

# The Continuing Question of Sovereignty and the Sovereign Military Order of Jerusalem, of Rhodes and of Malta

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## Abstract

The Sovereign Military Order of Malta is the only organisation currently recognised, albeit by a minority of States, as quasi-sovereign. The article begins with a brief look at the concepts of sovereignty and statehood as traditionally understood. The case of the Order of Malta is then examined in its historical context, and the basis for its claimed sovereignty assessed. Recent reconsideration of the concept of State sovereignty, and challenges to the State, are then considered. The lessons from the example of the Order of Malta for the relationship of territory and statehood are evaluated.

## Introduction

The Sovereign Military Order of St John of Jerusalem, of Rhodes and of Malta, also known as the Order of Malta, the Order of St John of Jerusalem, or simply the Knights Hospitallers or Hospitallers, is a unique international confraternity. It is the only organisation currently recognised, albeit controversially, by a minority of States, as sovereign or quasi-sovereign. In view of the claims to 'sovereignty' which have been made from time to time by other Orders of chivalry — or more recently by various pretended Orders — to such status, it is worthwhile looking more closely at the claims made by or on behalf of the Order of Malta. In so doing we may help to locate the origin and nature of this so-called sovereignty, and answer the question of which Orders of chivalry are likewise 'sovereign', or, indeed, whether the Order of Malta itself is truly sovereign.

The article begins with a brief look at the concepts of sovereignty and statehood as traditionally understood. A survey is then made of the origins of what might be called anomalous entities — bodies which have some status at international law, but which are not traditional States. The case of the Order of Malta is then examined in its historical context, and the basis for its claimed sovereignty assessed. The position of branches of the Order, and of other ancient religious Orders is looked at. Recent reconsideration of the concept of State sovereignty, and challenges to the State, are then considered. The lessons from the example of the Order of Malta for the relationship of territory and statehood are evaluated.

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## I. Sovereignty and Statehood

The notions of sovereignty and statehood were once among the most important aspects of public international law. Their heyday was perhaps in the late nineteenth century, when sovereign States enjoyed almost unfettered independence of action. These were subject only to the regulation of their diplomatic and military action, principally by the Law of Armed Conflict, or the Laws of War.<sup>1</sup>

But to have sovereignty, a State must have a permanent population, it must have a defined territory, it must have a government, and it must have the capacity to enter into diplomatic relations.<sup>2</sup> No other entity could be regarded as a sovereign State, whatever its de facto power. The Order of Malta at one time met all these criteria for statehood, but does not do so now.

This article is the latest in a long series of attempts to explain the somewhat anomalous situation of the Order.<sup>3</sup> That this is an on-going controversy is the result of what Breycha-Vauthier and Potulicki called ‘a somewhat regrettable confusion of the Order’s permanent position as an international organisation and its role as a territorial Power’.<sup>4</sup> The character of the Order did not originate simultaneously with its territorial sovereignty, and therefore did not disappear with the latter.<sup>5</sup> We must, therefore, be on guard against attaching too much significance to the characterisation of a particular entity as a ‘State’.<sup>6</sup> The Order may be sovereign in a limited sense, but not necessarily a State. It may also be true that recent debate surrounding the nature of State sovereignty has gone some way to tempering the hitherto rigid adherence to nineteenth century notions of State sovereignty.

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1 International law has been called ‘the sum of the rules or usages which civilized states have agreed shall be binding upon them in their dealings with one another’: *West Rand Central Gold Mining Co v The King* [1905] 2 KB 391 quoting Lord Russell of Killowen in his address at Saratoga in 1876. See also Sir Michael Howard, George Andreopoulos & Mark R Shulman (eds), *The Laws of War – Constraints on Warfare in the Western World* (1994); John Gillingham & J C Holt (eds), *War and Government in the Middle Ages* (1984).

2 *The Montevideo Convention on the Rights and Duties of States*, signed on 26 December 1933, 165 LNTS 19 (entered into force 26 December 1934) (*The Montevideo Convention*); Manley Hudson (ed), *International Legislation* (vol VI) (1931–50) at 620. Although the application of the Convention is confined to Latin America, it is regarded as declaratory of customary international law.

3 See for example, Giorgio Cansacchi, *La personalità di diritto internazionale del S.M.V. Gerosolimitano detto di Malta* (nd) at 8; Arthur Breycha-Vauthier & Michael Potulicki, ‘The Order of St John in International Law: A forerunner of the Red Cross’ (1954) 48 *American Journal of International Law* 554; Charles D’Olivier Farran, ‘The Sovereign Order of Malta in international law’ (1954) 3 *International and Comparative Law Quarterly* 222; Carlos Pasini-Costaodoat, ‘La personalidad internacional de la S.M.O. de Malta’ (September–December 1948) *Revista Peruana de Derecho Internacional* 231; Giorgio Cansacchi, *Il diritto di legazione attivo e passivo dell’Ordine de Malta* (1940) at 65; A Astraudo, ‘Saint-marin et l’Ordre de Malta’ (1935) *La Revue Diplomatique* 7.

4 Breycha-Vauthier & Potulicki, *ibid* at 555.

5 *Id* at 557.

6 Oliver J Lissitzyn, ‘Territorial Entities in the Law of Treaties, (1968–III) 125 *Recueil des Cours Academie de Droit International* 5 at 9–15 (1968–III). See also James Crawford, *The Creation of States in International Law* (1979).

## 2. The Existence of Anomalous Entities having Personality at International Law

Traditionally only territorial States were regarded as international persons, capable of having rights and duties under international law.<sup>7</sup> That was simply a corollary of public international law, which was nothing less than — and originally little more than — the rules governing the relations of States. But that understanding of statehood has passed through several phases. In one model 1648 and the Peace of Westphalia have stood out as seminal, but there have been other important historical moments. That entities other than States can be subjects of international law is not even now a universally accepted idea, and exactly which entities do have this status is an even more controversial topic.

The status of organisations in international law is less controversial than the assumption of rights and duties by individuals or groups of individuals. In 1949 the International Court of Justice recognised the United Nations ('UN') as an international person,<sup>8</sup> thereby beginning the process whereby an ever increasing number of modern international organisations are recognised as having personality at international law. That is not the same thing as saying that the UN is a State, which it certainly is not, or that its legal personality and rights and duties are the same as those of a State.<sup>9</sup>

There are now many international organisations, though not all of these are necessarily subjects of international law.<sup>10</sup> Whilst many such organisations, such as the European Union, or the UN, receive ambassadors from member countries, the Sovereign Military Order of Malta (known as SMOM for short — but here referred to as 'the Order' for convenience) almost alone among international organisations claims the right to send representatives to other States for the purpose of carrying on diplomatic negotiations, as well as to receive representatives from other States for the same purpose.<sup>11</sup> Most importantly, the Sovereign Military Order of Malta claims, and is sometimes acknowledged to be, a sovereign State in its own right.<sup>12</sup> This status has been claimed since at least the fourteenth century, well before international law began to accord legal personality to international organisations.<sup>13</sup> But the Order is not unique in

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7 Public International Law regulates the relations between nations. The basic sources of international law are written and unwritten rules, treaties, agreements, and customary law. Custom is general State practice accepted as law. The elements of custom are a generalised repetition of similar acts by competent state authorities and a sentiment that such acts are juridically necessary to maintain and develop international relations. The existence of custom, unlike treaty-law, depends upon general agreement, not unanimous agreement; Gerhard von Glahn, *Law Among Nations: An Introduction to Public International Law* (6<sup>th</sup> ed) (1992).

8 *Reparation for Injuries Suffered in the Service of the United Nations (Advisory Opinion)* (1949) 4 ICJ Rep 179.

9 Ibid, '[The United Nations Organisation] is a subject of international law and capable of possessing international rights and duties, and ... it has capacity to maintain its rights by bringing international claims.'

10 They may become subjects of international law by operation of municipal law, as for example, the *International Organisations Act 1968* (UK), and SI1968, No 442, which recognises the representative of the Council of Europe in the United Kingdom.

11 The Order was also involved in the Geneva Conventions, and is a member of the International Red Cross; Arthur Breycha-Vauthier, *Der Malteser-Orden im Völkerrecht* (1950) at 401–413. The European Communities also accredit some ambassadors.

12 For example, the Republic of San Marino acknowledged the Order as a sovereign state in a treaty of amity in 1935; Astraudo, above n3; Cansacchi, above n3 at 65.

such claims. Its own parent body, the Holy See, has for long been regarded as sovereign, apparently even when the papacy was without territorial possessions.

