

ON THE NATURE OF THE INTERNATIONAL PERSONALITY OF THE HOLY SEE

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I. — INTRODUCTION

1. The constantly broadening scope of the role played by the Holy See in international affairs suggests a revisitation of the doctrinal positions relating to the nature of the Roman Church's personality in international law. Of course, nobody nowadays doubts that the Roman Church is endowed with an international legal personality (1). Ambiguities and doubts persist, however, with regard to the precise relationship, under international law, between the Roman Church and the Holy See and even more with regard to the relationship between either of those two entities, on the one hand, and the Vatican City (or State of the Vatican City) on the other. The starting point for the determination of those relationships is, in my view, the definition of the very nature of the international personality of the entities involved. But that definition depends in its turn

(1) By far the most thorough research work on the subject is that of KÖCH, H.F., *Die Voelkerrechtliche Stellung des Heiligen Stuhls*, Berlin, 1975, with a large bibliography. *Addé* : Köch's himself *Holy See*, *Encyclopedia of Public International Law* (Bernhardt ed.), vol. 10 (1987) pp. 230-233 ; ARANGIO-RUIZ, G., « Stati e altri enti (soggettività internazionale) », *Novissimo Digesto Italiano*, vol. XVIII, 1971, pp. 155-162 and *Diritto internazionale e personalità giuridica*, Bologna, Cooperativa Libreria Universitaria, 1972, pp. 76-98 ; FERLITO, S., *L'attività internazionale della Santa Sede*, Milano, 1988 ; MALUWA, T., *The Holy See and the concept of international legal personality : some reflections*, *The comparative and International Law journal of Southern Africa*, XIX (1986), pp. 1 et s., and *The treaty-making capacity of the Holy See in theory and practice*, *ibidem*, XX (1987), pp. 155 et s. ; CORIDEN, J.A., *Diplomatic Relations Between the United States and the Holy See*, *Case Western Reserve Journal of International Law*, 19 (1987) pp. 361-373 ; FLYNN, Jane, *Diplomatic Relations, United States Ambassador to the Holy See*, *Harvard International Law Journal*, 25 (1984), pp. 441-450 ; GIULIANO, SCOVAZZI, TREVES, *Diritto internazionale*, 1991, pp. 156-158 ; *Oppenheim's International Law*, 9th ed. by R. JENNINGS and A. WATTS, vol. I, *Peace (Introduction and Part I)*, pp. 325-329 ; COMBACAU, J. et SUR, S., *Droit International Public*, 1993, pp. 267-268 ; SCOVAZZI, T., *L'Accordo fondamentale tra la Santa Sede e Israele : aspetti di diritto internazionale dei trattati*, *Quaderni di diritto e politica ecclesiastica*, Il Mulino, 1995/1, pp. 155-164.

upon the concept of international law : on which a small digression seems indispensable.

2. In brief, the current theoretical writing on international law is unevenly divided between two tendencies represented, on the one hand by what I call the « constitutional » theories of international law ; and on the other hand, by the theories of international law as an inter-State system. Of course, a number of variations are discernible within the framework of each group of theories, almost all characterized by a high degree of ambiguity. I confine myself, for the present purposes, to recalling the features of each group of theories which are of relevance to the nature of international persons and the Holy See's in particular.

II. — THE THEORIES OF INTERNATIONAL LAW AND THE CONCEPT OF INTERNATIONAL PERSONS

3. The « constitutional » theories tend on the whole to envisage international law as the supreme layer of a public law of a universal legal community of mankind, the constituency of which would be composed of individual human beings. Within such a system, States are conceived of as the legal institutions governing the « autonomous » territorial subdivisions of the legal community of mankind : *provinciae totius orbis*. Modern international law, which in my opinion does not reflect this view in practice, would be a decentralized stage of the hierarchical universal system which governed more or less effectively, until about Westphalia, the so-called *Respublica Christianorum*. According to the most optimistic among the adherents of the « constitutional » theories, a reverse, centralizing process would be gradually taking place before our eyes, thanks to the presence, within the universal community of our time, of a number of international institutions, particularly the United Nations. One of the main corollaries of this view is that the internal legal systems of States are derivative legal systems within the framework of the public law of mankind. This is, indeed, what is called the monistic theory of the relationship between international law and national law. States thus would be territorial *personnes morales* of international law, of general governmental competence, qualitatively non dissimilar, despite an incomparably higher degree of « autonomy », from such subdivisions of national law as provinces, cities, counties within a unitary State ; or cantons, *Länder* or member States within a federal State.

