THE VITORIAN RECOVERY AND THE (RE)TURN TOWARDS A SACRIFICIAL INTERNATIONAL LAW

Introduction

A recent return of interest in the question of history within International legal scholarship has been accompanied by an increased focus on debt that the discipline owes to European imperialism.[1] Furthermore, in parallel with this resurgence of historical/postcolonial international legal scholarship, greater attention is also being paid to the political-theological elements of legal violence, developing understandings of ways in which violence continues to gain operative function through the workings of the law, despite the presupposition of international law being a mechanism for guaranteeing international peace.[2] However, still largely underdeveloped in the literature is a reading that stresses the connection between these two theoretical insights, the claim of the enduring legacy of European imperialism within international law and the claim of law's ability to facilitate violence within a social order that ostensibly denies such violence an existence. In this article, I offer a theoretical framework for understanding the operation of violence within the contemporary global legal order by illustrating how the structure of the liberal, post-colonial vision of an international legal community that emerged over the twentieth century, marries with the model of community produced and sustained by sacrificial violence, as described by philosophical anthropologist René Girard. Drawing on Girard's idea of sacrificial violence, I will illustrate how the legal violence inflicted upon the colonialized subject can function as productive, rather than destructive, of the communality of international law, following the Benjaminian dictate of the violence of the law functioning so as to be law-making or law-preserving.[3] Applying the notion of sacrifice brings into play alternate understandings of law's claim to

[1] See, e.g., A Anghie, *Imperialism, Sovereignty and the Making of International Law*, (Cambridge UP, 2005); M Craven, M Fitzmaurice & M Vogiatzi (eds), *Time*, *History and International Law* (Martinus Nijhoff Publishers, 2007); D Kirkby & C Coleborne (eds), *Law, History, Colonialism: The Reach of Empire* (Manchester UP, 2001); M Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870-1960* (Cambridge UP, 2001).

[2] For scholarship on the relationship between law and violence, see R M. Cover, "*Violence and the Word,"* Yale Law Journal 95 (1986), 1609-1629; G Boire, "*Legalizing Violence: Fanon, Romance, Colonial Law"*, in M Freeman and A Lewis (eds), *Law and Literature, Current Legal Issues* 1999(2), 581–601; A Sarat (ed.) *Law, Violence, and the Possibility of Justice* (Princeton University Press: 2001)

[3] For Benjamin's concept of 'law-making or law-preserving violence' see W Benjamin, "Critique of Violence," in *Reflections: Essays, Aphorisms: Autobiographical Writing*s, P. Demetz (ed.) (New York: Schocken Books 1986), p.287

'maintain international peace', challenging conventional narratives of international law in the twentieth century so as critique the assumption of our current global legal community being a neutral, horizontal order of peace in that arose following two world wars in the first half of the century.[4] In making this argument, I will be engaging with the historical recovery of the jurisprudence of the Spanish theologian Francisco de Vitoria, who returned to prominence in the early twentieth century when celebrated by liberal jurists as international law's *paterfamilias*.[5] I will examine the ways in which Vitoria's model of universal humanity, developed at the origin of European colonialism, was retrieved in the twentieth century and then used to serve as a framework for the refashioning, rather than removal of, imperial violence in postcolonial international law.

This article illuminates the imperial violence that persists within the humanism of liberal, postcolonial international law through critically reviewing Vitoria's ideas in the context of their recovery after the Great War. To place Vitoria's schema in response to the crisis the Great War caused for the given legal order asks new questions regarding the potency of his ideas for the twentieth century and their implication in the qualified inclusion of former colonial subjects into the international community in the second half of the century. Was there something of the outbreak of mimetic warfare between the great empires of the world and crucially, the abject failure of international law to restrain this crisis that injected Vitoria's ideas with new life nearly four hundred years after they were first expressed? In response to this question, I will unpack the ways in which a return of interest in Vitoria was indicative of a wider shift in the conceptualisation of international community at this time, a shift away from the hierarchical order of competing empires, towards the moral, postcolonial, universal community claimed by contemporary international law. Vitoria's ideas, in their twentieth century form, help us to understand the (re)turn towards an international legal order that was, as I would rather describe, sacrificial. Through the notion of a sacrificial international law, a connection between the Vitorian recovery and the enduring imperial violence of contemporary international

[4] Chapter 1, Article 1 (1) of U.N Charter states 'The Purposes of the United Nations are 1. To maintain international peace and security' U.N. Charter available at http://www.un.org/en/documents/charter/preamble.shtml [02/09/14]

[5] Vitoria is read as the father of international law in, e.g., A Anghie (2005); C Rossi, *Broken Chain of Being: James Brown Scott and the Origins of Modern International Law* (Brill, 1998).

law can be drawn. Furthermore, this theoretical concept allows for a greater light to be placed on how former colonial subjects continued to be excluded from the international community even in their postcolonial inclusion, enabling them to take up their interior/exterior position required of a sacrificial victim. However before unpacking this concept of a sacrificial international law, it is important to initially contextualise the return of Vitoria's ideas by tracing the dispute over the significance of his texts that has taken place over time and that continues to divide international legal scholars.

Vitoria's Recovery

Many contemporary international legal historians now locate the 'origin' of the discipline in the texts of Vitoria.[6] More specifically, it is in two sets of Vitoria's lectures – *De Indis Noviter Inventis* and *De Jure Bellis Hispanorum in Barbaros* – that the birth of international legal jurisprudence has been identified.[7] These lectures are a juridical conceptualisation of the relations between the Spanish and the Amerindians in Vitoria's time, in other words, the ordering of the formative relations of the European colonial project. To posit Vitoria as an origin for international law is to accept, as influential Vitoria reader Anthony Anghie states, that international law 'did not precede and thereby effortlessly resolve the problem of Spanish-Indian relations; rather, international law was created out of the unique issues generated by the encounter between the Spanish and the Indians'.[8] However, after initially influencing a generation of sixteenth and seventeenth century scholars who followed in his wake at the School of Salamanca, Vitoria's legacy began to rescind as the centre of gravity for European imperialism moved away from Spain to the

[6] See D Kennedy, 'Primitive Legal Scholarship', 27.1 *Harvard International Law Journal* (1986) 1-98; J Brown Scott, *The Spanish Origin of International Law: Francisco de Vitoria and his Law of Nations* (Clarendon Press, 1934); A Pagden, 'Dispossessing the barbarian: The language of Spanish Thomism and the debate over the property rights of the American Indians', in A Pagden (ed.), *The Languages of Political Theory in Early-Modern Europe* (Cambridge UP, 1987) 79-99, 80. Pagden writes: 'Vitoria and his pupils, and the pupils of his pupils down to the generation of the Jesuits Luis de Molina (1535-1600) and Francisco Suarez (1548-1617), have come to be called 'The School of Salamanca', although the Italian term 'seconda scholastica' is a better description'.

[7] See A Anghie (2005); and P Fitzpatrick, 'Latin roots: The force of international law as event', in F Johns, R Joyce & S Pahuja (eds), *Events: The Force of International Law* (Routledge, 2011) 43-55.

[8] A Anghie (2005) 15.