The twentieth century, and particularly in the second half of the century, saw the growth of international organisations and other bodies now accorded general if not unanimous recognition as subjects in international law. With the growth in both the (horizontal) extent and (vertical) reach of international agreements, treaties, conventions and codes, national independence is arguably becoming less relevant. This tendency is becoming more noticeable in the modern commercial environment, and especially in regards to the internet.

Non-countries have increasingly become subjects of international law, most noticeably, the UN.<sup>14</sup> It was perhaps inevitable that as the traditional sovereign State lost ground in the face of economic globalisation, newer types of international entities, enjoying powers and privileges recognised by the international community, should emerge. Yet it is ironic that the first of these international organisations should date, not from the twentieth century, but from the twelfth.<sup>15</sup>

### 3. The Sovereign Military Order of Malta

The major features of the long history of the Order are well known. In the early eleventh century a hospice, served by a lay fraternity, was founded or restored in the city of Jerusalem. Its staff were bound by oath to serve the poor of the Holy Land, whatever their religion. The hospital was later dedicated to St John the Baptist. On 5 February 1113 the hospital was recognised by the Bull *Pie Postulatio Voluntatis* by Pope Paschal II as an autonomous religious Order, dedicated to serve the poor and sick.<sup>16</sup> Thereafter the Order spread outwards from Jerusalem, particularly to western Europe, where the Order's estates provided funds to operate the expensive and extensive medical facilities in the Holy Land, and new recruits for the Order. Eventually there were hospitals, or houses of the Order, throughout Europe.<sup>17</sup> The Order had one convent<sup>18</sup> (initially and until the fall of the Crusaders States, in the Holy Land),<sup>19</sup> but they erected a hospital wherever they went. It is scarcely an exaggeration to say that it is to the Order of Malta that we owe the survival of a public hospital service through the middle ages in Europe.<sup>20</sup>

13 Though the canon law of the Church accorded recognition to certain organisations.

14 *Reparation for Injuries Suffered in the Service of the United Nations*, above n8.

15 Strictly perhaps, it is the nineteenth century – or late eighteenth century – since the Order of St John owed its sovereignty to possession of the island of Rhodes. However, its sovereignty survived the migration of the Order from Rhodes to Malta, and may be said to have attached more to the Order than to the particular territory which it occupied. The same may be said of the Teutonic Order, in the Prussian lands.

16 Johann Christian Lünig, *Codex Italiae Diplomaticus* (vol IV) (1725–35) at 1451. It had previously been admitted as such by the King of Jerusalem; Breycha-Vauthier & Potulicki, above n3 at 554.

17 In 1130 the Order was granted freedom from tolls (Lünig, *ibid* at 1451); in 1144 it was placed under the protection of the Holy See (*Magn. Bull.* (vol II) at 471); and 1190 placed under the protection of the Emperor (Lünig, *ibid* at 1455).

18 The name for the monastery that was their home. Contrary to popular belief convents were not necessarily the homes of nuns.

19 The Order withdrew to Cyprus in 1291 when the jewel in the crown of the Latin principalities in Palestine, the Kingdom of Jerusalem, fell to the infidel.

In its early years the Order remained purely eleemosynary in character. But due to the exigencies of the times, between 1126 and 1140 it assumed an additional, military, function, 'to defend the Holy Sepulchre to the last drop of blood and fight the unfaithful wherever they be'.<sup>21</sup> In 1137 the Hospitallers accepted the custody of the newly fortified castle of Bait Jibrin, and the Order's military role in the Holy Lands steadily grew under the leadership of the second grand master, Raymond du Pay.

The military Orders gradually replaced the Frankish feudal aristocracy as the landlords in Syria. On the death of Baldwin II, King of Jerusalem, in 1185, the castles of the kingdom were placed in the custody of the two military Orders. But unlike the Order of the Temple (the Templars), the Hospitallers were never a purely military body, and they also allowed women to become affiliated members. They maintained the fight against the forces of evil on two fronts, against the seen and unseen enemy. One they fought in hospitals and on their estates in Europe, the other from their castles and fastnesses in Palestine, and later on Rhodes and Malta.<sup>22</sup>

The Order of St John withdrew from the Holy Land in 1291, when they established their convent on Cyprus. In 1309 they moved to Rhodes (which they seized from the Byzantine empire), which was to remain their home until 1523. After a time on the Venetian island of Crete and elsewhere, in 1530 they reformed on Malta,<sup>23</sup> their home till their power was finally broken with the arrival of the French in 1798.<sup>24</sup> On Rhodes and later on Malta — though not, apparently, on Crete — the Order had acquired and exercised sovereign authority, ruling the islands — at least in the early centuries — with an efficiency and vigour which was much to the advantage of the native inhabitants. Not the least of the Order's responsibilities was maintaining a small fleet for the suppression of piracy in the Mediterranean.

Attempts were occasionally made after 1798 to regain territory for the Order,<sup>25</sup> but none succeeded. Although lacking a territorial base, the Order continued to maintain hospitals, as it still does. For a few years it also retained its public status in Germany as a member of the Holy Roman Empire, with voting rights in the College of Princes<sup>26</sup> and

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20 In England, the old Order was effectively disbanded in 1540. It was revived by letters patent on 2 April 1557, and never subsequently abolished. Titular grand priors were appointed from the 1560s till 1815 by the Grand Master or (later) Lieutenant Grand Master in Malta (and after 1798, wherever they were temporarily based). A new grand priory was established in 1994. The revival of the Order in England in the early nineteenth century was not recognised as a branch of the Order. This revival was led initially by French Knights of Malta, as part of an abortive plan to raise military and naval forces to aid the oppressed Greeks gain their freedom from the Ottoman empire. Today relations between the Sovereign Military Order of Malta, and what eventually became the Most Venerable Order of St John of Jerusalem, are amicable. For the history of the Order in England, see Edwin King, *The Knights of St John in the British Realm* (1967); Edwin King, *The Grand Priory of the Hospital of St John of Jerusalem in England* (1924).

21 Guy Stair Sainty, *The Sovereign Military Hospitaller Order of Malta: The Crusades* <<http://www.chivalricorders.org/orders/smom/crusades.htm>> accessed 29 May 2008.

22 See Jonathan Riley-Smith, *The Military-Religious Orders: Their History and Continuing Relevance* (2005).

23 On 24 March 1530 Emperor Charles V granted the Order the island in his capacity as King of Sicily, '*in feudum perpetuum, nobile, liberum et francum*'. This was confirmed by Papal Bull of 1 May 1530 (*Magn. Bull.* (vol VI) at 140).

24 This was implemented by convention of 12 June 1798, in which the Order renounced in favour of the French Republic its rights of property and sovereignty in and over the islands of Malta, Gozo and Comino; G F Martens, *Recueil de traits* (vol VI) (2<sup>nd</sup> ed) (1817–35) at 322, 324.

retained a vote in the College of Princes of the Empire,<sup>27</sup> until those bodies in their turn fell under the wheels of the advancing French juggernaut, and the Holy Roman Empire collapsed with the abdication of Francis II in 1806.

Due to its grievously weakened condition, the Order remained for some time in danger of dissolution, despite its ongoing hospitaller function. As a sign of its weakness it lacked a permanent head for nearly a century, and it was governed by Lieutenant Grand Masters until 1871. Only in 1879 did the Holy See authorise the election of a new Grand Master.<sup>28</sup> But throughout this time the Order maintained diplomatic relations with a number of countries, and, at least to some extent, preserved its sovereign status.<sup>29</sup> While the loss of territory extinguishes a State, temporary loss due to the occupation of one's territory does not. However, given the voluntary cession to Great Britain of the island of Malta by its inhabitants in 1800, it cannot be claimed that this is a temporary loss of territory. However, unlike other sovereign entities the Order was peripatetic, and has shifted its territorial base more than once, while apparently preserving its sovereign character. Membership, with voting rights, in the College of Princes, reinforced this impression, though it could well be that the sovereignty was due to possession of Malta, and that the principality was effectively mediatised after the loss of that territory.

The Order of Malta is still recognised by many countries — though by no means all — as a sovereign entity in international law.<sup>30</sup> The Order is not a country, but it exhibits some aspects of a sovereign State.<sup>31</sup> How did this ambiguous situation arise? The key is in its long history, and in the dual nature of the Order, as both Order of chivalry and religious Order.

#### 4. The Legal Basis for the Sovereignty of the Order

The Order of St John is generally held to have become a State in international law possibly as early as 1291,<sup>32</sup> when it settled in Cyprus,<sup>33</sup> and certainly by 1313, in its possession of the islands of Rhodes.<sup>34</sup> In 1523 the Order lost possession of the island of

25 In 1806 Gustav IV, King of Sweden (or, as he was properly known, of the Swedes, Goths and Vends) offered the dispossessed Order Gothland. This offer was however rejected, nor can we know whether it would have proved a congenial home for the Order; A Visconti, *La sovranità dell'Ordine di Malta nel diritto italiano* (vol II) (1936) at 195, 205.

