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The law of the global economy and the spectre of inequality

Ingo Venzke*

Drawing on my inaugural lecture, I argue that the spectre of inequality haunts international law. The presence of the spectre first of all draws attention to what is rotten in the global economic order: how the law of the global economy has contributed to high levels of inequality while, at the same time, abdicating responsibility for it. Second, like all spectres, international law's spectre of inequality is animated by a spirit, the spirit of social justice. It points to forsaken paths, lost memories and conjures up past possibilities that were not realized. Third, the spectre endures unless we give in and break with current repetitions. It directs those in search of progressive change towards productive contradictions within global order. Those contradictions are indeed carriers of hope. They offer reason to believe that the future is open. Engaging with the spectre of inequality in international law turns out to be much less daunting than failing to do so.

A spectre haunts international law—the spectre of inequality.[1] While inequalities of wealth and opportunity have drawn significant attention, the roles international law has played in contributing to this inequality have often been downplayed or cast in a rosy light. In the present contribution I therefore follow others in drawing out the ways in which the global economy's legal structuring has contributed to increasing levels of inequality.[2] It bears

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1 Echoing the famous opening sentence of the K Marx and F Engels, 'Manifesto of the Communist Party', in *Selected Works*, vol 1 (Progress Publishers 1969) 14: 'A spectre is haunting Europe—the spectre of communism.'

2 Also, among others, IGLP Law and Global Production Working Group, 'The Role of Law in Global Value Chains: A Research Manifesto' (2016) 4 London Review of International Law 57; J Linarelli, ME Salomon and M Sornarajah, *The Misery of International Law: Confrontations with Injustice in the Global Economy* (OUP 2018); NM Perrone, 'Speed, Law and the Global Economy: How Economic Acceleration Contributes to Inequality and Precarity' (2020) 33 Leiden Journal of International Law 557.

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repeating, briefly, that the richest one per cent were able to capture the largest part of growth over the past decades, so that they now hold half of all the world's wealth.[3] The very poor, conversely, were locked out of growth, while the income of the middle class in developed countries in fact declined, and that of the middle class in emerging economies increased. For those who have lost out, high levels of inequality have evoked a sense of injustice, mixed with feelings of alienation from the world—a feeling of impotence in the face of inhuman forces that tie the present to a bleak future.[4]

Meanwhile, leading international institutions like the International Monetary Fund (IMF), the World Bank (WB) and the World Trade Organization (WTO) have abdicated responsibility for the distributive consequences of global economic arrangements. Other fields of international law, like human rights and labour law, may seem to be more open to acknowledging the problem, and pursuing social justice. They have, however, remained too weak and ambivalent, often coming too late to effectively redistribute what economic arrangements distributed unfairly in the first place.[5] In addition, the way in which the law is fragmented into sectoral regimes and across multiple levels of governance, has superficially eased its contradictions and hidden its contributions to inequality. Dynamics of professional specialization and fragmentated perspectives have, in turn, reduced the apparent need for introspection and change. Problems, in short, always seem to lie on the other side of each specific regime and beyond the reach of each particular expertise. For the human rights lawyer, they rest with economic law, and for the economic lawyer, the opposite is true. And thus, they rest all comfortably in their self-absolution.

In the present contribution, I will show how the law of the global economy has distributed gains from economic globalization, how it has done little to cushion the losses, and how it could possibly be transformed through a genuine engagement with emancipatory, progressive politics.[6] The argument is thus classically critical in the sense that it starts from an analysis of the

3 J Hickel, *The Divide: Global Inequality from Conquest to Free Markets* (Norton 2018); B Milanović, *Global Inequality: A New Approach for the Age of Globalization* (Harvard UP 2016) 31-33. Also see Credit Swiss, 'Global Wealth Databook 2018' (October 2018), putting the top one per cent's share at 45 per cent of the world's wealth; cf. *World Inequality Database* <wid.world> accessed 3 May 2021.

4 For a strong conception of alienation, see R Jaeggi, *Entfremdung* (Suhrkamp 2016).

5 Compare M Goldmann 'Contesting Austerity in the1970s and 1980s: When Human Rights Went Missing' in I Venzke and KJ Heller (eds), *Contingency in International Law* (OUP 2021) 297.

6 While Katharina Pistor, among others, has analysed the role of private law in a similar vein, my focus rests on public international law. See K Pistor, *The Code of Capital: How the Law Creates Wealth and Inequality* (Princeton UP 2019).

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problem, continues via an inquiry into alternatives that have not been realized, to then arrive at a reassessment of possibilities in the present which help us to imagine a different future.[7] My analysis here is inspired by one of the most famous ghosts of the theatre—that of the late King Hamlet.[8] Just like the spectre of King Hamlet, international law's spectre of inequality is also indicative of 'something rotten'.

I thus argue, first, that—both by design and by omission— international law has contributed to high levels of inequality. It has done so by distributing value under the guise of maximizing it, and by confining the pursuit of human rights to the enactment of minimal standards of protection rather than structural transformation. These developments are not only opportunistic, but also rely on a larger, principled argument that I develop in the form of Friedrich Hayek's dream.

Second, I suggest that the spectre of inequality is animated by a spirit, the spirit of social justice.[9] It points to forsaken paths and lost memories, for haunting is always historical.[10] It enacts the foundational moves of critical theory in its search for what could have been, and why it was not. In describing this aspect of the spirit, I offer some fragments from the history of the International Labour Organization (ILO) and the International Trade Organization (ITO) which testify to prior expectations about how the economy could be embedded politically. I also show that human rights discourses, too, once had a more structuralist orientation. The normative programme underneath this mourning for the past may be expressed well with reference to Gunnar Myrdal's gloom.

Third, I turn to the future and the daunting step of offering guidance for the way ahead. In its theatrical form, the spectre does not go away unless we give in to it, work with it, and follow its logic. Hamlet: 'Where wilt thou lead me? speak; I'll go no further'.[11] So too, international law's spectre of inequality demands of us that we stop and reconsider the present state of affairs. It takes us back to the past and, more specifically, towards contradictions within international law which may be the source of renewal. The 'logic of the spectre' eschews all-too-easy solutions that merely repeat the mistakes of the past—in the way that, for instance, the Sustainable Development Goals (SDGs)

7 Cf. TW Adorno, *Negative Dialectics* (EB Ashton tr, Routledge 1990).

8 I take further inspiration from Jacques Derrida's 'hauntology' and his reading of *Hamlet* in *Specters of Marx* (Routledge 1994). I take the gist of Derrida's hauntology to be classically critical in the way I just described. It centres on problems of the past that persist unless they are revisited.

9 Derrida (1994) 4, on the spectre being animated by a spirit.

10 ibid.

11 ibid 10.

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repeated those of the Millennium Development Goals (MDGs). Instead, it places its hopes in productive contradictions as carriers of an emancipatory politics that searches for nothing less than greater freedom in a world that is our own. But do 'we' live in a world that is ours? Or rather: whose world is it? I conclude with three forward-looking suggestions that I develop by going back to Jean Rousseau's 'Discourse Upon the Origin and the Foundation of the Inequality among Mankind'—suggestions focused on social freedom, beliefs in the legitimacy of what is legal, and future's past.

