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## The Political Economy of States of Emergency

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A cloud of permanent economic emergency hangs over the world. In early December 2011, as the leaders of European Union member states traveled to Brussels for their sixteenth emergency summit in two years to deal with the ongoing debt and fiscal crises of finance capitalism, the myriad tremors of a state of economic emergency continued to reverberate around the globe, from core to periphery and back again. In one of the centers of transnational financial trading—the city of London—those coming together under the banner of the “Occupy” movement to imagine and discuss alternatives to prevailing (failing) economic structures are essentialized by British authorities and catalogued alongside al-Qaeda as a threat to national security. Meanwhile, in the peripheral reaches of northern Peru, indigenous resistance to foreign capitalist extraction of natural resources prompts the declaration of a state of emergency by the national government

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and the granting of special police powers to suppress protests. This global snapshot is merely a single freeze-frame in an ongoing reel; evidence of the intersection of political economic interests and the emergency governance paradigm is abundant in volume, universal in scope.

Recourse by states to the frames of emergency and exception has never been limited solely to the sphere of “national security.” It has been integral to economic law and policy in consolidating hegemonic financial interests, and has been invoked in order to salvage finance capitalism from the wreckage of its own crisis on more than one occasion. Analysis of states of emergency in international legal scholarship has, however, primarily revolved around the resort to exceptional powers in times of “political”—rather than “economic”—crisis: military engagement, ethnic conflict, and securitization. The standard approach acknowledges three distinct varieties of emergency—grave political crises, economic crises, and natural disasters—before proceeding to focus on the first and dispense with the latter two.<sup>1</sup> As a result, the literature is left heavily weighted on the side of violent crises triggered by armed conflict, terror threats, riots and rebellions. In this regard, it is noted, “liberal legal and political analysts have too often ignored the seriousness of the normative and institutional problems posed by the surprisingly pervasive reliance on emergency devices to grapple with the exigencies of economic affairs.”<sup>2</sup>

The premise of an economic state of emergency is analogous to that presented to justify the invocation and entrenchment of extraordinary powers in relation to national security threats and political conflict. It bears a similar relation to the concept of the purported common good: temporary abdication of the rights of some

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<sup>1</sup> In their introduction to one of the seminal post-2001 texts on the law of emergency powers, Oren Gross and Fionnuala Ní Aoláin explain that they do not intend to examine all types of emergencies but will rather focus on violent crises, nonetheless conceding that “emergency powers have been used in times of great economic consternation and in situations of severe natural disasters as frequently as, and perhaps even more than, in the context of violent crises.” OREN GROSS & FIONNUALA NÍ AOLÁIN, *LAW IN TIMES OF CRISIS: EMERGENCY POWERS IN THEORY AND PRACTICE* 4 (2006). Clinton Rossiter presents similar categories of emergency, albeit in a slightly different configuration, naming war, rebellion and economic depression as his primary troika, but also acknowledging extraordinary action in situations of natural disasters, riots and strikes. CLINTON ROSSITER, *CONSTITUTIONAL DICTATORSHIP: CRISIS GOVERNMENT IN THE MODERN DEMOCRACIES* 6 (1948). Rossiter, for his part, does devote substantive attention to economic emergencies in the inter-war period. *See generally id.*

<sup>2</sup> William E. Scheuerman, *The Economic State of Emergency*, 21 *CARDOZO L. REV.* 1869, 1869–70 (2000).

is necessary in the greater public interest in order to stabilize and sustain a system seen as indispensable. In reality, however, in much the same way as such narratives of necessity underpin illiberal policies and consolidate security apparatuses in the political sphere, in the socio-economic realm they pay undue deference to capitalist institutions and obfuscate the notion of the common good by reifying elitist misappropriations of the “commons.” The general structures of international law are complicit in such misappropriations, as B.S. Chimni notes:

Armed with the powers of international financial and trade institutions to enforce a neo-liberal agenda, international law today threatens to reduce the meaning of democracy to electing representatives who, irrespective of their ideological affiliations, are compelled to pursue the same social and economic policies. Even international human rights discourse is being manipulated to further and legitimize neo-liberal goals.<sup>3</sup>

Indeed, concerns over the obfuscation of the common good in human rights discourse have lingered since the post-Cold War emergence of a market-friendly human rights paradigm that “reverses the notion that universal human rights are designed for the dignity and well-being of human beings and insists, instead, upon the promotion and protection of the collective rights of global capital in ways that ‘justify’ corporate well-being and dignity over that of human persons.”<sup>4</sup> Emergency economic measures feed into this contradiction insofar as they are couched in terms of protection of the public interest, but in actuality function to dilute the state’s commitment to socio-economic rights, and the West’s commitment to global equality. The state of emergency, premised on temporariness, is invoked to institute legislative and institutional changes whose effect will be felt far beyond the immediacy of a given crisis. Whilst the problems of normalized and entrenched “exceptional” measures are endemic in the history and ongoing politics of national security emergencies, some commentators have plausibly argued that extra-constitutional responses to economic crises can ultimately degrade the interests of liberty as much as, or even more than, extra-constitutional responses to violent crises.<sup>5</sup>

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<sup>3</sup> B.S. Chimni, *Third World Approaches to International Law: A Manifesto*, 8 INT’L COMMUNITY L. REV. 3, 3 (2006).

<sup>4</sup> Upendra Baxi, *Voices of Suffering and the Future of Human Rights*, 8 TRANSNAT’L L. & CONTEMP. PROBS. 125, 163–64 (1998).

<sup>5</sup> See, e.g., Rebecca M. Kahan, *Constitutional Stretch, Snap-Back, & Sag: Why Blaisdell was a Harsher Blow to Liberty than Korematsu*, 99 NW. U. L. REV. 1279 (2005).

The use of emergency measures as instruments of economic regulation and class subjugation must be understood against some important and related contextual backdrops: the intimate relationship that exists between capitalism and imperialism, the function of economic governance as an apparatus of security, and the susceptibility of capitalist economies to periodic “crisis.” Having introduced these underpinnings in Part I, emphasizing that the use of emergency powers in the economic sphere has long been entwined in colonial law and policy, this Article proceeds in Part II to trace the evolution of the economic state of emergency through the inter-war period in Europe and North America. Part III moves to examine the relevance of emergency discourse to the operation of the Bretton Woods institutions in the Third World, where the Machiavellian mindset of “opportunity in crisis” comes to the fore and emergency authority serves as a vehicle for the implementation of neoliberal doctrine and economic “shock therapy.” Part IV offers some thoughts on the versatile role of the doctrine of emergency in preserving and sustaining prevalent global capitalist structures, in such diverse guises as declarations of states of emergency to suppress protest movements, the ambiguous role of security exceptions in international trade and investment law, and the utilization of emergency discourse to justify austerity measures and bank “bailouts” in the post-2008 environment of Western financial meltdown. Even absent formal declarations of a state of emergency, the refrains and rhetoric of emergency, exception, and necessity remain a constant echo.

## I

### CAPITALIST EXPANSION AND COLONIAL EMERGENCY DOCTRINE

The standard narrative on economically-rooted emergencies begins by recounting an extension of codified emergency powers in Europe and North America from their First World War military origins to impact upon economic issues in times of peace from the 1920s onwards. While the inter-war period did constitute a pivotal moment in the expansion of emergency economic governance, over-emphasizing the point tends to obscure the fact that resort to exceptional powers in the context of class conflict has a history that long predates the First World War. Such a narrative also implies a postwar migration or seepage of special powers from security emergency to economic emergency that masks a deeper ideological circuit between political economy and national security discourses.

The state of emergency has its colonial origins. The colonial account of emergency cannot be written without reference to

capitalist expansion. Until the mid-sixteenth century in England, the invocation of martial law against civilians remained restricted for the most part to instances of war and open rebellion. In the 1550s, a time of severe economic depression, martial law was invoked as a peacetime measure for the first time, deployed as a means of class and political repression against “those products of a depressed economy . . . general undesirables with no apparent means of support,”<sup>6</sup> to stave off any inconvenient opposition to the Crown. With some initial hesitation about how it might be perceived, this shift was introduced cautiously by an establishment anxious to ensure that the first to be subjected to the new policy were not too close to home: in 1556, Mary I authorized the Marshal of the army in Ireland to proceed against “general undesirables” there by martial law.<sup>7</sup> In 1562, Thomas Radcliffe, 3rd Earl of Sussex, recommended to the Queen that an English-born ruler be appointed to govern the Irish province of Munster, with the “authority to execute the martial law in times of necessity, but only against persons that have no possessions.”<sup>8</sup>

The colonial nexus to peacetime emergency measures is thus evident from the outset, as is the class element of their invocation. The use of emergency measures as a form of class repression evolved in concert with colonial expansion, in the context of the broader, mutually interactive relationship between capitalism and colonialism. Marx and Engels show this relationship to be an organic one, in which colonialism is an outgrowth of the wider processes of capitalist transformation of European society.<sup>9</sup> Discussion of the deeper complexities of that relationship—and the divergences, conflicts and internal contradictions of those theorizing it—is beyond the remit of this piece. Suffice it to emphasize that a wide spectrum of thinkers from classic liberal political economy<sup>10</sup> to the Marxian tradition<sup>11</sup> to

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<sup>6</sup> J.V. Capua, *The Early History of Martial Law in England from the Fourteenth Century to the Petition of Right*, 36 CAMBRIDGE L.J. 152, 164 (1977).

<sup>7</sup> CALENDAR OF STATE PAPERS, IRELAND, 1509–1573, at 134 (Hans Claude Hamilton ed., 1974).

<sup>8</sup> CALENDAR OF THE CAREW MANUSCRIPTS, 1515–1574, at 336 (J.S. Brewer & William Bullen eds., 1867).

<sup>9</sup> The most comprehensive compendium of Marx and Engels’ writings on colonialism can be found in K. MARX & F. ENGELS, ON COLONIALISM (1960).

<sup>10</sup> See, e.g., ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS vol. II, at 25 (1776) (recognizing the economic benefits of colonialism, “[b]y opening a new and inexhaustible market to all the commodities of Europe, [colonial expansion] gave occasion to new divisions of labour and improvements of art, which, in the narrow circle of the antient [sic] commerce, could never have taken place”).

Third World Approaches to International Law (TWAIL)<sup>12</sup> persuasively demonstrate the economic underpinnings of colonial expansion by capitalist powers.<sup>13</sup> Put simply, “[e]conomization and colonization were synonymous.”<sup>14</sup> Many of the key factors in this equation are self-evident, particularly with reference to the intensification of imperial conquest in the mid-nineteenth century: the explosive increase in the European population and its heightened capacity for overseas movement;<sup>15</sup> the move to industrialism and the demand for raw materials; the supply of food and raw materials in both the “capitalist neo-Europes” of the temperate “empty” lands of the Americas, southern Africa and Australia, and the “tropical periphery” of Asia, Africa and the Caribbean.<sup>16</sup> What is also striking is the role of economic crises at home in the proliferation of conquest abroad. Europe’s major economic depression of the nineteenth century came in the 1870s on the heels of the free market and free trade policies that had been entrenched in the early to mid-nineteenth century. Karl Polanyi reminds us that by this time the formation of international economic structures were predicated on a deep-seated belief in the ability of the free market to organize life.<sup>17</sup> When

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<sup>11</sup> See RUDOLPH HILFERDING, *FINANCE CAPITAL: A STUDY OF THE LATEST PHASE OF CAPITALIST DEVELOPMENT* (Tom Bottomore ed., Morris Watnick & Sam Gordon trans., 1981) (1910); ROSA LUXEMBURG, *THE ACCUMULATION OF CAPITAL—AN ANTI-CRITIQUE* (Kenneth J. Tarbuck ed., Rudolf Wichmann trans., 1972) (1913); NIKOLAI BUKHARIN, *IMPERIALISM AND WORLD ECONOMY* (The Merlin Press 1972) (1917); V.I. LENIN, *IMPERIALISM: THE HIGHEST STAGE OF CAPITALISM* (International Publishers 1939) (1917). Lenin’s work was heavily influenced by J.A. HOBSON, *IMPERIALISM: A STUDY* (1902).

<sup>12</sup> See, e.g., Chimni, *supra* note 3. See generally ANTONY ANGHIE, *IMPERIALISM, SOVEREIGNTY AND THE MAKING OF INTERNATIONAL LAW* (2005).

<sup>13</sup> As B.S. Chimni points out, however, more contemporary liberal thinkers (such as John Rawls) and theorists of capitalism (such as Milton Friedman) fail to acknowledge the relationship between imperialism and capitalism. See B.S. Chimni, *Capitalism, Imperialism and International Law in the 21st Century*, Keynote Address at the Oregon Review of International Law Symposium: Third World Approaches to International Law (Oct. 20, 2011).

<sup>14</sup> Gustavo Esteva, *Development*, in *THE DEVELOPMENT DICTIONARY: A GUIDE TO KNOWLEDGE AS POWER* 6, 14 (Wolfgang Sachs ed., 2010).

<sup>15</sup> Michael Williams, *The Relations of Environmental History and Historical Geography*, 20 *J. HIST. GEOGRAPHY* 12 (1994).

<sup>16</sup> B.R. Tomlinson, *Economics and Empire: The Periphery and the Imperial Economy*, in *OXFORD HISTORY OF THE BRITISH EMPIRE, VOLUME III: THE NINETEENTH CENTURY* 53, 55 (Andrew Porter ed., 1999). “[E]mpty” is used “in the sense that the native peoples were ultimately unable to mount an effective resistance to capitalist colonization.” *Id.* at 56.

<sup>17</sup> For a TWAIL perspective of international political economy based on an insightful reading of Karl Polanyi *THE GREAT TRANSFORMATION: THE POLITICAL AND ECONOMIC ORIGIN OF OUR TIME* (1944), see Michael Fakhri, *Law as the Interplay of Ideas*,

currency fragility and falling profits threatened the stability of social organization, unflinching faith in the market and conviction of the necessity of free trade meant that the only logical response was a drive for new markets and more resources. Hence a wave of major colonial expansion that encompassed the “scramble for Africa” and the Berlin Conference in the 1880s.

What of the role of law in these developments? In the colonial domain, as elsewhere, legal relations and forms of state are molded by the material conditions of social life, of which the economic structure of society is an integral component. As Mohamed Bedjaoui’s quintessential quote—holding classical international law to be imbued with, *inter alia*, “a geographical basis (it was a European law) . . . [and] an economic motivation (it was a mercantilist law)”<sup>18</sup>—suggests, international legal structures were shaped in their origins by European economic exploitation of the Third World. The legal form of the colonial state itself encouraged and incentivized capitalist tendencies by coupling a framework for commercial exploitation of the colonies with policies of protectionism for its own planters and industrialists. As the model of colonial economic policy advanced towards a free trade model in the nineteenth century, so too did Western legal systems, and in turn, international legal norms and practice.