26 Many formerly sovereign principalities were mediatised, or accorded equality of status with the surviving independent states of the former empire; this of itself does not amount to recognition of continuing sovereignty.

27 Martens (vol VII), above n24 at § 32, sub 59.

28 Since 1630 the Grand Master has ranked as a cardinal in the Roman Catholic Church — though not actually holding office as such — since 1607 he has been a Prince of the Holy Roman Empire, and he has been an Austrian Prince (with the style 'Serene Highness') since 1880. Since the early seventeenth century the Grand Master have been styled 'Most Eminent Highness', and this was recognised by Italian royal decree in 1927; *Almanach de Gotha* (184<sup>th</sup> ed) (2000). The former requirement that the election of a new Grand Master be approved by the Holy See has disappeared (*Constitutional Charter and Code*, art 13).

29 This can be interpreted as a sign that the Holy See does not wish to have a role in the governance of the Order that can be seen as infringing its sovereignty — even if that sovereignty is only 'functional'. Although the United Kingdom does not now recognise the Order, Sir Alexander Ball, when Governor of Malta, was Minister to the Order in the late eighteenth century. This was, however, at a time when the future of the Order was uncertain — and its loss of territory arguably only temporary.

Rhodes, but not its sovereign territorial character, as it shortly thereafter acquired Malta, in the possession of which it was accorded recognition by the majority of the princes of western Christendom. Perpetual sovereignty over Malta was granted (or confirmed) in 1530 by the Emperor Charles V, in his capacity as King of Sicily, as a perpetual fief *cum imperio* of the Kingdom of Sicily.<sup>35</sup> By the late eighteenth century this grant was to cause problems for the Order, since it implied that the Order might not, as the possessor of a fiefdom of the kingdom, be sovereign in its own right. The conquest of the island by Napoleonic armies and the end of that century brought that problem to an end,<sup>36</sup> and the Order found itself homeless once again. Hopes that Great Britain would restore the island to the Order proved unjustified, and attempts to acquire other islands proved unsuccessful.<sup>37</sup> Since 1834 the Order has been domiciled in Rome, where its headquarters, the Palazzo Malta, covers three acres, which has exterritorial status but is not sovereign territory.<sup>38</sup>

As the rulers of Malta, the Order was regarded by contemporaries as a sovereign power. But did the loss of territory extinguish the independence, the sovereignty of the Order? Although sovereignty is not affected by loss of territory, complete loss would extinguish the State.<sup>39</sup> The principal question to be asked then is this: was it the Order which was an international person, or was it Malta? Thus, was the Grand Master a sovereign *qua* head of the Order, or *qua* head of the Maltese State?<sup>40</sup> If the Order itself was the international person, then this status should continue undiminished despite the loss of Malta. Cansacchi thought that it was arguable that there was a personal union akin

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- 30 In the 1950s only five countries accorded it diplomatic recognition. But the numbers have increased since. In 1962 it was 30, in 1999 82 with full diplomatic relations and seven others with special status. Commonwealth countries which recognise the Order include Malta, the Cameroons, Mauritius, Guyana, the Seychelles, St Vincent and the Grenadines, and Mozambique; Letter to the author from Jose Antonio Linati-Bosch, Ambassador of the Order of Malta to the United Nations, 20 May 1999. Of the 82, 13 are new states (Belarus, Bosnia-Herzegovina, Croatia, Czech Republic, Latvia, Lithuania, Macedonia, Slovak Republic, Slovenia, Armenia, Georgia, Kazakhstan, Micronesia); Ordine di Malta, <<http://www.smominfo.org/attdiplomatica.asp?idlingua=5>> accessed 18 June 2002. In 2006 the figure had risen to 96 with formal diplomatic relations and 6 others with official relations; Order of Malta, <<http://www.Orderofmalta.org/attdiplomatica.asp?idlingua=5>> accessed 31 December 2006.
- 31 The Officers of the Order include a Secretary of Foreign Affairs, and a system of courts. Cases falling within the jurisdiction of the ecclesiastical forum are submitted to the ordinary ecclesiastical tribunals, in accordance with canon law; Constitutional Charter of the Sovereign Military Hospitaller Order of St John of Jerusalem of Rhodes and of Malta (art 26 *Bollettino Ufficiale* (1998)). There is no military or police force, as there is no territory, or population, to defend or police.
- 32 It may previously have held certain rights within the Latin Kingdom of Jerusalem which were analogous to those of sovereign states, but this is not certain; Breycha-Vauthier & Potulicki, above n3 at 555.
- 33 The true nature of the authority exercised by the knights during their brief occupation of Cyprus should be regarded as less than true sovereignty, in that they acknowledged the suzerainty of Henry II, titular King of Jerusalem, as King of Cyprus. This could be seen as being the counterpart of the suzerainty of the Kings of Sicily admitted by the Order in Malta after 1530.
- 34 In 1446 Pope Nicholas V recognised the Grand Master of the Order as sovereign prince of Rhodes; Pasini-Costadoat, above n3.
- 35 Tripoli was also granted, though this was lost the following year; Adolfo Silenzi de Stagni, 'La S.O.M. de Malta' (1948) *Revista Peruana de Derecho Internacional* 110 at 10n. Malta had previously belonged to the Kingdom of Aragon, which became part of the Kingdom of Spain, of which the Emperor was King.
- 36 Martens, above n24.

to that of the Pope, as occupant of the Holy See and sovereign of Vatican City State,<sup>41</sup> but as the Grand Master was ruler of Malta solely as head of the Order,<sup>42</sup> and not separately as prince or duke of Malta, this argument appears weak. But in 1446 Pope Nicholas V had recognised the Grand Master of the Order as sovereign prince of Rhodes,<sup>43</sup> and this suggests that, at least with respect to Rhodes, the Grand Master was a sovereign prince *qua* head of the Rhodian State rather than *qua* head of the Order. It may well be that the situation with respect to Malta was no different.

But while neither alternative (the Order itself or Malta being sovereign) is entirely satisfactory to explain the post-1798 history of the Order, the most likely explanation was that it was only the possession of territory that gave the Order sovereign status — though that does not, necessarily, mean that that status was lost with the loss of Malta. The reality — and early international law was nothing if not realistic — was that the Order was an international person only because it possessed territory as a vassal of the Holy Roman Empire<sup>44</sup> and later of the Kingdom of Sicily.<sup>45</sup> This can be seen in the lack of similar status being accorded the Templars<sup>46</sup> or the Iberian Orders, and, in contrast with these, of it being conferred upon the Teutonic Order, masters of Prussia.<sup>47</sup>

As, until the twentieth century, only a sovereign State could be a subject of international law, it would seem that the Order could not have been such a subject in its own right. But the possession of Rhodes, and later Malta, gave it this status. The Grand Master of the Order was a sovereign prince as holder of a perpetual fief *cum imperio* of the Kingdom of Sicily, in the same way that the Archbishops of Mainz, Trier and Cologne were regarded as sovereign princes as feudatories of the Empire.<sup>48</sup> The Archbishops — and most other hitherto sovereign princes of the empire — lost their sovereignty when the empire was dissolved and they were integrated into the various successor States. It was only those which retained territory of their own that preserved their sovereign status,

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37 Visconti, above n25.

38 The Palazzo Malta is located at 68 Via Condotti 00187, Rome. The Palazzo Malta and the Villa Malta in Rome are regarded as extraterritorial property by the Italian Government. But the extraterritorial status of the Order's property in Rome does not however amount to possession of sovereign territory.

39 This is illustrated by the loss of the territory of the Holy See 20 September 1870, and its partial restoration 11 February 1929 by the Lateran Treaties. Nor does a state cease to be a state because it is occupied by a foreign power. An example is the survival as *de jure* states, later to become *de facto* states again, of the Baltic republics.

40 D'Olivier Farran, above n3.

41 Cansacchi, *La personalità di diritto internazionale del S.M.V. Gerosolimitano detto di Malta*, above n3.

42 D'Olivier Farran, above n3.

43 Pasini-Costadoat, above n3.

44 As suzerain of Rhodes — though actually the empire held little real power, and the Genoese and other Italian city states (and the Ottoman Turks) were the real masters of the Aegean Sea. In 1446 Pope Nicholas V recognised the Grand Master of the Order as sovereign prince of Rhodes; Pasini-Costadoat, above n3 at 231.