HAUNTING: SOMETHING IS ROTTEN

Creating and distributing value

I have said that international law is haunted by the spectre of inequality, even as it abdicates responsibility for the distributive consequences of the global economic arrangements that it helps to constitute. The IMF, the WB and the WTO recently published a joint report titled: *Making Trade an Engine of Growth for All: The Case for Trade and for Policies to Facilitate Adjustment.*[12] It is all there, right in the title: on the one hand, *international* law and its institutions seek to generate growth by enabling trade. They increase the size of the pie. On the other hand, *domestic* law and its institutions that are supposed to take care of the attendant distributive consequences by adopting policies to facilitate adjustment.[13] They redistribute the pieces.[14]

The argument that trade is an engine for growth of course leans on the magic of the comparative advantage. A very brief background sketch is in order: Adam Smith taught a good while ago that 'the tailor does not attempt

12 IMF, WB and WTO, 'Making Trade an Engine of Growth for All: The Case for Trade and for Policies to Facilitate Adjustment' (Policy paper, 10 April 2017).

13 ibid 4. Cf. N Lamp, *How Should We Think about the Winners and Losers from Globalization? Three Narratives and Their Implications for the Redesign of International Economic Agreements* (2019) 30 European Journal of International Law (2019) 1359; HG Cohen, 'What Is International Trade Law For?' (2019) 113 AJIL (2019) 326, both developing a similar critique against the division of labour between international and domestic levels of governance.

14 This view prevails in the policy discourse in Europe. See e.g. the statements by Commission President Jean-Claude Juncker in 'EU-Japan trade agreement enters into force' (press release, *European Commission*, 31 January 2019) <europa.eu/rapid/press-release_IP-19-785_en.htm> accessed 3 May 2021 and the speech by Trade Commissioner Cecilia Malmström at Sciences Po, Paris, 22 January 2018 <trade.ec.europa.eu/doclib/docs/2018/january/tradoc_156551.pdf> accessed 3 May 2021. For the Netherlands, see Minister Sigrid Kaag in the House of Representatives (Tweede Kamer): 'Het opvangen van negatieve effecten is vooral een kwestie van nationaal beleid, ook in ontwikkelingslanden', 28 November 2018, TK 29-14, 4, in English: 'Catching the negative effects is above all a question of national policy, also in developing countries' (author's translation).

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to make his own shoes, but buys them of the shoemaker.'[15] David Ricardo then refined this core idea in a well-known and lasting fashion:

> It is quite as important to the happiness of mankind that our enjoyments should be increased by the better distribution of labour.... Under a system of perfectly free commerce, each country naturally devotes its capital and labour to such employments as are most beneficial to each. This pursuit of individual advantage is admirably connected with the universal good of the whole.[16]

Ricardo opposed Great Britain's Corn Laws with these arguments—those laws which imposed high tariffs so that domestic farmers were protected against competition from cheaper foreign goods.[17] He used those tariffs as an example to develop his general critique of rents, which distribute but do not create value.[18] Ricardo's conception of 'rents' continues to have foundational significance today. According to one, widely shared view, it is the main function of international trade law to prevent precisely such Ricardian rent-seeking through tariffs.[19] The function of the law, this view suggests, is to cap tariffs and prohibit discrimination, both between different foreign producers and between foreign and domestic producers:

15 A Smith, *The Wealth of Nations* (Hackett 1993) 457: 'If a foreign country can supply us with a commodity cheaper than we ourselves can make it, better buy it of them with some part of the produce of our own industry, employed in a way in which we have some advantage.'

16 D Ricardo, *Principles of Political Economy and Taxation* (3rd edn, 1821) 136.

17 The Corn Laws allowed for prices of such heights that they led to the Great Famine in Ireland (then in Union with Great Britain) and they are pivotal in the important shift from mercantilism to classic liberalism. See B Semmel, *The Rise of Free Trade Imperialism: Classical Political Economy, the Empire of Free Trade and Imperialism, 1750-1850* (CUP, 1970) 203-29; D Kennedy, *A World of Struggle: How Power, Law and Expertise Shape Global Political Economy* (Princeton UP, 2016) 180; A Orford, 'Theorising Free Trade', in A Orford and F Hoffmann (eds), *Oxford Handbook of the Theory of International Law* (OUP, 2016); M Mazzucato, *The Value of Everything: Making and Taking in the Global Economy* (Penguin 2018) 39, 44-45.

18 See A Krueger,'The Political Economy of the Rent-Seeking Society' (1974) 64 The American Economic Review 291; R Kaplinsky, *Globalization, Poverty and Inequality: Between a Rock and a Hard Place* (Polity 2005) 62-65. The notion of rent refers to a transfer of profit that stems from limitations in the supply of a scarce resource. Import tariffs are Krueger's prime example. Ricardo notably offered an extensive account of rents with the example of landowners who could gain a profit simply because they had a monopoly of a scarce asset, much to his dismay. Ricardo also keenly saw that rents essentially worked due to legal titles and arrangements. He gets into such a rage about landowner's rent-seeking that he comes close to presenting claims to property as the original sin. See Ricardo (1821) ch 2. See also Kennedy (2016) 11.

19 Other policies were thus put on the defensive, see DK Tarullo, 'Logic, Myth, and the International Economic Order' (1985) 26 Harvard International Law Journal 533; N Lamp, 'How Some Countries Became "Special": Developing Countries and the Construction of Difference in Multilateral Trade Lawmaking' (2015) 18 Journal of International Economic Law 743.

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> While liberal trade rules benefit all consumers, import protection benefits only a few import-competing producers at the expense of other citizens. The democratic legitimacy of this indirect income redistribution is often doubtful, especially if it is implemented through administrative fiat without parliamentary control so as to accommodate 'rent-seeking' interest groups.'[20]

As Kal Raustiala puts it, this prevailing view focuses on 'enduring problems of collective action and rent-seeking, and sees international economic institutions as a corrective to the manifestation of these problems at both the international and the domestic levels.'[21] It is then deemed to be the overriding aim of the law to facilitate the re-allocation of resources to the most efficient producer and thereby to increase gains and growth. In this way, the field of international economic law is constituted in a way which not only excludes distributive consequences from view, but also places it immediately at odds with both social policy and economic planning, which are necessarily premised on discrimination of a certain sort.

A series of well-established critiques of growth through trade cast doubt on this unambiguous narrative. They show, for example, that trade benefits some countries more than others, and some actors within countries more than others across them—inevitably, it is by and large the stronger who reap the rewards disproportionately. In addition, critiques show that trade can also make some actors worse off.[22] I do not wish to rehash those arguments here, though I would indeed embrace many of them. I only want to highlight one perhaps fairly obvious point, namely that Ricardo and others advocated an international division of labour at a time when Britain would benefit from such arrangements-at a time when it could indeed become the 'Workshop of the World', the centre of valuable production.[23] Members of the British Parliament clearly saw this particular appeal of free trade: 'foreign nations would become Colonies to us, without imposing on us the responsibility of

20 E-U Petersmann, *The GATT/WTO Dispute Settlement System: International Law, International Organizations and Dispute Settlement* (Kluwer 1997) 10. See also K Abbott, 'The Trading Nation's Dilemma: The Functions of the Law of International Trade' (1985) 26 Harvard International Law Journal 501; M Krajewski, 'Democratic Legitimacy and Constitutional Perspectives of WTO Law' (2001) 35 Journal of World Trade 167.

21 K Raustiala, 'Rethinking the Sovereignty Debate in International Economic Law' (2003) 6 Journal of International Economic Law 841, 843.

22 See the seminal work in the 1950s by Raul Prebisch and Hans Singer. On their work, its uphill struggle, and continued relevance, see J Toye and R Toye, *The UN and Global Political Economy* (Indiana UP 2004) 110-37; JA Ocampo and MA Parra, 'The Terms of Trade for Commodities in the Twentieth Century' [2003] CEPAL Review 7.

