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**Short Notes on the International Status of Sovereign Order of Malta
under International Law. Functional Limits and Dependence upon the
Holy See in the light of the New Constitution of 3 September 2022**

ABSTRACT: The presence of the Order of Malta (acronym SMOM) on the international scene, because of its singularity, has been the subject of debate and discussion among scholars of international law as well as canon law. In fact, the SMOM's juridical subjection to the Holy See because of its nature as a Catholic Religious Institute is a critical point under the traditional international legal theory that seems to be inconsistent with the Order's international subjectivity. The aim of this study is to point out that, using a broad and modern notion of international subjectivity, there is no incompatibility between the canonical nature of the Order of Malta and its membership in the international community.

SUMMARY: 1. Introduction - 2. The SMOM self-qualification as full member of the international community: critical notes - 3. The nature and scope of the international legal subjectivity of SMOM - 4. The non-relevance of the canonical status and the relationship with the Holy See for the international subjectivity of SMOM - 5. Conclusions.

1 - Introduction

The presence of the Order of Malta (acronym SMOM) on the international scene, because of its singularity, has been the subject of debate and discussion among scholars of international law as well as canon law¹. In particular, the legal status of SMOM is a topic mainly affecting Italian scholars possibly because the Government of the Order is headquartered in Rome². In general, the Italian doctrine identifies the historical origin of

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¹ The bibliography concerning the Order of Malta is endless. For a general overview cf. **H.J.A. SIRE**, *The Knights of Malta. A Modern Resurrection*, Third Millennium Publishing, London, 2016.

² Some international jurists do not mention SMOM when in general exposing the subject of the international law system, for example cf. **A. REMIRO BROTONS**, R.M.



the Order of Malta's current international status to preferential treatment from the Italian Government³, which, since the unification of Italy (*Risorgimento*), has had relations with SMOM, considering it as an entity with international legal personality, despite its nature as a religious order within the Catholic Church⁴. It must be pointed out that recently there has been a legal precedent that tends to limit the Order of Malta's immunity also with respect to Italian jurisdiction⁵, but the Italian government's unwavering policy clearly confirms its traditional attitude towards the Order of Malta and its international status⁶. Having said that, the question about the subjectivity/legal personality of SMOM under international law has not as yet been settled although "the Sovereign Order of St John of Jerusalem, of Rhodes and Malta (known as the Order of Malta) is generally accepted as possessing international personality", both in doctrine and practice⁷.

RIQUELME CORTADO and others, *Derecho internacional*, Tirant Lo Blanch, Valencia 2007; *International Law*, M. EVANS ed., Oxford University Press, Oxford, 2003; **E. CANNIZZARO**, *Diritto Internazionale*, Giappichelli, Torino, 2022, 5th ed.; **NGUYEN QUOC DINH, P. DAILLIER, A. PELLET**, *Droit international public*, LGDJ, Paris, 1992, 4^e ed. Few words are spent in a footnote in *Oppenheim's International Law*, R. JENNINGS, A. WATTS Eds., Longman, London, 1993, 9th ed., vol. I part. I, p. 329 footnote 7, saying that "[SMOM] has very close links with the Holy See".

³ Cf. **G. PASCALE**, *Su alcune recenti vicende riguardanti i rapporti dell'Ordine di Malta con l'Italia e la Santa Sede*, in *La Comunità internazionale*, 2017, pp. 191-212.

⁴ About the development of the concept of international subjectivity cf. **J.E. JMAN**, *The Concept of International Legal Personality. An Inquiry Into the History and Theory of International Law*, T.M.C Asser Press, The Hague, 2004.

⁵ Cf. **ITALIAN COURT OF CASSATION**, sentence of 9 August 2010 n. 18451, commented by **F. GAZZONI**, *L'immunità giurisdizionale dell'Acismom nelle controversie di lavoro in materia sanitaria: dal diritto internazionale alla "esperienza giuridica"*, in *Giustizia civile*, 2011, pp. 960-970; **D. GIRARDI**, *Limiti all'immunità dell'Acismom dalla giurisdizione italiana nelle controversie di lavoro in materia sanitaria*, in *Il Foro italiano*, 2013, pp. 2018-2021; **ID.**, *L'esenzione dell'ACISMOM dalla giurisdizione italiana in materia di lavoro, tra convenzioni e consuetudini internazionali*, in *Il giusto processo civile*, 2013, pp. 841-849.

⁶ On 2013 was signed an agreement between the Italian Republic and the Sovereign Military Order of Malta concerning the updating of the diplomatic notes of 11 January 1960 and the regulation of the bilateral relations, cf. *Gazzetta Ufficiale della Repubblica Italiana* of 11 January 2013, general series n. 9, p. 67. Cf. also the postal agreement came into force on March 2016, and the very recent agreement on matters of cooperation for see rescue operations signed on September 2020, awaiting feedback from the Order of Malta to take effects (cf. <https://atrio.esteri.it/>).

