ON THE STATUS OF THE HOLY SEE IN INTERNATIONAL LAW

VINCENT A. DE GAETANO

ON September 20, 1870, troops of the King of Italy, acting in defiance of an agreement with France whereby Italy pledged to France not to attack what was left of the Pope's territory – the Patrimony of St. Peter – marched on Rome, and the city's walls and gates were battered by cannon. Pius IX gave the order to capitulate and Italy was at last united. But the refusal of the Pope to admit the legitimacy of the *fait accompli*, together with the conflicting opinions of a multitude of writers on International Law and the Roman Question, and the unique position of the Supreme Pontiff, have given rise – in academic circles, if not in practice, – to considerable confusion as to the status of the Holy See in International Law.

First of all, what do we mean by the 'Holy See'? The expression 'Holy See' has two different meanings: in its narrower sense the Holy See means the office of Supreme Pontiff; in his wider sense, however, it means the whole complex of Congregations, Tribunals, Offices, Commissions, etc., through which the Supreme Pontiff provides for the Government of the Catholic Church (cf. canon 7 of the Code of Canon Law). As regards the first of the two meanings – and, strictly speaking, we are only concerned with this first meaning – we may say that if the Catholic Church is a *societas perfecta*, the Holy See may be considered a sovereign institution, being the supreme organ of the Church. In the legal system of the Church the Holy See, understood in this narrower sense, is considered a legal body by divine right (cf. canon 100 para. 1 of the Code of Canon Law).

This interpretation is valid for canon law, and has been taught for centuries by the majority of theologians and Catholic canonists. The problem which we wish to examine here, however, is the position of the Holy See in the international legal system, especially with regard to doctrine and practice.

Prior to 1870 the situation in International Law seemed quite clear. The Pope was the temporal ruler of the Papal States; in this respect he was an ordinary Prince or King. But the Pope was also the spiritual leader of all Catholics. He therefore constituted in his person a personal union of two different organs, the highest organs of two different subjects of International Law: the Papal States and the Holy See. Even prior to 1870 the more important of the two was the Holy See. It is clear that Catholic States granted the privilege of Deanship to the Papal Nuncios not because of the political importance of the Papal States, but because of the supreme spiritual sovereignty of the Holy See.

Of these two persons in International Law, the one, the Papal States, undoubtedly came to an end under the rules of general international law by Italian conquest and subjugation in 1870. The Holy See was thus deprived of territorial sovereignty, although there is no lack of writers who maintained that the Holy See's territorial sovereignty continued either *de jure* or *de facto* over the Vatican buildings. At this point what the Italian legislators and politicians did was to distinguish sharply between the Pope's prerogatives, which they classified into two categories. In the first they placed those rights which he exercised as the civil ruler of the Papal States. These rights, in united Italy, went over to the House of Savoy. In the second category they placed those rights which accrued to the Sovereign Pontiff as the supreme head of the Catholic Church. These rights the Italians were fully prepared to recognise and preserve, guaranteeing them, if necessary, by treaty with other States. The Law (or Act) of Guaran-

tee tells us what these spiritual rights were conceived to be: they included the right of immunity, of inviolability, and of extra-territoriality, the right to have violations of these rights punished and the right to exchange diplomatic representatives. This Law of Guarantee did not, however, and nor was it intended to, confer any international rights upon the Holy See. What the lawmaker did in 1871 was to enact legislation which constituted formal and unequivocal recognition of preexisting rights. The Law merely conformed domestic legislation to a juridical situation that Italian law could neither create nor abolish. Hence the following comment of the then Foreign Minister Emilio Visconti-Venosta on Article 11, which deals with the envoys accredited to the Holy See and those sent by the Pope: 'The law of May 13, in recognising the existence of a diplomatic corps accredited to the Holy Father as well as the right to continue to dispatch nuncios to the heads of other governments, leaves untouched the eminent position which the public law of Europe has recognised in the Pope, as far as the exercise of his lofty spiritual mission is concerned ... Our duty therefore is to make it known to Europe that nothing has changed in the position of the papacy, from the viewpoint of public law, as far as his spiritual authority is concerned ... The law is nothing else ... than a formal and explicit recognition of the prerogatives and honours that international law accords to the papacy.'

Besides this recognition by Italy of the international status of the Holy See, two other factors militate against those who maintain that the Holy See is not an international person. The first of these factors is Canon Law itself. Canon 218 states: *Romanus Pontifex ... habet supremam et plenam potestatem jurisdictionis in universam Ecclesiam ... Haec potestas est ... a quavis humana auctoritate independens.* The second factor is general customary international law, or the practice of States. For even after 1870 the Holy See continued to conclude concordats and continued, with the consent of a majority of States, to exercise the active and passive rights of legation. The legal position of its diplomatic agents remained based on general international law (not on the Italian Law of Guarantee, a municipal law enacted under an international duty incumbent upon Italy). Moreover, concordats were, as they still are, negotiated and signed like any international treaty; they are concluded on the basis of full equality (although some writers deny this); they need ratification; they can be modified only by common consent; their norms become binding on individuals only by their transformation into municipal law. A number of these concordats have been registered and published by the Secretariat of the League of Nations. As the Holy See is a person in *general* international law, its capacity to conclude concordats is by no means limited to Catholic States. One may conclude by adding, in confirmation of the above, the visits which heads of States, even non-Catholic ones, paid to the Supreme Pontiff as to a sovereign in the period between 1870 and 1929.

