IV

ESTUDIOS SOBRE RELACIONES IGLESIA-ESTADO

THE HOLY SEE AND THE CODIFICATION OF INTERNATIONAL LAW: AN ASSESSMENT OF ITS CONTRIBUTION

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Abstract: This paper focuses on the contribution of the Holy See to the codification of contemporary public international law. In the aftermath of the institution of the ILC, and particularly from 1960s, several fields of international law experienced codification and progressive development. Although not formally a member of the United Nations, the Holy See participated to all the Conferences of Plenipotentiaries convened by the General Assembly. It actively contributed to the process of codification, always promoting the values of justice, equity, dignity and morality. In a historical moment characterised by ideological and political oppositions, the Holy See, free from any material interest, sought to shed light on moral reflections, which were seriously at risk of remaining marginal. This is particularly evident in the analysed contexts of the Vienna Conventions on Diplomatic and Consular relations, on the Representation of States in Their Relations with International Organizations and on the Law of the Sea, in which the Holy See acted both as the guardian of the ancient customs and as the moral guide of mankind. It remained always committed to the fundamental values which constitute the reason of its mission in the world and the ultimate aim of the whole family of nations.

Keywords: Holy See, Vatican City State, Codification, International Law, Diplomatic relations, Law of the Treaties, Jus cogens, Law of the Sea.

Resumen: Este artículo se centra en la contribución de la Santa Sede a la codificación del derecho internacional público contemporáneo. A raíz de la institución de la CDI, y particularmente a partir de la década de 1960, varios campos del derecho internacional experimentaron codificación y desarrollo progresivo. Aunque no es miembro formal de las Naciones Unidas, la Santa Sede participó en todas las Conferencias de Plenipotenciarios convocadas por la Asamblea General. Contribuyó activamente al proceso de codificación, pro-

moviendo siempre los valores de justicia, equidad, dignidad y moralidad. En un momento histórico caracterizado por oposiciones ideológicas y políticas, la Santa Sede, libre de cualquier interés material, buscó arrojar luz sobre reflexiones morales, que corrían gravemente el riesgo de quedar marginadas. Esto es particularmente evidente en los contextos analizados de las Convenciones de Viena sobre Relaciones Diplomáticas y Consulares, sobre la Representación de los Estados en sus Relaciones con Organismos Internacionales y sobre el Derecho del Mar, en los que la Santa Sede actuó tanto como guardiana de los antiguos costumbres y como guía moral de la humanidad. Siempre mantuvo su compromiso con los valores fundamentales que constituyen la razón de su misión en el mundo y el fin último de toda la familia de naciones.

Palabras clave: Santa Sede, Estado de la Ciudad del Vaticano, Codificación, Derecho Internacional, relaciones diplomáticas, Derecho de los Tratados, *ius cogens*, Derecho del mar.

INTRODUCTION

This paper analyses the peculiar contribution of the Holy See to the codification of the contemporary public international law. The process of codification, already in vogue since the XIX century, resumed from the 1960s, when colonial countries reached the independence[1]. The newly-born States

[1] DE VISSCHER, C., «La codification du droit international», *Collected Courses of the Hague Academy of International Law*, Volume 6, 1925, pp. 329-472.; and LAUTHERPACHT, H., «Codifica-

felt the necessity to discuss the content of customary norms, which apply to all the actors of the international community, but that for historical reasons former colonies did not contribute to form [2]. A fundamental role for the outcome of this process was played by the International Law Commission (ILC), a permanent subsidiary organ of the General Assembly of the United Nations (UN) aimed at favoring the codification and progressive development of international law.

Because the activity of the Holy See has always been «recognized as significant for the international community» [3], it participated to all the conferences of plenipotentiaries for the codification of international law convened by the General Assembly.

Despite some scholars believe that the attendance of the Holy See was only merely formalistic [4], from the preparatory works and the statements of its representatives, it appears that its contribution was rather practical and substantial. In fact, it both acted to foster the creation of a cooperative and friendly atmosphere and to ameliorate the texts of the conventions. This became especially evident during the negotiations of the UN Convention on the Law of the Sea, where issues of justice and equity were largely at stake.

This work starts with a brief insight into the process of codification. It then focuses on the participation of the Holy See to diplomatic conferences of codification by reason of enjoyment of international personality. Its specific contribution, in terms of statement of principles, amendments and resolutions, is highlighted. The Vienna Conventions on Diplomatic and Consular relations, on the Law of the Treaties, on the Representatives of States in International Organizations and the UN Convention on the Law of the Sea will be the main fields of interest.

1. THE CODIFICATION OF PUBLIC INTERNATIONAL LAW

As international law is consistently composed by customary norms based on State practice, the actors of the international community often times advo-

tion and Development of International Law», *American Journal of International Law,* Volume 49, 1955, pp. 16-43.

[2] Elias, C. A., Lim, C. L., *The Paradox of Consensualism in International Law*, Kluwer Law International, 1996, pp. 13-30.

[3] Maluwa, T., «The Holy See and the concept of International legal personality: some reflections», *The Comparative and International Law Journal of Southern Africa*, Volume 19, Number 1, 1986, p. 12.

[4] Bellini, P., *Principi di diritto ecclesiastico*, CETIM, 1972, p. 325.

cated the necessity to codify them for the sake of clarity and certainty. The Judge of the International Court of Justice Roberto Ago defined the process of codification of international law as «une opération consistant essentiellement à remplacer un droit de nature coutumière, formé d'une manière spontanée au cours des siècles au sein de l'opinio juris des membres de la communautè international, par un droit de formation volontaire, consacré dans des textes écrits adoptés par lesdits membres»[5].

While the establishment of the ILC was pivotal for the codification of contemporary international law, the first attempt in this regard is the *Précis d'un Code du Droit International* by Domin-Petrushevecz in 1861 which, however, remained unapplied. Since 1873, private and authoritative entities, like the *Institute de Droit International* and the International Law Association[6], as well as regional group of States[7] and the same League of Nations[8], strove to codify large sectors of international law. While some attempts revealed successful but still deprived of a universal acceptance, the convened conferences resulted in no further action, mainly because of political divergences and the limited time that delegates had to discuss the projects[9].

The most recent phase of codification took place from the 1960s and spanned over the following decades. After colonial countries gained their independence, through a process favored by the Declaration on the Granting of Independence to Colonial Countries and Peoples[10], the newly-born States asked to discuss the content of the customary rules to which they became automatically

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[5] AGO, R., «Nouvelles réflexions sur la codification du droit international», *Revue générale de droit international public*, Volume 92, Number 2, 1988, p. 539.

[6] TREVES, T., GIULIANO, M., SCOVAZZI, T., *Diritto internazionale: problemi fondamentali*, Giuffrè, 2005, pp. 294-297.

[7] WATTS, A., «Codification and Progressive Development of International Law», http://opil.ouplaw.com/view/10.1093/law: epil/9780199231690/law-9780199231690-e1380 January 2019; and BRUNS K., «On the road to Vienna: The Role of the International Law Commission in the Codification of Diplomatic Privileges and Immunities, 1949-1958», in P. Behrens's *Diplomatic Law in a new millennium, Oxford*, 2017, pp. 54-55; and ALVAREZ, A., *Le continent américain et la codification du droit international*, Paris Les èditions internationales, 1938.

[8] DHOKALIA, R. P., *The Codification of Public International Law*, Manchester University Press, 1970, pp. 111-132; and *League of Nations Committee of Experts for the Progressive Codification of International Law (1925-1928)*, Edited by S. Rosenne, Oceana Publications, 1972.

[9] MILLER, H., «The Hague Codification Conference», *American Journal of International Law*, Volume 24, Number 4,1930, pp. 674-693; ROSENNE, S., «Relations between Governments and the International Law Commission», *The Year Book of World Affairs*, Volume 19, 1965, p. 190; and HUDSON, M. O., «The First Conference for the Codification of International Law», *The American Journal of International Law*, Volume 24, Number 3, 1930, pp. 447-466.

[10] United Nations General Assembly Resolution 1514 (XV) of 14 December 1960, A/RES/15/1514.

bound[11]. They were convinced that the existing international norms were inspired by a set of moral, religious and juridical convictions they had never shared and that could endanger their successful process of independence[12].

Perfectly aware of the limited success of the previous efforts, at the Conference of San Francisco, the founding members of the UN acknowledged the possibility of entrusting the General Assembly with the aim to codify and favor the progressive development of international law. They came up with article 13 of the UN Charter, which was carefully worded since the delegates had clear in mind two factual considerations: the inadequacy of the contemporary international law to settle inter-State conflicts and that the existing norms could not easily chase the evolving needs of the international society[13].

With the conviction that the power attributed to the General Assembly could revive a fresh approach, and following the Report of the Committee on Progressive Development of International Law and its Codification[14], the UN facilitated the creation of the ILC, a permanent subsidiary organ of the General Assembly. The 1969 Vienna Convention on the Law of Treaties together with the 1961 and 1963 Vienna Conventions on Diplomatic and Consular relations are only three examples of its vital role in the contemporary process of codification.

The Statute and the practice of the ILC show that the adopted codification *iter* articulates in three different stages. As Roberto Ago stressed[15], the first one consists in the choice of the topic, the elaboration of a report and a first technical draft of the text, with relevant governmental comments.

The second opens with the convening of a conference to discuss and adopt a final text. As a large number of countries are asked to take part to the negotiations, it generally acts as a legislative assembly and applies practices which are typical of a parliament. These conferences work through two or more committees that discuss and amend the text proposed by the ILC, before a final vote in plenary session.

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[11] Crawford, J., *Brownlie's Principles of Public International Law*, Oxford, 2008, pp. 23-27.

[12] Corten, O., «Les aspects idéologiques de la codification du droit international», *Référence Mélanges Jacques Vanderlinden, le Code civil, bicentenaire d'un ancêtre vénéré*, 2004, pp. 492-520; and Dhokalia R. P., op. cit., pp. 19-36.

[13] Dhokalia, R. P., op. cit., p. 149; and Yuen, L. Y., «Progressive development and codification of international law», *World Affairs*, Volume 11, Number 1, 1948, pp. 24-29.

[14] United Nations General Assembly, Report of the Committee on the Progressive Development of International Law and its Codification of 18 July 1947, A/331.

[15] Ago, R., «La codification du droit international et les problèmes de sa réalisation», in *Recueil d'études de droit international en hommage à Paul Guggenheim,* Genève: Institut universitaire de hautes études internationales, 1968, pp. 102-108.

Finally, the last stage pertains to the achievement of the minimum number of ratifications for the conventions to enter into force: the bigger the number of ratifying States, the more successful the entire process[16].

This comprehensive mechanism, however, was not always pursued because of the political and diplomatic complexities it entailed. In many cases, like the UN Conventions on the Law of the Sea, the diplomatic conferences were anticipated by declarations of principles adopted by the General Assembly of the UN[17].

The main advantage of this last procedure lied in the consensus-based voting system, which derogates from the two third majority vote generally adopted by codification conferences[18].

In any case, with the only exception of the law of the sea[19], the conventions analyzed in this paper followed the tripartite scheme and concluded with a final text, based on the draft of the ILC as amended by the related diplomatic conference.

2. THE PARTICIPATION OF THE HOLY SEE TO THE CODIFICATION CONFERENCES: AN EVIDENCE OF ITS INTERNATIONAL PERSONALITY

The Holy See participated to all the conferences of plenipotentiaries for the codification of contemporary international law convened by the General Assembly of the UN and opened to «all States».

The issue of the actors to invite was discussed at length before the Conference of Plenipotentiaries on Diplomatic Intercourse and Immunities. In particular, two different approaches emerged within the Sixth Committee of the

[16] BAXTER, R. R., «The Effects of Ill-Conceived Codification and Development of International Law», *Recueil d'études de droit international en hommage à Paul Guggenheim,* Genève: Institut universitaire de hautes études internationales, 1968, p. 146.

[17] See United Nations General Assembly Declaration of the Legal Principles Governing the Activities of States in the Exploration and Use of Outer Space of 13 December 1963, A/RES/18/1962 and United Nations General Assembly Declaration of Principles Governing the Sea-bed and the Ocean Floor and the Subsoil Thereof, beyond the Limits of National Jurisdiction of 12 December 1970, A/RES/25/2749.

[18] SABEL, R., *Procedure at International Conferences*, Cambridge, 2006, p. 78.

[19] EVENSEN, J., «Working Methods and procedures in the Third United Nations Conference on the Law of the Treaties», *Collected Courses of the Hague Academy of International Law*, Volume 199, 1986, p. 415; and KOH, T. B., JAKUMAR S., «Negotiating Process of the Third United Nations Conference on the Law of the Sea», in H. Nordquist's *United Nations Convention on the Law of the Sea, A Commentary*, Volume I, Martinus Nijhoff Publisher, 1985, p. 29.

General Assembly. The first one[20] reflected the practice of other formal diplomatic meetings, namely that the members of the UN, its specialized agencies and parties to the Statute of the International Court of Justice could attend the consultations. This approach, besides already being used for the International Technical Conference on the Conservation of the Living Resources[21] and the International Conference on Statelessness[22], limited the participation to those subjects already having a formal link with the UN system.

The second formula[23], instead, interpreted the expression «all States» in a much broader way, enlarging the number of attendant States, but also augmenting possible political drawbacks and potentially endangering the success of the conference itself.

Despite the divergent views of the delegates on the topic, neither the Sixth Committee nor the participating States to the conferences of plenipotentiaries ever discussed the invitation of the Holy See and did not question its relationship with the Vatican City State. It was commonly accepted that, although not being a member of the UN, the Holy See was nevertheless part, among the others, to the International Atomic Energy Agency (of which it is a founding member) and the International Institute for the Unification of Private Law. This sufficiently confirmed that it was acting within the international community, in the words of Grotius, with *spiritus vitalis*, *consociatio plena atque perfecta iuris* and *summum imperium*[24].

The peculiar role of the Holy See within the UN has also been confirmed in the following years. In fact, since 2004, pursuant to Resolution 58/314 of the General Assembly, it is a Permanent Observer at the UN[25]. Similar status are enjoyed at the Food and Agriculture Organization, the International Labour Organization, the United Nations Educational Scientific and Cultural Organization, the World Health Organization, the Organization for Security and Coo-

[20] United Nations General Assembly, Sixth Committee, Official Records of Diplomatic intercourse and immunities (continued), 17 November 1959, A/C.6/L456.

[21] United Nations General Assembly, Resolution 900 (IX) of 14 December 1954, A/RES/900.

[22] United Nations General Assembly, Resolution 896 (IX) of 4 December 1954, A/RES/896.

[23] United Nations General Assembly, Sixth Committee, Official Records of Diplomatic intercourse and immunities (continued), 17 November 1959, A/C.6/L.457 Rev1(61).

[24] Grotius, H., *De iure belli ac pacis libri tres*, Pranava Books, 2018, p. 364.

[25] United Nations General Assembly Resolution 58/314 of 16 July 2004, A/RES/58/314; and Russell R. B., *A History of the United Nations Charter: the role of the United States*, Brookings, 1958, p. 509.

peration in Europe, the World Tourist Organization, the World Meteorological Organization and many more[26].

Despite the factual contribution of the Holy See to international relations, some scholars[27] are convinced that the participation of the Holy See to the conferences of codification only represented a mainly formal and honorific prerogative[28]. This interpretation does not find any confirmation in the practice[29], as in all conferences of plenipotentiaries the Holy See enjoyed the same rights of States, in accordance with the agreed procedural rules[30]. Although they do not explicitly provide for a formal equation between States *stricto sensu* and the Holy See, the latter had the chance to vote, to attach declarations to its intentions of vote and even to propose amendments.

Indeed, who questioned the full and equal participation of the Holy See even nourished doubts about its international personality. Though today there is no uncertainty about its capacity to enjoy rights and shoulder duties[31], the roots of the *superiorem non recognoscens* nature of the Holy See has long been disputed. Based on the claim of «esperta in umanità»[32], the international personality of the Holy See is even older than many other subjects, as it interacts with them since the 5th century[33].

Precisely for this reason, some authors argue that the international personality of the Holy See can be historically ascertained. In particular, the political events which led to the so-called *debellatio* of the Papal State in 1870, as a consequence of the Italian unification process, simply resulted into the loss of the territorial base on which it exercised its own jurisdiction. In this sense, the Holy See continued to enjoy its international personality even if only «with

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[26] TAURAN J. L., «La presenza della Santa Sede negli organismi internazionali», in O. Fumagalli Carulli's *Il governo universale della Chiesa e i diritti della persona*, Vita e pensiero, 2007, pp. 367-376.

[27] JEMOLO, A. C., *Premesse ai rapporti tra Stato e Chiesa*, Giuffré, 1965, pp. 56-65; and Bellini, P., *op. cit*, p. 325.

[28] *Ibidem*.

[29] BUONOMO, V., «Considerazioni sul rapporto Santa Sede- Comunità internazionale alla luce del diritto e della prassi internazionale», *Ius Ecclesiae*, Volume 8, 1996, pp. 14-16.

