PERMANENT OBSERVER MISSION
OF THE HOLY SEE
TO THE UNITED NATIONS

Prot. N. 3.192/23

NOTE VERBALE

The Permanent Observer Mission of the Holy See to the United Nations presents its compliments to the International Law Commission and has the honor to refer to the Report on the work of the Seventy-fourth session of the International Law Commission (A/78/10).

The Permanent Observer Mission of the Holy See kindly requests that the enclosed Note containing information on the issues of statehood and protection of persons affected by sea-level rise, submitted by the Holy See in response to the request contained in paragraph 28 of the said Report, be taken into consideration by the International Law Commission (Enclosed).

At the same time, the Holy See wishes to draw attention to the fact that, in page 49 of the aforementioned Report, paragraph 8 of the commentary to draft Guideline 2 on the topic "Settlement of disputes to which international organizations are parties", the Holy See is inaccurately described as a "*sui generis* subject of international law" other than a State.

Although the Holy See has a unique spiritual mission, it should be noted that, under current international law and practice, it is formally recognized as a *State*, having the same rights and obligations as every other State. The Holy See is in fact an Observer *State* at the United Nations General Assembly, a *State* party to the Vienna Convention on Law of Treaties and to the Vienna Convention on International Relations, which are open only to States, and a Member *State* of the International Atomic Energy Agency and other international, intergovernmental organizations. Consequently, the Holy See kindly requests that the International Law Commission issues a correction to the Report to reflect this fact.

The Permanent Observer Mission of the Holy See to the United Nations avails itself of this opportunity to renew to the International Law Commission the assurance of its highest consideration.

New York, 12 December 2023

INFORMATION SUBMITTED BY THE HOLY SEE
ON THE QUESTIONS OF

STATEHOOD AND THE PROTECTION OF PERSONS AFFECTED BY SEA-LEVEL RISE

IN RESPONSE TO THE REQUEST CONTAINED IN § 28 OF THE 2023 REPORT OF THE
INTERNATIONAL LAW COMMISSION (A/78/10)

DECEMBER 2023

In order to contribute to the International Law Commission's consideration of the topic "See-level rise in relation to international law" and in response to the request contained in § 28 of its 2023 Report (U.N. Doc. A/78/10), the Holy See is pleased to submit the following information regarding State practice and *opinio juris* on the questions of statehood and protection of persons affected by sea-level rise.

A) On statehood

Under current international law and practice, whether an entity is to be considered a State or not depends on its formal recognition as a State by the other members of the international community. The determination of statehood is not an academic exercise based on an assessment of the apparent fulfilment of the criteria mentioned in article 1 of the *Montevideo Convention of the Rights and Duties of States*, of December 26, 1933, but rather a unilateral legal and political act whereby one State recognized another as a member of the international community with all the rights and obligations that ensue from that status. Recognition is left at the discretion of the authorities competent for international affairs[1]. There are no restrictions on the

[1] *Cfr*. UNITED STATES, SUPREME COURT, *Jones v. United States*, 137 U.S. 202, 212 (1890): "*Who is the sovereign,* de jure *or* de facto*, of a territory, is not a judicial, but a political, question, the determination of which by the legislative and executive departments of any government conclusively binds the judges, as well as all other officers, citizens, and subjects of that government. This principle has always been upheld by this court, and has been affirmed under a great variety of circumstances*";

SINGAPORE, COURT OF APPEAL, Civil Aeronautics Administration v. Singapore Airlines Ltld [2004] SGCA 3, Judgement of 14 January 2004 , § 22, 27 : "*whether an entity is a State so as to enjoy sovereign immunity in Singapore, is eminently a matter within the exclusive province of the Executive to determine, as what are involved in the question are not only matters of fact but also matters of policy. The courts are not in the best position to decide such a question. (…) It is really not for the courts to get themselves involved in international relations. The courts are ill-equipped to deal with them. If the answer of the Executive to a query is not clear enough, the proper recourse would be for the court to seek further clarification and not to second-guess the Executive or to determine the answer independently based on evidence placed before it*";

BELGIUM, SENATE, *Session 2014-2015, Replies to written questions by the Minister of Foreign Affairs,* n° 6-688, 26 June 2015: "*La reconnaissance d'un Etat est un acte souverain et politique, qui se place dans le cadre de la politique étrangère de l'Etat reconnaissant. Dans le système belge la reconnaissance d'un Etat tiers est une compétence du gouvernement fédéral: en effet, conformément à l'article 167, §1er, de la Constitution, c'est le Roi qui a la responsabilité des relations internationales*";

recognition of other entities as States and, conversely, there is no obligation to recognize other entities as States, even if they fulfil the traditional criteria.

While the criteria mentioned in the *Montevideo Convention* may serve as a useful analytical tool, they do not reflect international practice or constitute part of customary international law. Recognition is based on policy and comity considerations. Some entities have been recognized as States well before they fulfilled one or more of the "traditional criteria" of statehood, while other entities, which unquestionably fulfil those criteria, are not recognized as States by most of the international community. Recognition of new States may even be made conditional on the fulfilment of political requirements unrelated to the traditional criteria[2]. Furthermore, over-reliance on the criteria contained in the *Montevideo Convention* may lead to the paradoxical situation of treating as a State an entity that the competent political authorities have decided not to recognize as such[3].

The Holy See's recognition of other entities as States is in fact based on a variety of political, humanitarian, and diplomatic considerations. For instance, based on its commitment to the "*stability in the region, and hopes that conditions will continue to be created for a future of reconciliation and of peace between the peoples of Serbia and Kosovo, with respect for minorities and commitment to the preservation of the priceless Christian artistic and cultural patrimony which constitutes a treasure*

---

[2] *See, e.g.*: EUROPEAN COMMUNITY COUNCIL OF MINISTERS, *Declaration on the Guidelines on the recognition of new states in Eastern Europe and in the Soviet Union,* 16 December 1991, UN Doc. S/23293, annex: *"The Community and its Member States confirm their attachment to the principles of the Helsinki Final Act and the Charter of Paris, in particular the principle of self-determination. They affirm their readiness to recognize, subject to the normal standards of international practice and the political realities in each case, those new States which, following the historic changes in the region, have constituted themselves on a democratic basis, have accepted the appropriate international obligations and have committed themselves in good faith to a peaceful process and to negotiations"*.

[3] *See, e.g.*: CANADA, SUPERIOR COURT OF QUEBEC, *François Parent, Specnor Tecnic Corporation et Corporation Specnor Tecnic International c. Singapore Airlines Limited* (22 October 2003), Montreal 500-05-074778-026 (Sup.Ct.Q.).

for all humanity"[4] the Holy See has not yet recognized Kosovo as a State, although it might appear to fulfil the traditional criteria for statehood.

As it concerns the status of the Holy See itself, it should be noted that, under current international law and practice, and notwithstanding its unique spiritual mission, it is formally recognized as a *State*, having the same rights and obligations that all other States do, independently from the existence of the Vatican City State. The Holy See is in fact an Observer *State* at the United Nations General Assembly, a *State* party to the *Vienna Convention on Law of Treaties* and to the *Vienna Convention on International Relations*, which are open only to States, and a Member *State* of the International Atomic Energy Agency and other international, intergovernmental organizations. In this regard, the Holy See wishes to draw the attention of the Commission to the February 25, 2016 Judgement of the Appeal Court of Ghent in the case *V. et al v. the Holy See*, where the tribunal found that:

> 3.2. The first instance court's assumption, *i.e.* that the Holy See is expressly recognised as a State by Belgium, or at least as a foreign sovereign with the same rights and obligations as a State, is correct and can be supported for the reasons set out below.
>
> 3.2.1. Belgium has maintained relations with the Holy See, diplomatically and by treaty, since 1832, including the period from 1871 to 1929 following the abolition of the Papal States and before the establishment of Vatican City. Twenty-four ambassadors have attended the Holy See since 1832 (…).
>
> The Holy See, not the State of Vatican City, is the depository of international sovereignty. The ambassadors are therefore accredited to the Holy See and not to Vatican City (…). This is evident, *inter alia*, from the Royal Decree of 4 December 1835 whereby Viscount Vilain XIIII was appointed the first ambassador of Belgium to the Holy See (…).
>
> Vatican City has no diplomatic relations with other states. The diplomatic representation of Vatican City with regard to other states or other entities under international law with regard to diplomatic relations or the signing of treaties is reserved for the Holy See and exercised by the State Secretariat.
>
> Moreover, the Holy See is also represented in Belgium by a Papal Nuncio. The Nuncio is therefore the diplomatic representative of the Pope and has the same status

[4] POPE BENEDICT XVI, *New Year's Address to the Members of the Diplomatic Corps accredited to the Holy See*, 8 January 2009.

as an ambassador. Traditionally, in Belgium, the Papal Nuncio is even considered as the Doyen of the Diplomatic Corps (…). This assumes accreditation by the Belgian State of the Papal Nuncio as a representative of the Holy See, so that he enjoys diplomatic immunity, as a result of the immunity of the Holy See.