Pietro Esperon, one of the propounders of the theory that the Holy See is not a person in International Law, made the fundamental mistake of starting his thesis from a theoretical hypothesis, such as the one that only States can be subjects of International Law, or from a gratuitous supposition that religious affairs could not possibly be concluded through the instruments of the law of nations. This doctrinaire construction is wholly rejected to-day.

The Lateran Treaty of 1929 in no way changed the international position of the Holy See. In fact, this treaty, which is undoubtedly (and is considered almost unanimously as such) an international treaty, was negotiated by the Holy See in its quality of supreme organ of the Catholic Church, and not of supreme organ of the State of the Vatican City (which until then did not exist). Besides in this treaty it is stated that (Art. 2): 'Italy recognises the sovereignty of the Holy See in international affairs as an attribute inherent in its nature, in conformity with its tradition and

with the needs of its mission in the world.' This provision, by which the sovereignty of the Holy See in international affairs, independently of its possession of territory, is implicitly affirmed by the Holy See and explicitly recognised by the Italian State, is in clear contrast to the two articles immediately following, which recognise the territorial sovereignty of the Holy See. For the Lateran Treaty furthermore created the State of the Vatican City, for which Italy made a cession of territory. This State of the Vatican City is a subject of International Law different from the Holy See. It has become a member of the Universal Postal Union. But whereas the Vatican City has the legal position proper to any State, it has also several particular characteristics worth noting, some of which influence to a greater or lesser extent its legal status.

In the first place, the State of the Vatican City has, in fact been, constituted not to permit an orderly society of men in a given territory, but to assure the liberty and independence of the Holy See in the spiritual government of the diocese of Rome and of the Catholic Church in every part of the world, and to constitute a visible sign of such liberty and independence. Because the State is constituted as a means and not as an end, and therefore requires a special connection with the Holy See, the Sovereign of the State is of necessity the same person as the visible head of the Catholic Church and the personification of the Holy See, that is to say, the Supreme Pontiff, This particular type of connection has been compared by some scholars to a real union between two States, while others compare it to a personal union, as some authors had maintained also with regard to the relationship between the Catholic Church and the Papal States. The truth of the matter is, however, that although we are dealing with an organic union, it is different from the various types of organic unions between States as known in International Law, for the Holy See is not a State; and therefore what we can state with some conviction is merely that the constitution of the Vatican City is not autonomous, but derived from the Holy See, and that therefore **the Vatican City is a vassal State of the Holy See.**

In accordance with the special nature of such a State, the Vatican City has assumed the position of a neutral State in virtue of Article 24 of the Lateran Treaty. Although such a position was, in the above-mentioned article, recognised only by Italy, this position has been recognised, at least implicitly, by most other States.

All territory of the State of the Vatican City is recorded among the historical sites in the register kept by UNESCO of cultural property accorded special protection by Article 9 of the treaty for the protection of cultural property in the case of armed conflict, signed in the Hague on 14 May, 1954.

Finally there are writers who believe they have found a resemblance which is more or less complete between the State of the Vatican City (which, if it were so, would not be a true State) and the seats of international organisations: that is, the State would have the same function in relation to the Holy See as the respective seat would have for each organisation. It has been argued that a parallel exists between the position of the State of the Vatican City with respect to Italy and the position of the seat of the United Nations with respect to the United States of America. However, aside from other considerations, there is undeniably a substantial difference, at least with regard to the fact that Italy does not have territorial sovereignty in the State of the Vatican City.

The Holy See certainly is not eligible as a member of the United Nations, because under Article 4 of the Charter admission is only open to States, which the Holy See is not. The Vatican City would not be admitted because it is not a sovereign State, but a vassal State of the Holy See. But the Holy See may participate in some activities of the United Nations and may also be chosen as a mediator or arbiter, and can be invited to international conferences.

To sum up we may state that at the present time prevailing opinion recognises

the Holy See's sovereignty in international affairs, and also considers as personified in the Holy See the international subjectivity of the Catholic Church, independently from the territorial sovereignty which the Holy See has over the territory of the Vatican City.

Sources and further reading:

Graham S.J., Vatican Diplomacy, ed. 1959, Princetown University Press.

Graham S.J., Rise of the Double Diplomatic Corps in Rome, ed. 1952, The Hague.

Annuario Pontificio. Roma, 1860-1870.

The Tablet, Sept. 18, 1943, Germans and the Vatican City State.

Ottaviani, Istitutiones Iuris Pubblici Ecclesiastici, 1958, Vatican City.

Concilium, October 1970 – Pio Ciprotti.

Puente Egido: Personalidad internacional de la Ciudad del Vaticano, 1965, Madrid.

Le Fur: Precis de droit international public, 1937, Paris, p. 139.

Rivista di Diritto Internazionale, XXI (1929) pp. 165-176.

American Journal of International Law, XXVII, i, (1933), pp. 271-289.

American Journal of International Law, XLVI (1952), pp. 308-314.

American Journal of International Law, Vol. 38, (1944), pp. 452-457.

Noel Blakiston: The Roman Question, ed. 1962, Chapman and Hall, London.

Amos J. Peaslee: Constitutions of Nations, Vol. 3, pp. 666-699, The Hague.