45 After 1530, for Malta.

46 Jan Hendrik Willem Verzijl, *International Law in Historical Perspective* (vol II) (1969) at 35–36.

47 C. H. Alexandrowicz, 'Paulus Vladimiri and the Development of the Doctrine of Coexistence of Christian and non-Christian countries' (1963) 39 *British Yearbook of International Law* at 441–448.

48 They were of course recognized as *de jure* sovereign after the Diet of Worms 1648.

though in some (honorific) respects the former sovereign princes retained their personal status.

What complicates the picture is the fact that after 1798 the Order still seems to have been widely believed to still possess an international legal personality, despite the loss of territory, a personality that was apparently independent of specific territorial sovereignty.<sup>49</sup> It would seem that the Order continued to be recognised as possessing something akin to sovereign status after 1798 for two major reasons. Firstly — in the earlier years at least — there was the distinct possibility that the Order might have recovered territory, and so its sovereignty, as it had done in 1530.<sup>50</sup> In this respect it might more appropriately be recognised as being equivalent to an exiled Government. Some of these, such as those of Poland and the Baltic States, were recognised by some countries for many years after they lost control of their territory.<sup>51</sup> But this is an unsatisfactory basis for continued claims to sovereign status in the twenty-first century, particularly given that the Order does not maintain a claim to the island of Malta, or indeed to any territory (its convent in Rome excepted).

The second reason is that, due to its unique history and humanitarian function the Order acquired the then unique status of international legal personality after 1798.<sup>52</sup> This did not equal the sovereignty which they possessed as masters of Malta, and which they must have lost some time after 1798 — though the distinction between the two sources of authority soon became blurred. It may be that at this time there was uncertainty as to the origin and nature of the sovereignty of the Order, and that the Order benefited from this uncertainty. This personality was based on the role of the Order as one of the few international humanitarian organisation of its time, and upon its unique history.<sup>53</sup>

Since the twelfth century the Order of Malta had been an international religious Order or brotherhood.<sup>54</sup> It only gradually became an Order of chivalry, as that term was later to be understood,<sup>55</sup> and the possession of sovereign powers over island territories also came comparatively late in its history.<sup>56</sup> The term ecclesiastical Orders of

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49 Breycha-Vauthier & Potulicki, above n3 at 556.

50 And possibly in 1313 also.

51 *Foreign Policy Bulletin* (No 2) (1991) at 33.

52 The Order as such was prohibited by its rules from fighting on any side in conflicts between Christian Powers; Breycha-Vauthier & Potulicki, above n3 at 555.

53 It might also be worth noting that the Order's surviving military potential was not entirely forgotten either. In the *Reichsdeputations-Hauptschluss* of 25 February 1803 (Martens, *Recueil de traits*, (vol VII) (2<sup>nd</sup> ed) (1817–35) at 435, 443) it was agreed that the Order should be exempted from secularisation 'en considération des services militaires de ses membres' (§ 26 at 485).

54 A brotherhood (or sisterhood) might be described as a body, usually of one sex, though sometimes mixed, dedicated to some religious object and subject to a rule of conduct and (usually) a communal life. The Knights of Justice of the Order are friars, committed, like other monks, by solemn vows of poverty, chastity and obedience.

55 An Order of chivalry is a group of individuals, grouped for a primarily secular rather than a religious purpose, usually honorific. Sometimes a residual religious object survives, but the great majority of Orders are purely secular. Most are now what are usually called Orders of merit.

56 Although the Order had been recognised by the King of Jerusalem as a distinct religious Order even before the papacy approved it, it would be inappropriate to see this as recognition of 'sovereignty'; Breycha-Vauthier & Potulicki, above n3 at 554.

knighthood describes those knightly Orders which, in one way or another, were connected with the Roman Catholic Church. At the present time there are two different groups of ecclesiastical Orders of knighthood: the pontifical Orders of knighthood in the strict sense and a group of chivalric Orders which derive from mediæval military Orders and continue to come under ecclesiastical jurisdiction.<sup>57</sup> A third category are the Eastern Orthodox and Uniate (in communion with the See of St Peter) Eastern Rite Churches Orders, which share similarities with both the other groups.<sup>58</sup>

The pontifical or papal Orders of knighthood are conferred directly by the pope. They include the Supreme Order of Christ,<sup>59</sup> the Order of the Golden Spur,<sup>60</sup> the Order of Pius IX,<sup>61</sup> the Order of Saint Gregory the Great,<sup>62</sup> and the Order of Saint Sylvester.<sup>63</sup> The religious military Orders include the Order of St John of Jerusalem, the Teutonic Order,<sup>64</sup> and the Order of the Holy Sepulchre.<sup>65</sup> There are also various Spanish Orders.<sup>66</sup> Most of the other ancient religious military Orders are now extinct or have become purely secular Orders of knighthood. Although it once possessed land in its own right, the Order of Malta was, and remains, essentially a religious Order.<sup>67</sup> While the Templars were suppressed, due largely to jealousy of their wealth and perceived privileges (and lack of peacetime function, since they were exclusively military in nature), the Hospitallers, always preserving an essential charitable function, survived.<sup>68</sup>

The legal status of the Order of Malta within the Roman Catholic Church was defined with greater precision in 1951. Pope Pius XII, on 10 December of that year, appointed a special tribunal of five cardinals, presided over by the Dean of the Sacred College,<sup>69</sup> Eugène Cardinal Tisserant,<sup>70</sup> in order to determine the nature of the Order and the extent of its competence both as a sovereign and as a religious institution, as well

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57 James Van der Veldt, *The Ecclesiastical Orders of Knighthood* (1956) at 1.

58 Such as the Patriarchal Order of the Holy Cross of Jerusalem of the Greek Melkite Patriarchy of Antioch.

59 1319, secularised 1499. In one class only.

60 1539, though claiming a much more ancient origin. In one class only.

61 1847.

62 1831.

63 1559, reformed 1841.

64 1199.

65 Founded 1099, re-organised 1496, revived 1868.

66 The Order of Alcantara (founded 1156, approved 1177), Order of Calatrava (founded 1158, recognised by the papacy 1164), Order of Santiago (or St James of Compostella) (founded 1170, canonically approved 1175), and the Order of Our Lady of Montesa (1317). The latter Order succeeded to the assets of the Templars in Spain, as well as to those of the Knights of Valencia. Each remains at least some religious attributes, though they were secularised from 1546.

67 Though the great majority of members are laymen. In some respects these members rather resembles the lay brothers of a monastery, or perhaps rather the corrodians, who obtained lodgings in a monastery in return for the payment of a suitable sum. Probably the most apposite comparison however, is that of the lay abbots and similar creations of the post-Reformation Church.

68 To some extent, the Order of St John exercised powers akin to sovereignty prior to obtaining territory. But, as international law was somewhat fluid at that time, it cannot be regarded, on its own, as a sufficient basis for present-day aspirations of sovereignty by the Order.

69 The Dean of the Sacred College is President of the College of Cardinals, and is responsible for convening a Conclave to elect a new Pope.

70 Prefect of the Sacred Congregation of Ceremonies, Titular Bishop of Porto e Santa Rufina.

as its relationship to the Holy See. After long discussions the commission of cardinals on 24 January 1953 gave the following unanimous verdict:<sup>71</sup>

The Order of Malta is a sovereign Order, inasmuch as it enjoys certain prerogatives which, according to the principles of international law, are proper to sovereignty. These rights have been recognized by the Holy See and a number of States. However, these rights do not comprise all the powers and prerogatives that belong to sovereign States in full sense of the word.<sup>72</sup>

The cardinalitial tribunal made clear in its decision released 19 February 1953 that the Order's sovereignty was 'functional', in that it was based on its international activities and not on the possession of territory. But, what does this 'sovereignty' mean? By 'functional sovereignty', the cardinalitial tribunal seems to have meant little more than de facto and de jure independence from the Church, and recognition by a number of States. In other words, this was personality in international law, not sovereignty, and justified by the international work of the religious Order.

In 1961 the Sovereign Military Order of Malta promulgated a new Constitutional Charter and Code. This was revised by an Extraordinary Chapter-General 28-30 April 1997.<sup>73</sup> *Inter alia*, this provides:

The Order is a subject of international law and exercises sovereign functions.<sup>74</sup>

The religious nature of the Order does not prejudice the exercise of sovereign prerogatives pertaining to the Order in so far as it is recognized by States as a subject of International law.<sup>75</sup>

However, internal rules cannot of themselves make an otherwise non-sovereign body sovereign; though States can recognise only what the Order claims for itself. If the Order of Malta is sovereign, it is so only because of the recognition of international law. Such recognition is not generally accorded, but the Order is widely accepted as an international entity with unusually wide privileges.