Netherlands, France and Great Britain.[9] By the turn of the twentieth century, Vitoria's influence was greatly reduced in the accepted historical narrative of international law, overshadowed by the likes of Hugo Grotius, the most common figure placed in the role of 'forefather of international law' at that time, with Vitoria marginalised as a representative of a pre-modern, theologically informed natural law.[10] However, once the rivalry between European empires imploded into warfare on an unprecedented scale, Vitoria returned to prominence. As Carl Schmitt argues 'after World War I, a "renaissance" of Vitoria and late Spanish scholasticism marked an especially interesting phenomenon in the history of international law.'[11] Vitoria's contribution to the birth of international law was resurrected, with a plethora of new literature generated that presented him no longer as a pre-modern theologian but more as a visionary who provided guidance for those looking for a more liberal international legal order.[12] In the inter-war period, the first editions of Vitoria's work appeared in Spanish, French and English, Camilo Barcia Trelles began to present courses on Vitoria at the Hague Academy of international law, the University of Salamanca created the Francisco de Vitoria Chair and Vitoria-Suarez International Association was established in 1932.[13] In the Anglosphere, the recovery and promotion of Vitoria's writings was primarily led by American legal scholar James Brown Scott, who envisioned Vitoria as the theoretical example for the USA to follow as it embarked upon its own emergence onto the international stage.[14] For Scott, Vitoria's insistence on the humanity of the colonised Amerindian, in opposition to the prevailing consensus of his time, was an ideal point of origin from which he could ground his own conception of an international law founded on a moral universalism. In the wake of the violent crisis of the Great War, Scott endeavoured to recuperate Vitoria's legacy by arguing that 'the corner-stone of Vitoria's system was equality of states, applicable not merely to the states of Christendom and of Europe but also to

[9] In the 18th and 19th Century, the figures of the natural law tradition continue to reference Vitoria but with increasing scarcity, especially once positivism becomes mainstream international legal jurisprudence.
[10] M Koskenniemi (2014) 121.
[11] C Schmitt, *The Nomos of the Earth in the International Law of the Jus Publicum Europaeum,* 117.
[12] For some of the literature on Vitoria produced in this period see, Francisco de Vitoria *De Indis et De ivre belli relectiones*, Ernest Nys, Johann Georg Simon, Herbert Francis Wright, trans. John Pawley Bate (eds), (The Carnegie Institution of Washington, 1917) or Camilo Barcia Trelles, *Francisco de Vitoria, Fundador del Derecho Internacional Moderno* (Reus, 1928)
[13] J María Beneyto and J Corti Varela (eds), *At the Origins of Modernity: Francisco de Vitoria and the Discovery of International Law* (Springer, 2017), 104-107
[14] See J Brown Scott (1934) and *The Catholic Conception of International Law* (The Lawbook Exchange, 2007).

the barbarian principalities in the Western World of Columbus'.[15] Scott retrieved Vitoria's legacy by arguing that the communality of an international legal order was inextricably tied to its claim to offer 'a single moral standard' applicable to all humanity, contrasting against the colonial division in the global order established by the European empires.[16] As well as writing on Vitoria's legacy himself, Scott also facilitated new English additions of Vitoria's work through the Carnegie Endowment for International Peace.[17] The spread of the new issues of Vitoria's writings, published in 1917, give an indication of the growing interest in his work that would emerge just as given global order became engulfed in conflict. Amplifying the potential for international law to function as a unifying moral force, Scott's recovery of Vitoria 'represents an incredible transmogrification of the postulates of natural law, from the Middle Ages to twentieth-century American Neo-Thomism.'[18] In Vitoria's writings were the jurisprudential antecedents for the international law that liberal humanitarians sought contrast against the global order of warring empires that was held to have dragged even the 'civilised' world into bloodshed; instead they advocated for an international law that was unitary, cohesive and ontologically complete in its encapsulation of all humanity. The retrieval and repurposing of Vitoria and his ideas in service of an early twentieth century reconstruction of international law is perhaps best captured by a vignette recounted in the eulogy for James Brown Scott published by the American Journal of International Law after his passing:

> When the new building for the Department of Justice was completed in Washington, it was decided to adorn the ceremonial entrance leading from the court of honor with a series of mural panels depicting the great lawgivers of history... Unable to locate a likeness from which to paint the features of Victoria… the artist, hearing of Dr Scott's work, sought his advice on a portrait of his subject. Unfortunately, Dr Scott had to tell him that none could be found anywhere in the world. The artist returned to his mural and painted the figure of Victoria garbed true to life as a Dominican friar but with an excellent likeness of the head and hands of James Brown Scott. So there in the halls of justice at Washington, standing … is a good portrait of Dr Scott disguised in the habit of the Dominican theologian

[15] J Brown Scott (1934) 281.
[16] C Rossi (1998) 10.
[17] See Carnige Endowment for International Peace series on International Law under series editorship of James Brown Scott, particularly Francisco De Vitoria, *De Indis Et De Ivre Bells Reflectiones*. Edited by Ernest Nys, Classics of International Law, Vol.7. (Washington D.C.: Carnegie Institution of Washington 1917)
[18] F Gomez, 'Francisco de Vitoria in 1934, Before and After' *MLN,* 117, 2 (Mar 2002), 365-405, 368

> who expounded the law of nations one hundred years before the classic treatise of Grotius.[19]

The image of Vitoria recast with the face of leading American international law theorist James Brown Scott provides an apt visual metaphor for the way Vitoria was remade to respond to a twentieth century crisis of international order. Anne Orford recognises the allegorical significance of the above vignette, stating that 'it is fitting that the entrance of the US Department of Justice displays a likeness of Scott in the guise of Vitoria, because it is the version of Vitoria created by Scott that would provide the ideological justification for the universal law of the American century.'[20] The images in question are reproduced below.

Fig 1. Mural of Francisco De Vitoria at U.S. Department of Justice Building. Reproduced from Edward Gordon "The Art Of *Justice,* Or *Queen For A Day",* available at *The Green Bag* Vol.15. (2012)


Fig. 2 Image of Dr James Brown Scott alongside the depiction of Vitoria. Reproduced from Edward Gordon "The Art Of *Justice,* Or *Queen For A Day",* available at *The Green Bag* Vol.15. (2012)

[19] G A Finch, "James Brown Scott, 1866-1943," *American Journal of International Law* Vol.38 No.2 (1944), 183-217, 199

[20] A Orford, "The Past as Law or History? The Relevance of Imperialism for Modern International Law", 17

The image of Vitoria constructed in this recovery project was of a benevolent father figure for international law, celebrated 'for espousing the interests of indigenous populations against a predatory Spanish colonisation of the Americas'.[21] Vitoria returned to influence to be remembered as 'a man of peace and religion … heroically turning against the colonial violence of his own countrymen'.[22] Vitoria's recovery both informed and mirrored the shift of international law towards imposing what James Brown Scott called a 'single standard of morality' upon the world at large.[23] Previewing the rise of humanitarianism that was to triumph over the twentieth century, Scott drew from Vitoria, this notion of 'a single standard of morality', in which law established ethical norms that bounded the individual lives of people, over and above the sovereign states they attached to. Scott explained this ideal further when stating:

> We have thus the measure of law: it must be moral and it must be spiritual in essence-whatever its material content-if it is to be consistent with the nature and dignity of humanity, in which right, not might, prevails ... Getting underneath the surface of the state, we have found it, not a personality, but a body corporate, with many members. The international community, made up of states, will become a gigantic artificial person unless we continually look behind the outward form of each member and recognize humanity.[24]

Contrasting itself against an overly-positivist international law which had failed to prevent the outbreak of war, this jurisprudence anchored upon a universal morality that could produce what might be termed a 'oneness' in the world. With Vitoria being the figure that Scott cited as the example to follow for this new model of international legal order, he helped to reinstitute an abiding image of the sixteenth-century Salamancan theologian as an innovative and prescient humanitarian.

[21] P Fitzpatrick (2011) 48.
[22] M Koskenniemi (2014) 121.
[23] J Brown Scott, 'A Single Standard of Morality for the Individual and the State,' Presidential Address delivered at the Twenty-sixth Annual Meeting of the American Society of International Law, 26 (1932), 20.
[24] J Brown Scott, "A single standard of morality for the Individual and the State," 20.

