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A GLOBAL GOVERNANCE AT THE SERVICE OF ALL PEOPLES

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Il nostro direttore è stato invitato a prender parte alla sessione inaugurale del meeting internazionale "Which Gospel for Which New Worldwide Governance in XXI Century?", primo incontro intercontinentale della rete degli Anciens de la Jeunesse Étudiante Catholique Internationale, tenutosi a Roma nello scorso mese di febbraio.

Si tratta della rete che unisce tutti coloro che hanno fatto parte negli anni delle organizzazioni studentesche di Azione Cattolica, rete molto attiva, oltre che in Europa, anche in Africa, in Asia e nelle Americhe.

Volentieri pubblichiamo il testo della sua relazione, ringraziandolo per averlo reso disponibile

La redazione

Your Eminence,
Madame la Présidente,
Distinguished Members of the Italian and French Parliaments,
Ladies and Gentlemen,
Mesdames et Messieurs,

Let me say, first of all, how flattered I am for having been asked to deliver this opening address at this JECI-IYCS meeting on "Global Governance".

I thank you all therefore, but I must also apologize for starting my contribution with a disclaimer.

To put it bluntly, the idea of global governance is, in my opinion, more an ambition than a reality.

The terms "global governance" in fact express the quite optimistic idea that it is possible to develop rules and regulations on the same scale as the global problems facing the world now.

This does not however imply the establishment of new institutions, though some may find it desirable, but rather stresses a point: that we need sets of new regulations, both public and private, which may offer better opportunities to meet the challenges of global problems.

To speak of a "global governance" thus also implies the idea of a crisis of governance at the national level, the idea that states or at least some states, are no longer able to properly perform their regulatory tasks, including in the economic and social milieus, to cope with new problems stemming from globalization.

But it also involves, in some of its manifestations and approaches (for example in what is sometimes called the global free market approach) the idea that international organizations, or at least those among them which are more traditional, more State centred or State … owned, are not able to cope adequately with global issues.

The idea of global governance is in fact critical of the State, both at the national as at the intergovernmental level, because, in the spirit of neo-liberalism, it asserts the superiority of private managerial strategies on those enforced by governments.

Be that as it may, in a wide and simple definition, "global governance" means the set of rules for organizing human societies across the globe.

Now, I must confess that to me, as a lawyer in the Western hemisphere, "global governance" means above all the establishment of an institutionalized system of global governance.

And when I say institutionalized, I do not mean only intergovernmental, because I feel that the challenge of global governance is now collectively to shape the destiny of the world by establishing a system of regulation of these many interactions that go beyond state action and that stem from the emergence of some elements of a global civic awareness.

In fact, a typical feature of the "global governance" scheme is that a rapidly growing number of movements and organizations sets the debate at the international or global level. Despite its limitations, this trend is obviously a logical response to the rise of global governance issues. We are compelled therefore to consider two dimensions: that of integration and that of solidarity.

That's why, although I know perfectly well that there are problems of global governance of the environment or the economy, in my presentation I will focus on institutional and legal issues.

Now, if we aim at the construction of a responsible global governance so as to align the political organization of society to globalization, we should work for a democratic political legitimacy at all territorial levels (local, state, regional, global).

For this to happen, we must plan a comprehensive strategy of rethinking and reformation, including at the same time:

• the vast majority of international organizations, largely inherited from the aftermath of the Second World War. They should change in a "system" of international agencies with more resources and capabilities, more fair and more democratic;

• the system of States, still based on a pre-Westphalian model. States must learn to share some of their sovereignty with institutions and agencies in other territorial scales and at the same time all must undertake major processes of deepening democracy and organizational accountability.

• the meaning of sovereignty for citizens. People must matter, but really! So we must rethink the meaning of representation and political participation, and work towards radical change of vision, where citizens may really

feel that they control of the whole process. We must seek for a new legitimacy for those who are in charge. It is striking, and definitely unbearable, that the most important decisions affecting the global economy are taken today through undemocratic procedures and without any real legitimacy

Now, in my opinion, to achieve these goals we need a thorough reformation of international law and international relations. And, moreover, we must start by changing the way we think of them. But this, my friends, is easier said than done.