4. A rather different picture is that proposed by the theories of international law as an inter-State system. According to these theories, the constituency of international law is composed basically of sovereign, independent States. Within the framework of such theories States are seen not as

the territorial subdivisions of a (non-existent) legal community of mankind but as the members of a *sui generis* community of sovereign entities and the primary persons of international law. Under the same theories, the internal legal systems of States are not dependent subdivisions of international law — and in that sense « derived » therefrom as the legal systems of a State's subdivision are « derived » from the law of the nation — but rather « original » legal systems. Hence the pluralist conception of the relationship between international law and municipal law.

5. The « constitutionalist » conception of international law (together with its corollaries) owes its predominance to the greater ideological appeal inherent in such notions as the basic physical unity of the human kind and the obviously interindividual composition of the constituency of all (national!) legal systems. Those theories are not substantiated, however, by more than occasional lip service from governmental spokesmen to the idea of a universal legal community of men and acritical, however frequent, doctrinal reiterations of that idea (2). There has been no serious effort to prove, in particular, the sociological and juridical foundation of the essential corollary — and *premise* — of that idea, which is the notion of States and other international persons as legal subdivisions of international law.

6. For my part, I believe that the study of international realities offers a host of data abundantly proving that in no sense States (and other international persons) are creatures of international law. Leaving aside the obvious and generally admitted fact that States « precede » international law in the sense that they are presupposed thereby — a proposition no one could reasonably extend to any subdivision of a State in national law — four macroscopic data point in that direction. One *datum* is the way States come into being. Unlike subdivisions and juristic persons of national law, which come into being by legal processes (3), States come into being *de facto*, continue to exist *de facto* and *de facto* are eventually modified or dissolved from the viewpoint of international law. It is well-known that a majority of existing States or governments were set up by some insurrection or revolution. Can one say in any sense that an insurgent party is a juristic person under any law? Is there anything more *factual* than an insurgent-belligerent party? The only analogies one can find for an insurgent party within a national, integrated society, are criminal associations and other factual associations which are either illegal or indifferent to

(2) As Stanley Hoffmann recalls (in *The Relevance of International Law, Essays Leo Gross*, at p. 30), Jean Giraudeau noted that international law was « the most powerful training ground for imagination ».

(3) I think not only of the Enabling Act of Congress by which most member States of the American Union came into being in United States Territories, but also of the constitutional rules or the legislation which creates provinces and cities, or the legal acts or transactions through which private juristic persons are set up (under the relevant legislative provisions) within a national legal system.

the national legal order. In international law, insurgents are instead persons. The second *datum* is that States are organized *de facto*, in the sense that they « will » and « act », for the purposes of treaty-making or international liability for unlawful acts, not through physical persons legally appointed as agents (as is the case with any juristic person or subdivision of municipal law) but through any human beings factually acting as its agents. Thirdly : the members of a State's population are not *per se* international persons except — according to questionable theories — through States themselves (4). Fourthly : juristic persons and subdivisions of national law are characterized by « autonomy », a legal condition created by an attribution of functions accompanied by subjection to the superior controls of the law of the whole nation. States as international persons are instead independent ; and independence is a factual condition and a synonym of sovereignty (5). Unlike the governmental functions of subdivisions, which are attributed by the law of the whole nation, the governmental functions of sovereign States are original, not delegated by international law. A State's competences remain essentially original — and in that sense factual from the viewpoint of international law — even when, as occurs very frequently, the State is internationally bound either to exercise or not exercise them, or to exercise them in a given way within the society over which it rules.

7. The features of States summed up in the preceding paragraphs — an obvious reflection of the lack of political and juridical integration of the human kind — are sufficient to prove, in my opinion, that the legal community of mankind is not an actual reality. And the absence of such a legal community is, at one and the same time, the cause and the effect of a unique situation — sociologically and juridically — below and above the summits of the structures, so to speak, of coexisting national societies. Below that level, there are as many systems of interindividual law as there are independent collective entities, such systems being not connected with each other by a continuous normative texture. Above that level, one finds, instead of such a continuous texture — instead of a public law of mankind — a body of rules, the existence, structure and contents of which derive their *raison d'être* from the relations among the said collective entities.

This explains the *sui generis* nature of international law as a « private law writ large » (Holland), namely as an « intergroup private law ». It clarifies, in particular, the relationship between international law and the national

(4) The situation is exactly the opposite with regard to the members of corporations and subdivisions within national law. In national law human beings are *primary* persons, while juristic persons (including the State itself under national law) are *secondary* persons.

