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INTRODUCTION: THE DISCONTENTS CONFRONT CRISIS

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I INTRODUCTION

In *Civilization and its Discontents*, Sigmund Freud argues that civilization itself is the major source of human unhappiness, inhibiting instincts and generating guilt. In *Globalization and Its Discontents*, Nobel prize-winning economist Joseph Stiglitz shows how the "economic architecture" which has produced globalization has also driven the backlash against it. This book brings together some of international law's most outspoken "discontents"; those who situate their malaise in international law itself. Their shared objective here is to expose international law's complicity in the ongoing economic and financial global crises and to assess its capacity – and its will – to address them constructively.

Some, like Freud, view that which holds us together as an inevitable source of discontent. Others, like Stiglitz, draw on the energy of the backlash to address urgent needs with radical pragmatism. Some are frustrated; others are angry; all are thoughtful and provocative.

This project began as a roundtable at the 2012 Annual Meeting of the American Society of International Law. The participants were invited to consider international law's "discontents" in relation to the Annual Meeting's theme, *Confronting Complexity*. Do its discontents generate "complexity" in international law? Do they resolve or even

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exploit it? To what effect? Under what circumstances does complexity disrupt what Antony Anghie has called the "civilizing mission [of the] imperial encounter?"

The speakers brought unexpected energy and originality to the session. They challenged the premises of the conference theme as well as the characterization of the 2008 economic and financial "crises" as somehow more significant than those that have affected the developing world more, and the developed world less. They questioned the constructs of "developed" and "developing," rejecting them along with "Global north and global south," "First and Third Worlds," and "the West and the Rest." They rejected the structure of the roundtable itself, appropriating for themselves (and an increasingly involved audience), the roles of interlocutors.

In this volume, three of the original participants are joined by six similarly prominent, cutting-edge international law scholars. They are a diverse and unruly group, tethered together by their shared focus on the ongoing global crises – their causes and consequences – and the transformative potential of international law.

A The Great Recession

The Great Recession has impacted more people worldwide than any crisis since the Great Depression. Rooted in bad government policy and worse corporate behavior in the United States, the American financial meltdown was globalized with devastating consequences, raising fundamental questions about global capitalism.

In 2007, the subprime mortgage market collapsed in the United States. Because lenders, such as Countrywide, made their money from the fees generated by transactions, they had been encouraging unqualified buyers to assume mortgage obligations that they would never be able to pay off. Subprime lending was not that risky, it was thought, as long as the residential real estate market remained strong and housing costs continued to grow. Homeowners also invested in the bubble, by taking out low-interest mortgage equity loans that enabled them to spend despite stagnant income.

The subprime mortgages themselves were sold to investment firms and repackaged. They were sliced and diced and rebundled into derivatives, complex securities created by investment banks and hedge funds. Because many of these "innovative" new instruments were unregulated, there was no legal obligation to secure them. Because there was no legal obligation, there were no reserves backing them when they failed. Even those that were regulated were highly leveraged; investors' debt was allowed to be as much as thirty times their equity. Ratings agencies, such as Standard & Poors, whose fees were paid by the investment banks, still gave them triple A ratings.[1] Government regulators, like everyone else, were unconcerned.

Then the housing bubble burst and the entire market tumbled. The now-underwater mortgages, the "toxic assets," were impossible to isolate because no one knew how to unbundle the complex new derivatives. So the bottom fell out, and once venerable investment firms like Bear Sterns and Lehman Brothers collapsed. Markets panicked, triggering a global recession.

As Stiglitz explains in *Freefall*,[2] the United States economy constitutes such a large proportion of the global economy that when it dives, it takes the rest of the world with it. In addition, the United States exported its recession because it had already exported its philosophy of deregulation. One quarter of the inadequately secured United States mortgages were held by foreign banks.

Those in low income states were especially vulnerable. They were quickly hit by the collapse in global demand.[3] Remittances – which dwarf foreign aid – from the United States and Europe plummeted.[4] The crises also spread rapidly because of policies long-foisted on developing states by the United States and the International Monetary Fund (IMF).[5]

1 Joseph Stiglitz, *Freefall: America, Free Markets and the Sinking of the World Economy* (New York: W. W. Norton, 2010), p. 23.
2 Ibid. 3 Ibid., p. 23.
4 Ibid., p. 24. Remittances were further reduced because the money transfer companies that enabled families to send money to keep their children in school were often the same companies that were used to send money to terrorist groups, such as the Shabab in Somalia. Nicholas Kulish, "Somalis Face a Snag in Lifelines From Abroad," *New York Times*, August 4, 2013.
5 Ibid.

