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**Drug Prohibition and the End of Human Rights:  
Race, 'Evil' and the United Nations Single Convention on Narcotic Drugs, 1961**

There has been a recent wave of interest in the concurrent but ostensibly contradictory histories of drug prohibition and human rights in international law.<sup>1</sup> The post-World War II international legal order was marked by an institutionalisation of global legal relations in the form of the United Nations, and two of the most prominent projects advanced through this organisation have been the spread of human rights and the prohibition of the illegitimate trade of drugs. However, despite sharing a concurrent timeline, recent legal scholarship has illustrated the chasm that exists, both practically and theoretically, between these twin projects of the UN-era. While the UN presents both drug prohibition and human rights as global norms, coherently realisable within one holistic legal order, scholars like Rick Lines have highlighted how 'in practice there has been little cross fertilization between the two. The United Nations drug control system has rarely considered the human rights impact of the regime and the human rights system has rarely considered drug control efforts within its mandate.'<sup>2</sup> Moreover, drug prohibition has been identified as actually being a persistent source of human rights infringements and a cover for discriminatory treatment of vulnerable groups as governments across the world legitimize increasingly strict mechanisms to enforce the drug laws.

The connection between drug prohibition and draconian state power makes the contrast between the stated goals of international drug prohibition and international human rights even starker. As Lines argues: 'Human Rights violations linked to drug control activities are driven by domestic and/or international efforts to meet the

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<sup>1</sup> See Richard Lines, *Drug Control and Human Rights in International Law* (Cambridge: Cambridge University Press, 2017); Saul Takahashi, *Human Rights and Drug Control: The False Dichotomy* (London: Bloomsbury 2016) or Beatriz Caiuby Labate and Clancy Cavnar, eds., *Prohibition, Religious Freedom, and Human Rights: Regulating Traditional Drug Use* (Berlin: Springer, 2014)

<sup>2</sup> Lines, *Drug Control and Human Rights*, 6.

obligations enshrined within the three United Nations drug control conventions’, meaning the international drug treaties can themselves be read as implicated in the violation of international human rights law.<sup>3</sup> Upon highlighting this contradiction in international law, scholars have tended to argue for drug prohibition to be limited by a requirement to comply with human rights demands, with the aim being for the moral injunctions of human rights to temper drug prohibition’s tendency towards the draconian. For example, Paul Hunt argues that it is imperative that international drug prohibition and international human rights ‘cease to behave as though they exist in parallel universes. The UN human rights system must give closer attention to the international drug conventions, the issue of drug control, and the plight of those who use drugs. Equally, the international drug control system must be respectful of human rights. This is not an option. It is a legal requirement.’<sup>4</sup> Hunt maps out how making drug prohibition comply with the right to health initiatives, for instance, could lead to harm reduction on a global scale.<sup>5</sup> Yet whilst the contradictions between the aims of international human rights and the consequences of international drug prohibition are as stark as above scholars crucially identify, a complication can be added to the presumption of these two great projects of post-war international law as operating in parallel universes. A question that is as-yet overlooked in the literature on drug prohibition and human rights is whether these projects share anything more substantial than concurrent timelines. Is there any shared theoretical ground between them, perhaps anchored in the presuppositions of the post-war birth of the United Nations and the remaking of the global legal order? The answer to this question has the potential to add complexity to the problem of drug prohibition and human rights

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<sup>3</sup> Lines, *Drug Control and Human Rights*, 11.

<sup>4</sup> Paul Hunt, *Human Rights, Health and Harm Reduction: States’ Amnesia and Parallel Universes* (London: International Harm Reduction Association, 2008), 9.

<sup>5</sup> Hunt, *Human Rights, Health and Harm Reduction*, 11.

operating in ‘parallel universes.’ Would ensuring drug prohibition complies with human rights be enough to tame the harms caused by enforcement? What if some of the most potent critiques of the drug war, for example that it is Euro-centric, disproportionately imposed upon the Global South and infused with a latent Christian moralism, had also been levelled at human rights?<sup>6</sup> The following sections of this chapter will look at the critical scholarship written on drug policy and human rights and argue for an understanding of the political theology that underwrites both projects as they have developed under the UN.