(5) One cannot deny that some of the features of States *qua* international persons resemble instead those of merely factual groups within national societies (including even the most unlawful ones : examples of which I leave to the reader's imagination).

legal systems of States. The inexistence of a continuous normative texture corresponding to a public law of mankind, cause and effect, at one and the same time, of the factual nature of States as international persons, determines a discontinuity not only between each national legal system and the other national systems — a point that even the most orthodox monists are unable to deny — but also between international law on one side and each national system on the other.

The discontinuity between international law and each national system (as between international law and interindividual law in general) is actually even more pronounced than the discontinuity between any two or more national systems. In the latter case, it is a matter of separation between the sovereignties and the law-making processes of distinct interindividual communities. In the case of international law and national law, the separation of *milieu* and law-making processes is deepened by the qualitative difference between inter-group rules and interindividual rules : between rules finding their *raison d'être* in inter-group relations and rules finding their *raison d'être* in the relations among individuals (6).

The distinctive, unique features of international law help also to understand what the plausible origin of international law must have been. Contrary to the belief of the constitutionalists, international law came into being not by a process of decentralization of the medieval *Respublica Christiana*. It came into being — first among *seigneurs* and kings and later among cities, principalities, kingdoms and republics — as a distinct formation of inter-sovereign rules in the course of the centuries which marked the crisis, and finally the demise, of the « universal » hierarchical order under Emperors and Popes. In other words, it originated not within the universal law but within the « gaps », and because of the « gaps » — temporal and spatial — of the increasingly ineffective universal law of Empire and Church. So, States did precede, historically and sociologically, international law. They were not, and never became later, creatures of international law (7).

(6) When I speak of intergroup rules I refer not, of course, to rules concerning the relations of juristic persons (*personnes morales*). Also these, indeed, are interindividual rules. By « inter-group rules » I mean the rules governing the relations between merely factual groups.

(7) One should not fail to consider, in this respect, Hans Kelsen's remarks on the concept of the State in the sense of international law and its relationship to the concept of international law itself. Indeed, an important element in the reasoning by which Kelsen refutes the pluralist conception (of the relationship between international law and national law) is his argument that if the pluralists were consistent with their separatist view, they should admit that there exist two Frances, two United States and so on, a France of national law and a France of international law etc. : an absurd consequence, Kelsen says, that the pluralists do not seem to accept. He added in fact that although sometimes the pluralists assert that the international and the national personality of the State are distinct, they only mean that one and the same identical State has both a national and an international personality, just as an individual has both a moral and a juristic personality — or words to that effect. Kelsen also noted in his « General Theory » that among the pluralists only Anzilotti would have admitted a real distinction where the latter stated (in the French translation of his course) that the term State signifying... the

The very opposite is actually true : international law is the creature of States (8).

III. — THE HOLY SEE IN THE *RESPUBLICA CHRISTIANORUM* AND IN INTERNATIONAL LAW

8. Coming now to the Holy See, one can first deal briefly with its position within the framework of the more or less effective legal system of the *Respublica Christianorum*. At that time the Roman Pontiff occupied a position of at least religious supremacy not just within the Catholic Church's legal order but also within the legal fabric of the « universal » medieval State. Also within the latter's hierarchical structure, the Papacy's status was, subject to the vicissitudes of its rivalry with the Emperors over primacy, one of high authority.

If however, as we believe, already at that time the first rules of international law were taking shape governing the relations among potentates who were escaping from the control of the weakening universal *Respublica*, the Holy See could not have failed to participate in the process. It surely took part, together with the contemporary potentates (including ecclesiastical *seigneurs*), in the making of those new rules and in their application to the egalitarian relations they came to cover, first beside, and later in the place of, the universal State's legal order. It would be difficult to believe, though,

subject of a national legal order, determines a subject entirely different from the State as the subject of international law.

As I see it, Kelsen read more than was really said in Anzilotti's *dictum*. As I read him, Anzilotti did not think of two distinct entities : I mean two Frances, two United States. He only thought of two juridical personalities. And it is because of this that I believe that Anzilotti, as well as Triepel and other pluralists, was not consistent, when he only distinguished two personalities, with his pluralist position.

Getting back to our view, we fully agree with Kelsen when he says that to be consistent the pluralists should envisage two Frances, two United States and so on. We only disagree from Kelsen when he maintains that the distinction would be absurd. Far from absurd, the distinction is quite well-founded upon the four sets of data I just indicated and a number of further data. It is also worth noting that the distinction is not so much a consequence of the separation between international law and national law. It is the very *cause* of the different, unique nature of international law and its separation from national law.