B Inequality

The Great Recession spread like wildfire because globalization had already eliminated the barriers that might have slowed it down. But the impact of the Great Recession has been skewed. As economist Branko Milanovic explains, "[F]rom a global perspective, two decades of globalization have produced what 'seems like a fairly benign outcome.' If you look at the world as a single nation, income inequality has, in fact, declined. Income in the middle has grown faster than at the top."[6] But inequality persists among countries, as Princeton economist Angus Deaton notes: "For every country with a catch-up story there has been a country with a left-behind story."[7]

Inequality *within* states, in fact, has increased almost everywhere. According to French economist Thomas Piketty, author of *Capital in the Twenty-First Century*, income inequality is increasing.[8] In terms of salary and compensation packages, Piketty shows that inequality in the United States is "probably higher than in any other society at any time in the past, anywhere in the world."[9] As set out in the Equilar 100 CEO Pay Study, conducted for the *New York Times*, the median compensation for a chief executive in 2013 was a stunning $13.9 million, up 9 percent from 2012. Piketty attributes two-thirds of the increase in American inequality over the past forty years to the growth of such "supersalaries."[10]

Even the IMF has noted, for the first time, that inequality threatens global stability. In a recent study, the IMF concluded that: "A flatter distribution of income contributes more to sustainable economic growth than the quality of a country's political institutions, its foreign debt and openness to trade, its foreign investment and

6 Eduardo Porter, "A Global Boom, But Only For Some," *New York Times*, March 19, 2014, p. B1.
7 John Cassidy, "Forces of Divergence," *The New Yorker*, March 31, 2014, p. 69.
8 Thomas Piketty, *Capital in the Twenty-First Century* (2014).
9 Cassidy, "Forces of Divergence," p. 70.
10 Peter Eavis, "Executive Pay: Invasion of the Supersalaries," *New York Times*, April 13, 2014, p. BU1.

whether its exchange rate is competitive." Reducing income inequality is now explicitly part of the IMF's core mandate.[11]

The crises may be easing for some,[12] but even in the United States they continue for many.[13] The wealth divide among races in the United States has deepened.[14] A study by the Urban Institute showed that in 2010 whites on average had twice the income of blacks and Hispanics, but six times the wealth.[15] Europe, similarly, was hit hard. In May 2013, unemployment in the Eurozone reached a new high.[16] Spaniards foraged in dumpsters for food.[17] Greek children went hungry.[18] While industrial output in Germany rose 2.5 percent in June 2013, it declined 1.5 percent in France.[19] While some analysts

11 Eduardo Porter, "In New Tack, I.M.F. Aims At Income Inequality," *New York Times*, April 9, 2014, p. B1.

12 See for example Danielle Costello, "The Drought Is Over (at Least for CEOs's)," *New York Times*, April 11, 2011, www.nytimes.com/2011/04/10/business/10comp.html?pagewanted=all (noting that the median pay for top executives at 200 major companies was $9.6 million in 2010). Annie Lowrey, "Incomes Flat In Recovery, But Not For the 1%," *New York Times*, February 16, 2013, p. B1 (noting that "Incomes rose more than 11 percent for the top 1 percent of earners during the economic recovery, but not at all for everybody else, according to new data").

13 Motoko Rich, "Feeble Job Numbers Show Recovery Starting to Stall," *New York Times*, July 9, 2011, p. A1 (noting new Labor Department statistics showing an increase in unemployment, up to 9.2 percent).

14 Signe-Mary McKernan, et al., *Less Than Equal: Racial Disparities in Wealth Accumulation*, The Urban Institute, 2012 http://urban.org

15 Ibid.

16 David Jolly, "In Continuing Sign of Weakness, Unemployment Hits New High in the Euro Zone," *New York Times*, May 1, 2013, p. B2.

17 Suzanne Daley, "Spain Recoils as Its Hungry Forage Trash Bins for a Next Meal," *New York Times*, September 25, 2012, p. A6 (describing "survival tactics" where "unemployment rose over 50 percent among young people and more and more households have adults without jobs").

18 Liz Alderman, "More Children in Greece Start to Go Hungry," *New York Times*, April 17, 2013, p. A1 (citing "2012 Unicef report showing that among the poorest Greek households with children, more than 26 percent had an economically weak diet").

