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The virtuous circle of Degrowth and Ecological Debt:

a new paradigm for Public International Law?

The seventh G20 was hosted by Mexico in Los Cabos on the 18th and 19th June of 2012. After the USA, the UK, France and South Korea, all rated as “developed”, “high-income” countries, it was for the first time a developing country's turn to direct the Leader's Summit. However, the out-coming response put forward as an answer to the global world issues remain unchanged and univocal: growth, growth, growth[1]. As an anecdotal but yet eloquent fact, we noted 55 occurrences of the word *crecimiento* (growth) in the final Spanish declaration, and Public international law (IL) is no exception in this trend. What has been called since the 60's « development law », specifically applicable to « underdeveloped countries » is an illustration of this evolution towards a global capitalist order seeking to produce and consume always more. Its ideology rests on Rostow's take-off theory from the early sixties[2] according to which every country should follow the great path of evolution of first world countries and “grow” toward a society of mass-consumption and productivism, what we would call a “growth society” or “society of growth”.

But growth is not the only paradigm for international law. The *Jus Gentium* also acknowledges humans to live free, in a decent environment, in good health. The Universal Declaration of Human Rights sets that everyone has the right to a standard of living adequate for the health and well-being of himself and of his family. In many (but maybe oblique...) ways, International law is calling for an actual “degrowth” of production and consumption. The best example is the Kyoto protocol which obliges States to achieve their

1 http://www.g20mexico.org/images/stories/docs/g20/conclu/declaracionlideresg20.pdf

2 ROSTOW Walt Withman, *The stages of economic growth, a non-Communist manifesto*, Cambridge, University Press, 1960, 178 p.

"limitation and reduction commitments" of "anthropogenic carbon dioxide equivalent emissions of the greenhouse gases"[3]. In this second paradigm, law becomes synonymic to equity, and its fundamental aim to allow each citizen to enjoy what belong to him only because of his existence.

The fact that the "growth paradigm" is the outcome of a self-serving "transnational capitalist class"[4] has been shown by many scholars, particularly by the TWAILers (Third World Approaches to International Law), whose central insight is to bring the problematic of colonialism and imperialism to the center of international law structure[5]. As Andrew Simms say, there is always a clear reason why some people get something, and why others don't[6]. But it seems that this duality doesn't depend much anymore (if it ever did) on a North-South opposition, as the Mexican declaration tends to show, but rather on a governor-governed breach, where laws, norms and policies are used to serve particular interests undermining the common goods.

We would like to argue here that environmental and social justice are condemned to be defeated by the "right to growth", inherently allowing some to take what belongs to others. Then one of the solutions to reverse the vicious circle of growth could be the recognition of Ecological Debt carried through an ethic of Degrowth.

We will start with a quick overview of the concept (I) followed by an analysis of what is lacking in the way international law captures this issues (II). The intellectual backgrounds that call for a legal implementation of the concept of Ecological Debt will then be exposed and discussed (III). We will end our presentation by proposing a convergence between Ecological Debt and Degrowth (IV).

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3 Article 3 of the Kyoto Protocol to the United Nations Framework Convention on Climate Change 11/12/1997, A-30822

4 AL ATTAT Mohsen & THOMPSON Rebekah, « How the Multi-Level Democratisation of International Law-Making Can Effect Popular Aspirations Towards Self-Determination », *Trade L. & Dev.*, 3:1-2011, pp. 65-102

5 GATHII James Thuo, « TWAIL: A Brief History of its Origins, its Decentralized Network, and a Tentative Bibliography », *Trade L. & Dev.*, 3:1-2011, pp. 26-64 ; See also : CHEMNI Bhupinder, « Third world appraches to International Law : a Manifesto », *International Community Law review*, 8-2006, pp. 3-27

6 SIMMS Andrew, *Ecological debt*, London, Pluto Press, 2005, 318 p.

I. The qualification of Ecological Debt content

The concept of Ecological Debt was born in the early 90's in South America. It was originally thought to be a counterargument to a plundering financial debt. As southern countries were considered to be debtors, they started arguing that from a different perspective and under different criteria, they might actually be creditors of a much more consequential Ecological Debt. In twenty years, the idea has come a long way, as it is now understood almost commonly. Academics started working on it, and links were made between Ecological Debt, environmental and social justice.