So far as canon law is concerned the Order remains sovereign. But canon law does not overrule the municipal laws of States. Sovereignty recognised by the papacy has canonical validity.<sup>76</sup> But it will lack validity in international law, since canon law is not universally accepted as a norm of international law.

The international personality of the Order of Malta was however upheld by the Italian Court of Cassation in 1935:

71 *Acta Apostolicae Sedis* (vol XX) (1953) at 765–767.

72 Van der Veldt, above n57 at 1, 22–3.

73 Letter to the author from Jose Antonio Linati-Bosch, Ambassador of the Order of Malta to the United Nations, 20 May 1999.

74 *Constitutional Charter and Code*, art 3.

75 *Ibid*, art 4.

76 Hyginus Eugene Cardinale, *Orders of Knighthood Awards and the Holy See – A historical, juridical and practical Compendium* (1983) at 26.

Sovereignty is a complex notion, which international law, from the external standpoint, contemplates, so to speak, negatively, having only in view independence *vis-à-vis* other States ... It is impossible to deny to other international collective units a limited capacity of acting internationally within the ambit and the actual exercise of their own functions, with the resulting international juridical personality and capacity which is its necessary and natural corollary.<sup>77</sup>

Although it too uses the term sovereignty, the Court of Cassation seems to have meant merely that the Order had ‘international juridical personality’<sup>78</sup> — though even this concession has been rejected by a majority of international lawyers. Neither the cardinalial tribunal in 1953, nor the Court of Cassation in 1935 accorded recognition to the Order of Malta as a State. Both seem rather to be recognising a precocious development of international personality.

In 1959 the Office of the Legal Adviser of the US Government asserted that: ‘[t]he United States, on its part, does not recognize the Order as a State’.<sup>79</sup> The Office of the Legal Adviser of the US Government is right to assert that the Order is not a State. Although sovereignty is not affected by loss of territory, complete loss would extinguish the State. Many countries accord it diplomatic recognition, but, as with the UN, this does not amount to recognition of full sovereign status. The view of the Office of the Legal Adviser of the US Government did however appear to agree with the majority opinion of scholars in the 1950s and 1960s, if not more recently also.

For examples of what might be termed the mainstream international lawyers view of that time, Paul Guggenheim stated that ‘[c]ontrary to a commonly defended opinion, these Orders do not have in general international law any legal status other than “charitable societies”’.<sup>80</sup> Roberto Quadri states: ‘it seems obvious to us that one must reject the international personality of the Order.’<sup>81</sup> Debez similarly states that ‘we must, along with the majority of the doctrine, refuse [the Order] the status of subject of international law.’<sup>82</sup> Alexander Hold-Ferneck says that the Order’s international status is ‘merely an outward form, which has been preserved for a variety of reasons, not an actual personality’.<sup>83</sup>

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77 *Nami and Others v Pace and the Sovereign Order of Malta* [1935–1937] Ann Dig 2 [No 2] (Cassation Court of Italy, 13 March 1935) at 4–6.

78 The Tribunal of the Republic, in Rome 26 July 1947 confirmed earlier decisions, especially that of the Court of Cassation 25 June 1945, which established the Order’s position in international law, as independent from Italian law; Michael Pillotti & Arthur Breycha-Vauthier, trans in *Oesterreichische Zeitschrift Für Öffentliches Recht* (1951) at 392–394.

79 Cardinale, above n76 at 84.

80 Paul Guggenheim, *Traité de Droit International Public* (1954) at 339n.

81 Roberto Quadri, ‘Droit International Public’ (1964) 113 *Recueil des Cours de l’Académie de Droit International* at 422.

82 Debez, (1964) at 129 as cited in Hendrik Dijkhof, ‘The Legitimacy of Orders of St John: A historical and legal analysis and case study of a para-religious phenomenon’ (2006) Universiteit Leiden PhD thesis (unpublished) at 244.

83 Alexander Hold-Ferneck, *Lehrbuch des Völkerrechts* (1930) at 246.

More recently, Dominique Larger and Marcel Monin have concluded that ‘the thesis of the international personality of the Order seems to us to rest on too tenuous evidence to be accepted.’<sup>84</sup> Ian Brownlie observed that:

Even in the sphere of recognition and bilateral relations, the legal capacities of institutions like the Sovereign Order of Jerusalem and Malta must be limited simply because they lack the territorial and demographic characteristics of States. In the law of war the status of the Order mentioned is merely that of a “relief society” within the meaning of the Prisoner of War Convention, 1949, article 125.<sup>85</sup>

At the other end of the continuum between recognition and non-recognition lie writers such as Berthold Waldstein-Wartenberg, who wrote that the sovereignty of the Order and its personality in international law is ‘generally recognised by international law doctrine.’<sup>86</sup> More significantly, Georg Dahm suggests that the Order is a ‘[v]ölkerrechtssubjekt ohne Gebiet’ (a subject of international law without territory).<sup>87</sup>

There are signs that greater flexibility may slowly be prevailing. James Crawford says that its international personality is recognised by particular States, but is not an objective international personality like the UN.<sup>88</sup> Gerhard von Glahn concluded that ‘the Order can be classified as a non-State subject of international law, although of a somewhat peculiar nature.’<sup>89</sup>

Helmut Steinberger noted that ‘[w]ith the historical exception of the Holy See, which maintains diplomatic relations with more than 100 States, in contemporary international law only States as distinguished from international organisations or other subjects of international law are accorded sovereignty.’<sup>90</sup> Since the Order itself maintains diplomatic relations with approximately half the recognised sovereign States in existence today, it may be questioned whether Steinberger’s own argument might be used to defend claims for the sovereignty of the Order. Wilhem Wengler rejects the notion that recognition of the Order by some States can make it a subject of international law, which argument would also be applied to the Holy See, where this to lack territory.<sup>91</sup>

It can be recognised as a non-State entity subject to international law, even if it is not a State, which is what the Constitutional Charter and Code of the Order appears to indicate. The privileges actually claimed or exercised by the Order appear to confirm this. It exercises, to some extent, the privilege of treaty-making.<sup>92</sup> It issues passports,<sup>93</sup> but

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84 Dominique Larger & Marcel Monin ‘A propos du protocole d'accord du 5 septembre 1983 entre les services gouvernementaux français et la représentation officielle en France de l'Ordre de Malte: quelques observations sur la nature juridique de l'Ordre de Malte’ (1983) *Annuaire Français de Droit International* 228.

85 Ian Brownlie, *Principles of Public International Law* (5th ed) (1998) at 64. See also Costas M. Constantinou, ‘Irregular States or the Semiotics of Knight-Errantry’ (2004) 17 *International Journal for the Semiotics of Law* 229.

86 Berthold Waldstein-Wartenberg, *Rechtsgeschichte des Malteserordens* (1969) at 264.

87 Georg Dahm, *Völkerrecht* (1958) at 182.

88 Crawford, above n6 at 29.

89 Gerhard von Glahn, *Law among nations: an introduction to public international law* (5th ed) (1986) at 67.

90 Helmut Steinberger, ‘Sovereignty’ in Rudolf Bernhardt (ed) *Encyclopaedia of Public International Law* (vol IV) (2000) at 512.

91 Wilhem Wengler, *Völkerrecht* (1964) at 165–6.

these also are not universally recognised. They do not, for instance, fall within the ambit of the *New Zealand Passport Act 1992* (NZ), as such a document could not establish the nationality of the holder.<sup>94</sup> Its right to mint coins and issue stamps is confined to an ornamental level.<sup>95</sup> From 2005 the Order has issued stamps with the Euro as the unit of postage, while Scudo (*pl.* Scudi) remains the Order's official currency. The scudo was a unit of currency in Malta under the rule of the Order of Malta. The denominations of the currency were 1, 2, 5, 10, and 20 Scudi. The 1 and 2 scudo coins were made of silver while the 5, 10, 20 scudi coins were made of gold. It was subdivided into 12 *tari*, each of 20 *grani*. Amateur radio operators consider the Order to be a separate 'country', but stations transmitting from there use an entirely unofficial call-sign starting with the prefix '1A0'. The Grand Master of the Order is however entitled to sovereign immunity, as is his residence,<sup>96</sup> and is accorded appropriate status on official visits to some countries.<sup>97</sup>

The Order is represented on international bodies.<sup>98</sup> The Order is a signatory to, though not a member of, the Universal Postal Union,<sup>99</sup> although other non-sovereign entities are also members or associate members.<sup>100</sup> The Order has observers at UN bodies in Paris (the United Nations Educational Scientific and Cultural Organization), Rome (the Food and Agriculture Organization), Geneva (the World Health Organization, and the UN High Commissioner for Refugees) and Vienna.<sup>101</sup> It also has member status at the International Maritime Organization, London.<sup>102</sup>

The UN does not classify it as a 'non-member State' but as one of the 'entities and intergovernmental organizations having received a standing invitation to participate as observers'. For instance, while the International Telecommunication Union has granted radio identification prefixes to such quasi-sovereign jurisdictions as the UN and the

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92 As with San Marino in 1935; Astraudo above n3. A treaty is an agreement between entities, both or all of which are subjects of international law possessed of international personality and treaty-making capacity. All sovereign states enjoy the right to make treaties. Some self-governing colonies, protectorates, and international organisations have the capacity to enter into agreements, though their right to do so is usually limited.

93 As to His late Majesty King Umberto II of Italy and His Imperial and Royal Highness Archduke Otto of Austria. Pasini-Costadoat, above n3 at 234.

94 Letter to the author from Gill George, Ministry of Foreign Affairs and Trade, New Zealand (27 May 1999). The definition of a passport in section two states that passport means 'a document that is issued by or on behalf of the Government of any country, and that purports to establish the identity and nationality of the holder...?.'

95 Though it has postal agreements with 48 countries.

96 Arthur Breycha-Vauthier, *Der Malteser-Orden im Völkerrecht* (1950) at 401–413.

97 Notably Malta in June 1968; Verzijl, above n46 at 31.

98 Membership of international bodies, even of the UN, is not regarded as ipso facto evidence of sovereignty, though full membership of the latter organisation would be compelling.

99 Letter to the author from Naguib Nermine, Universal Postal Union (17 May 1999).

100 The Netherlands Antilles, and United Kingdom Overseas Territories. The former Byelorussian Soviet Socialist Republic, and the Ukrainian Soviet Socialist Republic, while members of the Soviet Union, were also members of both the Universal Postal Union and of the UN, though their actual political independence was strictly prescribed.

101 Letter to the author from José Antonio Linati-Bosch, Ambassador of the Order of Malta to the United Nations (20 May 1999).

102 Letter to the author from George, above n94.

Palestinian Authority, the Order has never received one. The UN regards the Order as an entity having received a standing invitation to participate as an observer in the sessions and the work of the General Assembly and maintaining a permanent office at UN Headquarters.<sup>103</sup> The International Committee of the Red Cross and the International Federation of Red Cross and Red Crescent Societies are two other bodies listed under this classification.<sup>104</sup> Delegates are sent by the Order to the Council of Europe, and to the European Commission.<sup>105</sup> The Order is represented at the Organizacion de Estados Centro-Americanos, the Institut International de Droit Humanitaire, the Institut International Pour l'Unification de Droit Prive, and the Comite International de Medecine et de Pharmacie Militaires.<sup>106</sup>

The right to accredit diplomatic missions is known as the right of legation, or *ius legationis*. The only comparable non-territorial body claiming a similar right is the Holy See, and that is now a territorial State as well as a world-wide religious body,<sup>107</sup> though it was without territory between 1870 and 1929. The status of the Order's diplomats was confirmed in a wartime Hungarian case.<sup>108</sup> But even the right of legation is not conclusive evidence that an entity is sovereign, as any international organisation can accredit representatives to other organisations or to States. What is unusual is the antiquity and continuity of the Order, and its existence in age in which the Church itself was the only truly international organisation.

Although the Sovereign Military Order of Malta maintains diplomatic relations with many countries, and has maintained such relations for centuries, this, of itself is no guarantee of sovereign status. Today many international organisations are recognised as personalities in international law, though they do not claim sovereign status. The Order of Malta is equivalent to such bodies. While the Order was ruling on Rhodes and Malta it was a sovereign Order because it possessed territory over which it exercised at least de

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103 A status conferred 1994; Letter to the author from Linati-Bosch, above n101.

104 Letter to the author from Juan Carlos Brandt, Director, United Nations Information Centre in Australia (12 May 1999). The Order's Ambassador and Permanent Observer is José Antonio Linati-Bosch; Executive Office of the Secretary-General Protocol and Liaison Service, *Permanent Missions to the United Nations No 281 February 1998* (1998) at 290. The style of 'Ambassador' does not indicate in itself entitlement to diplomatic privileges and immunities.

105 He was listed as an observer (Count Ottino Caracciolo di Forino), along with those of the non-independent states of Hong Kong and Macao, and the international organisations such as the United Nations Children's Fund (UNICEF). The small Principality of Andorra (Mme Meritxell Mateu I Pi), and the Principality of Liechtenstein (HSH Prince Nicholas of Liechtenstein) had ambassadors to the European Commission in 1997; *Corps Diplomatique* (European Union, Brussels, 1997).

106 Letter to the author from Linati-Bosch, above n101.

107 The Apostolic Pro-Nuncios and Nuncios (originally only for Roman Catholic countries where they are accorded precedence over all ambassadors) represent the Holy See, not Vatican City State, which does not have separate diplomatic representatives as such. It is however the City State, and not the Holy See, which possesses territoriality and is therefore a traditional sovereign state. The unique history of the papacy affords it this special privilege of *ius legationis* dissociated from direct territoriality. The nuncios represents the papacy to the local Church was well as to the sovereign of the country. If only appointed to the local Church, he is styled Apostolic Delegate.

108 *Case No 798* (1949) 43 American JIL 537 (12 May 1943). Italy recognised the Order's right of legation in 1884; *Nanni and Others v Pace and the Sovereign Order of Malta*, above n77.

facto sovereignty. After 1798 it became the first of the organisations recognised by international law as having a separate legal personality. The Order itself is not however a State, nor can it be said to be sovereign, at least as that term is understood in traditional, nineteenth century, terms. Peculiarities of status can be explained by the ancient origins of the Order.<sup>109</sup> Any immunity enjoyed by the Grand Master of the Order, and by his diplomats, is akin to that now widely enjoyed by representatives of international organisations, rather than that of the princes of sovereign States.

## 5. The Branches of the Order of Malta and Other Religious Military Orders

A Convention<sup>110</sup> of Alliance in 1961 linked the Sovereign and Military Order of Malta, the Most Venerable Order of the Hospital of St John of Jerusalem,<sup>111</sup> the Johanniterorden,<sup>112</sup> and the Swedish and Dutch Orders of St John.<sup>113</sup> His Royal Highness The Duke of Gloucester, Grand Prior of the Most Venerable Order of the Hospital of St John of Jerusalem, is President of the Alliance Orders of St John. Each member of the Alliance recognises each other as historic successors of the ancient Order. As such, they must be considered the sole possessors to historic continuity, though only the Sovereign and Military Order of Malta can claim sovereignty in any sense by which that term may be used. Although the daughter Orders too operate beyond the territory of any one country, they do not, unlike the Order of Malta, enjoy the status at international law of being a legal person, or international organisation. Neither the Templars, nor less well-known Orders, such as the St Lazarus, ever achieved sovereign status, as they never obtained control of territory.<sup>114</sup> The Teutonic Order lost its sovereign status — which it acquired through the control of territories in Prussia — in when it ceased to rule territory in Germany after 1525.<sup>115</sup>

## 6. Reconsideration of State Sovereignty in the Late 20<sup>th</sup> Century

Since the development of the modern nation-state the concept of the State has dominated international law, but it has always been present, in one form or another, since

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109 The Jesuits, though similarly a world-wide religious Order was never recognised as sovereign, though it established and controlled an almost independent theocratic state of its own under the nominal sovereignty of Spain in Paraguay 1609–1766; Verzijl, above n46 at 36–37.

110 A convention is a pact or agreement between several states in the nature of a treaty. The term is usually applied to agreements for the regulation of matters of common interest, particularly of a technical nature.

111 The branch of the Order descended from that in England, and revived in the United Kingdom in 1831.

112 The German branch, also called the Venerable Order of St John in Prussia, established 1812 and recognised 1852.

113 The Venerable Order of St John in the Netherlands was established in 1909, and recognised in 1946. The Venerable Order of St John in Sweden was established in 1920.

114 Upon its recovery from Muslim occupation during the Third Crusade, Cyprus was sold by King Richard I of England (on behalf of the crusade's leaders) to the Knights Templars in 1192. However, unwilling to hold the territory, in the following year they sold it to Guy de Lusignan, who became King of Cyprus.

115 Verzijl, above n46 at 32–35.

the development of the first city-states, tribal federations and complex social alliances of this nature.<sup>116</sup>

The modern State as generally understood today evolved in Europe in the wake of the decline of the classical world and later especially under the impetus of the crusades against Islamic aggression in Europe and to recover the Holy Land of Palestine and its contiguous regions.<sup>117</sup> It gained encouragement from the growth of trade and commerce, and from the rediscovery of Roman laws and classical learning, in the years after the final long-drawn out and painful collapse of the Eastern Empire based on Constantinople.<sup>118</sup> Following the advent of the modern nation-State in the later middle ages political and legal theory tended to exalt the State as the pinnacle of authority — though this was disputed both by the Church<sup>119</sup> and, at times, by mesne feudal lords, burghers and other communities.

During what might be termed the classical period of statehood<sup>120</sup> — from the Treaty of Westphalia 1648 to the Treaty of Versailles 1919 — the study of politics tended to centre on the State. But for much of the twentieth century it had focused on political behaviour and policy-making, with governmental decisions explained as a response to social forces. In part this has been due to a growth in awareness of the limitations of studies based on political events which might themselves be the product of underlying stresses and dynamics. It also suited the increased emphasis in western debate upon countries outside Europe and North America and those countries within their direct and indirect spheres of influence.

The traditional understanding of public law (and more especially the more narrowly defined constitutional law) emphasised particular ideas of power that are associated with territory, sovereignty, and law, all concept about which there is often uncertainty — though some legal systems tend to imply a form of permanence, even akin to Platonic forms. The ideas of State, and State power expressed through law, however remain central to understanding government.<sup>121</sup>

International law is more fluid and less certain than the domestic legal systems of most if not all States, as is perhaps inevitable for a system which has evolved largely

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116 Moses Finley, *Authority and legitimacy in the classical city-state* (1982); Mason Hammond, *City-State and world state in Greek and Roman political theory until Augustus* (1951). See also Charles Keith, 'The origins of settlement, agriculture and the city-state in Mesopotamia' (1984) University of Edinburgh PhD thesis (unpublished).

117 Depending upon definitions — which have been fluid over the past three millennia — this includes parts of Syria, Lebanon, the Gaza strip, the West Bank (Judea and Samaria), the Sinai Peninsula, and Jordan. Attempts were also made to recover, or protect, parts of North Africa and the Mediterranean Sea (such as Egypt and Libya, Cyprus and Rhodes); Daniel H Weiss & Lisa Mahoney (eds), *France and the Holy Land: Frankish culture at the end of the crusades* (2004).

118 Cecil Stewart, *Byzantine legacy* (1947).

119 See Hyginus Eugene Cardinale, *The Holy See and the international Order* (1976); Walter Ullmann, *The growth of papal government in the Middle Ages: a study in the ideological relation of clerical to lay power* (2<sup>nd</sup> ed) (1965).

120 Though there is no generally accepted and satisfactory modern legal definition of statehood; Crawford, above n6 at 31.

121 John Morison, 'Modernising Government and the E-Government Revolution: Technologies of Government and Technologies of Democracy' in Nicholas Bamford & Peter Leyland (eds), *Public Law in a Multilayered Constitution* (2003) at 157–8.

through State practice over a considerable period of years — and which has lacked a truly effective enforcement or sanction system such as was almost indispensable for domestic State legal systems. It is derived from written and unwritten rules, treaties, agreements, and customary law. Custom is general State practice accepted as law. The elements of custom are a generalised repetition of similar acts by competent State authorities and a sentiment that such acts are juridically necessary to maintain and develop international relations.<sup>122</sup> The existence of custom, unlike treaty-law, depends upon general agreement, not deliberate consent.<sup>123</sup> This requires time to develop, and is often uncertain.

The development of public international law, and indeed of law in general, never truly ceases; like all living things, it evolves. There are times when important, indeed profound, changes occur, or milestones are reached — such as the establishment of the League of Nations, or of the Nuremberg and Tokyo war crimes tribunals.<sup>124</sup> These events may be important in themselves, or because of the example which they present for the future — though this latter may not always be perceived at the time as being especially significant. At other times there may appear to be little or no progress, neither improvements nor retrograde changes.<sup>125</sup> But, as Foucault would maintain, formal stasis — if such a thing can be found in international law — does not mean that the discourse has ceased or the power relations unchanging.

Change there may well be, for international law is intensely political and dynamic, as any law must be which is the distillation of the hope, needs and desires of almost 200 sovereign States.<sup>126</sup> Nor is it immutable by nature, though international laws may evolve more slowly than the domestic laws of some, though not necessarily all, countries.<sup>127</sup>

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122 *Lotus Case (France v Turkey)* 1927 PCIJ ser A No 10; *Asylum Case (Colombia v Peru)* 1950 ICJ 266 at 276; *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada v United States)* 1950 ICJ 266 at 299–300; *Fisheries Case (UK v Norway)* 1951 ICJ 116; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States)*, 1969 ICJ 3 at 97–98. See also *North Sea Continental Shelf Cases (Federal Republic of Germany v Denmark; Federal Republic of Germany v The Netherlands)* 1969 ICJ 3 at 43–45 in which the International Court of Justice emphasised the importance of *opinio juris* even in the face of inconsistent state practice in *Nicaragua v United States*. *Opinio juris* may be determined from resolutions of international organisations, notably the General Assembly.

123 Gerhard von Glahn, *Law Among Nations: An Introduction to Public International Law* (7<sup>th</sup> edn) (1996).

124 See Charles Howard-Ellis, *The origin structure and working of the League of Nations* (2003); Geoffrey Best, *Nuremberg and after: the continuing history of war crimes and crimes against humanity* (1984).

125 What may be perceived initially as a retrograde step may, of course, ultimately prove beneficial for the future development of public international law, by proving an example or lesson for others to learn from.

126 The UN has 191 members; and the United States, for example, recognises 192 countries — including the Vatican City State, or Holy See, which is not a member of the UN; ‘Basics facts about the UN’, *DPI* (2000); Office of The Geographer and Global Issues, Bureau of Intelligence and Research, United States Department of State, Washington, DC, *Fact Sheet* (7 February 2003). There are a number of other territories which meet most if not all of the requirements for recognition as a sovereign state, such as Taiwan. There are also dozens of dependencies, territories and colonies, many of which are self-governing, and some of which have a significant international profile; see Harvey W Armstrong & Robert Read, ‘Comparing the economic performance of dependent territories and sovereign microstates’, (2000) 48 *Economic Development and Cultural Change* at 285.

127 Principally through the absence of a single law-making body, the large number of participants involved, the bi-lateral and multi-lateral negotiations, and the gradual evolution of customary law through state practice.

Law itself, as a human artefact, is also inseparable from history and from culture.<sup>128</sup> This is especially true of public international law, which is formed and developed through the interactions of numerous sovereign States, but dominated by concepts derived from Roman law and the laws and practices of European States, principally during the period of European commercial and later colonial expansion.

The sovereign State seems to be one of the relatively few abiding constants in international law<sup>129</sup> — though sovereignty is not a necessary feature of a domestic legal system.<sup>130</sup>

But the concept of the sovereign State, though one of comparatively ancient origin,<sup>131</sup> has not continued completely unquestioned — nor has it continued unchanged.<sup>132</sup> Its place in the global political and legal system is not absolute, for the sovereign State belongs in a world in which interdependence (whether acknowledged or not) is inescapable.<sup>133</sup> Governmentality would recognise that it is in the discourse, rather than the formal structure (though this informs the discourse), that the real power may be seen.

Those geo-political developments which have also encouraged a re-evaluation of the nature and role of the State have been the recent use of force by great powers and a superpower,<sup>134</sup> in Yugoslavia in the name of humanitarian intervention,<sup>135</sup> and in Iraq on the basis of pre-emptive self-defence,<sup>136</sup> and the attitudes and assumptions which these actions reflect. The Iraq war in particular has served to highlight structural weaknesses in the fabric of the international security framework,<sup>137</sup> since it was widely condemned as illegal, yet little could be done to prevent it, even if this were desirable.

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128 Ali Khan, *The Extinction of Nation-States* (1996) at 1.

129 Though often dated from 1648, the modern state system is very much older. See Benno Teschke, *The myth of 1648: class, geopolitics, and the making of modern international relations* (2003).

130 Norman Barry, 'Sovereignty, the Rule of Recognition and constitutional stability in Britain' in Hume Institute, *In search of new constitutions: Hume Papers on Public Policy* (vol II) (1994) at 10–27.

131 An international system of sovereign states such as we would recognise today did not exist in mediæval times, which were characterised by a system based on strongly hierarchical and parallel religious or secular concepts of subordination and dependence; see, for example, Christopher Schreuer, 'The Waning of the Sovereign State: Towards a New Paradigm for International Law' (1993) 4 *European Journal of International Law* at 447. Non-European States were not so influential in the development of the international system.