19 David Jolly, "Rising Output in Factories Hints at Growth in Europe," *New York Times*, August 14, 2013.

were encouraged by rising output in factories, twenty-six million Europeans remain unemployed.[20] In 2014, the European Union finally took a step back from German-inspired austerity, entering into a new budget pact allowing debt-burdened states such as Greece and Italy some much-needed leeway.[21]

The issues rending Europe, such as disappearing pensions and shrinking social safety nets,[22] remain unimaginable luxuries in the developing states. As set out in the *UN Resolution on the World Economic Crisis*:[23]

> Developing countries, which did not cause the global economic and financial crisis, are nonetheless severely affected by it. The economic and social progress achieved during recent years, in particular on internationally agreed development goals, including the Millennium Development Goals, is now being threatened in developing countries, particularly least developed countries . . . Women also face greater income insecurity and increased burdens of family care.[24]

Since May of 2013, moreover, capital has been fleeing emerging markets as their currencies and stock markets plunge.[25]

C The Crises in Developing States

Recent reports from the Bank, somewhat surprisingly, "show a broad reduction in extreme poverty."[26] In part, this reflects the fact that the world's poorest had no jobs, housing, savings, benefits, or pensions to

[20] Ibid.
[21] Ian Wishart, "Renzi Prods Merkel into Shift as EU Eases Austerity Focus," *Bloomberg News*, June 27, 2014.
[22] David C. Unger, "Europe's Social Contract, Lying in Pieces," *New York Times*, June 9, 2013; Jack Ewing, "A Recession's Daunting Reach," *New York Times*, April 26, 2013.
[23] G.A. Res. 63/303, UN GAOR, 63rd Sess., Agenda Itm 48, UN Doc. A/Res/63/303 (2009).
[24] Ibid., p. 2.
[25] Paul Krugman, "This Age of Bubbles," *New York Times*, August 23, 2013, p. A27.
[26] Annie Lowrey, "Extreme Poverty in Developing World is Down Despite the Recession, Report Says," *New York Times*, March 7, 2012, p. A4.

lose. Closer analysis shows that while there has been "a small drop in the number of people living below $2 per day . . . the number of people living *between* $1.25 and $2 almost doubled from 648 million to 1.18 billion between 1981 and 2008."[27]

But questions have been raised about the validity of the benchmark for "extreme poverty" itself.[28] The Bank assumes an improvement in "poverty" using the $1.25 per day standards of the poorest 10–20 countries. As critics note, this is barely subsistence. Many also question the usefulness of GNP or per capita expenditure as meaningful indicators.[29] Amartya Sen and Martha Nussbaum, for example, have set out an alternative to GNP that focuses on "*human capabilities* . . . what people are actually able to do and be."[30]

Half of the decline in the extreme poverty rate, moreover, is attributable to China,[31] where growth is slowing.[32] Nor do the bank reports take into account the costs of that growth, including environmental degradation.[33] According to *The Lancet*, China's outdoor pollution contributed to 1.2 million premature deaths in 2010, or 40 percent of the worldwide total.[34] An American science journal reported in July 2013 that life expectancy in northern China had fallen by five years because of air pollution.[35]

27 Ibid.
28 Annie Lowrey, "Movin' On Up," *New York Times Magazine*, May 5, 2013, p. 18.
29 See for example Martha C. Nussbaum, *Women and Human Development: The Capabilities Approach* (2006), pp. 5–6.
30 Ibid. 31 Lowrey, "Movin' On Up," p. 16.
32 Keith Bradsher, "Easy Credit Dries Up, Choking Growth in China," *New York Times*, April 16, 2013, p. A1; Keith Bradsher, "China Says Lending Put Growth Rate at 7.5 Percent," *New York Times*, July 16, 2014, p. B2 (noting that heavy lending by the central bank "appears to have headed off or at least delayed a widely expected broader slowdown of the Chinese economy").
33 See for example Edward Wong, "Life in a Toxic Country," *New York Times*, August 4, 2013, p. SRI.
34 Ted Alcorn, "China's Skies: A Complex Recipe for Pollution with No Quick Fix," *The Lancet* 1973, 1973–1974 (2013), p. 381.
35 Yuyu Chen et al., "Evidence on the Impact of Sustained Exposure to Air Pollution on Life Expectancy from China's Huai River Policy," *Proc. Nat'l Acad. Sci. USA* 12936, 12936–12941 n. 32 (2013), p. 110.

Investment banks and hedge funds, meanwhile, continue to exploit ad hoc arrangements and resist the "global economic governance" called for by the UN Commission of Experts on Reforms of the International Monetary and Financial System. The G20 ignored calls by Miguel d'Escoto, President of the General Assembly, for "new global institutions, authorities and advisory boards." Absent such reforms, as Stiglitz explains, countries with lax regulation compete to attract financial services in a crippling "race to the bottom."

