

The Holy See and the concept of international legal personality: some reflections

Tiyanjana Maluwa*

Lecturer, Univeristy of Malawi

Introduction

In what is regarded as the most important development in Vatican diplomacy in recent years, the Vatican and the United States announced on 10 January 1984 the re-establishment of diplomatic relations at ambassadorial level after a lapse of 117 years. In fact, the first half of the present decade has witnessed the establishment or re-establishment of full diplomatic relations between the Holy See and other countries, such as: Greece (1979), Dominica (1981), Equatorial Guinea (1981), United Kingdom (1982), the Order of Malta (1983), Nepal (1983), Belize (1983) and so on. During this period, too, the Holy See has not only participated in a number of international conferences, but has also become a party to some of the international agreements concluded at such conferences. The United Nations Convention on the Law of the Sea (1982) easily provides the best example in this regard.

All this may be regarded as being of particular interest to the international legal scholar for one major reason: these events rekindle the old debate about the proper status of the Holy See in the international legal order and the legal implications of its participation in international affairs alongside the other subjects of international law, namely states and international organisations. This is a debate concerned with the legal and philosophical justification for according international legal personality to certain types of non-state entities, usually referred to in legal literature as entities *sui generis*.

At first sight one may be tempted to dismiss this alleged debate with a sense of *déjà vu*. For, was not the issue settled a long time ago in the copious pronouncements of international legal scholars in the immediate

*LLB (Mlw) LLM (Sheff) PhD (Cantab)

aftermath of the creation of the state of the Vatican city by the Lateran Treaty concluded between Italy and the Holy See in 1929? It is argued here that the issue is not passé and is worth pursuing even today. For one thing, an examination of the views expressed by most writers on the subject reveals a lack of any proper or sound philosophical justification for the international legal personality of the Holy See beyond the mere assertion that it is an international legal person *sui generis* which must be accepted as such. In this article it will be argued that the international legal personality of the Holy See, if there be such personality, must be founded on proper objective considerations. These considerations may be explained in terms of what the present writer would like to term “the social need theory”.

Part of the reason for the failure by some of the writers on this issue to proffer sound explanations for the international legal personality of the Holy See has been due to the failure by these legal scholars to mark out the exact interrelationships between the three entities: the Holy See, the state of the Vatican City, and the Pope. The tendency to treat all three entities, and in particular the Holy See and the Vatican State, as one and the same has often led to legal confusion and obscurity in this debate.

The international status of the Pope today rests on a two-fold foundation: as temporal sovereign of the miniature state of the Vatican City and as head of the supreme administrative organ of the Roman Catholic Church, the Holy See. This was equally the case before the annexation of the Papal State (whose origins can be traced to the reign of Emperor Constantine the Great, ruler of the Roman Empire from AD 306 to 337) by Italy in 1870. The position of the Pope as the temporal sovereign of the Papal state was never doubted. But, equally, the notion of the Holy See as a non-territorial entity based on the organisation of the Roman Catholic Church with the Pope as its spiritual sovereign was also already accepted even at that time.

Throughout the history of the Papacy it was always recognised that the Pope stood in a sovereign position extending beyond the bounds of the Papal State. It was regarded as within the scope of his mission and religious role in the world that the supreme head of the church should recognise no territorial boundaries. These two roles were exercised side by side. They were, however, always kept apart and the Papacy itself was always quick to keep this distinction clear. The Papal delegate to the Congress of Vienna in 1815 alluded to this when he noted:

“The size of the Papal State and the Pope’s real power should rate him as a second class ruler, but it is by reason of his religious character that the precedence has always been accorded to the Pope. . .”¹

The Papal secretary of state went on to remind the Congress that the Pope rules by two swords, one spiritual, the other temporal.²

¹Graham *Vatican Diplomacy* (1959) 168.

²*Ibid*, see also Lecler *The Two Sovereignties* (1952) *passim*

It may still be argued that it is the unchanged position of the Holy See in the international community, and not the territorial sovereignty which the Pope exercises over the 108-acre state of the Vatican City, that is the real determining factor in the international status of the Pope today. In simple terms, the relationship between the Holy See and the Vatican State can be said to be that of two distinct entities linked together under the leadership of a common sovereign. Perhaps it could be said that the relationship in fact goes beyond that, for by the very fact that the Vatican State was created for the specific purpose of serving the Holy See, and the Holy See was conversely given sovereignty over that territory, the position of the Vatican State becomes that of a vassal state.

The most telling evidence of the separate identities of the Holy See and the state of the Vatican City is provided by the fact that the former continued to send diplomatic representatives to various states and, conversely, that other states also continued to be represented at the Papal court during the period 1870 to 1929 when neither the Papal State nor the state of the Vatican City itself existed.³ Similarly, the Holy See continued to conclude international agreements with other subjects of international law during the entire period of the territorial interregnum.⁴ The Pope to this day can, and does, appear in the international sphere representing one or the other of the two entities and not necessarily both at the same time. Hence, the Pope or his representatives have on many occasions since 1929 concluded agreements either solely on behalf of the Holy See (called concordats) or the Vatican State (such as the conventions concerning customs, postal services, radio and telegraphic services and so on). In the same way, Papal representatives abroad represent both the Holy See and the state of the Vatican City. But it must still be emphasised that the question of the international legal personality of the Holy See ought to be examined independently from that relating to the position of the state of the Vatican City in the international legal order.

International law: problems of definition and approach

The question of personality in international law has always been linked to what jurists conceive international law itself to be. It is only by defining the content and scope of the international legal system that one can determine what its subjects can be. A discussion of the international legal personality of the Holy See, as indeed of any other entity, must therefore start with a preliminary discussion of the definition of internat-

³At the time of the annexation in 1870 there were eighteen permanent missions at the Vatican. These dropped to fourteen on the eve of the First World War but rose again to twenty-four in 1921. By the time the Lateran Treaty was concluded in 1929 the Holy See was host to twenty-seven diplomatic missions. See Graham *The Rise of the Double Diplomatic Corps in Rome* (1952); *La Prassi Italiana di Diritto Internazionale* (1861–1887) 303–34, 420–421. Smith “Diplomatic Relations with the Holy See: 1815–1930” (1932) 48 *LQR* 374.

⁴There are thirteen bilateral treaties concluded between the Holy See and various states during the period 1870–1929 still in force today. See Wagnon *Concordats et droit international* (1935).

ional law. As the nature and structure of the international community has undergone fundamental transformations in the last half-century, so has the substance and structure of international law. A study of this development consequently reveals, on the one hand, what are generally called the classical definitions and, on the other hand, the modern theories on the subject.