23 I Wallerstein, *Historical Capitalism: With Capitalist Civilization* (Verso 1983).

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governing them'.[24] The point, then, is that international law and its institutions have always played a dual role, *both* aiming to work as an 'engine for growth', thus increasing the size of the pie, *and* helping to distribute the pieces. Over time, however, the emphasis, and most important effects, have shifted towards the latter—from growth towards distribution.[25] This development reflects the fact that the size of one's own piece, not of the whole pie, has been the most important concern for many key actors.[26]

The international legal protection of intellectual property serves as an example that is both illustrative and topical in view of access to medical remedies amidst the global pandemic.[27] Like tariffs, copyright and patents are a form of rent as they fend off competition and distribute value, above all from the consumer, who pays a higher price, to the producer, who can charge more.[28] The impact of intellectual protection on the costs of medicines, for instance, is well documented. According to a wide-spread view, common across a number of disciplines, this protection has gone too far, stifling rather than sparking innovation.[29] Thus, in contrast to the conventional picture of international economic law as a solution to the problem of rent-seeking, the example of intellectual property highlights the ways in which international law itself underpins rents and is thus part of the problem.[30] International economic law

24 Semmel (1970) 8 quoting a Whig in the House of Commons with reference to the Parliamentary Debates, 3rd Series, LXXXIII of 23 February 1846, 1399-1400. For a nuanced discussion of the confluence between interest and principled argument in these debates, see ibid 206-210. See also Orford (2016).

25 D Rodrik, 'What Do Trade Agreements Really Do?' (2018) 32 Journal of Economic Perspectives 82-89.

26 It is of course another dubious beauty of Smith's argument that the two are intrinsically linked: that the invisible hand turns the pursuit of self-interest into an advantage for all. A Smith, *The Theory of Moral Sentiments* (CUP 2002) 215: '[The rich] consume little more than the poor, and in spite of their natural selfishness and rapacity, though they mean only their own conveniency, though the sole end which they propose from the labours of all the thousands whom they employ, be the gratification of their own vain and insatiable desires, they divide with the poor the produce of all their improvements. They are led by an invisible hand to make nearly the same distribution of the necessaries of life, which would have been made, had the earth been divided into equal portions among all its inhabitants, and thus without intending it, without knowing it, advance the interest of the society'.

27 See The IEL Collective, 'International Economic Law & COVID-19' (*Critical Legal Thinking*, 27 March 2020) <criticallegalthinking.com/2020/03/27/international-economic-law-covid-19/> accessed 3 May 2021.

28 Kaplinsky (2005) 79-81, who clearly appreciates that these rents are products of the law.

29 Mazzucato (2018) 202-207; P Drahos, 'Global Law Reform and Rent-Seeking: The Case of Intellectual Property' (1996) 7 Australian Journal of Corporate Law 1.

30 See also Rodick (2018) 75-76, concluding that 'trade agreements are shaped largely by rent-seeking, self-interested behaviour [and] produce welfare-reducing, or purely redistributive outcomes under the guise of free trade'; J von Bernstorff 'International Law and Global Justice: On Recent Inquiries into the Dark Side of Economic Globalization' (2015) 26 European Journal of International Law 279.

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does not just create, but more importantly distributes, value.[31] And, unsurprisingly, it does so in a way that makes the 'haves' come out ahead.

Minimal protection

I argued above that international economic law and its institutions wrongly abdicate responsibility for high levels of inequality while, at the same time, having a strong distributive impact. I now turn to the ways in which other parts of international law, in a familiar *pas de deux*, dissociate themselves from the underlying reasons for this and are too weak in their attempts to address the distributive consequences.[32] The story of Robert McNamara and his start at the World Bank serves as a pathway into that argument. When McNamara became the President of the Bank in 1968, he identified inequality as the major problem of the times.[33] A couple of years into his term of office, however, he drastically changed course:

> If we look objectively at the world today, we must agree that it is characterized by a massive degree of inequality. The difference in living standards between the rich nations and the poor nations is a gap of gigantic proportions.... Every indication is that it will continue to grow.... What we can do is begin to move now to ensure that absolute poverty is ended.[34]

McNamara's shift in position is emblematic of human rights discourses more generally. Over time, those discourses have come to focus on poverty rather than inequality, minimal protection rather than progressive distribution, and basic needs rather than social justice.[35] This turn to poverty, minimal protection and basic needs remains profoundly problematic,[36] most importantly because it sets aside the crucial question of why somebody may be poor or struggle to meet basic needs. In this way, a victim of a natural disaster is

31 See Kaplinsky (2015) 61; more recently on the allocation of value through rents in global production, D Davis, R Kaplinsky and M Morris 'Rents, Power and Governance in Global Value Chains' (2018) 24 Journal of World-Systems Research 43, 55-57.

32 See also D Zamora, 'Déplorer les inégalités, ignorer leurs causes' *Le Monde diplomatique* (January 2019) 3; U Baxi, *Human Rights in a Post Human World: Critical Essays* (OUP 2009).

33 Here I follow J Dehm, 'Highlighting inequalities in the histories of human rights: Contestations over justice, needs and rights in the 1970s' (2018) 31 Leiden Journal of International Law 871.

34 Quoted in ibid 877, with reference to McNamara, 'Address to the Board of Governors', Nairobi, Kenya, 24 September 1973.

35 See in detail, S Moyn, *Not Enough: Human Rights in an Unequal World* (Harvard UP 2018) 9. Cf. ME Salomon, 'Why Should It Matter That Others Have More? Poverty, Inequality, and the Potential of International Human Rights Law' (2011) 37 Review of International Studies 2137.

36 S Marks, 'Human Rights and Root Causes' 74 Modern Law Review (2011) 57; S Pahuja, *Decolonising International Law: Development, Economic Growth and the Politics of Universality* (CUP 2011).

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wrongly placed into the same position as a victim of domination and exploitation—poverty is rendered as if it were a localized tragedy, not a result of planned misery, as Susan Marks has argued.[37] But the claims of people in poverty are very different: in Rainer Forst's words, '[i]njustice is one thing, fate and fortune another.'[38] He continues: '[o]ne owes it to victims of domination not to treat them as "weak" and miserable human being in need of "help."'[39] And those who have benefitted from injustice should not be allowed to see themselves as acting charitably when they do help.

It may have been opportune, if not next to necessary, for McNamara to centre human rights on minimal protection. Institutional, material and discursive constraints may have pushed him to act in this way in spite of better knowledge—a dynamic which Marks sees at work in so much human rights related work.[40] Fragmented law and specialized discourses have facilitated the search for solutions in human rights protection at a distance from the problematic economic practices that are their cause, but which are also legally structured.

But quite aside from this dynamic, there is also a more principled argument in support of focussing on minimal protection, and in the next section I turn to this, through the figure of Friedrich von Hayek. My point in doing this is to extend, explicitly, my analysis of 'what is rotten' beyond the realm of institutions and rules, into the realm of ideas and normative agendas, in the critical vein I outlined above. Not only is that realm one in which power is at work, it is also one of conflict and continued contradiction, a space which has helped to determine the path of international law's development, and may yet provide resources for imagining how it might be otherwise.

Hayek's dream

Hayek grew up in the Austro-Hungarian Empire while it was falling apart—a context that was formative for him, and continued to influence him throughout his life and work.[41] He received his first doctorate in law and his second in economics from the University of Vienna. He then moved to the London School of Economics, abandoning any desire to return to Austria, instead adopting British nationality in 1938.[42] On the brink of the Second World War,

37 Marks (2011).

38 R Forst, 'A Critical Theory of Transnational (In-) Justice: Realistic in the Right Way' (manuscript on file with the author, 2018) 18-19.

39 ibid 18-19. See also Marks (2011).

