

# **The Evolution of Vatican Diplomacy**

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During the European Middle Ages, the Holy See was the spiritual leader of the *communitas Christiana* of Europe. And our modern international community, as we know it today, developed historically by way of decentralization of this medieval Christian community. Indeed, it is this historical development which explains the unique position in international law of the Holy See as the Supreme Head of the Catholic Church.

Diplomacy is as old as recorded history and almost certainly even predates it. Because of the economic and political world dominance of Europe and European-heritage countries for the past several centuries, a great deal of modern diplomatic practice can be traced from its origins in the Greek city-states through its evolution in the diplomatic practices of Rome, Byzantium, the Italian city-states, France, and nineteenth-century Europe.

Rome was important for organizational improvements on Greek practice. Ambassadorial appointments, instructions, and status became more formalized. Diplomatic immunity became more widely recognized, at least in theory. The Romans, with their penchant for laws, also stressed the sanctity of contracts, thus elevating the status of treaties.

The diplomacy of the Italian city-states began in the fifteenth century. The names Niccolo Machiavelli of Florence and Cosimo de' Medici, duke of Florence, are synonymous with scheming conduct. Machiavelli counseled in *The Prince* (1532) that it was best to be as powerful as a lion and as sly as a fox and summed up his estimation of human nature with the observation that one "must start with assuming that all men are bad and ever ready to display their vicious nature whenever they may find occasion for it." The Italian city-states also made positive contributions to the evolution of diplomacy. They established the first permanent diplomatic missions. Treaty making and protocol were improved. The Italians also introduced summit meetings as a diplomatic practice.

The year 1492 is an important date in the evolution of diplomatic method. In that year Lorenzo de Medici died and a Borgia became Pope. When

international law began to grow among the states of Christendom, the Pope was the monarch of one of those states - namely, the so-called Papal States. Until then, the Holy Father had been revered as the spiritual mediator among nations, as the natural chairman of some divinely appointed arbitral tribunal.<sup>1</sup> The canonical system was a wonderful system. The whole of western Europe was subject to the jurisdiction of one tribunal of last resort, the Roman curia. Appeals to it were encouraged by all manner of means, appeals at almost every stage of almost every proceeding. But the Pope was far more than the president of a court of appeal. Very frequently the Christian courts which did justice in nations were courts which were acting under his supervision and carrying out his written instructions.<sup>2</sup> Even as the Pope was recognized as ruling the conscience of all mankind, so also was the Holy Roman Emperor regarded as representing, at least in theory, the old conception of universal sovereignty. But once the Pope began himself to indulge in power politics, and once the Emperor ceased to possess undisputed authority, the field was open for feverish competition between the small Italian States. Even the ancient principle of a United Christendom arrayed against the infidel succumbed to the growing appetite for riches.

The Vatican that for several centuries had constituted the Papal temporal domain came to an end in 1870; and thereafter the Pope was the sovereign of the Papal State, a legal person of international law. Between 1870 and 1929, by Italian conquest and subjugation, there was no Papal State; its territory was annexed to the new Kingdom of Italy, hence no international personality. But the Holy See, by the practice of States, remained as always a subject of international law.<sup>3</sup> Even after 1870, the Holy See continued to regard itself as a

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<sup>1</sup> The word 'method' includes, not only the actual machinery for negotiation, but also the general theory, in accordance with which the machinery was used. Harold Nicolson, *The Evolution of Diplomatic Method*, The Chichele Lectures 1953, Westport, Connecticut: Greenwood Press, 1954, p.30.

<sup>2</sup> Pollock & Maitland, *The History of English Law*, reissued by S.F.C. Milsom, Cambridge: Cambridge Univ. Press, 1968, Vol. 1, pp.114-15.

<sup>3</sup> Francesco Capotorti, "Cours General de Droit International Public", *Hague Recueil des Cours*, Vol.248 (1994-IV), pp.57-59; Gordon Ireland, "The state of the City of the Vatican", *American Journal of International Law*, Vol.27 (1933), pp.271-89; Herbert Wright, "The Status of the Vatican City", *American Journal of International Law*, Vol.38 (1944), pp.452-57; Hugh McKinnon Wood, "Legal Relations between Individual and a World Organization of States", *Transactions of the Grotius Society of International Law*, Vol.30 (1944), pp.155-56;

separate entity in international law, and it was recognized as such by numerous states with which it retained normal diplomatic relations as well as active and passive legations.

Since the 1929 Lateran Treaty signed by Benito Mussolini's Italy and Pope Pius XI (1922-39), the Pope once again exercised the same unlimited governance over the sovereign of the State of the City of the Vatican (State della Citta de Vaticano) as over the Catholic Church. The Lateran Treaty ended sixty years of the Pope's captivity since the suppression of the Papal States in 1870. The creation of the sovereign of the Vatican City State is in both doctrine and practice of international law. There is not the slightest doubt that the Papacy is a subject of international law in both the State of the Vatican City and the Catholic Church. The Pope, with or without a State, is entitled to conclude concordats<sup>4</sup> in his capacity as chief of the central government of the internationally organized Catholic Church. The Vatican City has the attributes of a State, namely, to ensure the political independence of the central government of the Catholic Church. The Catholic Church, as an international and supra-national organization, is the basic element in the Pope's international legal position. The Holy See is embodying the central government of the Catholic Church.<sup>5</sup>

The Vatican State was created in 1929. It covered 44 hectares on the right bank of the Tiber in central Rome. Its population of perhaps 1,000 citizens<sup>6</sup> was to be ruled by the absolute authority of the Pope.

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Horace F. Gumbo, "The Holy See and International Law", *International Law Quarterly*, Vo1.2 (1948), pp.603-19.

<sup>4</sup> A concordat is an international agreement *sui generis* between the Pope and a State concerning the legal position of the Catholic Church in that State. Sidney Z. Ehler, "The Recent concordat," *Hague Recueil des Cours*, Vo1.104 (1961-III), pp.5-63.

<sup>5</sup> Sir Robert Jennings and Sir Arthur Watts, eds., *Oppenheim's International Law*, 9th ed., England: Longman, 1992, pp.325-29. Norman Davies, *Europe: A History*, New York: Harper Perennial, 1998, pp.944, 1089.

<sup>6</sup> The acquisition of Vatican citizenship is depended on stable residence inside Vatican City. There is no citizenship acquired by birth, but merely that which takes into account the residential factor. Cardinals, if resident in Rome, are Vatican citizens. Once residence ends, citizenship expires. A bearer of a Vatican passport enjoys the same treatment as any citizen of any State.

## I. Contemporary Evolution

Diplomacy, the art of negotiation, is based on the assumption that all States recognize the force of International law. International law gave rise to rights and obligations. When a State was aggrieved by the act of another State, the normal course was to submit a complaint through the diplomatic channel, asserting the right of the injured State and demanding reparation. This course might result in acknowledgement of the right and reparation; but in most instances, the claim was answered by questioning the role of law or the facts on which it was founded. This led to an impasse, incapable of legal solution and yielding only to diplomatic pressures. International justice, however, involves the objective decision of disputes between States by independent tribunals.<sup>7</sup>

Pope Paul saw Vatican diplomacy as a way of representing the claims of conscience and morality in a world where power politics tend to prevail.<sup>8</sup> The issue of Vatican diplomacy, its definition, purposes, justification and relationship to the Roman Catholic Church, is fairly complex. Historically, the origins of such diplomacy may be seen in the emissaries sent by different Popes to the court of the emperor of Constantinople, and then later to other European sovereigns. By the 11th century, these Papal envoys were called "Nuncios,"<sup>9</sup> i.e., "messengers". In the 16th century, the word "Nuncio" came to refer exclusively to a Papal representative with permanent diplomatic status.<sup>10</sup> The 1815 Protocol of Vienna puts Papal nuncios into the rank of ambassadors under international law. Until the Papal States became a part of a united Italy, the role

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<sup>7</sup> John E. Read, *The Rule of Law on the International Plane*, The W.M. Martin Lectures, 1960, Canada: Clarke, Irwin and Co., 1961, pp.10-11.