The classical theories

The most typical classical definition of international law is the one adopted by Fauchille:

“International law is the body of rules which determine the respective rights and duties of States in their mutual relations”.⁵

Although this is generally accepted as the standard classical definition, a brief survey of the issue shows that there still existed differences in the way individual writers approached the problem. Westlake, for example, simply defined international law as the body of rules prevailing between states,⁶ while others tended to emphasise the obligatory nature of the law. These jurists defined international law as designating the principles and rules of conduct which states feel themselves bound to observe and therefore do commonly observe in their relations with one another.⁷ Brierly, too, defined international law, or the law of nations, as:

“The body of rules and principles of action which are binding upon civilized States in their relations with one another”.⁸

Some of these early definitions tended to reflect a sociological rather than a juridical basis. A good example is afforded by the formulation taken by the French jurist Renault, for whom international law was a body of rules destined to reconcile the freedom of everyone with the freedom of others.⁹ For yet others, international law was best described as “the body of rules which regulate the intercourse of nations in war and peace”.¹⁰

A complete survey of all the classical theories and the divergencies that existed cannot be attained here, but the few definitions presented above represent the most prominent school of thought in the formative years of international law. This group of jurists considered the state as the only concern of international law. In all the definitions, emphasis was thus placed on the exclusive position of the state. The predominance of this view can indeed be detected in the definition adopted by the Permanent Court of International Justice when it stated, without further qualification, in the judgment in *The Lotus* case that international law governs the relations between independent states.¹¹

⁵Fauchille *Traité de droit international public* (1922) 4.

⁶Westlake *The Principles of International Law* (1923) 1.

⁷Hyde *International Law* (1945) 1.

⁸Brierly *The Law of Nations* (1928) 1.

⁹See Renault *Introduction à l'étude de droit international* (1897) 8 *et seq.*

¹⁰Moore “Fifty years of International Law” (1939) 50 *Harv L Rev* 395.

¹¹PCIJ Series A No 9 18.

The evolution of the international community and its impact on the definition of international law

An explanation for the predominance of the view that international law must be defined so as to designate the body of rules regulating the relations between states exclusively must be sought in the development of the early international community. Although a system resembling the present international legal system may be said to have obtained in ancient China, Mesopotamia, Egypt, etc over 2 000 years ago,¹² and Europe throughout the Roman era, the present system developed in the fifteenth, sixteenth and seventeenth centuries as the law governing relations between European nations. The disintegration of the Roman Empire had led to the formation of various groups or political units in Europe. These were the Papal State, the new Holy Roman Empire, the Italian City States in some parts of the old Roman Empire, and independent states on the fringes of the Holy Roman Empire such as France, England and Scotland, to mention only a few. Later with the decline and reduction of the Papal State, more nations and independent kingdoms emerged, among them the Kingdom of Naples or the Two Sicilies, the Venetian Republic, Lombardy, Piedmont, Tuscany, etc. These nations recognised the need for binding commitments between each other to safeguard their economic and political interests. These commitments were usually enshrined in some form of bilateral agreement. As time went by, legal concepts began to emerge around such agreements, soon giving birth to the growth of customary rules embracing such fields as maritime law, diplomatic protocol, mediation and arbitration. In the matter of arbitration the Pope, as sovereign of the Papal State, was at this period the most dominant figure; once in a while he would be called upon to arbitrate and propose conditions to be observed by feuding princes. As the world community further expanded to include the new nations of Eastern Europe and Asia, the field of customary laws was enlarged to cover such areas as state responsibility, reprisals, shipwreck and neutrality.¹³

The end of the First World War saw the further development of the rules of international law, mainly because of the concerted international efforts to control the use of force. International agreements and conventions were adopted on a wider scale. The most significant development in this respect was the formation of the League of Nations, the first international organisation of its kind. It signified efforts to coordinate international cooperation which were unfortunately shattered by the outbreak of the Second World War.

The end of the Second World War marked a watershed in the development of international law and cooperation. The process of decolonisation which followed the end of the war led to the further expansion of the international community as more nations became independent. The econ-

¹²See Bishop "General Course of Public International Law" (1965) 115 *Hague Recueil* 147 193.

¹³Schwarzenberger *The Frontiers of International Law* (1962) 50.

omic devastation caused by the war necessitated the establishment of order and control in many types of states. The establishment of the United Nations, successor organisation to the League of Nations, and the United Nations' various specialised agencies was the response to this necessity. More regional groupings embracing both political and economic alliances have since been established. All these non-state entities have been instrumental in the forging of a new international legal order and have greatly shaped the modern trend of international cooperation and relations between states. Consequently, they have not only directly or indirectly helped in the creation of some of the new rules of international law, but have themselves become the recipients of international rights and duties.

Modern definitions

The developmental pattern briefly outlined above shows that the growth of international law is a reflection of the structure of the international society at any particular time. In this way the growth of international law has been a continuous process of adjustment. The law has thus been adjusted to address itself to entities of a non-territorial nature instead of maintaining the now unworkable proposition that the regulation of interstate relations is its exclusive concern.

The need to redefine international law so as to accommodate the increasingly complicated nature of international relations has been emphasised in various post-war writings.¹⁴ Of this Jenks stated

The emphasis of law is increasingly shifting from the formal structure of the relationships between States and the delimitation of their jurisdiction to the development of substantive rules on matters of common concern vital to the growth of an international community . . . individuals, organisations and corporate bodies which call for appropriate legal regulation on an international basis.¹⁵

Not all these new definitions have managed to escape the predominance of the classical theory.¹⁶ However, the definition advanced by Starke is certainly one of the most all-embracing post-war formulations. He defines international law as:

That body of law which is composed for its greater part of the principles and rules of conduct which States feel themselves bound to observe and, therefore, do commonly observe in their relations with each other, and which includes also:

“(a) the rules of law relating to the functioning of international institutions or organizations and their relations with each other and with States and individuals; and

(b) certain rules of law relating to individuals and non-State entities as far as the rights and duties of such individuals and non-State entities are the concern of the international community.”¹⁷

¹⁴See, for example, Jessup *Transnational Law* (1956) 15–16; see also McDougal “International Law, Power and Policy: a contemporary conception” (1953) 82 *Hague Recueil* 133; Jenks *The Common Law of Mankind* (1958).

¹⁵Jenks *ibid* 17.

¹⁶See, for instance, Colombos *The International Law of the Sea* (1952) 7.

¹⁷Starke *An Introduction to International Law* 9 ed (1984) 3.

This definition clearly expresses the view that international law can no longer be adequately or reasonably defined or described as the law governing inter-state relations only. International law today represents a wider law of the world community of which the law governing relations between states is only one major division.

The theory of personality in international law

The quality of being a “subject of law” or a “legal person” is a notion common to all legal systems whether municipal or international, secular or ecclesiastical, public or private. The notion denotes, in every system, all those entities between whom legal relations in a given order can exist. In the domain of private law the concept of personality was already familiar to Roman lawyers. In Roman law entities which were considered as possible possessors or bearers of rights and duties were called *universitates personarum* or *universitates rerum*, while the term *persona* was restricted to human beings.¹⁸

Historically, the earliest formulation of the concept of international personality comes from Francisco de Vitoria. As early as 1532 Vitoria is said to have admitted and accepted, in a lecture delivered at the University of Salamanca, the international personality of the native kingdoms of North America which had just been conquered by Spain.¹⁹ The other acclaimed “fathers” of international law, Grotius and Vattel (writing a century and two centuries later, respectively) both expanded this concept of states or nations as political bodies with rights and obligations in the human community. None of these, however, used the expression “international personality”. The first use of this technical term is attributed to Leibniz, who employed it in his *Codex Juris Gentium* published in 1693.