40 Marks (2011) 75.

41 AO Ebenstein, *Friedrich Hayek: A Biography* (Martin's 2001) 16.

42 See Q Slobodian, *Globalists: The End of Empire and the Birth of Neoliberalism* (Harvard UP 2018).

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he published his remarkable article on the 'Economic Conditions of Interstate Federalism',[43] dreaming of a new world of lasting peace and justice, a world in which nationalist rivalry would belong to the past and economic efficiency would work to the progress of all. Non-discrimination and minimal protection were the two main pillars of his dream, a noble dream that has been remarkably powerful in the world of international law and beyond.

Hayek had seen how economic frontiers and nationalist rivalries had gone hand in hand, creating contexts in which conflicts of interest become destructive conflicts between communities.[44] His response was a radical individualism with cosmopolitan reach. Economic frontiers and nations, in his view, should be undone. There should be no discrimination between insiders and outsiders—between those who belong to a nation and those who do not.[45]

For Hayek, it was not only inefficient but also unjust to subsidize the corn farmer next door if to do so made everyone else worse off, including the farmer across the border.[46] If liberalization leads to inequality, he suggested, so be it. Stronger still, in his view, economic gains are impossible without inequality. But this was justifiable: growth would after all be to everyone's advantage, and the poorest would ultimately be better off. Inequality, as a result, ought not to be a primary concern of policy.[47] Social justice was, as a concept, entirely devoid of meaning for Hayek—a mirage, as he put it.[48] If social justice were pursued, he argued, then it would lead down the road of serfdom towards arbitrary and oppressive policies.[49]

Hayek received the Nobel Prize in Economics in 1974 and dedicated his acceptance speech to *The Pretence of Knowledge*, attacking the foundations of interventions into the market. How, he asked, could we possibly know the

43 F Hayek, 'The Economic Conditions of Interstate Federalism' in *Individualism and Economic Order* (University of Chicago Press 1948) 255-72.

44 ibid 257: 'conflicts of interests tend to become conflicts between the same groups of people'.

45 In contrast to current practices, Hayek notably placed emphasis on the free movement not only of goods and capital, but also of 'men'. It is not entirely clear, however, how far his cosmopolitanism reached then, at a time at which large parts of the globe were still colonized, or how far it would reach now. His federation was thought to be one of democratic states and his examples mentioned Europeans, North Americans, and South Africans. Ibid 262-63.

46 ibid 255-72. On that cosmopolitan trait, see also A Somek, 'The Social Question in a Transnational Context' (2011) LEQS Paper No 39/2011, 14.

47 F Hayek, *Constitution of Liberty* (Routledge 1960) 101. See more generally, on the arguably necessary link between growth and poverty, J Beckett, 'Creating Poverty', in A Orford and F Hoffmann (eds), *Oxford Handbook of the Theory of International Law* (Oxford UP 2016).

48 F Hayek, *Law, Legislation and Liberty*, vol 2 (University of Chicago Press 1976) 96. For a discussion, see S Lukes, 'Social Justice: The Hayekian Challenge' (1997) 11 Critical Review 65.

49 Hayek (1948) 255-72.

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effects of those interventions down the line?[50] By trying to know better than the market, Hayek argued, economists (and the policy-makers who might follow them) have in fact 'made a mess of things.'[51] During his dinner toast in Stockholm he is reported to have remarked: 'had I been consulted whether to establish a Nobel Prize in Economics, I should have decidedly advised against it'.[52] For Hayek, the bottom line was that there is no certainty in economic planning, so it is better to level the playing field by enforcing non-discrimination and protecting individual liberty.

Hayek's dream turned foul for large parts of the world, as the promise of the 'rising tide' did not materialise. Now, it is true that the world of international law is not shaped in Hayek's image—but it does come remarkably close, at least in some respects.[53] An emerging body of scholarship is teasing out the influence—of Hayek and others around him, ordo- and neo-liberals—on international law, [54] and there is no question that the focus of international economic law on non-discrimination, and the emphasis of human rights law on individual liberty, has strong resonance with a Hayekian vision of world order.

Arguments about the influence of ordo-liberalism and neo-liberalism on international law could be taken still further.[55] As compelling and insightful as it may be to tie legal developments to the rise of neo-liberalism, and to thereby

50 ibid 265-66.

51 F Hayek, 'The Pretence of Knowledge' (Nobel Prize Lecture, 11 December 1974) <www.nobelprize.org/prizes/economic-sciences/1974/hayek/lecture/> accessed 3 May 2021.

52 B Caldwell, 'Hayek's Nobel' (2016) 21 Advances in Austrian Economics 1, 6.

53 MW Doyle and JE Stiglitz, 'Eliminating Extreme Inequality: A Sustainable Development Goal, 2015-2030' (2014) 28 Ethics and International Affairs 5; Slobodian (2018); Moyn (2018) 191, with reference to E-U Petersmann, 'Time for a United Nations "Global Compact" for Integrating Human Rights into the Law of Worldwide Organizations: Lessons from European Integration' (2002) 13 European Journal of International Law 621, 629, arguing that economic liberalization best serves the promotion of international human rights; J Shotwell, 'The International Labour Organization as an Alternative to Violent Revolution' (1933) 166 Annals of the American Academy of Political and Social Science 18; A Peters, 'The "Great October Socialist Revolution": What Remains in and for International Law?' (2017) MPIL Research Paper Series No 9, 2-3.

54 E.g. J Hien and C Joerges (eds), *Ordoliberalism, Law and the Rule of Economics* (Hart 2017); N Tzouvala, 'The Ordo-Liberal Origins of Modern International Investment Law: Constructing Competition on a Global Scale' [2020] European Yearbook of International Economic Law 37.

55 There is some slippage between the two notions, ordo-liberalism and neo-liberalism. They differ, especially with regard to the role of the state, which the former acknowledges and the latter dismisses. Though that dismissal may be more apparent than real. Hayek, while closely connected the group of ordo-liberals in Freiburg, championed neo-liberal thinking. Cf. T Biebricher, 'Ordoliberalism as a Variety of Neoliberalism', in Hien and Joerges (eds) (2017) 103; PG Cerny, 'In the Shadow of Ordoliberalism: The Paradox of Neoliberalism in the 21st Century' (2016) 3 European Review of International Studies 78.

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expose and critique neo-liberalism's trenchant operation, it is also true that the varieties, ambivalence, and contradictions within the law tend to get lost within this story, and possibilities of alternative legal arrangements along with it.[56] The law continues to be replete with tensions and remains to some degree pliable, even whilst under the spell of a dominant political economy that is, after all, partially structured by law.[57] Moreover, it is really not that clear what neo-liberalism demands from the law. Struggles about how to understand the demands of non-discrimination and liberty, and how to translate them into legal command, must be part of any story of neoliberalism's influence on international law. No context speaks for itself, nor are its boundaries given—questions of what counts as context, and how to read it, are crucial sites of contingency. The future remains open, I will continue to argue. But to get there, it is necessary to follow the spectre into the past.

MOURNING: POSSIBILITIES OF THE PAST

The spirit of social justice

For a while, the spirit of social justice was able to thrive on labour movements that were sparked by the mournful spectacles of the Industrial Revolution. Back then, a physician stood at Oxford Road, Manchester to observe the plight of the workers as they left the mills:

> The children were almost universally ill-looking, small, sickly, barefoot, and ill-clad. Many appeared to be no older than seven.. . . Here I saw . . . men and women that were not to be aged, children that were never to be healthy adults. *It was a mournful spectacle.*[58]

56 That is the case, for instance, with the otherwise most insightful account in Slobodian (2018). On the downsides of law's contextualization, which tends to lead to its fateful determination in that context, see G Painter, 'Contingency in International Legal History: Why Now?' in Venzke and Heller (eds) (2021) 44.