[30] DAUDET, Y., *Les Conférences des Nations Unies pour la Codification du Droit International*, Librairie générale de droit et de jurisprudence, 1968, p. 259; and DAUDET, Y., «Notes sur l'organisation et les méthodes de travail de la Conférence de Vienne sur le droit des traités», *Annuaire français de droit international*, Volume 15, 1969, pp. 54-69; and DECLEVA, M., «Note sulle conferenze convocate da organizzazioni internazionali», *Rivista di diritto internazionale*, Volume 52, 1969, pp. 185-230.

[31] ARANGIO-RUIZ, G., *La persona internazionale dello Stato*, UTET, 2008, p. 62.

[32] GIOVANNI PAOLO II, Messaggio consegnato nella Sede dell'Organizzazione delle Nazioni Unite per la celebrazione del 50º di fondazione.

[33] SANTUS, I., *Il contributo della Santa Sede al diritto internazionale*, CEDAM, 2012, p. 355.

regard to the organization of the Church and with regard to the faithful in the various parts of the world»[34]. Actually, for the period between 1870 and 1929, during which the Holy See was deprived of the territory, a part of the doctrine went so far to even admit the enjoyment of international personality in a special fashion, comparable to that of governments in exile[35]. This understanding is evidently questionable as the latters lack effectiveness, which is the cornerstone of international subjectivity[36]. On the contrary, the effectiveness of the Holy See has never been contested: it «always existed as sovereign and independent unit participating as such in international relations»[37].

A further confirmation of its international personality is expressly contained in the 1929 Lateran Treaty regulating the relations between Italy and the Holy See. Article II states that «Italy recognizes the sovereignty of the Holy See in the international field as an *inherent attribute of its nature,* in conformity with its tradition and the exigencies of its mission in the world»[38]. This was also reiterated in 1992, when the Holy See emphasized its sovereign nature, which was also confirmed by the other participating States, at the Conference on Security and Cooperation in Europe[39].

As a rule, the recognition of a State is not a prerequisite for the enjoyment of international personality. However, the endorsement of the members of the international community can be «of considerable importance especially in marginal or borderline cases»[40]. Since the Holy See has diplomatic relations with more than 180 States[41], and cooperates with them in various fields, there follows that its international personality shall be assumed. The United States of America, for instance, summarizes its relations with the Holy See as follows: «The Holy See, as supreme body of government of the Catholic Church, is a sovereign juridical entity under international law. The United States and the Holy See consult and cooperate on international issues of mutual interest, in-

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[34] Arangio-Ruiz, G., «On the nature of the international personality of the Holy See», *Revue belge de droit international*, Volume 31, Number 2, 1996, p. 369.

[35] *Ibidem*, p. 362.

[36] Marchisio, S., *Corso di diritto internazionale*, Giappichelli, 2017, p. 239.

[37] Arangio-Ruiz G., On the nature…, p. 365.

[38] Treaty between the Holy See and Italy, concluded on 11 february 1929.

[39] CSCE Communication 193- 5 june 1992 cited in Barberini, G., *Chiesa e Santa Sede nell'ordinamento internazoinale*, Giappichelli, 1996, p. 47.

[40] Crawford, J., *The creation of States in International Law*, Oxford, 1979, p. 154.

[41] https://holyseemission.org/contents/mission/diplomatic-relations-of-the-holy-see.php#igo January 2019.

cluding human rights, peace and conflict prevention, poverty eradication and development, environmental protection and inter-religious understanding»[42].

As agreed in article 24 of the Lateran Treaty, the Holy See exercises its moral and spiritual guide in international relations, thus orientating and bolstering the formation of State practice. For this reason, in the Third Report on Reservations to Treaties[43], the practice of the Holy See, alongside that of other States, is analyzed to infer the existence of certain customary international norms.

Also the ILC had the chance to focus on the issue of international personality of the Holy See, when in 1959, during the first stages of the elaboration of the 1969 Vienna Convention on the Law of Treaties, it made clear that «it has always been a principle of international law that entities other than States might possess international personality and treaty-making capacity. […] The Holy See was […] regarded as possessing international treaty-making capacity»[44].

It has long been argued whether the treaty-making power is a consequence or a prerequisite of the international personality. If it is not given that an international person also has treaty-making capacity «since it may only possess some other capacity»[45], on the contrary, it seems evident that if an entity has such capacity, it undeniably does possess international personality.

Consequently, by concluding agreements in several fields[46], the Holy See was legitimately considered a subject of international law and, thus, fully titled to participate to the conferences of codification[47].

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[42] U. S. Department of State. Bureau of European and Eurasian affairs, at https://va.usembassy.gov; Coriden, J. A., «Diplomatic Relations Between the United States and the Holy See», *Case Western Reserve Journal of International Law*, Number 19, 1987, pp. 361-373.

[43] United Nations General Assembly, Third report on reservation to treaties of 19 July 1998 by Pellet A., A/CN.4/491.

[44] International Law Commission, Documents of the eleventh session including the report of the Commission to the General Assembly, 1959, A/LN.4/SER. A/1959/ADD.1.

[45] LISSITZYN, A. W., «Territorial entities other than independent States in the Law of Treaties», *Hague recueil de cours*, Volume 114, 1965.

[46] See, among the others, Lateran Financial Convention signed on 11 February 1929; the four Geneva Conventions signed on 8 December 1949; Grains Trade Convention signed on 20 January 199 and the Treaty on the Prohibition of Nuclear Weapons, signed on 20 September 2017.

[47] BUONOMO, V., «Considerazioni sul rapporto tra diritto canonico e diritto internazionale», *Anuario de derecho canònico*, Volume 4,2015, pp. 13-70.

3. THE CONTRIBUTION OF THE HOLY SEE TO THE CODIFICATION OF INTERNATIONAL LAW

Since it was directly involved in the negotiations of the drafts adopted by the ILC, the Holy See played a significant role in the codification of international law, showing deep knowledge of State practice and extensive diplomatic skills. Its contribution was very often beneficial for the good outcome of the conferences, particularly when divergent perspectives of the international law and politics confronted each other[48].

3.1 **The 1961 Vienna Convention on Diplomatic relations**

The field of diplomatic relations was among the first branches of international law successfully codified under the auspices of the ILC[49]. Up to the 1960s, the subject was regulated both by customary law and the Regulation on the Precedence of Diplomatic Agents, concluded by Austria, Spain, France, Great Britain, Portugal, Prussia, Russia and Sweden on 19 March 1815[50]. Although the Regulation represented a reference point for the ILC in its drafting of the 1961 Vienna Convention on Diplomatic Relations, the norms contained therein clearly reflected a political and religious condition which did not exist any longer in the XX century.

With the aim to promote clear rules and friendly relations among States, pursuant to Resolution 1450/XIV of 7 December 1959[51], the UN General Assembly convened the Conference of Plenipotentiaries on Diplomatic Intercourse and Immunities in Vienna from 2 March to 14 April 1961. The Holy See sent its delegation headed by Monsignor Casaroli and composed by Monsignor Borettini, Monsignor De Liva, Professor Kipp and Professor Karl Zemanek[52]. The importance it attached to the topic became clear on 11 April 1961, when at

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[48] Cumbo, H. F., «The Holy See and International Law», *International Law Quarterly*, Volume 2, 1948-49, pp. 603-607.

[49] Cahier, P., «The Vienna Convention on Diplomatic Relations», *International Conciliation,* Volume 37, Number 5, 1969; and Langhorne, R., «The Regulation of Diplomatic Practice: The Beginnings to the Vienna Convention on Diplomatic Relations,1961», *Review of International Studies*, Volume 18, Number 17, 1992, pp. 3-17.

[50] Réglement sur le rang entre les agents diplomatiques conclu le 19 Mars 1815; and Satow, E., *A guide to diplomatic practice*, Longmans, 1957, pp. 168-169.

[51] United Nations General Assembly Resolution 1450/XIV of 7 December 1959, A/RES/1450(XIV).

[52] United Nations Diplomatic Conference on Diplomatic Intercourse and Immunities, Official Records, Volume I, A/CONF.20/14, pp. X-XX.

the closure of the Conference Monsignor Casaroli pointed out that the Convention confirms the peculiar position of the Holy See in the international community, which is to be taken as a tribute to the higher values it represents and had always represented[53].

The 1961 Vienna Convention, indeed, recalled that the Holy See entertains peculiar diplomatic relations which, despite being based on the rules of international law, are «founded upon apostolic primacy of the Pope and not upon his possession of temporal power»[54]. In this regard, the so-called right of active and passive legation of the Holy See are generally understood as both an evidence of its international personality and a legal basis for entertaining diplomatic relations. However, under general international law there is no trace of the existence of such rights and, as article 2 of the 1961 Vienna Convention purposefully points out, diplomatic relations find their *raison d'être* in an agreement, though not always in a written form, between States: this is the only legal ground for sending and receiving diplomatic missions[55].

The draft of the ILC discussed in Vienna, while referring to the 1815 Regulation on the Precedence of Diplomatic Agents, offered a balanced combination between the ancient norms and the contemporary consolidated practice of States.

Article 3 is the cornerstone of the whole Vienna Convention on Diplomatic Relations and for this reason a vast amount of time was dedicated to its debate. The Holy See, in particular, contested the draft proposed by the ILC, stating that: «The functions of a diplomatic mission consist, inter alia, in: (a) Representing the sending State in the receiving State; (b) Protecting in the receiving State the interests of the sending State and of its nationals; (c) Negotiating with the government of the receiving State; (d) Ascertaining by all lawful means conditions and developments in the receiving State, and reporting thereon to the government of the sending State; (e) Promoting friendly relations between the sending State and the receiving State, and developing their economic, cultural and scientific relations»[56].

According to Monsignor Casaroli, the draft placed the five listed duties of a diplomatic mission on equal footing and did not take into account that the functions of protection, negotiation, observation and promotion of friendly re-

[53] *Ibidem*, p. 52.

[54] *Ibidem*.

[55] MARCHISIO, S., *op.cit.*, p. 309 e CARDINALE, H. E., *The Holy See and the International Order*, Maclean-Hunter Press, 1976, p. 129.

[56] United Nations Diplomatic Conference on Diplomatic Intercourse and Immunities, Official Records, Volume II, A/CONF.20/4, p. 3.

lations were only possible once the representation of the sending State was ensured. For this reason, he proposed a different version of the article, which was endorsed by Portugal and Tunisia: «The functions of a diplomatic mission consist in representing the sending State in the receiving State for the purpose, inter alia, of: (a) Protecting in the receiving State […]»[57]. According to the Portuguese representative, in fact, this formulation duly rendered the difference between the main role of a diplomatic mission and its subsequent duties, which had to be set forth in other sub-paragraphs. However, because of the rapid and unpredictable evolution of the international relations of the time, communist countries opposed that it was not appropriate to crystallize the activities mentioned in the list, so to avoid an unadaptable text. Hence, the amendment of the Holy See was withdrawn, and the article was adopted as it stands today.

Despite this, the Holy See was still proactive in the debate related to articles 14 and 16 of the Vienna Convention on Diplomatic Relations. Before analysing the drafting history of the provision, it is worth recalling the traditional distinction between the Heads of ordinary and permanent missions of the Holy See, whose most known figure is the Apostolic Nuncio[58]. While he belongs to the first class of diplomats and enjoys the rights of deanship and precedence, in the countries not recognizing them the Holy See is used to appoint an Apostolic Pro-Nuncio. According to Cardinale, «the Prefix pro procedes the name nuncio so as to insinuate that idea of substitution. In other words, the Holy See hopes some day to accredit a nuncio with *de jure* deanship to a given post»[59]. Since 1994, however, the title of Pro-nuncio was abandoned in favor of Nuncio, who, from that moment, was not expected to automatically enjoy deanship rights. Rather than reflecting the changed political context, this choice was mainly aimed at limiting the number of diplomatic titles and strictly complying with the 1961 Vienna Convention which does not mention them[60].

As for the Apostolic Internuncio, he is a second class diplomat, selected whenever, for political reasons, it is impossible to appoint a Nuncio, like in the case of Latin America during the XIX century.

Finally, Regents and *Chargè d'Affaires* are designated in extraordinary situations, particularly when diplomatic relations have only recently been established or for the prolonged absence of a Nuncio.

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[57] United Nations Diplomatic Conference on Diplomatic Intercourse and Immunities, Official Records, Volume I, A/CONF.20/C.1/SR.2, pp. 58-59.

[58] Cardinale, *op. cit.*, p. 140.

[59] *Ibidem*, pp. 136-190.

[60] Denza, E., *Diplomatic Law: Commentary on the Vienna Convention on Diplomatic relations,* Oxford University Press, 1976, p. 111.

Contrary to the trend of updating the rules pertaining to diplomatic relations pursued by the Conference, article 14 of the 1961 Vienna Convention, consistently reproduces article 1 of the 1815 Vienna Regulation, with only limited changes. Among them, the disappearance of the word *legati*, also contained in the Canon law, is of utmost importance. The draft of the ILC in fact, stated that: «1. Heads of mission are divided into three classes-namely: (a) That of ambassadors or nuncios accredited to Heads of State; (b) That of envoys, ministers and internuncios accredited to Heads of State; (c) That of chargès d'affaires accredited to Ministers for Foreign Affairs.

2. Except as concerns precedence and etiquette, there shall be no differentiation between heads of mission by reason of their class.»[61].

Monsignor Casaroli understood the intention of the ILC to drop the word since, at that time, no ordinary Head of mission enjoyed the title of *legato*. However, the Holy See had never expressly relinquished it, since some heads of special mission could still be referred to as *legati*. For this reason, he endorsed the Ghanaian amendment[62], according to which the expression «and other heads of mission of equivalent rank» should be added to paragraph 1(a). The proposal was approved with only five abstentions of whom, like Poland, believed that there was no reason to grant a special prominence to any religion or State, in accordance with the principle of sovereign equality among the members of the international community. The subsequent practice of the Holy See showed that its request did not merely arise from a linguistic issue, but was of practical importance: from 1965 to 1993, in fact, it appointed a number of Pro-Nuncios in countries not recognizing the deanery rights to the Holy See[63].

With regard to article 16(3), it corresponds to the provision of article 4 of the 1815 Vienna Regulation, stating that «Le présent règlement n'apportera aucune innovation relativement aux représentants du pape». When the ILC discussed the draft article, three different interpretations of the 1815 provision confronted. According to the first one, the representative of the Pope is automatically given precedence as a consequence of a customary norm which was codified in the 1815 Vienna Regulation. The second interpretation foresaw a restricted applicability of the rule so that only States already recognizing it were bound. Under the third understanding, States were left free to adopt or

[61] United Nations Diplomatic Conference on Diplomatic Intercourse and Immunities, Official Records, Volume II, A/CONF.20/4, p. 4.

[62] United Nations Diplomatic Conference on Diplomatic Intercourse and Immunities, Official Records, Volume II, A/CONF.20/C.1/L.177.

[63] CURTI GIALDINO, C., *Lineamenti di diritto diplomatico e consolare*, Giappichelli, 2015, p. 183.

discard the practice, without contravening to the general rule of precedence. Since the first two interpretations appeared impossible or inconsistent with the practice developed in the following years particularly in Latin American countries, article 16(3), as proposed by the ILC reads: «The present article is without prejudice to any *existing* practice in the receiving State regarding the precedence of the representative of the Pope»[64].

Monsignor Casaroli appreciated the stance of the ILC on the issue, but nonetheless objected that the word *existing* could limit the application of the precedence rights to those already recognizing it at the moment of the ratification. He, thus, proposed to replace that word with «accepted»[65], entailing that all the countries are free to adopt at any time such custom. Since some delegates pointed out that the Convention was aimed at codifying existing customary law, rather than introducing new norms, the Pontiff delegation clarified that the recognition of the precedence rights to the delegation of the Holy See was a purely honorific act, customarily recognized to the Holy See for the values it vests. In this perspective, its amendment was not intended to restrict or impose anything new upon States, nor involved any kind of acceptance of theological claims.

The position of the Holy See was not shared by Mr Tunkin, delegate of the Union of Soviet Socialist Republics. Contrary to what the Pontiff representatives had already maintained, he was convinced that the existence of an old rule of international law could be resolved in two different ways: as a confirmation of the longstanding and appreciable traditions or as a proof of obsolete customs[66]. Since the 1815 Vienna Regulation was only signed by eight countries and considering that it was concluded more than a century and a half before, the Holy See could not pretend that a European rule, nurtured in a Eurocentric society, could convert into a universal one. In this perspective, the mandate of the ILC was to present a document acceptable to all countries, whatever their religious convictions. The delegate of Bulgaria, Mr Golemanov, added that the precedence rights accorded to the Holy See were also at risk of conflicting with fundamental rules of international law, namely the equality among members of the international community. This objection, however, seemed not to take into

[64] United Nations Diplomatic Conference on Diplomatic Intercourse and Immunities, Official Records, Volume II, A/CONF.20/4, p. 4 (emphasis added).

[65] United Nations Diplomatic Conference on Diplomatic Intercourse and Immunities, Official Records, Volume II, A/CONF.20/C.1/L.120.