⁷ **R. PORTMANN**, *Legal Personality in International Law*, Cambridge University Press, Cambridge, 2010, p. 118 and also p. 115. A similar opinion is expressed by **A. CASSESE**, *International Law*, Oxford University Press, Oxford, 2005, 2th ed., p. 133; **F. GAZZONI**,



2 - The SMOM self-qualification as full member of the international community: critical notes

On its official website, the Order of Malta describes itself as a 'primary subject' of international law. First of all, it should be noted that the

L'Ordine di Malta, Giuffrè, Milano, 1979, pp. 66-74; **J.J. CREMONA**, *Malta, Order of*, in *Encyclopedia of Public International Law*, E. BERNHARDT ed., Elsevier, Amsterdam, 1997, vol. III, p. 279; **B.J. THEUTENBERG**, *The Holy See, the Order of Malta and International Law*, Stockholm Institute of International Law Arbitration and Conciliation (<https://theutenberg.org/18-the-holy-see-the-order-of-malta-and-international-law/>); **A. REINISCH**, *The International Organisation Before National Courts*, Cambridge University Press, Cambridge, 2000, p. 351, footnote 119; **J.J. KOVACS**, *The Country above the Hermes Boutique: The International Status of the Sovereign Military Order of Malta*, in *National Italian American Bar Association Law Journal*, 2003, p. 49; **B. WALDSTEIN-WARTENBERG**, *Rechtsgeschichte des Malteserordens*, Verlag Herold, Wien, 1969, p. 264, and **R. PRANTER**, *Malteserorden und Volkergemeinschaft*, Duncker & Humblot, Berlin, 1974, who affirms that the *functional sovereignty* of SMOM is not a privilege but a *Verpflichtung* on international ground, p. 70. On the opposite side, Verhoeven strenuously denies the international subjectivity of SMOM, cf. **J. VERHOEVEN**, *Droit International Public*, Larcier, Bruxelles, 2000, pp. 269-270. The same opinion is expressed by the above-mentioned **G. PASCALE**, *Su alcune recenti vicende*, cit., p. 212, and also **W. WENGLER**, *Völkerrecht*, Springer, Berlin, 1964, pp. 165-166. A middle way seems to be represented by saying that "the Order of Malta is still recognized by a number of States as a subject of international law. However, this entitlement is clearly a remnant of the old territorial sovereignty the organisation used to exercise over the Island of Malta. Thus, some States find it impossible to deny the Order's international legal personality due to its unique character as former territorial entity, together with the fact that the organisation continues to act internationally, even after losing its territorial basis", **R. HAREL BEN-ARI**, *The Normative Position of International Non-Governmental Organizations under International Law. An Analytical Framework*, Marinus Nijhoff Publishers, Leiden, 2012, pp. 81-82.

An important scholar as Crawford, provided that only the States have the 'power' to claim international personality, distinguishes between 'objective international personality' and personality recognized by particular States only, and he says "that the former exists wherever the rights and obligation of an entity are conferred by general international law, the latter where an entity is established by particular States for special porpoise. States clearly are included in the former category: the Order of St. John of Jerusalem, Rhodes and Malta is an example of the latter", **J.R. CRAWFORD**, *The creation of States in International Law*, Oxford University Press, Oxford, 2006, 2th ed., p. 30; on the same advice is **R. NICHOLSON**, *Statehood and the States-like in International Law*, Oxford University Press, 2019, p. 210. Similar but not the same is the advice of Karski who, by considering the Order of Malta's subjectivity under international law indisputable, points out that its "status, however, is of a secondary nature, stemming from its recognition by the Holy See - the Order's sovereign - as well as by states that maintain diplomatic and treaty relations with it" **K. KARSKI**, *The international Legal Status of the Sovereign Military Hospitaller Order of St. John of Jerusalem of Rhodes and of Malta*, in *International Community Law Review*, 2012, p. 29.



expression primary subject appears rather problematic from the point of view of international law and internationalist doctrine, where the concept is neither sufficiently determined nor agreed upon. However, precisely by qualifying itself as a primary actor, SMOM claims a position comparable to that of States. Now, if we remain attached to the classic internationalist law concept, according to which the entities that belong to the international community are those that *superiorem non recognoscunt* and exercise effective territorial control, two arguments undermine the Order of Malta's self-qualification as a subject of international law in the strict and proper sense as full subjectivity and sovereignty: a) the lack of a territory over which to exercise subjectivity/sovereignty under international law; and b) the dependence on the Holy See.

In the former, the lack of a territory over which to exercise subjectivity/sovereignty under international law, is today not so relevant, since it reflects a classic concept of international subjectivity under which international subjectivity strictly derives from exclusive dominion over a given territory⁸. In fact, such an argument has been criticised in particular by the Holy See, which has constantly claimed its own international subjectivity, even after the end of temporal dominion of the Papal States, and independently from the Vatican City established in 1929; and today no one can seriously deny that the Holy See joins a full membership in the international community⁹.

⁸ In this regard, precisely the presence of SMOM together with the Holy See within the international community is used as proof of the existence of non-State sovereign entities by **E. ALLEN, M. PROST**, *Ceci n'est pas un État: The Order of Malta and the Holy See as precedents for deterritorialized statehood?*, in *Review of European, Comparative & International Environmental Law*, 2022, pp. 171-180, and in particular p. 177, which reads "The key point to note then is that, even if the Order of Malta and the Holy See are, to an extent, valuable precedents for the disappearing island community, they are not in actual fact precedents of deterritorialized States but rather of legally proximate non-State sovereign entities. The two precedents may be drawn upon to prove that there is room in international life for some form of deterritorialized sovereign existence. But these precedents are, at best, examples of *sui generis* entities inhabiting the grey zone between statehood proper and non-State personhood. The idea of deterritorialized statehood in the full sense is theoretically conceivable. But it remains the case that a State without territory is a proposition for which there is, in actual fact, no genuine historical precedent".

⁹ In this regard, the preamble of the 1929 agreement between the Reign of Italy and the Holy See is very clear stating that "Since, in order to ensure the absolute and visible independence of the Holy See, it is necessary to guarantee it an unquestionable sovereignty in the international sphere, it has been deemed necessary to constitute, with particular modalities, Vatican City, recognising over it the full ownership and the exclusive and absolute power and sovereign jurisdiction of the Holy See [translation of



The argument worthwhile dwelling on is, therefore, the latter: the Order of Malta's dependence on the Holy See since it has a more direct impact on the question of the subjectivity/personality of SMOM under international law. If we remain bound to the classic and somewhat restricted concept of international subjectivity, understanding it as limited exclusively to subjects *that superiorem non recognoscunt*, it necessarily follows that SMOM is not *de jure* a subject of international law¹⁰. This is not the place to go into doctrinal insights and suffice to say that this view is not accepted here¹¹. Article 4 of the new SMOM Constitutional Charter promulgated by the Roman Pontiff on 3 September 2022¹², states that "The Order is a subject of international law and exercises sovereign functions in respect of the purpose referred to in Article 2 herein. It maintains

the A.]", *Acta Apostolicae Sedis*, 1929, pp. 209-210. This passage affirms that the Holy See is, *natura sua*, a fully-fledged subject of the international community, but it is considered opportune to cast any doubts or objections to this truth by creating the Vatican City State for this purpose.

¹⁰ By consequence, Italian scholars defending SMOM's full international subjectivity affirm that SMOM is a juridical entity with dual dimension: one as religious order of the Catholic Church and referred to the spiritual activities and one as full sovereign subject within the international community referred to the sanitarian and diplomatic activities; by consequence the canon law and the role of the Holy See doesn't touch anything affecting the second dimension of the Order of Malta, cf. **G. CANSACCHI**, *Sovrano Militare Ordine di Malta*, in *Enciclopedia Giuridica Treccani*, p. 3, § 4; **R. COPPOLA**, *Natura dell'Ordine di Malta, aspetti di diritto ecclesiastico e canonico*, in *Archivio giuridico*, 2007, pp. 306-307; **G. SARLO**, *Il sovrano militare ordine di Malta modello di persona mixta*, in *www.amministrativamente.com*, fasc. 3-4/2015, p. 6; **M. FERNÁNDEZ DE BÉTHENCOURT**, *La orden de Malta. Estatuto Jurídico internacional*, Editorial Sanz y Torres, Madrid, 2019, p. 28 and p. 258. Someone even affirms that SMOM is basically a knightly order subject of international law inside which there is a small group of members bound by religious votes enjoying a particular status within SMOM constitutional order; by consequence the relevance of canon law and the role of the Holy See is strictly limited to religious members both as individual persons and group, cf. **L. MAZZAROLLI**, *Osservazioni sulla nuova e vecchia organizzazione dell'Ordine di Malta*, in *Diritto e Società*, 2000, p. 3. A summary on Italian juridical theories supporting the international subjectivity and true sovereignty of SMOM, and therefore SMOM autonomy from the Holy See is offered by **F. TURRIZIANI COLONNA**, *Sovranità ed indipendenza nel Sovrano Militare Ordine di Malta*, LEV, Città del Vaticano, 2006.

¹¹ Staunch proponent of the classical notion of sovereignty is **M. LOUGHLIN**, *Why Sovereignty?*, in *Sovereignty and the Law. Domestic, European, and International Perspectives*, R. RAWLING, P. LEYLAND, A.L. YOUNG Eds., Oxford University Press, Oxford, 2013, pp. 34-49.

¹² Cf. https://www.vatican.va/content/francesco/it/motu_proprio/documents/20220903-decreto-smom.html.



diplomatic relations with States and International Organisations". Article 5 §7 of the Charter states that "The religious nature of the Order does not prejudice the exercise of its prerogatives as a subject of international law recognised by States". The scope and actual legal meaning of the provisions of the current SMOM's Constitutional Charter as well as the old Constitutional Charter must not be misunderstood.

First of all, and with reference to the particular relations between SMOM and the Holy See, it must be clearly pointed out that all international doctrine and civil governments are fully aware of the *status subiectionis* of the Order of Malta with respect to the Holy See. Even if the dependence on the Holy See has never been a problem for the States to engage an equal relationship with SMOM, this is the ground on which many authors develop their criticism about the true international subjectivity of SMOM¹³. The subjectivity of SMOM is contested on the basis of several formal and substantial arguments that prominent Italian scholars summarise as follows:

- the Order remains an entity subordinate to the Holy See and therefore lacks independence, as stated in a sentence passed by a Court of Cardinals ad hoc appointed by Pio XII on 24 January 1953¹⁴;
- the sovereign prerogatives enjoyed by the Order are granted only as a matter of courtesy and not based on an international obligation¹⁵ ;
- observer status at the United Nations is irrelevant since it is granted to various other entities whose international subjectivity is unanimously and uncontroversially excluded¹⁶;
- the agreements that the Order concludes and has concluded in particular with the Italian State cannot be qualified as true international

¹³ Cf. **U. VILLANI**, *Lezioni di diritto internazionale*, Cacucci, Bari, 2021, p. 84.

¹⁴ Cf. **C. FOCARELLI**, *Diritto internazionale*, CEDAM Wolters Kluwer, Padova, 2021, 6th ed., p. 94. The text of the sentence was published on the official bulletin of the Holy See, cf. *Acta Apostolicae Sedis*, 1953, pp. 765-767. The current full validity of this sentence has been reaffirmed by the Pope Francis by the above-mentioned decree of 3 September 2022; by consequence, vanish all discussions about the ongoing validity of that sentence arisen by **G. CANSACCHI**, *La soggettività internazionale dell'Ordine di Malta in una recente sentenza cardinalizia*, in *Rivista di Diritto Internazionale*, 1955, p. 47; **F. GAZZONI**, *L'Ordine di Malta*, cit., pp. 60-66.

¹⁵ Cf. **C. FOCARELLI**, *Diritto internazionale*, cit., p. 94. Focarelli goes on to say that in Italy, the recognition of jurisdictional immunity to SMOM unjustifiably derogates from, and therefore contravenes, Article 6 CEDU (right to a fair trial, criminal profile) and the principle of equality of citizens under Article 3 of the Italian Constitution.

¹⁶ Cf. **C. FOCARELLI**, *Diritto internazionale*, cit., p. 94



agreements, but as agreements subject to Italian law, not unlike many other agreements that Italy concludes with associations and entities engaged in medical-hospital and humanitarian assistance¹⁷;

– for the purposes of subjectivity under international law, it must generally be considered always and entirely irrelevant that the subject, as in the case of SMOM, self-qualifies as a subject of international law¹⁸;

– the Order of Malta has as its only link with the international community the fact of having once ruled over Rhodes and then, until the end of the eighteenth century over Malta, a link that is clearly not sufficient to attribute full subjectivity or sovereignty as a subject of international law¹⁹;

– the Order of Malta's main activity, which is of a charitable nature, is certainly very noble but this does not suffice to justify the possession of international personality²⁰.

However, regardless of legal soundness of the abovementioned statements and admitting the Order of Malta's subjectivity under international law at least as a *fact* demonstrated by the diplomatic relations that SMOM conducts *de facto* with over one hundred States²¹, it is beyond doubt that the international political-legal-diplomatic subjectivity of SMOM cannot be understood in the proper sense, i.e. as a full and independent sovereign subjectivity. In fact, international legal doctrine explains that even after the SMOM's constitutional reform of 1997, the sovereignty/independence of the Order of Malta's 'legal system' and 'organisational structure' from the Holy See can only be considered apparent²².

¹⁷ Cf. **C. FOCARELLI**, *Diritto internazionale*, cit., p. 95.

¹⁸ Cf. **C. FOCARELLI**, *Diritto internazionale*, cit., p. 95.

¹⁹ Cf. **B. CONFORTI, M. IOVANE**, *International Law*, Editoriale Scientifica, Napoli, 2021, 12th ed., p. 35

²⁰ Cf. **B. CONFORTI, M. IOVANE**, *International Law*, p. 35.

²¹ Cf. **D. CARREAU, F. MARRELLA**, *Diritto internazionale*, Giuffrè, Milano, 2018, 2th ed., p. 340. On the contrary Focarelli says that "however, relations with other states are not necessarily 'diplomatic relations' capable of proving that the Order is globally considered an international legal person, the agreements made by the Order are all bilateral in character. Unlike the Holy See, the Order is not party to any multilateral treaty. The Order might certainly be seen a 'relief society' under the terms of 1949 Geneva Conventions, but it is not, unlike the Holy See, a party to such Conventions", **C. FOCARELLI**, *International Law as Social Construct. The Struggle for Global Justice*, Oxford University Press, Oxford, 2012, p. 220.