57 See GI Tunkin, 'Co-Existence and International Law' (1958) 95 Collected Courses 1, 47 ('different elements of superstructure mutually influence each other and they also influence the development of the economic structure itself').

58 Quoted in E Baines, *The History of the Cotton Manufacture* (Fisher, Fisher and Jackson 1835) 462. Cf. J Simmons Jr (ed), *Factory Lives: Four Nineteenth-Century Working-Class Autobiographies* (Broadview 2007) 20; EP Thompson, *The Making of the English Working Class* (Pantheon 1963) 329. See also E Griffin, *Liberty's Dawn: A People's History of the Industrial Revolution* (Yale UP 2013), who cautions against excessive nostalgia for conditions of life in Britain before the Industrial Revolution.

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At the time, inequality soared.[59] Like all histories, the history of labour movements reflects the confluence of both power and ideas—especially the power of labour in relation to capital, and ideas of social freedom as opposed to the negative freedom of individual liberty.

Otto von Bismarck would not have enacted the first social legislation in the 1880s, nor would the Treaty of Versailles have established the ILO in 1919, had it not been for a plausible fear of communist revolution. When the Treaty of Versailles claims that it 'reflect[s] the belief that universal and lasting peace can be accomplished only if it is based on social justice,'[60] it expresses a belief that was shaped by the First World War as well as by the Russian Revolution.[61]

The United States eventually joined the ILO after the Great Depression and in the context of Roosevelt's New Deal. [62] At the time, it was a commonplace, both within the US and elsewhere, that labour standards should be promoted globally so as to ultimately *equalize* costs of production and to *erase* sources of comparative advantage.[63] The motivation was two-fold: to benefit both local *and* global labour conditions. Roosevelt supported his package of social legislation with the notable argument that 'necessitous men are not free men'[64]—an argument that then turned into the idea of 'freedom from want ... everywhere in the world'.[65] To be sure, one should treat this lofty rhetoric with some skepticism—after all, it glosses over imperialist practices and suggests, as so often, possibilities that may not in practice have existed. But the comparison with policy discourses in the present is striking and favourable.

59 On the importance of the Industrial Revolution, especially on inequality between countries, see Milanovic (2016) 119.

60 Treaty of Peace between the Allied and Associated Powers and Germany (adopted 28 June 1919, entered into force 10 January 1920).

61 R Tosstorff, 'The International Trade-Union Movement and the Founding of the International Labour Organization' (2005) 50 International Review of Social History 399; J van Daele, 'Engineering Social Peace: Networks, Ideas, and the Founding of the International Labour Organization' (2005) 50 International Review of Social History 435. Also see Peters (2017) 2, noting that 'The Russian revolution was the main motive for the foundation of the International Labour Organisation and its linkage to the peace process after World War I.'

62 One domestically oriented motivation was to overcome the Supreme Court's opposition to national labour standards. See G Sinclair, 'A "Civilizing Task": The International Labour Organization, Social Reform, and the Genealogy of Development' (2017) 20 *Journal of the History of International Law* 1, 31.

63 See Lamp (2020).

64 FD Roosevelt, 'State of the Union Message to Congress' (11 January 1944) <www.fdrlibrary.marist.edu/archives/address_text.html> accessed 3 May 2021. Cf. D Harvey, *A Brief History of Neoliberalism* (OUP 2005) 183.

65 Roosevelt (1944), The third is freedom from want—which, translated into world terms, means economic understandings which will secure to every nation a healthy peacetime life for its inhabitants—everywhere in the world.'

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The ILO helped enshrine the spirit of social justice within the Charter of the United Nations. The Charter's preamble notably affirms the aim of 'promot[ing] social progress and better standards of life *in larger freedom*.'[66] The ILO's Declaration of Philadelphia (1944), which speaks of the 'war against want', assumes the language of human rights, and even takes aim at the global economy.[67] But the ILO was too weak to really take on the task of re-tooling modes of economic production with a view to tackling global inequality. Instead, in the early 1970s, it ended up spearheading the focus on basic needs.[68] In 1975, it moved to a new building and indeed left its premises on the lake of Geneva to the GATT (and subsequently the WTO). The place that once proclaimed that 'labour is not a commodity', now houses the regime that facilitates global production around commodified labour.[69] The spirit of social justice has since been left wandering in some despair.

Structural transformation

In contrast to basic needs and minimal protection, the spirit of social justice animates different, relational and material conceptions of state sovereignty and individual freedom. For a short period in the 1940s, this spirit could place its hope in the World Trade Charter and the ITO, which reflected a distinct concern for employment and economic development.[70] But against expectations, the Charter ended in the dustbins of history and the ITO was never established.

Even so, the spirit lingered on and came to the fore during the 1960s in the push towards a New International Economic Order (NIEO).[71] Former colonies found themselves entangled in an international legal order that

66 Charter of the United Nations (24 October 1945) 1 UNTS XVI Preamble.

67 Declaration Concerning the Aims and Purposes of the International Labour Organisation (10 May 1944) <www.ilo.org> accessed 3 May 2020. On the economic dimensions, see especially art IV.

68 On the focus on 'basic needs', see Dehm (2018) 878; on the limitations of the ILO, see Moyn (2018) 96.

69 On the process of commodification, see K Polanyi, *The Great Transformation: The Political and Economic Origins of Our Time* (Beacon 2001) 71-80.

70 This was not the least due to the influence of developing countries. For a glimpse into the debates, see in particular the contributions by the Indian delegate PS Lokanathan at the meeting of the Preparatory Committee of the International Conference on Trade and Employment, 14 November 1946, Summary Record of the Meetings, E/PC/T/C.I/PV/2, 17-18, 51-53. Cf. A Lang, *World Trade Law After Neoliberalism: Reimagining the Global Economic Order* (OUP 2011).

71 U Özsu, 'Neoliberalism and the New International Economic Order: A History of "Contemporary Legal Thought"' in C Tomlins and J Desautels-Stein (eds), *In Search of Contemporary Legal Thought* (CUP 2017); A Anghie, 'Legal Aspects of the New International Economic Order', (2015) 6 Humanity 147; N Gilman, 'The New International Economic Order: A Reintroduction' (2015) 6 Humanity 1.

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recognized their formal independence but entrenched their material dependence.[72] In Mohammed Bedjaoui exemplary words:

> international law has helped to make independence a completely superficial phenomenon, beneath the surface of which the old forms of domination survive and the economic empires of the multinational corporations, and the powers that protect them, prosper. [73]

Bedjaoui wrote of 'phantom sovereignty', of independence as a fig leaf for 'an oligarchical system based on the exploitation of the greatest possible number of peoples'.[74] The NIEO, in turn, aimed at empowering weaker states, giving them knowledge to diversify their production, barrier-free market entry to sell their products, and access to new forms of finance. [75] It also supported the call for a Code of Conduct on Transnational Corporations, which would have created binding obligations.[76] Instead, the patchwork of around 3.000 bilateral investment treaties now grant foreign corporations rights without duties. After decades of ill-fated voluntary standards and self-certification efforts are just now again focusing on a Treaty on Business and Human Rights. But even the most far-reaching proposals at present still pale in comparison to the Code of the past.

It is true that many governments in the Global South had a poor record in improving the lot of their people—a record in which the North was at least occasionally complicit.[77] One consequence was that the Global North could therefore conveniently reject demands for structural change and international redistribution.[78] Rather than acknowledging complicity, these countries could

72 Cf. M Bedjaoui, *Towards a New International Economic Order* (UNESCO 1979) 41.

73 ibid 81.

74 ibid 13, 78, 81.