<sup>8</sup> Hebblethwaite, p.30.

<sup>9</sup> Addressing his envoys to the Far East gathered at Manila in 1970, Pope Paul said "The nuncio's role is also evolving. Until now the nuncio was little more than the Pope's representative to governments and churches. Above all his activity was of an hierarchical and administrative nature; in a certain sense he reminded a stranger to the local church." Peter Hebblethwaite, *The Year of Three Popes*, Glasgow: Collins, 1978, p.32.

<sup>10</sup> Pierre D' Autermont, *Le Saint-Siege en Droit International* (The Holy See in International Law), Paris: Jonve & Cie, Editeurs, 1910, pp.5-7; Msgr. Igino Cardinale, *Le Saint-Siege et la Diplomatie* (The Holy See and Diplomacy): *Apercu Historique, Juridique et Pratique de la Diplomatie Pontificale* (The Holy See and Diplomacy: An Historical, Juridical and Practical Survey of Pontifical Diplomacy), Paris: Desclee & Cie, Editeurs, 1962, p.93. John Francis Morley, *The Vatican Diplomacy and the Jews During the Holocaust, 1939-1943*, unpublished Ph.D. dissertation, New York University, 1979, pp.16-18.

of the Nuncio resembled quite closely that of any ambassador representing his country's interests in another nation. That the Papal nuncio abroad, representing both the Holy See and the State of the Vatican City, might also have had ecclesiastical or religious concerns, did not visibly alter this role.

Among the earlier exponents of the practice of diplomacy was the Papacy. Pope Pius II (Aeneas Silvius Piccolomini) had himself been a Renaissance envoy to numerous courts including that of King James I of Scotland, and the Vatican early established a network of efficient Papal nuncios and legates who kept the Holy See accurately informed of political and religious developments throughout Christendom and beyond. The task was because the Catholic church frequently finds itself pulled in different directions - for instance in Latin America - by the conflicting claims of traditional supporters of the Establishment on the one hand and of Liberation Theology on the other. And after the Second World War, the Vatican was criticized for not making more use of the information it had about the fate of the Jews in Nazi-occupied Europe. As well as reporting diplomatic developments, Papal nuncios also often act as talent spotters for the Vatican in the countries to which they are accredited. Nor was Pius II unique among Popes in being a diplomat. During 1921-25, Pope Pius XII (then Monsignor Eugenio Parcelli) had been the Papal Nuncio and the titular head of Hitler's Munich consular corps, and through his intimate knowledge of international politics, he was one of the first to recognize that the future of Europe depended largely upon what happened in Germany.<sup>11</sup> Pope John XXIII had also been nuncio in Paris before ascending the throne of St. Peter. For the first seventeen hundred years of the Papacy, the Pope was Rome, and Rome was the Pope. No Pope ever traveled outside Rome. Indeed the Pope never went beyond that Christian heartland.

During the process of Italian unification (1860-1870), the Papal territories were forcibly dissolved by Victor Emanuel II, the King of Italy in 1870. In protest the Popes refused to leave the Vatican and referred to themselves as the "Prisoners of Rome". This so-called Roman Question proposed by the Law of Guarantees<sup>12</sup> was settled by the Lateran Treaty. In this treaty Italy recognized

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<sup>11</sup> Robert Murphy, *Diplomat Among Warriors*, New York: Doubleday & Company, Inc., 1964, p.19.

<sup>12</sup> The Law of Guarantees was a municipal law of the Italian state, not an international act. It did

that the Holy See, the supreme directive organ of the Roman Catholic Church, possessed sovereignty in its international affairs. This treaty also assured absolute liberty and independence of the new State of the Vatican City, and defined its limits and essential characteristics.<sup>13</sup>

During the intervening six decades many nations continued their diplomatic relations with the Papacy, even though it was totally deprived of any territorial jurisdiction. For example, in 1890, there were eighteen states accredited to the Papal court; in 1914, fourteen, and in 1921, twenty-four.<sup>14</sup> After War World I more states established diplomatic relations with the Vatican than prior to 1914. In 1930 about thirty states were diplomatically represented at the Vatican, and the Vatican in about forty states. At the beginning of Pope Pius XII's reign in March 1939, thirty-eight states maintained diplomatic missions of some sort at the Vatican. Thirteen of these were at the ambassadorial level while most of the others were at the ministerial level. Correspondingly, there were Papal representatives in thirty-eight states. In several cases, the diplomatic relations were not entirely mutual and, thus, the lists of states sending and receiving representatives do not completely correspond. Twenty-three other envoys without diplomatic status were assigned by the Vatican to various states.<sup>15</sup>

The attitude of the Vatican during World War I in this connection was that "the Pope and the Holy See has not taken and will not take sides."<sup>16</sup> Under

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not constitute the fulfillment of an obligation toward the Holy See, which stubbornly refused to recognize it. It rather constituted the means chosen by Italy to fulfill the promise made to other states in the circular of October 18, 1870. The law shut the Pope off from all interference in the internal affairs of Italy, yet at the same time it respected his dignity and protected his liberty in the performance of his religious mission. Angelo Piero Sereni, *The Italian Concept of International Law*, New York, Columbia Univ. Press, 1943, p.189.

<sup>13</sup> *Lo Stato della Città del Vaticano* (State of the Vatican City) is the official name of the independent state created by a concordat between the Holy See and Italy, Rome, 11 February 1929; *Acta Apostolicae Sedis*, 7 June 1929; *British and Foreign State Papers*, Vol. CXXX (1929 - Part I), pp.810-14; Hygins Eugene Cardinale, *The Holy See and the International Order*, MacMillan of Canada: Maclean-Hunter Press, 1976, pp.100-01.

<sup>14</sup> Robert Graham, *The Vatican Diplomacy: A Study of Church and State on the International Plane*, Princeton: Princeton University Press, 1959, p. 25.

<sup>15</sup> *Annuario Pontificio per l'Anno 1940* (Pontifical Yearbook for the Year 1940), Citta del Vaticano: Tipografia Poliglotta Vaticana, 1940, pp.766-75; see also Appendix A, 484.

<sup>16</sup> *Catholic Times*, 26 February 1916, cited from "The Vatican and International Law", *International Law Notes*, Vol.1 (1916), p.45.

Article 24 of the 1929 Lateran Treaty, "the Vatican City will be always and in every case be considered as neutral and inviolable territory." Although this is merely an agreement between the Holy See and Italy, all the nations of the world received notice thereby of the perpetual "neutralization" of the State of the Vatican City. Thus the inviolability of the neutralized Vatican City itself would be guaranteed under the customary rule of international law, confirmed by the 1907 Hague Convention respecting the Rights and Duties of Neutral Powers and Persons in War on Land.<sup>17</sup> During World War II, the Protestant Occupying Powers of Italy -- the United Kingdom and the United States -- were bound under international law to observe the neutrality of the Vatican City State and to grant free correspondence between the Holy See and all States, including those with which the Occupying Powers were at war.

The diplomatic relations of the Holy See are primarily centered on its international status as seat of the Church rather than on its status as a sovereign entity. Its relations as a sovereign state continue to be governed by the Lateran Treaty and related agreements with the Italian government. In 1973, there were 57 ambassadors accredited to the Vatican, 2 ministers plenipotentiary and 10 lesser representatives.<sup>18</sup> The United States is represented by a personal representative from the President.<sup>19</sup> In 1993, diplomatic relations between the Holy See and Israel were established. They never tried to create greater understanding between the Catholic and Jewish communities in Spain.<sup>20</sup>

The historic breach with Protestant Christendom was partly overcome in 1982. Early in that year, Britain and the Vatican moved toward resolution of a centuries-old dispute by establishing full diplomatic relations for the first time since Henry VIII broke with the Roman Church in 1532. Seven months later, on August 2, 1982, the Vatican announced that the Holy See and the Lutheran countries of Denmark, Norway and Sweden (which had also broken with Rome

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<sup>17</sup> Herbert Wright, "The Status of the Vatican City", *American Journal of International Law*, Vol.38 (1944), pp.452-57.

