

to have, a primary effect in the municipal law of the United States, yet it doubtless had an indirect effect in international law. It manifested the intention of the United States to restore peace with Germany. The accomplishment of that intention would doubtless require, in the absence of a general treaty, general recognition of the new situation by the members of the community of nations.<sup>28</sup> Such general recognition could doubtless restore Germany as a functioning member of the community of nations in a state of peace, whether the hostilities were to be regarded as a lawful state of war or as unlawful aggression. In this sense the President's Proclamation can be considered recognition by the United States that peace has been restored. The accumulation of such recognitions would, when sufficient, establish the new status in international law. It appears that more than 30 states have now terminated their states of war with Germany—most of the states with significant relations with Germany outside of the Soviet Bloc. Many of these states have recognized the Federal Republic as the Government of Germany.

It would appear that the time is approaching when, by reason of general recognition, it can be said that in international law the Federal Republic is the Government of Germany and that Germany is at peace with the world.

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#### THE STATUS OF THE HOLY SEE IN INTERNATIONAL LAW

The protests in the United States against the nomination by the President of an American Ambassador to the Vatican reveal an astonishing lack of knowledge and understanding of the legal problem of the status of the Holy See in international law. Even in the professional literature on international law in English this problem is either neglected<sup>1</sup> or very briefly<sup>2</sup>

<sup>28</sup> Q. Wright, "Some Thoughts on Recognition," this JOURNAL, Vol. 44 (1950), pp. 548 ff.

<sup>1</sup> Thus in two leading treatises: William Edward Hall (7th ed., Oxford, 1917), and T. J. Lawrence (7th ed., London, 1925).

<sup>2</sup> Even Charles G. Fenwick's "International Law" (3rd ed., New York, 1948) discusses the problem briefly, only in relation to the City of the Vatican (pp. 124-125); and the full discussion in Oppenheim-Lauterpacht, *International Law, A Treatise*, Vol. I (7th ed., 1948, pp. 226-230), is not wholly free from ambiguous statements. Horace F. Cumbo's study, "The Holy See and International Law," *The International Law Quarterly* (London), Vol. II (1948), pp. 603-620, although written with the express purpose of clarifying controversial issues, defends the untenable thesis that the Papal State did not come to an end in 1870 and that, therefore, the state of the City of the Vatican is not a new state. He follows in that respect D'Avack, *Chiesa, Santa Sede e Città del Vaticano* (Florence, 1937). The brief statements are correct in A. P. Sereni, *The Italian Conception of International Law* (New York, 1943), and Alf Ross, *A Textbook of International Law* (London, 1947), pp. 103-104.

and sometimes inaccurately handled; the same is true in some German treatises.<sup>3</sup> On the other hand, there are full and correct discussions in French, Italian and German studies written before 1929 or after.<sup>4</sup>

Most of the erroneous treatments of this problem follow about this line: Until 1870 the Pope was the sovereign of the Papal State, a normal person in international law. Since the Lateran Treaty of February 11, 1929, the Pope is again the sovereign of the State of the City of the Vatican (*Stato della Città del Vaticano*). But between 1870 and 1929 there was no Papal State, hence no international personality. This line of reasoning, wholly untenable in the light of the practice of states, stems mostly from the pseudo-positivistic prejudice that only sovereign states *can* be persons in international law. But the Holy See was always a subject of general international law. Modern developments show, for instance, international organizations, which certainly are not states, as persons in international law.

To understand the problem correctly, we must start with a historical consideration. During the European Middle Ages the Holy See was the spiritual leader of the *communitas Christiana* of Europe. Our modern international community developed historically by way of decentralization of the medieval Christian community of Europe. Historically, the original members of our international community were only the Christian states of Europe and the Holy See. It is this historical development which explains the unique position in international law of the Holy See as the Supreme Head of the Catholic Church.<sup>5</sup>

<sup>3</sup> See, e.g., F. v. Liszt, *Das Völkerrecht* (12th ed., Berlin, 1925), pp. 92-94; Ernst Vanselow, *Völkerrecht* (Berlin, 1931).