²² Cf. **U. VILLANI**, *Lezioni di diritto internazionale*, cit., p. 85.



3 - The nature and scope of the international legal subjectivity of SMOM

The famous aphorism *ex facto oritur ius* should be taken into account when one reflects on the international status of the Order of Malta²³. Despite one's attempt to reduce it to a mere fact of courtesy paid to SMOM's past history²⁴, the Order's diplomatic relations are a really strong indication of its international subjectivity; the large number of bilateral agreements clearly and definitively confirm its membership in the international community or, in other words, that the States recognize SMOM as a peer partner in dealings²⁵.

Scholars in general think that, unlike the States, SMOM's international sovereignty can only be recognised as referring to a very limited sphere, not only due to the absence of a territory and a people, but also due to a competence limited to charitable, healthcare and hospital activities²⁶; in fact, the lack of population and territory implies lack of powers and sovereignty necessary to provide for them²⁷. In other words, it is a peculiar subjectivity functional to the achievement of the Order's institutional aims²⁸. However, this lack of full sovereignty does not undermine its juridical personality under international law, as the

²³ About this famous aphorism created at the beginning of the 13th century cf. **L. PROSDOCIMI**, *Ex facto oritur ius. Breve nota di diritto medievale*, in *Studi Senesi in memoria di Ottorino Vannini*, Giuffrè, Milano, 1957, pp. 802-813; **W. CESARINI SFORZA**, *Ex facto ius oritur*, in *Studi filosofico-giuridici dedicati a G. Del Vecchio*, Società tipografica modenese, Modena, 1930, vol. I, pp. 87-97.

²⁴ Cf. **J. VERHOEVEN**, *Droit International Public*, Larcier, Bruxelles, 2000, pp. 269-270.

²⁵ The non-registration of these agreements in accordance with article 102 of the Charter of the United Nations and art. 80 of Vienna Convention on the Law of Treaties (1969) as evidence to deny them the value of agreement under international law (cf. **G. PASCALE**, *Su alcune recenti vicende*, cit., p. 202) has no relevance because it doesn't affect their validity from a political and juridical point of view; moreover, the Order of Malta is not bound to this provision because it never signed these two multilateral treaties.

²⁶ Cf. **U. VILLANI**, *Lezioni di diritto internazionale*, cit., pp. 85-86.

²⁷ "Even in the sphere of recognition and bilateral 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", **J. CRAWFORD**, *Brownlie's Principles of Public International Law*, Oxford University Press, Oxford, 2019, 9th ed., p. 114.

²⁸ **C. FOCARELLI**, *Diritto Internazionale*, cit., p. 94. The possibility of a *functional* and by consequence *limited sovereignty* seems to be excluded by **H. STEINBERGER**, *Sovereignty*, in *Encyclopedia of Public International Law*, Elsevier, Amsterdam, 2000, vol. IV, p. 512.



international community's attitude towards SMOM seems to confirm. The membership in the international community per se should not be affected by differences in the degree and scope of sovereignty in the same way as differences in status and thus differences in rights, duties and in the degree of autonomy per se don't affect the general citizenship status²⁹. Conclusively SMOM, notwithstanding its special relationship with the Holy See and the limited scope of its sovereignty concerning charity, health and hospitaller activities, is a real citizen in the city of the international community³⁰.

4 - The non-relevance of the canonical status and the relationship with the Holy See for the international subjectivity of SMOM

²⁹ For example, this was the case of European society before the French Revolution or still today in some Non-Western societies. For a general overview on the topic of citizenship cf. *The Oxford Handbook of Citizenship*, A. SCHACHAR, R. BAUÖCK, I. BLOEMRAAD, M. VINK Eds., Oxford University Press, Oxford, 2017.

³⁰ By distinguishing between international subjectivity and sovereignty, Noel Cox affirms without hesitation the international subjectivity of the Order of Malta, but he denies its sovereignty because "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 recognised as personalities in international law, though they do not claim sovereign status. The Order of Malta is equivalent to such bodies. [...] 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", N. COX, *The Acquisition of Sovereignty by Quasi-States: The case of the Order of Malta* (<https://dx.doi.org/10.2139/ssrn.420024>), pp. 18-19; later the same author, by using a wider and flexible concept of sovereignty, affirms also the sovereignty of the Order of Malta, cf. ID., *The Continuing Question of the Sovereignty and the Sovereign Military Order of Jerusalem, of Rhodes and of Malta*, in *Australian International Law Journal*, 2006, pp. 211-232. SMOM is qualified as humanitarian organisation recognized by a certain number of States by B.A. BOCZEK, *International Law. A Dictionary*, The Scarecrow Press, Lanham Maryland, 2005, p. 117, footnote 124. A similar opinion is expressed by A.-K. LINDBLOM, *Non-Governmental Organisations in International Law*, Cambridge University Press, Cambridge, 2005, p. 68: "my definition of 'non-governmental organisation' embraces the Order of Malta. The Order therefore provides an interesting demonstration of the flexible character of international law, which can clearly accommodate particular NGOs as international legal subjects if this is accepted by the international community. The Order of Malta also illustrates what attributes of international legal personality can potentially be held by non-state entities". Against the assimilation of SMOM to the NGOs is J. KOVACS, *The Country above the Hermes Boutique*, cit., p. 50.