In fact, even if we are in the era of the United Nations and international law has enormously progressed in the past two centuries, States still behave as if they were in a pre-Westphalian Model of International Relations.

This model is based on the acceptance by States of the idea of their sovereign equality, from which follows the need for a mutual respect attitude between themselves thought as equally sovereign legal entities.

Before the Peace of Westphalia, a traditional starting point for discussions of international law, States abided by the so-called principle of non-intervention in internal affairs (and they still do).

The content of this duty of abstention was quite clearly defined. International practice of the time shows a "catalogue" of situations in which States were expected to refrain from what was thought to be a forbidden intervention in internal affairs of another State.

A first set of cases referred to situations where a Sovereign required another Sovereign to adopt, or refrain from adopting, a certain behaviour while exercising his power of government. Even a simple request for clemency for an individual subject to the sovereign power of the territorial Sovereign, was held to violate the principle and rejected on the grounds that the matter was purely internal and therefore within the sole responsibility of the territorial Sovereign.

A second set of hypotheses of forbidden intervention concerned cases where a foreign Sovereign troubled the sovereign right to exclusive exercise of powers of government of another Sovereign by encouraging or fomenting plots that disturbed order and peace in that State.

All these behaviours were included in the ban of "*se mêler des affaires domestiques*" (literally "interfere in domestic affairs") and is easy to see that the element they shared was just the fact of causing trouble on the power of government by the territorial Sovereign.

But why even just make a request for clemency was to be considered invasive of sovereignty?

To understand this, it should be noted that the administration of justice since the Middle Ages was considered to be the ultimate manifestation of a sovereign power and, therefore, venturing to ask that an individual subject to the sovereignty of another Sovereign should be treated in this or that way, amounted to acting as judge between the Sovereign and his *subditus*, thus exercising the sovereign power of adjudicating on the territorial Sovereign, replacing him in the exercise of this power that was considered essential to sovereignty, instead of leaving the whole matter to his exclusive power of appreciation.

Now, as we know, the true breaking point between the medieval and the modern cultural and institutional horizon is represented, with reference to this issue, by the acceptance of the reality of a plurality of *iurisdictiones*.

Middle Ages society, the *Respublica sub Deo*, deemed the *iurisdictio* to be one and unique, and several struggles opposed the Emperor and the Pope concerning the exercise and even the ultimate foundation of that *iurisdictio*.

The modern international society is international (and, maybe, is modern) because it is a society in which different States, all equally hold their own spheres of *iurisdictio* to be separate and distinct from that of other States.

But this is a point which requires some further conceptual development.

First, we should bear in mind that what we have been saying so far has its philosophical and cultural presuppositions in the idea according to which the Modern Age is no longer the era of a unique *Veritas*, but of the coexistence of different *auctoritates*, each with its own self-made and self-legitimizing *veritas*.

Here is how you build the legitimacy of the political power of the sovereign State, which is sovereign precisely because of its self-made and self-legitimizing *veritas*.

It is no coincidence that our investigation has got the moves from the breakup of the monolithic or otherwise rigidly hierarchical constitution of the medieval world and its legal rationalization. We are speaking of the same period of the humanistic crisis of classical Aristotelian-Thomistic construction that provided the paradigm of universal knowledge and therefore of universal justice.

The very idea of truth as a sole and unique *Veritas* enters an epochal crisis to give way to scepticism and a libertine culture in the name of an absolute freedom of the individual from any constraint. It 's the end of an hard idea of law based on a certain idea of natural order and of divine command.

Now, if every sovereign State carries its own self-made *veritas*, the only way in which these different and independent *veritates* can coexist is to build an order that, far by the emergence of its own *veritas*, has the sole purpose to promote coexistence between these autonomous individualities. An order which is based not on a particular *veritas*, nor on the sole and unique *Veritas* but on a convention, an agreement on the idea that what States need is simply to co-exist, respecting the right of everyone to build his own self-made *veritas*.

Thus, the individual *pleno jure* subject of this “conventional” international order, i.e. the sovereign State, is the only owner of rights and then proceeds to set a "law without a State" that on first hypothesis is based on a purely conventional idea, i.e. the necessity of living together, on the promotion of peace because war is too destructive and therefore unthinkable from the standpoint of preserving the system.

