice. This also explains the attitude of the doctrinal camp which assigns a less defined role to these principles than it does to the other sources of the international order. Generally speaking, it is an unwritten source, even although more recent tendencies in international doctrine and practice have situated the general principles amongst those ground rules of international life which every subject is called to respect in good faith; every subject is also called to fulfil the obligations deriving from them⁵⁰. Furthermore, their incorporation into, or reference made to them in, other sources confirms their existence and therefore their effective applicability, in some cases now being codified as covenant-type normative systems⁵¹.

In the international order, progress has taken place where the tendency is seen for some of these principles to be recognized as inderogable (*ius cogens*) by other international sources, with particular reference to the normative systems of conventional origin⁵², provided that a general acceptance and recognition by the international community as a whole can be ascertained.

That these general principles of law can be received into the juridical order of the Holy See is demonstrated by the general, but explicit, reference made by the legislator of the Church to the «generalibus iuris principii» in the case of a *lacuna legis*, with only one limitation, viz. the applicability of the observance of *aequitas canonica*⁵³. As regards the principles proper to international law, not only is the convergence of many of them with criteria which inspire the mission of the Catholic Church and its juridical order to be highlighted, but also the contribution made by the Holy See itself throughout the entire *iter* of the elaboration of some of the codified international norms which are specifically connected with or referred to the general principles⁵⁴. Finally, the very acceptance of the relevant dispositions contained in some multilateral conventions ratified by the Holy See shows how it receives both the content and the significance

⁵⁰ In so doing, the traditional interpretation is surpassed: on the basis of the disposition of art. 38, c) of the Statute of the International Court of Justice («general principles of law recognized by civilized nations»), that interpretation considered these general principles to be circumscribed exclusively to principles which were common to the different states' orders.

⁵¹ A typical example is seen in the principles contained in art.2 of the Charter of the United Nations, taken up again by the *Declaration on general principles concerning friendly relations between States*, adopted by the General Assembly of the UN in 1970; again, albeit on a more limited geo-political level, they were retaken by the *Ten Principles* of the *Helsinki Final Act* (1975).

⁵² This is the principle expressed by articles 53 and 64 of the Convention of Vienna of 1969 on treaty law in its relation to the nullity of those treaties concluded in violation of imperative norms or of *ius cogens*.

⁵³ Cf. can.19 of the CIC, which excludes the application of general principles in penal questions. The corresponding disposition of the CCEO is different: can. 1501, in foreseeing the *lacuna legis*, makes reference to the «generalia principia iuris canonici cum aequitate servata».

⁵⁴ Suffice it to mention here the codification of diplomatic law (cf. G. LINGUA, *op.cit.*) or to treaty law as codified at Vienna in 1968-69 and its reference to *ius cogens*. The Holy See has ratified the *Vienna Convention on Diplomatic Relations* on April 17, 1964, and the *Vienna Convention on the Law of Treaties* on February 25, 1977.

of these general principles into its own juridical system⁵⁵.

b) *Custom.*

As regards *international custom*, it is certainly to be noted that the Holy See, in force of its effectiveness of presence in the international Community, is a recipient of the rules of custom which operate in that context: this seems evident from the praxis related to the observance of customs in the area of the conclusion of agreements, of the exercise of the right of legation, as well as those customs concerned with «good neighbourly relations» and therefore which are inherent to the Holy See's sovereignty over the Vatican State.

In accordance with what is held by one section of internationalist school, to be excluded are those customs of which the Holy See cannot be recipient, since they deal with activities which it cannot realize by reason of its nature and condition⁵⁶.

It is possible to find traces of international custom in canonical legislation, in the form of a simple reference, as in the case of can.3 CIC and can.4 CCEO which recalls the international customary principle *pacta sunt servanda*; or else an explicit reference of a receptive kind, as in the case of can.362 relative to diplomatic law and therefore to international custom in this area⁵⁷.

At any rate it remains to be seen whether, in the case of international custom, the general criterion of appreciation for the validity of the custom operating in the canonical order, and referred directly to internal law, may be applied⁵⁸. The possibility that international custom might be received if it is *contrary* to divine law (can. 24 §1 of the CIC) or *derogates* it (can. 1506 §2 of the CCEO) would appear to be immediately excluded⁵⁹. At the same time, the

⁵⁵ One refers here not only to the ratification of the mentioned Convention on treaty law which entered explicitly into this area, but also, for example, to the ratification of the four Geneva Conventions on international humanitarian law (1949) or to the Geneva Convention on the Status of Refugees (1951).

⁵⁶ On this question, cf. G. MORELLI, *Nozioni di diritto internazionale*, Padova 1967, 7th ed., p.149, as regards custom in the area of law of war. For arguments against, cf. G. ARANGIO RUIZ (jr.) *Diritto internazionale e personalità giuridica*, Bologna 1972, especially pp.85 ff.. In reality, of course, the fact does have to be considered that the Holy See became party to the Geneva Conventions of 1949 on humanitarian law and of the relative Protocols of 1977 which partly codify traditional law of war. Interest in this sphere cannot just be limited to the humanitarian nature of the activity proper to the Holy See and the Catholic Church, because there is the parallel adhesion to The Hague Convention of 1954 on the protection of cultural heritage in the eventuality of armed conflict, with the connected aspects concerning the territorial sovereignty of the Holy See (cf. the very full documentation of E. GALLINA, *Il Vaticano è di tutti*, Vatican City 1991).

⁵⁷ In fact, can. 362, which concerns «pontifical Legates», and specifically the nomination, mission, transfer and recall of Legates to States and public Authorities (or indeed to international Organizations), makes reference to international law without any precise indication of the type of norm. Hence this reference of a receptive kind also operates with respect to international custom in this question, taking into account that the regulation of diplomatic activity is among the areas of international law in which the coming together of customary and conventional norms is most evident. Indeed, in the more recent praxis of international law, the conventions concluded tend not only to facilitate a «progressive development of international law», but to favour primarily a codification of existing customs (in this sense, cf. A. MARESCA, *Teoria e tecnica del diritto diplomatico*, Milan 1986, especially p.114) or again, in an indirect way, to lay the foundations for future customs, as can be deduced from the praxis of diplomatic law which has developed since the codification of 1961.

⁵⁸ Cf. canons 5 & 23-28 of the CIC; and canons 6, 2° & 1506-1509 of the CCEO. Clearly the content of these norms also applies to the juridical system of the Vatican State in force of the quoted *Legge sulle fonti del diritto*.

⁵⁹ The considerations given previously on *reserved dominion* hold true also here.

flexibility shown by the canonical legislator regarding custom in general might leave room for the possibility of a receptivity of international customs contrary to canon law⁶⁰, as is attested at any rate by the importance of can.3 of the CIC itself -or can.4 of the CCEO- with reference to the conventions concluded by the Holy See, whenever these contain explicit referrals to or indeed assumption of international customs⁶¹.

c) *Treaties.*

With respect to *international treaties* praxis clearly reveals that the Holy See has always concluded them at a bilateral level, above all in the form of concordats⁶², thus showing openly through the exercise of the *ius contrahendi* its international subjectivity proper and therefore the pursuit of interests falling within its own aims which, albeit sought by means of the exercise of a territorial power, remain those of the Church.

On the basis of can.3 (CIC) and can.4 (CCEO), it becomes clear, first of all, that the Holy See can conclude both bilateral and multilateral treaties, both with States and with other political Authorities, such as intergovernmental Organisations, or other subjects of the international order (e.g., insurgents, governments in exile)⁶³.

As regards the form and manner of concluding treaties, the internal normative system leaves open the possibility of the solemn form and of the simple one; hence that includes *self-executing* treaties or the *exchange of notes*, this latter being the simple form of treaty more usually employed in the “contractual praxis” of the Holy See.

One specific element is given by can.4 of the CCEO which, with respect to can.3 of the CIC, speaks not only of treaties «concluded» by the Apostolic See but also of treaties «approved» by it: the solemn form would in this way be explicitly foreseen in accordance with what is set out by the 1969 Convention of Vienna on treaty law; its article 14 §2 numbers «approval» among the forms of consenting to be bound by the treaty by any given contracting party⁶⁴.

Secondly, it follows from the same dispositions of internal law that the capacity to conclude treaties (treaty making power) is proper to the Roman Pontiff. This likewise accrues to him on the basis of art.3 of the Fundamental Law of the Vatican State. In fact, this power does not belong to other organs, even if it is exercised with the cooperation of the Secretariat of State, a cooperation which is demonstrated not only in technical-diplomatic support -as in the

⁶⁰ This is the problem of customs *contra* and/or *praeter legem*, or indeed those which are *centenarias aut immemorabiles* (cf. canons 26 and 28 CIC; 1507§3 and 1509 CCEO).

⁶¹ Cf. note 56 above as far as the disposition of can. 362 is concerned.

⁶² It does not fall within the scope of these brief considerations to open the question of the international nature of concordats which, at any rate, is adequately supported by uninterrupted international praxis. On the issue of the nature of international treaties as it is attributed to concordats, cf. the classic works of H. WAGNON, *Concordats et droit international*, Gembloux 1935; Y.-M. LEROY DE LA BRIÈRE, *Le droit concordataire dans la nouvelle Europe*, in «Recueil des Cours», 63 (1938), pp.367-468; these contain some interesting references to the period 1870-1929. For consideration of concordats as example of treaties stipulated by others subject of international law than States, made by the UN Commission of International Law, cf. P. CIPROTTI, *La posizione internazionale della Santa Sede*, cit., especially pp.14 ff.

⁶³ This is something which can also happen indirectly, above all with multilateral treaties to which subjects different from States and intergovernmental Organisations can be -or can become- party.

⁶⁴ In this way the formulation of can.4 of the CCEO would seem to be included among those cases of adaptation of internal law to international law, given that the Holy See ratified the Vienna Convention on treaty law.

negotiation stage of a treaty by means of the nomination of plenipotentiaries- but also, as praxis shows, by the signature of the apposite instrument of ratification or adhesion by the Secretary of State or by the Substitute of the same⁶⁵.

A third point arising from the examination of the canons mentioned regards the superiority of treaties over ordinary norms -i.e. Codes- and therefore a prevailing of international law over internal law⁶⁶. It is said that Codes can in no way abrogate or derogate norms of a covenant type: this is a principle which appears to be constant in canonical legislation, as is shown also by its presence in the CIC of 1917⁶⁷, even if it is limited in this case only to concordats and not to other conventions stipulated by the Holy See. At the present time superiority -or the quality of being beyond derogation- is to be applied also to the multilateral conventions to which the Holy See is party, as canons 362 and 365 demonstrate anyhow in relation to the Holy See's respect for international diplomatic law in the nomination, recall and transfer of Pontifical Representatives and in the regulation of those functions of the latter which are governed by international law. Furthermore, these two canons exemplify the adaptation which has taken place of the international norms contained in the Conventions of Vienna of 1961 (on diplomatic relations) and 1963 (on consular relations), to which the Holy See is party as of the 17 April 1964 and 8 October 1970, respectively⁶⁸.

There remains of course the doctrinal problem of the actual force within the internal order of the Holy See of the international treaty law to which she is party, especially that of the multilateral kind⁶⁹. There can be different criteria of evaluation in this instance, since such force does not necessarily have to be sought in the observance by the Holy See of a given obligation in the very same way as any State which is held to that identical obligation. The proper nature of

⁶⁵ In these circumstances, going by internal law, the power exercised is *vicarious* in the case of the Secretary of State, and *delegated* in the case of the Substitute, thus confirming that the *treaty making power* belongs to the Roman Pontiff alone.

⁶⁶ Accordingly, the interpretation of can.3 of the CIC of 1983 given by P.V. PINTO seems inaccurate: cf. *Le norme generali del nuovo Codice*, in AA:VV., *La nuova legislazione canonica*, Studia Urbaniana/19, Rome 1983, p.74 (note 46).

⁶⁷ Cf. in this sense P. CIPROTTI, *Alcuni particolari aspetti delle recenti tendenze della Corte costituzionale sull'art.34 del Concordato*, in «Il Diritto Ecclesiastico», LXXXII (1971), pp.258-259.

⁶⁸ A couple of observations are in order which require further investigation because they have direct consequences on the matter in hand. Firstly, it is to be remembered that Pontifical Representatives -both to Governments (Nuncios) and to particular Churches only (Apostolic Delegates)- also fulfil *consular functions* which are regulated by the mentioned 1963 Vienna Convention. Indeed, during the Conference for the codification of this Convention, the Holy See pointed out its own *ius instituendi consules*, as having independent territorial sovereignty, while making reference to the fact that «les Délégués Apostoliques du Saint-Siège sont reconnus par l'État de résidence comme habilités à exercer, comme les consuls, des fonctions de protection» (Conférence des Nations Unies sur les Relations Consulaires, *Documents officiels*, vol. I, p.104). This means that Apostolic Delegates enjoy the immunities and privileges attaining to the consular function and that the object of their «consular protection» are Catholic institutions and communities spread throughout the world (cf. *ibid.*). On this issue cf. G. LINGUA, *op.cit.*, pp. 87-110. It is to be added that Pontifical Representatives may also fulfil consular functions by reason of the Vatican State: this is foreseen by the Lateran Treaty, art. XIX, received by Law n. III of 7 June 1929 of the Vatican State, on citizenship and “soggiorno” which, in art.15, establishes that a Representative of the Holy See can grant visas for the passports of foreigners who go to the Vatican State; likewise, Decree n. LXVII of 15 September 1951, concerning maritime navigation under the Vatican City State flag, which, in art. 16, establishes that: «the captain of the ship [...] is to report, as soon as possible, to the representative of the Holy See in the port of entry, concerning the arrival of the ship and any relevant fact that occurred during the period of navigation».

⁶⁹Cf. S. FERLITO, *op.cit.*.

the subjectivity of the Holy See, the specific aims which she pursues and the principle of the *personality of the law* which, in the canonical order stands alongside (and, in some of its aspects, even stands above) that of its *territoriality*, constitute a number of objective limits to the identifying of such ways⁷⁰. In this sense, the different forms of carrying out conventional obligations cannot be considered as an absence of reciprocity, nor, therefore, pose any problem concerning a missing international imputability and responsibility vis-à-vis acts already carried out. Indeed, it is not to be forgotten in this respect that the Holy See is among the few -and perhaps the only?- subjects of international law whose international responsibility is not *collective* or imputable to the *individual organ*, but is easily accessible in the subject himself who assumes it: the Roman Pontiff.

At the same time, one simply cannot accept the position of those who maintain that the failure to publish in the *Acta Apostolicae Sedis* (or “Official Bulletin”) the multilateral treaties to which the Holy See becomes party, or of the instrument of ratification or adhesion to these, renders such treaties inoperative “de facto” in internal law. For the internal law of the Holy See, while stipulating as a general rule the said publication as a condition for a legislative provision of the Apostolic See to have obliging force, does not exclude (an) “*alius promulgandi modus*”⁷¹: should it therefore be within this prescription that the news of a given ratification or adhesion, or indeed the integral publication of the act in question in sources of news other than the “customary” or “official”, should fall?⁷²

d) *Norms adopted by Intergovernmental Organisations.*

As regards the normative established by *intergovernmental Organisations*, it seems necessary to evaluate their possible influence on the internal order of the Holy See, especially in the case of acts emanating from intergovernmental Organizations of which the Holy See itself (or the Vatican State in some three cases) is a member. Indeed, it seems obvious that norms emanating from the internal organs of these Organizations have immediate effect: an example is found in the rules governing postal services adopted by the Universal Postal Union (UPU), or those concerning telecommunications which were adopted by the International Telecommunications Union (ITU), of which the Vatican State is a full member. The same may be said for norms in the area of patenting and author's rights established by the World Intellectual Property Organization (WIPO), of which the Holy See was a founding member in 1975.

A separate issue altogether is the question of those norms coming from intergovernmental organizations of which the Holy See may or may not be a member, and regard the fulfilment of obligations deriving from multilateral Conventions concluded within the Organization itself or, indeed, of which the Organization is the depositary. This is the case of some Conventions adopted within UNESCO, such as the one on the importing of objects of an

⁷⁰At any rate, this question does not only concern the Holy See, but also other international subjects which are not States, but which become party to multilateral treaties even without themselves being able to meet the obligations prescribed in a way which is analogous to that of States. The question has become even more evident in recent times, since international praxis -and what is often only consequent regulating- started to register the adhesion of intergovernmental Organizations to multilateral treaties, themselves giving rise to other intergovernmental Organizations: the obligation which these “Member-Organizations” may have to fulfil will certainly be different from that of the “Member-States”.

⁷¹ CIC, can.8 and CCEO can. 1489.

⁷²The reference here is to the publication in *L'Osservatore Romano* of the most recent instruments of ratification of, or adhesion to, multilateral conventions.

educational, scientific and cultural character⁷³, the one relative to the protection of the world's cultural and natural patrimony⁷⁴, and those about the recognition of the studies and diplomas related to higher education⁷⁵.

e) *International jurisprudence.*

With respect to this source of the international order there is no direct rapport with the internal order of the Holy See. While recognizing as important that the solution of international controversies must pass through appropriate judicial and permanent instances⁷⁶, the Holy See has never made recourse to such instances, be they permanent or *ad hoc*⁷⁷.

On the other hand, the conventional obligations assumed through adhesion to some multilateral treaties⁷⁸ have involved for the Holy See the periodic control of its degree of internal execution of these conventional dispositions.

This control is made by mechanisms (Committees) foreseen by the Conventions themselves and which are defined by international law as “para-jurisdictional”. On the basis of a periodic report which the parties to the Convention must present, these Committees, which are composed of independent experts, highlight the level of execution of the obligations. On this same basis the Committees formulate specific indications or real and proper statements of incompliance which give rise, not only to commitments of a political nature, but also of a normative kind, i.e. of the kind aimed at modifying the conduct, even juridically, of those who are party to the covenant.

5. *Relations between the Holy See and intergovernmental Organizations.*

The Holy See, by force of her international subjectivity, participates also in these forms of organization of the international Community -intergovernmental Institutions and Conferences- in differing capacities and depending on the circumstances. Indeed, her active presence in multilateral relations, viz. intergovernmental Organizations and international Conferences, has, along with the bilateral form, always been uncontended. By the same token, such rights, as has already been seen, constitute the fundamental criteria for the ascertainment of international subjectivity.

⁷³ The Holy See adhered to the Convention on the 22 August 1979, whilst it adhered to the Protocol to the same Convention (concluded in 1976) on 22 February 1980.

⁷⁴ The Holy See adhered to the Convention in 1982, with the consequent inscription on the list of the World's Patrimony of the Vatican State and the extra-territorial areas or real estate in the city of Rome.

⁷⁵ On 30 November 1977, the Holy See ratified the Convention regarding Latin American and Caribbean State Members of UNESCO, and the Convention regarding European State Members, on 4 June 1982.

⁷⁶ Cf. among others the *Discourse* of John Paul II to the International Court of Justice, 13 May 1985 (the english text is in *L'Osservatore Romano*, 15 May 1985).

⁷⁷ The problem of can. 1404 remains unsolved in canonical doctrine: «Prima Sedes a nemine iudicatur». For some this would exclude the possibility of the Holy See submitting itself to international judicial instances, while for others it only constitutes an internal reference (cf. S. FERLITO, *op.cit.*, p. 191 ff.).

⁷⁸ In particular, the Convention on the Elimination of All Forms of Racial Discrimination of 1966, ratified by the Holy See on May 1st 1969, and the Convention on the Rights of the Child of 1989, which the Holy See ratified on April 20, 1990.

But if the bilateral form of the exercise of the right of legation -i.e. to individual States- demonstrates that the Holy See puts herself on a different plane from States while using their same methods, this appears all the more evident in relations of a multilateral kind. Of course, in accordance with her own nature and mission, the Holy See takes part in such activities with the predisposition to operate as a force for keeping in mind the ethical dimension, and in favour of the peaceful cooperation between peoples. This type of diplomatic activity begins by considering the aims which are proper to each Organization or Conference and are directed towards areas where continual growth is seen as evident. In this sense, the activity of the Holy See is not of a political nature as such, but it is aimed at giving direction, by means of principles of justice and solidarity, even to those options which have a very clear technical and specialized content.

Such participation has taken on various forms in the latest fifty years' history of intergovernmental Organizations. In a word, it can be said that the Holy See is "received" in her "actual nature", even if from the juridical-diplomatic perspective praxis has shown a tendency to consider as the basis of her international subjectivity the fact that she is, in some cases, the central organ of government of the Catholic Church, and in others, of the Vatican City State. This can happen alternately, but at times in a contemporaneous form. This datum does nothing more than confirm the double subjectivity which the Holy See personifies, deriving from the fact that she is the central organ of government of two sovereign entities.

Taking it from the viewpoint of the norms of the internal law of the Holy See, the Pontifical Representatives to an Organization have their proper function which is, of course, different from that played by their colleagues accredited to Governments: indeed, the former represent the Apostolic See "to witness to the interest of the Church in the general problems of civil life and to offer the help of her collaboration"⁷⁹. Also can.362 of the CIC makes reference to the right of the Roman Pontiff to "nominate and send his Legates to public Authorities", intending with this term to indicate intergovernmental Organizations and Conferences.

Generally speaking, at these Organizations, the Holy See has set up *Permanent Missions* which are qualified according to the position that the Holy See assumes in the Organization with respect to statutory norms or indeed those which emanate from the competent organs of the respective Organizations.

In the majority of intergovernmental Organizations, both of the United Nations system and of those which operate at regional level, the Holy See, while not becoming a member, has assumed the position of Permanent Observer, thus participating in all the activity of the organization, and exercising the right to speak but not the right to vote⁸⁰. There is no lack of differences of course as regards the reason for the presence of the Permanent Observer. This *status* was in fact inexistent for some Organizations according to their statutory norms and was created deliberately for the Holy See, as happened in 1948 at the FAO by reason "of the special circumstances characterizing the Holy See, and without relation to the territorial extent of the Vatican City over which it exercised its sovereignty"⁸¹. At the UN, as well as at other specialized Agencies, "observer" is the position reserved to non-member States. This status has therefore favoured a formal, but not substantial, recognition of the international capacity of the Holy See as it derives from the international subjectivity of the Vatican State.

It is to be remembered that the *status* of Permanent Observer accorded to the Holy See

⁷⁹ Paul VI, *Motu Proprio Sollicitudo Omnium Ecclesiarum*, Introduction, in AAS 61 (1969), pp.473-484.

⁸⁰ It is also to be noted here that the Holy See does not have the obligation of making financial contributions, but its contribution is only for some activities; this does, however, fall to the members of the Organization.

⁸¹ FAO, *Report of the Sixth Session of the Conference*, 1951, par.343.

by the UN - and similarly also in other Organizations of the UN System - concerns “non-members of the United Nations who are full members of one or more specialized agencies and are generally recognized by the Members of the United Nations”⁸²; hence it is different from the *status* of other international entities which are also qualified as Permanent Observer⁸³.

In some cases the Holy See is an effective member, and therefore accredits, just like member States, a Permanent Representative with the title of Delegate: such is the case of the International Agency for Atomic Energy (IAEA) and the World Organization for Intellectual Property (WIPO), or indeed the Universal Postal Union (UPU) and the International Telecommunications Union (ITU) for the Vatican State. This position, which has been generally accepted and has been consolidated throughout international practice, has made the Holy See directly equal to States, or, better still, has signified the identification of the Holy See and the Vatican State⁸⁴.

From the formal juridical perspective, and as a consequence of the position assumed before the mentioned Institutions, this means *the belonging of the Holy See to the United Nations System* and therefore the possibility of participating *en plein droit* in intergovernmental Conferences convoked by *all* the Organizations forming part of the System. Indeed, this occurs independently of the position of the Holy See in the promoting Organization itself -be they Member or Observer- provided the Conferences are open to the participation “of the member States of the Organization, the member States of the specialized Agencies or of the IAEA and of the States party to the Statute of the International Court of Justice”, according to the formula now established in the United Nations System since the Conference on Refugees convened by the UN in July 1951⁸⁵.

It should be remembered that the status of Permanent Observer used by the Holy See was amply confirmed by the attitude assumed by the Papal Delegation to the Conference of Vienna in 1975, which had been called to adopt the “Convention on the relations of States with international Organizations of a universal character”. On that occasion, indeed, the Holy See worked to obtain a double recognition: the insertion in the Convention of norms regarding Permanent Observer Missions, which are equivalent *de facto* to the Permanent Missions of the Member states, a substantial equivalence of Permanent Observers to the Delegates of Member States from a diplomatic-protocol perspective, albeit with different natures and tasks. The same thing holds analogously for intergovernmental Conferences convoked by international Organizations⁸⁶. It should also be remembered that this Convention has not entered into effect and therefore does not constitute a conventional type of obligation. However, the norms contained in it are in fact applied in international praxis, and especially by States which have the headquarters of intergovernmental Organizations on their territory. It is therefore possible to

⁸² *United Nations Juridical Yearbook 1962*, ST/LEG/8, fascicle 2, p.236.

⁸³ At this time only Switzerland is in the same position as the Holy See. Distinct from this are, e.g., the Organization for the Liberation of Palestine, the Sovereign Military Order of Malta and the European Community, even if formally these entities are qualified as “Permanent Observers”.

⁸⁴ One need just consider the fact that at the IAEA, as at the WIPO, it was the Vatican City State which figured as the original member, until 1960 and 1975 respectively.

⁸⁵ The formula adopted foresaw that the invitation to participate was addressed by the Secretary General to «tous les Etats membres de l'Organisation des Nations Unies, les Etats membres des institutions spécialisées et les Etats parties au Statut de la Cour Internationale de Justice». The mention of the IAEA was added to this formula after the creation of the Agency in 1957.

⁸⁶ Cf. in particular articles 7 & 71-72 of the Convention.

include this fact among those international norms which are in effect as the result of customary procedure.

Evidently, the formal, juridical perspective we have just examined does not run counter to the substantial attitude of the Holy See which “by virtue of her particular nature, which is very different from that of States [...] makes herself present in international Organizations to require, encourage and promote the search for the common good, with a view to the building up of a better world in truth and in justice and therefore for the integral well-being of Man”⁸⁷.

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⁸⁷ Discourse of Paul VI of 4 September 1974 to the Representatives of the Holy See to International Organizations, in *Insegnamenti di Paolo VI*, vol. XII, p.788.