The nature of international personality

International personality has been defined as the capacity to be a bearer of rights and duties under international law. Put differently, a subject of international law is an entity capable of possessing international rights and duties and having the capacity to maintain its rights by bringing an international claim.²⁰ This definition, though conventional, must be accepted with caution for, as Brownlie remarks, the *indicia* referred to depend upon the existence of a legal person. The definition is therefore circular and would appear to be no more than a tautological description. It has been suggested that perhaps all that can be said is that an entity which has been recognised by customary law as capable of possessing rights and duties and bringing international claims, and having those capacities conferred upon it, is a subject of international law.²¹ Unfortunately this view does not

¹⁸Verzijl *International law in Historical Perspective Vol 2* (1969) 1.

¹⁹*Ibid* 2.

²⁰See, for example, Schwarzenberger *A Manual of International Law* (1976) 42. Brownlie *Principles of Public International Law* (1979) 60.

²¹Brownlie *ibid*.

appear to be shared universally. Some international lawyers are of the opinion that it is the act of recognition by states, and not the rules of customary law, which clothes an entity with international personality.²² It is submitted here that this confusion and ambiguity can be avoided by approaching the question of personality from an objective basis and then utilising that objective test to determine both the existence of international personality and its consequences.

Methods for ascertaining international personality

As has been suggested above, there are two conflicting schools of thought regarding the acquisition of international personality. According to the first view, the proper method for the granting of international personality is by the unilateral act of recognition. Hence it is contended that international personality can, in fact, be accorded provisionally or definitely, completely or incompletely, and expressly or by implication, depending on the will of other states.²³ The other school, however, rejects the institution of recognition as the determining factor in international personality. On the contrary, it is argued that only the rules of law can determine who is a legal actor and they alone may select different entities and endow them with different legal functions and capacities. O'Connell, one of the foremost advocates of this view, rejects the contention that capacity, and thereby personality and sovereignty, derives from recognition by other subjects of international law. Rather, he proposes a set of questions which must be asked if the international personality of an entity is to be determined objectively.

- Do the *rules of international law* establish that this claimant to capacity has the capacity which it claims?
- What exactly is the capacity which it claims and which is allowed to it, or in other words, just *what sort of legal relations* may this entity enter into?
- Where the claimant to capacity is a novelty (and therefore there are no rules of international law on the subject at all until it appears and asserts itself) the question arises: should the entity be recognised (in the sense of *acquiescence in the claim* by other parties to the international action) as *having the capacities* which it claims to have? (emphasis added).

The author goes on to emphasise that an affirmative answer to the third question means that a series of acts performed by the entity in question in the field of international affairs are allowed to be legal acts, and the entity is admitted to have the capacity to perform them.²⁴

This approach is a typical formulation of the objective theory of international personality.

²²Schwarzenberger *op cit* 56.

²³*Ibid.*

²⁴O'Connell *International Law* Vol I (1970) 81.

The essence of the objective theory is that in any legal order personality can only be granted on the basis of rules prevailing in that order. The ability to acquire rights and obligations within such a sphere is contingent upon the presence, applicability and application, within that legal order, of a rule granting such rights and obligations. In its Advisory Opinion in the *Reparation for Injuries* case,²⁵ a judgment of undoubted significance on the subject of international personality – in particular, that of international organisations – the International Court of Justice adopted the objective approach rather than the theory that recognition is the key to personality. A structural analysis of the reasoning of the court provides a fine illustration of this doctrine. The judgment is not, of course, a general pronouncement on international personality. Yet, although it restricts itself to the determination of the international personality of the United Nations Organisation, the judgment does provide an interesting example of how the question of international personality, even in the case of entities other than international organisations, may be approached. It is not intended to discuss all aspects of the case here. But it may be noted that the court was asked to advise on two questions:

1. In the event of an agent of the United Nations suffering injury in circumstances involving the responsibility of a state while performing his duties, has the United Nations, as an organisation, the capacity to bring an international claim against the responsible *de facto* or *de jure* government with a view to obtaining the reparation due in respect of damage caused (a) to the United Nations, (b) to the victim or to the persons entitled through him?

2. In the event of an affirmative reply on point 1(b) how is action by the UN to be reconciled with such rights as may be possessed by the state of which the victim is a national?

What is worth noting from the outset is that the court was not specifically requested to pronounce on the international personality of the organisation at all. Nevertheless in order to answer the first question the court found it necessary to investigate the international personality of the organisation and then use that concept to derive the existence of the right to prosecute a claim. The court thus decided to:

(a) ascertain the presence of certain *pre-conditions* or *objective characteristics* fulfilled by the organisation;

(b) to *derive and affirm the legal personality* of the organisation from such objective conditions;

(c) to mark out the *extent and degree* of this personality, deriving from it the *right to prosecute a claim*.

²⁵ICJ Rep (1949) 174.

The objective conditions

In ascertaining the objective conditions on which to base the international personality of the organisation, the court first of all found that the Charter had gone further than creating a mere centre for harmonising the actions of nations in the attainment of common ends (Article 1(4)), but also,

it has equipped that centre with organs and has given it special tasks. It has defined the position of the members in relation to the organisation by requiring them to give it every assistance in any action undertaken by it and to accept and carry out the decisions of the Security Council . . . Practice – in particular the conclusion of conventions to which the organisation is a party – has confirmed this character of the organisation, which occupies a position in certain respects in detachment from its members . . .²⁶

These findings were regarded by the court as forming the objective basis or preconditions on which to establish the existence of international personality. Instead of starting with the assumption that the organisation was an international person, the court sought to discern the international personality of the organisation in specific elements pertaining to the structure of the organisation itself.

The content of the objective theory varies with the type of entity under consideration. The elements identified by the court in the *Reparation* case as the objective conditions for the international personality of the UN can be recorded as follows:

- (a) the existence of an international organisation established by two or more states, with a common organisational goal;
- (b) such an international organisation must not be subject to the authority of any one state, but to the joint authority of all members through their representatives;
- (c) it must be capable of performing sovereign acts in its own name detached from the member-states.

In the case of states, international law has laid down conditions of territory, population, governmental authority and the capacity to enter into relations with other state as the basis for international personality.²⁷ Once these conditions have been fulfilled the state acquires international personality. There is sometimes confusion between the objective requirements for the international personality of states, and the conditions for statehood itself. Whether an entity claiming to be a state is indeed a state or not is a question of fact. But not every state automatically becomes a subject of international law; it may only have limited international person-

²⁶*Ibid* 179.

²⁷Article 1 of the Montevideo Convention on the Rights and Duties of States (1933) provides that the state as an international person should possess: (a) a permanent population, (b) defined territory, (c) government and (d) the capacity to enter into relations with other states: on the criticism of some of these conditions see, Brownlie *op cit* 74 *et seq.*

ality due to constitutional inadequacies or limitations – for example, states forming a federation and protected or dependent states. Apart from this, it is generally acknowledged that any fully sovereign state automatically qualifies as a subject of international law.

