

# **The Acquisition of Sovereignty by Quasi-States: The case of the Order of Malta**

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## **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 Hospitallers, is a unique international confraternity. It is the only organization currently recognized, albeit by a minority of states, as quasi-sovereign. In view of the claims which have been made from time to time by other orders of chivalry – or even 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 special position of the Holy See is covered. 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. The lessons from the example of the Order of Malta for the relationship of territory and statehood are evaluated.

## **Sovereignty and statehood**

The notions of sovereignty and statehood were once among the most important aspects of public international law. Its 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>

The traditional juristic theory of territorial sovereignty, with the King being supreme ruler within the confines of his kingdom, originated as two distinct concepts. The King acknowledged no superior in temporal matters, and within his kingdom the King was emperor.<sup>2</sup> If the Holy Roman Emperor had legal supremacy within the *terrae imperii*, the confines of the empire, theories of the sovereignty of kings were not needed, for they had merely *de facto* power.<sup>3</sup> Sovereignty remained essentially *de jure* authority.<sup>4</sup> This was not merely power without legitimacy.<sup>5</sup> Mediæval jurists cared not whether the emperor had jurisdiction and authority over kings and princes, but focused on his power to usurp the rights of his subjects. Whether this power was *de facto* or *de jure* was unimportant.<sup>6</sup>

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<sup>1</sup>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, G. J. Andreopoulos and M. R. Shulman (eds.), *The Laws of War - Constraints on Warfare in the Western World* (Yale University Press: New Haven, 1994); J. Gillingham and J. C. Holt (eds.), *War and Government in the Middle Ages* (Boydell Press: Cambridge, 1984).

<sup>2</sup>W Ullmann, ‘This Realm of England is an Empire’ (1979) 30(2) *Journal of Ecclesiastical History* 175-203.

<sup>3</sup>In Roman law it was originally considered that the emperor’s power had been bestowed upon him by the people, but when Rome became a Christian State his power was regarded as coming from God. In America also God had been recognized as the source of government, although it is commonly thought in a republican or democratic government ‘all power is inherent in the people’. This dual basis of authority is symbolised by chapter 25 verse 10 of the Book of Leviticus, which was popular in the USA:

And ye shall hallow the fiftieth year, and proclaim liberty throughout all the land unto all the inhabitants thereof: it shall be a jubilee unto you; and ye shall return every man unto his possession, and ye shall return every man unto his family.

<sup>4</sup>J P Canning, ‘Law, sovereignty and corporation theory, 1300-1450’ in J. H. Burns (ed.), *The Cambridge History of Mediæval Political Thought c.350-c.1450* (Cambridge University Press: Cambridge, 1988) 465-467. Emperor Frederick I Barbarossa saw the advantages of Roman law and legal science for his ambitions and his inception of absolutism. This led to the growth of royal absolutism, and eventually to the emergence of opposition to this, throughout Europe; See K. Pennington, *The Prince and the Law, 1200-1600* (University of California Press: Berkeley, 1993) 12.

<sup>5</sup>J P Canning, ‘Law, sovereignty and corporation theory, 1300-1450’ in J. H. Burns (ed.), *The Cambridge History of Mediæval Political Thought c.350-c.1450* (Cambridge University Press: Cambridge, 1988) 467-471.

<sup>6</sup>K. Pennington, *The Prince and the Law, 1200-1600* (University of California Press: Berkeley, 1993) 30.

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>7</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. It possesses a population, but not exclusively, as its 10,000 members are subjects and citizens of other nations. Its Government is accorded some diplomatic recognition and accredits representatives. But the major problem for the Order is that for two hundred years it has been effectively land-less.<sup>8</sup>

This paper is the latest in a long series of attempts to explain the somewhat anomalous situation of the Order.<sup>9</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 organization and its role as a territorial Power'.<sup>10</sup> The character of the Order did not originate simultaneously with its territorial sovereignty, and therefore did not disappear with the latter.<sup>11</sup> We must, therefore, be on guard against attaching too much significance to the characterisation of a particular entity as a 'state'.<sup>12</sup> The Order may be sovereign in a sense, but not necessarily a state.

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<sup>7</sup>The Montevideo Convention on the Rights and Duties of States, signed 26 December 1933; M. O. Hudson (ed.), *International Legislation* (Carnegie Endowment: Washington, 1931-50) vol 6, 620. Although the application of the Convention is confined to Latin America, it is regarded as declaratory of customary international law.