<sup>18</sup> *Annuario Pontificio* 1973, pp.1083-101.

<sup>19</sup> President Nixon of the United States of America maintained relations with the Holy See on a personal basis, through a roving ambassador, whom he dispatched to the Vatican from time to time for the purpose of discussing problems of joint concern in the pursuit of peace and human welfare throughout the world.

<sup>20</sup> *Yearbook of the United Nations* 1993, Vol. 47 (Dordrecht: Martinus Nijhoff, 1994), p. 860.

during the 16th century) would exchange ambassadors in an effort "to promote and develop mutual friendly relations." Subsequently, on January 10, 1984, formal relations at the ambassadorial level were re-established, after a lapse of 117 years, with the United States. Worldwide, such linkages now total well over 100 with unofficial representation by apostolic delegates in a number of other countries.

Professor Josef L. Kunz has said that the Holy See is not eligible to be a member of the United Nations because of its exiguity.<sup>21</sup> But my opinion is that international law has so far not developed any requirements concerning the minimum size of the territory of a State. The Holy See was precluded from becoming a member of the League of Nations by Article 24 of the Lateran Treaty in which the Pope renounced participation in international political organizations. In fact, the Holy See, concerned about its own foreign policy, has chosen not to become a full member of the United Nations. It claims that membership in the United Nations is contradictory to its policies and status. Nonetheless, the Holy See has maintained a permanent observer mission at the United Nations Headquarters in New York since 1964, and at some of its associated agencies. The Vatican's non-membership in the United Nations does not imply that it opposes the purposes and principles of the UN Charter. The Holy See, which does participate in many activities of the United Nations, is also a member of the Universal Postal Union (UPU), the International Telecommunication Union (ITU), the International Atomic Energy Agency (IAEA), Food and Agriculture Organization (FAO), United Nations Educational Scientific Cultural Organization (UNESCO), the United Nations Industrial Development (UNID) and (WIOP) among others.

While in principle the Holy See maintains a neutral posture in secular matters, Popes have taken an active interest in international affairs. A manifestation of this orientation was the sending of representatives to the Conferences on Security and Cooperation in Europe held at Helsinki in 1975,<sup>22</sup>

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<sup>21</sup> Josef L. Kunz, "The Status of the Holy See in International Law", *American Journal of International Law*, Vol.46 (1952), pp.308-14.

<sup>22</sup> On two occasions the proposal to grant the floor to a representative of a non-member State or to invite non-member States to participate in the discussions in the plenary meetings was rejected by vote. E. Suy, "The Status of Observers in International Organizations", *Hague Recueil des cours*, Vol.160 (1978-II), p.132.



Belgrade in 1977-78, and Madrid in 1980-83. A somewhat more specific issue was addressed by Pope Paul VI in April 1974, when he announced the dropping of earlier demands for the internationalization of Jerusalem and called upon the United Nations to develop a new formula that would include the Vatican's right to be consulted in any settlement between Israel and the Arab States regarding the status of that city. In an equally specific vein, Pope John Paul II departed from tradition in strongly endorsing the Egyptian-Israeli peace treaty immediately prior to its signing at Washington on March 26, 1979.<sup>23</sup>

However much one may legitimately stress the continuity of Vatican diplomatic activity, it is undeniable that when Cardinal Montini became Pope Paul VI in 1963, he had to face a radically changed situation. His predecessor, Pope John XXIII, had initiated a cautious dialogue with communist leaders on which Pope Paul was to build. The other major novelty was the ending of the colonial period and the emergence of new and youthful nations, especially in Africa and the Far East. If the opening to the communist world was reflected in Pope Paul's first encyclical, *Ecclesiam Suam*, another encyclical, *Populorum Progressio*, placed the Church firmly on the side of development and what was becoming known as the "third world."

1978 was a year of outstanding importance for the Roman Catholic Church. Pope Paul VI died in July 1978 after 15 years as pope, leaving a troubled inheritance. Would the new pope be able to answer the hopes of the Church and the world? The cardinals surprised everyone, including themselves, by electing a virtually unknown Italian, Albino Luciani. But then, after a pontificate of only 33 days, Pope John Paul I died on 28 September 1978, leaving behind the memory of his smile and his engaging simpler style. In that short space of time he had changed the papacy. Could the cardinals produce another surprise? Amazingly, they did, this time electing the first non-Italian pope for 455 years. Karol Wojtyla was young in Papal terms - 58 - and came from a communist country. He soon showed his independence of the Vatican bureaucracy. Within the space of 3 months the papacy move into a new era, one

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<sup>23</sup> Arthur S. Banks, Thomas C. Muller and Katherine F. Sheahan, eds. *Political Handbook of the world\_1988*, Binghamton, New York: CSA Publ. 1988, pp.655-56.

in which the pope would have a role to play for all Christians, as well as on the international political scene.<sup>24</sup>

John Paul II became the inspiration and the protector of Solidarity - a non-Communist workers' movement in the heart of the Communist world - and came to influence his time much as Churchill and Roosevelt did theirs. With Reagan, he fashioned a Holy Alliance against the Communists that kept Solidarity alive underground after Moscow seemed to succeed in crushing it. John Paul and Reagan met in Rome and committed the vast resources of two superpowers - one spiritual and the other strategic - to reversing the divisions of Yalta and hastening the demise of communism. Both believed they were guided by Providence.<sup>25</sup>

In 1989-90 the Vatican was also prominent in international affairs. In July 1989, diplomatic relations with Poland, severed in 1945, were restored. The Vatican had hitherto maintained no diplomatic relations with Eastern European governments under Communist rule, except for Yugoslavia. In the same month diplomatic links with the Soviet Union were upgraded and the Pope appointed the first bishop<sup>26</sup> to a Soviet republic, Byelorussia, in 60 years. In November, Mikhail Gorbachev became the first Soviet leader to be received by the Pope during a state visit to the Vatican.

In December 1989, General Manuel Noriega, the deposed Panamanian leader, received temporary sanctuary in the Vatican Embassy in Panama before surrendering to the United States in early January 1990.

In February 1990 diplomatic relations between the Vatican and Hungary were restored. In the following month permanent official contacts with the Soviet Union were established and a Soviet ambassador to the Vatican was appointed. In April, diplomatic relations between the Vatican and Czechoslovakia were restored. In the same month, Pope John Paul II visited Czechoslovakia, his first visit to an Eastern European country outside his

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<sup>24</sup> Peter Hebblethwaite, *The Year of the three Popes*, London: Collins, 1978.

<sup>25</sup> Carl Bernstein and Marco Politi, *His Holiness: John Paul II and the Hidden History of Our Time*, New York: Doubleday, 1996.

<sup>26</sup> Since the end of the World War I, it has been a determined line of the Papacy to do away with the antiquated privileges which the Popes had granted to the secular power in the past, and to concentrate the appointment of bishops all over the world exclusively within the competence of the Holy See.

native Poland. By mid-1992, following the collapse of communism in many parts of the world (particularly in Eastern Europe) and the disintegration of the Soviet Union in December 1991, the Vatican had established diplomatic relations with the former Communist states of Mongolia, Romania, Bulgaria, and with Ukraine and the newly-independent Baltic states of Estonia, Latvia and Lithuania.

## II. Definition of Vatican Diplomacy

Diplomacy is the art of creating among peoples humane and reasonable relations animated by a high ideal, and aiming at establishing the rule of law, justice and peace in the international community.<sup>27</sup> Vatican diplomacy<sup>28</sup> may be defined as a "... system by which, through accredited public agents, the Holy See carries on stable, formal and reciprocal intercourse with the states. It is the instrumentality by which the supreme authority of the Catholic Church communicates within the framework of standard international practice, with the supreme authority of the states. In the transaction of current or special problems which arise on the part of either Church or State, for the resolution of which the common accord of the ultimate authority of both parties is required. This consensus may take the shape of treaties (concordats) or less formal understandings... In short, by Papal diplomacy is here meant the system of reciprocal permanent representation...."<sup>29</sup>

The Nuncio to Vichy France during the war years, Archbishop Valerio Valeri, publicly discussed the meaning and purposes of Vatican diplomacy in a speech given several years after the end of the war. He stated:

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<sup>27</sup> Mgr. Montini, in 1951 *sostituto* in the Secretariat of State, defined diplomacy as the art of creating and maintaining international order, that is to say peace, not by means of force or by the balancing of material interests, but by way of open and responsible settlements. Hebblethwaite, p.27. Francis Sweeney S.J. ed., *The Vatican and World Peace*, London: Colin Smythe, 1970, p.96.