132 As Schreuer has said, '[a] look at history .... tells us that conceptions of world Order have by no means always been shaped by the model of sovereign co-equal actors with a territorial basis'; *Ibid.*

133 One might even say of the state, as did the English poet John Donne of the individual, that 'No man is an island, entire of itself'.

134 The collapse of the Soviet block, and the dismemberment of the eastern European Communist empire, have left the United States as the sole superpower. Though it has been predicted that China will one day reach a similar strategic level to that enjoyed alone today by the United States, there are a number of counties whose military, economic or political influence and capabilities qualify them for the lesser, though nonetheless exalted style, of great power. This term, which had been somewhat neglected, has enjoyed a resurgence, though the term major power still seems more prevalent; See David Shambaugh (ed), *Greater China: the next superpower?* (1995).

135 See Noel Cox, 'Developments in the Laws of War: NATO attacks on Yugoslavia and the use of force to achieve humanitarian objectives' (2002) *New Zealand Armed Forces Law Review* at 13.

136 See Noel Cox, 'The Consequences for the World Legal Order of the War on Iraq' (2003) *New Zealand Armed Forces Law Review* at 11.

But at the same time it is possible to be cautiously optimistic. At the forefront of much of the discourse from the allies in both wars was the perceived need for their actions to be justified in international law.<sup>137</sup> These cases illustrate the dynamic effect of both power projection and technology — of a military sort — upon the relationships between States. Formal political equality may exist, but that is relatively meaningless when the political will exists to ignore or disregard that equality and impose (or attempt to impose) the will of one nation — or a coalition of States — on another.

These recent wars, small though they may have been in historical terms, have served to draw both popular and academic attention to the evolution of, and recent challenges to, the laws of armed conflict — or laws of war as they were commonly known.<sup>138</sup> These laws have long had the effect of imposing limitations upon the freedom of States to levy war without the support of the international community and without ‘just’ or lawful cause.<sup>139</sup> Just what constituted a just cause (or just war) was never entirely certain, but, like the equally vague concept of the rule of law, it served to impose some limitations on freedom of State action — by operating in a form of Foucauldian discourse among the politicians and rulers who decided national policy. But such limitations on State sovereignty have been challenged by these wars, which were conducted despite lacking clear justification in public international law.

Regretfully, it would appear that the precise legal limits upon the levying of war, perhaps the most ancient and fundamental of a State’s responsibilities towards its people,<sup>141</sup> are now more uncertain than they have been for 50 years. Both these wars have also raised important questions about the legal justification for State or international intervention in another State’s internal affairs, on humanitarian grounds, or to depose a tyrannical regime.<sup>142</sup>

The geo-political environment is concerned with the strategic balance, and relations between States. This is affected by the law of armed conflict, and other formal legal limitations which are imposed upon State sovereignty. These can be, and often are, challenged by the strategic balance, by wars and by the threat of the use of force by States. It is also affected by changes of an ostensibly more benign — or less obviously malignant — form, such as telecommunications, transportation, agricultural improvements, and so on.

The late twentieth century and early twenty-first century is an appropriate time to re-evaluate the concept of sovereignty. The sovereign State must evolve, or at least have its nature reassessed, as its environment changes. The world is very different today to what

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137 For a view of the inherent weakness in the international security system, see Joseph P. Lorenz, *Peace, power, and the United Nations: a security system for the twenty-first century* (1999).

138 For example, for an attempt to justify the 2003 war against Iraq, see ‘War and law: Attorney General statement’, *The Times (London)*, 17 March 2003.

139 Strictly, the laws of war might be said to cover a narrower field than the laws of armed conflict.

140 See Michael Walzer, *Just and Unjust Wars* (3<sup>rd</sup> ed) (2000).

141 Whether there is a duty to levy offensive war might be questioned, though sometimes attack is the best form of defence.

142 Both grounds were used, at times, along with self-defence, to justify the United States-led invasion of Iraq in 2003; see Cox, above n137.

it was in what may be regarded as the zenith of State sovereignty, in the nineteenth century.<sup>143</sup> The notion that all States are legally equal,<sup>144</sup> whilst perhaps laudable in theory, has also been shown more than once to be subject to important practical qualifications.<sup>145</sup> Nor indeed is the notion of equality of particularly great antiquity.<sup>146</sup> The freedom of action of States can at times be severely restricted, both legally, and practically,<sup>147</sup> by strategic considerations, by international law, and by economic factors. The increasingly pivotal role of international economic law is also having a significant effect.<sup>148</sup>

As a consequence of these developments, and others, the relationship between national law and international law, and the concept of State sovereignty, are arguably more uncertain today than they were 100 years ago. It is therefore an opportune time for investigation and exploration, albeit one which is narrowly focused, and at times tentative in its conclusions. It may also cast light on the apparent anomaly of the Sovereign Military Order of Malta.

## 7. Conclusion: Territory and Statehood

The Order of Malta owes its peculiar status to having been possessor of the fiefdom of Malta for 200 years, and of Rhodes even earlier. But it, after it ceased to rule Malta, it retained certain attributes of sovereignty, at a time when international law was slowly developing new concepts of statehood. This was due in part to the circumstances of the time (just as the continued recognition of the Baltic States by the USA was a consequence of the Cold War), but also because the Order was the oldest and most prestigious of the hospitaller religious Orders of the Roman Catholic Church. These two factors, which quickly became intermingled, preserved for the Order a marked degree of independence, and placed it amongst the first of the international organisations to be recognised by international law. Not, indeed, as a sovereign State, but as a subject of international law with some powers and duties akin to those enjoyed by States.

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143 See Hayward R Alker, Thomas J Biersteker & Takashi Inoguchi, 'From Imperial Power Balancing to People's Wars: Searching for Order in the Twentieth Century', in James Der Derian & Michael Shapiro (eds), *International/Intertextual Relations: Postmodern Readings of World Politics* (1989) at 135–62.

144 Schreuer, above n132.

145 For the origins of State sovereignty, the peace of 1648 was influential, see Leo Gross, 'The Peace of Westphalia, 1648–1948' (1948) 42 *American Journal of International Law* at 20. See also Teschke, above n130.

146 1648 is also usually given as the decisive date for the transition from the vertical imperial to the horizontal inter-State model; see Richard Falk, 'The Interplay of Westphalia and Charter Conceptions of International Legal Order', in Cyril E Black & Richard Falk (eds), *The Future of the International Legal Order* (vol I) (1969) at 32, 43.

147 Not all States follow the same model, either. It was observed (before the collapse of organised Communism) that at least five world Orders – Soviet Socialism, Capitalist Power Balancing, Authoritarian Corporatism, Maoist agrarian Communalism and Islamic Transnationalism – could be found within all world regions; Hayward R Alker, 'Dialectical Foundations of Global Disparities' (1981) 25 *International Studies Quarterly* 69 at 81–5.

148 See Joost Pauwelyn, *Conflict of norms in public international law: how WTO law relates to other rules of international law* (2003); Robert W Cox, *Production, Power, and World Order: Social Forces in the Making of History* (1987) at 107.

To have sovereignty, a State must have a permanent population, it must have a defined territory, it must have a government, and it must have the capacity to enter into diplomatic relations.<sup>149</sup> No other entity could be regarded as a sovereign State, whatever its de facto power. Yet, this definition is increasingly meaningless.

The notions of sovereignty and statehood are not easily defined or explained. To a large degree this is because they are principally political concepts, rather than merely legal principles. With the growth in both the (horizontal) extent and (vertical) reach of international agreements, treaties, conventions and codes, national independence is becoming less relevant. This tendency is becoming more noticeable in the modern commercial environment, and especially the internet.

As the concept of State sovereignty declines in relevance, so notions of racial sovereignty have grown. The idea that a given population group is, or ought to be, sovereign within a larger country is not confined to New Zealand.<sup>150</sup> Yet, sovereign States have clung tenaciously to their rights, rights which have become more precious as they become rarer.

It was perhaps inevitable that as the traditional sovereign State lost ground, so newer types of international entities, enjoying powers and privileges recognised by the international community, should emerge. Yet it is ironic that the first of these international organisations should date, not from the twentieth century, but from the twelfth.

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149 *The Montevideo Convention*, above n2; Hudson, above n2 at 620. Although the application of the Convention is confined to Latin America, it is regarded as declaratory of customary international law.

150 Richard Conley, 'Sovereignty or the Status Quo? The 1998 pre-referendum debate in Quebec' (1997) 35 *Journal of Canadian and Comparative Politics* 67; Paul Howe, 'Nationality and Sovereignty Support in Quebec' (1998) 31 *Canadian Journal of Political Science* 31; Stephen Krasner, 'Sovereignty: an institutional perspective' (1988) 21 *Comparative Political Studies* 66.