A Contested Legacy

The image of Vitoria offered by his interwar recovery has been challenged in recent years, with a particularly piercing critique offered by Antony Anghie's book *Imperialism, Sovereignty and the Making of International Law* (published in 2005). Anghie revisited Vitoria's jurisprudence and argued that, counter to the great humanitarian presented in the recovery project, within Vitoria's work lay an eventual accommodation of, rather than an opposition to, the brutalities of the sixteenth-century Spanish *Conquista*. Moreover, Anghie stressed that Vitoria's accommodation of violence was particularly dangerous as it was expressed more subtly than that favoured by explicit colonial apologists; Vitoria's jurisprudence masked its violence 'precisely because it is presented in the language of liberty and even equality'.[25] Anghie did recognise that Vitoria refused to justify colonial violence through characterising the Amerindians as an inferior species and as natural slaves, a position advocated by other influential Spanish jurists such as Juan Ginés de Sepúlveda.[26] However, as opposed to reading this refusal as an indication of Vitoria being a prototypical altruistic humanist, Anghie spies in Vitoria's thought a qualification to this defence of the colonised: while Vitoria may have seen the Amerindians as human, he did not see them as being quite *as* human as the Spanish, who were by extension elevated into the condition of the pre-determined standard for humanity.

Anghie's critique marked the culmination of a stream of scholarship that offered a dissenting opinion against the claims of Scott and the early twentieth-century Vitorian recovery. Robert Williams argued that Vitoria's jurisprudence did not provide a moral antecedent for twentieth century international law but instead 'justified the extension of Western power […] as an imperative of the European's vision of truth'.[27] Furthermore, Carl Schmitt had also defied the humanitarian image of Vitoria being offered by inter-war jurists, arguing that Vitoria's 'conclusions ultimately justified the *Conquista*' and through an appeal to a universal morality legitimised the violence of

[25] Ibid 122.
[26] For more on Sepúlveda's thought, see L Hanke, *All Mankind is One: A Study of the Disputation Between Bartolomé de Las Casas and Juan Ginés de Sepúlveda in 1550 on the Intellectual and Religious Capacity of the American Indians* (Northern Illinois UP, 1994) 84: Hanke tells us that for Sepúlveda, the natives were as inferior to the Spanish 'as monkeys were to men'.
[27] RA Williams, *The American Indian in Western Legal Thought. The Discourses of Conquest* (Oxford UP, 1990) 6-8.

Spanish colonialism.[28] Anghie expanded on this line of critique by bringing into clearer focus the extent to which Vitoria's schema, which recognised the Amerindian within an international community yet forgave the violence of the *Conquista*, laid the structure for a 'dynamic of difference' between Europeans and non-Europeans to be maintained within an ostensibly liberal, non-hierarchical universal order.[29] Despite being included within a 'single standard of morality' the colonised were still excluded from full membership of the community by the ultimate legitimation of the violence that had befallen them.

Anghie's critique of Vitoria has provoked a response by scholars still committed to retaining Vitoria's humanitarianism. Georg Cavallar argues that it is 'one-sided to present [Vitoria] as an unequivocal accomplice of European colonialism', citing Vitoria's personal letters commenting on the conquest of Peru by Francisco Pizarro as evidence of the extent of his horror at the conquistadors' bloodlust and explaining his reluctance to publicly condemn the conquistadors for fear of the political price he would have had to pay for doing so.[30] Ian Hunter also critiques Anghie's argument, claiming that Anghie and other postcolonial critics of Vitoria fail to extract themselves from the project of constructing a universal history that itself inadvertently results from a Eurocentric philosophical perspective.[31]Charging the recent Vitoria critics with offering an anachronistic reading, Hunter suggests that Vitoria's jurisprudence would not have been received in his own time in terms of either producing or failing to produce a 'global normative order … and cannot be understood by modern historians in this way either'.[32] For Hunter, Vitoria's lectures are best understood by 'situating them in the immanent conflicts among the rival intellectual cultures on which they were based.'[33] What Hunter and others overlook in their plea for contextualism is that, however one might understand Vitoria in his sixteenth-century context, there is a distinct twentieth-century version of Vitoria that was constructed by the likes of Scott and it is this version that served to inform the moalism, universalism and humanitarianism of contemporary international law. Encasing Vitoria's ideas solely in the own time fails to explain why there was a

[28] C Schmitt, *The Nomos of the Earth in the International Law of the Jus Publicum Europaeum*, 113.
[29] A Anghie (2005) 1-15.
[30] G Cavaller (2008) 191, 207, 209-211.
[31] I Hunter (2010) 11-29.
[32] Ibid 12.
[33] Ibid.

sudden surge of interest in these ideas in the twentieth century, hundreds of years after their author's passing; a crude contextualism also does not explain why Vitoria is retrieved to be proffered as the 'father' of international law just as scholars sought a fresh jurisprudence to shift the global legal order away from a cycle of imperial competition and world war. A deeper consideration of the theoretical challenge facing international law at the time of Vitoria's recovery following the Great War helps to address these questions and respond to the argument against reading of Vitoria's humanitarian schema as sustaining an imperial 'dynamic of difference' through the backdoor.

More Than 'A Scrap of Paper'

When, with an evangelical zeal, James Brown Scott called for jurists to abandon the 'paths marked out by false prophets of international law' and turn back to 'the Vitorian principles which for four hundred years have pointed the path to an international law still of the future, in which law and morality shall be one and inseparable,' he sought to address the unmooring of international law from its moral and universalist roots as had occurred with the rise of positivism in the previous century.[34] Over the course of the nineteenth century, international law had become preoccupied by an intra-disciplinary debate between naturalism and positivism, a debate in which positivism would eventually gain pre-eminence.[35] At the height of European colonialism, the influence of positivist jurisprudence directed international law away from its theologically-informed, natural-law roots towards a more scientific theoretical grounding. Moving away from anchoring international law upon moralistic notions such as what are rights, what is just or what is the good, positivist international law theorised an order based on the recognition of sovereignty and the task of harmonising the interests of the different sovereign entities.[36] The consequence of this shift was to fix the state and its sovereign authority as 'the most

[34] J Brown Scott, *The Spanish origins of International Law* (Oxford: Clarendon Press, 1934) 11a.
[35] For a full history of International legal positivism and its rise since the nineteenth century, see *Monica Garcia-Salmones Rovira, The Project of Positivism in International Law* (Oxford: Oxford University Press 2014).
[36] For examples of positivist international jurisprudence, see Lassa Francis Oppenheim, *International Law: A Treatise* (London: Longmans, Green, 1905); and Hans Kelsen, *Principles of International Law* (New Jersey: The Lawbook Exchange, 1952).

basic doctrinal and philosophical underpinnings for international law.'[37] As a result of this jurisprudential shift, international law began to be shorn of its moralistic element and turn towards an 'understanding of law as a science, which went global in the mid-nineteenth century.'[38]

This understanding of international law exhausted itself with the outbreak of the Great War when, due to its failure to contain escalating imperial rivalry, 'international law died its first death on 1 August 1914.'[39] Law's inability to enact a binding power on sovereign states was exposed by German Chancellor Theobald von Bethmann Hollweg's famous dismissal of international treaties as just a 'scrap of paper.'[40] The Vitorian recovery occurred in the context of jurisprudence seeking to address this failing. Stressing the need to remember that international law ultimately governed people, not only sovereigns, Scott stated that 'if we continue to look upon the state as an artificial person, instead of a thing of men and women and children, we may end by being the victims of our Frankenstein-a soulless mechanical thing which inevitably destroys itself.' [41] Scott credited the conflicting interests of great states as the source of the violence in the international arena, illustrating an appreciation of the dangers of escalating rivalry amongst states unless constrained by a restraining force, which could be something best described as a shared universal culture.[42] Scott decried nineteenth-century jurisprudence's abandonment of international law to 'the dictates of the artificial entities which we call states' and instead sought to influence international law towards a reworking of Vitoria's moral humanism for a renewed universal international community.[43] However, recalling the critique of Vitoria offered by Anghie and other postcolonial scholars who read Vitoria as ultimately accommodating the colonial violence of Spanish conquest within his ostensible