### **Drug Prohibition in the ‘Age of Human Rights’**

Uprendra Baxi famously described the latter-half of the twentieth century as the ‘Age of Human Rights.’<sup>7</sup> With this phrase, Baxi sought to capture how under the auspices of UN, ‘human Rights languages steadily supplant all other ethical notions’ as every global project and movement is determined in accordance with an ability to engender human rights.<sup>8</sup> However, as scholars of human rights and drug policy have noted, the project of drug prohibition has often been at odds with the vision of human rights although the two co-exist within the same international legislative framework. Neil Boister argues that, with their insistence on prohibition over health and wellbeing, ‘the drug conventions fail to adequately protect the human rights of those individuals subject to the system.’<sup>9</sup> As David Bewley-Taylor details, whereas human rights law aims at the protection of marginalized and vulnerable groups, drug laws have facilitated the criminalization and isolation of these same groups. Drug laws have served as justification for over-policing and brutal law enforcement strategies that

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<sup>6</sup> Costas Douzinas, *The End of Human Rights* (Oxford: Hart Publishing, 2000).

<sup>7</sup> Uprendra Baxi, *The Future of Human Rights*, 3rd ed. (Oxford: Oxford University Press, 2012), 1-2.

<sup>8</sup> Baxi, xi.

<sup>9</sup> Neil Boister, *Penal Aspects of the UN Drug Conventions* (The Hague, London, Boston: Kluwer International, 2001), 524.

disproportionately impact racial minorities; for restricting access to controlled medicine and medical-care for those in need; for restricting the rights of refugees and migrants; for using excessive modes of punishment, including arbitrary detention and the death penalty; and for causing environmental damage through crop eradication policies.<sup>10</sup> The drug conventions differ from the general trend of UN treaties in that they largely ignore the question of human rights. The only brief reference to human rights made across the three major UN drug treaties is in article 14 (2) of the United Nations *Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 1988*.<sup>11</sup> Recently there have been some steps made by the UN human rights apparatus towards measuring drug prohibition using the standards of human rights. High Commissioner for Human Rights, Navanethem Pillay recognized that ‘Individuals who use drugs do not forfeit their human rights’, whilst calling for a focus on human rights and harm reduction in international drug policy.<sup>12</sup> However, the most common approach remains seeing international law’s project of drug prohibition as distinct from international law’s project of spreading and promoting human rights. Each year, the distinction between the two projects is rendered most acute on June 26<sup>th</sup>, as this date serves as both the UN International Day against Drug Abuse and Illicit Trafficking and the UN International Day in Support of Victims of Torture. Remarkably, the UN is able to have drug prohibition and victims of torture share the same commemorative date despite the extensive accounts of law enforcement officials using torture and indefinite detention as tactics against drug traffickers and so-called “rehabilitation” centres using physical abuse, shackles,

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<sup>10</sup> David Bewley-Taylor, *International Drug Control: Consensus Fractured* (Cambridge: Cambridge University Press, 2012), 138.

<sup>11</sup> Bewley-Taylor, *International Drug Control*, 144; Article 14 (2) of the United Nations *Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 1988*, Accessed December, 12<sup>th</sup> [https://www.unodc.org/pdf/convention\\_1988\\_en.pdf](https://www.unodc.org/pdf/convention_1988_en.pdf).

<sup>12</sup> Navanethem Pillay, *Human Rights and Harm Reduction*, Accessed May, 18<sup>th</sup> [http://www.ohchr.org/documents/Press/HC\\_human\\_rights\\_and\\_harm\\_reduction\\_drug\\_policy.pdf](http://www.ohchr.org/documents/Press/HC_human_rights_and_harm_reduction_drug_policy.pdf)

solitary confinement, and forced labour as tactics to treat drug addicts.<sup>13</sup>