<sup>4</sup> See P. Fauchille, *Traité de Droit International Public*, Vol. I, 1st Part (Paris, 1922), pp. 727-756; R. Knubben, *Die Subjekte des Völkerrechts* (Stuttgart, 1928), pp. 427-438; G. Diena, *Diritto Internazionale* (3rd ed., Milan, 1930), pp. 195-216; A. Hold-Ferneck, *Lehrbuch des Völkerrechts*, Vol. I (Leipzig, 1930), pp. 238-246; K. Strupp, *Éléments du Droit International Public*, Vol. I (Paris, 1930), pp. 44-49; P. Fedozzi, *Corso di Diritto Internazionale* (Milan, 1931), pp. 137-153. In all these works, as well as in Oppenheim-Lauterpacht, *op. cit.*, there are large bibliographies. The best, although a brief, discussion is now to be found in A. Verdross, *Völkerrecht* (Vienna, 1950), pp. 205-207, 211-213.

<sup>5</sup> That is why the recent attempt by an Austrian writer (Brandweiner) to treat relations between Protestant churches in different countries as falling under international law, is legally untenable, because of being in contradiction with the practice of states. That is why the argument that American diplomatic relations could not be given to all churches, is not to the point. It is as if one would oppose American diplomatic relations with the new Kingdom of Libya, because they could not be given to the Arab communities of Algeria, Tunisia and Morocco.

The Holy See<sup>6</sup> is, therefore, a *permanent*<sup>7</sup> subject of *general*<sup>8</sup> customary international law *vis-à-vis* all states, Catholic or not. That does not mean that the Holy See has the same international status as a sovereign state.<sup>9</sup> But the Holy See has, under general international law, the capacity to conclude agreements with states (concordats). The Holy See can also conclude normal international treaties, formerly on behalf of the Papal State, now on behalf of the State of the City of the Vatican, but also in its own capacity.<sup>10</sup> Although the juridical nature of the concordats is a controversial question, they are not only expressly recognized as international treaties by a number of states, but they have all the characteristics of an international treaty: They are concluded on the basis of full equality. This sovereignty and independence of the Holy See is not only based on Canon Law,<sup>11</sup> but on general customary international law, on the practice of states. The recognition of this sovereignty by the Italian municipal Law of Guarantee of May 13, 1871, and by the international Lateran Treaty of 1929 is purely declaratory in nature. Concordats are negotiated and signed like any international treaty. They need ratification. They can be modified only by common consent. Their norms become binding on individuals only by their transformation into municipal law. As the Holy See is a person in *general* international law, its capacity to conclude concordats is by no means restricted to Catholic states.<sup>12</sup>

The Holy See has the active and passive right of legation under general international law, not restricted to Catholic states. The Protocol of Vienna of March 19, 1815, puts Papal nuncios into the rank of ambassadors under general international law. The Vienna Protocol also provides that "the present regulations shall not cause any innovation with regard to the representatives of the Pope," to whom Catholic states grant the privilege of being the Dean of the Diplomatic Corps. These norms are binding on all

<sup>6</sup> Not the Catholic Church as such; not the Pope. The relation between the concepts of the Holy See and of the Pope are analogous to the relation in British constitutional law between the concepts of the Crown and of the King.

<sup>7</sup> Contrary, *e.g.*, to insurgents, recognized as a belligerent party.

<sup>8</sup> Contrary, *e.g.*, to the Sovereign Maltese Order which is only a person in *particular* international law. The status of its representatives is not based on general international law but only on recognition by the receiving states.

<sup>9</sup> See, as to the international personality of international organizations, the statement of the International Court of Justice in its Advisory Opinion of April 9, 1949 (Reports of Judgments, Advisory Opinions and Orders, 1949, p. 179).

<sup>10</sup> The Lateran Treaty of 1929 is a normal international treaty. Recently the Holy See signed and ratified the four new Geneva Conventions of 1949.

<sup>11</sup> "*Romanus Pontifex . . . habet supremam et plenam potestatem jurisdictionis in universam Ecclesiam. Haec potestas est . . . a quavis humana auctoritate independens.*" (Code of *Juris Canonici*, Canon 218, pp. 1, 2.)

<sup>12</sup> Between 1920 and 1930 nine concordats were concluded with states, including Latvia and Prussia.

the states, Catholic or not.<sup>13</sup> Cardinals, on the other hand, are not diplomatic agents of the Holy See.<sup>14</sup>

Prior to 1870, there were two subjects of international law: The Papal State and the Holy See. The Pope constituted in his person a personal union of two different organs, the highest organs of two different subjects of international law. Even prior to 1870, the more important of these two subjects was the Holy See. It is clear that Catholic states granted the privilege of deanship to the Papal nuncios not because of the political importance of the Papal State, but because of the supreme spiritual sovereignty of the Holy See.

Of these two persons in international law the one, the Papal State, undoubtedly came to an end, under the rules of general international law, by Italian conquest and subjugation in 1870. But the Holy See remained, as always, a subject of general international law also in the period between 1870 and 1929. That this is so, is fully proved by the practice of states.

The Holy See continued to conclude concordats and continued, with the consent of a majority of states, to exercise the active and passive right of legation. The legal position of its diplomatic agents—as the continuance of the Vienna Protocol also during this period proves—remained based on general international law, not on the Italian Law of Guarantee, a municipal law, but enacted under an international duty incumbent upon Italy. Hence, the confiscation by Italy in 1917 of the Palazzo Venezia, house of the Austro-Hungarian Ambassador to the Vatican, constituted a violation of international law.

It is interesting to note that after the first World War more states established diplomatic relations with the Vatican than prior to 1914. The states did so because they recognized that the Vatican is a unique diplomatic observation point.<sup>15</sup> In 1930 about thirty states were diplomatically represented at the Vatican and the Vatican in about forty states. Among the states represented during this century at the Vatican were not only Catholic

<sup>13</sup> This is fully recognized by this country. See Secretary of State Fish to Mr. Cushing, Minister to Spain (Moore, *Digest of International Law*, Vol. I, p. 39), and Acting Secretary of State Adee to the American Minister to Costa Rica, April 29, 1908 (Hackworth, *Digest of International Law*, Vol. IV, p. 636).

<sup>14</sup> A spokesman for the American Jewish Congress stated that "a Vatican Ambassador might become a disservice to the Roman Catholics in that the 'princes of the church' might be considered agents of another country and thus have to register as alien agents." This remark is rather strange, since the leaders of American Zionism themselves warned that, after the independence of Israel, they must be careful not to become alien agents. The view is, furthermore, wholly untenable. "Cardinals," wrote Secretary of State Hughes to Mr. Cunliffe-Owen on April 21, 1924, "are not accredited to this Government, and have no official status before this Government. They are merely officers of a church." (Hackworth, *op. cit.*, Vol. IV, p. 637.)

<sup>15</sup> "Le Vatican est en effet le point de l'univers d'où l'on peut le mieux observer l'ensemble des événements politiques mondiaux." (Fauchille, *op. cit.*, p. 742.)

states, including states where the constitutional law of separation of state and Church prevails, as, *e.g.*, in France, but Protestant states, such as Germany, Holland, Great Britain, and Switzerland, and Greek Orthodox states, such as Czarist Russia, Montenegro, Bulgaria, Rumania, Greece, and Yugoslavia. Heads of Protestant states paid visits to the Holy See: Edward VII, in 1903, Woodrow Wilson in 1919.

The Cardinal-Secretary of State of the Vatican exercises the functions of a Foreign Minister. In many other respects the status of the Holy See as a person in general international law was also clearly demonstrated in the period 1870-1929. Pope Leo XIII acted as a mediator in the Carolina Islands dispute between Germany and Spain.<sup>16</sup> The same Pope acted in 1895 as arbiter in a border conflict between Haiti and Santo Domingo. In 1898 Orthodox Russia sent her project for the Hague Peace Conference to the Holy See and solicited its support. The exclusion of the Holy See from the Hague Peace Conferences was due to the request by Italy, just as Italy in the London Treaty of 1915 made it a condition of her joining Great Britain and France in the first World War that the Holy See would not be invited to the Peace Conference. Italy also opposed the Holy See as a Member of the League of Nations; but the German project for a League of Nations of 1919 provided expressly that the Holy See could become a member. During the first World War its own flag was conceded to the Holy See and the vessel flying this flag declared to be neutral and assimilated to a state vessel. After the first World War new states or governments applied for recognition by the Holy See; such recognition was, for instance, granted to Poland and Estonia.

The Lateran Treaty had the object of liquidating once for all the "Roman Question" and bringing about a reconciliation between the Holy See and Italy,<sup>17</sup> but it in no way created or changed the international position of the Holy See.<sup>18</sup> The treaty concluded between the Holy See and Italy presupposes the international personality of the Holy See. Italian recognition, in Article 2, of the sovereignty of the Holy See, and, in Article 12, of the active and passive right of legation under the norms of general international law, is purely declaratory.

The Lateran Treaty created, furthermore the state of the City of the Vatican as a *new state*,<sup>19</sup> for which Italy makes a cession of territory. The

<sup>16</sup> See Coella, *La Conferencia de Berlin y la cuestión de las Carolinas* (1885); P. de Andrade, *Historia del conflicto de las Carolinas* (1886); Selosse, *L'affaire des Carolines* (1886).