[66] United Nations Diplomatic Conference on Diplomatic Intercourse and Immunities, Official Records, Volume I, A/CONF.20/C.1/SR.18, p. 121.

account the sovereignty rights of States, which are free to autonomously set up their relations with foreign countries.

When in the aftermath of a vibrant debate, the Chairman put the amendment to vote, it was adopted with only one contrary vote and seventeen abstentions[67]. This not only confirms that States felt fully free to decide whether to recognize precedence rights to the Holy See, but is also a proof of the ideological contrasts which sometimes animated the debate at the Conference.

As the Holy See always pursued to bring the values of justice and equity at the core of the debates, its contribution to the immunity of diplomatic agents was of recognized importance. Since the very beginning of the twenty-ninth meeting of the First Committee, the Holy See proposed the drafting of a statement of principles about the obligation of the sending State to ensure justice to those suffering damages caused by an unlawful act of a diplomat. To reinforce this duty, Monsignor Casaroli proposed to amend the text of article 32 of the Convention. In its final version, as it stands today, it stipulates that:

«1. The immunity from jurisdiction of diplomatic agents and of persons enjoying immunity under article 37 may be waived by the sending State.

2. Waiver must always be express.

3. The initiation of proceedings by a diplomatic agent or by a person enjoying immunity from jurisdiction under article 37 shall preclude him from invoking immunity from jurisdiction in respect of any counterclaim directly connected with the principal claim.

4. Waiver of immunity from jurisdiction in respect of civil or administrative proceedings shall not be held to imply waiver of immunity in respect of the execution of the judgment, for which a separate waiver shall be necessary»[68].

The proposal of the Holy See consisted in adding an entire new sentence to the first paragraph, stating that: «It shall be in any case under an obligation to take appropriate steps to provide fair compensation for damages caused by its diplomatic agents in consequence of liabilities incurred by them in criminal or civil matters in the receiving State»[69]. The amendment presented by Monsignor Casaroli encountered the approval of Mr Barton, the Yugoslavian delegate, who, having admitted that it clearly constituted a progressive deve-

[67] *Ibidem*, p. 123.

[68] Vienna Convention on Diplomatic Relations concluded on 18 april 1961 and entered into force on 24 april 1964, article 32.

[69] United Nations Diplomatic Conference on Diplomatic Intercourse and Immunities, Official Records, Volume II, A/CONF.20/C.1/ L.292.

lopment of international law, revealed that its aim was not to automatically render the sending State liable to pay whatever suffered damage. On the contrary, it simply meant to provide the claimant with some means of obtaining redress, in order to avoid that the injured party had no chance to accede to remedies. The United States of America, however, criticized the amendment of the Holy See as its representative pointed out that no mechanism to cope with uncertain cases was set. Thus, his government was not ready to accept an obligation which could possibly remain unapplied. Also Mr de Romree, representative of Belgium, despite having understood the reasons which drove the Holy See to promote the amendment, was skeptical about the possibility of precisely establishing the responsibility of the diplomatic agent and the eventual liability.

Mr Vallar, from United Kingdom, added that if the proposal of the Holy See was accepted, there would be the risk of triggering serious legal and constitutional difficulties. He, therefore, urged the Holy See to withdraw the amendment and consider other viable solutions. Because of the lack of a general acceptance to its proposal, the Holy See pushed for Resolution II attached to the Final act of the Conference[70], claiming that when immunity is not waived, the sending State is called to use its best endeavors to bring about a just settlement of the claims. Through this resolution, which is not binding, the Holy See had still the chance to shed light on the conduct States are required to maintain at least from a moral perspective.

Hence, when the Conference of Plenipotentiaries concluded on 14 April 1961, the Holy See not only succeeded in keeping alive customary rules related to its ancient rights, but it also contributed to clarify some of the most controversial issues pertaining to diplomatic relations[71]. With the only exception of the referred political divergences, none of the participants questioned the added moral value embodied by the Holy See and its tireless involvement in the positive outcome of one of the most prolific conferences of codification convened under the auspices of the United Nations[72].

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[70] United Nations Diplomatic Conference on Diplomatic Intercourse and Immunities, Official Records, Volume II, A/CONF.20/10/Add.1. resolution II.

[71] Feldkamp, M. F., *La diplomazia pontificia*, Jaca, 1998, pp. 12-18.

[72] Abdullah Y., «The Holy See at United Nations Conferences: State or Church?», *Columbia Law Review*, Volume 96, Number 7, 1996, pp. 1835-1875.

3.2 **The 1963 Vienna Convention on Consular relations**

From 4 March to 22 April 1963 the Holy See also participated to the UN Conference on Consular relations.

Following the successful outcome of the 1961 Vienna Convention on Diplomatic relations, ninety-five States met in Vienna to codify the customary rules pertaining to consular missions. The Holy See, which promptly signed the Convention, participated to the meetings on the ground of the possible establishment of consular relations in foreign countries.

Historically, since the time of the famous *capitoli* and *ordinazioni,* it entertained consular relations like every other State[73]. However, after the loss of its territory, the Holy See did not appoint Papal consuls and transferred the existing consular representatives to the Holy See to Italy. The last appointment of a Papal consul took place in 1872, under the direction of the Cardinal Secretary of States who, meanwhile, replaced the Cardinal Camerlengo in his duties.

Evidently, the major issue during the Conference lied in whether it was for the Holy See or the Vatican City State to effectively shoulder the rights and duties related to consular relations[74]. For this reason, the United Kingdom questioned the participation of the Holy See to the Conference in its capacity of moral rather than territorial entity.

Monsignor Casaroli, together with Monsignor Prigione and Professor Karl Zemanek, claimed that their participation as representatives of the Holy See aimed firstly at promoting friendly relations between peoples and nations of the world, but they could not exclude that the Holy See would establish consular relations in the future.

Having assessed the interest of the Holy See for the topic, its delegates intervened in the discussion of article 16 about precedence as between heads of consular posts, proposed by the ILC. It stated that:

«1. Heads of consular posts shall rank in each class according to the date of the grant of the exequatur.

2. If, however, the head of the consular post before obtaining the exequatur is admitted to the exercise of his functions provisionally, his precedence shall be determined according to the date of the provisional admission; this precedence shall be maintained after the granting of the exequatur.

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[73] CARDINALE, *op. cit.*, p. 279; and DI NOLFO, E., *Vaticano e Stati Uniti. Dalle carte di Myron C. Teylor*, Franco Angeli, 1978, pp. 19-21.

[74] MARESCA, A., *Le relazioni consolari*, Giuffrè, 1966, pp. 54-55.

3. The order of precedence as between two or more heads of consular posts who obtained the exequatur or provisional admission on the same date shall be determined according to the dates on which their commissions or similar instruments were presented or of the notice referred to in article 10, paragraph 3.

4. Acting heads of post rank after all heads of post in the class to which the heads of post whom they replace belong, and, as between themselves, they rank according to the order of precedence of these same heads of post.

5. Honorary consuls who are heads of post shall rank in each class after career heads of post, in the order and according to the rules laid down in the foregoing paragraphs.

6. Heads of post have precedence over consular officials not holding such rank»[75].

Mr Tshimbalanga, delegate of Congo, Leopoldville, presented an amendment[76] aimed at adding an entirely new paragraph, to stress that the precedence should not affect the one eventually accorded to the Holy See by the receiving States: «7. This article is without prejudice to any practice accepted by the receiving State regarding the precedence of the representative of the Holy See.».

The precedence rights of the Holy See were, however, not accepted by the same countries questioning the participation of the Holy See to the Conference. They claimed that such rule was not aimed at codifying international customary law, since no practice of consular relations of the Holy See existed at all. In contemporary times, in fact, the Holy See only tried to open a consulate in Vienna in 1938, but the project was never realized because of the Second World War. Since the issue of precedence rights[77] was polarizing the debate within the First Committee, Monsignor Prigione, having paid tribute to the Congolese amendment, asked not to press for its adoption.

This, however, did not prevent the Holy See from signing and then ratifying the Convention, immediately after the end of the Conference of Plenipotentiaries.

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[75] United Nations Conference on Consular Relations, Official Records, Volume II, A/CONF.25/6, p. 14.

[76] United Nations Conference on Consular Relations, Official Records, Volume II, A/CONF.25/C.1//L.133.

[77] Lee, L. T., *Consular Law and Practice*, Oxford University Press, 1991, pp. 32-37.