(8) This explains why it is so difficult for the universal human society to move from its present state to that condition of political and juridical integration in the absence of which it is utopian to envisage a world government. There is obviously a huge vicious circle. As long as States continue to exist as sovereign, independent entities, the compacts they conclude in order to set up international institutions seem inevitably to contain that inherent crucial genetic deficiency which is represented by the States' express or implied reservation of their respective sovereignties : and this makes structural reform very difficult. The escape routes from the vicious circle seem to be — apart from outright annexation of the weak by the strong — the hardly less problematic processes of regional integration.

Despite his comparatively clearer perception of the *uniqueness* of the *milieu* of international law, Stanley Hoffmann sounds ambiguous when he refers to « fragmentation of sovereignties » as the cause. It is a matter of plurality or pluralism of sovereignties rather than fragmentation. « Fragmentation » seems to suggest the notion of a previously unique sovereignty.

that in participating in the latter relations the Papacy operated within the framework of the still surviving, albeit increasingly ineffective, hierarchical, « universal » order. Under the developing rules of egalitarian inter-power relations the Holy See would not be in the position of legal authority it occupied in the « universal » legal order. It was in a position of juxtaposition to, and equality with, the coexisting potentates (9).

9. Considering the ambiguities in the attitudes of the Holy See and the coexisting powers, it is of course difficult to say at what time precisely the Roman Church's claim to its longstanding supremacy lost objective vitality as a consequence of the definitive predominance, in its external relations, of the international law concept of equality among sovereigns. It seems reasonable to assume, however, that once the *Respublica Christiana*'s legal order ceased to exist altogether and the notion of an egalitarian system of international law took hold for good, the claim of the Holy See to any kind of « supranationality » lost any weight. The Roman Church found itself at that stage, more or less reluctantly, in a position of *par inter pares* within the international system.

The assertion of a « supranational » character of the Holy See is indeed not infrequent even today. It is my understanding, however, that that adjective, used at times inappropriately also with regard to the United Nations, is simply used, albeit not less inappropriately, to indicate the *transnational* nature of the « constituency » of the Roman Church's faithful. I do not think that the Holy See's legal experts would maintain nowadays that the Holy See is placed in any fashion, by international law, « over and above » States and other international persons.

10. International personality in the described sense has thus been maintained by the Holy See without interruption from the time of the inception of the rules governing international relations up to the present time. It has never been seriously contested and it seems very unlikely that it ever would be.

In particular, there was no interruption in the international personality of the Holy See following the taking of Rome and the so-called *debellatio* of the « Papal State » by the Italian Kingdom in September 1870. Once the population and the territory of that State were annexed by Italy, the Church simply found itself deprived of the elements over which it had pre-

(9) We find it curious that while rightly stressing that « the international personality of the Holy See is based on the fact that the internal legal order of the Church is not derived from any State or other subject of international law, and is therefore sovereign », H.F. Kock does not feel it necessary to stress as well that that internal order does not derive from international law either (« Holy See », in R. BERNHARDT (ed.), *Encyclopedia of Public International Law*, vol. 10 (1987), pp. 230-233). It is indeed in the « originality » of the Roman Church's legal order *vis-à-vis* international law that resides in my view that main obstacle to the functional qualification of the international personality of the Holy See's (and the Church) discussed in paras. 11 *et seq. infra*.

viously exercised both the governmental authority under its own internal law and international legal rights identical to those of any other sovereign, such as a State, endowed with a territory and a population. During the 1870-1929 period, the supreme organ of the Church had its seat within Italian territory in a situation comparable — *mutatis mutandis* — to that of a government in exile. That international status was not legally affected in any direct sense by the legislation (*Legge delle Guarentigie*) passed by the Italian State, obviously within the framework of Italian law, in order to ensure that the Holy See's independence would be fully respected despite the fact that it had its seat in the heart of the Kingdom's territory. Apart from the fact that the Holy See's international personality continued to exist *erga omnes* just as it had existed until 1870, that Italian legislation was just the internal legal instrument by which the Italian State ensured compliance, by its organs and subjects, with Italy's international obligation to respect the independent status of the Holy See : an obligation with which the Italian Government had clearly committed itself to comply at the time of the 1870 annexation.

A *fortiori*, no relevant change occurred in the international personality of the Church following the Lateran Agreements with Italy of 11 February 1929 and the creation of the State of the Vatican City. On this occasion the Roman Church simply acquired new international rights and obligations — not only territorial — essentially similar to some of its international rights and obligations pre-existing the 1870 spoliation.

IV. — THE NATURE OF THE HOLY SEE'S PERSONALITY

11. According to the prevailing doctrinal view, the Holy See's international personality differs in nature from the personality of States and other non-States. That doctrine considers, in particular, that the Holy See is a *sui generis* person of international law, first in view of its « spiritual » functions, different from the « temporal » functions of States ; secondly, because it differs, or for a period differed, from States with respect to such « elements » as territory and population. This special nature of the Holy See would entail its having a limited legal capacity under international law.