II THE DISCONTENTS

The essays here focus on the impact of the crises on particular groups, sovereign states and international law itself. How have states, non-state actors and international law responded? What roles has international law played in the ongoing debacle? When and where does crisis serve as a catalyst, and for whom?

A International Environmental Law

The first section describes the global environmental crisis from two very different perspectives. In "Binge Development in the Age of Fear: Scarcity, Consumption, Inequality and the Environmental Crisis," Ileana Porras sets the tone with King Lear's bitter complaint, "Allow not nature more than nature needs, Man's life's as cheap as beast's."[36] Like Lear, Porras explains, those of us in the overdeveloped West have come to see our extravagant way of life as absolutely necessary. We cannot imagine living without cheap energy, new clothes, new cars, new electronic devices, and unlimited clean water on demand. Alarmed by scientists warning of shrinking resources and irreparable environmental degradation, we respond by buying bottled spring water and organic produce flown in from the Southern Hemisphere, delivered to our door. Porras draws on the recent work of

[36] William Shakespeare, *King Lear* (Act 2, Sc. 4).

Harvard economist Sendhil Mullainathan and Princeton psychologist Eldar Shafir[37] to explain why:

> The evidence of drought and depleted reservoirs, the knowledge that there is less available abundance, produce an outsize feeling of insecurity. The fact that the community may have to reconsider both its short term and long term usage priorities, that non-critical uses may have to be severely restricted or prohibited, and that other uses may need to be better monitored and possibly reduced, are experienced not as necessary adjustments but as existential threats.

We cannot bear to contemplate scarcity, let alone deal with it rationally. Or, as Lear exclaims, "O reason not the need!"

Even if we were somehow able to cope with our collective pathology, Porras continues, international law is unlikely to offer useful templates because of its own commitment to, and investment in, global trade. As Philip Alston observes, "International lawyers have served as the handmaidens of globalization."[38] Indeed, Porras reminds us, "from its inception in the sixteenth century international law has had an overriding affinity for international commerce."

As she explains in her introduction, this affinity has only been deepened by the ongoing crises.

> The response of bureaucrats, policy pundits, and politicians at the national, regional, and international levels has been variously to call for more or better regulation and oversight of transnational banks and corporations; to demand the massive infusion of stimulus capital into local and national economies; or to insist on the necessity of adopting austerity measures. All agreed, however, that the way out of the global economic crisis was national economic growth.

No one argued in favor of shrinking national economies, or even of limiting growth to "green growth." Confronted with economic crises, world leaders quickly put the environment on the back

[37] Sendhil Mullainathan and Eldar Shafir, *Scarcity: Why Having Too Little Means So Much* (2013).

[38] Philip Alson, "The Myopia of the Handmaidens: International Lawyers and Globalization," *EJIL* 435 (1997), p. 3.

burner. Even the EU backed away from its earlier commitments to limit carbon emissions. International law, Porras shows, is not only ill-equipped to counter deep psychological drives for abundance, superfluidity, and growth; it is the *product*, and a key facilitator, of these same drives.

In "International Law as a War Against Nature? Reflections on the Ambivalence of International Environmental Law," Karin Mickelson analyzes the role of international environmental law itself in the ongoing environmental crises. Mickelson undertakes a daunting project:

> Looking back on more than two decades of lost opportunities with regard to climate change, and many more decades of partially successful or failed attempts to come to terms with other environmental harms associated with industrialization, how do we account for the fact that we keep falling short of the mark?

Mickelson begins by quoting Freud: "The principal task of civilization, its actual *raison d'être*, is to defend us against nature." The essence of modern environmentalism, Mickelson suggests, could be seen as a rejection of this view and its replacement with a depiction of nature as that which must be defended against civilization. Environmental law, whether in its domestic or international form, is expected to play an equalizing role, placing limits on the exploitation of nature while allowing for the supposedly rational pursuit of economic development. Increasingly, however, many question whether the mainstream understanding of economic growth and prosperity is fundamentally inconsistent with environmental sustainability. Given that this understanding is deeply embedded in the structures and principles of international law, international law effectively justifies a war against nature.

This chapter explores both the possibilities and the limitations of this portrayal of international environmental law, drawing on TWAIL (Third World Approaches to International Law) scholarship. Mickelson also resurrects the uncompromising work of Murray Bookchin, an early ecologist. Finally, Mickelson draws on the concept of "environmental justice" developed by social movements, to stress that: