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The International Legal Status of the Vatican/Holy See Complex

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Abstract

This article offers a re-examination of the international legal status of what is here termed the Vatican/Holy See complex (VHS), focusing on claims to statehood. The problematic 'effect' of Vatican City, of the Holy See, of the papacy and of associated entities is interrogated at the level of international law, entering as little as possible into administrative or theological distinctions. The various grounds cited as supporting status amounting to statehood are argued to be inadequate. The continuing exchange of representatives with states by the VHS is missionary and hierarchical in character and is reflective neither of the reciprocity of peers nor of customary obligation going to law. Agreements entered into by the papacy with the Kingdom of Italy (the Lateran Pacts) in 1929, relating to the status of the geographical territory known as Vatican City, cannot be determinative of international status. Nor can membership of international agreements and organizations confer a status amounting to statehood. Events and practices since 1929 have not substantially altered international status as of 1870. The Roman Catholic Church is but one of many faith-based international movements, and since the eclipse of the papal state nearly one-and-a-half centuries ago, the status in international law of its temporal headquarters in Rome should not be privileged.

1 Introduction

A *An Entity* Sui Generis

Up until the later years of the 19th century, there existed the 'papal states' in the geographical heart of what is now (but for San Marino) a unified Italy, a territory from which military, as well as diplomatic and spiritual, forces were deployed. The papal states had been conquered or overrun at various times, perhaps most notably in the Napoleonic era, and individual popes had on many occasions fled Rome for short or

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extended periods of time. These circumstances – the existence of a papal territory – were long over when an agreement was reached between the incumbent Pope and Benito Mussolini in 1929, according to which a small area of Rome (the Vatican City) would be treated by the Kingdom of Italy as having special status. The international status of this '*sui generis*'[1] entity is both conceptually problematic and of practical concern – whether this status amounts to statehood or to something less than statehood.[2] Yasmin Abdullah, Geoffrey Robertson and Gillian Triggs have rejected the claim to statehood.[3]

Robertson accuses the Roman Catholic Church of culpability in relation to the worldwide sexual abuse of minors. To the extent that the Vatican City or the Holy See has either internationally recognized statehood, or a status that in any way approaches statehood so as to sustain any of the privileges that go with statehood, then any 'normal' criminal investigation is impeded.[4] There are protections generally available under customary international law for incumbent heads of state and other senior state officials. The detention of a papal official in or around the Vatican might correspondingly give rise to questions of state sovereignty. The status of the incumbent Pope as a national of Argentina, and, hence, *prima facie*, subject to Argentinian jurisdiction over serious criminal allegations as head of the Roman Catholic Church, is rendered problematic by anything approaching statehood for the Vatican. Recourse is uncertain from the Vatican's own processes since under the Vatican Constitution, which was promulgated in 2000, the Pope 'has the fullness of legislative, executive and judiciary power'.[5]

Statehood brings with it obligations to accept responsibility for internationally wrongful acts that were committed by, or can be attributed to, the state.[6] The Vatican has been allowed, in effect, to select attributes of statehood that it wishes to enjoy (such as those conferring powers, influence and immunities) without accompanying those privileges with an acknowledgement of the obligations that normally attend statehood. Thus, as Ioana Cismas explains, in allowing that some threshold has been crossed by the compound or construct of the Holy See and Vatican, affording the basis for international immunities, international obligations are also triggered.[7] Religious organizations are deserving of no special legal protection from such obligations, where they are otherwise appropriate. With the advantageous incidents of statehood

1 J. Crawford, *Brownlie's Principles of International Law* (8th edn, 2012), at 124; G. Robertson, *The Case of the Pope* (2010), at 160.

2 As discussed later in this article, Cismas argues that a holistic 'construct' or compound of the Vatican City and Holy See (VHS) amounts, since 1929, to an entity with 'the resemblance of statehood'. I. Cismas, *Religious Actors and International Law* (2014), at 155.

3 Abdullah, 'The Holy See at United Nations Conferences: State or Church?', 96 *Columbia Law Review* (1996) 1835; Robertson, *supra* note 1; G. Triggs, *International Law: Contemporary Principles and Practices* (2nd edn, 2011), at 249; also see Neu, '"Workers of God": The Holy See's Liability for Clerical Sexual Abuse', 63 *Vanderbilt Law Review* (2010) 1507, at 1538.

4 Robertson, *supra* note 1, at 164.

5 Martens, 'The Position of the Holy See and Vatican City State in International Relations', 83 *University of Detroit Mercy Law Review* (2005–2006) 729, at 750.

6 J. Crawford, *The International Law Commission's Articles on State Responsibility* (2002), at 77.

7 Cismas, *supra* note 2, at 237.

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go the responsibilities, such as, in this case, the responsibility for extraterritorial violations of human rights standards by persons and other legal entities closely connected with such a state-like entity. Perhaps anything like statehood is inchoate until both obligations and rights have been engaged. It could be argued that this selectivity in the deployment of the Vatican's international personality itself undermines the legitimacy of any claims to statehood, which involves correlative rights and obligations.[8]

B *The Vatican/Holy See Complex*

The focus of this article is on the international legal dimension of the activities and the status of what is here termed the Vatican/Holy See complex (VHS).[9] This is a pragmatic and inclusive term of convenience to allow for a variety of powers, status or obligations to be attributed to one or more components of that complex or, occasionally, to the whole 'package', without it being felt necessary to pin the matter down with more terminological exactitude.[10] Such exactitude, even if desirable, would seem to call for fine theological or administrative distinctions that are beyond the scope, or beneath the attention, of international law.[11] Further, the power relationships between Pope, Roman Catholic Church, Vatican City, and Holy See are themselves unstable since '[i]t is the Pope, as the Head of the Roman Catholic Church and the Head of the Vatican Government, who decides on the hierarchical relation between the Holy See and the Vatican Government'.[12] This personal and discretionary form of sovereignty, consistent with the entire absence of any separation of powers within the Vatican's legal systems,[13] greatly reduces, or may even entirely undermine, the validity of any formula for what may be termed the 'separation of international powers' as between Holy See, Vatican City and pontiff.[14]

It may be that one of the many articulations in the literature on relationships between the Holy See, Vatican City, and so on may be both accurate and of persisting applicability. But such formulations cannot be relied upon in the international law context. The Holy See cannot be thought of straightforwardly as the government of the Vatican State territory for the Holy See is 'the central authority and administrative

[8] See *Island of Palmas (The Netherlands v. United States of America)*, Decision of 4 April 1928, reprinted in UNRIAA, vol. 2, 829, 839. Importantly, secular states themselves sometimes adopt a '"pick-and-choose-a-personality" strategy' in their dealings with VHS. Cismas, *supra* note 2, at 193.

[9] Araujo, 'The International Personality and Sovereignty of the Holy See', 50 *Catholic University Law Review* (2000–2001) 291; Bathon, 'The Atypical International Status of the Holy See', 34 *Vanderbilt Journal of Transnational Law* (2001) 597; Dias, 'Roman Catholic Church & [sic] International Law', 13 *Sri Lanka Journal of International Law* (2001) 107.

[10] The 'top-down' term 'Vatican/Holy See complex' is to be distinguished from the 'bottom-up' notion of a 'construct' or compound of Vatican City and the Holy See, as together comprising a single entity with international legal personality, as described by Cismas, *supra* note 2, at 153.

[11] J. Crawford, *The Creation of States in International Law* (2nd edn, 2006), at 228.

[12] J. Duursma, *Fragmentation and the International Relations of Micro-States: Self-Determination and Statehood* (1996), at 387.

[13] *Ibid.*, at 377.

[14] E.g., the proposal that while both the Holy See and Vatican City have international legal personality, in neither case are they entirely dependent on the personality of the other; only the latter is a state. *Ibid.*, at 386; Martens, *supra* note 5, at 755; R. Portmann, *Legal Personality* (2010), at 116.

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organ of the Catholic Church',[15] which is a role well beyond 'governing' the Vatican City. If the Holy See were a government in the sense of a regime, it would be as such invisible to international law. In any event, the Holy See is defined expansively in the Code of Canon Law as comprising the pontiff, the Roman Curia[16] and 'that which appears from natural law or the context'.[17] At the same time, 'a country does not have diplomatic relations with the Vatican, but with the Holy See'.[18] In its preparatory work for the 1969 Vienna Convention on the Law of Treaties, the International Law Commission noted that treaties are 'entered into not by reason of territorial sovereignty over the Vatican State, but on behalf of the Holy See, which exists separately from that State'.[19]

The aim of the inclusive terminological strategy adopted in this article, which is an attempted cutting of a conceptual Gordian knot, is to ensure as much as possible that any substantive claims to international legitimacy are recognized irrespective of the nomenclature in use. Generally speaking, international law is unconcerned with wording. A bilateral document called a 'treaty' may or may not be defined as a treaty under international law. To say that VHS has some international legal status will thus mean, for example, that the status can be attributed to either 'the Vatican' or the 'Vatican City' in some sense, as the supposed state or other entity, and/or to the Holy See as a form of governance, institution, supposed state or international organization.[20] Senior officials of the Roman Catholic Church may be included to the extent that such individuals may be said to partake of international legal status as a consequence of that role.[21]

15 Crawford, *supra* note 11, at 225.

16 Canon 360 states that '[t]he Supreme Pontiff usually conducts the business of the universal Church by means of the Roman Curia, which fulfils its duty in his name and by his authority … it consists of the Secretariat of State or the Papal Secretariat, the Council for the Public Affairs of the Church, congregations, tribunals and other institutions'. Reprinted in J. Coriden, T. Green and D. Heintschel (eds), *The Code of Canon Law: A Text and Commentary* (1985), at 294.

17 Duursma, *supra* note 12, at 387. For Cardinale, 'Holy See' has three distinct meanings: the Pope plus the curia; the Pope as head of the Roman Catholic Church in descent from St. Peter; and the spiritual organization of papal government: H. Cardinale, *The Holy See and the International Order* (1976), at 82. The Holy See is 'the Pope's competent international agent' and is (with the Roman Catholic Church and the Vatican state) one of three distinct subjects of international law under the Pope's sovereignty. *Ibid.*, at 117.

18 Martens, *supra* note 5, at 729. Former Australian representative to the Holy See Tim Fischer is probably unique in defining the Holy See as a 'nation state'. T. Fischer, *Holy See, Unholy Me: 1000 Days in Rome* (2013), at 49.

19 Cited Araujo, *supra* note 9, at 343; Vienna Convention on the Law of Treaties 1969, 1155 UNTS 331.

20 Membership of some international organizations is in the name of 'Vatican City State', while other international arrangements are signed by the Holy See. Martens, *supra* note 5, at 757–758; Crawford, *supra* note 11, at 227–228; Cismas, *supra* note 2, at 156. Both 'Vatican City' and 'the Holy See' were at different times named as members of the World Intellectual Property Organization, and similar re-definitions have occurred in the context of the Interntional Atomic Energy Agency and of the United Nations (UN). Duursma, *supra* note 12, at 402–405. In any event, ratification is carried out by the Pope. *Ibid.*, at 378. Indeed, the Pope may be directly referenced by one usage of the term Holy See. Bathon, *supra* note 9, at 598.

21 With the long historical significance of the Vatican buildings prior to the 1929 definition of a 'Vatican City state', whether the papal residence or not, the term VHS is not anachronistic in relation to that period.

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Controversy over the international status of the papal entity in its various forms is not new. Lassa Oppenheim attributed a '*quasi* international position' to the Holy See, under which it was entitled to be treated 'as though she were an International Person', just as the Pope was entitled to be treated 'as though he were the head of a monarchical State', while neither was in fact the case.[22] In 1929, Charles Fenwick canvassed diverse expert opinions relating to the period after 1870, including the alternatives of the eclipse of international character versus the fullness of sovereignty.[23] In 1952, Josef Kunz opined that the Holy See, while never a state, had always retained an international legal personality. For Kunz, Vatican Cit**y** is distinct as an international person from the Holy See and is a state but not a sovereign state – instead, 'a vassal state of the Holy See'.[24] International legal personality is a much wider term than statehood, but questions relating to statehood open up these wider issues. Criteria for statehood, and the general issue of diplomatic representation, should both be discussed at this point.

2 Criteria for VHS Statehood: General Considerations

A *The Limited Applicability of the Montevideo Criteria*

In relation to statehood, many recent commentators have pointed out that VHS in many ways fails to meet what might be called the 'textbook' criteria for statehood in international law,[25] as articulated in the 1933 Convention on the Rights and Duties of States (Montevideo Convention).[26] In brief, these criteria refer to four dimensions: permanent population; defined territory; government and the capacity to enter into international agreements. Clearly, there is no sustainable, civil population if the territorial base is taken to be the Vatican City itself. The population is transient, comprising the main papal officials and employees, who are allowed to reside. No person would become stateless as a consequence of relinquishing Vatican citizenship or having that citizenship terminated, either as a child leaving parents or as an adult leaving employment or an official position in Vatican City.[27] As discussed further below, the setting up of Vatican City in 1929 can be said to have deliberately excluded any person other than those 'recruited' – an arresting antipode to the self-determination of a people.[28] Correspondingly, the physical territory is small. (It is important to note of course that

[22] L. Oppenheim, *International Law: A Treatise*, vol. 1 (2nd edn, 1911), at 160.

[23] Fenwick, 'The New City of the Vatican', 23 *American Journal of International Law* (*AJIL*) (1929) 371.

[24] Kunz, 'The Status of the Holy See in International Law', 46 *AJIL* (1952) 308, at 313.

[25] H. Charlesworth and C. Chinkin, *The Boundaries of International Law* (2000), at 134; Robertson, *supra* note 1; Triggs, *supra* note 3, at 249.

[26] Convention on the Rights and Duties of States 1933, 165 LNTS 19, Art. 1; see M. Dixon, R. McCorquodale and S. Williams, *Cases and Materials on International Law* (5th edn, 2011), at 137.

[27] Cardinale, *supra* note 17, at 110; girls born in Vatican City may retain Vatican citizenship while they remain single, while boys lose Vatican citizenship at age 25. Crawford, *supra* note 11, at 223. Citizenship and other residence rights may be withdrawn at any time at the discretion of the pontiff. Duursma, *supra* note 12, at 383.

[28] De la Brière, 'La Condition Juridique de la Cité du Vatican', 33 *Recueil des Cours de L'Academie de Droit International de la Haye* (1930) 113, at 130: '*[L]e recrutement tout particulier de sa population.*'

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the Montevideo Convention formula does not specify a minimum size for a population or for a territory.) There is effective government in place. There are numerous international agreements to which either the 'Vatican' or the 'Holy See' are party, but membership in international agreements is not conclusive in relation to statehood – 'entities other than States can make treaties'.[29]

In any event, alignment or misalignment with the Montevideo criteria is far from conclusive. There is no basis for calling upon these criteria to adjudicate on the statehood of any particular entity, and there is no international mechanism by which entry to the category of statehood is regulated. The Montevideo Convention's 'hackneyed formula' is no more than an empirical sketch of the general attributes of entities already accepted as states.[30] For James Crawford, in the case of entities whose statehood is in question for some reason, statehood is a matter of function and of legitimacy.[31] While this approach differs from that of Robertson, who places considerable weight on the Montevideo criteria, it arrives at a similar conclusion to Robertson on the international legal status of VHS. In the third section of this article, a chronological framework will be adopted in order to examine the grounds upon which claims to statehood (or a status close to statehood) might legitimately have been based at different times. Attention is focused on the period from approximately 1800 to 1929 for reasons to be explained.

Criteria for statehood and for its related territorial sovereignty have evolved over the centuries. The role played by conquest in earlier centuries, up to perhaps the 19th century, has been in some respects taken over by self-determination in modern times. Contestation over statehood includes the problematic status of micro-states, 'rogue' states, 'failed' states, newly emergent states and 'Bantustans' (pseudo-state enclaves).[32] A related category would be states that, like the Baltic states, 'disappear' as geopolitical entities as the result of what might in earlier centuries have counted as conquest, yet which retain some international legitimacy as suppressed states.[33]

B *Diplomacy as International Law*

The sending and receiving of representation was well established before the Lateran Pacts defined the Vatican City as such in 1929. Such international relationships had not come to an end with the extinguishing of the papal state by Italian unification in 1870. It has been suggested that international legal personality for the Holy See, although not amounting to statehood, continued to exist in the period 1870–1929 in a manner constituted by the ongoing reciprocity of diplomatic relationships.[34] The

[29] Crawford, *supra* note 11, at 44.

[30] *Ibid.*, at 437: 'Despite its regional character and low participation, the Convention definition is referred to reflexively, irrespective of its actual language or of the context' (at 46). Habit is not custom, and the assertion that 'the criteria of the Montevideo Convention … have now passed into customary international law', Dixon, McCorquodale and Williams, *supra* note 26, at 137, must be questioned.

[31] Legitimacy brings up normative aspects – in particular, issues of self-determination – which is a consideration noticeably lacking from the Montevideo formula. Crawford, *supra* note 11.

[32] Duursma, *supra* note 12; Crawford, *supra* note 11, at 722.

[33] See also Acquaviva, 'Subjects of International Law: A Power-Based Analysis', 38 *Vanderbilt Journal of Transnational Law* (2005) 345.

[34] Cismas, *supra* note 2, at 162; Crawford, *supra* note 11, at 226.

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exchange of representatives (however termed) between those purporting to be international persons, such as sovereigns, is no light matter. However, unless the exchange is founded on some kind of legal obligation, presumably of a customary nature, then the practice must be classified at best as courtesy or protocol.[35] Indeed, both the sending and the receiving are discretionary on the part of the VHS – diplomacy is only a means to the end of the Roman Catholic Church mission and is not essential in itself.[36] Vatican diplomacy is informed by, and in many ways consistent with, international law, but it cannot be said to be governed by it. It would seem to be religious or political.[37]

There are various practices between states and other entities that, however regular and habitual, however widely observed, and however important for political or other reasons, have never been taken to constitute international law. Crossing the line from 'mere custom' to customary law requires a significant, if imperfectly defined, step.[38] Political expediency does not suffice.[39] Importantly, the 19th-century legal attitude to this question was the same as that of the 20th century.[40] Secular states' dealings with the papal states in mid-century up until the 1860s, and their dealings with the VHS in the period after Italian unification was completed in 1870, must be seen in this light. A statement made by the Brazilian representative at the Vatican, dean of the diplomatic corps, immediately following the conclusion of the Lateran process in early 1929, is of interest.[41] Charles de Azeredo suggested that secular state sovereigns had been offering recognition of a kind of sovereignty in the papacy for many years by maintaining representation. An unworthy (non-sovereign) papacy, he argued, would not have attracted or maintained that practice. However, (secular) sovereigns are not obliged to send representatives out to any particular other (putative) sovereign, so that the contingencies as to which states in fact make such contact is not determinative of the status of any receiving entity. This is not state practice going to international custom.

In any event, and more specifically, the sending out of papal representatives, and the receiving of foreign representatives, has different functions in the case of the Holy

[35] The treatment of consulates and diplomatic representatives is governed by international agreements widely held to reflect age-old customary observance. But these obligations as to the protection of accredited representatives (and of premises, documents and so on) supervene on the legitimacy of the diplomatic relationship; they do not constitute that legitimacy. See discussion later in this article on the question of customary law.

[36] Cardinale, *supra* note 17, at 45.

[37] Continuing ceremonial interaction is not inconsistent with the absence of international legal personality; deposed monarchs may receive privileged treatment that bears the trappings of diplomacy and that might be glossed or experienced as a form of continuing 'recognition' – e.g., Kaiser Wilhelm II in post-war 'exile'. C. Clark, *Kaiser Wilhelm II: A Life in Power* (2009), at 349.

[38] *North Sea Continental Shelf (Federal Republic of Germany v. Denmark)*, Merits, 20 February 1969, ICJ Reports (1969) 3, para 77.

[39] *Asylum (Colombia v. Peru)*, Judgment, 20 November 1950, ICJ Reports (1950) 266.

[40] The 1900 decision in *The Paquete Habana* stating that 'custom or comity, courtesy or concession' is insufficient to provide evidence for legal obligation and thus to constitute law, itself endorsed an already century-old distinction, of 'comity' versus 'legal decision', due to Lord Stowell. The contrast is between 'an act of grace' and 'a matter of right'. *The Paquete Habana*, 175 US SC Rep (1900) 677.

[41] Cismas, *supra* note 2, at 163; De la Brière, *supra* note 28, at 160.

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See or Vatican as compared to a secular state.[42] As Pope Paul VI emphasized in 1970, the relationships that arise are not between states but, rather, between states and the Roman Catholic Church.[43] The church can act as the 'closest link between … nations … so long as they trust her and … acknowledge her right to … freedom in fulfilling her mission'.[44] The Holy See 'has a loyal dialogue with States … as an expert on human nature'.[45] The Roman Catholic Church's role is seen here as a kind of arbitrator or mediator, possessing unique skills and experience for that global role. Indeed, it is a role that has been expressly played by popes and by papal officials over the centuries. But an arbitrator or mediator is not one among equals. Its status is not reciprocal *vis-à-vis* with those entities to which it offers these services.

The mission to reach out to a world of nations is a religious mission:[46] 'By divine mandate, the Pope has the duty of expounding the principles of divine law and … of international law.'[47] Representatives of the Holy See 'help the local Churches to strengthen their bonds with Us'.[48] Canon law states that '[t]he *principal* duty of a pontifical legate' relates to unity of the universal church'.[49] Thus:

> diplomatic relations of the pope are always carried on in light of [the] spiritual mission, hence legates represent the Holy See – not the State of Vatican City; civil governments enter into relations not with the State of Vatican City but with the Holy See itself [and] the title given representatives of the Holy See ('nuncios' rather than 'ambassadors') is intended to underscore the particular nature of their mission.[50]

Papal diplomats are 'priests first and diplomats second'.[51] Pastoral responsibilities of the envoy in the foreign place might restrain a decision to withdraw that representation, which is a consideration absent from the functioning of secular diplomats.[52]

Papal representatives continue to be given precedence over the representatives of secular states. The Congress of Vienna provided that while members of the diplomatic corps should assume a precedence rank among themselves based on the date of appointment to their office, the rank to be assigned to the papal representative was not affected by such temporal arrangements.[53] These provisions were carried forward

[42] The Vatican functions as a unique setting for international dialogue, detached from material interests and instead enabling the application of 'eternal principles of the truth'. Cardinale, *supra* note 17, at 214.

[43] Pope Paul VI, *Apologia for Papal Diplomacy* (1970), cited as foreword in Cardinale, *supra* note 17, at xvii. Azaredo himself made similar points on exceptionality. De la Brière, *supra* note 28, at 160.

[44] Cardinale, *supra* note 17, at xviii.

[45] Similarly, the Pope Paul VI, *Sollicitudo Omnium Ecclesiarum* (1969), cited in Cardinale, *supra* note 17, at 312.

[46] Thus, the sovereignty of the Holy See 'is not restricted by a specific territory … its sovereignty … is exercised throughout the world'. Araujo, *supra* note 9, at 329.

[47] Cardinale, *supra* note 17, at 32.

[48] *Ibid.*, at xix.

[49] Canon 364, reprinted in Coriden, Green and Heintschel, *supra* note 16, at 302 (emphasis added).

[50] Commentary on Canon 362, *ibid.*, at 302.

[51] Cardinale, *supra* note 17, at 175.

[52] *Ibid.*, at 206. Canon 365 provides for the 'special responsibility' of the papal legate to a secular state to also deal with state secular authorities; however, this interaction focuses on spiritual matters and is to be informed by the counsel of local bishops. Coriden, Green and Heintschel, *supra* note 16, at 303.

[53] Martens, *supra* note 5, at 749; Coriden, Green and Heintschel, *supra* note 16, at 301.

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into the 1961 Vienna Convention on Diplomatic Relations.[54] It is in the nature of diplomacy, and of the legal inter-relationships involved, that these relationships are reciprocal and, in formal terms, symmetrical. The papal system of diplomacy 'is the most ancient in existence',[55] but it is not diplomacy as international law recognizes it. It is religious outreach,[56] and internal church controversy over papal diplomacy centres on matters of religion, such as the undermining of local church autonomy by the papal representative.[57] Oppenheim's conclusion that Holy See envoys are not diplomatic envoys – 'not agents for international affairs of States, but exclusively agents for the affairs of the Roman Catholic Church'[58] – remains true a century later.

3 The Papal States from Charlemagne to 1870

A *From Founding to 1850: Under Siege*

Territorial claims on behalf of the papacy to a central zone of the Italian peninsula can be traced back at least to the time of Charlemagne's father, Pepin III, king of the Franks.[59] In around 750, Pope Stephen appealed to Pepin for protection against the depredations of the Kingdom of Lombardy to his north, since protection from the distant eastern emperor was unrealistic.[60] From around the middle of the 15th century onwards, the papal states occupied more or less the same territory for some four hundred years, straddling the peninsula, with the Pope as monarch. The Pope saw himself as 'suzerain of earthly princes and arbiter of Christendom'.[61] However, there were significant ruptures in that history, especially in the Napoleonic era.

In 1796, Napoleon invaded the papal states. A Roman republic was declared, and other parts of the papal territory were occupied by Austrian and Neapolitan troops. Pope Pius VI was transferred under arrest to France and died in captivity a few years later. Pope Pius VII was elected in Venice under Austrian protection in 1800 and was able to return to Rome, having reached an agreement with Napoleon, still no more than First Consul of the French Republic. Pius VII took part in Napoleon's self-coronation as emperor in December 1804.[62] In 1808, Napoleon re-occupied Rome, annexing the remainder of what had been the papal states. Arrested and interned by Napoleon in Fontainebleau, Pius VII signed an agreement making extensive concessions and,

[54] Vienna Convention on Diplomatic Relations 1961, 500 UNTS 95, Art. 16; Coriden, Green and Heintschel, *supra* note 16, at 302.

[55] Cardinale, *supra* note 17, at 39.

[56] Unlike the papal envoy, the 'secular envoy has no jurisdiction over the people of the country to which he is accredited'. *Ibid.*, at 162.

[57] *Ibid.*

[58] Oppenheim, *supra* note 22, at 161.

[59] A purported documentary basis for papal territorial sovereignty across the west of Europe, treated as such for some seven centuries (the 'Constantine Donation'), was identified as a forgery in 1439.

[60] G. Procacci, *History of the Italian People* (1970), at 95; J. Kelly and M. Walsh, *The Oxford Dictionary of Popes* (2006), at 90.

[61] Cardinale, *supra* note 17, at 76

[62] In 1803, Pius had made a concordat with the (Napoleonic) Italian Republic that included parts of the pre-war papal states. Kelly and Walsh, *supra* note 60, at 307.

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in effect, renouncing title to the papal states.[63] With Napoleon's temporary imprisonment on Elba and with his final defeat at Waterloo in 1815, Pius was able to return to Rome once more.

The post-Napoleonic settlement under the Congress of Vienna[64] reinstated most of the former papal state territory in mainland Italy, along with other sovereign entities (kingdoms and dukedoms) across the peninsula. Papal sovereignty over Avignon and Venaissin, both in mainland France, came to an end. The remainder of the former (Napoleonic) Italian kingdom was re-allocated to newly defined states such as Lombard-Venetia in the north (under Austrian domination).[65] Austrian military intervention was needed shortly afterwards to assist the papacy in regaining control of its territory, and over the next fifty years, Austria and France were in turn called upon to re-establish, or to defend, the territorial domination of the Pope by force of arms, playing the protector role as had the Franks in earlier times.

The papal territories were frequently host to foreign armies during the second quarter of the century.[66] During the period of European revolutions in 1848, Pope Pius IX was forced to flee Rome,[67] and in February 1849, following elections, a Roman republic was declared.[68] The republic approved a new constitution, formally terminating papal rule. Church property was confiscated for redistribution. It could be said that this marked the end of legitimate territorial aspirations of the Roman Catholic Church in Italy as represented by the papacy. It marked the birth of a republic, the suppression of which by force might be seen to constitute a 'Baltic state' situation, so as to render illegitimate any future statehood arrangement maintained by such force.[69] And, indeed, the Roman republic was short lived. The republic's military defences under the command of Giuseppe Garibaldi were overpowered by French troops despatched by Napoleon III, and Pius IX was enabled to return to Rome in 1850. Once more the papal supremacy over Rome and its hinterland was re-imposed by the force of arms.

In early 1849, Rome and Venice had been independent and republican entities, at that time the only such examples in Italy.[70] By 1850, the papal state was a French protectorate, and Venice had fallen to Austrian troops. Austrian forces now occupied most of the north of Italy and dominated Piedmont. From the perspective of Britain, the Pope was too reliant upon, and too friendly with, Austria. Any destabilization of

63 Pius VII retracted the Fontainebleau concessions prior to his release by Napoleon in 1814. In 1811, Napoleon had named his heir-apparent at birth 'King of Rome.'