In more detail, the prevailing theory seems to run as follows.

The Roman Church's aims and activities are spiritual. Only, or mainly, in consideration of that fact the Holy See is an international person and has maintained such status even during the period (1870-1929) during which it was deprived of territory and population. Consequently, the Holy See enjoys international personality by, so to speak, a very special, spiritual, title. The Holy See actually would be so special as a person that it is distinct and separate from any temporal entity or organization factually linked to the Holy See or depending therefrom, such as the Pontifi-

cal State or the Vatican City. From the distant origins up to September 1870, the Holy See's personality would have been distinct — as a personality « for the spiritual » — from that Pontifical State which was to suffer *debellatio* and annexation in 1870. The Pontifical State thus would have been an international person — *qua* State — distinct from the Holy See. In the 1870-1929 period the Holy See would have been the only international person in existence which was related to the Roman Church. Since 1929, there would again be in existence two international persons : the Holy See « for the spiritual » and the « Stato della Città del Vaticano », as a mini-State, for the « temporal ».

The idea underlying this distinction of personalities is that the Holy See would be the most special — the most *other*, so to speak — among the so-called « international persons other than States ». I refer to that category of persons which includes insurgent parties, liberation movements, governments in exile and the various international organizations of general or specialized competence. While insurgent parties, liberation movements and governments in exile (*Staatsfragmente*) would be special on account of other factors, the Holy See and international organizations would be special mainly in view of their functions. The Holy See in particular would qualify as a special person under international law — with a special legal capacity — in view of its spiritual, religious functions. The international legal capacity of the Holy See would be consequently restricted to religious or spiritual matters.

12. The notion that the international personality of the Holy See is specially qualified as a matter of international law is obviously grounded in that corollary of the « constitutional » theory of international law according to which States are territorial subdivisions of a legal community of mankind. It is under that corollary that States would qualify as territorial juristic persons under international law in the latter's role of public law of the universal legal community. And it is under the same theory and corollary that the adherents of the « constitutional » theories envisage qualitative distinctions among kinds of international persons comparable to the distinctions existing among the public juristic persons of national law. In addition to the State itself (singled out as the major public institution of general governmental competence) and non-territorial public utility companies one distinguishes cities, provinces or *départements*, counties, regions, cantons or member States, each type, or each individual entity being legally endowed with given competences *ratione materiae*, *ratione personae* or *ratione loci*.

In a similar way — *mutatis mutandis* — international law would distinguish, among its persons, States and « non-States » (or persons « other than States ») ; among the latter, the different kinds of « non-States » : insurgent parties, liberation movements, national committees, governments

in exile and international organizations ; and, among the latter, organizations of general competence (such as the League or the United Nations), on the one hand, and the various specialized agencies and bodies on the other.

While States would be international juristic persons of general competence, each type of « non-State » would have a different sphere of more or less circumscribed international legal competence. Thus, international organizations would be specialized in conformity with their respective statutes ; the other « non-States » would be specialized on account of their features. For example, liberation movements, national committees and governments in exile would be special, as compared to States, in view of the lack of a direct, exclusive control of a territory and a population ; insurgents would be special because of their ephemeral or provisional nature (in the sense that they either become the government of the whole State or of a portion thereof, or dissolve). Both categories would be characterized as juristic persons of limited competence or capacity.

A similar restriction would seem to be envisaged, *mutatis mutandis*, for the Holy See. In view of its spiritual, religious vocation, the Holy See would possess an international legal competence or capacity limited *ratione materiae* to the spiritual or religious sphere. It is on account of such an international legal qualification that the Holy See seems to be envisaged, by the prevailing doctrine, as a very special international person, as a *unique* « non-State » among the other « non-States ».

13. With all respect for the numerous adherents of this theory the present writer is unable to share it. He also takes issue, in certain respects, with his late grandfather, an *emeritus* professor of constitutional law in the University of Turin (10).

Obviously, the religious activities carried out by the Roman Church and the spiritual ends that it pursues are at the basis of the international legal status of the Holy See. It is because of those activities and purposes that the Roman Church enjoys throughout the world a following the size of which has no equal among other churches, and has for centuries occupied a unique position of prestige. The Holy See's historical condition of independence and sovereignty rests upon these factors and upon the respect that the Roman Church commands nowadays from all governments. The entity's independence and sovereignty is in turn at the basis of its international legal personality. This does not imply, however, that in addition to vesting the Holy See with international personality, international law qualifies the Roman Church as a person specialized in religious or spiritual functions.