The international legal personality of the Holy See: The social need theory

If the content of the objective theory in relation to states and international organisations is now reasonably clear, that is far from the case with regard to entities *sui generis*, and in particular the Holy See. Its international personality cannot be based upon the objective rules respecting statehood, for it is not a state.²⁸ Neither can such personality arise out of the existence of an organisational goal common to states. It is not an international organisation in the same sense as, say, the United Nations or the European Economic Community. In all the legal literature about the international status of the Holy See the majority of writers have found it easier to conclude that the Holy See is an international person than to explain the reasons for this conclusion. Indeed, the line of reasoning appears to be that the Holy See is an international person because it has always concluded treaties and exercises the right of legation. What appears to be forgotten in this debate is the fundamental question whether the capacity to conclude treaties and to send and receive diplomatic envoys exercised by the Holy See is a precondition for, or a consequence of, its international personality. Indeed, the remark has been made that entities such as the Holy See must be recognised as international persons for the simple reason that they exist as such.²⁹

However there is a better basis for the endowment of entities *sui generis* with international personality. This is that international personality should not be conferred in a vacuum, but in accordance with and in consideration of the needs of the community. The international character of the aims of such entities should be taken as the measure of justification for saying that the conduct of those entities must be governed by international law. On that basis the entities themselves can consequently be regarded as assuming international personality.

It is contended here that such entities as the Holy See, or the Order of Malta, or any other entity *sui generis*, do not exist in a social vacuum, but are seen as performing real and significant functions for the international community. Although the ends these entities represent are remarkably different from those of states and international organisations, they are

²⁸It is in this regard that it becomes important to distinguish the international status of the Vatican City, which is a state, from that of the Holy See. Unfortunately, some of the major writings on this issue do not always observe this distinction and tend to confuse the two separate issues. The discussion in Crawford *The Creation of States in International Law* (1979) 152–160, is one of the few exceptions.

²⁹Seyersted “The International Personality of Intergovernmental Organizations” (1964) 4 *Ind J Int L* 1 at 40 *et seq.*

perceived by the international community as performing functions which can be regarded as useful for international society itself. Because of the international character of the ends or functions of these entities, and in order to be able to effect them on the international plane, they need to be accorded an international status. This "international end" is therefore the objective test on which to base the personality of these entities in the international legal order. It is on this criterion that the international personality of the Holy See is based. For the sake of convenient terminology this objective criterion will be termed "social need", since it reflects a perception on the part of the international society that the functions in question form a recognisable and acceptable need within the society.

In its bare essentials the social need theory can be reduced to the statement that when in some cases it is necessary for an entity – which is neither a state nor an international organisation – to have an international character in order to execute its functions, themselves recognised as significant for the international community, such an entity must be seen as possessing international personality. The rationale behind this formulation is that the creation of new subjects of international law must arise out of society's needs for the development of international cooperation and the furtherance of the ends of the international community.

The question that then arises is: who determines that the functions being performed by the entity are such useful needs for the international community as to justify the endowment of that entity with international personality? The attitude of the international community, or a substantial section of it, is what determines whether the functions have been accepted as social needs. This can be judged from the practice of states, singly or through their collective pronouncements. This means that there is a sense in which recognition is crucial to the ascertainment of the international personality of entities *sui generis*. The important point is that it is not recognition of international personality itself, but of the usefulness of the functions which the entity claims to serve. In other words, the practice of states determines whether the objective criteria on which international personality is based have been satisfied.

The evidentiary value of state practice in determining the fulfilment of the objective conditions on which personality is based is illustrated by the debate about the international personality of liberation movements.³⁰ The argument for the international personality of liberation movements is based on the fact that the function those entities serve has been accepted by the larger section of the international community as a useful, legitimate need: the combating of colonialism and all forms of alien subjugation. In

³⁰The debate about the international legal personality of liberation movements is far from settled. Even those writers who are prepared to admit the existence of such personality do not agree whether it should be accorded to all liberation movements or to particular ones. See, for example, Travers "The Legal Effect of U.N. Treatment of African Liberation Movements and the PLO" (1976) 17 *Harv Int. LJ* 561.

his contention that certain African liberation movements have acquired international personality, Travers points out that the various resolutions on self-determination adopted by the General Assembly of the United Nations represent the views of the majority of states.³¹ Resolution 1514(XV) of 14 December 1960, for example, states that the "subjection of people to alien subjugation, domination and exploitation is contrary to the Charter and a denial of fundamental human rights." Although not all these resolutions are recognised as having a law-creating quality, it is argued that, as collective acts of states, they are capable of developing into international customary law.³² In fact, following the adoption of the above resolution, colonialism is now generally regarded as a denial of human rights and an impediment to world peace and cooperation. Subsequent United Nations resolutions in the field of self-determination are no longer regarded as mere moral pronouncements, but involve juridical concepts. It can be concluded that where a national liberation movement has been accepted as representing the needs of a certain section of the international community in its struggle for self-determination, the movement can be accorded personality in the international legal order to that effect. This view has been endorsed by states in various General Assembly resolutions. Articles 7 and 10 of Resolution 3328 (XXIX) of 6 December 1974, for instance, specifically request the representation of colonial territories in Africa by national liberation movements concerned in an "appropriate capacity" when dealing with those territories at all deliberations.

A good illustration of the use of the objective test in order to ascertain the international personality of an entity *sui generis* is provided by the Order of Malta. Regarded as the oldest order of chivalry, the Order of Malta has its origins in the year 1042. It was set up as a charitable, religious and hospitalist organisation by the Italian merchants of Amalfi and the Califs of Egypt.³³ The Order obtained Malta by treaty with King Charles V as a fief of the Kingdom of Sicily in 1530, but it had already acquired an international capacity and its acts were competent in the international order even when they were unrelated to the island of Malta.³⁴ When it lost the island in 1798, the Order continued to accredit diplomatic representatives to most European capitals, for example, Rome, Vienna, Madrid and Paris. These envoys were recognised as equal in rank to other ambassadors. To this day, in spite of its lack of a territorial base, the Order continues to make treaties and to accredit delegations to various international organisations; its Grand Master and his residence in Rome have sovereign status, and it exchanges embassies with some forty countries. The ceremonial

³¹See, in general Travers *Ibid.*

³²See, Asamoah *The Legal Significance of the Declarations of the General Assembly of the United Nations* (1966) 7 *et seq.* See also, Higgins, *The Development of International Law through the political Organs of the United Nations* (1963) 2.

³³Farran "Sovereign Order of Malta in International Law" (1954) 3 *ICLQ* 217. See also Potulicki "The Order of St. John in International Law" (1954) 48 *Am J Int L* 554.

³⁴O'Connell *op cit* 85.

treatment of the Grand Master, when paying official visits to other countries, is like that of a head of state.³⁵ More important, the Order was the subject of a judgment of the Italian Court of Cassation in 1935 in which personality was induced from an analysis of functional needs. It was stated, *inter alia*:

It must be admitted that only States can contribute to the formation of international law as an objective body of rules – States as international entities which are territorially identifiable. This is so because the fulfilment of this latter requirement makes them the principal objects and creators of such rules. But it is impossible to deny to other international collective units a limited capacity of acting internationally within the ambit and actual exercise of their own functions, with the resulting international juridical personality and capacity which is its necessary and natural corollary. In accordance with these doctrines such personality was never denied to the Holy See before the Lateran Treaty . . .³⁶

The basic aim of the Order is to assist the sick and the poor on an international basis. Its ends are therefore of an international character and to achieve such ends there is need for it to have the capacity to operate upon the international plane.³⁷

The international end or social need theory, it is submitted here, has always been at the root of the international personality of the Holy See. In a work published in 1930, it was observed:

Since international law does not allow any one State to control the Pope in his character as head of the Catholic Church, he has to be put in a position of international independence, that is, even though he is not the head of State . . . he has to be made an independent subject of international law.³⁸

Siotto-Pintor made similar observations a little later. He noted that the Holy See was an international person *sui generis* and that this personality was derived from the “international end” that the Papacy stood for in the human society.³⁹ Zimmermann, in his analysis of the international personality of the Holy See, has provided an even more elaborate account of this theory.⁴⁰

Other recent legal commentators have also supported this view. Ehler has cited the international end or purposes of the Holy See as the specific factor from which the international status of the Pope (and thereby the Holy See) must be derived. O’Connell, too, makes the same observation.⁴¹

³⁵Farran *op cit* 225.

³⁶*Nanni v Pace and the Sovereign Order of Malta* Ann Dig Int L Cases (1935–37) Case No 2. See also, *Scarfo v Sovereign Order of Malta* 24 ILR (1957) holding that a contract between the Order and an Italian was not subject to Italian law.

³⁷In its humanitarian functions the Order can be compared with the International Committee of the Red Cross except that the latter is not considered an international person; it remains a Swiss corporation in spite of its international operations.

³⁸Hatschek *An Outline of International Law* (1930) 56.

³⁹Siotto-Pintor “Les sujets de droit autres que les Etats” (1932) 41 *Hague Recueil* 245 324 *et seq.*

⁴⁰Zimmermann “La crise de l’organisation internationale à la fin du Moyen Age” (1933) 44 *Hague Recueil* 315 at 352 *et seq.*

⁴¹O’Connell *op cit* 85; see also Ehler “The Recent Concordats” (1961) 104 *Hague Recueil* 1.

In addition to these legal writings, one could also cite the provisions of the Lateran Treaty of 1929, referred to above, which by implication refer to the social need for, or international end of, the Holy See. A perusal of the preamble and Article 26 of the Treaty leaves no doubt that it was the need for “the absolute independence for the fulfilment of its exalted mission in the world” which lay behind the acknowledgement of the international personality of the Holy See. In addition, Article 2 of the treaty implies that the sovereignty of the Holy See in international matters was accepted as an “inherent attribute in conformity with its traditions and the requirements of its mission to the world.”

The practice of states would appear to confirm that this “mission” of the Holy See has been widely recognised and accepted by many other states. After all, it is this “mission” which the Holy See sets out to regulate when it concludes concordats with states, and the variety of states which have concluded such agreements with the Holy See over the centuries bears testimony to the wide acceptance of the latter’s “international end”.

It can thus be concluded that whereas in the case of states rules respecting territory, population and constitutional competence which automatically endow the state with international personality have been laid down, and in the case of international organisations there exist objective tests regarding the existence of an organisation with a common goal and constitutional detachment from its member-states, in the case of entities *sui generis*, such as the Holy See, the objective test is a functional one. This functional test is based on the societal needs and the ‘international end’ of the entity itself. The content of the objective theory of international personality *vis-à-vis* entities *sui generis* is thus embodied in the ‘social need’ or ‘international end’ theory. In the case of international organisations emphasis was placed on the fact that the organisation must manifest its ability to operate as a distinct entity separate from its members. Similar emphasis must also be made as regards the international personality of entities *sui generis*: the concept of international personality is a shorthand for the statement that an entity is legally independent of any other subject of international law; that it is not subject to the jurisdiction of any other entity, but that it operates on the basis of equality with those other subjects in the international legal order. Hence, it is generally said that the common characteristic among subjects of international law is sovereignty – not in the sense of territorial sovereignty – but simply legal “independence” from other entities. All this applies to entities *sui generis*, too. It was argued above that the Holy See is a distinct entity that operates in the international legal order in its own right, divorced from the other entities that are, nevertheless, related to it: the state of the Vatican City and the Pope. It can, therefore, be concluded that the Holy See is a distinct sovereign entity independent from any other subjects of international law and therefore a true international person.

The consequences of international personality

Having ascertained the purposes and objectives of the United Nations

in the *Reparation* case, the International Court of Justice went on to conclude

The Organisation was intended to exercise and enjoy and is in fact exercising and enjoying functions and rights which can only be explained on the basis of the possession of a large measure of international personality and the capacity to operate on an international plane.⁴²

The key phrase in the court's conclusion was "the capacity to operate on an international plane." This was intended as a generic formula summarising the capacities which result from the acquisition of international personality, including the capacity to bring an international claim and to negotiate and conclude a special agreement.

The "capacity to operate on an international plane" is now generally taken by most writers on international law as the consequence of international personality. After analysing both the *Reparation* and the *US Nationals in Morocco*⁴³ cases Fitzmaurice comes to the conclusion that the necessary attribute of international personality is the power to enter, directly or mediately, into relationships (by treaty or otherwise) with other international persons.⁴⁴ O'Connell has also taken up the issue; according to him, personality must be interpreted as a different way of saying that an entity is endowed with legal capacity to participate in international relations, that is, to do certain acts in the international order.⁴⁵

The conclusion can thus be made that the capacity to operate on the international plane is a consequence of international personality. But two major questions arise. First of all, if, as Fitzmaurice has said, the necessary attribute of international personality is the power to enter into relationships (by treaty or otherwise) with other international persons, what is the legal position of a subject of international law *vis-a-vis* another subject which refuses to acknowledge its personality? Secondly, there arises the question whether the capacity to act on the international plane gives every subject of international law the power to perform any act it is in a practical position to perform, as appears to be Seyersted's view, or, as O'Connell contends, whether international capacity may in some circumstances be more limited.⁴⁶ Both these views will be examined so as to ascertain the legal position of the Holy See *vis-à-vis* the non-recognising states of the communist block, particularly the Soviet Union and the rest of Eastern Europe, and to determine whether the international personality of the Holy See entails a plenary capacity to act on the international plane.

⁴²ICJ Rep (1949) 179.

⁴³ICJ Rep (1952) 176.

⁴⁴Fitzmaurice "The Law and Procedure of the International Court of Justice" (1953) 30 *BYIL* 12.

⁴⁵O'Connell *op cit* 81-82.

⁴⁶See O'Connell *ibid*; but see, Seyersted *op cit* 53, who holds the view that the consequence of international personality for international organisations is that they can perform all acts they are in a practical position to perform, unless they are precluded by their constitutions.

The extent of international personality vis-à-vis non-recognising states

It was stated above that the attainment of international personality does not depend on recognition. However, the ascertainment of international personality is only the primary aspect of the wider problem. The ascertainment of the practical *consequences* of that personality is another matter, and it is here that the role of recognition becomes significant. It is hardly contestable, even by the most ardent advocates of the objective theory, that after the acquisition of personality, recognition becomes relevant in the sense that it can effectively limit, or totally deny, the new entity the facilities open to it as a subject of international law. This is so because there is no rule of international law prohibiting a subject of international law from choosing not to enter into any relations, for whatever reasons, with another subject of international law. Technically, therefore, the less recognised or accepted an entity is the less its chances for a practical manifestation of its personality become.

But this has no relevance to the question of its international personality. An entity can possess international personality though it may lack one or more of the legal capacities possessed by states.⁴⁷ In the same way, the fact that it is unable to exercise a particular capacity by virtue of its non-recognition by a particular state or group of states diminishes its personality in a practical, but not in a legal sense. Consequently, the reduction, or total absence, of the exercise and enjoyment of international rights as between any two entities is not enough justification for concluding that as between them the other's international personality does not exist. This view found unanimous support in the *Reparation* case when it was held that the United Nations Organisation had the capacity to bring an international claim even against non-member states of the organisation.

Although the above aspect of the court's judgment has been criticised by certain writers, the view that not only the United Nations, but other international organisations, too, possess international personality *vis-à-vis* non-members or non-recognising states is compelling.⁴⁸ In the case of the UN the court's finding in the *Reparation* case was based on the logic that the Charter of the organisation was formulated by fifty states, at that time representing the vast majority of the members of the international community. These states, the court observed, had the power in conformity with international law, to bring into being an entity possessing objective international personality and not merely personality recognised by them alone.⁴⁹ The court had recourse to some provisions in the Charter in order to substantiate its view. The most important of these, Article 2(6) provides that "the Organisation shall ensure that States which are not members of

⁴⁷Lukashuk's view is therefore incorrect. See his "Parties to Treaties – The Right of Participation (1972) 135 *Hague Recueil* 231 at 237.

⁴⁸See, generally, Seyersted "Is the International Personality of inter-governmental Organs valid *vis-à-vis* non-members?" (1964) 4 *Ind J Int L* 233.

⁴⁹ICJ Rep (1949) 185–187.

the United Nations act in accordance with these principles so far as may be necessary for the maintenance of international peace and security." This has led to the view that the Charter is something more than a regular convention – "an international constitution or a basic law of the international community." It is thus argued that a state does not have to be a member of the international organisation to be required to observe the demands of that basic law of the international community.⁵⁰

It is submitted that even where the constituent instrument of an international organisation does not stipulate that its personality shall be valid *vis-à-vis* non-members, or that any of its provisions shall bind non-members, such an organisation may still retain its international personality *vis-à-vis* non-member states. This is a corollary of the objective theory outlined above. The crucial point is that once an international organisation has been established and has fulfilled the objective conditions outlined above, it acquires international personality. This personality becomes a "legal fact" both for members as well as non-members, whether or not such states choose to recognise or to ignore the fact of its existence. There would be no logic for a state to deny the existence of the international personality of the Organisation of African Unity, for example, on the basis that such a state is not a member of the Organisation. Equally, there is no legal justification for the communist countries of Eastern Europe, for example, to continue to deny the existence of the international legal personality of the European Economic Community (EEC). A brief discussion of this issue may be instructive in our examination of the international legal personality of the Holy See.

The Soviet government refuses to recognise or acknowledge the legal personality of the EEC, or to transact business with the Community institutions. It has no diplomatic representation in Brussels and has managed to rally the other Comecon states into withholding juridical recognition the EEC, although some have at times appeared to be close to doing so.

The reasons for the Council for Mutual Economic Assistance's refusal to accord diplomatic recognition to the EEC, are more ideological and political than legal.⁵¹ The EEC is an international organisation with a common organisational goal among its members. Although it is not a supra-national organisation its members have accorded it, by some provisions in the constituent instrument, the power to enter into external agreements with states or other organisations and such international agreements as are signed by the Commission are binding on all the members.⁵² The organisation can also undertake certain acts or effect agreements in a distinct manner and in clear detachment from its member-states. The EEC is therefore a properly constituted international organisation whose distinct

⁵⁰See Seyersted *op cit* 236–237.

⁵¹See Pinder *The European Community's Policy towards Eastern Europe*, (1975) 28–32.

⁵²The treaty-making power of the Commission of the EEC, is derived from Articles 113, 228 and 238 of the Treaty of Rome.

personality cannot be denied. This international personality it acquired as a result of fulfilling the objective characteristics laid down by the rules of international law. It is not, as has already been argued, endowed with such international personality as a result of recognition by other international persons, whether states or international organisations. In view of this, the absence of recognition from the Eastern European countries does not diminish the international personality of the EEC, at all; even more, for the reasons outlined above, it cannot be claimed that as a result of the absence of such recognition the EEC is not a valid subject of international law *vis-à-vis* the Comecon countries. As is the case in matters of this nature even the diplomatic practice of the Eastern European countries themselves reveals the unreality of the political and ideological arguments surrounding the problem. Russia, Poland and East Germany have all negotiated with the EEC about North Sea fishing after the imposition of the 200-mile limit. As might be expected, a lot of effort was made on the Soviet side to emphasise that this did not imply recognition.⁵³ East Germany, though at the time itself not recognised as a state by the Western (EEC) countries, has been accommodated by a Protocol to the Treaty of Rome guaranteeing it tariff-free entry into the Federal Republic's trade. Indeed such is the cooperation between East Germany and the EEC, that it has at times been referred to as a (sleeping) member of the Community!⁵⁴ Poland, though, was the first Comecon country to enter into negotiation with the EEC, in 1964, thereby acknowledging its existence. An agreement was signed in 1965 followed by another in 1968, both covering the exemption of levies on some agricultural commodities. A similar agreement was concluded between Hungary and the EEC in June 1968 and was effected by an exchange of letters between the Hungarian authorities and the Commission immediately afterwards. In 1969 and 1970 agreements were similarly concluded between the EEC and Rumania and Yugoslavia respectively.⁵⁵

There have been other diplomatic contacts between the Eastern European states and the EEC, but the brief survey recorded above is enough to justify the observation that however their political or ideological views may compel them to withhold recognition of the personality of the EEC, in practice contact with it is almost unavoidable. The legal personality of the EEC exists irrespective of recognition. As we shall see a similar situation exists as regards the Holy See.

The international personality of the Holy See vis-à-vis non-recognising states

The divergence between theory and practice in the attitude of the Soviet Union and the Eastern European countries towards the international personality of the EEC also obtains with regard to the personality of

⁵³Pinder "The Community and Comecon: what could negotiations achieve?" (1977) 33 *World Today* 176 at 177.

⁵⁴*Ibid* 182.

⁵⁵Yugoslavia is not a member of Comecon and theoretically it is under no obligation to follow the Soviet policy of non-recognition; see, Pinder, *ibid* 20.

the Holy See. As states which purport to establish a social order which will exclude, as a matter of national policy, any place for churches and religion as such, the communist countries do not acknowledge the international legal personality of the Holy See. Yet, interestingly enough, the Soviet Union has entered into agreements with the Holy See to regulate matters of common interest, particularly during the early days of the revolution. Even more significant, modern Soviet diplomatic practice has shown that diplomatic and political contact between the two entities is not totally lacking.

When the Pope visited the United Nations in 1965 he had an audience with the Soviet delegate to that Organisation. Two years later the same delegate, Mr Gromyko, together with the Soviet ambassador to Italy, were received by the Pope in an official audience at the Vatican. In 1967 the then Chairman of the Supreme Soviet of the Soviet Union, a position corresponding to that of a ceremonial head of state, Mr Podgorny, visited Pope Paul VI. This visit was followed by other Soviet ministerial delegations to the Vatican. In 1979, Pope John Paul II received Mr Kosygin, the then Soviet Prime Minister, in another official audience. These are only a few examples.

As Grzybowski has pointed out,⁵⁶ the legal meaning of these events is a matter of conjecture. Soviet law regards the agreements concluded with the Holy See as ordinary contracts belonging to the same category as those contracts concluded with such non-governmental charitable organisations as Caritas International and Oxfam. By this reasoning Soviet critics dismiss the personality of the Holy See.⁵⁷ The respective official visits by the Soviet president and other officials are also explained as having been undertaken only in recognition of the position of the Pope as head of the Vatican State and not as representing the Holy See.

The above reasoning is not entirely convincing. It is difficult to see how one can validly claim to deal with the Pope purely in his capacity as sovereign over the few acres of land in Rome and ignore the international status he derives from his position as head of the Holy See. It may be pointed out here that it is in the latter capacity that the majority of states acknowledge the international status of the Pope. This was particularly demonstrated between 1870 and 1929 when the Pope was not the sovereign of any state or territorial entity.

The practice of the Soviet Union and other communist states reveals that in spite of their legal arguments against the international personality of the Holy See, the existence of the latter is a fact which they cannot ignore. In addition to the occasional bilateral contacts between these non-recognising states and the Holy See, there exist other areas in which diplomatic contact between them has been manifested. The Holy See is a party to a number of multilateral agreements and conventions to which these states

⁵⁶Grzybowski *Soviet Public International Law* (1970) 65.

⁵⁷Okeke *Controversial Subjects of Contemporary International Law* (1974) 71.

are also party. None of them has ever protested against the participation of the Holy See in these international acts, nor against its accession to those agreements that have long been in operation between states. This is not to suggest that participation in international agreements or, for that matter, common membership of international organisations or international conferences implies recognition. Yet since, for example, no state protested or recorded any reservations when the Holy See ratified the Vienna Convention on Diplomatic Relations (1961), it would appear that if a nuncio, whose welfare is covered by that convention, were to make a stop-over in the Soviet Union, or any other non-recognising state, while proceeding to his destination, he would be entitled to all the respect and immunities due to normal state diplomatic agents.

The significance of these diplomatic and political contacts between the Holy See and the communist states can be viewed from two standpoints. First of all they underline the artificiality of the constitutive theory of recognition as the basis for the endowment of international personality. As in the case of Eastern European – EEC relations, the diplomatic interaction between the Holy See and these states indicates their acknowledgement of the *de facto* existence of the former as a distinct entity on the international plane.

Secondly, these events are significant in that they provide further evidence of the international character of the functions of the Holy See; they signify the present-day importance of the Holy See even among non-recognising states. When there is even acknowledgement by non-recognising states of the importance of the Holy See, it becomes difficult to see how one can maintain that the international personality of the Holy See is not valid *vis-à-vis* these states.

The extent of the consequences of international personality

We have seen that in the *Reparation* case the court summarised the consequences of international personality by the generic expression “capacity to operate upon an international plane.” The question that arises is: what is the extent of this capacity for the state, the international organisation, the Holy See, or any other entity endowed with international personality?

Traditionally international law has always linked statehood with a certain range of rights and duties which states customarily enjoy and are subject to simply as international persons. This conglomeration of rights which states have traditionally been considered to enjoy as subjects of international law has never been precisely determined but is generally held to include such capacities as the right of self-preservation, the right of commerce, the right to enter into international treaties and the right of legation, among others. Indeed, Oppenheim did not hesitate to assert that these acts or capacities can never be exhaustively enumerated.⁵⁸ Further-

⁵⁸Oppenheim *International Law Vol I* (Ed Lauterpacht) (1952) 324.

more, where such enumeration is attempted, it is never made clear which rights are essential to, or inherent in, the state. Rather, it has come to be accepted without question that the state possesses absolute competence or the totality of international rights and duties recognised by international law. The generally accepted conclusion is that for the state the legal capacity to act on the international plane covers any sovereign act which the state is practically capable of performing as long as it is not in contravention of a norm of international law; this capacity embraces all those rights and duties regarded as forming the basis of intercourse between states in the international community.

International organisations, on the other hand, are not generally considered to possess such absolute competence. Their capacity to act upon the international plane is restricted by the principle of functional limitation: that international organisations can perform international acts provided for in their constitutions together with any other acts which can be reasonably implied from such constitutions through the link of necessity. This approach is based on the theory of delegated and implied powers of international organisations, and is supported by the jurisprudence of international tribunals. In an often quoted passage from the *Reparation* case, the International Court of Justice stated:

... Whereas the State possesses the totality of international rights and duties recognized by international law, the rights and duties of an entity such as the Organisation must depend upon its purposes and functions as specified or implied in its constituent documents and developed in practice.⁵⁹

Earlier, the Permanent Court of International Justice had made a similar observation in the *European Commission of the Danube* case in 1927

As the European Commission is not a State but an international institution with a special purpose, it only has the functions bestowed upon it by the Definitive Statute with a view to the fulfilment of that purpose, but it has power to exercise these functions to their full extent, in so far as the Statute does not impose restrictions upon it...⁶⁰

The question of the extent of the powers of an international organisation has also been partially discussed in the *Certain Expenses of the United Nations* case⁶¹ and the *Namibia Advisory Opinion*.⁶² Although the central issue in the former case involved the internal structure of the United Nations, and in particular a determination of the “expenses of the Organisation within the meaning of Article 17(2) of the Charter,” the court suggested that if an action were performed by a wrong organ (of the Organisation) it was irregular as a matter of internal structure but was not *ultra vires* the Organisation if such an action was appropriate for the fulfilment of one of the stated purposes of the United Nations. Expenses

⁵⁹ICJ Rep (1949) 180.

⁶⁰PCIJ Ser B No 14 64.

⁶¹ICJ Rep (1962) 151.

⁶²ICJ Rep (1971) 16.

undertaken in the course of such an action might therefore be considered expenses of the organisation.

The implied powers doctrine, though enjoying support among the majority of international lawyers, is forcefully rejected by certain writers. Both Rama-Montaldo and Seyersted, for instance, are of the opinion that the extent of the international capacities of international organisations is not limited by the delegated and implied powers theory.⁶³ The latter argues that the powers of international organisations depend on an inherent powers doctrine, so that once an international organisation has fulfilled the objective conditions for its international personality, it has inherent powers to undertake any international acts it is in a practical position to perform. The author enumerates instances of international acts which he considers as being within the capacity of an international organisation, even where they are neither expressly nor impliedly provided for in its constitution. Among these he records the capacity to conclude treaties, and the right of legation or participation in international conferences.⁶⁴

It is, however, submitted here that it is incorrect to assert that the capacity of international organisations is unlimited. The majority view among legal scholars undoubtedly supports the theory that the extent of the international personality of international organisations is determined by the provisions of their charters; they can perform only those acts which are expressly or impliedly provided for in such charters. Moreover, what are considered by some as inherent powers – such as the right of an international organisation to send and receive legates – can appropriately be described as powers to be implied from the very fact that the organisation is intended to operate upon the international plane. The problem, as was revealed by the difference in approach in Judge Hackworth's dissenting judgment in the *Reparation* case and the majority judgment (both of which claimed to use the implied powers doctrine), may be one of determining how widely ranging the implied powers should be. To this extent the inherent powers doctrine may only be an overextended interpretation of the delegated and implied powers theory.