[37] D Kennedy, 'International Law and the Nineteenth Century: History of an Illusion', *Nordic Journal of International law*, 65 (1996), 385-420, 386.
[38] I de la Rasilla del Moral, 'The Ambivalent Shadow of the Pre-Wilsonian Rise of International Law', *Erasmus Law Review* (Special issue on "The Great War and Law – The Lasting Effects of World War I on the Development of Law"), 7, 2 (2014), .80-97, .86.
[39] M Koskennemi, Nationalism, Universalism, Empire: International Law in 1871 and 1919, paper presented to the Conference, 'Whose international Community? Universalism and the Legacies of Empire', Columbia University, April 29-30 (2005), 3.
[40] See I V. Hull, *A Scrap of Paper: Breaking and Making International Law during the Great War* (Cornell U P 2014)
[41] Scott, 'A single standard,' 19.
[42] G Simpson, *Great Powers and Outlaw States: Unequal Sovereigns in the International Legal Order* (Cambridge: Cambridge University Press 2004),141-142.
[43] Ibid,.21.

generous universal humanism, we may ask if this model of community that Scott retrieves from Vitoria and repurposes for the service of a crisis-ridden twentieth century legal order could be better understood, not just as humanitarian, but as what I term as 'sacrificial.'

Girard and Sacrifice

The potency of sacrifice as a conceptual model for community production is most clearly illuminated in the work of French philosophical anthropologist Rene Girard. Girard challenges any presumption of communities and social orders being the product of spontaneous consensus rooted in peace and communality. Instead he conceptualises that peace as being anchored in a sacrificial violence – which he explains as being the paradoxical outcome of the insight that violence may only be contained by violence. Through his reading of archaic ritual, Girard offers an understanding of religion as functioning not only to facilitate the worship of the deific but, also, to allow the tying together of the social order as a constitutive whole. It is worth recalling that religion as a word is etymologically rooted in the Latin word religare – meaning to bind.[44] Girard begins his study by examining archaic societies 'where institutions such as political or penal systems have not yet come into focus.'[45] In these societies, he suggests, an immediate problem is that of community formation- how does the group externalise violence from within its midst to allow community to emerge? For Girard, the answer is to be found in the operative functions of sacrifice. To be briefly reductive in the service of clarification, Girard's theory can be described in two movements: firstly a recognition of the mimetic nature of violence leading to escalation that threatens to engulf social order due to a preponderance for violence to spiral exponentially and secondly, the reliance on a scapegoat mechanism as being the only means by which this violence might be contained and therefore allow a social order to be founded. The first step, which is the understanding of violence as functioning mimetically, illustrates how violence within a social order acts as contagious, with one act of violence being reciprocated for another, escalating to a

[44] S. F. Hoyt, "The Etymology of Religion", in *Journal of the American Oriental Society,* Vol. 32, No. 2 (1912), 126-129, 126.
[45] M Kirwan, 41.

crisis unless contained by some sort of limiting system.[46] The second step, the reliance on the scapegoat mechanism, is for Girard, the sacrificial ritual that functions as this limiting system in that it facilitates the transfer of this potential escalating violence onto a 'legitimate' victim, a victim included in the community but in such a manner that it is always excluded so that the community somehow justifies it as deserving of violence. Girard illuminates the workings of this mechanism of productive violence in clear detail when he says:

> The violence directed against the surrogate victim might well be radically generative in that, by putting an end to the vicious and destructive cycle of violence, it simultaneously initiates another and constructive cycle, that of the sacrificial rite—which protects the community from that same violence and allows culture to flourish.[47]

Furthermore, Girard reads the law as inheriting this office of sacrificial community production within modernity. For Girard, the work of the sacrificial mechanism persists in 'one of our social institutions above all: our judicial system.'[48] When these ideas are read alongside the insights of Benjamin and other scholars of law's relation to violence, Girard's philosophy becomes to tool through we can illuminate how legal violence can actually be productive, rather than destructive of a legal order. Following modernity, the law functions as to 'secularise' the sacrificial ritual, as Girard highlights when arguing:

> It is that enigmatic quality that pervades the judicial system when that system replaces sacrifice. This obscurity coincides with the transcendental effectiveness of a violence that is holy, legal, and legitimate successfully opposed to a violence that is unjust, illegal, and illegitimate.[49]

Girard's schema suggests an alternative understanding of twentieth century international law's shift towards a more universal, humanitarian communality. Furthermore, it shines new light on the relevance of Vitoria and his 'single standard of morality', as Scott would describe it, to the shifts occurring over this moment. By

[46] For a full explaination of this theory see R Girard. *Violence and the Sacred*, (The Johns Hopkins U P 1977).
[47] Ibid 93.
[48] Ibid 15.
[49] Ibid 24.

this, I mean that the debate between the two images of Vitoria - one of a theologian whose generous invitation of the colonised into the universal order of man was founded on his Christian moralism, and the other of an imperial apologist who ultimately justified the violence of the *Conquista* in even more totalitarian terms – are, to my reading, myopic in that these two visions of Vitoria can be reconciled through an understanding of the 'sacrificial' element of imperial violence.

Vitoria, Colonialism and Law's Theological Inheritance

Vitoria provides an appropriate point of departure for reading an element of sacrifice within international law: not only does his thought directly concern the colonial context and its legalised violence, but it also disrupts the presumption of international law's claim to an immanent ontological completeness, because it 'straddles the divide between a medieval world … and a secularised modernity'.[50] Vitoria's work and biography struggle to fit within modern law's claims of facilitating a rational disenchantment of the world; even at his most humanistic, the spectre of theology consistently haunts Vitoria's jurisprudence. The twentieth-century recovery of Vitoria sought, ostensibly, to secularise the Dominican friar through a celebration of his rebellion against medieval papal political authority, arguing that by not grounding his jurisprudence in the power of the Christian church, Vitoria contributes to modernity's turn away from religion. In addition to his rejection of the natural slavery of the colonised, emphasis was placed on how Vitoria's shifting away from the received arguments that justified Spanish colonialism also constituted a break with the universal authority of the papacy. On one level, Vitoria's shift in this regard should not be easily dismissed; in practice it meant that his response to the colonial question 'constituted both heresy [against the pope] and treason [against the Emperor]'.[51] However, it must also be stressed that Vitoria remained a theologian throughout; his Thomistic training, as well as his concern with the internal rivalries plaguing the Christian church at the time, remained central to his entire jurisprudence.[52] To appreciate why Vitoria's jurisprudence could be read alongside the theological restraining force that Girard sees in the juridical system and why Scott and others

[50] P Fitzpatrick (2011) 43.
[51] U Baxi, 'New Approaches to the History of International Law', 19 *Leiden Journal of International Law* (2005), 555-566.
[52] A Pagden (1987) 83.

were drawn to Vitoria's work in the midst of contagious global warfare, it is helpful to remember that Vitoria's own writings were produced within an era of rivalry within Christendom. Ramon Hernandez describes Vitoria's time as one in which:

> The revolution represented by Martin Luther's reforms had erupted in a manner that called into question the very internal constitution of ecclesiastical society. In the political order, the confrontation between Christian princes, the interminable wars between France and Spain, and the conflicts in Italy, Germany, and elsewhere in Europe, had never before acquired such intensity nor such sweeping proportions.[53]

It is instructive to consider Vitoria's thoughts on the *Conquista* not only as an attempt to schematise Spanish-Amerindian relations but also as an attempt to abate the rivalry flaring within Christendom. When unpacking the Vitorian invention of the Amerindian legal personality, it should be recalled that 'Vitoria and his successors were far less concerned with the particulars of the American case than they were with the opportunities it provided for a refutation of Lutheran and later, Calvinist theories of sovereignty'.[54] In response to the reformation, which shattered Christendom within Vitoria's lifetime, the 'discovery' of the Americas served as a release valve for a political order descending into the crisis of rivalry.[55] In this straddling of the divide between the theological and the political, Vitoria's international legal schema could be read as one concerned 'not just on the assertion of a sovereign statehood but also on the quality, the communal quality, of the international'.[56] In other words, the tradition of Vitorian jurisprudence offered an obvious source to be exhumed in the twentieth century as an earlier moment of the production of 'coherence' within international legal order as it was caught the midst of internal and seemingly escalating crisis.

As the Prime Professor of Theology at the University of Salamanca, Vitoria interwove the religious and the political in responding to the key question of his time: what was

[53] R Hernández, 'The Internationalization of Francisco De Vitoria and Domingo De Soto', 15.4 *Fordham International Law Journal* (1991), 1031-1059, 1031.
[54] A Pagden (1987) 83.
[55] See L Hanke (1994) 4-7 for a rich discussion of the relationship between colonialism and the Reformation. Hanke writes: 'Luther and Cortez were to be born in the same year: one to destroy the church the other to rebuild it'.
[56] P Fitzpatrick (2011) 44.

the system of law that could account for and govern Spanish-Amerindian relations.[57] From the moment that confirmation of Christopher Columbus's arrival in the Americas was received in Spain, the question of law became an urgent one. Upon his 'discovery', Columbus dispatched a letter to Luis de Santangel, finance minister to the Crown of Castile and Aragon, stating: 'I found many islands filled with people innumerable, and of them all I have taken possession for their highnesses, by proclamation made and with royal standard unfurled'.[58] Implicit within Columbus's statement is a provocation: 'what meaning could his legal ceremonies have for the people who were ostensibly to be bound by them'?[59] In other words, the juridical question of what was the law that should be followed when the Spanish encountered the Amerindian on the American continent? Was there a universal law that could be referred to and, if so, what held it together?

A Sacrificial '*jus gentium*'

The first lesson that Scott and his contemporaries could draw from the Vitorian schema was to eschew any insistence on a universal law born from the dominion of *respublica Christiana*. By that time of his twentieth-century recovery, the explicitly religious juridical authority that Vitoria had first turned away from was now firmly attached to the pre-modern world.[60] Vitoria therefore was heralded as a prototypical liberal not only due to his generosity to the Amerindians, but also because this generosity was founded on the discourse of natural law rather than through deferring to the divine law claimed by the Christian Church to carry universal jurisdiction. Vitoria's work commences from an understanding that for divine law to govern relations between the Spanish and Amerindians would require it to be relatable to both Christians and heathens alike. His writings do not deny the universal spiritual authority of Christ, but recognise that this does not translate into stable grounds for a universal political authority to be claimed by the Pope as Christ's earthly vicar. Instead, Vitoria states that while Christ 'may have spiritual power over the whole

[57] A Pagden (1987) 79.
[58] Christopher Columbus, 'Letter of Columbus on the First Voyage', trans. Cecil Jane (ed.), *The Four Voyages of Columbus,* 2 vols (Dover, 1988), vol. 1, 1.
[59] A Anghie (2005) 16.
[60] See C Rossi (1998). Chapter 4 gives a comprehensive account of how the debates between positivism and natural law fuelled Scott's recovery of Vitoria.

world, over unbelievers as much as the faithful … the Pope does not have that power over unbelievers', as evidenced by his inability to 'excommunicate them or prevent them from marrying'. Ultimately, Vitoria makes a stark shift away from the hegemony of Rome when he declares that 'the Pope is not civil or temporal lord of the whole world in the proper sense of the words "lordship" and "civil power"'.[61] Vitoria's texts instead provide the grounds for a universal, unifying law as sourced from the human world, allowing the later recovery of his work to offer an image of Vitoria as being a proto-secularist. However, unlike the image of Vitoria as a 'friend of the natives', 'Vitoria the secularist' is an image attested-to not only by those who celebrate Vitoria like Scott, but also by recent critics like Anghie, who despite challenging the image of Vitoria as a humanitarian still accept that 'Vitoria clears the way for his own elaboration of a new, secular, international law'.[62] However, an overemphasis on the secularism of Vitoria's thought overlooks the extent to which it drew on the theological in order to bind a community together-as in the root meaning of religion.[63]

The extent to which the theological continued to inform Vitoria's jurisprudence becomes particularly relevant when considering the idea of the communality that held international law together offered by his texts. Vitoria's refusal of the Papal Bulls provoked a jurisprudential shift, moving understandings of global order away from a presupposed division between 'areas of Christian lawfulness and areas without law, and thence ripe for free acquisition'.[64] The delinking of the rights offered by law from a mandate for inclusion within the Christendom signals an emerging shift away from a notion of the Christian as the ideal universal subject, towards the notion of 'human' serving as the anchor for 'a single standard of morality.' However, it can be problematized whether Vitoria's writings do in fact not a complete break between a world governed by divine law and one governed by natural law, perhaps instead they offer an example of an attempt to draw the transcendence of divine law into the natural world. Kathleen Davis makes this point clearer when she states:

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[61] Francisco de Vitoria, 'On the American Indians', in A Pagden & J Lawrence (eds), *Vitoria: Political Writings*, trans. Jeremy Lawrence (Cambridge UP, 1991), 260-261.
[62] A Anghie (2005) 28.
[63] See C Miéville, *Between Equal Rights: A Marxist Theory of International Law* (Brill, 2005) 174.
[64] P Fitzpatrick (2011) 49.

> Far from displacing divine law, Vitoria is advocating a particular understanding of the fundamental position of divine law in the world. … Shifting the authority over divine law from the precarious hold of the papacy, Vitoria articulates a comprehensive, universal legal theory that places all law (human/civil, natural, the law of nations) and all peoples (Christians and unbelievers of all types) under divine law.[65]

A single, universal standard of law applying to all humans emerges as a deific surrogate for the modern age, arrogating to itself the omnipotence that had previously been the sole preserve of a jealous God. The universal, humanist tradition that held Vitoria as a forefather may extract the political order of law from a reliance on this theological, external reference point, but they do so not by detaching from the reverential power of the transcendent, but rather, in a Promethean gesture, by stealing the transcendent reference point so as to bring it into the law itself. China Miélville goes some way towards illuminating the fallacy of Scott's characterisation of Vitoria as a secularist harbinger of modernity, arguing that 'Vitoria is neither the modern thinker nor the liberal he is sometimes painted. His spatial conceptualisation of early colonialism represents the last, brilliant applications of pre-modern categories to new problems'.[66] In this analysis, Miéville is correct in identifying the extent to which the 'pre-modern' continued to inform Vitoria's schema, but even Miéville misrecognises this point as evidence of Vitoria producing a 'paradoxical proto-modernity.'[67] Rather than Vitoria's indebtedness to the pre-modern categorising him as proto-modern, his ability to straddle the sacred and the secular actually captures the full nature of modernity. The paradox does not indicate a proto-modernity; the containment of the paradox is the act of modernity itself.

The haunting presence of the theological within the ostensibly secular is an argument well-rehearsed by critical scholars.[68] However, the potency of the notion of 'sacrifice' is that it helps to bring to the forefront the connection between the theological, the political and the desire to contain the outbreak of violence in communities. With the law holding contagious violence in check, the modern secularised jurist can dismiss

[65] K Davis, 'Timelines: Feudalism, Secularity and Early Modernity', *South Asia: Journal of South Asian Studies*, 38, 1 (2015),
[66] C Miéville (2005) 174.
[67] C Miéville (2005) 174.
[68] See e.g., H de Vries & L E Sullivan (eds), *Political Theologies: Public Religions in a Post-secular World* (Fordham UP, 2006), and S Žižek, *The Puppet and the Dwarf: The Perverse Core of Christianity* (MIT Press, 2003).

the need for an explicitly theological anchor for an omnipotent morality, presuming that 'because we have no need for it, religion itself appears senseless'.[69] In the modern age, the juridical replaces the theological not because it is opposed to the religious but because it is even more effective in doing the work of the religious. Girard explains further:

> The 'curative' measures … become increasingly mysterious in their workings as they progress in efficiency. As the focal point of the system shifts away from religion and the preventive approach is translated into judicial retribution, the aura of misunderstanding that has always formed a protective veil around the institution of sacrifice shifts as well, and becomes associated in turn with the machinery of the law.[70]

In short, the law contains, in both senses of the word, the violence of the society. This masking of the persistent sacred quality of law underwrites the Vitorian schema. This is only amplified when discussing international law and its claim to universal authority. The absence of an overarching authority to quell violent rivalry is resolved by way of a negative move, the cathartic inclusion/exclusion of the other. This shift is key in understanding the appeal of Vitoria's innovation in his inclusion of the 'native' into a single standard of law but in a condition of exclusion so that the 'native' both remained in contradistinction to the idealised (European) universal human subject and that the violence endured by them would be legitimised as being in service of creating this universal human community. When reading the Vitorian schema as a method for inviting the colonised into the international community but sustaining that 'dynamic of difference' his appeal to twentieth century jurisprudence as international law transitioned away from an order of imperial relations. Moreover, recognising how Vitorian schema leaves the colonised in an included/excluded positionality brings the revival of his work after the Great War into conversation with Girard's understanding of sacrificial structure of cathartic violence, the displacement of internal rivalry onto an included/excluded scapegoat.

Girard presents a theoretical lens for understanding how a universal, humanitarian international community seeks to effect a movement from being plagued by

[69] R Girard (1977) 20.
[70] Ibid 21.

contagious violence, as with the mimetic warfare of the Great War, to the 'peace' of late twentieth century liberal, post-colonial international legal order. The sacrificial structure allows the mimetic violence of rival sovereigns to be displaced onto a hidden third term, a target structured to serve as a legitimate recipient for this violence – a scapegoat. Recognising the echoes of Girard's sacrificial structure in international law, Gregor Noll has emphasised how international legal violence represents a 'curative and preventative means' and coheres community through the form of legitimised violence.[71] However, if the Girardian understanding of the containment of rivalry centres on the enacting of sacrifice upon the scapegoat, the obvious corollary that presents itself is: who is sacrificed by preventative violence in contemporary international law? If the communality of universal humanity is produced through a sacrificial violence of the law, who occupies the subject position fulfilled by the Girardian scapegoat? A crucial addition to Noll's insights is the connection between the sacrificial and colonial structure of international law. Noll's application of Girard to questions of international law is enriched and further developed by a recognition of how the interior/exterior positionality that Girard mandates as necessary for the scapegoat to exorcise the intra-communal violence, marries with Vitoria's inclusion of the colonised into the international legal order in a condition of exclusion. The concept of sacrifice should be read alongside the post-colonial critique of international law in a way that is so far absent from the literature, because as a concept, it helps explain the persistence of violent imperial relations in an ostensibly post-colonial world. Furthermore, to provide the conceptual work on sacrifice and generative violence in international law a historical grounding in Vitoria's writings, helps to bring together divergent literature on post-colonial and political theological critiques of international law as well as helping to provide deeper context for the twentieth-century recovery of Vitoria.

The Inclusive/Exclusion of the Colonial Subject

As aforementioned, the image of Vitoria that was established by his twentieth-century recovery was that of a great humanist, in the words of Scott, 'a broad-minded, high-minded and charitable person' who could serve as an inspiration for a new age of

[71] G Noll, 'The Miracle of Generative Violence? René Girard And The Use Of Force In International Law', 21 *Leiden Journal of International Law* (2008) 563-580, 569.

international humanitarianism. [72] Leading early twentieth-century American international theorist, Quincy Wright tied Vitoria into a tradition of moral humanitarianism alongside Bartolome de las Casas, Thomas Clarkson and William Wilberforce.[73] As a result of this image scholars continue to celebrate Vitoria for the way that 'his concept of human rights suggests a form of moral cosmopolitanism', which recognised the humanity of the Amerindian at a time that few others could.[74] However, as the more recent critique of Vitoria has now shown, Vitoria's inclusion of the Amerindian inside the borders of a universal humanity ultimately only 'endorses the imposition of Spanish rule on the Indians by another argument'.[75] In addition to the now familiar critique of Vitoria's writings allowing for an apology for colonial violence through the backdoor, a further argument to offer is how Vitoria's inclusion of Amerindians within the universal order can be further understood as an essential prerequisite to the licensing of a sacrificial violence upon them, in order to produce the resultant international community.

De Indis Noviter Inventis begins by recognising that, 'before the Spanish arrived, these barbarians possessed [as] true [a] dominion' over their land as any Christian did over their own.[76] Vitoria dismisses the idea that Amerindians fitted the model of natural slaves and therefore all excesses were licensed upon them. Vitoria's writings recognises the Amerindian alongside the rivals of the Christian world, the 'Saracens and Jews', arguing that if the Spanish could recognise as human their 'continual enemies', then they could not deny that same recognition to the Amerindian. Vitoria concluded that 'it is no impediment for a man to be a true master, that he is an unbeliever'.[77] To be a heathen did not revoke the humanity of unbelievers, therefore neither could it override the dominion they enjoyed over their lands. However, the Amerindians were invited into the universal community of mankind with a qualification: if they were to be recognised as human, they had to behave like human beings, as defined by the predetermined standard already embodied by the Spanish. For Vitoria, the Amerindians' possession of universal reason was a pre-requisite to being human and therefore being bound by *jus gentium*. However, this *jus gentium*

[72] J Brown Scott (2007) 3.
[73] Q Wright, *Mandates Under the League of Nations* (The University of Chicago Press 1930) 9.
[74] G Cavaller (2008) 192.
[75] A Anghie (2005) 22.
[76] Francisco de Vitoria in A Pagden et al. (1991) 251.
[77] Ibid 250-251.

served to saturate the universal with the particularities of Christian Spain. As Anghie recognises, Vitoria's schema resulted in the Amerindian only becoming human through the 'adoption or the imposition of the universally applicable practices of the Spanish'.[78]

The cost of entering into Vitoria's universal humanity was that the Amerindian was now bound by a *jus gentium* which allowed the Spanish 'right to travel and dwell' in the Americas, the right to 'trade with the barbarians' and 'the right to preach and announce the Gospel in the lands of the barbarians'.[79] If the Amerindians denied the Spanish these rights, this would constitute 'acts of war', in accordance to Vitoria's international law. As a result, the Spanish would then be fully justified in unleashing violence upon the Amerindians in order to enforce their rights. The extract below relays the point in full:

> If after the Spaniards have used all diligence, both in deed and in word, to show that nothing will come from them to interfere with the peace and well-being of the aborigines, the latter nevertheless persist in their hostility and do their best to destroy the Spaniards, they can make war on the Indians, no longer as on innocent folk, but as against forsworn enemies and may enforce against them all the rights of war, despoiling them of their goods, reducing them to captivity, deposing their former lords and setting up new ones.[80]

Vitoria presents these rights as neutral and reciprocal, implying that the Amerindians have as much right to travel and trade in Spain as the Spanish do in the Americas. However, Vitoria's rights could only be read as neutral when divorced from the material history from which they were derived. Vitoria's generosity in articulating a universal 'right to travel' ignores the fact that movement between the Iberian peninsula and the 'new-world' was, and would remain, strictly one-way; to invite the Amerindian into an emerging world market through a universal 'right to trade' is blind to the extent to which Spanish-Amerindian trade took the form of plunder rather than exchange. The universal 'right to proselytise' was articulated with an awareness of the impossibility of the Amerindians having 'the same rights of propaganda and

[78] A Anghie (2005) 23.
[79] Francisco de Vitoria in A Pagden et al. (1991) 278-284.
[80] Ibid 284.

intervention for their idolatry and religious fallacies as Spanish Christians'.[81] In short, the material realities of the context in which he was writing meant that Vitoria's *jus gentium*, which initially appears to legislate universal rights, in practice ultimately authorises Spanish incursion into the Americas. Within this schema, for the Amerindians to refuse or attempt to resist these incursions justifies the Spanish in waging war upon them. The colonised are therefore fixed as being simultaneously inside and outside the boundaries of humanity. Anghie shows that in Vitoria's scheme:

> Indians belong to the universal realm like the Spanish … Vitoria asserts, they have the facility of reason and hence a means of ascertaining *jus gentium*. However, the Indian is very different from the Spaniard because the Indian's specific social and cultural practices are at variance from the practices required by the universal norms – which in effect are Spanish practices – and which are applicable to both Indian and Spaniard. Thus the Indian is … both alike and unlike the Spaniard.[82]

The Amerindians are awarded the capacity for reason and are therefore recognised as human by Vitoria, but in being so recognised they are also determined as failing to reach the standards that are expected of a human, at least in their present condition. The full realisation of their humanity becomes contingent upon their improvement, producing an inclusive/exclusive positionality. That this (im)possible development of the colonial subject underwrote the Vitorian schema was recognised by Scott as he sought to recovery of Vitoria's humanism to serve as the key source for twentieth century humanitarian international law:

> Vitoria recognised that there were peoples in an imperfect state of civilisation; but they were human beings, and human beings, to his way of thinking, should not be subject to exploitation, but should be fitted – if they were not already fit – to enjoy the rights of all human beings, as well as to be subjected to their duties.[83]

However, the inclusion promised is always an inclusion deferred, as the Amerindian is invited into the universal whilst also becoming the constitutive outside against with

[81] C Schmitt (2006) 113.
[82] A Anghie (2005) 22.
[83] J Brown Scott (1934) 11.

the Spanish are contrasted. The colonised are trapped in an impossible position: full inclusion into the universal order is dependent upon being able to conform, to progress, or – borrowing from modern parlance – to develop, up to a standard that is constituted by the colonised own exclusion.[84] Vitoria defines the colonising Europeans as 'perfect communities', Christian social orders that are self-sufficient, complete and ontologically whole within themselves.[85] In contradistinction to this perfection are the imperfect communities such as those inhabited by the Amerindians.[86] This imperfection is presented as 'something lacking' with the colonised assumed as having the potential to be perfect and therefore the use force to encourage this progress becomes legitimise.[87] However, the persistence of this logic into the contemporary rhetoric of 'developed' and 'developing' peoples demonstrates just how indefinite Vitoria's promise of perfectibility for the colonised has been.[88]

Vitoria's work could therefore be taken as offering the creation of the colonised as a novel subjectivity, as suggested by his very lecture title: *De Indis Noviter Inventis*. *Noviter* translates from Latin to English as 'to reconstitute', while *inventis* can mean both 'discovery' and 'invention'. These translations suggest the dual role undertaken by Vitoria's lectures: to account for Spanish-Amerindian relations post-discovery, but also to constitute the Amerindian in a novel mode of colonial subjectivity. Ultimately, it is a subjectivity that is rendered naked before a legitimising and (re)generative violence. Recalling the positionality Girard illuminates as necessitating sacrifice, Vitoria's Amerindian is invited into his international community, however the invitation is already embedded with violent exclusion. The recognition of the legitimate victim's inclusion in the international community is an essential precursor to the catharsis of sacrificial violence being enacted upon them, as illustrated by Noll analysis of the parallel between international law and Girardian community production:

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[84] P Fitzpatrick, 'The Revolutionary Past: Decolonizing Law and Human Rights,' 2.1 *Metodo International Studies in Phenomenology and Philosophy* (2014) 117-133, 121.
[85] Francisco de Vitoria, 'On the Essence of Law' in A Pagden & J Lawrence (eds), *Vitoria: Political Writings*, trans. Jeremy Lawrence (Cambridge UP, 1991) 260-261.
[86] Ibid 301: 'A perfect community or commonwealth is therefore one which is complete in itself … Such commonwealths are the kingdom of Castile and Aragon, and others of the same kind'.
[87] Ibid.
[88] O Guardiola-Rivera, *What If Latin America Ruled The World? How the South Will Take the North Through the 21st Century* (Bloomsbury, 2010) 84.

> With Girard, the sacrificial victim is a substitute for all members of the community. To make substitution work, the scapegoat must first be integrated into the life of the community. … The transfer of violence from community members to the scapegoat can only succeed if the former is ritually assimilated to community members. If we revert to an 'international community' of states, a plausible account of the fettering of violence would presuppose that any sacrificial victim would first be integrated into the 'international community' benefiting from the sacrifice.[89]

Vitoria's jurisprudence allows the colonial subject to be included into the international community, into the single standard of morality, before the violence on them is ultimately legitimised, thereby giving it a generative force. By appreciating the cathartic properties of sacrificial violence, the Vitorian tradition of colonialism-in-equality no longer appears contradictory but, rather, coherently mythic. By mythic, I refer to the way in which sacrificial violence functions so as to be law-making, the mythic element of law serves as the 'mute ground which enables … a unified "law"'.[90]

Upon this understanding the tradition of Vitorian jurisprudence as sacrificial, the Girardian reading of the production of a scapegoat on whom violence could be licensed becomes apposite. In accordance with Girard's theory, the sacrificial victim 'should belong both to the inside and the outside of the community'.[91] A subject is produced to be both like and unlike the community, a distortion of the model, a failed realisation of what should be. It is through this process that the making of 'the victim wholly sacrificeable' is realised.[92] As outlined above, Vitoria's construction of the colonised mirrors the subjective qualities required of the Giradian victim. Traversing the boundaries of a projected universal humanity, the colonised are exposed to a cathartic violence through being a subject both similar enough and different enough to absorb the rivalry that threatens to engulf the community as a whole. Viewed through Girard's lens, Vitoria's inclusion of the colonised within a universal humanity, so celebrated by Scott and others in the twentieth century recovery of a liberal tradition of international law, merely precedes and facilitates the violence that is ultimately visited upon the colonised. Unless the victim is situated within the bounds of the

[89] G Noll (2008) 574.
[90] P Fitzpatrick, *The Mythology of Modern Law* (Routledge, 1992) 2.
[91] R Girard (1977) 272.
[92] R Girard (1977) 272.

community, it cannot become a signifier for the rivalry within the community, and the violence performed upon the victim's body cannot do its purifying work. In order to expunge the internal violence, 'continuity must be maintained' between community and victim. However, 'there must also be discontinuity', which Vitoria effects with his formulation of the 'native' personality.[93] The acts of violence upon the colonised are now offered as necessitated by their own monstrosity and in service of the desire to produce a 'perfect' universal community and ideal (European) human subjects.

A Twentieth-Century (Re)Turn towards a Sacrificial International

To understand Vitoria's jurisprudence as 'sacrificial' in a Girardian sense, as in aiming at a coherent universal order through first the inclusion and then violent exclusion of the colonial subject, helps us to understand why Vitoria was recovered. In addition to being the jurist who drove the Vitoria's recovery, Scott, is himself now considered a major figure in the history of liberal international law due to both his academic and practical work during this turbulent time of international conflict. As aforementioned, Scott championed Vitoria in a flurry of writings and lectures, eventually became the driving force behind the establishment of the Vitoria-Suarez society, established in 1932 with a Spanish counterpart being instituted in 1936.[94] However, Scott had been engaging with Vitoria's work from his first reading of *De Indis* and *De Belli Relectiones* in 1906.[95] Following this early engagement with Vitoria, Scott became concerned with placing international law in 'its true historical light.'[96] A supporter of the League of Nations, international arbitration and the moral universalist turn in international law more widely, Scott presented Vitoria's writings as the jurisprudential antecedents for an international law able to respond to the challenges of world ordering at that historical moment.[97]

The Vitoria that was exhumed and repurposed aided Scott and others in their

[93] Ibid 271.
[94] C Rossi, *Broken Chain of Being: James Brown Scott and the Origins of Modern International Law (Brill 1998)* 40.
[95] Ibid, 7-8.
[96] E A. Walsh, forward to James Brown Scott, *The Spanish Origins of International Law* (Clarendon Press, 1934)
[97] C Rossi (1998), 10-32

endeavours to reimagine 'international law as a war-prevention structure'.[98] An absence of peace meant a void in the ground of international law for Scott and this concern with developing a jurisprudence to respond to the task of containing mimetic violence provides further understanding for this era's recovery of Vitoria, as well as offering a new historical context for the reading of the Salamancan theologian alongside philosophical anthropologist Rene Girard performed in this article.[99] Furthermore, historians have argued that Scott held that 'international law was more than a study or a profession; it was, in fact, a religion.'[100] Scott's investment in 'international law as the basic ordering system for peace' parallels the Giradian understanding of how law, acting as the religion after the end of religion contains violence through inheriting the sacrificial mandate.[101] For it is also worthwhile recalling that Scott and the tradition of liberal American international law that he so greatly influenced and that would go on to be hegemonic over the course of the century, would turn away from the orthodox European colonialism in favour of an international community based upon a universal notion of humanity. Scott's resurrection of Vitoria points towards the universal humanism within international law, which would replace the legal order based on explicit European imperial exceptionality that failed to contain the escalation of inter-communal violence in the first half of the twentieth century. With the formal end of the colonial legal order, previewed in the inter-war period with the mandate system of the League of Nations before being finally realised in the post-world war II context of the birth of the United Nations, international law would seek to anchor itself on an all-inclusive conception of universal humanity, one that continues to inform notions of human rights, humanitarian law and crimes against humanity in international law today. Scott advanced a holistic conception of international law, envisaging an intimacy in the relationship between domestic and international legal systems that realised what he refers to as the 'oneness of the world.'[102] This vision of international law erases the strict binaries between the people of the world and the states that wielded legal recognition on their behalf, for Scott 'the artificial personality called the

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[98] F L. Kirgis, "Elihu Root, James Brown Scott and the Early Years of the ASIL", 141.
[99] J Brown Scott, Introduction, in Otfried Nippold, The Development of International Law after the World War (transl. by A Hershey, Clarendon: Oxford, 1923), viii.
[100] F R Coudet, 'An Appreciation of James Brown Scott' *American Journal of International Law* Vol.37, No.4 (1943), 559-561, 559.
[101] F L. Kirgis, Jr, *The American Society of International Law's First Century: 1906-2006,* 161
[102] C Rossi, 15.

state…[which] in fact have no existence separate and distinct from their incorporators,-the people who have made them what they are.'[103] For Scott, a return to moral universalism would necessitate an extension of international law to incorporate a world order ontologically complete in itself. This order concerns the lives of all individuals included within the universal subject of humanity, as Scott elucidates,

> There can not be two standards [of morality]. There must be a single standard for the human being applying to all of his activities...There can be but one standard for the groups of individuals which we call states. There can be but one standard for the groups of individuals which, taken together, form humanity, and the groups which, as such, compose the international community. Humanity needs and the world must have the moral interpretation of history.[104]

Yet despite, or as is my argument, as an inevitable result of this reworking of the Vitorian legacy for a new historical moment, this 'single standard of humanity' did not bring about the end of legal violence for colonial subjects, but as has been shown in a plethora of scholarly works, allowed for the persistence of an imperial structure of law, a new 'dynamic of difference' through new rubrics such as development or human rights.[105] In the service of establishing a single standard of humanity to anchor the legal order, international law has facilitated military intervention, exploitative trade agreements and restrictive sanctions to imposed on the postcolonial world, troubling the presumption of law as the opposite of war and violence as seen in the founding statements of the UN.[106] The colonial subject is brought inside of the legal order, only to be included in an already determined condition of exclusion. The concept of sacrifice, as expanded on over the course of this article, guides us towards seeing how this dynamic relates to the communality and the containment of

[103] J Brown Scott, "A single standard of morality for the Individual and the State," 20
[104] Ibid, 21.
[105] J Brown Scott, Introduction, in Otfried Nippold, *The Development of International Law after the World War* (transl. by A Hershey, Clarendon: Oxford, 1923), p. vii. Explaining his historical understanding, Scott declares 'the present is the creature of the past, and that the future is merely the prolongation of the two, in the light of new conditions.'
[106] For critical legal scholarship illustrating contemporary imperial violence in post UN international law see J Beard, "The International Law in Force: Anachronistic Ethics and Divine Violence," published in F Johns, R Joyce & S Pahuja (eds), Events: The Force of International Law (Routledge, 2011) or V Hamzić, 'International Law as Violence: Competing Absences of the Other,' published in D Otto (ed) *Queering International Law: Possibilities, Alliances, Complicities, Risks.* (London: Routledge 2017)

contagious violence that international law's reboot in the twentieth century was founded upon.

Conclusion

A reading of the Vitorian tradition of liberal international law as 'sacrificial' rather than merely 'humanitarian' helps us understand why twentieth-century jurists drew on this tradition to shift international legal relations following the violence of the Great War and the decline of the formal colonial order. The texts that Scott and others retrieved from sixteenth-century Salamanca provide inspiration for the bringing together of a universal, post-colonial international community. However, once unpacked, these texts also offer a glimpse of the violence inflicted upon the colonised subject that swiftly follows their invitation into this community. Moreover, to add to the current literature on the subtle violence of the Vitorian 'humanitarian' schema, the reading of these texts alongside Girard's theory of sacrificial social ordering explains the attraction of this archive for twentieth-century jurists who sought to produce an condition of abiding 'peace' within a international legal order in crisis. This offers a currently underdeveloped element to the critique of the Vitorian recovery made by Anghie and others by showing how the Vitorian schema does not only mask the persistence of imperial violence within the humanitarian law, but does so in service of producing an abiding peace amongst the international community itself, allowing this legitimised form of masked imperial violence to contain the mimetic warfare of sovereign rivalry that threatens to engulf all. The inclusive/exclusive positionality of the colonised allows a misrecognition of violence upon the colonised subject to do the religious/binding, cathartic work of sacrifice, and thus enable the international community to (re)generate itself through redirecting the violence onto a 'legitimate' target.[107] In reading Vitoria's works alongside Girard's theory and unpacking the context in which the Salamancan theologian was recovered in the twentieth century, we are able to reconcile the debate over whether Vitoria is a liberal humanitarian or a colonial apologist, by understanding how liberal humanism, even as it emerged in contemporary international law to respond to the crises of the World Wars, has itself resulted from and depended on a sacrificial relation to those held to traverse the

[107] R Girard (1977) 10.

boundaries of humanity. When we appreciate this productive operative function of imperial violence within a moral, universal community, we are then able to better understand why a humanitarian imperialism can be seen to persist within international law up until today.

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