The Order of Malta is a *sui generis* institution not only in the international legal system but also in the canonical legal system. In fact, it enjoys a very particular and exclusive status within the Catholic Church, and it is precisely this particular and exclusive canonical status that makes it possible and safeguards SMOM's membership in the international community.

At first glance, according to Article 1 §2 of the new constitution that reads "It is a lay religious Order, recognised by Pope Paschal II with the Bull *Pie postulatio voluntatis*, and is a subject of international law", SMOM seems to be a regular religious order and thus fully subject to the regular canonical legislation, especially the Code of Canon Law like any other religious order, but it is not so. In fact, the Order of Malta is a true religious order from a canonical point of view, but it is not entirely regular.

Firstly, it must be said that a lay religious order under canon law is a species in the genus of the institutes of consecrated life³¹ and, in case of a male institute of consecrated life, members can be indifferently laics and clerics, in short priests or not³². The main and specific feature of a religious order within the framework of the institutes of consecrated life is that its members, according to the proper law of each order, pronounce public vows, either perpetual or temporary which are to be renewed, however, when the period of time has elapsed, and lead a life of brothers or sisters in common³³. So, members of a religious order are exclusively men or women bound by religious vows. Of course, there may be laic (i.e., non-religious or consecrated) men or women sharing the same spirit of a

³¹ The consecrated life "through the profession of the evangelical counsels, is a stable form of living by which the faithful, following Christ more closely under the action of the Holy Spirit, are totally dedicated to God who is loved most of all, so that, having been dedicated by a new and special title to His honour, to the building up of the Church, and to the salvation of the world, they strive for the perfection of charity in the service of the kingdom of God and, having been made an outstanding sign in the Church, foretell the heavenly glory" Code of Canon Law, Can. 573, § 1.

³² Cf. Code of Canon Law, "Can. 588 § 1. By its very nature, the state of consecrated life is neither clerical nor lay. § 2. That institute is called clerical which, by reason of the purpose or design intended by the founder or by virtue of legitimate tradition, is under the direction of clerics, assumes the exercise of sacred orders, and is recognized as such by the authority of the Church. § 3. That institute is called lay which, recognized as such by the authority of the Church, has by virtue of its nature, character, and purpose a proper function defined by the founder or by legitimate tradition, which does not include the exercise of sacred orders".

³³ Cf. Code of Canon Law, Can. 573, § 2.



religious order however living a secular life, but they never enjoy membership in that³⁴. The Order of Malta, on the contrary, is the only religious order having laic members (i.e., non-religious or consecrated) as true members and, also, having laic female members with exactly the same rights and duties of laic male members³⁵.

Secondly, a unique constitutional framework derives directly from the aforementioned peculiar membership³⁶. To preserve the ontological nature of the Order of Malta as a true religious laic Order but also to reflect its current way of being characterized by the decisive contribution of the laic members, the central government of SMOM is now split in two different but coordinated command-lines: one under the exclusive responsibility of the religious members and the other shared by religious and laic members³⁷.

³⁴ They may establish their own associations called Third Orders, but these are clearly distinguished by the related religious Order. In this regard, the Code of Canon Law Can. 303 states that "Associations whose members share in the spirit of some religious institute while in secular life, lead an apostolic life, and strive for Christian perfection under the higher direction of the same institute are called third orders or some other appropriate name". For its part, a Religious Order having associations of the Christian faithful joined to it, has the duty to assist them with special care so that they are imbued with its genuine spirit of its charism, cf. Code of Canon Law, Can. 677, § 2.

³⁵ The profession of religious vows reserved to the knights is the only existing difference based on sex within the Order of Malta. In order to avoid sexual discrimination, the current Constitution and Code generally use the generic reference *member* instead of *knight* or *dame*.

³⁶ The Order of Malta has three different classes of members with different juridical status according to SMOM's Constitution Art. 9: "§ 1 - The Sovereign Military Order of Malta comprises members who participate, according to their state of life, in fulfilling the charism and mission of the Order. The members of the First Class, or Knights of Justice also called Professed, and the Professed Conventual Chaplains, who have taken both temporary simple and solemn religious vows, are the essential core of the Order. They are accorded full duties and rights. Given, however, the lay nature of the Order, the Professed Chaplains can only vote except as provided in Article 29 § 1 d) according to which they can also be voted. § 2 - The members of the Second Class, who are bound to the Order through the promise of obedience, and the members of the Third Class, by reason of their status are given specific duties and rights". It is certainly coherent with its nature of catholic religious Order that only the members of First Class possess the fullness of rights within the Order of Malta because they are burdened with the fullness of duties in virtue of their religious profession.