<sup>28</sup> The Romans first used the word "diploma," a word borrowed from the Greek, to indicate a double or folded sheet, or two sheets hinged together like the bronze plates employed in military discharges. Subsequently they used the term to designate a certificate or license to travel by the *cursus publicus*, or public post, and for official grants or privileges in general. Tom Farer, "Diplomacy," Mary Hawkesworth and Maurice Kogan ed., *Encyclopedia of Government and Politics*, London and New York: Routledge, 1992, Vol.2, pp.1025-38.

<sup>29</sup> Graham, *supra* note 7, pp.11-12; John Morley, *supra* note 4, pp.22-24.

... It is clear that the activity of the Holy See is not limited, and cannot be limited, to purely diplomatic efforts, in the strict sense of that word, inasmuch as it indicates certain juridical relations between states. The Roman Pontiff is identified with the Church ... (which) has a universal mission that distinguishes it from every other earthly society and it basically tends to continue through the centuries the salvific work of its Divine Founder. With such a mission the Church has entered into history and it has the highest awareness of this.

The development in time and according to circumstances of this mission can also be called diplomacy, if one wishes, but only in an elevated sense, above the purely natural and political order. From this point of view, the supreme law of the Church, and indeed, of the Holy See, is the salvation of souls. All of its activity is always directed to this end ... even when the Church, because of historical circumstances had to concern itself with its temporal interests.<sup>30</sup>

It is true that according to the Church's own concept of itself and its mission, it is imbued with the divine Presence to the extent that it has no essential need of diplomacy. Nevertheless, the universal character of the Church and the fact that its members live in various states, make the Church's use of diplomacy not only legitimate but also an effective means of fulfilling its role.<sup>31</sup>

### **III. Objections to Vatican Diplomacy**

The Popes of the present century have been men of outstanding merit. Not

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<sup>30</sup> Valerio Valeri, *Le Relazioni Internazionali della Santa Sede dopo il Secondo Conflitto Mondiale (International Relations of the Holy See after the Second World War)*, Rome: Centro Italiano di Studi per la Riconciliazione Internazionale, 1956, Speech given in Rome on 23 February 1956 under the auspices of the Italian Study Centre for International Reconciliation, Rome: Banco di Roma, n.d., pp.23-24.

<sup>31</sup> Cardinale, *Le Saint-Siege et la Diplomatie*, supra note 4, p.18.

the least of their virtues has been an extraordinary concern for mankind, particularly the poor, the persecuted and the suffering. Pope Leo XIII whose pontificate bridged the 19th and 20th centuries was the great champion of labor relations and his encyclical letter, *Rerum Novarum*, on this subject is still studied. Pius (1903-1914) was concerned about the Christian education of youth and the spiritual situation in Communist Russia. Benedict XV (1914-1922) literally wore himself out in efforts to end World War I and establish a just peace. Pius XI (1922-1939) in a far-ranging concern talked about Christian education, the missions, the priesthood, family-life, marriage, labor problems and world justice. In a blunt encyclical he denounced Hitler and Nazi hysteria. Pius XII (1939-1958) suffered through World War II and worked in every way open to him to relieve suffering and prevent the mass murder of Jews and others, including thousands of Christian Poles, Czechs and Lithuanians. Pope John XXIII's genial optimism brought new hope to the world. He sounded a call for world peace in *Pacem in Terris*. In the Second Vatican Council, he urged upon the Church a new attention to the spiritual and material needs of the world. Succeeding him in 1963, Pope Paul VI saw the work of the Council to completion and continued John's interest in the emerging nations in particular and in the family of nations in general. With the exception of the ceremonial occasion when Pope Paul VI, the first Pope, addressed the United Nations General Assembly, no State which is not a member of the United Nations had spoken in the Plenary meetings of the General Assembly until the 30<sup>th</sup> session in 1975. He pleaded for justice and peace. "If you want peace," he often said, "work for justice."<sup>32</sup> If Pius XII could be called "the Pope of the Atlantic Alliance" and John XXIII "the Pope of the opening to the East," Pope Paul VI merited the title of "Pope of the third world." One could note that this new emphasis corresponded not only to a changed world situation in which third world countries, though still economically weak and dependent, had an important role to play in the United Nations and its specialized agencies, but also to an imminent change in the distribution of Catholics throughout the world. John Paul II proclaimed to the

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<sup>32</sup> Knights of Columbus, *The Papacy: Expression of God's Love*, No. 11, U.S.: Most Reverend John J. Carberry, Archbishop of St. Louis (no date), pp.3-4.

world his intention not to interfere in temporal politics, but at the same time he emphasized the Church's "interest in and help for human issues, which must be promoted sometimes by direct intervention, but above all through the formation of conscience, to bringing a specific contribution to justice and peace on the international plane." And he insisted that he would reach out "to all who are oppressed by whatever injustices or discriminations, whether it has to do with economic, social or political life, or with freedom of conscience." There was no promise here of political silence.<sup>33</sup>

John Paul II's impact on the world has been enormous. Many believe his support of the trade union Solidarity in Poland was the precipitating event in the collapse of the Soviet bloc. Others credit him with having defeated a U.S.-sponsored proposition at the UN's Cairo Population Conference in September 1994 that he feared would have encouraged abortions world-wide. He stands solidly against much of what the secular world deems progressive: the notion, for example, that humans share with God the right to determine who will and will not be born. He also lectures against that which the secular world deems inevitable: the abysmal inequality between the wealthy and the wretched of the earth, the sufferings of those condemned to lives of squalor, poverty and oppression.<sup>34</sup>

There are, however, objections to Papal diplomacy. For example, it has been claimed that the Catholic Church may compromise itself in the practice of diplomacy both by using earthly means to obtain spiritual goals and by possible intrigue or interference in the internal affairs of a country. To this objection, it has been pointed out that Papal diplomacy is exclusively concerned with religious matters submitted to the authority of the Pope. As a spiritual sovereign, his actions cannot be viewed as interference. To protect the rights of religion and the Church, wherever they are not recognized or where they are violated, he must use representatives to do so, and this hardly compromises the dignity and uniqueness of the Church.<sup>35</sup>

Another objection to Vatican diplomacy is that Papal representatives from

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<sup>33</sup> George Blazynski, *Pope John Paul II*, New York: Dell Publishing Co., 1979, p.172.

<sup>34</sup> Paul Gray and John Elson, "John Paul II: An Army of One", *Reader 's Digest'* October 1995, pp.85-90.

<sup>35</sup> *Ibid.*, pp. 18-19; John Morley, *supra note 4*, pp.22-23.

outside the country are not necessary and that local ecclesiastical officials could perform the same functions. This, of course, remains theoretically possible, but there is the real problem of the preparation and background of the local clergy to perform such tasks. Moreover, many of the problems between Church and State are involved with international law and thus are beyond the competence of the local hierarchy.<sup>36</sup>

#### **IV. Ideals of Vatican Diplomacy**

Far from being merely tolerated, Vatican diplomacy, on the contrary, has been proposed as a model for civil diplomacy. The ideal of ecclesiastical diplomacy is the brotherhood of men, and whether or not it succeeds in achieving this goal it serves as a guide for civil diplomacy which attempts to make reason prevail over force and to contribute to the growth of individual states in harmony with all others. In fact, according to this view, it would be a positive loss for civil diplomacy if Vatican diplomacy ceased to be practiced.<sup>37</sup>

Thus, the envoys of the Holy See are sent to various countries, not just to defend the rights of the Church, but also to defend the rights and to serve the needs of the people there. For the Church, diplomacy is a form of love and service because:

The ecclesiastical diplomat brings words of understanding; he is the advocate of the just causes of the population; he collaborates with the government and with the nation in which he is a guest.<sup>38</sup>

The ordinary diplomatic emissary of the Holy See is the Nuncio, who has the rank of ambassador and represents the Pope before the government and the Church of the country to which he is posted. According to Canon Law, the

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<sup>36</sup> Msgr. Iginio Cardinale, *supra note 4*, p.20.