The part played by law in the expansion of capitalist production is elucidated in a 1987 collection of readings on *The Political Economy of Law*, which provides insight into the multiple ways in which colonial law fostered capitalist institutions, sought to facilitate the replacement of a subsistence agrarian economy with a capital/wage-labor matrix, and underpinned the integration of peripheral countries into the world economy.<sup>19</sup> The volume demonstrates the influence of the expansion of European and United States enterprise on patterns of economic development and social structures in the Third World, with the dominance of capital secured through colonial governance. Socio-economic disparities originally produced by direct rule nowadays tend to reproduce themselves through less overt forms of imperial coercion; consequently, new institutions and rules have evolved to

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*Institutions, and Interests: Using Polyani (and Foucault) to ask TWAIL Questions*, 10 INT’L COMMUNITY L. REV. 455 (2008).

<sup>18</sup> Mohammed Bedjaoui, *Poverty of the International Order*, in INTERNATIONAL LAW: A CONTEMPORARY PERSPECTIVE 152, 154 (Richard Falk et al. eds., 1985).

<sup>19</sup> THE POLITICAL ECONOMY OF LAW: A THIRD WORLD READER (Yash Ghai et al. eds., 1987).

maintain the hegemony of Western capitalism. These include the international financial institutions and sovereign power-wielding multinational corporations, as well as regulatory frameworks for intellectual property.

The narrative of apolitical law and legal institutions obscures the inequalities that are intrinsic to the international legal order. Even where colonized and colonizer are framed as formally equal before the law, the premises of the legal form and its basic concepts—such as contract and property—inherently favor those endowed with economic power, access to information concerning the law, and close ties to the state.<sup>20</sup> Thus, in the Ocean Island cases,<sup>21</sup> “classic assumptions of contract had been vitiated by the gross imbalance in the parties’ political and economic power.”<sup>22</sup> Furnivall explains such disparity with reference to the social context of the colonies—plural societies where two distinct groups interact only through commerce and are subject to no common standards except those of law as it regulates the market.<sup>23</sup> This law reflects the will and economic interests of the dominant power; “[t]he rule of law becomes in effect the rule of economic law.”<sup>24</sup> The *raison d’être* of the rule of law in the colonies was, in essence, the fostering of commerce.<sup>25</sup>

Anghie brings us back to the British East India Company as the embryo in which commercial interests and colonial governance coalesced. In exercising sovereign powers over non-European territories, the company “established systems of law and governance that were directed at furthering the commercial relations that were the very *sine qua non* of their existence . . . . The governance of non-European territories was assessed principally on the basis of whether it enabled Europeans to live and trade as they wished.”<sup>26</sup> This

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<sup>20</sup> *Id.* at 3.

<sup>21</sup> See *infra* Part IV.

<sup>22</sup> THE POLITICAL ECONOMY OF LAW, *supra* note 19, at 4.

<sup>23</sup> See J.S. Furnivall, *Colonial Policy and Practice*, in THE POLITICAL ECONOMY OF LAW, *supra* note 19 at 117.

<sup>24</sup> *Id.* at 125.

<sup>25</sup> For further elaboration see J.S. FURNIVALL, PROGRESS AND WELFARE IN SOUTHEAST ASIA: A COMPARISON OF COLONIAL POLICY AND PRACTICE (1941); J.S. FURNIVALL, COLONIAL POLICY AND PRACTICE: A COMPARATIVE STUDY OF BURMA AND NETHERLANDS INDIA (1948).

<sup>26</sup> ANGHIE, *supra* note 12, at 252. As Anghie points out, for positivists such as Westlake, the absence outside of Europe of a regulatory system for European commercial activity was justification in itself for the imposition of colonial rule and law: “non-European states were uncivilized unless they could provide a system of government ‘under the protection of which . . . the former [Europeans] may carry on the complex life to which they have been accustomed in their homes.’ If such government was lacking, Westlake



association between governance and commerce was augmented and refined under the direct governmental rule that succeeded the trading companies, culminating in the focus of the Berlin Conference on the efficient and orderly mercantile exploitation of Africa, with commercial development presented to the world as the means by which backward populations could enter the world of civilization. The role of capitalism in the civilizing mission was elaborated through the colonial project's dual mandate of civilization and commerce,<sup>27</sup> which would carry through to the League of Nations' missionary calling. It was during the League period that Anghie's "dynamic of difference"<sup>28</sup> evolved from a purely racial construct to one also infused with a class element, through characterizations of the non-European world as economically primitive. He shows that irrespective of rhetoric as to humanism and the well-being of Third World peoples, the commercial and trade interests of the West have remained paramount through the centuries. The "developed" versus "undeveloped" binary constructed during the League persists today, permeating the pretensions of the international financial institutions to economic development and poverty alleviation in the Third World.<sup>29</sup> The fundamental tension that has prevailed since the Mandate system—between political independence on the one hand and economic subordination on the other—is constitutive of the reality that the core economic aspects of colonialism persist in a neocolonial, imperial configuration. This entails the continuation of an asymmetrical relationship between core and peripheral states, which is predisposed to benefit the core and facilitate a steady transfer of resources from the periphery.<sup>30</sup> Subsumed into those relations is now an emerging

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argued, "government should be furnished." *Id.* (citing JOHN WESTLAKE, CHAPTERS ON THE PRINCIPLES OF INTERNATIONAL LAW 141–42 (1894)).

<sup>27</sup> See SIR F.D. LUGARD, THE DUAL MANDATE IN BRITISH TROPICAL AFRICA (5th ed. 1965).

<sup>28</sup> ANGHIE, *supra* note 12, at 37.

<sup>29</sup> *Id.* at 267–68.

<sup>30</sup> Core-periphery theory and related world-systems theory are elucidated extensively in this context in the works of Immanuel Wallerstein and Samir Amin. See IMMANUEL WALLERSTEIN, THE MODERN WORLD-SYSTEM I: CAPITALIST AGRICULTURE AND THE ORIGINS OF THE EUROPEAN WORLD-ECONOMY IN THE SIXTEENTH CENTURY (1974); IMMANUEL WALLERSTEIN: THE MODERN WORLD-SYSTEM II: MERCANTILISM AND THE CONSOLIDATION OF THE EUROPEAN WORLD-ECONOMY, 1600–1750 (1980); IMMANUEL WALLERSTEIN: THE MODERN WORLD-SYSTEM III: THE SECOND GREAT EXPANSION OF THE CAPITALIST WORLD-ECONOMY, 1730–1840'S (1989); IMMANUEL WALLERSTEIN : THE MODERN WORLD-SYSTEM IV: CENTRIST LIBERALISM TRIUMPHANT, 1789–1914 (2011). See also, e.g., SAMIR AMIN, IMPERIALISM AND UNEQUAL DEVELOPMENT (1977).

transnational capitalist class in the periphery that transcends North-South divides without challenging the existing structures.

In both the colonial and “post-colonial” setting, the rule of liberal international law functions to reinforce the capitalist agenda in several ways, including through the development of a doctrine of emergency that is not only racially contingent but is underpinned by class and commercial interests. It goes without saying that colonialism, capitalism, race, and class are immensely weighty analytic categories, and it is beyond the purview of this article to attempt to fully capture or reconcile them all. They interact in a profusion of intricate, unwieldy, and untold ways. The most that this article ventures to suggest in this regard is that the evolution of emergency doctrine plays a notable role in those interactions; the concepts intersect in particular ways *through* the doctrine of emergency.

The history of the British empire is replete with the use of emergency measures to support and sustain the colonial economic architecture, whether in the suppression of the 1865 peasant uprising in Jamaica,<sup>31</sup> the protection of settler plantation interests in India by consistent recourse to martial law, or the invocation of a state of emergency to crush native trade unionism in Malaysia.<sup>32</sup> Britain’s resort to emergency laws and special powers in the 1940s and 1950s in a last-ditch bid to prevent the fragmentation of the empire was particularly pronounced. It also had a profound effect on the international human rights treaties being drafted at the time, with a Britain deeply engulfed in its colonial emergencies insisting on the

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<sup>31</sup> See R.W. KOSTAL, *A JURISPRUDENCE OF POWER: VICTORIAN EMPIRE AND THE RULE OF LAW* (2005); David Dyzenhaus, *The Puzzle of Martial Law*, 59 U. TORONTO L.J. 1 (2009).

<sup>32</sup> The backdrop to anticolonial agitation by the Malayan Communist Party and the invocation of the state of emergency in June 1948 was a rapid expansion of trade unionism from 1945 and a bolstered consciousness and assertion of workers’ rights, culminating in large-scale industrial conflict and repression by colonial authorities. At the meeting of colonial government officials in Malaya in May 1948 that initiated the process by which the emergency would be declared, it was decided that measures should include “a simultaneous raid on the headquarters of the PMFTU [Pan Malayan Federation of Trade Unions] in Kuala Lumpur and of the Federations in each of the states.” ANTHONY SHORT, *THE COMMUNIST INSURRECTION IN MALAYA, 1948–60*, at 67–68 (1975). See also Michael Morgan, *The Rise and Fall of Malayan Trade Unionism, 1945–50*, in *MALAYA: THE MAKING OF A NEO COLONY 150* (Mohamed Amin & Malcolm Caldwell eds., 1977); KUMAR RAMAKRISHNA, *EMERGENCY PROPAGANDA: THE WINNING OF MALAYAN HEARTS AND MINDS 1948–1958* (2002).

inclusion of an option to derogate from treaty obligations during a state of declared emergency.<sup>33</sup>

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My account and analysis of economic states of emergency entails some inherent meditation on the nature of capitalist state, how it can be harnessed by certain interests and how it is wont to act in the interest of the bourgeois class in order to preserve and sustain itself. To continue functioning, as some of the examples elucidated below will illustrate, the capitalist state acts, for instance, to stave off or deflect internal crises, and to discipline labor. Such functions foreground how the state as an institution is itself central to the process of accumulation. Here, two particular features of capitalism abound and warrant brief mention.

First, capitalism is prone to crisis, and for the purposes of self-preservation, such crises must be mitigated. Marxists, Minskyans and Keynesians and other schools of heterodox economics may vary in their diagnoses of exactly how and why capitalist systems have an innate proclivity to instability but all essentially agree on the fundamental point: that crisis is structurally endemic in capitalism.<sup>34</sup> Second, capitalism is prone to challenges aimed at redistribution or reduction of inequalities; challenges which must similarly be managed. In both regards, the versatility of emergency discourse in sustaining existing patterns of capital accumulation comes to the fore; whether in allowing economic institutions to compel states to adopt unpopular austerity measures as a technique of crisis management, or enabling the suppress of domestic protest or industrial action. In other words, the emergency paradigm will surface, regardless of the rationality underpinning a particular form or “art” of government at a particular point in time.

Here, we can make a link to Michel Foucault. Emergency doctrine purports to provide security from an impending “threat to the life of

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<sup>33</sup> See John Reynolds, *The Long Shadow of Colonialism: The Origins of the Doctrine of Emergency in International Human Rights Law*, 6 OSGOODE COMP. RES. L. POL. ECON. 1, 16–30 (2010).

<sup>34</sup> For contemporary Marxist analyses, see, e.g., DAVID HARVEY, *THE ENIGMA OF CAPITAL AND THE CRISES OF CAPITALISM* (2010); John Bellamy Foster and Robert W. McChesney, *Monopoly-Finance Capital and the Paradox of Accumulation*, 61 MONTHLY REV. 1–20 (2009). For Minsky’s financial instability hypothesis, see Hyman P. Minsky, *The Financial Instability Hypothesis*, Levy Economics Institute of Bard College, Working Paper No. 74 (May 1992). For an outline of the structural Keynesian perspective as well as a succinct overview of the commonalities and divergences between the varying positions, see Thomas I. Palley, *The Limits of Minsky’s Financial Instability Hypothesis as an Explanation of the Crisis*, 61 MONTHLY REV. 28–43 (2010).

the nation.” Reliance on emergency doctrine in the economic realm can be seen as symptomatic of a particularly Foucauldian idea of economic governance as itself an apparatus of security. In the shift from sovereignty to governmentality, Foucault identifies an emergent and distinct form of government in which the institutions of sovereignty are supplemented by those of economy. The essence of the “art of government” acquires as its primary objective the economy; it becomes “the art of exercising power in the form and according to the model of the economy.”<sup>35</sup> Within the context of what he delineates as the “sovereignty-discipline-government” triangle, Foucault emphasizes the inter-relatedness of security and economy in a configuration that has the population as its primary target, political economy as its principal form of knowledge and security apparatuses as its essential mechanisms.<sup>36</sup> Agamben sees the manner in which this move to the security paradigm occurs as related less to human security and more to economic gain: “Foucault showed how security becomes in the 18th century a paradigm of government. For Quesnay, Targot and the other physiocratic politicians, security did not mean the prevention of famines and catastrophes, but meant allowing them to happen and then being able to orientate them in a profitable direction.”<sup>37</sup>

This is mirrored in the contemporary “homeland security” incarnation of the security paradigm. Crises continue to provide opportunity for profit—indeed, it is often in the state of crisis and instability that profits are optimized—and are thus actively sought by market forces. In this context, political economy remains inseparable from security; the economic and the political cannot be disentangled. Similarly, political emergencies invariably have socioeconomic consequences just as economic emergencies entail political consequences. Emergencies triggered by natural disasters, such as that in New Orleans following Hurricane Katrina, are likely to have both political and economic ramifications that intersect with questions of security. Agamben refers us back to the state of siege declared on the occasion of the 1908 earthquake in Messina and Reggio Calabria, which he characterizes as “only *apparently* a different situation” from previous states of siege stemming from public disturbances—ultimately proclaimed as it was for reasons of public order—but

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<sup>35</sup> Michel Foucault, *Governmentality*, in *THE FOUCAULT EFFECT: STUDIES IN GOVERNMENTALITY* 87, 92 (Graham Burchell et al. eds., 1991).

<sup>36</sup> *Id.* at 102.

<sup>37</sup> Ulrich Raulff, *An Interview with Giorgio Agamben*, 5 *GERMAN L.J.* 609, 611 (2004).

which notably formed the basis for the elaboration of jurisprudential theses that distinguished necessity as the primary source of law.<sup>38</sup>

## II

### THE ECONOMIC-FINANCIAL STATE OF EMERGENCY

The flaws of Carl Schmitt's theoretical inquiry and the perniciousness of his ideological stance notwithstanding, William Scheuerman concludes that the German jurist's work provides a useful insight into some of the real failings of capitalist liberal democracy,<sup>39</sup> particularly in relation to what Schmitt termed the "economic-financial state of emergency."<sup>40</sup> Schmitt, indeed, did accurately highlight the tendency of liberal discourse post-First World War to equate economic and financial crises with the threats posed by military attack or armed rebellion. In this conflation, security of capital becomes entwined with the state of emergency in the same manner as national security. Governmental assumption of emergency powers to pursue pervasive economic measures is justified on the same premise of necessity. This engenders the class component of the story of emergency.

Emergency intervention in the economy by the Western state has long been common in contexts of war or insurrection, and in contexts of race and class domination in the colonies. It is with the shift from sovereignty to governmentality in the eighteenth century that economic emergency authority comes to the fore in its own right, and the broad scope of "emergency" is fully revealed. With labor and socialist agitation emerging as a challenge to capitalist hegemony, constitutional emergency clauses are ready-made for legalized crackdowns. In *The Eighteenth Brumaire of Louis Bonaparte*, Marx describes the use of French Revolution "state of siege" emergency provisions as a weapon in the hands of the "bourgeois dictatorship," invoked to buttress class privilege and sideline the interests of workers and petty bourgeoisie in nineteenth-century France.<sup>41</sup> Clinton Rossiter would later observe that such devices of constitutional dictatorship as the French *état de siège*—as well as Article 48 of the

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<sup>38</sup> GIORGIO AGAMBEN, *STATE OF EXCEPTION* 17 (Kevin Attell trans., 2005) (2003) (emphasis added).

<sup>39</sup> Scheuerman, *supra* note 2.

<sup>40</sup> Ingeborg Maus, *The 1933 "Break" in Carl Schmitt's Theory*, 10 *CAN. J.L. JURISPRUDENCE* 125, 131 (1997) (quoting CARL SCHMITT, *DER HÜTER DER VERFASSUNG* 115–17 (1931)).

<sup>41</sup> KARL MARX, *THE EIGHTEENTH BRUMAIRE OF LOUIS BONAPARTE* 24–27, 102–03 (Progress Publishers, 1934) (1852).

Weimar Constitution and the Emergency Powers Act 1920 in Britain—are “ideally suited to be employed as a weapon of reaction and class struggle.”<sup>42</sup>

In the twentieth century inter-war period, the use of emergency powers to regulate the economy was an integral element of the political governance of major Western states,<sup>43</sup> prompting depictions of “economic dictatorship” in Weimar Germany and the United States.<sup>44</sup> Scheuerman describes a rudimentary sequential pattern in the story of emergency economic power that we can extract in some shape or form from the experiences of Britain, the United States, Germany, and France during the two World Wars. According to this delineation, emergency powers operated in the economic realm initially to stifle one of the most visible products of a crisis-ridden capitalist economy, the workers’ movement, before being invoked to manage the economy itself and later as an instrument to preclude the return or continuation of instability.<sup>45</sup>

Permeating this process is a fundamental conflation of economy and security, evident on both sides of the Atlantic through perceptions of workers as security threats and the construction of economic crises as warlike situations. After the Civil War, the primary function of martial law in the United States was as a “household remedy” to quash the growing labor movement.<sup>46</sup> Through the inter-war period, Western liberal democracy deployed the rhetoric and executive authority of military confrontation in its “war” against the economic crisis that threatened to annihilate finance capitalism. Franklin D. Roosevelt epitomized this in his demand for “broad Executive power to wage a war against the emergency, as great as the power that would be given to [him] if we were in fact invaded by a foreign foe.”<sup>47</sup> Executive regulation of the economy is generally seen as having been relatively effective in the case of Roosevelt and the New Deal, but the socio-political perils of unfettered emergency power became all too real in the French and German cases, where “the unlimited decree-rule of a constitutional government with a dubious popular or

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<sup>42</sup> ROSSITER, *supra* note 1, at 173.

<sup>43</sup> *See id.* at 41–53 (on Weimar Germany), 117–29 (on France), 171–83 (on Britain) and 255–64 (on the United States).

<sup>44</sup> *Id.* at 51, 273.

<sup>45</sup> Scheuerman, *supra* note 2, at 1875.

<sup>46</sup> Charles Fairman, *Martial Rule, In the Light of Sterling v. Constantin*, 19 CORNELL L. Q. 20, 29 (1934).

<sup>47</sup> President Franklin Delano Roosevelt, Inaugural Address, (Jan. 20, 1933) (*available at* [http://avalon.law.yale.edu/20th\\_century/froos1.asp](http://avalon.law.yale.edu/20th_century/froos1.asp)).

parliamentary basis serve[d] only as an intermediate station on the road to complete authoritarianism.”<sup>48</sup>

In Britain from the 1920s onwards, labor movements and industrial unrest were viewed and portrayed by business and political elites as a form of civil insurrection, an intemperate uprising against liberal conceptions of an ultimately flourishing and lucrative market economy. These portrayals were in turn reflected in the emergency laws and powers deployed against such movements. Such practices followed the trend that had long been set in the colonies, where strikes or protests by native workers would be painted with the “security threat” brush and colonial governors would declare a state of emergency to legitimize the use of force in their suppression.

The enabling legal framework emanated from the wartime codification of emergency powers in mainland Britain, which itself brought home the colonial experience from Ireland and India in particular. Although the Defense of the Realm Act 1914 lapsed in 1921, the sweeping authority that the Cabinet had become accustomed to during the war years would inform future policy and extend to a range of economic issues in times of peace. With the “power [that the Defense of the Realm Act] had brought them still fresh in their minds, the members of the Cabinet decided to ask Parliament for a direct grant of emergency competence, couched in terms of a permanent statute.”<sup>49</sup> Emergency powers were henceforth institutionalized in Britain in the form of legislation that Rossiter describes as “a revolution in English politics and government.”<sup>50</sup> The Emergency Powers Act 1920<sup>51</sup> allowed the Crown to proclaim a state of emergency under certain circumstances in relation to the supply and distribution of necessities (including food, water, fuel and light) and granted special powers to the police in such regard, as well as effectively allowing for military intervention. Although presented by the government as discharging a longstanding commitment to such legislation based on the war experience in order to protect essential supplies, the social context in which the bill was passed is instructive. Rushed through parliament during strikes by miners and railway workers in October 1920, amidst a broader climate of escalating class

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<sup>48</sup> Otto Kirchheimer, *Decree Powers and Constitutional Law in France Under the Third Republic*, in *POLITICS, LAW, AND SOCIAL CHANGE: SELECTED ESSAYS OF OTTO KIRCHHEIMER* 130 n.56 (Frederic S. Burin & Kurt L. Shell eds., 1969).

<sup>49</sup> ROSSITER, *supra* note 1, at 174.

<sup>50</sup> *Id.* at 177.

<sup>51</sup> Emergency Powers Act, 1920, 10 & 11 Geo. 5, c.55 (repealed 2004).

conflict, it was “abundantly clear to everyone that the new act was intended to be used against the strikers.”<sup>52</sup>

Scheuerman zooms in on the Act as a

microcosm of the entire history of economic emergency power between the mid-nineteenth and mid-twentieth centuries: its proximity to the wartime context linked it to an earlier tradition in which emergency power chiefly functioned as a tool against violent uprisings and foreign invasions; its anti-strike thrust tied it closely to the widespread tendency to rely on emergency authority against the labor movement; and finally, the Act’s forthright concern with guaranteeing the “supply and distribution of food, water, fuel, or light” clearly pointed the way towards the employment of emergency authority for peacetime economic coordination.<sup>53</sup>

While ostensibly confined to the category of essential supplies, the reach of the Act would in practice “encompass a broader gamut of economic matters, industrial disputes and class conflict.”<sup>54</sup> Enacted as a permanent but dormant piece of law, it was quickly and consistently called into life: in 1921 in response to the coal strike; in 1924 for sectional transport workers’ strikes; and in 1926 when the general strike throughout Britain was called.<sup>55</sup> In the last case, the strike itself lasted only a few days, while the state of emergency continued for eight months.<sup>56</sup> By this point the pretence of a link to military conflict or armed insurrection as integral to the notion of emergency had evaporated. Even outside of declared emergencies, the exception continued as the norm in Britain through the economic instability of the 1920s and 1930s: “drastic emergency laws were enacted in the normal manner”;<sup>57</sup> that is, through the regular parliamentary legislative process. Specific recourse to emergency executive authority in the form of enabling acts—delegating law-making power to the cabinet of Ramsay MacDonald’s emergency “national government”—was made during the severe depression of 1931–1932.<sup>58</sup>

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<sup>52</sup> Mark Neocleous, *From Martial Law to the War on Terror*, 10 *NEW CRIM. L. REV.* 489, 502 (2007).

<sup>53</sup> Scheuerman, *supra* note 2, at 1877–78.

<sup>54</sup> KEITH JEFFERY & PETER HENNESSY, *STATES OF EMERGENCY: BRITISH GOVERNMENTS AND STRIKEBREAKING SINCE 1919*, 213 (1983).

<sup>55</sup> Cecil T. Carr, *Crisis Legislation in Britain*, 40 *COLUM. L. REV.* 1309, 1312–13 (1940).

<sup>56</sup> Neocleous, *supra* note 52, at 502; JANE MORGAN, *CONFLICT AND ORDER: THE POLICE AND LABOUR DISPUTES IN ENGLAND AND WALES, 1900–1939* (1987).

<sup>57</sup> ROSSITER, *supra* note 1, at 178.

<sup>58</sup> For analysis of the wide-ranging departures from accepted British constitutional practice in MacDonald’s formation of the national government and management of the



It was in the context of the same economic maladies that Roosevelt immediately waged war on the emergency upon election in 1933. His inaugural address was drenched with military analogy, alluding to the “leadership of this great army of our people dedicated to a disciplined attack upon our common problems” and “treating the task as we would treat the emergency of a war.”<sup>59</sup> Two days later, without recourse to Congress, the President officially declared a state of emergency, and would rely on not only the language, but the legal framework of war to jettison regular legislative procedures and turn to executive emergency powers for economic regulation.<sup>60</sup> For Roosevelt, this was an emergency that related to far more than banks: “it covered the whole economic and therefore the whole social structure of the country.”<sup>61</sup> Whether it could be said to constitute an impending threat to the *life* of the nation or the existence of the state, however, is doubtful. Regardless, Roosevelt summoned the appreciable executive prerogative provided by the Trading with the Enemy Act 1917 and passed much of the emergency banking regulations of 1933 and other early New Deal legislation under its expanded rubric.<sup>62</sup> The result was “a group of emergency statutes delegating the President unprecedented power to wage war on the economic front.”<sup>63</sup> Such legislation began with declarations of an “acute economic emergency” characterizing disparities in the market as detrimental to the “national public interest,”<sup>64</sup> and subsequently

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whole affair, see, for example, HAROLD J. LASKI, *THE CRISIS AND THE CONSTITUTION: 1931 AND AFTER* (1932).

<sup>59</sup> Roosevelt, *supra* note 47.

<sup>60</sup> AGAMBEN, *supra* note 38, at 21. Agamben too notes Roosevelt’s strategic invocation of the “metaphor of war” and how he “was able to assume extraordinary powers to cope with the Great Depression by presenting his actions as those of a commander during a military campaign.” *Id.* What he concludes from this situation, however, is that military and economic emergency cannot be differentiated within the history of the twentieth century:

[f]rom the constitutional standpoint, the New Deal was realized by delegating to the president . . . an unlimited power to regulate and control every aspect of the economic life of the country—a fact that is in perfect conformity with the already mentioned parallelism between military and economic emergencies that characterizes the politics of the twentieth century.

*Id.* at 22.

<sup>61</sup> FRANKLIN D. ROOSEVELT, *ON OUR WAY* 35 (1934).

<sup>62</sup> See, e.g., Emergency Banking Relief Act of 1933, Pub. L. No. 73–1, 1 § 2, 48 Stat. 1. (1933).

<sup>63</sup> ROSSITER, *supra* note 1, at 260.

<sup>64</sup> See, e.g., Agricultural Adjustment Act of 1933, Pub. L. No. 73–10, tit. I, 48 Stat. 31 (1933).

granted the executive an essentially unfettered ability to regulate industry and to authorize monopolies and cartels in certain sectors.<sup>65</sup> Emergency powers also filtered through to industrial conflict; according to congressional records, there were over thirty labor disputes between 1933 and 1935 in which the military was deployed to intervene on grounds of emergency.<sup>66</sup> Neocleous presents the New Deal as “emergency rule writ large”<sup>67</sup> and frames it in the context of a nexus between emergency powers and security that had become central to political administration. Rooted as it is in a distinctly economic emergency, this nexus feeds in to my argument regarding the broader relationship between security and economy: “[i]n conjoining the security project with the ‘emergency situation’ faced by global capital, the U.S. was able to gain ideological support for both the politico-strategic and economic dimensions of liberal order building: to think simultaneously about the security of capital and the American state.”<sup>68</sup>

The embedded doctrine of emergency would persist in the United States and elsewhere long beyond the conclusion of the New Deal and the ensuing emergency created by the Second World War. The end of the war may have been assumed to herald the end of any remaining

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<sup>65</sup> See, e.g., National Industrial Recovery Act of 1933, Pub. L. No. 73-67, 48 Stat. 195 (1933).

<sup>66</sup> Neocleous, *supra* note 52, at 505 (citing 80 CONG. REC. 2069 (1936)).

<sup>67</sup> Neocleous, *supra* note 52. See also Michal R. Belknap, *The New Deal and the Emergency Powers Doctrine*, 62 TEX. L. REV. 67 (1983).

<sup>68</sup> Neocleous, *supra* note 52, at 511. The emergency clauses of Article 48 of the Weimar Constitution in Germany followed a similar trajectory insofar as “public order” and “security” assumed a function that was economic in character:

From late 1922 it was emergency ordinances and decrees of a social and economic nature that predominated. One Reich Chancellor, Luther, noted this in 1928 when he commented that Article 48 “proved to be very useful in cases of extreme urgency when economic measures—and especially the imposition of taxes—had to be carried out.” It has been estimated that of the sixty-seven decrees issued between October 1922 and 1925, forty-four were devoted to economic, fiscal, and social problems. Similarly, approximately sixty emergency decrees were passed during the progressive deterioration of the economic situation in the early 1930s, virtually all of which were for economic purposes.

Mark Neocleous, *The Problem with Normality: Taking Exception to “Permanent Emergency,”* 31 ALTERNATIVES 191, 196 (2006), citing Hans Boldt, *Article 48 of the Weimar Constitution: Its Historical and Political Implications*, in GERMAN DEMOCRACY AND THE TRIUMPH OF HITLER 91 (Anthony Nicholls & Erich Matthias eds., 1971). Scheuerman reminds us that Carl Schmitt himself “was a prominent advisor to the quasi-constitutional executive regimes that ruled Weimar Germany during 1930–33. These governments (under Brüning and then Papen) relied on the emergency clauses of the Weimar Constitution (Article 48) to undertake far-reaching forms of economic and social regulation.” Scheuerman, *supra* note 2, at 1869.

threat to the life of the nation, and a return to normalcy. Yet wartime emergency powers as set out in Britain by the Emergency Powers (Defence) Act 1939 were again retained by government to facilitate broad executive control in the economic sphere, including over industrial relations and the market price of supplies and services.<sup>69</sup> The Emergency Powers Act 1920 (as amended by the Emergency Powers Act 1964) was consistently invoked during strikes between the late 1940s and the 1980s,<sup>70</sup> with the Crown regularly declaring an official state of emergency, as in 1973 when on the basis of “industrial disputes affecting persons employed in the coal mines and in the electricity supply industry . . . ‘Her Majesty . . . deemed it proper . . . to declare that a state of emergency exists.’”<sup>71</sup> Such routine exercise of emergency powers essentially as a weapon of class warfare personify Leonard Feldman’s image of the “prosaic politics of emergency.”<sup>72</sup> Emergency remained the default setting throughout the British Empire, with one count tallying twenty-nine separate declarations of emergency between 1946 and 1960 in colonies from Aden to Zanzibar,<sup>73</sup> many relating to economic matters and to class as well as racial subjugation.

Likewise in the United States, reliance on emergency powers to manage the economy continued in the post-war years, with successive presidents relying upon “a broad range of emergency delegations of impressive power to conclude strikes, control international trade, and even reshuffle the rules of the international monetary system.”<sup>74</sup> Martial law was even invoked to curb labor movements in the 1950s and 1960s;<sup>75</sup> President Nixon proclaimed a national emergency in

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<sup>69</sup> For further detail on the immediate years after the war, see JOHN EAVES, *EMERGENCY POWERS AND THE PARLIAMENTARY WATCHDOG: PARLIAMENT AND THE EXECUTIVE IN GREAT BRITAIN, 1939–1951* (1957). Emergency powers were applied to an expansive range of fields through temporary regulations such as the Supplies and Services (Transitional Powers) Act 1945 (extending emergency economic powers from 1946–51) and through ordinary permanent legislation such as the Exchange Control Act 1947.

<sup>70</sup> See HOUSE OF COMMONS LIBRARY RESEARCH DIVISION, *BACKGROUND PAPER NO. 66: EMERGENCY POWERS, 1979*.

<sup>71</sup> 866 PARL. DEB., H.C. (5th ser.) (1973) 414–15.

<sup>72</sup> Leonard C. Feldman, *The Banality of Emergency: On the Time and Space of “Political Necessity,”* in *SOVEREIGNTY, EMERGENCY, LEGALITY* 136, 138 (Austin Sarat ed., 2010).

<sup>73</sup> Denys C. Holland, *Emergency Legislation in the Commonwealth,* in *CURRENT LEGAL PROBLEMS, 1960*, at 148, 148 (George W. Keeton & Georg Schwarzenberger eds., 1960).

<sup>74</sup> Scheuerman, *supra* note 2, at 1871–72.

<sup>75</sup> See ROBERT S. RANKIN & WINFRIED R. DALLMAYR, *FREEDOM AND EMERGENCY POWERS IN THE COLD WAR* 172–87 (1964).

order to force the discontinuation of a postal strike in 1970, and another the following year in an attempt to manage an international monetary crisis by terminating certain trade agreement clauses and imposing import duties.<sup>76</sup> Based on the fact that the country had been in a state of emergency since March 1933, comprised in fact of four overlapping presidentially-proclaimed states of national emergency (three of which were purely economic in character), a Special Committee on the Termination of the National Emergency had been established “to examine the consequences of terminating the declared states of national emergency.”<sup>77</sup> Notably, this Committee reported that the plethora<sup>78</sup> of emergency statutes enacted over the preceding four decades delegated to the executive not only exceptional military authority but also distinctly economic powers to “seize property; organize and control the means of production; seize commodities.”<sup>79</sup> From the process initiated by the Committee’s report came the National Emergencies Act 1976 to regulate exceptional executive authority, and to repeal many of the emergency measures.<sup>80</sup> Certain key provisions remained in place, however,<sup>81</sup> and broad authority was vested in the executive by the International Emergency Economic Powers Act 1977 to restrict trade and commerce with states or classes of persons seen as providing a threat to the United States.<sup>82</sup> A presidential declaration of national emergency in relation to the threat is required to trigger the Act, and many such declarations have been made in relation to internal issues in states such as Burma, Belarus, and Libya.<sup>83</sup> How repressive practices by undemocratic regimes in

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<sup>76</sup> 10 U.S.C. 673 (1970); Proclamation No. 4074, 36 Fed. Reg. 15724 (Aug. 17, 1971).

<sup>77</sup> SPECIAL COMM. ON THE TERMINATION OF THE NAT’L EMERGENCY POWERS STATUTES: PROVISIONS OF FEDERAL LAW NOW IN EFFECT DELEGATING TO THE EXECUTIVE EXTRAORDINARY AUTHORITY IN TIME OF NATIONAL EMERGENCY, S. REP. NO. 93-549, at III (1973).

<sup>78</sup> Another Senate committee document noted “at least 470 significant emergency powers statutes without time limitations delegating to the Executive extensive discretionary powers.” SPECIAL COMM. ON NAT’L EMERGENCIES AND DELEGATED EMERGENCY POWERS, A BRIEF HISTORY OF EMERGENCY POWERS IN THE UNITED STATES, at V (Comm. Print 1974).

<sup>79</sup> EMERGENCY POWERS STATUTES, *supra* note 77.

<sup>80</sup> 90 Stat. 1255, 50 U.S.C. 1601.

<sup>81</sup> *E.g.*, Section 5(b) of the Trading With the Enemy Act 1917, 50 App. U.S.C. § 5(b) (2012).

<sup>82</sup> 91 Stat. 1626, 50 U.S.C. §§ 1701–1706.

<sup>83</sup> Prohibiting New Investment in Burma, 62 Fed. Reg. 28301 (May 20, 1997); Blocking Property of Certain Persons Undermining Democratic Processes or Institutions in Belarus, 71 Fed. Reg. 35485 (June 20, 2006); Prohibiting Trade and Certain Transactions Involving Libya, 51 Fed. Reg. 875 (Jan. 9, 1986).

distant corners of world, against their own peoples, constitute national emergencies in the United States is unclear. Regardless, the effect is further “emergency” regulation of economic activity.

Emergency governance of economic affairs is not limited to Europe and North America. Emergency powers in Israel, commonly assumed to be confined to national security matters, are “exercised in an almost routine fashion” with respect to industrial disputes, labor law, trade and monetary issues. Emergency powers are invoked, for example, as a convenient way of bypassing onerous labor dispute resolution processes.<sup>84</sup> In Sri Lanka, the long-standing state of emergency was retained and renewed until late 2011 despite an overt end to its underlying conflict in early 2009.<sup>85</sup> Through the intervening period, the coalescence of political and economic emergency powers manifested in the utilization of emergency regulations to implement economic cutbacks at the behest of the International Monetary Fund, and to suppress popular opposition to such cuts. Indeed, intervention by the international financial institutions in the Third World has frequently been entwined with emergency discourse.

### III INTERNATIONAL FINANCIAL INSTITUTIONS AND OPPORTUNITY IN CRISIS

Since the collapse of the Soviet barriers to a capitalist world market, “end of history” globalization narratives have predominated. For world-systems theorists such as Samir Amin, globalization—“associated with the spread and deepening of capitalism”<sup>86</sup> does not represent a departure from previous trajectories, but rather a fine-tuning of imperial structures that has similar objectives (market expansion and control, harnessing of natural resources and exploitation of labor in the periphery) at its heart.<sup>87</sup> From the perspective of the Third World, global market fusion connotes the

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<sup>84</sup> GROSS & NÍ AOLÁIN, *supra* note 1, at 232–33, citing MENACHEM HOFNUNG, *DEMOCRACY, LAW AND NATIONAL SECURITY IN ISRAEL* 55–60 (1996); Mordechai Mironi, *Back-to-Work Emergency Orders: Government Intervention in Labor Disputes in Essential Services*, 15 *MISHPATIM* 350, 380–86 (1986).

<sup>85</sup> On the belated repeal of Sri Lanka’s 28-year-old Emergency Regulations (and incorporation of emergency powers into “normal” anti-terrorism legislation), see, e.g., *Sri Lanka’s State of Emergency: Repealed or Rebranded?*, *SRI LANKA GUARDIAN*, Sept. 10, 2011.

<sup>86</sup> Samir Amin, *The Challenge of Globalization*, 3 *REV. INT’L POL. ECON.* 216, 216 (David Luckin trans., 1996).

<sup>87</sup> Samir Amin, *Imperialism and Globalization*, 53 *MONTHLY REV.* 6, 9 (2001).

consolidated management of the non-European world by international institutions in the form of the International Monetary Fund (IMF) and the World Bank, through the “techniques and technologies generated by globalization and governance.”<sup>88</sup> Viewed through a TWAIL lens, therefore, globalization means simply that “domination is global.”<sup>89</sup> What can be described as “the relocation of sovereign economic powers in international trade and financial institutions” constitutes a form of “recolonization” that haunts the Third World.<sup>90</sup>

Nation-state sovereignty, so long the light at the end of the tunnel for the anti-colonial emancipatory struggle, has proven illusory for Third World peoples, recalibrated and diluted by the forces of global capital flows. As such, colonial political hegemony is reincarnated in an economic avatar, courtesy of the market. The dilution of nation-state sovereignty does not denote the decline of sovereignty itself, however; it has rather assumed a more global guise in the form of a series of national and supranational organisms. Where nation-state imperialism involved the extension of the sovereignty of European states beyond their own boundaries, global corporate imperialism is rooted less in individual territorial power centers and more in the globalization of capitalist production and trade.

While by definition no single nation-state can form the center of this diffuse apparatus, the United States has for several decades occupied a privileged position, owing not in this case to its similarities to the old European imperialist powers but to its differences; by the fact that its hegemony is not based upon, or limited by, territorial boundaries.<sup>91</sup> As the Second World War dragged on, the colonial empires of increasingly weakened and destabilized European powers began to appear vulnerable. The U.S. administration had been actively planning for the implementation of a new post-war world order since 1940, with three priorities on the agenda: “reconstructing Europe, containing communism and reaping the spoils of the collapsing European colonial empires”;<sup>92</sup> the latter being crucial to American access to raw materials, as well as market and capital investment expansion (much as it is to China today). Thus, in the years that followed, “colonies” would be succeeded by

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<sup>88</sup> ANGHIE, *supra* note 12, at 246.

<sup>89</sup> Makau Mutua, *What Is TWAIL?*, 94 AM. SOC’Y INT’L L. PROC. 31, 38 (2000).

<sup>90</sup> Chimni, *supra* note 3, at 3 n.1.

<sup>91</sup> *Id.* at xiv.

<sup>92</sup> JACQUES B. GÉLINAS, FREEDOM FROM DEBT: THE REAPPROPRIATION OF DEVELOPMENT THROUGH FINANCIAL SELF-RELIANCE 3 (1994) (Arnold Bennett & Raymond Robitaille trans., 1998).

“underdeveloped regions” in need of international development assistance and private investment (regardless of the views of the populations concerned). The Bretton Woods international financial institutions<sup>93</sup> became the de facto managers of economic policy in the vast majority of “developing” countries, imposing Western conceptions of “good governance” through “structural adjustment programmes” that necessitated radical economic restructuring (including liberalization of trade and markets, increased privatization and reduced social spending; all to the benefit of the industrialized North and conducive to the maintenance of international economic structures that prejudice the South) and produced a deepening vortex of debt and dependency.<sup>94</sup>

Such involvement of the World Bank and IMF in the domestic affairs of Third World states and eastern bloc countries in post-Soviet transition has typically been premised on a form of emergency discourse that serves as a convenient conduit for the infliction of neoliberal doctrine and economic “shock therapy.” The theory underpinning the “the crisis hypothesis” articulated by Mancur Olson<sup>95</sup> and others is that societies that experience no major crises have a natural tendency over time to become increasingly susceptible to the influence of pressure groups (representing, for instance, cotton-farmers, steel-producers or trade unions) and the demands of ordinary workers and voters. On the basis of an argument that protectionist policies advocated by such interest groups are regressive and detrimental to economic growth, neoliberal doctrinaires realized the benefits to interruptions of the “normal” circumstances under which such policies are able to blossom. They sought to establish the need for radical policy reform to emerge from the ashes of any national crisis, to capitalize accordingly where such crises occur, and even to

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<sup>93</sup> The World Bank and the International Monetary Fund, both creations of international treaty law; the former with a mandate to promote development and foreign investment, the latter to regulate monetary policy. On the International Monetary Fund, see M. Zammit Cutajar, *The International Monetary Fund*, in *THE POLITICAL ECONOMY OF LAW*, *supra* note 19, at 353; on the World Bank, see A.A. Fatouros, *The World Bank*, in *THE POLITICAL ECONOMY OF LAW*, *supra* note 19, at 327.

<sup>94</sup> For further discussion see ANGHIE, *supra* note 12, at 258–63. By the turn of the millennium, in spite of any optimism that the UN’s ‘Millennium Development Goals’ may have generated, the reality was that “Crushing debt, which the West advanced to corrupt, undemocratic regimes, now ensures that many countries in Africa, Asia, and Latin America cannot create meaningful development programs. Yet the international financial institutions refuse to do the right thing and either right off or forgive the debt.” Mutua, *supra* note 89, at 35.

<sup>95</sup> See generally MANCUR OLSON, *THE RISE AND DECLINE OF NATIONS: ECONOMIC GROWTH, STAGFLATION, AND SOCIAL RIGIDITIES* (1982).

consider purposely engendering real or apparent crises where they do not occur “naturally”:

If it indeed proves difficult to identify cases of the sort of extensive policy reform needed to make the transition to an open, competitive, market economy that were not a response to a fundamental crisis, then one will have to ask whether it could conceivably make sense to think of deliberately provoking a crisis so as to remove the political logjam to reform . . . . Is it possible to conceive of a pseudo-crisis that could serve the same positive function without the costs of a real crisis?<sup>96</sup>

Applied to structural adjustment programs in the Third World, the idea was based on two simple elements: nations engulfed in an emergency often require financial assistance to stabilize their situation, and in the context of such emergency circumstances a sweeping overhaul of economic policy and structure will be easier for its advocates to justify, more difficult for its opponents to resist. The state of emergency emerges as “a stabilizing political strategy; a true foundation of ‘predatory capitalism.’”<sup>97</sup> Milton Friedman and the “Chicago School” economists were early pioneers of this philosophy in the operation of American foreign policy in the global South, which was implemented through alliances with cooperative leaders in the countries concerned (often installed by undemocratic means to replace uncooperative counterparts) and through coercive loan packages that tied financial assistance to privatization and free-trade policies.

One of the first significant laboratories in which this experiment was tested was Chile, where following General Pinochet’s U.S.-sponsored military coup in 1973, a state of siege was declared, martial law introduced and parliament suspended. In the shadows of the upheaval and turmoil, complete liberalization of the economy and repeal of Salvador Allende’s social protections were quickly instituted by Pinochet’s Chicago School-trained team of economists.<sup>98</sup> Chile remained under either a state of siege or a state of emergency (the latter being the less draconian of the two under Chilean law) for the

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<sup>96</sup> JOHN WILLIAMSON, *In Search of a Manual for Technopols*, in *THE POLITICAL ECONOMY OF POLICY REFORM* 11, 20 (John Williamson ed., 1994).

<sup>97</sup> Ugo Mattei, *Emergency-Based Predatory Capitalism: The Rule of Law, Alternative Dispute Resolution, and Development*, in *CONTEMPORARY STATES OF EMERGENCY: THE POLITICS OF MILITARY AND HUMANITARIAN INTERVENTIONS* 89 (Didier Fassin & Mariella Pandolfi eds., 2010).

<sup>98</sup> See, e.g., JUAN GABRIEL VALDES, *PINOCHET’S ECONOMISTS: THE CHICAGO SCHOOL IN CHILE* (1995).



majority of Pinochet's seventeen-year rule,<sup>99</sup> with the regime oscillating between the two legal frameworks according to prevailing socio-economic conditions. Emergency measures—including twenty-four hour curfews, comprehensive media censorship, banning of political parties and prohibition of trade union activities—fed into broader repressive policies of extra-judicial killings, torture, disappearances and mass displacement. Throughout the 1970s, the military junta expanded and systematized emergency powers before incorporating them into a new Chilean constitution in 1980.<sup>100</sup> The state of siege had been reduced to a state of emergency in 1978 only to be reinstated in 1984 following protests against widespread unemployment and government repression of trade unions. In 1985, Pinochet hastily lifted the state of siege to ensure U.S. support in advance of a vote on a World Bank loan to Chile,<sup>101</sup> again reverting the following year. A similar state of indefinite exception was born of the crisis conditions of hyperinflation in Bolivia, which executed its own neoliberal shock therapy program in the 1980s under the guise of a state of national emergency.

On the back of such relatively successful dilution of democracy and introduction of emergency free-market reforms in Latin America, by the late 1980s the international financial institutions themselves—moving inexorably towards the tellingly-named “Washington Consensus” on the need for deregulation, increased privatization and reduced social spending—were subsuming free-market requirements into the debt relief and emergency loan packages provided to crisis-ridden Third World states.<sup>102</sup> A similar model was incorporated into the IMF's engagement in the post-Soviet transition in Eastern Europe, in which emergency powers were necessary to carry the type of economic reconstruction advocated by the market capitalist gurus that descended on Warsaw, Riga, and Moscow. The result was that soon thereafter, “[n]eoliberalism and relatively open-ended delegations of exceptional legislative authority to the executive, justified by reference to the spectre of economic instability, are now political bedfellows in fledgling liberal democracies from Moscow to Buenos

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<sup>99</sup> DIANA CHILDRESS, *AUGUSTO PINOCHET'S CHILE* 70 (2009).

<sup>100</sup> MARK ENSALACO, *CHILE UNDER PINOCHET: RECOVERING THE TRUTH* 51 (2000).

<sup>101</sup> HERALDO MUÑOZ, *THE DICTATOR'S SHADOW: LIFE UNDER AUGUSTO PINOCHET* 156 (2008).

<sup>102</sup> For further discussion, see Sundhya Pahuja, *Technologies of Empire: IMF Conditionality and the Reinscription of the North/South Divide*, 13 *LEIDEN J. INT'L L.* 749 (2000).

Aires.”<sup>103</sup> In a climate of global economic integration, the assumption of exceptional executive discretion to administer the decisions of international financial overlords is perhaps now easier than ever for domestic governments to justify, endowed as they are with an opportune smokescreen behind which to pursue objectionable socio-economic policies. This has been seen in varying degrees from the well-documented cases of Russia and Argentina, to those of Thailand—where economic shock treatment was disbursed through the emergency medicine of executive decree—and Algeria, where Washington Consensus policies of loan dependency and domestic austerity through the 1990s were followed by further IMF-driven reforms under a 2001 Emergency Reconstruction Plan that promoted foreign exploitation of Algeria’s hydrocarbons.<sup>104</sup>

It may once have been the case that “Western states are immune from the operations of the [international financial institutions] although they engage in forms of protectionism, for example, that have been targeted by the [international financial institutions] when present in Third World societies.”<sup>105</sup> Western states that have been rendered increasingly peripheral to Europe’s core, however, appear to have lost that immunity due to the threat that their adjudged fiscal recklessness has generated for the centers of European capitalism. The IMF’s conditional loan policy has made its way up the food chain from the Third World nations of Latin America, Africa, and Asia via the Second World space in Eastern Europe now to the fringes of the European Union. The end result for the Third World is that it is left burdened with the debt imposed on it previously and neglected by the IMF in a time of global economic crisis.

Although caused primarily by the sort of unsustainable neoliberal policies often administered under the guise of emergency that have privileged market interests over public interest, and global finance over the real economy, the response to the post-2008 economic crisis has been more emergency measures to bolster the international financial sector. U.N. estimates put the level of funding committed to restoring the operations of global finance by 2010 at almost ten times that devoted to the fiscal stimulus and social protection programs that

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<sup>103</sup> Scheurman, *supra* note 2, at 1872. On the use of emergency economic authority in Latin American and Eastern Europe, see also EXECUTIVE DECREE AUTHORITY (John M. Carey & Matthew Soberg Shugart eds., 1998).

<sup>104</sup> Muriam Haleh Davis, *Emergencies and Economics: Algeria and the Politics of Memory*, JADALIYYA (Mar. 1, 2011), [http://www.jadaliyya.com/pages/index/766/emergencies-and-economics\\_algeria-and-the-politics](http://www.jadaliyya.com/pages/index/766/emergencies-and-economics_algeria-and-the-politics).

<sup>105</sup> ANGHIE, *supra* note 12, at 269.

are fundamental to rescuing the real economy and preserving basic living standards.<sup>106</sup> Having appeared to be drifting towards irrelevance beforehand, the IMF has been empowered as the chief lending institution for countries afflicted by the debt crisis. Virtually all assistance given by the IMF has come in the form of further debt-creating instruments rather than grants to those in most dire straits, with the provision of funds continuing to be conditional upon prescribed budgetary policies.<sup>107</sup> Further, even in the early period of the crisis in 2008–2009 (i.e., before the bailout of Greece was on the table) the IMF had diverted its attention from the lowest-income countries in Africa and Asia to the opportunities in non-EU Europe and elsewhere: “by November 2009, 18 countries had drawn on emergency financing through standby programs of the IMF, totaling some \$53 billion, of which about \$25 billion was allocated to Iceland and countries in Eastern and Central Europe, \$18 billion to economies in transition and only \$10 billion to developing countries.”<sup>108</sup>

#### IV

##### STATES OF EMERGENCY AND THE PROTECTION OF CAPITAL

The prevalent international capitalist system (whose structural evolution has itself facilitated the expansion of emergency economic power) is marked by a diffusion of power from the once all-powerful state to corporations vested with significant control over global capital and resources. In one sense, we can see the current situation as having revolved full circle from the hegemony of the Dutch and British East Indies companies; the physical trading of spices and textiles merely substituted by the virtual trading of financial products. Significantly, the somewhat unruly apparatus of contemporary global capitalism, despite a decentered and deterritorializing character, nonetheless relies on the police and security forces of nation-states to uphold its logic and protect its performers. Law, including emergency powers, and legal discourse intersect with the operations of transnational corporations and the assemblies of international trade

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<sup>106</sup> U.N. DESA & UNCTAD, *World Economic Situation and Prospects 2010* (Dec. 2, 2009).

<sup>107</sup> See, e.g., Bhumika Muchhala, *The IMF's Financial Crisis Loans: No Change in Conditionalities*, THIRD WORLD NETWORK (Mar. 11, 2009), <http://www.twinside.org.sg/title2/par/IMF.Crisis.Loans-Overview.TWN.March.2009.doc>.

<sup>108</sup> ALDO CALIARI ET AL., CENTER OF CONCERN ET AL., *BRINGING HUMAN RIGHTS TO BEAR IN TIMES OF CRISIS: A HUMAN RIGHTS ANALYSIS OF GOVERNMENT RESPONSES TO THE ECONOMIC CRISIS*, 17 (Mar. 2010), [http://www.escr-net.org/usr\\_doc/HRResponsestoEconCrisis\\_Final.pdf](http://www.escr-net.org/usr_doc/HRResponsestoEconCrisis_Final.pdf).

organizations in significant ways. Without attempting to detail such intersections exhaustively, a number of examples can be touched upon for illustration.

#### A. *Suppression of Resistance to Globalization*

The aforementioned volume on *The Political Economy of Law* begins with excerpts from the judgments of the Ocean Island cases.<sup>109</sup> The small Pacific island in question was established as a British settlement after the discovery of phosphate there in 1900, and was promptly “denuded of its valuable phosphates and converted into an uninhabitable honeycomb of pinnacles, pits, and refuse piles during mining operations under British colonial supervision.”<sup>110</sup> The story unfolds with an all too familiar gist: the circumvention of regulations protecting native land interests, the sale of exploitation rights to mining companies, the degradation of the native environment by those companies in disregard of the terms of their access, and an absence of accountability. In the 1970s, the displaced inhabitants of the land in question—the Banabans—brought a claim before the Chancery Division of the High Court in London against the Crown and three British Phosphate Commissioners, seeking payment of royalties owed to them by the mining companies as well as restoration of the land to a condition suitable for their return. The ensuing judgment<sup>111</sup> rejected the Banabans’ argument that the Crown owed them a fiduciary duty (holding the parties formally equal in law without regard to the profound imbalance in their respective political and economic power), denied the claim for specific performance in terms of restoration of the land and awarded damages according to English law rather than Banaban rules or principles, taking no account of the social and environmental destruction wrought. The damages were based solely on the reduced value of the land as a marketable commodity; the court equated “restoration” with “replanting” and the mining companies were thus ordered only to re-establish the land’s previous vegetation levels by replanting some coconut palms, but not to reverse the major upheaval visited on the topography of the land, or to replenish the depleted soil. Sally Engle Merry’s conclusion is an unavoidable one—the case signifies a lamentable general theme: the expansion of European and U.S. capital, in concert with colonial rule,

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<sup>109</sup> THE POLITICAL ECONOMY OF LAW, *supra* note 19, at 11.

<sup>110</sup> Sally Engle Merry, *Law and Colonialism*, 25 L. SOC’Y REV. 889, 910 (1991).

<sup>111</sup> *Tito v. Waddell* (No. 2), [1977] Ch. 106.

has all too often determined the patterns of economic development and social transformation of the Third World.<sup>112</sup>

As the exploitation of Third World resources by multinational corporations continues today, so too does the use of law to facilitate such exploitation. Mimicking the policies of European colonizers, post-colonial states have turned to emergency laws and powers in order to protect the interest of foreign companies in the face of resistance from their own citizens.

The use of emergency measures to criminalize social protest and resistance to major extractive industry projects in Latin America is a case in point, where civil society organizations have emphasized the use of law as a form of harassment in concert with a strategy of increased militarization:

By maintaining overly vague definitions of concepts such as “hostile groups” or criteria for states of emergency, military forces are able to mobilise in response to protest actions that normally would not justify domestic military deployment. This is the case in for example Peru, Ecuador, Mexico and Guatemala.<sup>113</sup>

In this context, Ecuador declared a state of emergency on seventy-seven separate occasions between 2000 and 2006,<sup>114</sup> including in response to indigenous protests against oil production in the Amazonian provinces of Sucumbios and Orellana.<sup>115</sup> In Bolivia, the Cochabamba “water war” in 1999 (arising from protests against the granting of a concession contract for water services to a private consortium) prompted the government to declare a nation-wide state of emergency.<sup>116</sup> A state of exception was likewise declared in Guatemala in 2008 to suppress protests against the activities of

<sup>112</sup> Merry, *supra* note 110, at 910–11.

<sup>113</sup> COOPERACIÓN INTERNACIONAL PARA EL DESARROLLO Y LA SOLIDARIDAD (CIDSE), CRIMINALISATION OF SOCIAL PROTEST RELATED TO EXTRACTIVE INDUSTRIES IN LATIN AMERICA, 3 (June 2011), [http://www.cidse.org/uploadedFiles/Publications/Publication\\_repository/Criminalisation%20of%20Social%20Protest%20related%20to%20Extractive%20Industries%20in%20Latin%20America\\_CIDSE%20analysis%20and%20recommendations\\_June%202011.pdf](http://www.cidse.org/uploadedFiles/Publications/Publication_repository/Criminalisation%20of%20Social%20Protest%20related%20to%20Extractive%20Industries%20in%20Latin%20America_CIDSE%20analysis%20and%20recommendations_June%202011.pdf) (citation omitted).

<sup>114</sup> FÉDÉRATION INTERNATIONALE DES LIGUES DES DROITS DE L'HOMME (FIDH), No. 460/3, LA PROTESTA SOCIAL PACÍFICA: ¿UN DERECHO EN LAS AMÉRICAS?, 49 (Oct. 2006), [http://www.fidh.org/spip.php?page=article\\_pdf&id\\_article=4477](http://www.fidh.org/spip.php?page=article_pdf&id_article=4477).

<sup>115</sup> *Ecuador Govt Declares State of Emergency for Amazon Oil Protest*, XINHUA NEWS AGENCY (Aug. 18, 2005, 1:54 PM), [http://news.xinhuanet.com/english/2005-08/18/content\\_3371151.htm](http://news.xinhuanet.com/english/2005-08/18/content_3371151.htm).

<sup>116</sup> Ibiro T. Odumosu, *The Law and Politics of Engaging Resistance in Investment Dispute Settlement*, 26 PENN ST. INT'L L. REV. 251, 259–60 (2007). In this instance, the government ultimately cancelled the concession contract and granted many of the protestors' requests.

mining companies. A fifteen-day military occupation of the affected area ensued pursuant to the emergency framework, during which the behavior of the armed forces prompted the submission by local communities of multiple complaints of abuse.<sup>117</sup> In Colombia, such exceptional situations have been normalized in areas where extractive industries operate, with a permanent military presence often established to facilitate foreign mining companies and curb local resistance.<sup>118</sup> In northern Peru, a state of emergency was declared by President Ollanta Humala in December 2011 to suppress local protests against the construction of an opencast gold and copper mine by the U.S.-based Newmont Mining Corporation, in what would be the largest foreign investment project in Peru's history.<sup>119</sup> Residents of the Cajamarca region are opposed to the project for fear of environmental pollution and degradation of the water supply.

The list can continue but the common denominator is clear: the harnessing of the state of emergency as an instrument of exclusion, to delegitimize popular protest against potentially harmful and exploitative extraction of natural resources and to circumvent the participation of local and indigenous communities in the resource utilization process.

In addition to oiling the gears of resource exploitation for the purposes of global capitalist consumption, states of emergency have also been invoked in attempts to forestall opposition to the free trade paradigm and neoliberal globalization. This can be seen in a panorama that stretches from rural communities in the Third World, where free trade agreements carry an inherent threat to the livelihoods of small-scale farmers, to large cities in the West where international trade summits convene.

An indigenous uprising in Ecuador in 2006 in defiance of the government's negotiation of a free trade agreement with the United

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<sup>117</sup> Leonor Hurtado, *La Ambición Individualista Disfrazada como "Desarrollo."* SODEPAZ (Oct. 29, 2008, 9:20 AM), <http://www.sodepaz.org/america-latina-mainmenu-15/guatemala-mainmenu-37/732-la-ambicion-individualista-disfrazada-como-desarrollo.html?tmpl=component&print=1&layout=default&page=>.

<sup>118</sup> MININGWATCH CANADA, CENSAT-AGUA VIVA & INTER PARES, LAND AND CONFLICT RESOURCE EXTRACTION, HUMAN RIGHTS, AND CORPORATE SOCIAL RESPONSIBILITY: CANADIAN COMPANIES IN COLOMBIA, (Sept. 2009), [http://www.interpares.ca/en/publications/pdf/Land\\_and\\_Conflict.pdf](http://www.interpares.ca/en/publications/pdf/Land_and_Conflict.pdf). Links of this sort between multinational corporations and the military-security apparatus have become increasingly prevalent in recent years, not least in Iraq.

<sup>119</sup> *Peru Declares State of Emergency to End Protests Over Mine*, GUARDIAN (London) (Dec. 5, 2011, 12:34 AM), <http://www.guardian.co.uk/world/2011/dec/05/peru-state-of-emergency-protests-mine>.

States and the operation of American petroleum companies prompted the declaration of an emergency in five provinces and the resort to special powers by Ecuadorian authorities. In numerous African and Latin American countries, burdensome structural adjustment programs implemented at the behest of the International Monetary Fund have triggered “IMF riots”<sup>120</sup> and precipitated the use of exceptional police powers.

Western cities and seats of power hosting major world trade summits have also found themselves on the fault lines of “anti-globalization” protests and resorted to the emergency caveat to justify heavy-handed suppression of such protest, perhaps most famously in the form of the declaration of a state of emergency in Seattle during the 1999 ministerial meeting of the World Trade Organization.<sup>121</sup> Indeed, as Mark Neocleous observes, “[w]orld summits invariably require the declaration of a state of emergency *before* they have even begun”; by way of example, he cites the declaration of a state of emergency in parts of the U.S. state of Georgia in 2004, a full two weeks in advance of the G8 summit on Sea Island.<sup>122</sup> Such a course of action indicates the presumption of a security threat emanating from the mere existence of individuals and groups with a desire to voice opposition and alternatives to prevailing economic structures. Advance invocations of special powers also amount to a form of *auto-emergency* which exemplifies how ingrained the state of emergency now is in the establishment psyche.

In terms of the convergence of political economy and security discourse, the characterization of the “Occupy” movement as a “terrorist/extremist” group by City of London police<sup>123</sup> is testament to ruling class perceptions of any questioning of finance capitalism in its current guise as a national security issue. The drastic emergency law passed in a bid to suppress anti-austerity student protests in Quebec in the spring of 2012,<sup>124</sup> and the blanket ban on assembly and

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<sup>120</sup> ANGHIE, *supra* note 12, at 259–60, citing MICHEL CHOSSUDOVSKY, *THE GLOBALISATION OF POVERTY: IMPACTS OF IMF AND WORLD BANK REFORMS* (Zed Books, 1997) and Sigrun I. Skogly, *Structural Adjustment and Development: Human Rights—An Agenda for Change*, 15 HUM. RTS. Q. 751, 763 (1993).

<sup>121</sup> See Aaron Perrine, *The First Amendment Versus the World Trade Organization: Emergency Powers and the Battle in Seattle*, 76 WASH. L. REV. 635, (2001) (arguing against the constitutional legality of the emergency measures).

<sup>122</sup> Neocleous, *supra* note 52, at 507 n.56 (emphasis in original).

<sup>123</sup> Shiv Malik, *Occupy London's Anger Over Police “Terrorism” Document*, GUARDIAN (London) (Dec. 5, 2011, 11:01 AM), <http://www.guardian.co.uk/uk/2011/dec/05/occupy-london-police-terrorism-document>.

<sup>124</sup> Bill 78, L.Q., 2012, c. 12.

demonstration enforced in Frankfurt (and upheld by Germany's Federal Constitutional Court) imposed on the attempted "Blockupy" protests at the European Central Bank in May 2012<sup>125</sup> are further cases in point.

### ***B. Security Exceptions in International Trade and Investment Law***

The coalescence of national security-inspired emergency discourse and international economic law is visible in the exception clauses of bilateral investment treaties, as well as international trade agreements such as the World Trade Organization agreements (including the General Agreement on Tariffs and Trade (GATT)) and the North American Free Trade Agreement. In the trade sphere, the language used to justify exceptional measures is often seen as "broad, self-judging, and ambiguous."<sup>126</sup> Provisions recognizing exceptions to the treaties of which they form part (Article XXI of the GATT,<sup>127</sup> for instance) allow exceptional economic measures to be taken in the context of threats to security. That a wide margin of appreciation is granted to states in such cases has been indirectly confirmed by the International Court of Justice in the *Nicaragua*<sup>128</sup> and *Oil Platforms*<sup>129</sup> cases, prompting considerations of whether Article XXI permits "anything under the sun."<sup>130</sup> Elastic interpretations of security in the realm of international trade have shown that national security is integral, rather than tangential, to ostensibly civilian functions of the economy. National security has been invoked, for example, to justify

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<sup>125</sup> See, e.g., *Blockupy Frankfurt Day 1: 16 May—Frankfurt effectively in 'State of Exception'*, CRITICAL LEGAL THINKING (May 16, 2012), <http://criticallegalthinking.com/2012/05/16/blockupy-frankfurt-day-1-16-may/>.

<sup>126</sup> JOHN H. JACKSON, *THE WORLD TRADING SYSTEM: LAW AND POLICY OF INTERNATIONAL ECONOMIC RELATIONS* 230 (MIT Press 2nd ed. 1997).

<sup>127</sup> For analysis, see, e.g., Michael J. Hahn, *Vital Interests and the Law of GATT: An Analysis of GATT's Security Exception*, 12 MICH. J. INT'L L. 558 (1991).

<sup>128</sup> In comparing Article XXI of the 1956 Treaty of Friendship, Commerce, and Navigation between the United States and Nicaragua with Article XXI of GATT, the Court emphasized the crucial subjective nature of the latter: "This provision of the GATT . . . stipulates that the Agreement is not to be construed to prevent any contracting party from taking any action which it 'considers necessary for the protection of its essential security interests.'" *Military and Paramilitary Activities In and Against Nicaragua* (Nicar. v. U.S.), 1986 I.C.J. 14, ¶ 222 (June 27) (emphasis added).

<sup>129</sup> In comparing Article XX of the Treaty of Amity between Iran and the United States with Article XXI of GATT, the Court reiterated the position taken in *Nicaragua* as to the definitive nature of the subjective element of GATT's security exception. *Oil Platforms* (Iran v. U.S.), 1996 I.C.J. 803, ¶ 20 (Dec. 12).

<sup>130</sup> Markus A. Reiterer, *Article XXI GATT—Does the National Security Exception Permit "Anything Under the Sun"?*, 2 AUSTRIAN REV. INT'L & EUR. L. 191, 192 (1997).



such measures as restrictions on the import of Polish clothes pegs, on grounds that domestic peg-producing functions would be necessary in the event of an outbreak of hostilities with eastern bloc states.<sup>131</sup>

Such banal—by comparison to actions prompted by perceived ticking bombs and guerrilla insurrections—security paradigms also come to the fore in the context of emergency exceptions in bilateral investment treaty law<sup>132</sup> and the state of necessity, the guise in which the doctrine of emergency crystallizes in customary international law. Arbitration proceedings arising from the state of emergency declared during Argentina’s fiscal crisis of 1999-2002,<sup>133</sup> a paradigmatic “economic emergency,” are a case in point. A host of claims have been made before the World Bank-affiliated International Center for Settlement of Investment Disputes (ICSID) by international investors against the Argentine state. Such claims are based on losses incurred due to Argentina’s actions during the emergency, which adversely affected foreign investors (particularly those invested in the public utilities and energy sectors) and included a sovereign debt default of

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<sup>131</sup> MICHAEL J. TREBILCOCK & ROBERT HOWSE, *THE REGULATION OF INTERNATIONAL TRADE* 9 (Routledge 3rd ed. 2005).

<sup>132</sup> Often signed to facilitate marriages of convenience between capital exporting states seeking investment protections and Third World states seeking increased foreign direct investment, bilateral investment treaties generally operate in that context to create obligations for the Third World states and provide protections for the investors from the capital exporting states. Some such treaties envisage an exception to the legal obligations created in the interests of national security or essential state interests. On the colonial origins of international investment law in general, and the emergence of investor-state arbitration during the era of decolonization, *see* Odumosu, *supra* note 116, at 252–55.

<sup>133</sup> The role of neoliberal doctrine and the IMF in creating the conditions that precipitated this crisis must be noted. Through the 1990s Argentina enacted a range of liberalizing economic policies at the urging of the IMF. Large-scale privatization of public utilities, the signing of bilateral investment treaties, a transformed monetary policy that pegged the peso to the U.S. dollar, and the introduction of free market reforms and a business-friendly regulatory climate combined to successfully attract international investment and create a rapid growth economy. While the strategy of pegging Argentina’s currency to the dollar initially helped the proliferation of this growth, the peso’s fixed value and its true value soon fell out of sync. Argentina’s public debt ballooned as borrowings increased to meet spending costs and maintain the necessary dollar reserves. The IMF continued lending regardless. Economic crises throughout Latin America led to a drying up of foreign investment in the region. By 1999, Argentina was in recession, unemployment had reached a critical level, and deflation, coupled with inflation in the United States, exacerbated the discrepancy in the currency value. Devaluations elsewhere in Latin America had an adverse effect on Argentinean exports, and predatory speculation on the overvalued peso triggered the ultimate deepening of the crisis, resulting in the flight of foreign capital and a run on Argentina’s banks in 2001, followed by formal declaration of a state of emergency, default on sovereign debt of \$132 billion, and abandonment of the peso-dollar parity.

\$155 billion,<sup>134</sup> the freezing of foreign assets, bank deposits and tariff rates, restrictions on withdrawals and transfers, and a significant currency devaluation. Argentina has sought to rely upon a defense of necessity, claiming the extant state of emergency justified derogation from legal obligations to foreign investors. Most relevant to such claims given the domicile of the majority of plaintiffs is the 1994 Argentina–United States Bilateral Investment Treaty, Article XI of which holds that the treaty will not “preclude the application by either Party of measures necessary for the maintenance of public order . . . or the Protection of its own essential security interests.”<sup>135</sup> Argentina in its defense also cites the state of necessity exemption from international obligations under customary international law. Article 25 of the International Law Commission (ILC) Articles on State Responsibility for Internationally Wrongful Acts allows, under strict conditions, for the vindication of an internationally wrongful act where the act is necessary “to safeguard an essential interest against a grave and imminent peril.”<sup>136</sup>

The Argentinean claim that the economic measures taken during the state’s financial crisis were essential to public order and security reinforces the idea of an indivisibility of economy and security. The five most significant arbitration tribunal awards to date in this regard<sup>137</sup> reveal an indeterminacy and inconsistency of law that raise questions as to the suitability of applying the concept of emergency derogations in financial crises, and to the legitimacy of ICSID arbitration itself. Deviations between ICSID tribunals (involving the application of different bodies of law; the drawing of diametrically opposed conclusions on pivotal matters of both fact and law; and the awarding of vastly different amounts of damages) are embodied in the

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<sup>134</sup> *A Decline Without Parallel*, THE ECONOMIST (Feb. 28, 2002), <http://www.economist.com/node/1010911>.

<sup>135</sup> Argentina-U.S. Bilateral Investment Treaty, U.S.-Arg., Nov. 14, 1991, S. TREATY DOC. 103-2, 31 I.L.M. 124.

<sup>136</sup> *Responsibility of States of Internationally Wrongful Acts 2001*, 2001 Y.B. Int’l L. Comm’n 32, U.N. Doc. A/CN.4/SER.A/2001/Add.1 (Part 2).

<sup>137</sup> *CMS Gas Transmission Co. v. Arg. Republic*, ICSID Case No. ARB/01/8, Award (May 12, 2005); *LG&E Energy Corp. v. Arg. Republic*, ICSID Case No. ARB/02/1, Award (Oct. 3, 2006); *Enron Corp. Ponderosa Assets, L.P. v. Arg. Republic*, ICSID Case No. ARB/01/3, Award (May 22, 2007); *Sempra Energy Int’l v. Arg. Republic*, ICSID Case No. ARB/02/16, Award (Sept. 28, 2007); and, *Cont’l Cas. Co. v. Arg. Republic*, ICSID Case No. ARB/03/9, Award (Sept. 5, 2008). For discussion of these claims, see, e.g., Kathryn Khamsi, *Compensation for Non-expropriatory Investment Treaty Breaches in the Argentine Gas Sector Cases: Issues and Implications*, in *THE BACKLASH AGAINST INVESTMENT ARBITRATION: PERCEPTIONS AND REALITY*, (Michael Waibel et al. eds., 2010).

deeply fractured approaches of the first two tribunals dealing with the Argentine crisis—*CMS* and *LG&E*—to the question of necessity, on virtually identical facts.<sup>138</sup> The *CMS* tribunal held in 2005 that Argentina’s actions were not justified by a state of necessity under the meaning of international law, and thus ordered a payment of \$133 million to *CMS* Gas by way of compensation. The following year, the *LG&E* tribunal found the same economic conditions in Argentina to be sufficiently grave as to justify emergency measures and reliance on a state of necessity, and accordingly awarded a much lower sum against the state.

Of the two, the *CMS* finding was the one that initially held sway, followed in 2007 in both the *Enron* and *Sempra* cases, where it was held that the situation in Argentina did not compromise “the very existence of the State and its independence . . .”<sup>139</sup> in the sense of Article 25 of the ILC Articles, and as such that Argentina could not claim necessity for its emergency measures. The tribunal decisions of *CMS*, *Enron* and *Sempra* thus appear to reveal a structural bias that permeates investment arbitration law and operates to protect Western investment interests in the global South.

The 2008 Tribunal decision in *Continental*, on the contrary, absolved Argentina’s economic policy as “necessary” to protect “essential security interests” under Article XI of the bilateral investment treaty and thus awarded the U.S. investor only \$2.8 million of the \$112 million claimed. From this and Annulment Committee decisions in *CMS*, *Enron* and *Sempra*<sup>140</sup> criticizing the original tribunal findings on necessity, an emerging pattern may be discerned. Although state action is not unfettered in the sense of the apparently self-judging standard written into Article XXI of GATT, the ICSID proceedings have gradually allowed a wider margin of appreciation to the state in the context of Article XI of the Argentina–United States Bilateral Investment Treaty. A two-tiered approach has evolved, whereby emergency-based derogations from obligations may be permitted under the Article XI security exception even where the

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<sup>138</sup> For analysis see Michael Waibel, *Two Worlds of Necessity in ICSID Arbitration: CMS and LG&E*, 20 LEIDEN J. INT’L L. 637 (2007).

<sup>139</sup> *Sempra Energy Int’l*, ICSID Case No. ARB/02/16 at ¶ 348.

<sup>140</sup> *CMS Gas Transmission Co. v. Arg. Republic*, ICSID Case No. ARB/01/8, Decision of the *Ad Hoc* Committee on the Application for Annulment of the Argentine Republic (Sept. 25, 2007); *Enron Corp. Ponderosa Assets, L.P. v. Arg. Republic*, ICSID Case No. ARB/01/3, Decision on the Application for Annulment of the Argentine Republic (July 30, 2010); *Sempra Energy Int’l v. Argentine Republic*, ICSID Case No. ARB/02/16, Decision on the Argentine Republic’s Application for Annulment of the Award (June 29, 2010).

higher threshold of absolute necessity under customary international law and Article 25 of the ILC Articles cannot be proved.<sup>141</sup> The parameters of emergency or necessity under international investment law are thus wide enough to include economic instability; not restricted to a grave and imminent peril to the existence and independence of the state. An economic crisis is thus conflated with a threat to security or public order, giving legal truth to Foucault's assertions on the economic as an apparatus of security.

The apparent emerging pattern in ICSID jurisprudence on the Argentine economic emergency suggests the possibility of investment dispute resolution as a site of resistance for Third World states. Necessity can be an important shield for unstable Third World economies as part of the trade-off involved in assuming obligations under bilateral investment treaties. While the fundamental purpose of protection of global capital still prevails, a certain responsiveness to the interests of defendant states can be detected in the recent evolution of investment dispute settlement mechanisms (not least with Western states attempting to reclaim the higher ground in state-investor legal relations given the likelihood of international arbitration on "emergency" measures undertaken by governments in 2008 and thereafter). However, such development of international investment law in broad terms remains dominated by the agenda of developed states in a manner that eludes particular Third World influence.<sup>142</sup> Whilst any increased sensitivity to state positions generally cannot but contain the potential to benefit all states, Ibironke Odumosu shows that although international investment law is not being reformulated solely to protect foreign investment in the Third World (as was the case during the colonial and initial decolonization periods), "it still remains largely insulated from Third World sensibilities, and does not necessarily take Third World struggles, resistances and perspectives into account."<sup>143</sup>

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<sup>141</sup> Notably, however, the *Enron* Annulment Committee decision found that even the higher standard of the customary international law defence of necessity was met in the case of Argentina's economic emergency.

<sup>142</sup> For an interesting exploration of the dwindling of Third World critiques of investment arbitration during the 1980s and 1990s, see Amr A. Shalakany, *Arbitration and the Third World: A Plea for Reassessing Bias Under the Specter of Neoliberalism*, 41 HARV. INT'L L.J. 419 (2000). On questions on regime bias and conflict between Western and Third World interests in international arbitration, based on the institutional make-up and final award decision of the International Chamber of Commerce arbitration tribunal regarding the Dabhol project in India, see Gus Van Harten, *TWAIL and the Dabhol Arbitration*, 3 TRADE L. & DEV. 131 (2011).

<sup>143</sup> Odumosu, *supra* note 116, at 257.

The Argentine emergency cases are symptomatic of this broader point. Among the technologies of exclusion embedded in ICSID arbitration is the construction of the state as an abstract, artificial entity, divorced from its population.<sup>144</sup> The parties to arbitration proceedings are generally construed narrowly as the corporate foreign investor and the host state as private entities, with the arbitration itself framed as a commercial matter. Public interest considerations and the needs and desires of the people are incidental. This is the natural product of a tendency to subsume individual and community interests and social life under the universalizing agent of the nation-state. In the Third World in particular, the concerns of the populace are homogenized and instrumentalized by the indicators of the economic development of the post-colonial state. Thus, when invoked, Argentina's necessity defense is presented primarily through the prism of the health of the state's financial system and institutions, rather than the socio-economic conditions or civil rights of its people. Popular protests and interests remain sidelined by investment dispute settlement mechanisms, with this implicit reading of the state as separate from the people it represents allowing a more straightforward process that elides consideration of the public interest and the broader socio-political elements underlying more purely "legal" questions. As such, the state "is stripped of its population with all its appendices—the public interest, dissenting voices, and needs that do not equate with global capitalist ideology—and is left with a not-so-abstract but artificial construct, known as government and territory."<sup>145</sup>

Where a wide margin of appreciation is given to the state in respect of necessity, as in the recent Argentine ICSID cases, this may help to protect Third World state interests, but conversely lays down a negative precedent for individual and collective claims by those whose rights may be violated in the course of the emergency. The application of the margin of appreciation doctrine—granting wide latitude to states regarding measures taken in a state of emergency and, even more, regarding the existence of the emergency itself—already comes at the expense of human rights, even within the confines of the international system for the *protection* of human rights.<sup>146</sup> Investment arbitration is a mechanism of the international legal system that is designed to balance the priorities of foreign

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<sup>144</sup> *Id.* at 257.

<sup>145</sup> *Id.* at 270.

<sup>146</sup> See, e.g., *Brannigan & McBride v. the United Kingdom*, 14553/89, 14554/89, Eur. Ct. H.R. judgment 25 May 1993.

investors with the interests of the state, devoid of any human rights mandate. From the perspective of subaltern populations, the appropriateness or usefulness of such a mechanism interpreting or making law on the contentious issue of the state of emergency must be questioned. Here, anxieties over the fragmentation of international law in broad terms can be related to the haphazard international governance of states of emergency.<sup>147</sup> In this schematic, in a case such as Argentina, disregard of state obligations in the socio-economic sphere or derogations from individual civil rights under the self-declared emergency may be accepted as necessary by an international or regional human rights body, while at the same time a mechanism of international investment law may hold that the same circumstances do not constitute an exceptional justification to negate the interests of foreign investors. The result is a distorted three-tiered hierarchy that privileges the corporation over the state, and the state over the human.

Apparently evolving ICSID jurisprudence in respect of Argentina notwithstanding, the underlying law itself remains vague, and its overall application plagued by indeterminacy. While Annulment Committee decisions in *CMS*, *Enron* and *Sempra* may have reversed the legal reasoning of the original Tribunal decisions, those Committees do not serve as appellate bodies in the true sense: they cannot overturn the award decisions themselves, nor reduce the amounts awarded. Argentina accordingly remains obliged to pay the original awards, but has yet do so and is unlikely to do so voluntarily in light of the Annulment Committee decisions. Meanwhile, impervious to, or ignorant of, the security necessity exception and relevant ICSID developments, those in financial circles continue to assert the absolute protection of investors under bilateral investment treaties, claiming there is a “strong case to be made for liability of states under international investment law, a case bolstered by the critical absence of exceptions for state conduct in this area of international law.”<sup>148</sup>

### *C. Capitalism’s Emergency: Financial Crises in the Core*

Restrictive international economic measures that have long been imposed on developing nations found their way to the European

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<sup>147</sup> See Vik Kanwar, *International Emergency Governance: Fragments of a Driverless System*, CRITICAL SENSE, 41 (Spring 2004).

<sup>148</sup> Joint World Bank-CEPR Conference: Trade Implications of Policy Responses to the Crisis, Anne Van Aaken & Jurgen Kurtz, *The Global Financial Crisis and International Economic Law*, at 1, Brussels (May 26–27, 2009).

Union in 2010. In the midst of a sovereign debt proliferation triggered by the vacillations of finance capitalism, Greece, Ireland, and Portugal were compelled to draw from an emergency “bailout” loan facility established by the European Commission, European Central Bank and International Monetary Fund troika. The principal beneficiaries of this arrangement are the hawkish European Central Bank and the financial institutions holding the bonds of the peripheral nations’ sovereign and banking debts.<sup>149</sup> The brunt of the “austerity” measures upon which the loans are conditional is disproportionately visited upon subaltern groups in the societies in question.<sup>150</sup> Left with little effective control over economic policy, Greece, Ireland, and Portugal have essentially fallen under external dominion in the way that Third World nations remain subject to neocolonial dominance through prohibitive trade policies and conditional development assistance measures that serve to reinforce indebtedness. Ireland has heard the reverberations of recolonization, with the troika commonly likened to former British landlords and colonial administrators.<sup>151</sup>

The dual aims of the EU and the ECB as they have stumbled through the economic downturn since 2008 have been to restrict the crisis to Europe’s periphery, and to placate the international financial markets so as to prevent contagion spreading to its core. Clear deference to the structures and institutions of finance capitalism has

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<sup>149</sup> Here, the absurdity of projecting nationality onto financial transactions in a globalized context must be noted. This point is particularly salient with regards a European Union in which economic and fiscal policy is increasingly concentrated in a central core, and which has been pushing the idea of a single European market for financial services since its inception. The removal of borders and nationality of capital is paramount. Money can move uninhibited from a German investor in Frankfurt to an English property speculator in London, via the books of a bank in Dublin. When things go wrong—and only when things go wrong—with the speculative investment, it becomes naturalized as “Irish” money; its payback now the responsibility of the Irish people. In a “post-national” economic climate where approximately US \$4 trillion is traded daily on foreign exchange markets alone, such sudden acquisition of “nationality” by free-moving money can only be seen as the “crudest form of nationalism.” See Fintan O’Toole, *Treatment of Ireland a Disaster for European Project*, THE IRISH TIMES (May 3, 2011), <http://www.irishtimes.com/newspaper/opinion/2011/0503/1224295913381.html>.

<sup>150</sup> In Ireland, for example, one of the cruelly ironic results of the disproportionate diversion of public funds to service private debt amidst a climate of increasing poverty has been the dismantling of the Combat Poverty Agency, the only state agency specifically dedicated to poverty alleviation.

<sup>151</sup> Those viewing the situation from a Third World perspective and conscious of the IMF’s role in Africa in particular will detect an irony in the fact that the IMF has been the least hawkish of the troika in its European policy; maintaining (if not imposing on its European partners) a pragmatic awareness that it is not in the interests of the international economy to cripple domestic economies entirely through debt and austerity.

been shown by Europe's technocratic establishment, justified with reference to the necessity of preserving the extant system for fear of what might prevail were it to collapse. Greece, Ireland, and Portugal were effectively forced into austerity and structural adjustment programs, as well as further debt, in order to repay and reassure private bondholders, and, through such vivid demonstration of the severity of European emergency rescue measures, to spur larger euro-zone states into addressing their own debt problems. With the Italian and Spanish dominoes wobbling significantly, power in terms of European economic governance is concentrated in an ever-shrinking core, centered on a Franco-German axis. The protection of German and French banks is held up as sacrosanct; one cannot but be reminded of Lenin's critique of finance capitalism almost a century ago, indicting the excessive concentration of capital and power in French and German banks.<sup>152</sup> The result of the crisis is the increasing fracture and fragmentation of the European Union. The people of irresponsible basket-case peripheral states<sup>153</sup> are held responsible for the reckless lending of private institutions and the poor governance of public institutions, while the political and economic powers at the core remain immune from accountability for their own questionable lending and governance practices.

Emergency authority operates as a flexible response mechanism for grappling with the exposure of modern capitalism to periodic crisis. The troika's management of the crisis emerges as a form of international intervention couched in technocratic procedures that often disregard normal constitutional arrangements. The establishment of the European Financial Stability Facility to provide financial assistance to struggling member states stood in stark conflict with the "no bailout clause" contained in Article 125 of the (Rome) Treaty on the Functioning of the European Union. It is permitted, however, by Article 122 of that treaty, which allows for the conditional granting of financial assistance where a member state is "seriously threatened with severe difficulties caused by natural disasters or exceptional occurrences beyond its control." In so doing, the EU has for all intents and purposes declared itself in a state of

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<sup>152</sup> LENIN, *supra* note 11, at 31–46.

<sup>153</sup> Culturally condescending attitudes and rhetoric—particularly in relation to Greece, instrumentalized by their northern European counterparts as lazy, nefarious and incapable of good governance and basic accounting—have been a hallmark of the euro-zone crisis. Corruption, cronyism, and clientelism—although similarly prevalent in other non-Mediterranean nations—are projected as stemming from intrinsic defects in the Greek character.



emergency, invoking a paradigm of exception that has underpinned, but has not been restricted to, the institutional bailouts of Greece, Ireland, and Portugal. Larger debt-ridden economies such as Italy and Spain have become increasingly reliant on “emergency intervention” by the European Central Bank,<sup>154</sup> subject accordingly to budgetary supervision, and obliged to plunge down the avenue of austerity. European leaders stumbled from one “emergency” summit to the next, reaching the sixteenth such meeting since the outbreak of the crisis by the end of 2011.<sup>155</sup> Continuing failures to resolve the situation had precipitated German calls in the run-up to that summit for an “emergency, narrow treaty change” (to Article 126 of the Treaty on the Functioning of the European Union, which regulates the economic policy of member states in respect of budget deficits) in order to grant the European Court of Justice the power to impose sanctions on indebted nations that fail to execute the necessary budgetary adjustments.<sup>156</sup> A strong institutional advocate of what might be described as increased governmentality of the European polity, the European Commission sought to further capitalize on the euro-zone crisis by pushing reforms that would allow weaker states to be placed under “a form of EU ‘administration,’”<sup>157</sup> effectively rendering any such state a protectorate of the Brussels bureaucratic apparatus.

Increased budgetary supervision and centralized economic governance was indeed agreed upon at the December 2011 emergency summit, where euro-zone leaders explicitly invoked the terminology of their own “new deal.”<sup>158</sup> The general immunity of capitalist institutions from accountability was further extended, however. The German chancellor abandoned her prior insistence that private financial institutions assume a share of the financial burden of debt

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<sup>154</sup> Dan O’Brien, *Nobody should think that Europe is out of the woods*, IRISH TIMES (Oct. 28, 2011), <http://www.irishtimes.com/newspaper/opinion/2011/1028/1224306622624.html>.

<sup>155</sup> Sébastien Seibt, *Another Emergency Summit to Save the Eurozone*, FRANCE 24 (Dec. 5, 2011), <http://www.france24.com/en/20111204-another-emergency-summit-save-eurozone>; Harry McGee, *Once More into the Breach*, IRISH TIMES (Dec. 8, 2011, 9:17 PM), <http://www.irishtimes.com/blogs/politics/2011/12/08/once-more-into-the-breach/>.

<sup>156</sup> Leigh Phillips, *Emergency Narrow Treaty Change Now, Political Union Later*, EU OBSERVER (Nov. 17, 2011, 5:34 PM), <http://euobserver.com/18/114314>.

<sup>157</sup> Arthur Beesley, *Europe Seeks Power to Place Weak States in “Administration,”* THE IRISH TIMES (Nov. 22, 2011), <http://www.irishtimes.com/newspaper/frontpage/2011/1122/1224307950245.html>.

<sup>158</sup> EUROPEAN COUNCIL, STATEMENT BY THE EURO AREA HEADS OF STATE OR GOVERNMENT, ¶ 3 (Dec. 9, 2011).

servicing across Europe. Britain prioritized the financiers of the City of London over the stabilization of the European economy, opting out of the agreement upon failing to secure the City of London as a zone of exception from any heightened financial regulation. In the ensuing treaty agreed by twenty-five of the EU's member states in January 2012,<sup>159</sup> the elevation of finance sector interests is clear. Centralized fiscal controls are institutionalized; fiscal rectitude is to be enforced through quintessential international monetary conditionality arrangements. The treaty is not signed by all EU member states and as such cannot be an instrument of EU law, yet stakes an explicit claim for its substance to be incorporated into the legal framework of the European Union legal framework within five years of its entry into force. It also delegates signatory states' prerogatives to the European Commission and European Court of Justice—similarly outside the “normal” legal parameters of the EU—and without reference to any exceptional circumstances, but permanently. In this light, the treaty is seen as a utilitarian “use of the state of emergency in a way that is contrary to the democratic construction of the EU and functional to respond to the pressure of the markets.”<sup>160</sup> The path being followed illuminates the EU as a form of commissarial dictatorship, beholden to the market rather than to the principles of democracy, in which technocracy trumps politics and the structures of European governance are revolutionized from Brussels and Frankfurt under the guise of the necessity of preserving the single currency.

The troika's second bailout package for Greece, agreed in February 2012, speaks further to the primacy of soft power technocracy to that end. Amidst the rhetoric of a monetary crisis inching ever closer to the precipice, Greece's economic management becomes subject to “enhanced and permanent . . . on-site monitoring” by European experts.<sup>161</sup> The country is required to amend its constitution to prioritize debt repayments over the funding of government services, while the “bold structural reform agenda” imposed on the labor market<sup>162</sup> involves deep cuts to salaries, pensions and the minimum wage. With a confidential document circulated among euro-zone finance ministers in advance of the bailout negotiations having

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<sup>159</sup> Treaty on Stability, Coordination and Governance in the Economic and Monetary Union (Jan. 31, 2012).

<sup>160</sup> Tomaso Ferrando and Giovanni Esposito, *A European State of Prolonged Emergency*, CRITICAL LEGAL THINKING (May 22, 2012), <http://criticallegalthinking.com/2012/05/22/european-state-of-prolonged-emergency/>.

<sup>161</sup> *Eurogroup Statement* (Feb. 21, 2012).

<sup>162</sup> *Id.*

warned that such medicine would be unlikely to cure Greece's ails,<sup>163</sup> questions arise as to the ideological motivations for pursuing this particular form of labor-targeting austerity, regardless of the warnings.

The discourse of emergency has also permeated domestic lawmaking, justifying the socialization of private debt by national governments and the fast tracking of emergency finance measures through the legislative process. In the United States, the reaction to the ailing finance sector was the passing of the Emergency Economic Stabilization Act in 2008. In Ireland, the Credit Institutions (Financial Support) Act 2008, commonly referred to as an "emergency law" (the absence of a formal state of emergency notwithstanding),<sup>164</sup> was enacted to guarantee the liabilities of all banks in the state, including the particularly "toxic" debt held by speculative commercial lenders Anglo Irish Bank and Irish Nationwide. A few months later, the emergency nationalization of the former was fast-tracked by the Anglo Irish Bank Corporation Act 2009.<sup>165</sup> The Credit Institutions (Stabilisation) Act 2010, introducing radical reforms to the banking sector and granting sweeping emergency powers to the Minister for Finance, was similarly rushed through both houses of parliament in a single day. For perspective, the Emergency Powers Act 1976—introducing special police powers in response to the intensification of violence by the provisional IRA, arguably a more time-sensitive matter<sup>166</sup>—was the subject of weeks of debate and deliberation by

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<sup>163</sup> Memorandum produced by the European Central Bank, International Monetary Fund & European Commission, Greece: Preliminary Debt Sustainability Analysis (Feb. 15, 2012).

<sup>164</sup> See, e.g., Simon Carswell, *Noonan Approves AIB Takeover of EBS*, THE IRISH TIMES (June 29, 2011), <http://www.irishtimes.com/newspaper/finance/2011/0629/1224299730725.html>.

<sup>165</sup> Anglo Irish Bank Corporation Act 2009 (Act No. 1 of 2009) (Ir.), available at <http://www.oireachtas.ie/documents/bills28/acts/2009/a0109.pdf>. While the legislation was presented as essential to the common good of preserving the stability of the Irish financial system (sec. 2(1)(b)(ii)), it contains secrecy provisions that appear to marginalize the public interest. The opposition's first sight of the Bill came on the same morning that it would be debated and pushed through a vote.

<sup>166</sup> The position taken by Gross & Ní Aoláin on the difference between violent and economic emergencies in general is that: "A violent conflict often requires the executive branch of government to act immediately without the benefit of consultation with other institutions and other branches of government. Economic crises may, but do not have to, allow for longer response periods, thus enabling a more sustained inter-branch action." GROSS & N. AOLÁIN, *supra* note 1, at 5. While the Irish emergency banking legislation was passed through parliament, the nature of the Irish political system produces a legislature that is in practical terms controlled by, rather than independent of, the executive.

both houses, and a Supreme Court assessment of its constitutionality before being passed into law. Arriving into government in early 2011 on a wave of self-proclaimed “democratic revolution,” the first gesture of the Fine Gael/Labour coalition was to echo the vernacular that had accompanied previous war-time emergency powers legislation. Its program for government thus spoke of an “unprecedented national economic emergency” necessitating “strong, resolute leadership.”<sup>167</sup>

The reality is that the protection of the financial sector rather than the real economy signifies undue deference to capitalist institutions and obfuscates the notion of the common good by reifying elitist misappropriations of the “commons.” This obfuscation of the common good is starkly revealed in the 1% - 99% dichotomy that emerged as central to the narrative of the “Occupy” movement. In global terms, the hegemonic biases of the international economic system are also very much in evidence. Most Third World countries are less integrated into the international financial sector, whose crisis has most severely impacted the West, while it has been the spillover effect of that financial crisis on global trade and the real economy that has hit the Third World hardest. The priority in the response of Western policymakers has clearly been given to rescuing the finance sector rather than stimulating the real economy; restoring the status quo rather than radically overhauling the financial system to prevent another collapse. As far as the institutions are concerned, the IMF for its part can be seen as having somewhat neglected its commitment to Third World development now that more lucrative prey has emerged on the peripheries of Europe.

## V

### CONCLUSION: PERMANENT ECONOMIC EMERGENCY AND THE “REAL” STATE OF EMERGENCY

Historical analysis shows that the use of emergency measures to manage the economy is pervasive, and can eclipse differences of ideology and legal landscape. Civil and common law systems, colonial and post-colonial regimes, right-wing and left-wing administrations; all have been wont to resort to states of emergency in the economic sphere, in some shape or form. The overriding and inescapable conclusion, however, is the centrality of emergency to the

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<sup>167</sup> Fine Gael and Labour Party, *Government for National Recovery 2011–2016: Statement of Common Purpose* (Mar. 2011).

entrenchment of capitalist doctrine and institutions in modern political life. As such, emergency economic regulation is the normal and permanent state of affairs in the contemporary state. It is defined in ongoing political time, standing in stark contrast to the urgent, exceptional, immediate moment of the “ticking bomb” scenario so often invoked as the paradigmatic state of exception. Bearing in mind the differentiation between the state itself and government as but one of several elements of the state system, it is unsurprising that coercive state functions tend to become embedded in the machinery of state power in a manner that renders them distinct from government. Thus such repressive functions survive and transcend changes of administration. The overarching function of the elite interests that control this machinery is to preserve and consolidate capitalist interests in a class-structured society.<sup>168</sup> Understanding the state of emergency as part of this machinery allows us to diagnose the permanent nature of the emergency.

Reflecting on the permanent nature of the ongoing economic crisis in Europe, Slavoj Žižek implores us to remember that

[W]e are dealing with *political* economy—that there is nothing ‘natural’ in such a crisis, that the existing global economic system relies on a series of political decisions—while simultaneously being fully aware that, insofar as we remain within the capitalist system, the violation of its rules effectively causes economic breakdown, since the system obeys a pseudo-natural logic of its own. So, although we are clearly entering a new phase of enhanced exploitation, rendered easier by the conditions of the global market (outsourcing, etc.), we should also bear in mind that this is imposed by the functioning of the system itself, always on the brink of financial collapse.<sup>169</sup>

Here, Žižek is responding to mainstream establishment narratives that portray economic crises as naturally occurring events; emergency regulation is in turn presented not as political decision but as the imperative of an apolitical financial logic. The “no alternative” mantra predominates. Thus, the IMF, long seen as an “oppressive agent of global capital” from a Third World perspective, appears from another perspective as a “neutral agent of discipline and order.”<sup>170</sup> The lessons from the Third World experience of vicious debt cycles are disregarded.

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<sup>168</sup> For elucidation of the state-government distinction, and analysis of the elements of the state system and the composition of state elites in capitalist countries, see RALPH MILBAND, *THE STATE IN CAPITALIST SOCIETY* 49 (1969).

<sup>169</sup> Slavoj Žižek, *A Permanent Economic Emergency*, 64 *NEW LEFT REV.* 85 (2010).

<sup>170</sup> *Id.*

The cyclical and increasingly destabilized nature of advanced capitalism suggests that as long as the system is maintained in its present form, economic crises will reoccur and emergency measures that prejudice subaltern and Third World populations will continue to be necessary to preserve the structures and institutions of global capitalism. Through the lens of a continuing and permanent emergency, the norm/emergency divide is exposed as illusory; emergency is the norm. The implication that flows is that rather than simply demanding a return to “normal” rules of law and economic governance, what is needed is a counter politics not only against the permanent emergency but also against the normality of class power structures and the rule of law that sustains them.<sup>171</sup> While Neocleous implies that this necessitates a turn to violence, the popular uprisings in Tunisia and Egypt in 2011 may have brought about the beginnings of what Walter Benjamin envisaged as a “real state of emergency”<sup>172</sup> that seeks not legal checks and balances on the permanent emergency but an overhaul of the system that fosters it. It is as yet unclear whether resistance to the authoritarian status quo in the Arab world and to economic structures globally by the likes of the “Indignados” and “Occupy” movements can be sustained to garner sufficient leverage to effectuate progressive and lasting systemic change. A concerted challenge to the discourses of emergency law and emergency economic regulation may at the least provide a springboard towards the radical transformation of global governance structures.

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<sup>171</sup> Neocleous, *The Problem with Normality*, *supra* note 68, at 209.

<sup>172</sup> Walter Benjamin, *On the Concept of History*, in WALTER BENJAMIN: SELECTED WRITINGS, VOL. 4: 1938–1940 389, 392 (Howard Eiland & Michael W. Jennings eds., Edmund Jephcott trans., Harv. 2003) 392. Žižek also alludes to the idea of a “real” or “true” state of emergency as opposed to the ongoing facade of emergency: “When a state institution proclaims a state of emergency, it does so by definition as part of a desperate strategy to avoid the true state of emergency and return to the ‘normal course of things.’” SLAVOJ ŽIŽEK, WELCOME TO THE DESERT OF THE REAL!: FIVE ESSAYS ON SEPTEMBER 11 AND RELATED DATES 108 (2002).