<sup>17</sup> Del Giudice, *La questione Romana e i rapporti fra Stato e Chiesa fino alla Conciliazione* (Rome, 1948).

<sup>18</sup> It is, therefore, not correct, as Oppenheim-Lauterpacht (*op. cit.*, p. 228) states, that "the hitherto controversial international position of the Holy See was clarified as a result of the Treaty."

<sup>19</sup> The contrary position of D'Avack and Cumbo is legally untenable.

treaty, correctly speaking, did not create this state, but laid down only the necessary presuppositions. This state of the City of the Vatican is a state, a subject of international law, different from the Holy See.<sup>20</sup> It has become a member of the Universal Postal Union. But it is not a sovereign state. As all writers correctly state, "its activities are totally different from those inherent in national States."<sup>21</sup> Its constitution is not autonomous, but derived from the Holy See.<sup>22</sup> It is a vassal state of the Holy See.

During the second World War the Protestant Occupying Powers of Italy—Great Britain and the United States—were bound under international law to observe the neutrality of the state of the City of the Vatican and to grant free correspondence between the Holy See and all states, including those with which the Occupying Powers were at war.<sup>23</sup> In Article 24 of the Lateran Treaty the Holy See makes a unilateral statement that it will remain aloof from the temporal competitions of states and from congresses convoked for such purposes, *except* that the contending parties by common consent may appeal to its mission of peace. The Holy See reserves in any event the right to exercise its moral spiritual influence. In this sense the Popes appealed to all belligerents during the two World Wars. In his Christmas address, 1951,<sup>24</sup> the Pope declared that the Holy See cannot remain neutral between right and wrong, but, on the other hand, can never consider political conflicts on purely political lines, but always "*sub specie aeternitatis*."

The Holy See, certainly, is not eligible to be a Member of the United Nations because, under Article 4 of the Charter, admission is only open to "States." The City of the Vatican would not be admitted because of its exiguity, just as the sovereign Principality of Liechtenstein was not admitted to the League of Nations. But the Holy See may participate in some activities of the United Nations, just as Papal delegates participated in the League of Nations meetings concerning calendar reform.<sup>25</sup> The Holy See can, of course, be chosen as a mediator or arbiter, and can be invited to international conferences. Recently the Holy See was invited to and participated in the diplomatic conference held at Geneva in 1949. It signed and ratified and is a contracting party to the four new Geneva Conventions of 1949. At this conference, nearly all the states, including the Soviet States, were represented; none objected to the invitation and participation of the Holy See.

<sup>20</sup> The statement in Oppenheim-Lauterpacht (*op. cit.*, p. 229) is therefore incorrect: "The Lateran Treaty marks the resumption of the formal membership, interrupted in 1871, of the Holy See in the Society of States."

<sup>21</sup> Oppenheim-Lauterpacht, *op. cit.*, p. 230. <sup>22</sup> Verdross, *op. cit.*, pp. 87-88.

<sup>23</sup> See Roberto Ago, *Occupazione bellica dell' Italia e Trattato Lateranense* (1946).

<sup>24</sup> Text in the New York Times, Dec. 25, 1951, p. 4.

<sup>25</sup> G. P. Cansacchi, *Il Papa e la Società delle Nazioni* (Turin, 1929).

Whether to send an American Ambassador to the Holy See,<sup>26</sup> is, under international law, a political question. The political arguments so to do, given by the President, are, as this discussion shows, very strong and the attempted refutation is in contradiction with the practice of states. But if this decision is made in an affirmative sense, this country merely enters into diplomatic relations with a subject of general international law. Such diplomatic relations—as the examples of Great Britain, Holland, other Protestant, Orthodox, and Islamic<sup>27</sup> states show—constitute, of course, no privilege for one or discrimination against other churches.

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<sup>26</sup> Not to the Pope; not to the state of the City of the Vatican. The phrase “American Ambassador to the Vatican” is merely a diplomatic one, just as we speak of the envoy to Great Britain as “the Ambassador to the Court of St. James,” or as French or Austro-Hungarian foreign policy was diplomatically referred to as the foreign policy of the “Quai d’Orsay” or of the “Ballhausplatz.”

<sup>27</sup> *E.g.*, at this time Egypt and Indonesia. At the end of 1951 forty-three states—the majority of states—were diplomatically represented at the Vatican.