(10) Gaetano ARANGIO-RUIZ, « senior, Sulla personalità internazionale della Santa Sede », *Rivista di Diritto pubblico*, 1925, I, pp. 417 et s. ; and *La Città del Vaticano*, *ibid.*, 1929, I, pp. 600 et s.

A juridical dedication of the Church to the pursuit of religious ends and activities, something different from the *actual* spiritual vocation, the *actual* spiritual action and the spiritual means *actually* used, is, of course, to be found within the internal law of the Church and in the national laws of given States. Interindividual legal orders such as these are naturally apt to establish destinations of the kind — namely purposes and functions — for any *personne morale* acting within their framework. Interindividual legal orders can validly and effectively provide that the persons placed at the head of such entities ought or may pursue given aims through given activities, and that other individuals are required to subject themselves to those persons only in so far as the latter pursue the specified aims and activities. Interindividual legal systems can also provide — validly and effectively — that any departure, on the part of a juristic person's agents, from the aims and activities envisaged in the person's statute will be sanctioned as invalid and/or illegal.

In contrast, the rules governing the relations among international persons — whether States or « non States » — do not directly consider, and have no reason so to consider, juridical destinations of the kind, either for States or for « non-States ». Secondly, the essentially inter-State and non-interindividual nature of international law, excludes that it address itself directly to the persons proposed to the government of the Church in order to impose upon them the pursuit of given ends or activities. For the same reason, it would not be for international law to tell the Church's faithful when and how far they are subject to given ecclesiastical authorities. International law does not confer individual competences or establish individual subjections of the kind. Moreover, as regards in particular the Roman Church, the non-confessional character of the majority of States, and the presence, within the sphere of international law, of non-Catholic and also non-Christian States, makes it difficult to conceive the existence — and, for that matter, even the future formation — of customary rules constituting a kind of international *ius singulare* of the Roman Church comparable to the special rules of certain national legal systems relating to the status of the Roman Church or other confessions, churches or religions.

14. One is bound to conclude that although the nature of the Roman Church's interests and activities is, especially nowadays, the main factor of the Holy See's title to participate in international relations as an equal member of the « society of States », and although that title's very nature gives the Holy See's international « personality » despite the not minor criticism that some periods or aspects of its multisecular tradition undoubtedly deserve, a degree of solidity probably higher than that of the personality of many existing States, it is not *qua* religious organisation that the Holy See enjoys an international personality. The truth seems to me to be that the Holy See has become a power among the powers : where by

power I understand any entity factually existing as a sovereign and independent unit and participating as such in international relations. This concept has nothing to do with any major or superior military, economic and/or political power. Despite the lack of «divisions» the Roman Church appears to be, as a moral power, far more powerful than many if not most States.

15. It follows that only as a sovereign, independent entity, the Roman Church took and takes part in international agreements concerning either matters relating to cult and the position of Catholic ministers and Church properties within the territory of States, as is the case of *concordats* ; — or territorial and political matters, like the 1929 Lateran Treaty ; — or financial matters, like the Financial agreement of the same year. All such agreements create international right-obligation situations essentially not dissimilar from the situations created by any inter-State agreement relating either to the treatment of the respective citizens, residents or organs, or questions concerning territorial, financial, commercial or communications matters.

The fact that the Holy See's activity relates most frequently to religious or spiritual matters does not affect the essentially legal, and in that sense quite *temporal* nature of its international rights and obligations more than the essential nature of an inter-State treaty is altered by the treaty's subject-matter. In particular, no difference is visible, from the viewpoint of their essentially international and temporal nature, between *concordats*, on the one hand, and other treaties or agreements to which the Holy See is a party, on the other hand. The fact that *concordats* relate to the status of the Roman Church and its ministers and to matters of cult within the territory of the States with which they are concluded does not single them out in any way from other treaties, except for the objects of the rights and obligations they envisage. It would be as inappropriate to single them out in view of their spiritual object as it would be inappropriate to qualify as spiritual (or less than temporal) the contract by which a parson rents his dwelling or purchases candles or ornaments for the chapel altar.

Just as States, the Holy See also takes part in diplomatic relations. Just as any other sovereign body, in other words, the Roman Church is endowed with the rights and is subject to the obligations deriving from the rules of customary or conventional international law applicable to the Church's diplomatic relations with any States or other international persons. The fact that the Holy See's diplomacy deals principally with matters of cult or religious interests does not make the legal regime of those relations any different from the international legal regime of the diplomatic relations between States.

It is hardly necessary to add that, just as there is no real foundation for the alleged «speciality» of the Holy See's personality there is no foundation

for the alleged limitations of the Holy See's legal capacity mentioned by some scholars. If the Holy See has ceased, for example, to participate in military operations, it is because of its lofty inspiration, its own constitution and legal order and its choices, not because of any international legal incapacity.

V. — CONCLUSIONS. HOLY SEE, ROMAN CHURCH,
PAPAL STATE AND VATICAN CITY

16. The main factors of the myth of the *sui generis* nature of the personality of the Holy See are on one hand the tendency of States to reduce the Roman Church's interference in their internal affairs; on the other hand the inclination of the ecclesiastical legal literature to emphasize in certain circumstances — not always to the Holy See's advantage — the distinction between the temporal and the spiritual. Another factor is the unfounded idea that only by being characterized as a spiritual entity instead of a temporal one, was the Holy See able to survive, as an international person, the 1870 annexation of its territory and people.

No doubt, considerations such as these have had and still have a political impact and even a legal impact within State law and within the internal law of the Roman Church itself. They do not justify, however, the obviously fictitious qualification of the Holy See as a « spiritual » entity from the viewpoint of a religiously « neutral » international law.

17. It also becomes apparent at this point how thin is the ground on which the prevailing doctrine bases the distinction between a temporal international person (such as the Papal States until 1870 or the Vatican City since 1929), on the one hand, and a spiritual international person (the Holy See or the Roman Church), on the other hand. Of course, it is quite possible to speak of the Vatican City as of a person, institution or articulation juridically distinct from the Holy See within the sphere of the internal law of the Roman Church itself and possibly within the national law of one or more States, especially the Italian State. Similar notions were also appropriate with regard to the Papal States until 1870. From this does not necessarily follow that the Holy See on the one hand and the Papal States or the Vatican City on the other, are or were distinct international persons.

With regard to the Holy See as well as any State, what matters from the viewpoint of international personality and from the viewpoint of the person's organization is the factual situation. The factual situation is that the Vatican City is an entity dependent from the Holy See as a part of its effective organisation. It follows that on the one hand the Vatican City is not an international person; on the other hand, that any internationally relevant conduct of the Vatican City is a conduct of the Holy See (and/or the

Roman Church). In other words, the status of the Vatican City does not differ, from the viewpoint of international law, from the status of a province or any other subdivision of a State. It is just a part of the person regardless of whatever legal status it may have within the internal law of the Holy See, of the Roman Church or of any State.

Any international act of the Vatican City — the qualification of which as a State having no more international legal consequence than the name «State» as attributed to Virginia, Florida or Mississippi — is obviously, from the viewpoint of international law, an act of the Roman Church or its supreme organ, the Holy See.

It is of course quite understandable that given States may prefer, by reason of their policy in religious affairs and/or internal constitutional principles, to deal with the Vatican City instead of the Holy See (or the Roman Church) for the purposes of diplomatic relations or for the conclusion of treaties or conventions on any or given matters (11). The Holy See itself may well in given areas of its international relations prefer to operate through the Vatican City. The Vatican City appears in fact formally the party also in some multilateral instruments of a technical nature such as the Universal Postal Union and the International Telecommunications Union.

It seems obvious, in either case, that the acting or contracting party is always, from the viewpoint of general international law, the Holy See (or the Roman Church). The Vatican City operates merely as an organ or dependency of the international person of the Holy See (or the Roman Church). Indeed, it was recognised by the United Nations and the International Atomic Energy Agency (IAEA) that it is the Holy See and not the Vatican City which takes part, through representatives, delegates or observers, in the work of those organizations and in the international conferences they promote.

As in other areas of international legal relations, the practice in question is likely to mislead any observer who fails to realize that international legal practice of States or international organs (including the International Court of Justice and arbitral tribunals) must not necessarily be taken *à la lettre*. A proper understanding of the practice requires frequently a subtler and

(11) This seems to be the case of the United States of America, whose belated establishment of regular diplomatic relations with the Holy See in 1984 (preceded for some time by the practice of «Personal Representatives») was presumably due to that country's government's policy to avoid either «an unconstitutional establishment of religion» or «a special preference of one religious group over others», in real, feared or alleged violation of the «equal protection guarantees» of the Fifth (constitutional) Amendment: charges discussed on May 7, 1985 by District Judge John P. Fullam. See Marian NASH (Leich) (ed.), *Cumulative Digest of United States Practice in International Law, 1981-1988*, Book I (Office of the Legal Adviser, Dpt. of State), pp. 894-896). It is presumably for similar reasons that international agreements on certain matters were concluded by the United States (in conformity with the practice of other States and of the Holy See itself) with the Vatican City.

harder effort of interpretation than it is usually required for the proper understanding of legal rules ; and what should matter for the scholar is the substance and not just the language of international practice. Apart from the fact that international practice is not always the product of international legal experts, one should not fail to consider that practice may well be influenced in various ways — as it frequently is — by legal theories : not all of which, in their turn, reflect legal reality as faultlessly as it may seem *prima facie* to be the case.