The first way to describe Ecological Debt is to do it in a very simplistic way as the responsibility that have industrialized northern countries for gradually spoiling and damaging the ecosystem of southern countries. In their effort to calculate Ecological Debt, NGOs tried to divide it into different components that are today quite commonly accepted. They are four:

- the carbon debt
- the waste debt, exportation in the South of hazardous waste produced in industrialized countries
- the biopiracy debt, spoliation of knowledge and biological resources through intellectual property appropriation
- the corporate debt, environmental and social cost of private companies activities

In 2004, the University of Ghent finalized a report called ‘Elaboration of the concept of Ecological Debt’[7] in which the concept was analyzed through scientific methods in an academic way. The Ecological Debt of country A was then defined as:

1) The ecological damage caused over time by country A in other countries or in an area under jurisdiction of another country through its production and consumption patterns, and/or

2) The ecological damage caused over time by country A to ecosystems beyond national

7 Centre for Sustainable Development (CSO), *Elaboration of the concept of ecological debt*, Ghent University, 2004, 240 p.

jurisdiction through its consumption and production patterns; and/or

3) The exploitation or use of ecosystems and ecosystem goods and services over time by country A, at the expense of the equitable rights to these ecosystems and ecosystem goods and services by other countries or individuals.

As to “where does the Ecological Debt come from?” the activists as well as the academic response seems quite clear. It comes from “production and consumption patterns […] characteristic of the present development model”[8]. Unfortunately, it appears conceptually difficult to look at these pattern as an accurate legal tort. Nevertheless the characterization of these production and consumption patterns leads to outlining constant drivers deeply interconnected, being capitalism, neo-liberalism, neo-colonialism and imperialism. The duet capitalism / neo-liberalism generate a commodification of the ecosystem and an increasing use of its services. This process which can be refers to as “increasing social metabolism patterns” produce **loss and degradation of natural resources**. But this ecological degradation also very constantly leads to environmental social conflicts[9], raising awareness on a more political or societal (if there is to make any difference...) issue. Local population feel dispossessed of their **capability to manage natural resources** and ecosystem because of mechanisms such as concessions granting or lands sales (often refers to as “land grabbing” by scholars) to multinational companies. They also often claim to be deprived of their right and responsibility to sustain their own needs with their own resources as what they actually produced is mostly exported to foreign developed countries. We could call this phenomenon a loss of the **capacity to use natural resources**.

To conclude this first part, we outlined two different damages constituting the Ecological Debt. We have the **ecological damages**, understood in an environmentally centered way relating to the natural resources depletion and degradation. Then, Ecological Debt is also made of a **political and social damages** stemming from disempowerment of a State regarding the managing of its natural resources.

II. Ecological Debt and International Law

8 Quoting the NGO Acción Ecológica's definition

9 See the EJOLT database for more information on environmental conflicts http://www.ejolt.org/

The concept of Ecological Debt is a slogan used as a catch phrase in order to express political claims. So, if we want to truly understand it, we will have to get over the words and redefine it in an international legal way.

When we hear “Ecological Debt”, we may think of a financial obligation resulting from an infringement on a property right or on an environmental right. That would be a normal definition in the language of the dominant discourse of IL. But it would be the opposite logic of the one in which the concept of Ecological Debt was originally thought.

The ethic of debt lays on a temporal ethic of awareness of “what led us to where we are”. The idea of Ecological Debt would be to make people grateful for what they got in order to act right in the future. It is a dynamic concept that cannot be reduced to a pecuniary liability; debt rather has to be thought in a metabolic vision of material and immaterial flow analysis between States, even more probably in term of power distribution among them. That “State centered” approach is a natural consequence of our field of study, Public international Law; but it also reflects the geopolitical logic of the concept of Ecological Debt, based on a dual reading of international relations within a North/South opposition, or a center/periphery vision.

The concept of Ecological Debt clearly challenges the ones of State sovereignty and “sovereignty over natural resources” and this in two different ways. First, the ecological damages can be seen as an infringement in a classical property right approach where the ecosystem, property of a State, is “injured” by another State; this can be related to a matter of internal sovereignty, since it still recalls to a paradigm where natural resource are managed – and hence defended – by a State. Damaging another State's environment is clearly forbidden by international law and has been recognized as a customary principle of IL since over hundred years[10] and acknowledged in the Principle 21 of the Stockholm Declaration, stating that:

> “States have, in accordance with the Charter of the United Nations and principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure

10 *Trail Smelter Arbitration*, UNRIAA, vol. III, p. 1905 at p. 1965 stated:
“[U]nder the principles of international law, … no State has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of other or the properties or persons therein, when the case is of serious consequences and the injury is established by clear and convincing evidence.”

> that activities within their jurisdiction and control do not cause damage to the environment or other areas beyond the limits of national jurisdiction."[11]

But behind this matter, we observed another prejudice encompassed in the notion of Ecological Debt: the disempowerment of the right and responsibility of people to use their natural resources. Since people don't truly benefits from the use and enjoyment of their natural resources, we could plead something like an infringement on the usufruct right on natural resources, or in another word, an affront against intrinsic components of sovereignty. We are then facing a matter related to the external side of sovereignty, the side of sovereignty according to which a State has the right to be in control of its country and not subordinate to any other entity.

III. Enforcing Ecological Debt

In law, a debt is an obligation bonding a debtor to a creditor. In international law, the word "debt" refers almost exclusively to a financial obligation. Now, one of the biggest concerns that keeps on being expressed about Ecological Debt is that it cannot be subsumed into a financial relation. So if we want to be loyal to the South discourse, we will need to find another legal qualification.

We know that debt is an obligation. But where does an obligation come from? Well, obligation comes from responsibility. Responsibility can be seen as an obligation to repair, like for example the "responsibility of States for internationally wrongful acts" or even, "responsibility for transboundary harm". But responsibility can also refers to a charge, a duty, like in "responsibility to protect". We then have a **responsibility-liability**, and a **responsibility-duty**. To differentiate this dual meaning in international law, we talk about **primary obligations**, defining the content of a substantial rule, and **secondary obligations**, defining the consequences of the inobservance of a substantial rule.

Then, Ecological Debt could refer to:

- the secondary obligation to repair ecological and social damages
- the primary obligation to preserve not only the ecosystem but also people's capabilities and capacities to manage it

11 Declaration of the United Nations Conference on the Human Environment, Stockholm 116/06/972

Both of these obligations have to be temporally thought, as as we said, the idea of debt in itself seeks to acknowledge a time-lined responsibility in order to insure that duties were and are well balanced within a society. If this equilibrium appears not to have been respected, then it generates a liability which could be penal or more frequently civil. In the sphere of Ecological Debt, the purpose of secondary obligations would clearly be to act a past, historical responsibility of industrialized countries in today's environmental and social issues. Then, the ethic of its primary obligations would certainly be to enforce people sovereignty on their natural resources. At a political level, some kind of historical responsibility has been recognized through the principle of Common but Differentiated Responsibilities[12]. But legally, it was never thought to acknowledge a historical liability. It was even used in a future-orientated way, as it appears clearly in the Kyoto protocol within the Clean Development Mechanism. This mechanism allows industrialized countries to get "Certified Emission Reductions" to reach their own reduction commitments, by investing in emission reduction projects in developing countries in order to facilitate their sustainable development. What are those mechanisms, if not a continuation of disempowerment of developing countries?[13] Lessons from historical perspective are not learned and therefore not linked to a possibly different management of our natural resources. It has not led to a definition of clear and coherent primary obligations, mostly because of the the supremacy of trade law and market values that characterizes international law.

IL is often presented as being divided into sections working almost in an autonomous way within what is called “self-contained regimes”. Nevertheless, the trade law regime often seems to supplant all the others. As an example, the WTO's appellate body conclude in a 1998 report that whatever the status of the precautionary principle was “under international environmental law”, it had not become binding in international trade law[14]. Of course, the principle of sustainable development was thought to resolve this paradox by creating a bridge between social, environmental and economical concerns, just as the idea

12 Article 3 of the United Nations Framework Convention on Climate Change, conclusion 09/05/1992, entry into force 21/03/1994, registration number I-30822

13 For a strong criticism of those mechanism, see : BOND Patrick and al. *The CDM in Africa Cannot Deliver the Money*, Report by the University of KwaZuluCNatal Centre for Civil Society (SA) and Dartmouth College Climate Justice Research Project (USA) 11 avril 2012

14 WTO Report of the Appellate Body, European Communities - EC Measures Concerning Meat and Meat Products (Hormones), 16/01/1998, WT/DS48/AB/R

of a green economy. It is not my point to go into this debate today, but it has been clearly shown that these pretty words were translating at best nothing more than a rhetorical change. And in fact, this "change" is constantly focusing on dealing with secondary obligations and creating never-ending lists of *policies* assorted with *compliance mechanisms*, but never outlining primary obligations concerning the actual management and use of natural resources. This logic can be find today in most approaches of International Environmental Law. It deals with the consequences of trade and its "externalities" and uses market mechanisms as tools and "cost-effectiveness" as standard. Principle 16 of the 1992 Rio Declaration reads :

> "National authorities should endeavor to promote the internalization of environmental costs and the use of economic instruments, taking into account the approach that the polluter should, in principle, bear the cost of pollution, with due regard to the public interest and without distorting international trade and investment."[15]

Therefor, environmental law has become tort law, and its purpose to ensure that:

> "those who suffer harm or loss as a result of such incidents involving hazardous activities are not left to carry those losses and are able to obtain prompt and adequate compensation."[16]

The encompassing and sacred primary principle remains untouchable: natural resources are to be used for the benefits of whom has the money to pay for them.

This is why aside from secondary obligations, Ecological Debt calls for a recognition of newly thought primary obligations which would respect the basic requirements of the coherence principle and the non-contradiction law. Instead of thinking environmental law as a palliative way to frame trade law and repair damages, advocates of Ecological Debt ask for a structural change in our production and consumption patterns. But then, we are facing a huge challenge: how can we prove the legal existence of something like an "ecosystemic responsibility", which is to say a local responsibility-duty of population on their ecosystem? Or maybe in an other way, can we legally demonstrate that capitalistic patterns of consumption and production are wrong?

15 Rio Declaration on Environment and Development, 13/06/1992

16 International Law Commision, *Draft principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities*, 2006

IV. Degrowth and Autonomy to move forward

In order to find a State ecosystemic responsibility in international law, we have to understand – and use, the discourse of international law and demonstrate that there are positive dynamic relations between the concept of Ecological Debt and international law. We need to establish that this two sphere of thinking are appealing and even maybe generating each other. For Professor Martti Koskenniemi, law should be found "in a narrow space between fixed textual understandings (positivism) on the one hand, and predetermined functional objectives (naturalism) on the other"[17]. For him, we can no more structure our legal comprehension on strict positivism, we have to read law with some predefined values in mind. In other word, law has to be build on an explicit theory of justice. Lays behind this assumption the idea that anyway, law is always the result of a political discourse, it is never purely neutral[18]. Applying Koskenniemi's methodology on the idea of Ecological Debt, we could show that positive IL features elements favoring the recognition of Ecological Debt, but also that the Ecological Debt philosophy is relevant in term of international law justice foundations.

In trying to find a just foundations of Ecological Debt, we realized this concept was a very accurate counterpart of a northern doctrine called the Degrowth theory[19] which could work as a substantive base to formulate primary obligations regarding the management of our ecosystems.

We often describe Degrowth as an actual decrease of the GDP. That would be reducing its true signification. If Degrowth was primarily a criticism of our over consumption and over production, those patterns were found to be the results of an other deeper problem: the lack of people's political and economical autonomy stemming from a capitalistic model of production. Hence, Degrowth was making a clear link between ecological integrity and local communities responsibilities and capabilities. Its basic idea is that citizens free of "imaginary colonization" and financial constraints have the ability to use sparely and efficiently their natural resources in a way that would sustain their needs while not

17 KOSKENNIEMI Martti, « International Law : Constitutionalism, Managerialism and the Ethos of Legal Education », *European Journal of Legal Studies* 1-2007, pp.1-18

18 KOSKENNIEMI Martti, *The politics of international law*, Oxford, Hart Publishing, 2011, 371 p.

19 See for an introduction : LATOUCHE Serge, *Farewell to growth*, Cambridge, Polity, 2009, 124 p.

endangering the fulfillment of the needs of other people and species.

In France and Spain and from what we have seen, there is a growing consensus around the notion of autonomy as being the key tool of Degrowth. Autonomy is viewed as an easy and efficient way of framing one communities' impact on earth. Learning to do with what was given to us by the Nature around us would not only free us from depending on global mechanisms and contingency but also radically limit our exploitative and dominative potentiality on other human and non-human kind.

Autonomy derives from auto- "self" and nomos- "custom, law". It refers to the capacity of an entity to make a decision about its actions without the involvement of another entity. Autonomy is a concept that drives away from free-trade but which has nothing to do with autarky. The ethic of free-trade lays on a liberal approach in which the key right would be *freedom*. But this freedom is accepted as being granted by a supra-entity imposing its view. In autarky, the primary feature would be *self-sufficiency,* where a community stands by itself excluding exchanges. Within those two political systems, the given options are to move in chain or to stand alone. *Autonomy* attempts to make us move alone. It could then be the criteria of a system of “open localism” where individuals and communities build consciously their own rules while cooperating with each others. It could in fact relate more to the concept of sovereignty, as for example used in the concept of “food sovereignty” developed by Via Campesina. We chose not to use this word because of the state-centered vision it generates in our mind today. The notion of autonomy aspires to be applied to individuals, or local communities. Then, it could be a State's responsibility-duty to insure that communities are autonomous and that individuals are free in their decision-making processes. This relates to a new way of thinking the rule of law not only as being ruled by the law (the “rule *by* law”) but as having the capacity to take part in the making of the law and in decisions concerning our livelihood.

Finally, if Degrowth severely scratches the State power, it does not necessarily lead to its abolition. It rather seeks to redefine it as a neutral structure responsible for power distribution among its citizenry in order to avoid exploitation of human and natural resources.