<sup>8</sup>In accordance with the settlement with the Roman Catholic Church, the Italian Government recognizes the extritoriality of the Order of Malta's property in Rome, the Palazzo Malta, Via dei Condotti 68 (where the Grand Master resides and the government bodies meet) and a villa in the Aventine, the Villa Malta, which houses the Grand Priory of Rome, the Embassy of the Order to the Holy See and the Embassy of the Order to the Italian Republic; <<http://www.smominfo.org/domrisp.asp?idlingua=5>> at 18 June 2002.

<sup>9</sup>See, for example, G. Cansacchi, *La personalità di diritto internazionale del S.M.V Gerosolimitano detto di Malta* (n.d.) 8; A C von Breycha-Vauthier and M. Potulicki, 'The Order of St John in International Law: A forerunner of the Red Cross' (1954) 48 *American Journal of International Law* 554; C D'Olivier Farran, 'The Sovereign Order of Malta in international law' (1954) 3 *International and Comparative Law Quarterly* 222; C A Pasini-Costadoat, *La personalidad internacional de la S.M.O. de Malta* (September-December 1948) *Revista Peruana de Derecho Internacional* 234; G. Cansacchi, *Il diritto di legazione attivo e passivo dell'Ordine de Malta* (1940) 65; A Astraudo, 'Saint-marin et l'Ordre de Malta' (1935) *La Revue Diplomatique* 7.

<sup>10</sup>A C von Breycha-Vauthier and M Potulicki, 'The Order of St John in International Law: A forerunner of the Red Cross' (1954) 48 *American Journal of International Law* 554, 555.

<sup>11</sup>*Ibid.* ap 557.

<sup>12</sup>25 *Recueil des Cours Academie de Droit International* 5, 9-15 (1968-III). See also J. Crawford, *The Creation of States in International Law* (Clarendon Press: Oxford, 1979).

## The existence of anomalous entities having personality at international law

Traditionally only a territorial state was regarded as an international person, capable of having rights and duties under international law.<sup>13</sup> That entities other than states can be subjects of international law is not even now a universally accepted idea, and exactly what entities do have this status is an even more controversial topic. As Hall has noted, primarily international law governs the relations of independent states, but 'to a limited extent ... it may also govern the relations of certain communities of analogous character'.<sup>14</sup> Lawrence also wrote that the subjects of international law are sovereign states, 'and those other political bodies which, though lacking many of the attributes of sovereign states, possess some to such an extent as to make them real, but imperfect, international persons'.<sup>15</sup> Whereas these scholars tended to define subjects of international law as states and certain unusual exceptions, there are others who go further in opening up the realm of reasonable subjects of the law of nations. Notable among them is Sir Hersch Lauterpacht. In his view:

International practice shows that persons and bodies other than states are often made subjects of international rights and duties, that such developments are not inconsistent with the structure of international law and that in each particular case the question whether a person or a body is a subject of international law must be answered in a pragmatic manner by reference to actual experience and to the reason of the law as distinguished from the

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<sup>13</sup>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; G. von Glahn, *Law Among Nations: An Introduction to Public International Law*, 6<sup>th</sup> edn (Allyn and Bacon: Boston, 1992).

<sup>14</sup>W. E. Hall, *A Treatise on International Law*, 8<sup>th</sup> edn (Clarendon Press: Oxford, 1924). Nor is he alone, similar views being expressed by other writers - G. Schwarzenberger, *A Manual of International Law*, 1<sup>st</sup> edn (Stevens: London, 1947) 48; W. Friedmann, *The Changing Structure of International Law* (Columbia University Press: New York, 1964) 213-215.

<sup>15</sup>T. J. Lawrence, *The Principles of International Law*, 7<sup>th</sup> edn (Macmillan: London, 1923) 69.

preconceived notion as to who can be the subjects of international law.<sup>16</sup>

This paper involves a study of just such a case. The status of organizations 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 recognized the United Nations as an international person,<sup>17</sup> thereby beginning the process whereby an ever increasing number of modern international organizations are recognized as having personality at international law. That is not the same thing as saying that it 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>18</sup>

While it is possible for organizations and individuals to be subjects of international law, states remain the dominant agents in world politics and the dominant actors in international law. This dominance has led some theorists to distinguish 'subjects' of the law from 'objects' of the law, suggesting that although entities other than states may have rights and duties in international law, these rights are conferred upon them by states and, presumably, may be taken away by states.<sup>19</sup> It is now more correct to regard international law as a body of rules which binds states and other agents in world politics in their relations with one another and is considered to have the status of law.<sup>20</sup>

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<sup>16</sup>Hersch Lauterpacht, 'The Subjects of the Law of Nations' (1947) 63 *LQR* 444.

<sup>17</sup>*Reparation for Injuries Suffered in the Service of the United Nations* Advisory Opinion (April 11, 1949) 4 ICJ Rep 179.

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[The United Nations Organization] 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.

*-Ibid.*

<sup>19</sup>G. Schwarzenberger and E. D. Brown, *A Manual of International Law*, 6<sup>th</sup> edn (Professional Books: Milton, 1976) 42.

<sup>20</sup>H. Bull, *The Anarchical Society* (Macmillan: London, 1977) 127; Hersch Lauterpacht, 'The Subjects of the Law of Nations' (1947) 63 *LQR* 444; Dame Rosalyn Higgins, *The Development of International Law Through the Political Organs of the United Nations* (Oxford University Press: London, 1963) 1; P. Jessup, *A Modern Law of Nations* (Macmillan: New York, 1968); J. G. Castel, *International Law: Chiefly as Interpreted and Applied in Canada*, 3<sup>rd</sup> edn (University of Toronto Press: Toronto, 1976) 1.

There are now many international organizations, though not all of these is necessarily a subject of international law.<sup>21</sup> Whilst many such organizations, such as the European Union, or the United Nations Organization, receive ambassadors from member countries, the Sovereign Military Order of Malta (known as SMOM for short) almost alone among international organizations 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>22</sup> Most importantly, the Sovereign Military Order of Malta claims, and is sometimes acknowledged to be, a sovereign state in its own right.<sup>23</sup> This status has been claimed since at least the fourteenth century, well before international law began to accord legal personality to international organizations.<sup>24</sup> But the Order is not unique in 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, has seen the growth of international organizations and other bodies now accorded recognition as subjects on international law. 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.

Although the basic sources of international law, the written and unwritten rules, treaties, agreements, and customary law, have long been present, since the nineteenth century there has been enormous growth in regulations binding upon what are still spoken of as sovereign states. There has been significant growth in the laws of

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<sup>21</sup>They may become subjects of international law by operation of municipal law, as for example, the International Organizations Act 1968 (UK), and SI1968, No. 442, which recognizes the representative of the Council of Europe in the United Kingdom.

<sup>22</sup>The Order was also involved in the Geneva Conventions, and is a member of the International Red Cross; A. C. von Breycha-Vauthier, *Der Malteser-Orden im Völkerrecht* (1950) 401-413. The European Communities also accredit some ambassadors.

<sup>23</sup>For example, San Marino acknowledged the Order as a sovereign state in a treaty of amity in 1935; A Astraudo, 'Saint-marin et l'Ordre de Malte' (1935) *La Revue Diplomatique* 7; G. Cansacchi, *Il diritto di legazione attivo e passivo dell'Ordine de Malta* (1940) 65.

<sup>24</sup>Though the canon law of the Church accorded recognition to certain organizations.

humanity, or human rights,<sup>25</sup> and in many other aspects of international law. Some sovereign states have chosen to relinquish certain aspects of their independence, such as the United Kingdom by joining the European Union.<sup>26</sup> Increasingly the scope of international law has extended well beyond the regulation of the relations of nations, and into what were traditionally purely domestic concerns. Indeed, the extent to which any country is now truly sovereign is debatable, given the growth in the scope and reach of international law.<sup>27</sup>

At the same time, non-countries have increasingly become subjects of international law, most noticeably, the United Nations.<sup>28</sup> It was perhaps inevitable that as the traditional sovereign state lost ground, so newer types of international entities, enjoying powers and privileges recognized by the international community, should emerge. Yet it is ironic that the first of these international organizations should date, not from the twentieth century, but from the twelfth.

## **The Holy See**

The Holy See, the parent jurisdiction or court of the Roman Catholic Church, was a person in international law even before the Lateran Treaty of 11 February 1929,<sup>29</sup> which restored to the papacy some of the lands lost in 1870. Its position is best explained by Hatschek:

Since international law does not allow any one state to control the Pope in his character as head of the Catholic Church, he has to be put in a position of international independence, that is, even though he is not the head of a state ... he has to be made an independent subject of international law.<sup>30</sup>

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<sup>25</sup>Consideration of human rights obligations have become central to planning military operations; Felicity Rogers, 'Australia's Human Rights Obligations and ADF Operations' (1998) 131 *Australian Defence Force Journal* 41-44.

<sup>26</sup>F M Brookfield, 'A New Zealand Republic?' (1994) 8 *Legislative Studies* 5-13; I Loveland, 'Parliamentary Sovereignty and the European Community' (1996) 49(4) *Parliamentary News* 517-536.

<sup>27</sup>Sir Eli Lauterpacht, 'Sovereignty' (1997) 73(1) *International Affairs* 137-150.

<sup>28</sup>Above n. 17.

<sup>29</sup>*Documents* (1929) 216-241.

<sup>30</sup>J. Hatschek, translated by C. Manning, *An Outline of International Law* (Bell & Sons: London, 1930) 56, cited in D. P. O'Connell, *International Law*, 2<sup>nd</sup> edn (Stevens: London, 1970) 85-86.

As we shall see, the international personality of the Order itself was to derive, at least in part, from this functional approach to law - one which accords nicely with the much more modern ideas of Lauterpacht. Yet the position of the Holy See itself was controversial until it once again obtained actual physical territory in 1929. But the Holy See marks the transition from subject of international law with an essential territorial origin to those of an entirely different character. At times the Holy See has had a territorial basis, at other times it has not. Yet all the time, a considerable number of states have recognized the Holy See as a subject of international law. Though whether, in the absence of territory, it should be regarded as a state is another matter.

## **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. The hospital was later dedicated to St John the Baptist. In 1099, Brother Gerard, then head of the hospital, and who had aided the Crusaders in the capture of the Holy City, adopted the rule of the Augustinian canons in place of the former Benedictine rule. On 5 February 1113 the hospital was recognized by the Bull *Pie Postulatio Voluntatis* of Pope Paschal II as an autonomous religious Order, dedicated to serve the poor and sick.<sup>31</sup> This Bull was confirmed by Pope Calixtus II in 1120. Thereafter the Order spread outwards from Jerusalem, until there were hospitals, or houses of the Order, throughout Europe.<sup>32</sup> The Order had one convent (in the Holy Land), but they erected a hospital whenever they went. It is to the Order of Malta that we owe the survival of a public hospital service through the middle ages in Europe.<sup>33</sup>

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<sup>31</sup>J. C. Lünig, *Codex Ital. Diplom.* vol IV, 1451. It had previously been admitted as such by the King of Jerusalem; Above n. 10 ap 554.

<sup>32</sup>In 1130 the Order was granted freedom from tolls (J. C. Lünig, *Codex Ital. Diplom.* vol IV, 1451); in 1144 it was placed under the protection of the Holy See (*Magn. Bull.*, vol II, 471); and 1190 placed under the protection of the Emperor (J. C. Lünig, *Codex Ital. Diplom.* vol IV, 1455).

<sup>33</sup>In England, the old Order was disbanded in 1540. It was revived by letters patent 2 April 1557, and never subsequently abolished. Titular grand priors were appointed from the 1560s till 1815. A new grand priory was established in 1994. For the history of the Order in England, see Sir Edwin King, *The Knights of St John in the British Realm* (London, 1967); E. J. King, *The Grand Priory of the Hospital of St John of Jerusalem in England* (Fleetway Press: London, 1924).

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 a military function, 'to defend the Holy Sepulchre to the last drop of blood and fight the unfaithful wherever they be'. 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.

The Order of St John withdrew from the Holy Land in 1291, when they established their convent on Cyprus. In 1310 they moved to Rhodes, which was to remain their home until 1523. After a time on Crete and elsewhere, in 1530 they reformed on Malta,<sup>34</sup> their home till their power was finally broken with the arrival of the French in 1798.<sup>35</sup> On Rhodes and later Malta the Order had acquired and exercised sovereign authority, ruling the islands - at least in the early centuries - with an efficiency and vigour which were 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>36</sup> but none succeeded. Although lacking a territorial base, the Order continued to maintain hospitals, as it still does. It also retained its public status in Germany as a member of the Holy Roman Empire, with

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<sup>34</sup>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, 140).

<sup>35</sup>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*, 2<sup>nd</sup> edn (Gottingue, 1817-35) vol 6, 322, 324.