The error is particularly frequent in that area of attribution (the so-called « imputation ») of international legal acts or delinquencies which is closely related to the present subject. There is frequently a confusion, in that area, between the international legal relevance of the act — obviously a matter of *law* — with the *constat* that the act is an act of a State : obviously a matter of fact (12). The unfounded qualification of the Holy See's international personality as a « spiritual » personality distinct and separate from a temporal personality of the Papal State or the Vatican City is another egregious example of the same confusion. The relationship of the Vatican City to the Holy See is, from the viewpoint of international law, a question of fact. *De facto* the Vatican City is a portion of the organisation of the Roman Church, of which the Holy See is the supreme organ. Any act of the Vatican City is thus in fact not, for international legal purposes, an act of an international person distinct from the Holy See or the Roman Church. It is an act of the Holy See (or the Church).

To put it bluntly, it would in practice be very difficult to accept the notion, for example, that an unlawful act of Vatican organs would not be attributable to the entity — the Holy See — of which the Vatican City is so obviously, in fact, a dependency.

18. Another questionable notion, also linked with the so-called *sui generis* nature of the entities involved, seems to be the general preference to refer international personality to the Holy See rather than to the Catholic Church, namely the Roman Catholic, Apostolic Church. Once again, one is led astray by the *sui generis* person's concept.

It is quite obvious that the Holy See is the government of the Catholic Church. With regard to States everybody identifies the international person, indeed rather roughly, with the State, the State government being the State's supreme organ. With regard to the Catholic Church, in contrast, one puts aside the body, so to speak, and confines personality to the head. It is quite obvious, though, that despite the special nature of the relationship of the Holy See with its peripheral structures and with the faithful — two

(12) State Fault and the Forms and Degrees of International Responsibility : Questions of Attribution or Relevance, *Etudes à la mémoire de Michel Virally*, Paris, 1990 ; and Second Report on State Responsibility, A/CN.4/425, Add. 1 (1989), paras. 162-188 and references therein.

secondary, internal differences — the dichotomy is essentially similar to the State-Government dichotomy. Isn't it correct to believe that what matters, for the Church as well as for States (and « non States » other than the Church), is the real, factual collective entity, namely the Holy See together with its structural ramifications, *i.e.* the organization of the Catholic Church ? The international person is neither just the Holy See nor just the Pope's person : it is the whole organisation of the Church.

19. The conclusions are rather simple.

a) Up to September 1870, the Holy See, as the supreme organ of the Catholic Church, possessed the territory and the population of the Papal States. As the only person corresponding to the Roman Church and its articulate, peripheral organization, it was thus endowed, under international law, with territorial sovereignty. At that time the Holy See exercised, under its internal law, not only its special functions with regard to the Church's organization and to the faithful throughout the world but also — for good or bad — the ordinary governmental functions over the territory and the population of that part of central Italy that was known as the Papal States. In other words, the only international person in question acted (internally) as a religious institution and as a State government at the same time.

b) In the course of the period between 1870 and 1929 the Holy See was deprived (in order to complete the unfortunately belated unity of the Italian nation) of the above-mentioned territory and population. Consequently, while still enjoying international personality, it only exercised, under its own internal law, its functions with regard to the organization of the Church and with regard to the faithful in the various parts of the world. It was not endowed with the international legal rights and obligations relating to territory or population. Thanks to its uninterrupted international personality it did exercise, nevertheless, international rights and assumed international obligations under customary or treaty law, such rights and obligations relating, for example, either to the Roman Church's ministers and faithful under the jurisdiction of States or to the Roman Church's diplomatic relations.

c) In 1929 the Holy See acquired under international law — following the Lateran Treaty with Italy — new sovereign rights over the territory of the Vatican City and its population. Since 1929, therefore, the Holy See, as the Church's supreme organ, has exercised, under its own internal law, both the functions relating to the administration of the Church and its faithful and governmental functions over its dependent Vatican City. The latter qualifies, *de facto*, for international legal purposes, not as a separate person, as noted, but merely as an organ of the Holy See. Any qualification of the City as a distinct *personne morale* would be a matter of the internal law of the Roman Church or of the national law of a State : not a matter of international law.