The fact that this accreditation by the Belgian State involves an act of recognition is confirmed by Article 2 of the Vienna Convention on Diplomatic Relations of 18 April 1961 (hereafter "VCDR") - which governs diplomatic relations between Belgium and the Holy See - which reads as follows:

> "art. 2: The establishment of diplomatic relations between States, and of permanent diplomatic missions, takes place by mutual consent."

Thus, in formal terms, diplomatic relations between two States are based on mutual consent. Establishing diplomatic relations requires mutual recognition as a State and, as far as the diplomatic relations between Belgium and the Holy See are concerned, provides proof of the acceptance by the Belgian executive of the Holy See's status as a State and sovereign.

3.2.2. Moreover, the Holy See has in the past entered into bilateral treaties or concordats with Belgium, such as the concordat of 26 May 1906 between the Holy See and the Congo Free State (…). Since the State of Vatican City did not exist then (it was not established until 1929), this bilateral treaty cannot be based on the existence of a territory or control over territory. The treaty was entered into between the Holy See and the government of the Congo Free State and was ratified by the Belgian King as sovereign King of that independent State. From the Belgian perspective, at that time, the King entered into a bilateral treaty with the Holy See as an equal sovereign.

On 8 December 1953, a second concordat was entered into between Belgium and the Holy See (…). The concordat related to the Belgian Congo and replaced the concordat of 26 May 1906 between the Holy See and the Congo Free State.

According to the preamble, the contracting parties are the Belgian government and the Holy See. Articles 29 and 30 of the concordat stipulate that the treaty must be ratified. According to Article 14 of the Vienna Convention on the Law of Treaties of 23 May 1969 (to which both Belgium and the Holy See are parties), ratification is the process of approval of international treaties entered into between States (in order to express their agreement to be bound by a treaty).

A bill was brought before the Chamber of Representatives for the approval of the treaty between Belgium and Holy See. This bill was passed by the Chamber of Representatives on 11 March 1954. However, the bill became irrelevant fallowing the independence of Congo on 30 June 1960.

The formation of these bilateral treaties (even though they are no longer in force) constitutes further proof of the recognition by the Belgian State of the Holy See as a State. Indeed, the signing of treaties is undeniably the preserve of States (cf. art. 6 of the Vienna Convention on the Law of Treaties of 23 May 1969, which codified the international customary law and therefore applied even earlier in 1906, or at least in 1954).

3.2.3. Furthermore, reference may also be made to the ratification by the Holy See of multilateral conventions which can only be ratified by States, such as the Vienna Convention on Diplomatic Relations of 18 April 1961 and the Vienna Convention on the Law of Treaties of 23 May 1969. These conventions were ratified by the Holy See on 17 April 1964 and 25 February 1977 respectively.

None of the States that are a party to these conventions, including Belgium, objected to the ratification of these conventions by the Holy See as a State.

3.2.4. The Holy See also enjoys international recognition as a foreign sovereign, in the sense of an entity with the status of a State, in view of its diplomatic relations with numerous States.

The Holy See currently maintains diplomatic relations with 178 countries, with the European Union and the Sovereign Military Order of Malta (…).

The Holy See also participates in several international and regional intergovernmental organisations, including the UN (…).

Furthermore, the Holy See is a party to many multilateral treaties (…) and enters into concordats with States, i.e. bilateral treaties relating to the position of the Roman Catholic Church in those States (…).

Finally, the Holy See has the status of Permanent Observer at the United Nations *inter alia* (…). In principle, the United Nations is formed by existing States, so that membership of the United Nations is a significant indication of an entity's status as a State.

The General Assembly of the United Nations in New York passed a resolution on 16 July 2004 (A/58/314) in which the participation of the Holy See in the work of the United Nations was defined in greater detail (…). The Holy See is not only able to participate in the general debate at the General Assembly, but also has the right to speak in the course of the discussion of agenda items during the General Assembly. Although the Holy See - due to its capacity as supreme authority - does not have the right to vote and cannot propose any candidates for the General Assembly and is therefore not a 'full member' of the United Nations, it does have a seat with the status of “Observer State”, a category that is only available to States. All of this

demonstrates that the Holy See is a foreign sovereign, with the same rights and obligations as a State.