How do we begin to explain the contradiction between drug prohibition and human rights in the UN-era, which is rendered naked every 26<sup>th</sup> of June? Has the international legal apparatus merely overlooked the ways in which drug prohibition facilitates breaches of human rights? Or could it be the case that drug prohibition has been implicitly assumed to be a complement to the project of human rights, in that it claims to produce the autonomous human, who can then subsequently insist of their rights? The idea that drug prohibition actually aids human rights is reliant upon a perception of drugs themselves being a greater threat to human rights than the effects of prohibition; this perception of drugs as leading to individual, human degradation and the breakdown of social cohesion, is also one that is championed by prohibitionists. This vision is reflected in a 2009 statement by Professor Hamid Ghodse, President of the International Narcotics Control Board, who argued that ‘drug abuse is often in conflict with the due recognition of rights and freedoms of others and in meeting the requirements of health, public order and the general welfare in a democratic society.’<sup>14</sup> Ghodse’s reading of a complementary *modus operandi* between drug prohibition and human rights is grounded in the mythology of drugs as an inherent, existential threat to social order that has informed international drug prohibition since the turn of the twentieth century; however it may provide a clue to the narrow conception of the human that has underwritten much of the UN-era human rights law, which may, in turn, offer some explanation for why the UN has been largely silent on abuse produced through drug prohibition. To explore this line of critique further, it is important to engage with the scholarship that has sought to

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<sup>13</sup> Open Society Foundations, *Treatment Or Torture? Applying International Human Rights Standards To Drug Detention Centers* (Open Society 2011)

<sup>14</sup> Statement by Professor Hamid Ghodse, President of the International Narcotics Control Board, at the High-Level Segment of the Fifty-Second Session of the Commission on Narcotic Drugs on 11 March 2009, Vienna, Austria, [www.incb.org/pdf/e/narcotics/2009\\_CND\\_52\\_HIGH\\_LEVEL\\_final.pdf](http://www.incb.org/pdf/e/narcotics/2009_CND_52_HIGH_LEVEL_final.pdf)

unpack the presuppositions that underwrite modern human rights.

### **Who is the ‘human’ of human rights?**

As aforementioned, in conventional terms, the triumph of human rights in the latter half of the twentieth century was complete. In legislative terms, human rights are to be all-encompassing, extending over every area of life. All UN bodies operate under the umbrella of a stated commitment to promote ‘universal respect for, and observance of, human rights and fundamental freedoms’.<sup>15</sup> However, in recent years, legal scholars have begun to question the omnipotence of human rights. Costas Douzinas details how orthodox human rights reach their limit at extending to those groups whose humanity has historically been rendered contingent. Douzinas elaborates by stating:

[F]ormal right, the legal subject’s capacity to will, is theoretically limitless. But real people are embedded in the world [where] inequalities [...] prevent formal rights from becoming effective. We are all legally free and nominally equal, unless of course we are improper men.<sup>16</sup>

For Douzinas, it is this question of *who* qualifies as the human of human rights that has been overlooked in much of the literature on this topic, how do human rights address those who have been constructed as ‘improper men’? Highlighting how ‘humanity’ has never been a concept that has been applied equally to all people from all places, scholars have drawn on a wide array of theoretical but also practical sources to show how human rights can be used to exclude as much as include. Take for instance one of the traditional discourses for categorising ‘improper men’ – the discourse of race – could the post-war triumph of human rights in international law be

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<sup>15</sup> Article 55, UN Charter, accessed September 12, 2017, <http://www.un.org/en/sections/un-charter/un-charter-full-text/>

<sup>16</sup> Costas Douzinas, ‘Philosophy and the right to resistance’ in Costas Douzinas and Connor Gearty (eds.), *The Meaning(s) of Human Rights* (Cambridge, Cambridge University Press, 2013), 33.

indebted to a desire to bury the potency that the language of race and sub-humanity had gained in the previous epoch of international relations and helped drive the world into WWII. However, as one cannot leap from one condition into another, but must instead carry traces and lineages from each epoch into the next, scholars have argued for a continuum between the language of racialised, idealised humanity and the egalitarian discourse of human rights. For instance, Walter Mignolo identifies that whilst human rights ‘state that we are all born equal, it doesn’t mention the fact that we stop being equal shortly after we are born’ and human rights as conventionally conceived take little notice of the geographical and economic inequalities that persist across the globe.<sup>17</sup> Indeed, as Douzinas points out, ‘at the heart of humanism, humanity remained a strategy of division and classification.’<sup>18</sup> The language of racial classification that informed the widespread acceptance of racism in the nineteenth and early twentieth century functioned through a hierarchical conception of the human condition, with not all peoples being awarded full humanity but some instead characterized as sub or non-human. Scholars have connected this to the history of human rights, bringing together the eighteenth century celebration of human rights through the French and American revolutions with the concurrent systems of slavery and colonialism being enacted by those same states.<sup>19</sup> This tradition of scholarship begins to narrow the gap between human rights and drug prohibition as it echoes some of the critiques that have been offered of drug prohibition.