3.3 **The 1969 Vienna Convention on the Law of Treaties**

The 1968 Conference of Plenipotentiaries on Law of the Treaties convened by the General Assembly of the United Nations pursuant to its Resolution 2166/XXI is certainly one the most interesting meetings of State representatives held in recent times. The Conference, in fact, constituted a forum for the confrontation on both the major concerns of the international society of the time and the divergent interpretations of the law of the treaties, the core of inter-State relations[78]. Notwithstanding the opposing political interests and the tangible opposition between older countries and the new African block, the atmosphere remained generally relaxed and businesslike[79]. Most of the issues, in fact, had already been technically addressed by the ILC, so that only the second session of the Conference was characterized by a lively debate. The Holy See was invited to participate pursuant to paragraph 4 of the Resolution and its delegation, headed by Monsignor Opilio Rossi, also consisted of Monsignor Prigione, Professor Dupuy, Professor Vedovato and Father Antonio Messineo[80]. During the discussion within the Committee of the Whole, the Holy See stated that in a historical moment when a common language among the actors of the international community seemed to lack, with the consequent risk of its structural disruption, a treaty on the conclusion of treaties could reconstitute good and friendly relations among States[81]. For this reason, it prized the draft of the ILC as meeting the fundamental needs of the modern international society.

The political debate was mostly focused on Part V of the Convention, with peculiar reference to articles 53 and 64. The negotiations, in fact, centered on the concept of *jus cogens* which, despite having gained an almost general acceptance, still lacked a shared mechanism for identification. It is worth noting that the expression *jus cogens* had more recently appeared in the draft of the ILC and came up, in parenthesis, besides «peremptory norms of general international law», contained in the titles of the mentioned articles. The two terms are equivalent; However as shown by the case law of the International Court of Justice, rarely refers to the *jus cogens*, and more commonly to the peremptory

[78] ROSENNE, S., *The Law of the Treaties: a guide to the legislative history of the Vienna Convention*, Oceana Publications, 1970, p. 50.

[79] *Ibidem,* p. 73.

[80] United Nations Conference on the Law of Treaties, Official Records, Volume I, A/CONF.39/11, p. XVI.

[81] United Nations Conference on the Law of Treaties, Official Records, Volume I, A/CONF.39/C.1/SR.45, p. 258.

norms of international law[82]. In this vein, when dealing with *jus cogens*, one has to denote the existence of a certain quality whose presence does not depend on its factual recognition[83].

France, in particular, was among the countries which condemned that a conference convened to codify the existing customary international law, could end up focusing on *jus cogens*. The French delegates underlined that their greatest concern was represented by the possible drawbacks arising from article 53. In particular, because of the absence of a recognized criterion to identify the norms belonging to *jus cogens*, the subsequent limitations to the sovereign will of a State could not be domestically accepted. Since no agreement on the details to be included in the definition of *jus cogens* was reached, Mr De Bresson, representative of France, expressed his contrariness also to article 64.

Indeed, most of the States shared a widespread belief that the elements of morality, legality and international public order were the cornerstone of the definition of *jus cogens,* which is simpler to identify than to define[84]. As the same Holy See was convinced that a common denominator could be found in the principle of primacy of human rights, the topic of *jus cogens* drew the attention of the Pontiff delegates since moral reflections were at stake. They delivered one of the most appreciated speeches and clarified the relation between *jus cogens* and natural law. According to them, the latter is characterized by undisputed existence (which was only challenged by the positivist approach to international law), acknowledged moral value and independence from recognition by the members of the international community.

On the contrary, *jus cogens* is at the mercy of temporal evolution and it is a product of the international legal system outlined during the centuries. Natural law is nonetheless somewhat part of *jus cogens*, as several norms, which are typical of the contemporary international order, still maintain a valuable link with the fundamental rules rooted in the common awareness[85]. The Holy See, thus, having stressed that this relation adds the binding character of positive law to natural law, pointed out that an agreement on *jus cogens* paves the way for

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[82] For a reference to «peremptory norms of international law», see the Judgment of 25 September 1997 in the case of *Gabčíkovo-Nagymaros Project* (Hungary/Slovakia) or the Judgment of 3 February 2006 in the case of *Arme Activities on the Territory of the Congo* (New Application: 2002) (Democratic Republic of the Congo v. Rwanda) or the Judgment of 20 July 2012 in the case of *Questions relating to the Obligation toProsecute or Extradite* (Belgium v. Senegal).

[83] Sztucki, J., *Jus cogens and the Vienna Convention on the Law of Treaties: a critical Appraisal*, Springer-Verlag, 1974, pp. 97-106.

[84] Marchisio, M., *op. cit.*, p. 64; and Sztucki, J., *op. cit.*, p. 98.

[85] Keller, H. K. E. L., *Droit naturel et droit positif en droit international public*, Recueil Sirey, 1931.

the ideal of common justice, which is the ultimate aim of the international legal system[86].

Having in mind the necessity to confirm the importance of *jus cogens* from a practical and moral perspective, the Holy See did not hesitate to vote in favor of both articles as amended by the Drafting Committee. It also promptly signed and ratified the Convention.

With reference to the validity of the norms codified by the 1969 Vienna Convention for the Holy See, the theme has long been disputed by the doctrine[87]. Indeed, it seems evident that if the participant States of the Conference had wanted to limit the application of the Convention to the treaties concluded by the Holy See, they could have proposed it when article 3 was under discussion.

While the applicability of the 1969 Vienna Convention is not argued for agreements of a political nature stipulated by the Holy See, the major problem arises with Concordats, which are defined by José Martìn De Agar as «agreements between civil and religious authorities through which the juridical status domestically enjoyed by the Holy See is established»[88].

It is a commonly held view that it is not the content of a treaty that qualifies it, but only the methods and procedures employed for its conclusion are of a relevance. As it has been claimed, in fact, «la seule définition technique satisfaisante du traité international est une définition d'ordre formale, élaborée en function de la procédure utilisée pour sa formation. Le traité international, au sense étroit, se definit par sa forme, non par son contenu»[89]. Thus, the simple assumption that most of the treaties concluded by the Holy See relate to spiritual matters does not imply that they are not international agreements and that rights and duties descend from them.

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[86] FERLITO, S., *L'attività internazionale della Santa Sede*, Giuffrè, 1988, p. 178; and MARESCA, A., *Il diritto dei trattati: la Convenzione codificatrice di Vienna del 23 Maggio 1969*, Giuffrè, 1971, pp. 620-621.

[87] For the applicability of the 1969 Vienna Convention to the Holy See, MESSINEO, A., «La Convenzione di Vienna sul diritto dei trattati», *Civiltà cattolica*, Number 1, 1968; MESSINEO A., «Il jus cogens e la procedura cautelare», *Civiltà cattolica,* Number 3, 1969; and MALUWA, T., «The treaty-making capacity of the Holy See in theory and practice: a study of jus tractum of a non-state entity, *The comparative and International Law Journal of Southern Africa*, Volume 20, Number 2, 1987, pp. 155-174.

[88] MARTIN DE AGAR, J., «Concordato», in Otaduy Guerín, J., Viana, A., and Sedano Rueda, J., *Diccionario general de derecho canònico*, Aranzadi, 2012, pp. 431-440.

[89] ROUSSEAU, C., *Principes généraux de droit international public*, Pedone, 1944, p. 156.

3.4 **The 1975 Vienna Convention on the Representation of States in Their Relations with International Organizations**

As the Holy See enjoyed the permanent observer status at the United Nations since 1964, it was particularly skilled to contribute to the Conference on the Representation of States in Their Relations with International Organization, convened in 1973 with UN General Assembly Resolution 3072(XXVIII). Pursuant to the invitation contained in Resolution 3274 (XXIX), from 4 February 1975 to 14 March 1975 the Holy See sent its delegation to Vienna. Since the opening remarks of the Conference, the Holy See suggested to favor the progressive development in this field, which was not only characterized by the consolidated practice of States and international organizations, but also by the evolving nature of relations between member and non-member States of international organizations of a universal character[90].

One of the grounds of major debate within the First Committee and the Committee of the Whole was article 7 of the Convention, as drafted by the ILC. It outlined the main functions of permanent observer missions and stated that «The functions of the permanent observer mission consist inter alia in: (a) ensuring, in relations with the Organization, the representation of the sending State and maintaining liaison with the Organisation; (b) ascertaining activities in the Organization and reporting thereon to the Government of the sending State; (c) promoting co-operation with the Organization and, when required, negotiating with it»[91]. Most of the attenders to the Conference, including the Holy See, were convinced that the text as adopted by the ILC succeeded in striking a balance between the necessity to involve permanent observer missions to the largest extent feasible and to diversify their functions from permanent missions, as also well argued in the Commentary attached to the draft article. According to Monsignor Rovida, the aim of article 7 was precisely to favor the cooperation between permanent observer missions and international organizations and to allow the formers to initiate negotiations with other members with a view to become a member State[92].

The delegate of the United States of America, however, opposed this interpretation and required to: «Amend subparagraph (a) to read as follows (orally

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[90] Fennessy, J. G., «The Vienna Convention on the Representation of States in Their Relations with International Organizations of a Universal Character», *The American Journal of International Law*, Volume 70, p. 62.

[91] United Nations Conference on the Representation of States in their Relations with International Organizations, Official Records, Volume II, A/CONF.67/4, pp. 10-11.

[92] United Nations Conference on the Representation of States in their Relations with International Organizations, Official Records, Volume I, A/CONF.67/C.1/SR.7, p. 108.

revised formulation): observing, on behalf of the sending State, the activities of the Organization, and maintaining liaison with the Organization. Delete in subparagraph (c) the following words: "and, when required, negotiating with it"»[93]. The amendment to subparagraph (a), in the view of the Holy See, was totally inconsistent with the broader functions of a permanent observer mission. Monsignor Rovida, in fact, claimed that a permanent observer mission not representing the interests of its sending State could not evidently negotiate for the purpose of cooperation. It would be impossible to conceive one so disconnected from its sending State not to represent it in an international organization. The Holy See also marked that each State has the sovereign right to be represented in another State or international organization. If on one hand there is no general rule of international law referring to such right, on the other, depriving a State of the possibility to entertain these relations would be a limitation of the sovereign equality of the members of the international community. Thus, while accepting that the main function of an observer mission is, trivially, to observe, it is undoubtable that the delegation must have a representative character. Otherwise, as the delegate of the Ivory Coast said, it would be very difficult to understand the position taken by Switzerland and the Holy See in many years at the United Nations as permanent observers. When asked to clarify the issue, the Expert Consultant argued that two approaches emerged within the ILC. Some members opted for a historical attitude and concluded that the todays permanent observer missions are no longer vested with the same importance as in the past, considering the almost universal membership of the United Nations. Some others, instead, highlighted that this peculiar institute has no transitory character, as the practice of Switzerland and the Holy See showed. This last understanding was certainly the leading one, but it was also tempered by the necessity to properly diversify the tasks of a permanent mission from a permanent observer one. In this regard, for the latter, the ILC added that the negotiation function was not of primary importance, considering the scopes it pursues. Guided by article 2 paragraph 6 of the United Nations Charter, the ILC concluded that the duties of permanent observer missions mainly consisted in representing the sending State, ascertaining the activities of the organization and promoting cooperation (even) through negotiations. In this perspective, the stance taken by the ILC mediated the willingness of the United States to restrict the role and competences of permanent observer missions and the need to preserve the representative function, as required by the Holy See.

[93] United Nations Conference on the Representation of States in their Relations with International Organizations, Official Records, Volume II, A/CONF.67/C.1/L.22.

Since the Expert Consultant contributed to the clarification of the issue, most of the delegates concluded that there was no reason to fear that permanent observer and permanent mission would be placed on equal footing in their relations with international organizations. When, in fact, the amendment of the United States of America was put to vote, it was rejected by thirty-seven votes to thirteen.

Thereafter, the Holy See contributed to the debate related to article 73 of the Vienna Convention on the Representation of States in Their Relations with International Organization. In particular, together with Guatemala and Switzerland, its representatives co-sponsored an amendment[94] to the article. As proposed by the ILC, it stated that «The head of mission and members of the diplomatic staff of the mission, the head of delegation, other delegates and members of the diplomatic staff of the delegation should in principle be of the nationality of the sending State. They may not be appointed from among persons having the nationality of the host State, except with the consent of State which may be withdrawn at any time». Convinced that, as also underlined by the UNESCO in its comments[95], article 73 applied both to permanent missions and to delegations to organs of the conferences, the Holy See stated that, although being acceptable in general terms, the provision did not faithfully reflect the principle of international cooperation. In order to cooperate, in fact, States shall be able to draw on human resources particularly when dealing with technical issues. For this reason, the amendment proposed by the Holy See aimed at deleting the second sentence of the article and to add the following: «The head of mission and members of diplomatic staff of the mission may not be appointed from among persons having the nationality of the host State except with the consent of that State, which may be withdrawn at any time. Where the head of delegation, any other delegate or any member of the diplomatic staff of the delegation is appointed from among persons having the nationality of the host State, the consent of that State shall be assumed if it has been notified of the appointment and has made no objection».

While the principle according to which members of a delegation should be nationals of the sending State was not questioned, the Holy See stressed that in many cases poorer States had not enough economic resources to send them to conferences lasting even more than one week. If in these circumstances the sending State, in accordance with the draft of article 73, had to wait for the

[94] United Nations Conference on the Representation of States in their Relations with International Organizations, Official Records, Volume II, A/CONF.67/C.1/L.137.

[95] Yearbook of the International Law Commission 1971, Volume II, Number 1, A/CN.4/240 and Add. 1-7, pp. 415-418.

consent of the hosting State, it could take too much, because of the slowness of domestic procedures. There could be a risk, in other terms, that while waiting for the consent of the host State, the conference in question would have finished its works. Therefore, the aim of the amendment presented by the Holy See was to exclude a formal acceptance of the hosting State, without prejudicing the possible withdrawal of consent in case of serious objections.

To whom believed that the presence of a national in the delegation of another State could diminish the prestige of the hosting State, the Holy See not only foresaw an adequate mechanism of notification, but also stressed that such practice even enhances it. The Holy See did not further detail the timing of notification procedures, since, as its representatives pointed out in reply to an observation of Mr Tankoua, delegate of the United Republic of Cameroon, it is strictly linked to the issuing of credentials, which are often communicated very tardily.

Mr El-Erian, Expert Consultant for the Conference, stressed that the ILC also discussed a different drafting of the article, much closer to the proposal of the Holy See. However, only the minority of the members, including the Special Rapporteur, was in favor since issues of privileges and immunities could be at stake. As a consequence of the divergent understandings, in the view of Mrs De Merida, representative of Guatemala and co-sponsor of the amendment, the ILC promoted a text which consistently departed from the international practice. In this respect, not only the proposal of the Holy See conformed the text to the reality, but also removed any residual uncertainty about the possible withdrawal of the consent in the mentioned case.

Having discussed the issue, the amendment was put to vote and adopted by sixty-three votes to none, with only six abstentions.

When the Conference concluded on 14 March 1975 the Holy See had succeed in both promoting the progressive development of the relations between States and international organization and confirming the existing practice with reference to the functions assigned to permanent observer missions.

3.5 **The 1982 United Nations Convention on the Law of the Sea**

Especially concerned by the rapidity at which technologies were transforming the availability of ocean resources, the Holy See was crucial in the nego-

tiation of the UN Conference on the Law of the Sea and particularly in the determination of the concept of Common Heritage of Mankind[96].

The codification of the Law of the Sea committed the whole international community for a long period of time, starting from 1950s. However, it was only the Third UN Conference to achieve the goal of setting a clear arrangement. Initiated in 1973, the last process of codification of the Law of the Sea, as evident from the vast amount of preparatory works, was intense and often times uneasy. Not only many States already domestically regulated the matter and were hence reluctant to achieve a shared understanding, but the opposition between industrialized and developing countries was among the reasons of the breakdown of the consensus[97].

The delegation of the Holy See, composed by Monsignor Cheli, Monsignor Bressan and Monsignor Lebeaupin, was convinced that the sea-bed resources had a potential to redesign the future of the entire community. However, the capacity of only a limited number of its members to win them put the essence of Common Heritage at risk.

The expression Common Heritage of Mankind is not new in the classical doctrine of international law and was largely endorsed by the Catholic Church, which maintained that everyone should have access to a fair share of resources. Firstly promoted by Andrés Bello in 1830 under the form of «indivisible common patrimony»[98], it came back to limelight after a very famous speech delivered by Arvid Pardo, Ambassador of Malta, in 1967. In the same occasion, he proposed the adoption of a Memorandum declaring the sea-bed and the ocean floor beyond national jurisdiction the Common Heritage of Mankind, which was then reiterated by the Nepalese delegation to the Third United Nations Conference on the Law of the Sea[99]. The suggestion of the Maltese Ambassador was translated by the General Assembly of the United Nations into the 1970 Declaration of Principles Governing the Sea-bed and the Ocean Floor, and the Subsoil Thereof, Beyond the Limits of National Jurisdiction[100]. In particular,

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[96] Vedovato, G., «La diplomazia dei valori. Il ruolo internazionale della Santa Sede», *Rivista di Studi Politici Internazionali*, Volume 68, Number 2, pp. 163-195; and Wolfrum, R., «The principle of the Common Heritage of Mankind», *Zeitschrift fur auslandisches offentliches Recht und Volkerrecht*, Volume 43, 1983.