³⁷ This is not the time to discuss SMOM's current constitutional order. Here it is sufficient to highlight the presence of two different Cabinets (the Sovereign Council and the Council of Professed Members, cf. SMOM Const. Art. 25 and Art. 26) and two different Estates-General (the General Chapter and the Chapter of the Professed Members, cf. SMOM Const. Art. 28 and Art. 31).



Lastly, SMOM is unique in the panorama of the Catholic Church not only because of its membership or its constitutional framework but also and above all because of its *sui generis* status as religious order within the canonical legal system. In fact, the Order of Malta enjoys such strong autonomy, i.e. some prerogatives, privileges and immunities towards the Holy See that place it at a much different level compared to all other religious orders³⁸.

With reference to this last point, it must be said that the promulgation of a new Constitution and Code directly by the Roman Pontiff on 3 September 2022 has the opposite meaning from what might appear at first glance. Instead of an undue interference infringing upon the autonomy of the Order of Malta and its right to be a member of the international community, the papal ruling is strictly aimed at safeguarding SMOM's special status within the canonical legal system and thus its international status. In fact, the *ius proprium* of the Order of Malta, because it is granted directly by the Roman Pontiff as *lex specialis*, prevails over *lex generalis*, namely all canonical legislation and even the Code of Canon Law itself.

By the peculiar nature of SMOM, it follows that a constitutional and structural independence must be radically excluded, i.e. the independence of both the legal system of SMOM (in its founding principles at least) and of the Order of Malta's governing organisation (in its apex and central structure at least) with respect to the Holy See, i.e. the body at the head of the universal Catholic Church to which SMOM belongs, and on which its very existence basically depends³⁹. The new and current Constitution

³⁸ For example: unlike all other canonical entities, the Order of Malta is not required to obtain the permission of the Holy See in case of alienation of goods which exceeds the amount defined by the Holy See for each country but only in case of alienation of things given to the Church by vow, or things precious for artistic or historical reasons (cf. SMOM Const. 56, § 1, compared with Code of Canon Law Can. 638, § 3); notwithstanding the Code of Canon Law Can. 1405, § 3, n. 3°, which states that it is reserved to the Apostolic Tribunal of Roman Rota the judgement over "dioceses or other physical or juridic ecclesiastical persons which do not have a superior below the Roman Pontiff", the Apostolic Tribunal of Roman Rota has no jurisdiction over the Order of Malta (cf. **SUPREME TRIBUNAL OF THE APOSTOLIC SIGNATURA**, sentence of 13 April 2018 Prot. N. 50773/15 CG unpublished). On the canonical regulation of the privilege cf. **B. ESPOSITO**, *I privilegi apostolici. Commento sistematico-esegetico alla seconda parte del can. 4 del CIC/83*, in *Lex rationis ordinatio. Studi in onore di Patrick Valdrini*, V. BUONOMO, M. D'ARIENZO, O. ÉCHAPPÉ Eds., Luigi Pellegrini, Cosenza, 2022, vol. II, pp. 617-665.

³⁹ It should be pointed out that dependence on the Holy See affects both the Order of Malta as an institution and each individual member. In this regard, the Code of Canon Law Can. 590 is very clear by stating that "§1. Inasmuch as institutes of consecrated life



confirms that by stating that “Order of Malta has, *ipso iure*, a public juridical personality in the Church” (SMOM Const. Art. 5, § 1) and by consequence it is inserted in the canonical legal system so much so that the canon law and the binding acts of the Roman Pontiff are sources of law within the Order of Malta (cf. SMOM Const. Art. 6, nn. 1 and 2)⁴⁰. Even with reference to the abrogated 1997 Constitution and Code, that one scholar described as a Copernican revolution granting full independence from the Holy See and thus full international sovereignty to the Order⁴¹, the international doctrine clearly pointed out that “the constitutional reform of 1997 has allowed the Order to assume greater confessional autonomy [translation by the A.]”⁴², but certainly not such autonomy as to sever its ties with the Holy See from which it clearly remains dependent⁴³. Other authors define the relationship between the Holy See and SMOM in terms of subordination or lack of independence⁴⁴. But, either way, the Holy See, especially in case of agreements between SMOM and States, does not have direct jurisdiction on the Order’s activities, although these must be carried out in accordance with the inalienable principles of Catholic morality.