<sup>37</sup> Discourse by Monsignor Giovanni Battista Montini on the occasion of the 250th anniversary of the Pontificia Accademia Ecclesiastica (the Academy for Training of Papal Diplomats) Rome, 25 April 1951. Iginio Cardinale, *supra note 4*, pp.25-29.

<sup>38</sup> Montini Iginio Cardinale, *Le Saint-Siege et la Diplomatie*, *supra note 4*, p.194.

Nuncios are charged with the twofold task of fostering relations between the Vatican and the civil governments to which they are accredited and reporting on the condition of the Church in those nations.<sup>39</sup> Ordinarily, diplomatic relations involving the Vatican are mutual, but the papacy claims the right, independent of any civil authority, to send its representatives into every part of the world.<sup>40</sup>

The twofold responsibility described in Canon Law is considered only as a minimum for its diplomats by the Vatican. For example, the goal of Vatican diplomatic service has been described as a dedication to the principles of justice and charity.<sup>41</sup> Moreover, the Vatican diplomat has been depicted as representing Christ and the Church, indeed of bearing Christ in his heart.<sup>42</sup>

The Nuncio to Belgium, Luxembourg, and the European Economic Community (EEC), Archbishop Hyginus Igino Cardinale, admits that the first concern of a Vatican diplomat must be for the Church in the country to which he is assigned. In addition, Cardinale states:

His mission ... includes the moral, cultural and social problems which belong to the major interests of mankind such as the respect for human rights, the promotion of international order, the development of friendly ties among all nations through peaceful co-existence, through respect for justice and the promotion of human progress.<sup>43</sup>

These descriptions, admittedly, were all stated after the war but there is nothing in them to indicate that they constituted a new approach to, or new appreciation

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<sup>39</sup> *Codex Iuris Canonici* (Code of Canon Law), The Vatican City: Typis Polyglottis The Vaticanis, 1956, Canon 267, p.72.

<sup>40</sup> *Ibid.*, Canon 265, p.72.

<sup>41</sup> Valerio Valeri, *Le Relazioni Internazionali della Santa Sede dopo il Secundo Conflitto Mondiale (International Relations of the Holy See after the Second World War)*, Rome: Centro Italiano di Studi per la Riconciliazione Internazionale, 1956, Speech given in Rome on 23 February 1956 under the auspices of the Italian Study Centre for International Reconciliation, Rome: Banco di Roma, n.d., p.23.

<sup>42</sup> Montini in Igino Cardinale, *Le Saint-Siege et la Diplomatie*, *supra* note 4, p.197.

<sup>43</sup> Hyginus Igino Cardinale, *The Holy See and the International Order*, Gerrards Cross: Colin Smythe, 1976, p.38.



of, the role of the Vatican diplomat. The criteria, therefore, developed by the Holy See itself for the Nuncio's activities go beyond the narrow juridic confines of Canon Law to embrace a humanitarian and Christ-like<sup>44</sup> concern for the needs of all those residing in the Nuncio's host country. The deceased Pope Paul VI summarized this as averring that the Nuncio "... must confer himself zealously with the probe of peace, of progress and of the collaboration of people in view of the spiritual, moral and material good of the entire human family."<sup>45</sup>

The Nuncio's unique role among diplomats has traditionally been acknowledged by his recognition as dean of the diplomatic corps in the various states. As recently as 1961, in a United Nations Conference on Diplomatic Relations and immunities, the precedence of the Nuncio was specifically mentioned.<sup>46</sup> This precedence ...

has always been granted to the Papal Nuncio in homage to the Holy See which he represents. For among the members of the international community, the Holy See alone is distinguished by its special nature and by the peculiar characteristics of its methods and aims. These are directly inspired by spiritual and moral values and ideals, and constitute all that is most sublime, most precious and most worthy of respect in the eyes of all nations.<sup>47</sup>

Other Vatican diplomatic functionaries are the interNuncio<sup>48</sup> and the *charge d'affaires*. The interNuncio is appointed to those countries where, for certain

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<sup>44</sup> "Christ-like" is a term often used in Catholic circles to summarize those qualities of a person which are the most noble and altruistic.

<sup>45</sup> *Sollicitudo Omnium Ecclesiarum* (The Care of All the Churches), the Apostolic Letter of Pope Paul VI on the Duties of Papal Representatives, 24 June, 1969 in Cardinale, *Le Saint-Siege et la Diplomatie*, supra note 4, p.314.

<sup>46</sup> Igino Cardinale, *Le Saint-Siege et la Diplomatie*, supra note 4, pp.156-57, p.400.

<sup>47</sup> Ibid.,p.157

<sup>48</sup> The Holy See employs for its ministers of the second class the title of *internounce apostolique*. From the Middle Ages onwards *internuntius* was in use to denote the diplomatic agent of a lay sovereign, but was not so common as *ambasciator* and *orator*. It first occurs in the literature of the subject in 1595. Lord Gore-Booth, ed., *Satow Guide to Diplomatic Practice*, 5th ed., London: Longman, 1979, p.87.

reasons, a Nuncio cannot be sent. He has a lower diplomatic rank although his responsibilities parallel those of the Nuncio. The *charge d'affaires* is the third class of Papal diplomat and functions as head of a diplomatic mission in the absence of the Nuncio or interNuncio. He is accredited to the foreign minister rather than to the head of state of the host country.

Another category of Papal emissary is the apostolic delegate who represents the Pope before the hierarchy, clergy and faithful of the state. He has no official relations with the government and possesses no diplomatic character. His main responsibility is to oversee the condition of the Church in the country to which he is assigned and to send periodic reports concerning it to Rome.

## **V. Mechanisms of Vatican Diplomacy: The Concordat**

A concordat is an agreement between the Pope and the head of a state which has for its purpose to safeguard the interests of the Roman Catholic Church in the state concerned.<sup>49</sup> Concordats, which must not be put on the same level as treaties between States, are particular rules of international law. The treaties which the Holy See concludes with States can be grouped into two categories. The first consists of those treaties concluded by the Holy See on matters of immediate relevance to the Catholic Church as such: these are commonly called concordats.<sup>50</sup> The second category consists, on the one hand, of those treaties which the Holy See concludes on behalf of the Vatican City State,<sup>51</sup> and on the other hand, of those which the Holy See concludes as a member of the international community such as treaties for the promotion of

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<sup>49</sup> Clive Parry, John P. Grant *et al.*, *Encyclopaedic Dictionary of International Law*, New York: Oceana, 1986, p.71; William E. Addis & Thomas Arnold, *A Catholic Dictionary*, 5th ed., Revised by P.E. Hallett, London: Routledge & Kegan, 1951, pp.203-04.

<sup>50</sup> A concordat is a treaty between the Pope and the head of a state concerning ecclesiastical affairs. Melquiades J. Gamboa, *Elements of Diplomatic and Consular Practice: A Glossary*, Quezon City, Philippines: Central Lawbook Publ. 1966, p.62; A concordat is an agreement between the Pope and a head of state to protect the interests of the Roman Catholic Church in that particular state. James R. Fox, *Dictionary of International and Comparative Law*, New York: Oceana, 1992, p.83.