<sup>36</sup>In 1806 Gustav IV King of Sweden offered Gothland. This was rejected however; A. Visconti, *La sovranità dell'Ordine di Malta nel diritto italiano* (1936) vol 2, 195, 205.

voting rights in the College of Princes<sup>37</sup> and retained a vote in the College of Princes of the Empire.<sup>38</sup>

Due to its weakened condition, the Order remained for some time in danger of dissolution, 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>39</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>40</sup> The Order of Malta is still recognized by many countries - though by no means all, as a sovereign entity in international law.<sup>41</sup> The Order is not a country, but it exhibits some aspects of a sovereign state.<sup>42</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.

## The legal basis for the sovereignty of the Order

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<sup>37</sup>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.

<sup>38</sup>§ 32, sub 59.

<sup>39</sup>Since 1630 the Grand Master has ranked as a cardinal, since 1607 a Prince of the Holy Roman Empire, and an Austrian Prince (styled Serene Highness) since 1880. Since the early seventeenth century they have been styled "Most Eminent Highness", recognized by Italian royal decree 1927; *Almanach de Gotha*, 184<sup>th</sup> edn (Almanach de Gotha: London, 2000). However, the former requirement that the election of a new Grand Master be approved by the Holy See has disappeared (Art. 13 Constitutional Charter and Code):

Before the assumption of the office, the election of the Grand Master is to be communicated by letter to the Holy Father by the person elected.

<sup>40</sup>Although the United Kingdom does not now recognize the Order, Sir Alexander Ball, when Governor of Malta, was Minister to the Order in the late eighteenth century.

<sup>41</sup>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 recognize 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); <http://www.smominfo.org/attdiplomatica.asp?idlingua=5> at 18 June 2002.

<sup>42</sup>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 (Bollettino Ufficiale: Rome, 1998) Art. 26. There is no military or police force, as there is no territory, or population, to defend or police.

The Order of St John is generally held to have became a state in international law possibly as early as 1291,<sup>43</sup> when it settled in Cyprus,<sup>44</sup> and certainly by 1313, in its possession of the islands of Rhodes.<sup>45</sup> In 1523 the Order lost possession of Rhodes, but not its sovereign territorial character, as it shortly thereafter acquired Malta. Perpetual sovereignty over Malta was granted in 1530 by the Emperor Charles V, as a perpetual fief *cum imperio* of the Kingdom of Sicily.<sup>46</sup> Since 1834 the Order has been domiciled in Rome, where its headquarters, the Palazzo Malta, covers three acres.<sup>47</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>48</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>49</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 to that of the Pope, as occupant of the Holy See and sovereign of Vatican City State,<sup>50</sup> but as the Grand Master was ruler of Malta solely as head of the Order,<sup>51</sup> this argument appears weak.

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<sup>43</sup>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; Above n. 10 ap 555.

<sup>44</sup>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 the Kings of Cyprus.

<sup>45</sup>In 1446 Pope Nicholas V recognized the Grand Master of the Order as sovereign prince of Rhodes; C A Pasini-Costadoat, 'La personalidad internacional de la S.M.O. de Malta' (September-December 1948) *Revista Peruana de Derecho Internacional* 231.

<sup>46</sup>Tripoli was also granted, though this was lost the following year; A Silenzi de Stagni, *La S.O.M. de Malta* (January-April, 1948) *Revista Peruana de Derecho Internacional* 110 fn 10.

<sup>47</sup>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.

<sup>48</sup>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.

<sup>49</sup>C D'Olivier Farran, 'The Sovereign Order of Malta in international law' (1954) 3 *International and Comparative Law Quarterly* 222.

<sup>50</sup>G. Cansacchi, *La personalità di diritto internazionale del S.M.V Gerosolimitano detto di Malta* (n.d.) 8.

<sup>51</sup>Above n. 49 ap 222.

But neither alternative (the Order itself or Malta being sovereign) is satisfactory. 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>52</sup> and later of the Kingdom of Sicily.<sup>53</sup> This can be seen in the lack of similar status being accorded the Templars<sup>54</sup> or the Iberian Orders, and its being conferred upon the Teutonic Order.<sup>55</sup> As, until the twentieth century, only a sovereign state could be a subject of international law, 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>56</sup>

What is undeniable is the fact that after 1798 the Order still had an international legal personality, independent of specific territorial sovereignty.<sup>57</sup> It would seem that the Order continued to be recognized as something akin to sovereign 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>58</sup> In this respect it might more appropriately be recognized as being equivalent to an exiled Government. Some of these, such as those of Poland and the Baltic States, were recognized by some countries for many years after they lost control of their territory.<sup>59</sup>

Secondly, due to its unique history and humanitarian function the Order acquired the then unique status of international legal personality after 1798.<sup>60</sup> This did not equal the sovereignty which they possessed as masters of Malta, and which they must have lost some time after 1798-

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<sup>52</sup>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 recognized the Grand Master of the Order as sovereign prince of Rhodes; Above n. 45 ap 231.

<sup>53</sup>After 1530, for Malta.

<sup>54</sup>J. H. W. Verzijl, *International Law in Historical Perspective* (A. W. Sijthoff: Leyden, 1969) vol 2, 35-36.

<sup>55</sup>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* 441-448.

<sup>56</sup>They were of course recognized as de jure sovereign after the Diet of Worms 1648.

<sup>57</sup>Above n. 10 ap 556.

<sup>58</sup>And possibly in 1313 also.

<sup>59</sup>(September/October 1991) vol 2, No 2 *Foreign Policy Bulletin* 33.

<sup>60</sup>The Order as such was prohibited by its rules from fighting on any side in conflicts between Christian Powers; Above n. 10 ap 555.

though the distinction between the two sources of authority soon became blurred. This personality was based on the role of the Order as one of the few international humanitarian organization of its time.<sup>61</sup>

Since the twelfth century the Order of Malta had been an international religious order or brotherhood.<sup>62</sup> It only gradually became an order of chivalry,<sup>63</sup> and the possession of sovereign powers over island territories came comparatively late in its history.<sup>64</sup> The term ecclesiastical orders of knighthood describes those knightly orders which, in one way or another, were connected with the Catholic Church. At the present time there are two different groups: 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>65</sup>

The pontifical or papal orders of knighthood are conferred directly by the pope. They include the Supreme Order of Christ,<sup>66</sup> the Order of the Golden Spur,<sup>67</sup> the Order of Pius IX,<sup>68</sup> the Order of Saint Gregory the Great,<sup>69</sup> and the Order of Saint Sylvester.<sup>70</sup> The religious military orders include the Order of St John of Jerusalem, the Teutonic Order,<sup>71</sup> and the Order of the Holy Sepulchre.<sup>72</sup> There are also various Spanish orders.<sup>73</sup> Most of the other ancient religious military orders are now

<sup>61</sup>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 (G. F. Martens, *Recueil de traits*, 2<sup>nd</sup> edn (Göttingen, 1817-35) vol 7, 435 et seq., at 443) it was agreed that the Order should be exempted from secularisation 'en considération des services militaires de ses membres' (§ 26 at 485).

<sup>62</sup>A brotherhood 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 bound, like ordinary monks, by solemn vows of poverty, chastity and obedience.

<sup>63</sup>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.

<sup>64</sup>Although the Order had been recognized 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'; Above n. 10 ap 554.

<sup>65</sup>J. Van der Veldt, *The Ecclesiastical Orders of Knighthood* (Catholic University of America Press: Washington, 1956) 1.

<sup>66</sup>1319, secularised 1499. In one class only.

<sup>67</sup>1539, though claiming a much more ancient origin. In one class only.

<sup>68</sup>1847.

<sup>69</sup>1831.

<sup>70</sup>1559, reformed 1841.

<sup>71</sup>1199.

<sup>72</sup>Founded 1099, re-organised 1496, revived 1868.

<sup>73</sup>The Order of Alcantara (founded 1156, approved 1177), Order of Calatrava (founded 1158, recognized 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

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>74</sup> While the Templars were suppressed, due largely to jealousy of their wealth and privileges, the Hospitallers, always preserving an essential charitable function, survived.<sup>75</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 10th December of that year, appointed a special tribunal of five cardinals, presided over by the Dean of the Sacred College, Eugene Cardinal Tisserant, 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 as its relationship to the Holy See. After long discussions the commission of cardinals on 24th January 1953 gave the following unanimous verdict:<sup>76</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.

Insofar as the Order of Malta is composed of knights and chaplains, it is a ‘religio’ and more precisely a religious order, approved by the Holy See, according to the *Codex juris canonici*, Can. 487 and 488, nn. 1 and 2. The purpose of this order is, besides the sanctification of its members, also the pursuit of religious objectives, charity, and welfare work.

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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.

<sup>74</sup> Though the great majority of members are laymen. In some respects these members rather resemble 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 comparisons however, is that of the lay abbots and similar creations of the post-Reformation Church.

<sup>75</sup> 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.

<sup>76</sup> *Acta Apostolicae Sedis* (1953) vol 20, 765-767.

The sovereign and the religious character of the order are intimately related, inasmuch as the former serves to attain the objectives of the order as a religious institution and its development in the world.

The Order of Malta depends on the Holy See and, as a religious order, on the Sacred Congregation of Religious.

Those persons who have obtained marks of distinction from the order and the associations of these persons depend on the order, and, through it, on the Holy See.

Questions concerning the institution's character as a sovereign order are treated by the Secretariat of State of His Holiness. Those of a mixed nature are received by the Sacred Congregation of Religious in accord with the Secretariat of State.

The present decisions do not interfere with the order's acquired rights, customs and privileges which the Popes have granted or recognized, insofar as they are still in force according to the norms of canon law<sup>77</sup> and the order's own constitutions.<sup>78</sup>

The cardinalatial 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 cardinalatial 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>79</sup> *Inter alia*, this provides:

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<sup>77</sup>*Codex juris canonici*, can. 4 and 5; can. 25-30; can. 63-79.

<sup>78</sup>Above n. 65 ap 22-3.

<sup>79</sup>Letter to the author from Jose Antonio Linati-Bosch, Ambassador of the Order of Malta to the United Nations, 20 May 1999.

The Order is a subject of international law and exercises sovereign functions.<sup>80</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>81</sup>

However, internal rules cannot of themselves make an otherwise non-sovereign body sovereign; though states can recognize 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 recognized by the papacy has canonical validity.<sup>82</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:

Sovereignty is a complex notion, which international law, from the external standpoint, contemplates, so to speak, negatively, having only in view independence *viz-à-viz* 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>83</sup>

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<sup>80</sup>Article 3.

<sup>81</sup>Article 4.

<sup>82</sup>H. E. Cardinale, *Orders of Knighthood Awards and the Holy See - A historical, juridical and practical Compendium* (Van Duren: Gerrards Cross, 1983) 26.

<sup>83</sup>*Nanni and Others v Pace and the Sovereign Order of Malta* [1935-1937] Ann Dig 2, 4-6 [No. 2] (Cassation Court of Italy, 13 March 1935).

Although it too uses the term sovereignty, the Court of Cassation seems to have meant merely that the Order had ‘international juridical personality’.<sup>84</sup> Neither the cardinal 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 recognizing 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>85</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 United Nations, this does not amount to recognition of full sovereign status. But it can be recognized as a non-state entity subject to international law, which is what the Constitutional Charter and Code of the Order appears to indicate.

The privileges actually claimed or exercise by the Order appear to confirm this. It exercises, to some extent, the privilege of treaty-making.<sup>86</sup> It issues passports,<sup>87</sup> but these also are not universally recognized. 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>88</sup> Its right to mint coins and issue

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<sup>84</sup>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; M. Pillotti and A. C Breycha-Vauthier, trans in *Oester. Zeitschrift für öffentliches Recht* (1951) 392-394.

<sup>85</sup>Above n. 82 ap 84.

<sup>86</sup>As with San Marino in 1935; A Astraldo, ‘Saint-marin et l’Ordre de Malte’ (1935) *La Revue Diplomatique* 7. 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 organizations have the capacity to enter into agreements, though their right to do so is usually limited.

<sup>87</sup>As to His late Majesty King Umberto II of Italy and His Imperial and Royal Highness Archduke Otto of Austria. Above n. 45 ap 234 n12a.

<sup>88</sup>Letter to the author from Gill George, Ministry of Foreign Affairs and Trade, New Zealand, 27 May 1999. Section 2 definition of a passport 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 ...’.

stamps is confined to an ornamental level.<sup>89</sup> The Grand Master of the Order is however entitled to sovereign immunity, as is his residence,<sup>90</sup> and is accorded appropriate status on official visits to some countries.<sup>91</sup>

The Order is represented on international bodies.<sup>92</sup> The Order is a signatory to, though not a member of, the Universal Postal Union,<sup>93</sup> although other non-sovereign entities are also members or associate members.<sup>94</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 United Nations High Commissioner for Refugees) and Vienna.<sup>95</sup> It also has member status at the International Maritime Organization, London.<sup>96</sup>

The United Nations 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 United Nations Headquarters.<sup>97</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>98</sup> Delegates are sent by the Order to the Council of Europe, and to the European Commission.<sup>99</sup> The Order is represented at the Organizacion

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<sup>89</sup>Though it has postal agreements with 48 countries.

<sup>90</sup>A. C. Breycha-Vauthier, *Der Malteser-Orden im Völkerrecht* (1950) 401-413.

<sup>91</sup>Notably Malta in June 1968; Above n. 54 ap vol 2, 31.

<sup>92</sup>Membership of international bodies, even of the United Nations, is not regarded as ipso facto evidence of sovereignty, though full membership of the latter organization would be compelling.

<sup>93</sup>Letter to the author from Naguib Nermine, Universal Postal Union, 17 May 1999.

<sup>94</sup>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 United Nations, though their actual political independence was strictly prescribed.

<sup>95</sup>Letter to the author from Jose Antonio Linati-Bosch, Ambassador of the Order of Malta to the United Nations, 20 May 1999.

<sup>96</sup>Letter to the author from Gill George, Ministry of Foreign Affairs and Trade, New Zealand, 27 May 1999.

<sup>97</sup>A status conferred 1994; Letter to the author from Jose Antonio Linati-Bosch, Ambassador of the Order of Malta to the United Nations, 20 May 1999.

<sup>98</sup>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) 290. The style of "Ambassador" does not indicate in itself entitlement to diplomatic privileges and immunities.

<sup>99</sup>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 organizations such as the United Nations Children's Fund (UNICEF). The small Principality of Andorra (Mme Meritxell Mateu I Pi), and

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>100</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>101</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>102</sup> But even the right of legation is not conclusive evidence that an entity is sovereign, as any international organization can accredit representatives to other organizations 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 organization.

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 organizations are recognized 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 facto* sovereignty. After 1798 it became the first of the organizations recognized 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, as that term is understood in traditional, nineteenth century, terms. Peculiarities of

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the Principality of Liechtenstein (HSH Prince Nicholas of Liechtenstein) had ambassadors to the European Commission in 1997; *Corps Diplomatique* (European Union: Brussels, 1997).

<sup>100</sup>Letter to the author from Jose Antonio Linati-Bosch, Ambassador of the Order of Malta to the United Nations, 20 May 1999.

<sup>101</sup>The Apostolic Pro-Nuncios and Nuncios (originally only for 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.

<sup>102</sup>Case No 798, May 12, 1943 (1949) 43 American JIL 537. Italy recognized the Order’s right of legation in 1884; Above n. 83.

status can be explained by the ancient origins of the Order.<sup>103</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 organizations, rather than that of the princes of sovereign states.

## **The branches of the Order of Malta and other religious military orders**

A Convention<sup>104</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>105</sup> the Johanniterorden,<sup>106</sup> and the Swedish and Dutch Orders of St John.<sup>107</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 recognizes 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 organization. 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>108</sup>. The Teutonic Order lost its sovereign status in when it ceased to rule territory in Germany after 1525.<sup>109</sup>

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<sup>103</sup>The Jesuits, though similarly a world-wide religious order was never recognized 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; Above n. 54 ap vol 2, 36-37.

<sup>104</sup>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.

<sup>105</sup>The branch of the Order descended from that in England, and revived in the United Kingdom in 1831.

<sup>106</sup>The German branch, also called the Venerable Order of St John in Prussia, established 1812 and recognized 1852.

<sup>107</sup>The Venerable Order of St John in the Netherlands was established in 1909, and recognized in 1946. The Venerable Order of St John in Sweden was established in 1920.

<sup>108</sup>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.

<sup>109</sup>Above n. 54 ap vol 2, 32-35.

## Conclusion - Territory and Statehood

The Order of Malta owes its peculiar status to having been possessor of the fiefdom of Malta for two hundred 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 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 organizations to be recognized 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.

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>110</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

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<sup>110</sup>The Montevideo Convention on the Rights and Duties of States, signed 26 December 1933; M. O. Hudson (ed.), *International Legislation* (Carnegie Endowment: Washington, 1931-50) vol 6, 620. Although the application of the Convention is confined to Latin America, it is regarded as declaratory of customary international law.

not confined to New Zealand<sup>111</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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<sup>111</sup>R Conley, 'Sovereignty or the Status Quo? The 1998 pre-referendum debate in Quebec' (1997) 35(1) *Journal of Canadian and Comparative Politics* 67-92; P Howe, 'Nationality and Sovereignty Support in Quebec' (1998) 31(1) *Canadian Journal of Political Science* 31-60; S Krasner, 'Sovereignty: an institutional perspective' (1988) 21(1) *Comparative Political Studies* 66-94.