[97] Guntrip, E., «The Common Heritage of Mankind: An Adequate Regime for Managing the Deep Seabed?, *Melbourne Journal of International Law*, Volume 4, Number 2, 2003, p. 382.

[98] *Peaceful Order in the World's Oceans: Essays in Honor of Satya N. Nandan*, Edited by M. W. Lodge and M. H. Nordquist, Brill Nijhoff, 2014, p. 282- 300.

[99] Third United Nations Conference on the Law of the Sea, Official Records, Seventh and Resumed Seventh Session, Volume IX, A/CONF.62/65.

[100] United Nations General Assembly Resolution 2749 (XXV) of 12 December 1970, A/RES/25/2749.

the expression Common Heritage of Mankind entails the prohibition of national appropriation, the sole pacific use of the areas and the proper management of resources, bearing in mind the needs of developing States[101].

At the Third Conference on the Law of the Sea the meaning, scope and practical consequences of applying this principle to the deep seabed were marked by intense debate, particularly when the term «mankind» was combined with the word «heritage». This, of course, foresaw a peculiar interest for the future generations[102], which large part of the international community was not ready to bear yet.

During the negotiations, Monsignor Bressan stressed that the Church believed in the mankind as constituting a single family whose political division into countries could not affect the spirit of cooperation and universal solidarity[103]. For this reason, it was for all the participating States to clearly assess the specific determination of the Common Heritage with regard to sea, seabed and subsoils. However, while developing countries favored a broader interpretation of the concept, implicitly rejecting the principle of freedom of access to areas beyond national jurisdiction[104], industrialized countries only believed that the Common Heritage implied a more equal distribution of the economic benefits deriving from the exploitation of resources. Indeed, the formers, also taking into account the parallel negotiations related to the Agreement Governing the Activities of States on the Moon and Other Celestial Bodies, pushed for the recognition of the Common Heritage as *tertium genus*[105], with the peculiar creation of a trust in charge of the equal distribution of resources[106]. The Holy See particularly envisaged the creation of such authority, serving the peoples of

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[101] DANILENKO, G. M., «The concept of the Common Heritage of Mankind in International Law», *Annals of Air and Space Law*, Volume XIII, 1988, pp. 249-250.

[102] WOLFRUM, R., «Common Heritage of Mankind», in R. Bernhardt's *Encyclopedia of Public International Law*, Volume I, North Holland, 1992, p. 693.

[103] Third United Nations Conference on the Law of the Sea, Official Records, Seventh and Resumed Seventh Session, Volume XIV, A/CONF.62/SR.136, p. 34.

[104] TUERK, H., *Reflections on the Contemporary Law of the Sea*, Martinus Nijhoff, 2012, p. 36; and TUERK, H., «The idea of the Common Heritage of Mankind», in N. A. Martinez Guttierrez's *Serving the Rule of International Maritime law, Essays in honour of Professor David Joseph Attard*, Routlegde, 2010, pp. 156-175.

[105] MARCHISIO, *op. cit*., p. 220-222.

[106] NICHOLSON, G., «The Common Heritage of Mankind and Mining: An Analysis of the Law as to the High Seas, Outer Space, The Antarctic and World Heritage», *New Zealand Journal of Environmental Law*, Volume 6, 2002, pp. 191-193; and SCOVAZZI, T., «The Seabed beyond the Limits of National Jurisdiction, in A. G. Oude Elferink and E. J. Molenaar's *The international legal regime of areas beyond national jurisdiction: current and future developments*, Brill, 2010, pp. 43-48.

the world, with the aim to promote economic and social development as declared in the United Nations Charter.

In one of his most appreciated statements, Monsignor Cheli recognized that the material wealth was an important tool to unite men and the creation of an International Sea-Bed Authority could pursue this goal. In his opinion, while it is a duty of the Conference to set it with care and sense of responsibility, the Authority shall not be considered an enemy of State sovereignty, but rather as a common instrument to manage common resources.

Unfortunately, the great commitment of the Holy See to such a fundamental cause was not sufficient to grant the accord among countries. As Monsignor Lebeaupin claimed, the consensus mechanism, chosen as a guiding procedural rule for the whole system of deliberation, broke at the very last stage of the negotiations. He stressed that the participation of his delegation was neither legalistic nor founded upon political and economic claims, but rather it was aimed at concluding a text which had not only to be logic, but valuable and effective. Since the participating States were unable to find a compromise, which then resulted in some of them not to sign and ratify the Convention, the Holy See decided not to participate to the final vote on the draft text. As its delegates finally acknowledged that more than eight years of intense debate were at risk of producing an unfruitful document, the Pontiff delegation decided to sign the Final Act of the Conference and reserved the right to eventually sign and ratify the Montego Bay Convention.

Additionally, the Holy See sponsored a Resolution[107] attached to the Final Act, expressing concern for three points remained opened, namely the operative establishment of the Sea-Bed Authority and the International Tribunal of the Law of the Sea and the pioneer activities related to polymetallic nodules.

CONCLUSION

The relevant role played at different levels by the Holy See in international fora is surely unquestionable. Ranging from the contribution for the peaceful settlement of disputes, to the participation to international conferences for the codification of international law, the Holy See has always been a fundamental actor of law and politics.

[107] United Nations Convention on the Law of the Sea concluded on 10 December 1982 and entered into force 16 November 1994, Resolutions I and II.

With regard to the conferences of plenipotentiaries analysed so far, its involvement was certainly beneficial because of its peculiar position within the international community and the values it represents. In a historical moment of evident ideological opposition, the Holy See succeeded in favoring the formation of a peaceful and constructive atmosphere, which in most of the times resulted in a shared understanding of some fundamental norms of international law. Being part of the international community for centuries, the Holy See acted as the guardian of ancient customs and safeguarded them from attempts to distort their very nature.

This became evident during the Conference of Plenipotentiaries for Diplomatic Intercourse and Immunities when the Pontiff delegates pointed out that the main task of a diplomatic mission is certainly to represent a State rather than negotiate and protect nationals. Evidently, the latter functions can only be performed once the representation of a country is pursued and friendly relations are established.

The process of codification of international law was often times characterized by contrasting necessities and ideologies. In such a scenario, the Holy See, free from political interests, sought to shed light on moral reflections, which were at risk of remaining marginal. Because of its role of spiritual and ethical guide, the Holy See was able to put the principles of justice, equity, proportionality and common and shared interest at the core of the meetings.

The support for these values became clearer during the negotiation of the 1969 Vienna Convention on the Law of the Treaties. In endorsing the reference to and the content of *jus cogens*, the Pontiff delegates considered humanity and morality as means to ascertain the existence of peremptory norms. The acknowledgment of the imperative nature of certain human rights, as advocated by the UN bodies, was inspirational for one of the wisest interventions of the Holy See representatives. Having built upon the differences between natural law and *jus cogens*, they traced a way for a proper recognition of the cogent character of several norms protecting human life and dignity.

As the Holy See largely endorsed the scopes pursued by the UN, and ultimately acting to favor its universal membership, during the negotiations of article 7 of the 1975 Vienna Convention, the Pontiff representatives pointed out that there was no reason to fear that permanent and permanent observer missions could enjoy similar benefits. Since the aim of establishing and maintaining friendly relations among nations was relevant for the entire international community, the Holy See could not see how mechanisms aimed at favoring widespread and inclusive consultations could endanger in any way the rights of UN members. In this same belief, during the debate of the nationality of State

delegates to international conferences, the Holy See highlighted the importance to facilitate the participation of poorer nations. It, thus, largely endorsed the adoption of a text entailing the possibility to appoint a national of another State as own delegate. In the understanding of the Holy See, this clearly embodied the spirit of cooperation which should always guide international relations.

The Holy See had also the chance to clarify its interest in future generations and mankind during the negotiations of the UN Convention on the Law of the Sea. In that occasion its delegates anticipated the concept of sustainable sharing of Earth resources with a view to safeguard the interests of who, at the time, was unable to benefit from the potential economic advantages of the exploration of the seabed. The Holy See, thus, once again referred to the principle of solidarity as the leading value of the international cooperation.

Although the process of codification, with regard to the features it enjoyed up to the 80s, has come to term, the Holy See continues to offer its contribution in other fields of international law. This has recently emerged with clarity in the case of disarmament and, in particular, for what concerns the ban of nuclear weapons. Its general involvement, despite having reshaped for historical reasons, remains totally committed to grant the respect of equity, dignity, morality, cooperation and solidarity, which are the foundation of its mission in the world and the ultimate aims of the whole family of nations.