75 M Hudson, *Global Fracture: The New International Economic Order* (Harper & Row 1977) 165-216; J Toye, 'Assessing the G77: 50 Years After UNCTAD and 40 Years After the NIEO' (2014) 35 Third World Quarterly 1759.

76 M Staggs Kelsall, '"Poisonous Flowers on the Dust-heap of a Dying Capitalism": The United Nations Code of Conduct on Transnational Corporations, Contingency and Failure in International Law', in Venzke and Heller (eds) (2020); K Sauvant, 'The Negotiations of the United Nations Code of Conduct on Transnational Corporations' (2015) 16 Journal of World Investment & Trade 11; J Bair, 'Corporations at the United Nations: Echoes of the New International Economic Order?' (2015) 6 Humanity 159.

77 On this reason, see T Pogge, 'Recognized and Violated by International Law: The Human Right of the Global Poor' (2005) 18 Leiden Journal of International Law 717, 735. One might also ponder the killing capable African leadership: V Kumar, 'The In/Security of Assassinations in International Law: Contingency, Emancipation, Decolonial History and the Case of Thomas Sankara' (manuscript on file with the author).

78 See B Rajagopal, *International Law from Below: Development, Social Movements, and Third World Resistance* (CUP 2003); Pahuja (2011).

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put good governance first, locating the problem in the governance capacities of the dispossessed themselves. This brings me back, once more, to human rights and basic needs.

A competing vision of human rights has focused not on poverty but on unjustified privilege. In this vision, rights are understood as relational rather than self-reliant and emphasis is placed not on safeguarding minimum standards, but on human rights as allies in political transformation. Recent research into the history of human rights has highlighted this structural conception, and how it was virtually lost in the 1970s.[79] The next section seeks to recall it, via the figure of Gunnar Myrdal.

Myrdal's gloom

The Swedish economist Gunnar Myrdal was one of those who struggled to keep the spirit of social justice alive. Like Hayek, Myrdal first studied law and then turned to economics. In 1974, the two of them grudgingly shared the Nobel Prize for Economics. Their views could hardly have been more different.[80]

Both Nobel laureates argued against their background experience of the welfare state and its development in the decades following the Second World War. For Hayek, excesses in economic planning stood in the way of efficiency gains through increased liberalization. For Myrdal, in contrast, the welfare state was a role model for global economic governance.

Myrdal titled his Nobel Prize lecture 'The Equality Issue in World Development', arguing that the most egregious forms of inequality had been shielded from international scrutiny for as long as large parts of the world were colonized. In his view, decolonization had broken through the 'isolating wall of inattention [and] ignorance'.[81] In retrospect, of course, that was an overly optimistic view which underestimated the reluctance of those in the Global North to give up 'the peace and quiet that injustice can and does offer'.[82] The global division of labour seems to hide misery in the peripheries

79 T Borstelmann, *The 1970s: A New Global History from Civil Rights to Economic Inequality* (Princeton UP 2012).

80 Caldwell (2016). See also 'Myrdal and von Hayek Share a Nobel', *New York Times* (10 October 1974) 97.

81 G Myrdal, 'The Equality Issue in World Development' (1975) 4 Swedish Journal of Economics 413. Also note how core decision-making has moved towards ever greater distance from sites of possible confrontation; for international trade law-making in particular compare PJ Kuijper, 'From Seattle to Doha: from the surreal to the unreal—a personal account' in G Marceau (ed), *A History of Law and Lawyers in the GATT/WTO* (CUP 2015) 374.

82 J Shklar, *Faces of Injustice* (Yale UP 1990) 45.

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just enough to ensure that ignorance and hypocrisy can continue to prevail in the centres.[83]

Myrdal's main point of criticism was directed at the aid policies of developed countries, which he found not only insufficient and opportunistic but entirely ill-conceived. His arguments remain largely apposite today. His view of justice in economic relations, both locally and globally, was systematically relational. He was concerned with gains from privilege and domination, not with redistributing profits of some fictitious, fair competition.[84]

Myrdal further argued that that an uncritical emphasis on growth had painfully limited the horizon of economic policy-making. He confronted his audience in Stockholm with the 'blunt truth,' as he put it, 'that without rather radical changes in the consumption patterns in the rich countries, any pious talk about a new world economic order is humbug.'[85] *Avant la lettre*, he tied his argument on equality in world development to issues of sustainability.[86] To Hayek's outspoken dismay, Myrdal's lecture fell on fertile ground and, among other things, created ripples in the Club of Rome, which had just published its report on 'Limits to Growth'.[87]

Myrdal's acceptance speech runs in opposition to Hayek from beginning to end: inequality is to be solved by political means and by changes in the institutional structures of governance; neither by aid, nor by minimal protection. Myrdal's understanding of freedom is not the negative one of individual liberty, but a social one. He embraces the idea of social freedom that lets every human see that their freedom is not constrained by, but conditioned on, the freedom of others.[88]

In this section I have shown ideas and practices in respect of international law's relation with inequality, that contrast with those of the previous section. The mourning for the past has followed the recognition that something is

83 Wallerstein (1983).

84 Myrdal (1975) 14.

85 Myrdal (1975) 20.

86 For this close connection, see N Klein, *This Changes Everything: Capitalism vs. the Climate* (Penguin 2014).

87 See Caldwell (2016). Many of the concerns about what would today be called sustainability then focused on population growth, not always free of racial undertones, see S Ranganathan, 'Global Commons' (2016) 27 European Journal of International Law 693.

88 K Marx, 'Zur Judenfrage' in *Marx Engels Werke*, vol 1, (Karl Dietz Verlag 2006) 347, 365 critiques the human right of private property because it leads to a society that lets 'jeden Menschen im anderen Menschen nicht die *Verwirklichung*, sondern vielmehr die *Schranke* seiner Freiheit finden.' On the notion of social freedom, see A Honneth, *Das Recht der Freiheit:Grundriß einer demokratischen Sittlichkeit* (Suhrkamp 2011).

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rotten in the present. But what happened? And what does it possibly take to make the ghost go away?

RECOVERY: WORKING WITH THE SPECTRE

The logic of the ghost

The presence of a spectre marks that something is foul and prompts questions about the past. It does so in a particular logic. The spectre of inequality starts out by pointing towards gaps between normative aspirations and a recalcitrant reality. Economic growth should lift all boats, domestic institutions should react to distributive consequences where necessary, labour law and human rights should help out, etc. That is how it should be, and yet it is not. An intuitive response might be to try harder to close that gap between aspiration and reality.

That, it turns out, is not the best strategy and is doomed to fail, as it has failed in the past. The spectre knows that all too well. An example my best explain why that is so. A lot of attention has recently centred on the United Nations Sustainable Development Goals (SDGs)—a lot of public policy and research claiming relevance connects to these goals. They followed up on the Millennium Development Goals (MDGs) in 2015 and, among other things, now claim in goal 10 to 'reduce inequality within and among countries'.[89] The path is clear, the direction set, we just need to get our act together and get there.

The logic of the ghost is different. The spectre knows that this path, which seems to only have a future but no past, will not arrive at the goal. It won't work, not this way. The spectre knows because it has its eyes fixed on the mournful spectacles around the world. As Derrida exclaims after a quick dip into etymology, the spectre, it looks![90] And it sees that the problem does not so much, not even primarily, lie in the yawning gap between normative aspirations—the goals—and a recalcitrant reality—persistent inequality. The spectre inspects what has been going on all along and sees contradictions, between competing conceptions of international law, human rights, social policy and economic thinking, symbolized by the Nobel Prize split into two. It ultimately points to the most classic of all contradictions: that between autonomy and dependence, between formal rights and material conditions, between the

89 See 'Goal 10: Reduce inequality within and among countries' (*United Nations*) <sustainabledevelopment.un.org/sdg10> accessed 3 May 2021; UNGA Res 70/1 (25 September 2015) UN Doc A/Res/70/1.