Whatever kind of relationship SMOM has with the Holy See, the current international legal position of the Order of Malta is first and foremost *a fact* that depends on the willingness of a considerable number of members of the international community to consider SMOM as a peer interlocutor, albeit *sui generis*, because of historical reasons and, moreover, for the particular importance and characterisation of its activities at

are dedicated in a special way to the service of God and of the whole Church, they are subject to the supreme authority of the Church in a special way. §2. Individual members are also bound to obey the Supreme Pontiff as their highest superior by reason of the sacred bond of obedience”. With reference to the members, it is obvious that the degree of dependence of each individual varies according to his juridical status within the Order of Malta i.e. to a minimum level in case of a Third Class member because, of course, he is not burdened with the bond of obedience, to a maximum level in case of a member of First Class because he is a true religious person.

⁴⁰ An author affirms that SMOM legal system derives from canonical legal system, cf. **F.M. MARINO MENENDEZ**, *Derecho Internacional Publico [Parte General]*, Editorial Trotta, Madrid, 1999, 3th ed., p. 208.

⁴¹ Cfr. **P. PAPANTI PELLETIER**, *L’ordinamento giuridico melitense dopo il Capitolo Generale del 1997: prime riflessioni*, in *Il Diritto Ecclesiastico*, 1999, pp. 547-548.

⁴² **F. SALERNO**, *Diritto internazionale*, cit., p. 39.

⁴³ **B. CONFORTI, M. IOVANE**, *Diritto internazionale*, cit., p. 35.

⁴⁴ **C. FOCARELLI**, *Diritto Internazionale*, cit., p. 94.



international level. In addition, SMOM's sovereignty is not boundless like that of the States but it is limited to the management of its activities (which can be defined as a *functional sovereignty*)⁴⁵.

At the same time, however, the subjectivity of SMOM under international law is also a *fact of law*, in the sense that the exercise of its international subjectivity recognised *de facto* by the States is closely linked to the centuries-old and ever-present desire of the Holy See to grant SMOM, which by its own nature is nothing more than a religious Order of the Catholic Church and a juridical person under canon law, the right to enjoy its membership with related duties and rights in the international community⁴⁶.

5 - Conclusions

The subjectivity or juridical personality attributed to SMOM at international level is different from the subjectivity/personality under international law enjoyed by States that are political and juridical entities to which SMOM is in no way comparable. While the international legal personality of States is connatural to them and is to be understood in the full sense, i.e. as full sovereignty and independence, the same is not in the case of the Order of Malta. First, its international subjectivity/sovereignty is accidental. In fact, it arises from a common consensus within the international community to consider SMOM, by its very nature a juridical entity within the canonical legal system, as a peer partner in dealings for historical reasons and, moreover, for the great importance and particular characterisation of its activities at international level. Secondly, the sovereignty of SMOM is functional, because its scope, i.e. its independence or autonomy, is limited to the aforementioned activities. By consequence,

⁴⁵ By consequence diplomatic relationships seem to be limited by the scope of SMOM's functional sovereignty, cf. **S.M. CARBONE**, *I soggetti e gli attori della comunità internazionale*, in *Istituzioni di Diritto Internazionale*, S.M. CARBONE, R. LUZZATO and others Eds., Giappichelli, Torino, 2016, p. 24; **M.N. SHAW**, *International Law*, Cambridge, 2003, p. 218.

⁴⁶ "given the fact that the Order of Malta is an order of the Roman Catholic Church, i.e., part of another entity it, therefore, cannot be regarded as a sovereign subject under international law. This is despite the fact that it lays claims to such a status, which is reflected, among others, in its name. [...] Yet it undoubtedly is a subject of international law, a secondary subject whose status is determined by the recognition by primary subjects, i.e. by the Holy See and various states", **K. KARSKI**, *The international Legal Status*, cit., pp. 31-32.



this *sui generis* subjectivity is not such as to make SMOM sovereign and fully independent from the Holy See to which it remains organically connected. In this sense, it would perhaps be more correct to define SMOM as a *de facto* international entity with international juridical subjectivity. The Order of Malta's international juridical personality is only *functional* insofar as it is limited to its institutional functions - charitable and assistance - and not extended to its legal system and governance structure, which cannot but remain subject to the Holy See which, however, grants to the Order a particular and exclusive status within the canonical legal system. Hence the full legitimacy under international law of the Holy See's intervention to protect the Order of Malta's founding charisma and its existence. But still this dependence on the Holy See doesn't affect SMOM's international subjectivity at all⁴⁷.

⁴⁷ A similar advice is expressed by Bonet Navarro who affirms that the "Sovereign Order of Malta is an entity with strong link to the Holy See, due the fact that it is a religious order. However, unlike other religious orders, it has the status of subject of international law, the right to send its own diplomatic mission, and the right to sign agreements with other subjects of international law", **J. BONET NAVARRO**, *Religious Confession in International Order*, in *Integrazione e politiche di vicinato. Nuovi diritti e nuove economie*, G. DAMMACCO, B. SITEK, A. URICCHIO Eds., Cacucci Editore, Bari, 2012, p. 313.