<sup>51</sup> See e.g. the 1929 Lateran Treaty. A new concordat which bears the title "An Agreement of the Revision of the Lateran Concordat" was ratified on 3 June 1985 and was designed to replace the one in effect since 1929. *1988 Catholic Almanac*, Huntington, Indiana: Our Sunday Visitor, Inc., 1987, p.177.

world peace and development, or for the improvement of the legal, cultural, economic and social conditions of mankind. In the latter case, the interests of the Church are only indirectly affected, in so far as its mission is facilitated by the existence of good international and inter-community conditions, and in so far as the object of its mission, the integral development of man, is thereby fostered. Thus, the classification of treaties concluded by the Holy See into concordats and other agreements does not correspond exactly to the division of its functions into those undertaken as the supreme head of the Catholic Church and those undertaken as the sovereign of the Vatican City State since the treaties for the promotion of international welfare are concluded by the Holy See as a spiritual and moral authority, yet concordats are not.<sup>52</sup>

The qualification of a treaty as a concordat depends only upon its object and purpose, and not upon the name or outward form chosen by the parties. Although the term originally was also used for treaties between States, it has increasingly become restricted to only those Treaties concluded with the Holy See. In State practice the term does not, however, enjoy exclusivity; in some cases, it is applied to public treaties (e.g. between the Swiss cantons); in others, treaties which are in substance concordats bear different names, (e.g. simply *modus vivendi*).<sup>53</sup>

## A. Historical Background<sup>54</sup>

Two factors contributed greatly to the emergence of the concordat: (a) the rise of the Papal States and (b) the reform movement within the Church leading to the investiture controversy in the eleventh century. Writers disagree as to which treaty can be regarded as the first concordat, but the treaty of Worms concluded in 1122 between Pope Calixtus II and Emperor Henry V is certainly

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<sup>52</sup> Heribert Franz Kock, "Concordats", *Encyclopedia of Public International Law*, Amsterdam: North-Holland, 1992, pp.729-32.

<sup>53</sup> A *modus vivendi* does not include all the formalities of a concordat, but it possesses substantially the same binding force. It should be noted that the existence of diplomatic relations between the Holy See and other states does not presuppose the necessity or establishment of a concordat. In reality, concordat states are in a minority in the present diplomatic corps at the Vatican.

<sup>54</sup> Heribert Franz Kock, "Concordats", *Encyclopedia of Public International Law*, Amsterdam: North-Holland, 1992, pp.729-30.

the most prominent and important among the early examples. It takes the form of two separate documents - one executed by the Pope, the other by the Emperor - each of which not only delineates the agreement reached but also contains the legislation for both spheres, the ecclesiastical sphere and that of the State.

All the great problems dominating the relationship between Church and State in the feudal Middle Ages - nomination of bishops, the Papal nominees to the episcopal sees, the dioceses with frontiers of the contracting States, adjustment of State's legislation to canon law, guarantees for Catholic school, charitable works and ecclesiastical property, status of the Catholic clergy, exemption from military service - have found their reflection in Concordats.<sup>55</sup> The concordat was originally regarded as an amicable settlement solely between the two supreme powers of Christendom, the Pope and the Emperor. The disintegration of the Holy Roman Empire, whose claim to universality had never really corresponded to reality, and the emergence of the principle of *rex in regno suo* imperator led to the conclusion of concordats with other princes as well. Thirty-three concordats were thus concluded before the end of the Middle Ages. The most prominent among these were: the concordats concluded in 1447 with the German Emperor Frederick III, the Electors of Mayence and Brandenburg, and nine other German princes; the Concordat of Vienna, in 1448 concluded with Emperor Frederick III, which remained the fundamental ecclesiastical law of the empire until 1803 and--on the threshold of modern times--the concordat with King Francois I of France, which formed the legal basis for the relations between Church and State in France until the Revolution.

The period between the Reformation and the French Revolution was unfavorable to concordats. Absolutism, enlightenment and the attempt to subordinate the Church to the State overshadowed even the rising number of concordats in the 18th century. These must be regarded as the landmarks in the forced withdrawal of the Church from a progressively secularized world. With the dawning of the 19th century, concordats entered a period of trial. The first agreement between Pius VII and Napoleon I in 1801 was significant in that the

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<sup>55</sup> For the old concordatory practice, see Yves de La Briere, "Le droit concordataire dans la nouvelle Europe", *Hague Recueil des Cours*, Vol.63 (1938-I), pp.371-464.

Holy See entered into its first solemn treaty with a "modern," i.e., officially secularized State. The affairs of the Church in Germany were regulated by a series of treaties, starting with the Bavarian Concordat of 1817.<sup>56</sup> Also important were the concordats with Spain on March 16, 1851,<sup>57</sup> and especially with Austria on August 18, 1855,<sup>58</sup> which freed the Church from the legal and practical remnants of the ecclesiastical policies of Emperor Joseph II, while giving it more influence in education and marital legislation.

The concordats of the 18th and 19th centuries took for the most part the standard form of a treaty between the Holy See and a corresponding State. Certain States preferred, however, not to enter into such a formal treaty, in which case the concordat would consist of an informal agreement, on the basis of which the Holy See and the State would execute separate instruments. A Papal bull which contained the provisions for a local church was also embodied in a statute and thus enacted as State law. Examples are the agreements with Prussia in 1821, with Baden and Hohenzollern for the ecclesiastical province of the Upper Rhine in 1821.<sup>59</sup> and 1827,<sup>60</sup> and Hanover in 1824.<sup>61</sup>

Concordats concern the legal position of the Catholic Church in the contracting State. The pontificates of Pius XI (1922-39) and Pius XII (1939-58) constitute the classical period of modern concordats. In particular the changes brought about by World War I made it imperative for the Holy See to find a way to procure for the local church the necessary freedom of action, the Vatican being convinced that the concordat was the best instrument for this purpose.

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<sup>56</sup> Convention between Navaria and the Holy See, signed at Rome, 5 June 1817. Clive Parry, ed. and annotated, *The Consolidated Treaty Series*, Dobbs Ferry, New York: Oceans Publication, 1969, Vol. 67(1817), pp. 217, 218-25.

<sup>57</sup> Concordat between the Holy See and Spain, signed at Madrid, Ratified by the Queen of Spain, 1 April 1851, and by His Holiness the Pope, 23 April 1851. Parry, *The Consolidated Treaty Series, ibid.*, Vol. 105(1850-1851), pp.261, 262-88, 289-304.

<sup>58</sup> Concordat between Austria and the Holy See, signed at Rome, Ratifications exchanged at Vienna, 25 September 1855. Parry, *The Consolidated Treaty Series, ibid.*, Vol. 113(1855), pp. 312, 323.

<sup>59</sup> Agreement between the Holy See and Prussia, concluded at Rome, 16 July 1821. Parry, *The Consolidated Treaty Series, ibid.*, Vol. 72(1821-1822), pp. 82-109.

<sup>60</sup> Boundary Treaty between Hanover and Prussia, signed at Iburh, 22 December 1827. Parry, *The Consolidated Treaty Series, ibid.*, Vol. 78(1827-28), pp. 2-23.

<sup>61</sup> Agreement between Hanover and the Pope, concluded at Rome, 26 March 1824. Parry. *The Consolidated Treaty Series, ibid.*, Vol. 74(1824), pp. 112-25.

Hence, numerous concordats were thus concluded,<sup>62</sup> in part with new States which had emerged from the dismemberment of the Austro-Hungarian Empire and Tsarist Russia, and in part with older States which had undergone fundamental political and constitutional transformations. The more noteworthy of these concordats were concluded in 1929 with Italy on the occasion of the Lateran Treaty, with the German Reich in 1933, and with Austria in 1934. While many of these concordats did not survive the changes brought about by World War II and its aftermath, the latter three concordats continued to form the nucleus of the Church-State relationship in the countries in question. Pius XII attempted to continue the concordatarian policy and achieved his greatest success in the concordat concluded in 1953 with Spain and in 1954 with Dominica.<sup>63</sup> In all this, it is evident that concordats ultimately became a durable part of customary international law.

Thereafter, however, a noticeable decline occurred. The emergence of numerous new States, whose notion of national sovereignty makes them reluctant to bind themselves in relations to matters they regard as being within their domestic jurisdiction, and whose political instability also makes them uncertain partners in potential concordatarian agreements, has contributed to this development. The idea that the freedom of the Church is best served by a recognition of human rights, including religious liberty, in the internal law of the various States, reinforced by their institutional international protection, has been a further factor.<sup>64</sup> The Second Vatican Council has supported this idea in its Declaration on Religious Freedom, *Dignitatis humanae*, of 1966; the Holy See made it its basis of action in the course of the Helsinki Conference for Security and Cooperation in Europe 1973-75.

This does not mean, however, that the Holy See has renounced the instrument of the concordat altogether. A *modus vivendi* was concluded with Tunisia in 1964 and even less formal agreements with various Socialist countries thereafter. Moreover, the *Motuproprio Sollicitudo omnium*

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<sup>62</sup> The 1940 Portuguese Concordat is remarkable because of its unique arrangement concerning the legal position of the Church in Portuguese colonies. Ehler, p.56.

<sup>63</sup> Dominican Concordat, *Acta Apostolicae Sedis*, 1954, p.433ff.

<sup>64</sup> The Holy See had injected the freedom of the individual to profess and practice (religion) alone or in community with others in Article 18 of the International Covenant on civil and Political Rights 1996.

*ecclesiarum* of 1469 makes it the duty of every Papal representative to see to the conclusion of a concordat where necessary and possible. Nevertheless, recent agreements tend to be either executions of existent concordat (e.g. various treaties between the Holy See and Austria since 1962, which, however, also contain certain modifications of the provisions of the concordat of 1933), or adaptations of former concordats to the spirit of the Second Vatican Council, in which the Church declared its readiness to renounce outdated and inconsistent privileges. Examples of this are the Convention with Spain of 1976 and the draft for a revision of the concordat in Italy. The agreements with various German Lander and the concordat with Colombia in 1975, while retaining more traditional forms, have also contributed to an *aggiornamento* in the relations between Church and State.

## **B. Current Legal Situation<sup>65</sup>**

The Vatican City is recognized in customary international law as possessing the characteristics of a State. Opinions differ as to whether, besides the State, the Catholic Church or the Holy See is the second party to a concordat. The Holy See enters into treaties on the same basis as States, and is one of the contracting parties of the 1969 Vienna Convention on the Law of Treaties.<sup>66</sup> The Holy See by establishing diplomatic relations with foreign States and by signing treaties with them, both voluntary acts, thus comes within the orbit of international law. The Holy See not only has the international capacity to set these acts in motion, but once performed to supervise the normal working of these international relations. Foreign Diplomatic agents accredited to the Holy See, even if the State has no diplomatic relations with Italy, may still reside in Italian territory enjoying their immunities. This uncertainty is nourished by concordatarian practice, recognizing the Church as a *societas perfecta* and the Holy See as a subject of international law. Popes Pius XI and XII, however, made it clear that it is the Roman Pontiff, legally also called the Holy See, who

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<sup>65</sup> Kock, *supra note* 36, pp.729-30.

<sup>66</sup> The Holy See is a party to, e.g. the Convention relating to the Status of Refugees 1951, the Vienna Conventions on diplomatic Relations 1961 and on Consular Relations 1963, and the International Convention for the Elimination of All Forms of Racial Discrimination 1965.

concludes concordats for the Church as her supreme and sovereign organ, the plenitude of ecclesiastical power being concentrated in the Holy See.

A special form of concordat is the treaty concluded by the church hierarchy with the State in which the local church is situated. Examples are agreements between certain German lander and Catholic dioceses and between the patriarchs of various Eastern Catholic churches and the States in which they reside. These agreements require the approval of the Holy See. In exceptional cases, the local hierarchy has concluded agreements with a State or unit of it without visible interference on the part of the Holy See. Approval by the latter must, however, be presumed, unless the accord remains strictly within the framework of the existing law and provides only for its concrete execution. The validity of a treaty concluded by one or more bishops without the manifest consent of the Holy See is determined by the principles laid down in Article 46 (provisions of internal law regarding competence to conclude treaties) of the 1969 Vienna Convention on the Law of Treaties. Moreover, the principles embodied therein regarding invalidity and termination also apply *mutatis mutandis* to concordats, including the *clausula rebus sic stantibus*,<sup>67</sup> which is taken to encompass fundamental political transformations.

As an universal rule, disputes arising from the interpretation and application of a concordat are to be settled by the parties through negotiations in good faith. A revision of a concordat is possible only through a new settlement to which both parties have consented. Since the subject matter of concordats (e.g. nominations to ecclesiastical dignities or religious instruction) may also

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<sup>67</sup> Article 62 of the 1969 Vienna Convention on the Law of Treaties. See generally, C. Hill, "The Doctrine of *rebus sic stantibus* in International Law", *The University of Missouri Studies*, Vol.3 (1934), p.2; Quincy Wright, "Article 19 of the League Covenant and the Doctrine *rebus sic stantibus*", *Proceedings of the American Society of International Law*, 1936, p.55; O. J. Lissitzyn, "Treaties and Changed Circumstances", *American Journal of International Law*, Vol. 61 (1967), p.895; Richard J. Erickson, *International Law and the Revolutionary State*, Dobbs Ferry, New York: Oceana Publications, 1972, pp. 75-80; S. A. Tiewul, "The Fisheries Jurisdiction Case and the Ghost of *rebus sic stantibus*", *New York University of International Law and Politics*, Vol. 6 (1973), p.455; Georg Schwarzenberger, "Clausula *rebus sic stantibus*", *Max Planck Encyclopedia of Public International Law*, Vol. vii (1984), p.22; Sir Ian Sinclair, *The Vienna Convention on the Law of Treaties*, 2nd ed., Manchester: Manchester Univ. Press, 1984, pp.192-96; Athanassios Vamvoukos, *Termination Of Treaties in International Law. The Doctrines of Rebus Sic Stanlibus and Desuetude*, Oxford: Clarendon, 1985, pp. 150, 153.



involve divine law, the Holy See is not in a position to accept the decision of a third party, even if it were an international court or tribunal, for the settlement of disputes.

### C. Special Legal Problems<sup>68</sup>

The legal character of concordats has always been in dispute, both within and without the Church. Ecclesiastical writers and the Holy See have always rejected the so-called "legalistic theory," according to which a concordat takes its legal force exclusively from the consent of the State and must, in fact, be regarded as a mere State law, which the latter may alter or revoke whenever it sees fit. On the other hand, two theories evolved within the framework of Catholic doctrine which still exist. According to the older one, a concordat must be regarded as a privilege by the Holy See granted to the State and, therefore, unilaterally revocable at any time. This theory is an erroneous conclusion deriving from the correct premise that the State must not interfere with the free exercise of ecclesiastical power directly derived from God, since concordats almost always grant more to the Church than its mere liberty. The prevailing doctrine, therefore, regards concordats as real treaties, not only confirming already existing rights of the parties--especially the free exercise of the Church's mission--but also creating new rights and obligations for them. A residuum of the privilege theory is retained in the claim by the Holy See to be the ultimate judge regarding the validity or termination of any existing concordat, a claim based on the superiority of spiritual over temporal power.

The theory of the treaty character of concordats, expressed in 1817 by Pius VII in the classical phrase "*haec concordata habent vim veri contractus utrumque obligantis*," is supported by international practice. This practice demonstrates, moreover, that concordats are true international treaties, not merely "public" ones which do not belong to the sphere of international law even though the principle *pacta sunt servanda*<sup>69</sup> applies to them. With the

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<sup>68</sup> Kock, *supra* note 36, pp. 729-30.

<sup>69</sup> "Agreements must be observed" was said to be fundamental to the laws of nations, but as in fact all states are sovereign, i.e., not answerable to any external authority, this rule is only an 'ought-to-be'. The League of Nations suggested by I. Kant, if it were to be a reality, would need

exception of two cases in the 19th century, in which Sardinia and Baden tried to free themselves from concordatarian obligations by invoking the superiority of the State over the Church, States have regularly refrained from basing violations of concordats upon the allegation that the latter were not true international treaties, and have instead either invoked other grounds for not complying with them or denied any violation altogether. The character of a concordat as a treaty governed by international law has also been recognized by decisions in domestic courts and by the private expert opinion of the then members of the Permanent Court of International Justice in 1938. This opinion, procured by the Holy See against the continuing violations of the 1933 concordat with the German Reich by the Hitler regime, stated unequivocally that the internal legislative act of one party to a concordat cannot alter or terminate the legal force of that concordat or of any of its provisions as international treaty. Later, so flagrantly was it violated that Pius XI was moved to protest in the masterly Encyclical *Mit brennender Sorge* on 19 March 1937.<sup>70</sup>

The degree of binding force of a concordat cannot be stated in a single formula;<sup>71</sup> each concordat must be examined within the circumstances surrounding its negotiations. Pope Pius XII (1939-58), in discussing the role of concordats, noted:

Concordats are a practical expression of collaboration between

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what, given the nature of states, it cannot have, namely a supreme sovereign will. Richard J. Erickson, *International Law and the Revolutionary State*, Dobbs Ferry, New York: Oceana Publications, 1972, pp.73-75; Sir Ian Sinclair, *The Vienna Convention on the Law of Treaties*, 2nd ed., Manchester: Manchester Univ. Press, 1984, pp.83-84; J. G. Starke, *Introduction to International Law*, 10th ed., London: Butterworths, 1989, pp. 24-25, 438; Daniel Patrick Moynihan, *On the Law of Nations*, Cambridge, Massachusetts: Harvard Univ. Press, 1990, pp.97-119; J.M. Kelly, *A Short History of Western Legal Theory*, Oxford: Clarendon Press, 1993, pp.345-46.

<sup>70</sup> Jean Neuvecelle, *The Vatican: Its Organization, Customs, and Way of Life*, translated from the French by George Libaire, New York: Criterion Books, 1955, pp.88-89.

<sup>71</sup> On 9 December 1905, France broke altogether the compact entered into by the concordat. Two days later, Pius X solemnly protested against this violation of the rights of the Church. All ecclesiastical property has been seized. William E. Addis & Thomas Arnold, *A Catholic Dictionary*, 5th ed., Revised by P. E. Hallett, London: Routledge & Kegan, 1951, p.204; Pope Pius XII (1939-58) states their binding force that when the Church has set her signature to a Concordat it holds for everything contained therein. But with the mutual knowledge of both high contracting parties, it may not hold in the same way for everything. *Acta Apostolicae Sedis*, Vol. XLV (1953), p.802.

the Church and State; they must assure to the Church a stable condition in right and in fact and must guarantee to her full independence.<sup>72</sup>

In an allocution to historians in 1955, he summed up the purpose of concordats in these words: "in concordats the Church seeks juridical security and the necessary independence for her mission."<sup>73</sup>

Briefly, diplomatic relations between the Church and State are normally cultivated by the Papal representative. He treats all questions which may arise between the two, and concerns himself with the stipulations of the *modus vivendi* of agreements and concordats as well as conventions referring to questions of public law.<sup>74</sup>

The groundwork for concordats is drafted by Papal representatives, but it must be remembered that the function of Papal diplomats is to execute, not initiate, the Pope's policy. Not only does the structure of the Holy See tend to inhibit initiative but the entire educational process of the diplomats has fostered an awareness of a belief in the authoritarian nature of the structure. To this must be added the ever-present awareness among the corps that they represent the person of the Pope. There appears to be a greater caution than at times may be warranted in undertaking anything innovative without direct instructions from the Holy See simply because there is a general and understandable reluctance to risk possible embarrassment to the Pope.

The bilateral nature of the concordat has made them treaties *sui generis* within the legal scope of the two universal international organizations. Under Article 18 of the Covenant of the League of Nations and Article 102 of UN Charter, where the obligations imposed upon the member States of these two universal international organizations to register their international treaties. Like international treaties, concordats qualify for registration with both the League of Nations and United Nations Secretariat. Since the Holy See is not a member of these two international organizations, it is neither necessary nor appropriate for its concordats to register. Accordingly, no such application has been made

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<sup>72</sup> *Acta Apostolicae Sedis*, Vol. XLV (1953), p.802.

<sup>73</sup> *Acta Apostolicae Sedis*, Vol. XLVII (1955), p.679.

<sup>74</sup> Graham, *supra note 7*, pp.114-43.

since World War II; but in 1922 and 1928, two concordats were registered with the Secretariat of the League of Nations upon the demand of Latvia and Colombia respectively.

It may be fair to conclude that concordats are analogous to treaties, and may operate to create reciprocal rights and obligations as between the contracting parties; but that they seek to regulate matters governed not only by the public law of the State but also by customary international law. In this connection, it may be relevant that no concordat appears as yet to have been registered under Article 102, (1) of the United Nations Charters.<sup>75</sup>

## VII. Conclusion

It seems clear that the Vatican City State is designed as a sovereign state with most of the attributes and privileges of other sovereign states. It is the smallest sovereign independent state in Europe - its independence was recognized by the Italian Government in the 1929 Lateran Treaty. The Pope is absolute ruler and enjoys full executive, legislative and judicial power. The College of Cardinals which elects the Pope from its members, acts as a Privy Council and Cabinet and the Curia is the administrative body of the Church, which commands the allegiance of more than 527 million Roman Catholics in virtually all countries of the world. The civil government of the state (population about 1250) is in the hands of a lay Governor and a Council who are appointed by and are responsible to the Pope. Both the Vatican City State and the Holy See are subjects of international law. Nevertheless, the Vatican functions as a supra-national agency directing the spiritual activity and commanding the religious affiliation of Roman Catholics throughout the world,

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<sup>75</sup> Article 102 of the UN Charter stipulates that "every treaty and every international agreement entered into by any Member of the United Nations after the present Charter comes into force shall as soon as possible be registered with the Secretariat and published by it." *Giuseppe Casoria, Concordati e ordinamento giuridico internazionale*, Rome: Perugini, 1953; The Holy See, not only participated in but also party to the 1969 Vienna Convention on the Law of Treaties, which enters into treaties on the same basis as states. If the Vatican City were not recognized as possessing the characteristics of a state, agreements concluded between the Holy See and International Organizations would not be eligible for registration. Shabtai Rosenne, *Developments in the Law of Treaties 1945-1986*, Cambridge: Cambridge Univ. Press, 1989, pp. 18, 26, 312.

and it is in this role that the Vatican becomes an international actor of importance. Vatican structure is hierarchical with the Pope in supreme authority as its head. Because of the authority of the Pope, his personality and mind set become the single most important internal factors in determining Vatican policy. Papal infallibility is not publicly questioned. Although there is a bureaucratic structure with competing factions, there is no provision for loyal opposition and rivalries rarely come to the surface. The bureaucratic apparatus is meant to execute the Papal will, and it generally does. The Vatican will not in practice take the initiative in breaking a concordat and will not deny its treaty obligations for the sake of expediency, nor will it make a priori ecclesiastical changes in disputed territories without internationally recognized settlements.

The Vatican "power" in international affairs is based neither on authority nor on force, but on prestige or influence. There is ambiguity in this aspect simply because of the Vatican's authoritarian role in the spiritual lives of individual Catholics, but that authority does not extend to states in international affairs. The power exerted through prestige can only exist when the fact of prestige is conceded by others. The separateness of prestige and power emerges clearly in this study. Those who are subject to Vatican authority, i.e. the hierarchy, the clergy and the universal membership, may accept the legitimacy of Vatican issued pronouncements, sanctions and actions, but the resources of that authority are subject to individual appraisal by each recipient and are not comprehended in common. Even in a state whose population is almost entirely Catholic, such as Poland, Vatican authority does not extend from the population to the state. Power through prestige stems from the perception of the state involved and is not inherent in the Vatican itself. Power through prestige is granted to the Vatican, not imposed by it. No matter what the scope of authority the Vatican claims, the parameters of its power fluctuate with the perceptions of its audience. Prestige has undoubtedly been granted to the Vatican, and when that concession has not been based entirely on tradition, it can generally be related to the interests of the state conceding the prestige. In reality, Vatican "power" is based on prestige and will exist so long as that prestige is perceived.