In short, the recognition of the Holy See by the Belgian State as a State, or at least as a foreign sovereign with the same rights and obligations as a State, is therefore established incontrovertibly.

Since this is a prerogative of the Belgian executive, such recognition cannot be ignored within the context of judicial proceedings.

Thus, the Holy See - which was summoned by Appellants - possesses State immunity.[5]

That decision was examined by the European Court of Human Rights in the case of *J.C. and others v. Belgium* where it decided that:

> 56. La Cour relève que la présente espèce se distingue des affaires précitées dans lesquelles elle a examiné l'accès à un tribunal sur le terrain de l'immunité des États en ce qu'elle soulève pour la première fois la question de l'immunité du Saint-Siège. La décision qui fait grief figure dans l'arrêt du 25 février 2016 par lequel la cour d'appel de Gand s'est déclarée sans juridiction pour juger de l'action en responsabilité civile introduite par les requérants contre le Saint-Siège notamment en raison de l'immunité de juridiction dont il jouit. Pour parvenir à cette conclusion, la cour d'appel a constaté que le Saint-Siège se voyait reconnaître sur la scène internationale les attributs communs d'un souverain étranger disposant des mêmes droits et obligations qu'un État (…). Elle a notamment relevé que le Saint-Siège était partie à d'importants traités internationaux, qu'il avait signé des concordats avec d'autres souverainetés et qu'il entretenait des relations diplomatiques avec environ 185 États dans le monde. La cour d'appel s'est aussi appuyée sur la pratique belge pour constater que la Belgique, qui entretient avec le Saint-Siège des relations diplomatiques depuis 1832, le reconnaît comme un État.
>
> 57. La Cour n'aperçoit rien de déraisonnable ni d'arbitraire dans la motivation circonstanciée qui a mené la cour d'appel à cette conclusion. Elle rappelle en effet qu'elle a déjà elle-même caractérisé des accords conclus par le Saint-Siège avec des États tiers comme des traités internationaux (*Fernández Martínez c. Espagne* [GC], no 56030/07, § 118, CEDH 2014 (extraits), et *Travaš c. Croati*e, no 75581/13, § 79, 4 octobre 2016). Cela revient à reconnaître que le Saint-Siège a des caractéristiques comparables à ceux d'un État. La Cour estime que la cour d'appel pouvait déduire de

[5] BELGIUM, COURT OF APPEAL OF GHENT, *V. et al v. the Holy See*, Nr. 2013/AR/2889, 25 February 2016, https://ilbc.be/?m=201602 , our translation.

ces caractéristiques que le Saint-Siège était un souverain étranger, avec les mêmes droits et obligations qu'un État.[6]

B) On the protection of persons affected by sea-level rise

The Holy See calls for an ethical approach to the challenges posed by sea-level rise that would respect not only the rights and needs of the present generation but also those of future generations. In that context, the Holy See notes the Commission's detailed analysis of the various legal frameworks that could be used to address the situation of persons affected by rising sea-levels, including human rights law, international humanitarian law, refugee law, and environmental law. Regrettably, it appears that none of those legal frameworks, either individually or in conjunction with the others, would provide adequate protection to those affected by changes in sea-level. Therefore, the Holy See favours the development of a new legal regime to protect both those who will be permanently displaced within their own country and those who will be forced to migrate to another country due to rising sea-levels.

Concerning the principles that would be applicable, a "rights-based approach" would be insufficient to protect the victims of sea-level rise, particularly in cases where there is no actual link between the persons in need and the States called to protect their rights. Therefore, the Holy See would favour a "needs-based approach," which would give priority to the duty to address the urgent but differentiated needs of the person requiring protection.

Moreover, although persons displaced due to environmental reasons do not fall within the internationally agreed definition of refugees, the situation of those forced to leave their country of origin due to rising sea-levels is closer to that of the refugees than that of the other models examined. Hence, the Holy See is of the view that the provisions of Refugee law could provide a useful model to develop new norms for the protection of those affected by rising sea-levels, including the recognition of their right to request asylum, the applicability of the principle of *non-refoulement* and the right not to be punished for the illegal entry.

---

[6] EUROPEAN COURT OF HUMAN RIGHTS, *J.C. and Others v. Belgium - 11625/17 Judgment of 12 October 2021 [Section III]*, https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-212635%22]} §§ 56-57.