64 Crawford, *supra* note 11, at 221; G. Simpson, *Great Powers and Outlaw States* (2004), at 94.

65 Pope Gregory XVI was installed with the support of Metternich on behalf of Austria.

66 Kelly and Walsh, *supra* note 60, at 312.

67 Taking the accredited diplomatic corps with him. Cardinale, *supra* note 17, at 99.

68 Procacci, *supra* note 60, at 303.

69 In which case, the events of 1870 might be seen as the 'correction' to this 'Baltic' state of affairs. But the 'reverse Baltic' is suggested by Fenwick, *supra* note 23, at 374, in the 'legal fiction' of military occupation during 1870–1929, as in the Napoleonic era, such that 'the Vatican becomes the successor in law of the Papal States'.

70 Procacci, *supra* note 60, at 304.

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the papal territory in central Italy threatened to give rise to even greater Austrian dominance throughout the peninsula.[71]

B *1850–1870: Eclipse of the Papal States*

In the 1850s, the papal territories contained a population of some three million people.[72] However, within the decade, a movement for national unification had taken shape. By September 1860, with the exception of Rome and its region of Lazio, the former papal state had become assimilated into the newly unified Kingdom of Italy, which was declared in 1861.[73] Rome remained under the protection of the French army, reflecting a personal commitment of Emperor Napoleon III. By 1866, when (thanks to Prussia's defeat of Austria) the Venice region was added into the expanding national entity under the leadership of Cavour, the whole of the peninsula was unified under Victor Emanuel II, with the exception of two enclaves: the residual papal state centred in Rome and San Marino.[74] Pope Pius IX and his advisors remained optimistic that either France or Austria would come to their aid or that war in Europe would weaken the new Italian kingdom and hasten a return to a three-fold division of the peninsula with a reduced Piedmontese kingdom in the north, a Sicily/Naples entity in the south, and restored papal territories once more stretching from coast to coast.[75]

Annexation of Rome by the unification movement had already been attempted. Garibaldi's forces were turned back by Italian troops in 1862.[76] Following this episode, Napoleon III and the Italian government reached an agreement in 1864 (the September Convention) by which Italy would guarantee the inviolability of the papal territory against attack and would change its national capital from Turin to Florence to signal that Rome was not in its sights. The emperor agreed to withdraw the French troops from Rome. The troops were withdrawn on schedule by 1866, but they returned the next year when Garibaldi again threatened to march on Rome. However, with the Franco-Prussian War of 1870 and the defeat of the French forces at Sedan, French troops were no longer available to defend the residual papal territory against the threat of Italian military incursions. The inadequate papal military was overrun in

[71] For Palmerston, the British Foreign Secretary of the 1850s, the Pope's temporal sovereignty was outdated and in decline, and the concomitant decline in the transnational spiritual authority of the papacy was 'a good Thing for Europe'. Cited by J. Flint, *Great Britain and the Holy See: The Diplomatic Relations Question 1846–1852* (2003), at 125; see also Crawford, *supra* note 11, at 226. Palmerston's views must be seen in the context of British constitutional discrimination against the Catholic faith.

[72] Bathon, *supra* note 9, at 601.

[73] Kelly and Walsh, *supra* note 60, at 314.

[74] The continuing independence of San Marino, geographically enclosed by the new Kingdom of Italy, was acceptable to the unification movement for political reasons. Formerly a vassal of the papal states, San Marino was treated by Italy so to say as a 'Baltic' state, its previously suppressed statehood now restored. The Convention of Good Neighbourship was agreed between Italy and San Marino in 1862. Crawford, *supra* note 11, at l, 736.

[75] D. Kertzer, *Prisoner of the Vatican: The Pope's Secret Plot to Capture Rome from the New Italian State* (2004), at 18.

[76] *Ibid.*, at 14.

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September 1870.[77] At Sedan, Napoleon III surrendered and became a prisoner of the Prussians, thus ending France's Second Empire, and a republic was declared in Paris. It may therefore be that Italy's obligations under the 1864 September Convention – obligations that had been the topic of recent re-negotiations – ended at that point.[78] In any event a plebiscite followed, by which the assimilation was confirmed.[79] Given that the residual papal state was assimilated into the Kingdom of Italy in this way, its statehood was *prima facie* extinguished at that point, even if not in 1849. Italy's Foreign Minister Visconti argued in October 1870 that the exercise of temporal power by the papacy had represented 'the last debris remaining of the institutions of the Middle Ages … Political sovereignty that does not rest on popular consent, can no longer exist'.[80]

It might be suggested that the papal entity was not extinguished but, rather, was in suspension from 1870 onwards. Where a pre-existing state is forcibly assimilated into another, the question will arise as to whether legitimate statehood has been suppressed, in which case the duty of international law is to seek the reinstatement of the victim state. Certainly, the papal authorities 'refused to recognise the loss of temporal power' after 1870.[81] However this 'Baltic' argument relies on the legitimacy of the state of affairs *ante bellum.* Since the mid-20th century, if not before, legitimacy would involve a plausible and continuing case for self-determination – for example, as operationalized by the results of elections (if other than uncontested). While it had been initially achieved by force of arms, the absorption of the papal territories into Italy in 1870 was accompanied by a plebiscite that endorsed this process. A (retrospective) self-determination argument supports the legitimacy of the Italian state's assimilationist position rather than the papal state's sovereignty position. From 1870 onwards, then, there would appear to have been no more substance to a claim to statehood (or some comparable status) for the residual papal entity than there was for the Kingdom of Naples or the Republic of Venice, likewise absorbed into the new political entity of a Kingdom of Italy.

As discussed later in this article, it has been argued that substantive international legal personality remained in operation for the territory-free Holy See (that is to say,

[77] Procacci, *supra* note 60, at 330. In the days after the defeat and disbanding of the papal army, Italian forces refrained from crossing the Tiber, thus leaving the river's right bank (the Leonine City, of which the Vatican was a section) under the Pope's control. Pius IX requested that Italian troops cross the river in order to police the area. Kertzer, *supra* note 75, at 60. The status of those Leonine City inhabitants in terms of the subsequent Rome-wide plebiscite of all males was also problematic. *Ibid.*, at 62. The Pope was offered, but declined, authority over the Leonine City. Martens, *supra* note 5, at 732.

[78] It has been suggested that the Italian seizing of Rome violated the September Convention. Crawford, *supra* note 11, at 221. If France retained benefits under the Convention, specifically the prohibition of Italian military incursion into Rome, then their first step would have been to protest at the Italian actions. Favre, foreign minister of France under the new republic, 'refused to publicly renounce' the September Convention, but he did not protest to Italy and, indeed, wrote privately: '[T]he temporal power has been a scourge to the world, it is prostrate, we will not resurrect it.' Kertzer, *supra* note 75, at 51.

[79] The validity of the plebiscite is of course difficult to ascertain. Kertzer, *supra* note 75, at 63.

[80] *Ibid.*, at 308.

[81] Cardinale, *supra* note 17, at 283. The papal consulate in Amsterdam remained open until 1876, and a named papal consul remained in New York until his death in 1895. *Ibid.*

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the papal mission and its institutions). Legal personality is said to have survived on the basis of a kind of religious legitimacy. It is certainly true that the evaporation of temporal sovereignty did not diminish the papacy's global aspirations. Defining himself as a 'prisoner of the Vatican', Pius IX continued to communicate with the faithful throughout Europe and beyond. The 'imprisonment' itself was largely self-imposed and rhetorical – the Pope and his officials were free to move around Rome and, for example, to convene a Vatican Council had they wished to do so – that is to say, in the exercise of their spiritual function. The Italian government would have much preferred it if they had done so.[82]

4 The Long Arm of Diplomacy, 1870–1929

Pope Pius IX and his entourage were left unmolested and at liberty within the Vatican buildings after the events of September 1870. However, the geographical territory over which the popes had recently ruled as quasi-dynastic monarchs, including the city and the environs of Rome, became part of Italy. Indeed, from 1871, Rome became the capital city of the kingdom. The immunities and the monetary compensation provided or offered to the Vatican under the Italian Parliament's Law of Guarantees appear to confirm that the territory was entirely at the disposal of Italy, at least according to the latter law.[83] There was no armistice treaty between a defeated prince and a victorious one. The Vatican 'City' had become merely municipal,[84] like Florence and Venice, but much smaller. As a former head of state, assuming this status to have been itself legitimate (questionable given the events of 1849), Pope Pius IX might have been considered entitled to certain continuing formal recognition in terms of the international law of his time. However, the Pope was no longer a prince. Receiving lay representatives of foreign states – where up until 1870 these foreign representatives had always been clerics – was thus a provocation to the Italian state and a challenge to its temporal sovereignty.[85]

Pius' successor Leo XIII, with no more territorial sovereignty or political authority than Pius, played an active role in international diplomacy and as an arbitrator in international disputes.[86] Temporal restrictions on the mission of the Roman Catholic Church were deplored.[87] The VHS played no role in the first Hague International Peace Conference of 1899. Pius X attempted to rely on international law when France 'abrogated a concordat by unilateral action'.[88] Benedict XV, who was the Pope during World

[82] Kertzer, *supra* note 75, at 68.

[83] Procacci, *supra* note 60, at 331.

[84] None of these acts by the assimilating state would have sufficed to 'cure' a 'Baltic' situation if such had existed.

[85] Cardinale, *supra* note 17, at 182.

[86] Kelly and Walsh, *supra* note 60, at 316. Papal diplomacy flourished between 1870 and 1929 'free from all material interests'. Cardinale, *supra* note 17, at 70.

[87] In 1891, Leo issued the Encyclical *Rerum Novarum* in which he addressed problems of the working classes, including their welfare needs, observing that the Roman Catholic Church 'will intervene with all the greater effect in proportion as her liberty of action is the more unfettered'. Encyclical *Rerum Novarum* (1983), at 38.

[88] Fenwick, *supra* note 23, at 372.

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War I, unsuccessfully proposed a peace settlement between the central powers and the Allies during the third year of that conflict.[89] Again, there was no role for the Pope or the VHS in the Versailles process or in the League of Nations.[90] The Kingdom of Italy had objected to the inclusion of the Holy See in the League of Nations because of the possibility of territorial claims being launched in that forum.[91]

However, overseas diplomatic representation at the Vatican was on the rise. In the reign of Benedict's predecessor Pius X, there was already significant diplomatic representation, and this increased under Benedict in the post-war years up to a total of 27 by 1922. For example, Britain was represented by a chargé d'affaires from 1915 onwards; Germany and Austria were also represented. Thus, when Pius XI became the Pope in 1922, the papacy was continuing to enjoy diplomatic relations with many overseas countries if not Italy, despite the loss of the territory that might previously have sustained the legitimacy of such intercourse. From an international law perspective, the question is what status if any was reflected or constituted by such liaisons.

The situation greeting the new Pope Pius XI in 1922, according to the argument presented here, was therefore one in which some of the trappings of (pre-1870) statehood remained but without any underlying legitimacy. In his first year in office, despite taking the conciliatory step of imparting his first apostolic blessing to the public in Italian Rome (instead of inside the Vatican buildings), Pius XI took a firm stand on sovereignty and its political dimensions. Pius XI insisted that the sovereignty of the Roman Catholic Church 'extends beyond the confines of nations and states' and must never be 'subject to any human authority or law whatsoever, even though that law be one which proclaims certain guarantees for the liberty of the Roman Pontiff'.[92] This statement of 1922 essentially re-affirmed the position of Pius IX in rejecting the guarantees offered by the Kingdom of Italy in 1870. An indication was given that the papacy might be moving towards acceptance of the political reality of a unified Italy, for Pius states that Italy is 'our own dear native land' and that it does not have 'anything to fear from the Holy See'. Pius XI's re-evaluation of the Vatican's position in 1929 is discussed below.

As well as maintaining and enhancing the diplomatic effort, Pius XI entered into express agreements with 'some twenty states'.[93] This raises the possibility that such purportedly interstate relations might themselves constitute statehood for the VHS, irrespective of the impediments outlined earlier. After all, the capacity to enter into legal relations with pre-existing states (by means of such conventional instruments as treaties) is one of the 'traditional' (Montevideo) earmarks of an independent and

[89] Kelly and Walsh, *supra* note 60, at 320; in the event of a German/Austrian victory (and, hence, a defeat for Italy), Benedict XV was anticipating the return of the papal states. In 1887, as secretary to papal secretary of state Rampolla, Della Chiesa (as Benedict then was) was responsible for promulgating Pope Leo XIII's intransigent rejection of any reconciliation with the Italian government that fell short of the full restoration of the papal territories. Rampolla's view was that 'a European war, and Italy's defeat, was the only way the Holy See would ever get Rome back'. Kertzer, *supra* note 75, at 257.

[90] Araujo, *supra* note 9, at 325.

[91] Cardinale, *supra* note 17, at 230; Kunz, *supra* note 24, at 312.

[92] *Ubi Arcano Dei Consilio* (1922), cited in Martens, *supra* note 5, at 798.

[93] Kelly and Walsh, *supra* note 60, at 322.

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sovereign entity. However, the circularity of 'capacity' as criterion is vicious. There are various kinds of institutions with which states may enter into legal agreements, without the existence of such agreements going to the status of such institutions as states or state-like entities. The United Nations (UN), as such, the International Committee of the Red Cross, international corporations or charitable organizations, and so on may all be legitimate partners (with states) in such agreements.[94]

Generally speaking, in contemporary commentaries recognition (by pre-existing states) is not considered a sufficient basis for statehood because of the circular form of argument this would entail and the absurdities that would arise if reliance were placed on this in either a logical or a causal sense.[95] Similarly, there is no reason to think that an entity that is not otherwise considered legitimate as an independent entity (for example, because of a self-determination argument[96]) could attain legitimacy merely on the basis of a set of bilateral arrangements. Of course, this is not to deny that certain kinds of international agreements might suffice to establish independent statehood for a new entity. The principality of Albania (1913–1919) was thus established.[97] Directly involving Italy, free city status was established for Fiume (Rijeka) in modern-day Croatia in 1919 and for Trieste in 1947.[98] None of these examples, all of which were short-lived, seems to assist an argument for international legal status in the VHS. Nor do they offer support to the claim that an agreement between the Kingdom of Italy and the incumbent Pope might be capable of giving birth to, or bestowing legitimacy upon, an independent entity within the environs of the city of Rome. Yet this is what the agreements of 1929 are purported to do. The argument of this article, therefore, is that in 1929, if there was an international legal person called the Holy See or any other facet of the VHS, the status of that person was paper thin.

5 The Lateran Pacts of 1929

One specific two-party agreement, which is more precisely a set of agreements, therefore needs to be examined more closely.[99] In 1929, agreements were entered into after extended negotiations between Benito Mussolini and the papacy,[100] under which a

[94] Concordats are in any case a somewhat special matter. According to Oppenheim, '[t]he so-called Concordats – that is, treaties between the Holy See and States with regard to matters of the Roman Catholic Church – are not international treaties, although analogous treatment is usually given to them. Even … when the Pope was the head of a State, such Concordats were not concluded with the Papal States, but with the Holy See and the Pope as representatives of the Roman Catholic Church'. Oppenheim, *supra* note 22, at 161.

[95] Crawford, *supra* note 11, at 21.

[96] Duursma, *supra* note 12, at 418; the reference by Araujo, *supra* note 9, at 329, to 'self-determination' seems gratuitous.

[97] Crawford, *supra* note 11, at 447.

[98] *Ibid.*

[99] Duursma, *supra* note 12, at 389. Conciliation Treaty between the Holy See and Italy (Lateran Pacts) 1929, English version available at www.vaticanstate.va/content/dam/vaticanstate/documenti/leggi-e-decreti/Normative-Penali-e-Amministrative/LateranTreaty.pdf (last visited November 2015).

[100] King Victor Emmanuel III was the head of state, on whose behalf for Italy the pacts were signed by Mussolini. Bathon, *supra* note 9, at 603. The Pope's representative was Cardinal Secretary of State Pietro Gasparri.

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rapprochement between the Italian state (the Kingdom of Italy) and the Holy See was articulated. After nearly sixty years of attempted independence, during which time popes refused to acknowledge the legitimacy of the united Italy that surrounded them, powers and guarantees were offered that Pius XI accepted in return for assurances over the temporal aspirations of the religious organization of which he was leader. Italy agreed to treat the VHS, with its newly defined territorial basis as Vatican City, as possessing status independent of Italy. In terms of the interests of the parties, the Lateran Pacts were a brilliant success. The Roman Catholic Church was converted from a potential fifth column within Mussolini's Italy to an integral component of the state.[101] At the same time, the church resumed its control over spiritual practice, personnel and property throughout Italy, consolidated its immunities from undesirable state interference and secured a territorial base, complete with sustainable infrastructure, from which to continue its mission beyond, as well as within, the shores of Italy. The papacy achieved all this without taking on the responsibilities for a civil population.

Pope Pius on behalf of the VHS recognized that Rome was part of the Kingdom of Italy. The VHS would limit its global aspirations to the spiritual realm: the Holy See would thenceforth 'remain extraneous to all temporal disputes between states'.[102] Reciprocally, Mussolini declared Catholicism to be the state religion of Italy, an extremely significant concession on the Fascist regime's part. The assurances over the sanctity of the Vatican premises as such were in substance the same as those extended in 1870. The Holy See was now granted 'full ownership, exclusive and absolute dominion and sovereign jurisdiction' over the Vatican City.[103] Several aspects were new in 1929, in addition to the new political landscape of fascist Italy. The extent of the control now granted to the Roman Catholic Church over church issues, including personnel and property (including buildings) throughout Italy, was a great coup. In the Concordat that formed part of the Lateran Pacts, the church's influence over family law and religious education in Italy was affirmed.

Commensurate with this recognition by the Kingdom of Italy of the independent authority of the Roman Catholic Church within Italy was the declaration by the Italian state of an internationally independent status for the VHS. 'Indisputable sovereignty in international matters' was guaranteed to the Holy See. While it was a significant new step in the context of Italy, this guarantee was consistent with the approach of the Law of Guarantees, at the time of the initial annexation, in its commitment not to interfere with or trammel the worldwide religious leadership and communication of the papacy, sending representatives to, and receiving representatives from, foreign sovereigns.

What must now be considered is the status of the Lateran declaration regarding Vatican City as an independent entity. It is certainly the case that a new state can be

[101] Under Article XX of the Concordat, bishops were to be required to swear their respect to the king and to the government of Italy.

[102] Article 24; see Kunz, *supra* note 24, at 313. It was implied that the Kingdom of Italy need not feel threatened by any future papal involvement in an anti-Italy alliance. De la Brière, *supra* note 28, at 157.

[103] Robertson, *supra* note 1, at 72.

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set up by a treaty.[104] It may also be the case that there is 'nothing illogical about a State being a party to the treaty that constitutes or reconstitutes it'.[105] However, this does not seem to cover the case where the party in question consists of the head and senior officials of a religious order who have been allowed to retain occupancy of their headquarters while refusing to recognize the legitimacy either of the national state that surrounds them or of the plebiscite that confirmed the termination of the former political arrangements.[106]

The purported independent entity – Vatican City under the sovereignty of the Holy See – was endowed or constituted by the pre-existing state (Italy) on whose territory the purported state was defined. Comparison with the Bantustans of apartheid South Africa is therefore instructive. In both cases, a non-democratic national regime defined a small portion(s) of their state's territory as having independent status. The Rome arrangement emerged from the dialogue of two strong leaders who both saw benefit – both internationally and locally – in collaboration. Similarly, the state-recognized political leaders of the Bantustans saw benefit in their own form of collaboration, just as the leaders of apartheid South Africa did. The state of South Africa exercised control over the Bantustans notwithstanding some degree of autonomy over internal administration, which was not inconsistent with their 'puppet' status.[107] Claims to self-determination were also held to be bogus. However, existing states may enter into all sorts of arrangements with their neighbours without sacrificing statehood, including extreme dependence in practical, political, or military senses, and existing states manifest many degrees of adequacy of self-determination.[108] Other scenarios might be entertained.[109]

The political decisions of the Italian government would not suffice to generate or to provide evidence for international legal status for the VHS. Given the arguments earlier in this article, the agreements entered into between Mussolini and the Pope were agreements within the Italian national polity. Definitions agreed upon by the parties

[104] States and internationalized territories 'are quite often created pursuant to treaty provisions'. Crawford, *supra* note 11, at 105. Examples would include Cyprus, set up by multilateral treaty in 1960. *Ibid.*, at 28. Libya was established as a state by the UN.

[105] *Ibid.*, at 106. Thus, Austria was a party to the (multilateral) State Treaty for the Re-establishment of an Independent and Democratic Austria (Austria, France, Soviet, United Kingdom, USA) 1955, 217 UNTS 223, which re-established Austria's independence, along with the United Kingdom, France, the USA, and the Soviet Union, and Cyprus was party, with Greece, Turkey and the United Kingdom, to the (multilateral) 1960 treaty.

[106] A bilateral agreement between part of a state and the whole state could not be considered an instrument generating duties and obligations at the international level.

[107] 'Transkei' had 'a relatively coherent territory' but was economically and politically dependent on South Africa. British courts dealt with 'Ciskei' as a subordinate local government of South Africa. Crawford, *supra* note 11, at 344.

[108] The factors weighing in favour of VHS independence from Italy are political independence as an actor on the world stage; a degree, difficult to estimate, of financial independence; and increasing legal independence under religious control. Cismas, *supra* note 2, at 173; see also Bathon, *supra* note 9, at 617; Duursma, *supra* note 12, at 415.

[109] Foreign consulates and embassies are routinely granted special protective status by the host state. This practice is governed by international custom and convention; it does not represent a mere act of courtesy. Analogy with the VHS seems strained. See also Duursma, *supra* note 12, at 389.

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to those agreements said nothing about international status under international law. The arrangements were merely municipal. Municipal laws cannot overrule international regulations in their proper sphere, and although municipal acts and conduct may contribute to the development of state practice at the international level, they cannot in themselves constitute new international entities.[110] Even major devolutions of political authority involving, for example, the creation of representative regional parliamentary bodies (such as in Scotland or Chechnya) do not give rise to alterations in international status for Scotland, Chechnya, the United Kingdom or the Russian Federation. Short of the agreed parting of the ways represented by the splitting of Czechoslovakia into two entities, any redefinition of territory by the state is of only municipal significance.[111]

The Kingdom of Italy's defining of Vatican City as being independent of itself was expressly accompanied by the de facto retention of Italian nationality for the whole population of Italy, including the whole population of Rome.[112] There was no division of population. Indeed, the Roman Catholic Church's leadership would hardly have wanted to take up again (as before 1870) the onerous and risky business of looking after the welfare of a population, especially given the changes in complexity of society since that time.[113] In any case, the Lateran Pacts were of highly circumscribed status, for '[n]o system of government or treaty can restrict or control the spiritual ministry which belongs to the papacy … by its own right, by divine disposition … which it has exercised in international life uninterruptedly for nearly two thousand years'.[114]

The municipal (Italian) nature of the Lateran arrangements is illustrated by the status of Italian law within Vatican City, available as a default, so long as it is not incompatible with Vatican regulations. This is in addition to those Italian laws expressly provided under the Vatican Constitution, such as laws on motorcars and contagious diseases as well as the Commercial Code. Overall, there seems to be no reason to place any international legal weight on the Lateran Pacts, and no significant international legal status for the VHS (for example, statehood or something approaching it) can be derived from it. The Pope should not be treated as a head of state, thereby subject to the same duties and enjoying the same privileges, rights, or immunities as a head of state on the basis of the treaty. By the same logic, Vatican obligations indicated in the treaty – such as the papal declaration of non-involvement in matters

[110] In the 1990s, the government of France attempted unsuccessfully to define a part of its territory (inside Paris-Orly airport) as 'international' such that it did not in that place recognize an obligation to protect certain persons seeking asylum. J. Hathaway, *The Rights of Refugees under International Law* (2005), at 321.

[111] The parallel with emerging statehood for a territory previously administered by the UN appears inexact. Crawford, *supra* note 11, at 231; Robertson, *supra* note 1, at 67.

[112] De la Brière, *supra* note 28, at 128. It may also be noted that '[t]he Italians gave up on internationalism altogether under Mussolini'. Mégret, 'The Rise and Fall of "International Man"', in P. Singh and B. Mayer (eds), *Critical International Law* (2014) 223, at 236.

[113] As in 1870, see note 77 in this article. Vatican City was not so much a minimal territory for the needs of the VHS as a maximum territory that it wished to handle.

[114] Cardinale, *supra* note 17, at 127.

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political – cannot currently be relied on against the VHS at an international level as if entered into by a state.

6 Conclusions: A Stark Choice?

In the over 85 years since the signing of the Lateran Pacts, the VHS has been involved in numerous international activities and forums.[115] In 1964, the VHS (under the term Holy See) sought and was granted permanent observer status at the UN General Assembly (UNGA), which was apparently a unilateral decision of Secretary-General U Thant.[116] In the first papal address to the UNGA in 1965, Pope Paul VI made reference to the Holy See's position as an 'expert in humanity' as a basis for its UN role.[117] In 2004, the UNGA resolved that the Holy See as an observer state should be entitled to participate in debates and to have its communications included as official in UNGA documents and that the seating provided in the UNGA Hall (six seats) should be so arranged that the Holy See immediately follows member state representatives and thus heads the observer representatives.[118]

This article has referred selectively to recent and contemporary debate over the international legal personality of the entity variously referred to as the Holy See or the Vatican City. In terms of chronology, the focus has been on the period from the fall of the papal states to the Lateran Pacts. Much has happened since, but the logic of the above analysis is that the international status going to something like statehood of what is here inclusively called the VHS has not changed since 1870.

At this point, the important contribution of Ioana Cismas needs to be further discussed. For Cismas, there exists a 'construct', comprising the peculiar combination of Holy See and Vatican City, that thereby achieved a status approaching or resembling statehood in 1929 and retains that (*sui generis*) status in the present day. The single international personality is 'anchored in two sources: international custom recognizing the religious legitimacy of the Holy See, and the resemblance of statehood conferred upon the construct by the Lateran Treaty'.[119] To the extent that the two components can be separated, neither achieves even the semblance of statehood, although the Holy See retains its historic international legal personality.[120]

Cismas and the present author are in agreement in rejecting the view, attributed by Cismas to the Holy See as the 'dual personality scenario', according to which both a Vatican City State and the Holy See as such are separate, although very closely

[115] On events since 1929 reference should be made to the comprehensive review and analysis recently presented in Cismas, *supra* note 2, including domestic court proceedings worldwide.

[116] Robertson, *supra* note 1, at 98; previous correspondence in 1957 with UN Secretary-General Hammarskjold had indicated that the UN status of Vatican City derived from the status of the Roman Catholic Church. Bathon, *supra* note 9, at 627.

[117] Araujo, *supra* note 9, at 315.

[118] GA Res 58/314, 16 July 2004. See Martens, *supra* note 5, at 758.

[119] Cismas, 'Introductory Note to Committee on the Rights of the Child Concluding Observations on the Second Periodic Report of the Holy See', 53 *International Legal Materials* (2014) 580

[120] Cismas, *supra* note 2, at 184.

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interlinked, international actors.[121] Further, and although Cismas places some weight on cumulative state practice since 1929 in consolidating a status, Cismas and the present author are in agreement that no event or practice since 1929 has materially altered the central issues. The present author, however, demurs from Cismas' claims concerning a construct with unitary personality formed by the combination of Vatican City and Holy See. As previously noted, Cismas argues that sufficient evidence exists for a status resembling statehood but that the rights thus attributed have not been accompanied by the engagement with state-like responsibilities.[122] The practicalities of this point (that it is important and urgent for these obligations to be engaged) need to be considered for it may be somewhat optimistic. It might be said that, as demonstrated by the recent Vatican response to issues of children's rights,[123] there is no reason to believe that anything other than slow, selective and ultimately unreliable acceptance of international responsibilities is to be anticipated. Every new incumbent of the papacy can change policy. Somewhat more provocative is the proposal that a 21st-century recognition of state-like legitimacy for a VHS construct is a kind of new Law of Guarantees proffered by the international community in the hope that international responsibilities will finally be engaged.

The VHS is the institutional embodiment of one of many alternative, faith-based international movements, ranging from sects, to the great world religions, to newer faiths. Their international legal status should be the same. There are various ways in which the Roman Catholic Church and its officers should be subject to international law as well as to the laws of various municipalities around the world. Individual Catholics have been the subject of discrimination and persecution in many places, and many leaders of Catholic communities have been courageous advocates of individual and collective rights. However, the many benevolent functions of the Roman Catholic Church worldwide – of the papacy and of its officers – would all survive the extinction of state-like international legal status for the VHS.

How might this all look to the leadership of that extraordinary institution? Cismas and the present author might be seen to represent between them two alternative analyses, and, hence, two alternative international futures, for what is in this article called the VHS complex and is called by Cismas '[t]he Holy See-Vatican State-Like Construct'. As alternative analyses, the arguments of Cismas and the present author constitute a stark choice for the papacy in the 21st century. Either the responsibilities that go with statehood must be fully embraced or the immunities that go with statehood must be fully relinquished. The analysis presented above supports the second of these options. What is needed now, in other words, is an appropriately Franciscan gesture of humility.

[121] *Ibid.*, at 185.
[122] *Ibid.*, at 237.
[123] Cismas, *supra* note 119.

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