90 Derrida (1994) 6.

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negative freedom of individual liberty and social freedom of flourishing in interaction.[91]

It then is possible to see those contradictions underneath repetitive practices. Current repetitions include attributing responsibility for growth to international law and its institutions while abdicating responsibility for distributive impacts. Repetitions extend to the emphasis placed on increasing voice and representation, which have not led to shifts in power or policy.[92] The SDGs notably remain entirely committed the current legal structures of the global economy, those same structures that have contributed to inequality in the first place.[93] Sub-goal 10.b. encourages in the same breath official development assistance and foreign direct investment. It glosses over entirely the categorical differences between aid, on the one hand, and demands for justice, on the other.

Such repetitions are marked by a lack of learning from past wrongs. Getting out of them, the logic of the ghost suggests, requires working with contradictions (B.) and returning to the past (C.). It seeks change, not repetition. How so?

Emancipatory politics

Contradictions are carriers of hope.[94] They can destabilize, open up what seems resistant to change, and work as a transformative force.[95] In order to work that wat, they must be given light and exposure and not be closed down prematurely. Some responses to inequality notably do follow the logic of the ghost, but only halfway. They carve out underlying contradictions and then resolve them too quickly. Let me highlight three of those responses. First are arguments following up on critiques according to which rights do more harm than good. Rights, those arguments go, abstract from concrete conditions of inequality in a way that not only leaves those conditions entirely intact, but

91 GFW Hegel, *Elements of the Philosophy of Right* (CUP 1991); Marx (2006).

92 The first set of concrete policies that sub-goal 10.4 mentions are notably those of individual countries, 'especially fiscal, wage and social protection policies, and progressively achieve greater equality'.

93 See sub-goal 10.a.

94 'Widersprüche sind die Hoffnungen.' That is how Berthold Brecht opened the lawsuit over turning his *Beggar's Opera* into a movie. A 2018 movie centres on how Brecht's original movie was never made, now enacting parts of the original script.

95 On such a dialectic of social developments, notably for better or worse, see Adorno (1990). On the reason to hope—between certainty and wishful thinking—that change would be emancipatory, leading to greater freedom rather than domination, see TW Adorno, *Minima Moralia: Reflections from Damaged Life* (EFN Jephcott tr, Verso 1974) 97-98.

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even entrenches and justifies them.[96] Doing away with rights, however, stands in contrast with many concrete struggles for justice at both individual and collective levels.[97] For Bedjaoui, 'international law has long concealed flagrant economic inequalities between States under the cover of sovereign equality'.[98] But at no point would he want to give up that hard-fought sovereignty, which he, like others, valued as an asset in the further struggle towards real emancipation.[99] Doing away with individual rights or collective sovereignty resolves contradictions without gain. That this contradiction can indeed be productive is supported by the next two examples.

A second way of dealing with contradictions does not take aim at rights per se but at particular conceptions of rights. It takes aim at false universals, questioning the baseline for what is universal, or 'normal', and what is not. That prong of critique has been particularly strong in feminist and TWAIL scholarship. It has shown, among other things, how rights have contributed to maintaining a division of the private and public spheres that is aligned with male privilege.[100] More generally, it has critiqued ill-guided abstraction and called for situated, concrete analyses, given that the abstract point of view has so often turned out to be that of the presumably rational and white man.[101] In international law, too, all are formally sovereign and equal, and substantially different. It is then fairly easy to see how the emphasis on non-discrimination in international economic law makes the policy preferences of developed countries the norm while it delegitimizes policies that developing countries might find useful.[102] It also becomes clear that the emphasis on

96 Marx (2006).

97 S Žižek, *First as Tragedy, Then as Farce* (Verso 2009) 49. See also H Marcuse, *An Essay on Liberation* (Beacon Press 1969); Shklar (1990). For an argument on the relative absence of rights in social movement, however, see B Rajagopal, *International Law from Below: Development, Social Movements, and Third World Resistance* (CUP 2003) 245-49.

98 Bedjaoui (1979).

99 ibid 90, 95, 244. For related discussions of law's transformative potential, see R Knox, 'Marxism, International Law, and Political Strategy' (2009) 22 Leiden Journal of International Law 413, 429-32, and with skepticism about sovereignty's emancipatory potential because it remains judged against Western standards, see R Buchanan and S Pahuja, 'Law, Nation and (Imagined) International Communities' (2004) 8 Law Text Culture 137.

100 Cf. C MacKinnon, 'Reflections on Sex Equality Under Law' (1991) 100 Yale Law Journal 1281, 1286.

101 S Benhabib and S Cornell (eds), *Feminism as Critique: On the Politics of Gender* (University of Minnesota Press 1987) 77; cf. D Schmalz, 'Social Freedom in a Global World: Axel Honneth's and Seyla Benhabib's Reconsiderations of a Hegelian Perspective on Justice' (2019) 26 Constellations 301; Pahuja (2011).

102 Cf. H-J Chang, *Kicking Away the Ladder: Development Strategy in Historical Perspective* (Anthem Press 2005).

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non-discrimination has not touched measures such as the protection of intellectual property, which, like all property, is discriminatory. The principle of non-discrimination turns out to be a false universal. But there is a productive, dynamic tension here between claims to universality and their particular expressions—a tension that may be one of the main drivers towards greater freedom.[103] If that is so, then a categorical rejection of universals, apart from such a rejection's philosophical difficulties, may also be questionable strategically.

A third variant of critique focuses on the relationship between those parts of the law that shape economic conditions and those that are concerned with equal dignity as well as specific identity. In other words, it focuses on the relationship between the law of development and the law of recognition in the way that Emanuelle Toume-Jouannet has spelled out in her work. She ultimately comes close to dismissing the law of recognition as symbolic and as distracting from the underlying economic reasons for injustice.[104] But even if recognition may seem cheap and sometimes inconsequential, redistribution does not happen without it.[105] Recognition is, once more, a valuable asset in struggles to break through durable inequality that also persists through beliefs in inferiority and superiority.[106] The tension between both—the law of development and the law of recognition—is again productive. It is also true that different sets of rights stand in a symbiotic relationship. It is not possible to fully enjoy political rights on an empty stomach; and a lack of political rights will probably mean an empty stomach for longer.

The spectre cautions not to resolve tensions quickly—be it by prioritizing the law of development over the law of recognition, or by harmonizing different sets of rights into one coherent whole. It bears repeating that the reason for keeping contradictions open, to savour and work with them, rests upon the idea that they may sustain hope in the changeability of global economic conditions and their legal structuring.[107] It is impossible to capture the nature

103 A Honneth, *Der Kampf um Anerkennung: Zur moralischen Grammatik sozialer Konflikte* (Suhrkamp 1994). On freedom as the point of emancipation, see also R Forst, *Normativiät und Macht* (Surhkamp 2015) 15, 37-81; and already J Habermas, 'Knowledge and Interest' (1966) 9 Inquiry: An Interdisciplinary Journal of Philosophy 285: 'The knowledge interests of all critical scholarship is *emancipatory*, it frees the subject from dependence on hypostatized forces.'

104 E Toume-Jouannet, *What is a Fair International Society? International Law Between Development and Recognition* (Hart 2013) 204.

105 G Therborn, *Killing Fields of Inequality* (Polity 2013), presenting recognition as a cheap panacea. See, more generally, A Honneth and N Fraser, *Redistribution or Recognition?* (Verso 2003).

106 Seminally, F Fanon, *The Wretched of the Earth* (C Farrington tr, Grove 1963); generally C Tilly, *Durable Inequality* (University of California Press 1998).

107 Compare Adorno (1974) 97-98 (on the conception of hope and its basis).

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of the spectre in a single take: it is both ideal and material, both imagined and real, both present and not present.[108] The spectre cannot be reduced to either one or the other; instead, it asks that productive contradictions be put to work towards political emancipation—that is, towards greater freedom in a world that is our own. Do 'we' live in a world that is ours?[109]

Futures past

I mentioned at the outset that levels of inequality have evoked a sense of injustice, mixed with feelings of alienation from the world—a feeling of impotence in the face of seemingly inhuman forces.[110] The spectre may ultimately ask that current policies? break with their current path that seems only to lead towards greater levels of inequality in the future. That is the reason why the spectre appears. It intervenes and prompts us to stop. Hamlet: 'Speak; I'll go no further.'[111] The spectre asks that we work for change by doing history.[112] Why?

Here, a critique comes in that focuses on law's role in rendering the present state of affairs more natural, necessary and even just.[113] I will develop this last component of my argument in light of Rousseau's critique of the rule of law, which he offered in his 'Discourse Upon the Origin and the Foundation of the Inequality among Mankind'.[114] Three points stand out for me in that

108 Derrida (1994) 63, who notes that the spectre exceeds the binary, which differs from my more dialectical interpretation of the spectre. In fact, I bring it close to ideas of immanent critique that start from establishing contradictions. See R Jaeggi, *Kritik der Lebensformen* (Suhrkamp 2013).

109 The assumption that 'we' inhabit the same single world in a sociologically meaningful way is in fact rather shaky. Moreover, the degree to which particular individuals and groups believe to determine their own circumstances and fate notably varies widely. It is, by and large, particularly high among white, male elites, and low among those who are on the receiving and of discrimination and economic exploitation. See respectively for the emphasis on gender and social strata H Charlesworth, 'International Law: A Discipline of Crisis' (2002) 65 Modern Law Review 377; Marks (2009) 14, noting that 'to those at the less comfortable end of social relations ... the patterning of privilege and deprivation will be quite plain'. See also ASR Manstead, 'The Psychology of Social Class: How Socioeconomic Status Impacts Thought, Feelings, and Behaviour' (2018) 57 British Journal of Social Psychology 267.

110 See Jaeggi (2016).

111 There are of course strong resonances with Walter Benjamin's angel of history and the desire to stop. See W Benjamin, 'Über den Begriff der Geschichte' in *Gesammelte Schriften*, vol 1.3 (Suhrkamp 1991) 691, 697-698; cf. C Tomlins, 'After Critical Legal History: Scope, Scale, Structure' [2012] Annual Review of Law and Social Science 31. See also J-F Bayart, *Le Gouvernement du monde. Une critique politique de la globalization* (Fayard 2004) 405-436.

112 Cf. J Nijman, 'Seeking Change by Doing History' (Inaugural Lecture 591, University of Amsterdam, 2018).

113 See D Kennedy, *A Critique of Adjudication (Fin de Siècle)* (Harvard UP 1997) 241.

114 J Rousseau, *A Discourse Upon the Origin and the Foundation of the Inequality of Mankind* (R and J Dodsley 1755).

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classic treatise. First, Rousseau offers a strong argument against the negative freedom of individual liberty. He argues that in any society we need each other to be free. In his elegant phraseology: 'Of what service can beauty be, where there is no love?'[115] Appreciating the social conditions of freedom offers a pathway into the structures of the global economy and towards empathy within it.[116] It may work against those theories, ideas and legal orderings that sustain the abdication of responsibility that I described above.

Second, Rousseau famously wrote of 'the first man, who, after enclosing a piece of ground, took it into his head to say, "This is mine," and found people simple enough to believe him.'[117] Rousseau continued:

> How many crimes, how many wars, how many murders, how many misfortunes and horrors, would that man have saved the human species, who should have cried to his fellows: Be sure not to listen to this imposter; you are lost, if you forget that the fruits of the earth belong equally to us all, and the earth itself to nobody![118]

That element of *belief* is most interesting, just as well as the ambivalent role that law plays in naturalizing the current state of affairs. In *Coding Capital*, Katharina Pistor draws out the ways in which law creates wealth and buffers the critique of inequality.[119] The practices that have led to the state of affairs are, after all, tolerated by the law, even enabled by it. 'But it's legal!' is capitalism's strongest defence, Pistor notes.[120] On another occasions, I have started to further tease out the social effect that the law—and the way we teach and do law—has in that regard.[121] There is indeed a wide practice of rationalizing legal analysis that grants the present state of affairs a naturalizing gloss.[122] However, thinking counterfactually—thinking about what could have happened—can make the law and the present look less natural, less likely and less just. A lot remains to be done in studying how law shapes social beliefs and in

115 ibid 17.

116 Cf. Beckett (2016).

117 Rousseau (1755) 18.

118 ibid.

119 Pistor (2019).

120 ibid 6, 161.

121 I Venzke, 'What If? Counterfactual (Hi)Stories of International Law' (2018) 8 Asian Journal of International Law 403; I Venzke, 'Cognitive Biases and International Law: What's the Point of Critique?' in M Hirsch and A Bianchi (eds), *International Law's Invisible Frames: Social Cognition and Knowledge Production in International Legal Processes* (Oxford UP forthcoming).

122 R Unger, *What Should Legal Analysis Become?* (Verso 1996) 36.

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teasing out the repercussions that this has also for the way in which law is taught and practiced.[123]

The third and final lesson that stands out for me is that Rousseau wants to go back, rather than forward. He wants to proceed by 'discovering and following the lost and forgotten tracks.'[124] The lovable and hopeless romantic that he is, Rousseau is nostalgic for what there supposedly was before the rule of law. The spectre of inequality also carries with it a longing to return to the past, just for a moment, not to dwell there. The spectre is everything but nostalgic. It wants to return to the past and suggests working with contradictions in order to get out of the ever-moving present that seems to leave no choice.[125] Revisiting the NIEO or structural conceptions of labour and human rights law is neither an expression of nostalgia nor naïveté. The point is rather to give an open future back to the past, the past of the present and of the future.[126] The future will have been open.[127] As Marx already knew, emancipation requires 'not a great stroke of thought between past and future, but a *consummation* of ideas of the past. It will finally be shown that humanity begins no *new* task, but consciously consummates its old task.'[128] The task, as I also see it for international law, is to follow the spirit of social justice into the past towards a different future.

123 Notwithstanding the fact that a lot has been done, cf. L Eslava, 'The Teaching of (Another) International Law: Critical Realism and the Question of Agency and Structure' (2020) 54 The Law Teacher 1, with futher references.

124 Rousseau (1755) 33.

125 R Koselleck, 'Von Sinn und Unsinn der Geschichte' in: *Vom Sinn und Unsinn der Geschichte* (Suhrkamp 2010) 9, 18.

126 R Koselleck, *Futures Past: On the Semantics of Historical Time* (Columbia UP 2004).

127 Cf. Žižek (2009).

128 K Marx, *The Letters of Karl Marx* (Prentice Hall 1979) 32. In German in K Marx and F Engels, *Werke*, vol. 1 (Karl Dietz Verlag 1976) 337, 346: 'Es wird sich zeigen, daß es sich nicht um einen großen Gedankenstrich zwischen Vergangenheit und Zukunft handelt, sondern um die *Vollziehung* der Gedanken der Vergangenheit. Es wird sich endlich zeigen, daß die Menschheit keine neue Arbeit beginnt, sondern mit Bewußtsein ihre alte Arbeit zustande bringt.'

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