The extent of the international personality of entities *sui generis* is even more difficult to determine. The Holy See differs from most other international organisations because its creation and existence are not based on a constitution or charter. Neither is it an entity which any one person or group of persons consciously set out to create, with defined aims and objectives. It also differs from the Order of Malta, since the latter has a statute setting out its aims and purposes. The Holy See has nevertheless performed a variety of sovereign acts associated only with international persons. It has always enjoyed sovereign privileges and immunities, the facility of recognising new states and governments, participation in inter-

⁶³See, Rama-Montaldo "International Legal Personality and Implied Powers of International Organizations" (1970) 44 *BYIL* 111.

⁶⁴Seyersted *op cit* 6 *et seq.*

national conferences, membership of intergovernmental organisations and a number of other sovereign rights. Above all, it has demonstrated its treaty-making capacity and its active and passive right of legation over the centuries.

The question of the extent of the capacity of the Holy See to act on the international plane is particularly significant with regard to its treaty-making capacity. An examination of the various multilateral treaties entered into by the Holy See reveals a wide range of agreements some of which have nothing to do with the inherent nature of that entity. It is a party to agreements ranging from the Convention on the Facilitation of International Maritime Traffic, to the Convention on Psychotropic Substances. In the matter of international organisations and conferences, the Holy See is a member of such organisations as the Universal Postal Union, and it has attended all kinds of international conferences.

This apparently unlimited capacity has led some legal commentators to the conclusion that the Holy See can legally perform any international act it is in a practical position to perform, and that it is subject to unlimited corresponding international rights and duties.⁶⁵ This observation is correct only if two important factors are taken into consideration.

First of all, it will be reiterated that there are two entities which must be distinguished in this discussion: the Holy See itself and the state of the Vatican City. It has also been observed that in most cases the term 'Holy See' is ordinarily used to denote the Vatican State. This confusion is not accidental but arises from the fact that when acting on the international plane the Holy See, as was observed above, represents either itself or the state of the Vatican City. In fact it can be said that although often enough the Holy See acts in its own capacity, the Vatican State always acts through the Holy See, since sovereignty over the Vatican territory is vested in the latter.

Having made that observation we can conclude that all the sovereign or international acts which the Holy See performs can be grouped into those pertaining to the Holy See *qua* Holy See, and those undertaken by it as the sovereign authority over, and on behalf of, the Vatican State. The right of active and passive legation, for instance, is a right which the Holy See exercises as *the* Holy See, as is the right to conclude concordats. Both these are capacities or rights which the Holy See continued to exercise during the fifty-nine years that neither the Papal State nor the Vatican State existed. On the other hand, when the Holy See joins an international union such as the Universal Postal Union, or signs an international convention to regulate monetary, telegraphic or customs matters it does so on behalf of the Vatican State, the body which is actually interested in such matters.⁶⁶

⁶⁵*Ibid* 61.

⁶⁶Falco *The Legal Position of the Holy See* (1935) 41.

This brings us to the original question: the extent of the international personality of the Holy See. Looking first at the capacity of the Holy See itself, (the capacity in which it is being examined in this article) the answer is that the consequences of its international personality are limited. They cannot be equated to those of international organisations, let alone to the capacities resulting from the international personality of states, on account of its obvious demographic and territorial deficiencies. Although it lacks a constituent charter, we can say by analogy with international organisations that the extent of its international capacity must be determined by functional limitations. So, the Holy See could be said to have the capacity to perform only such acts as are in furtherance of, and consistent with, its "inherent nature and mission in the world". This would limit its treaty-making power, for instance, to agreements or acts of a religious, ecclesiastical and humanitarian nature, together with acts which can be implied, by the link of necessity (for example the sending of nuncios and receiving ambassadors).

On the other hand, if the question is considered in the context of the Holy See as acting on the international plane not just on its own behalf, but also that of the Vatican State, then its international capacities become broader. The state of the Vatican City, it must be remembered, is a state as understood in international law. It is obviously an anomalous one by reason of its negligible size and other limitations, but from the legal point of view there is no reason to doubt its capacities as an independent, territorial unit. As a state the Vatican is theoretically entitled to the same plenary capacity as other states and is in theory capable of concluding any type of agreement which other states are entitled to conclude. There is technically no reason for denying the Vatican State the right to conclude or become a party to the conventions on the Trade of Land-locked Countries, the Arresting of Sea-Going Ships, Continental Shelf or the UN Law of the Sea Convention, etc. When the Holy See acts on behalf of the Vatican State it thus acts with the plenary capacity "derived" from the Vatican State. In this way the Holy See itself becomes vested with a plenary capacity similar to that exercised by states, but only as long as it represents the Vatican State. The view that the Holy See is endowed with the capacity to undertake any sovereign act on the international plane in the same manner as states may be justified only in this context. It is only in this context, too, that the statement by the International Law Commission that the phrase "other subjects of international law" as used in Article 3 of the Vienna Convention on the Law of Treaties (1969) was designed to provide for treaties concluded by, *inter alia*, "the Holy See, which concludes treaties on the same basis as States"⁶⁷ can be supported.

The conclusion that the extent of the international capacity of the Holy See is determined by the ambit of its inherent mission or functions in

⁶⁷See para 8 of Commentary to Article 1, *ILC Yrbk vol 2* (1962) at 162.

the world when it operates in its own right, and that this capacity acquires a plenary character only if the Holy See is acting on behalf of the Vatican State can only be correct if all international acts undertaken by its fall into these two categories. From the available evidence this would appear to be the case. There do not appear to be any peripheral cases which cannot be appropriately categorised into either of these two groups. However, if one day the Holy See were to perform a new act which does not fall into either of the two categories the question of whether such an act is within the international competence of the Holy See could only depend on the response of the international community: whether states accepted the new act as valid.

The observations made in this essay as regards the international personality of the Holy See can thus be summarised as follows: the international personality of this entity is based on objective factors rather than recognition. This objective basis is, however, dependent on the perception and attitude of the international community. International practice determines the existence of the functional need on which the personality is being claimed; this is the international end or social need theory. To that extent, therefore, it can be said that state practice is of a significant evidentiary value since it determines whether the objective test has been satisfied. Once an entity has satisfied that test, it becomes a general subject of international law and its personality is valid *vis-à-vis* non-recognising states. The fact of non-recognition does, however, affect the practical consequences of the international personality of an entity *sui generis*. The extent of the personality of an entity like the Holy See depends on its functional limitations, an objective matter, but one to which the perceptions of the international community are, again, highly relevant. The two most important capacities which the international community has accepted as belonging to the Holy See in its own right, independently of the Vatican State, are the right to make treaties and the right of legation: the *jus tractum* and the *jus legationis*. The capacity to perform these acts has traditionally been regarded as the touchstone of sovereignty and, therefore, international legal personality.