In addition, this sovereign State, and precisely because it is sovereign, must reject the construction of a genuine institutional neutralization of opposing claims such as we could build (in a schmittian sense) by a "State of States" in the world.

We have therefore a situation of peace (or rather, not war) based on rules which are mere “formal” rules of the game of a conventional order. The principle of non-intervention in internal affairs in fact tells us only that we must respect the sovereignty of other Sovereign States, but says neither what it consists of, nor to what extent we need to respect it.

And the way of creating norms is the agreement by States, i.e. the international treaty or an international custom seen as a tacit agreement.

And then we have a parallel situation where opposing claims clash one another, a situation that in classical international law was represented by the "state of war" and in current international law is represented by unilateral self-help.

On the contrary, the mere existence of United Nations advocates another model of international relations, which coexists today with the pre-Westphalian model spoken about till now.

Several years ago, Richard Falk wrote about the overlapping between the Westphalian model and the model of United Nations, showing how difficult this interaction was in collective security matters.

But this idea stretches to provide the basis for a new model of normative order in international relations. It is, in my opinion, the mere existence of the UN which implies the need to move toward a new conception of international law.

The mere fact that an international universal organization exists has caused the abandonment of the conventionalist paradigm replacing it by an attempt to build common values on which to base the international relations, an international community, which is no more to be seen as a mere community of coexistence, but as a community based on shared values.

So we are confronted here with a vision that aims to replace the community of States governed by a conventional logic by a community of states that recognize and share common values.

Values which are difficult to identify in a comprehensive manner and one feels that the list he would draw would always be rounded down.

Values too often established as mere working program, taking the attitude that once was of the late nineteenth century militant legal positivists.

Values that largely tend to coincide with the purposes of the United Nations at large. But if we wanted to focus on one evolutionary line among others, we might just draw on the adoption of the Universal Declaration of Human Rights which has given rise to a vast Human Rights Movement which overwhelmed several classical international law approaches.

And again, the mere fact that an international universal organization exists has important normative implications in that it modifies the way international law is made and works.

First of all, an emphasis is put on non contractual ways of norm creation, such as custom or general principles, international organizations resolutions, soft law mechanisms and so on.

Secondly, the international order seems to move toward a hierarchical asset, through ideas such as those of *ius cogens*.

Thirdly, a set of norms on State responsibility is steadily developing as a major form of international guarantee for international rights and norms.

Fourthly, individuals are coming to the fore as subjects of international law, being attained by international norms endowing them with rights, but also imposing upon them an internationally based criminal responsibility.

Fifthly, the international law making technique shifts from the paramount role of the non-intervention principle, to a modus operandi which identifies States' behaviours forbidding them as such.

A good example is provided by the norms forbidding the threat or use of force, not because it would amount to a forbidden intervention in internal affairs, but because the threat or use of force is deemed to be illicit in themselves.

This second non contractual viz. constitutional model, however, as I briefly sketched it in its "purity", is far from being established in international law today. This is deemed to be commonplace, but it is held to be merely attributable to the faults of the system, to its imperfect implementation.

In my opinion, there are stronger reasons for this. States simply cannot accommodate themselves with this new model and while paying lip service to the non contractual viz. constitutional model, they tend to behave as if they were living in the past, in the traditional conventionalist model.

For the moment being, the coexistence of the old law truly "international" (based on the principle of non-intervention in internal affairs) and the "new" legal rights based on the "new" model have created some more problems to theorists of international law.

Those stem primarily from failure to keep in mind that the law "international" as we find in the practice of States and the law "universal" are based on two different and conflicting images of the world community that cannot overlap or assimilate.

Now, in short, I believe that not only the unresolved coexistence between these two models can successfully explain the difficulty of reconciling two legal discourses inspired precisely by different models, but that, being the stage we have reached the phase of an infinite transition from one model to another, a transition which seems destined never to be achieved, we are therefore called to a difficult, acrobatic task, that of devising a law order for this never-ending transition.

I thank you all very much for your kind attention!