### **Conjoined Twins: Drug Prohibition and Human Rights**

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<sup>17</sup> Walter Mignolo, “From Human Rights to Life Rights (Life, Water, Dignity and Rights)” in Douzinas and Gearty (eds.), 3.

<sup>18</sup> Costas Douzinas; “The Paradoxes of Human Rights” in *Constellation* 20, no.1 (March 2013): 5-7.

<sup>19</sup> See Philip Kaisary “Human Rights and Radical Universalism: Aimé Césaire’s and C.L.R. James’s Recuperations of the Haitian Revolution.” *Law and Humanities* 6, No. 2 (February 2016): 197–216 or Emmanuel Chukwudi Eze, *Race and the Enlightenment: A Reader* (Hoboken: Wiley-Blackwell 1997)



Scholarship on the history of drug prohibition in international law has regularly emphasised a debt owed to imperial and racist assumptions regarding the global order.<sup>20</sup> Drug prohibition emerged as a legitimate international legal project in the first half of the twentieth century, a time in which imperial relations within states and hierarchies amongst races were still taken as a given. International law had been shifting towards greater legislative support for drug prohibition since the 1909 meeting of the Shanghai Opium commission, with several drug treaties having been brought into effect through the League of Nations in the interwar period. However, these treaties had been limited in their effectiveness due to the discordance and disorganisation that plagued the League and, with the creation of the UN, the legislative ground for prohibition would require reinforcement. The UN sought to clear the confusion produced through multiple, overlapping League-era drug treaties through the creation of a single, comprehensive drug convention. This aim of synthesising and consolidating the preceding treaties into one unified instrument sits alongside the *Universal Declaration of Human Rights, 1948* or the *Convention on the Prevention and Punishment of the Crime of Genocide, 1948* as an equally ambitious, but comparatively under-researched, project of totalising post-war legal ordering. Drafting on the *United Nations Single Convention on Narcotic Drugs, 1961* (hereby referred to as the Single Convention) commenced in parallel with these other treaties in 1948, but it was not until 1961 that an acceptable third draft was ready.<sup>21</sup> As one of the principle organs of the UN, the Economic and Social Council (ECOSOC) called for a consolidation of existing drug treaties into a single treaty in 1948. However, the

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<sup>20</sup> See Michelle Alexander, *The New Jim Crow: Mass Incarceration in the Age of Colorblindness*, Reprint Edition (The New Press, 2012) or Dorine Marie Provine, *Unequal Under Law: Race and Law in the War on Drugs* (Chicago: University of Chicago Press, 2007)

<sup>21</sup> William McAllister, *Drug Diplomacy in the Twentieth Century* (London: Routledge 2000), 204-209

scale of the task is demonstrated by the fact that it would take thirteen years to produce the Single Convention. Still the eventual signing of the Single Convention brought a conclusion to the piecemeal form that drug prohibition had taken since 1909 and established it as a grand project of post-war international law, alongside international human rights.

The UN can, and has been, critiqued for continuing to be informed by imperial relations that favoured the West against the former colonial world, despite the egalitarian claims of this new international legal institution. The Single Convention is not immune from these critiques. The categorisation of drugs produced in the schedules of the treaty underwrote a system of international control that has disproportionately impacted on the peoples of what is now termed the Global South.

William McAllister details that:

The ‘schedules of control’ outlined by the Single Convention discriminated against the interests of producers. Raw materials and simple concoctions such as heroin and cocaine suffered under the more severe restrictions of schedules I and IV. Certain manufactured (primarily codeine-based) narcotics received somewhat more lenient treatment in schedules II and III.<sup>22</sup>

The distinction drawn between plant-based or raw drugs and ‘manufactured’ narcotics parallels the distinction between raw materials and added-value commodities that economists and dependency theorists have read into the uneven nature of the post-world economic order, even arguing for these economic structures to be understood as an alternative means of imperialism.<sup>23</sup> Moreover, the requirement that the Single Convention placed upon producing countries to centralise and then eradicate drug cultivation, production and consumption ensured that they would be carrying the

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<sup>22</sup> McAllister, *Drug Diplomacy*, 209.

<sup>23</sup> See Walter Rodney, *How Europe Underdeveloped Africa* (London: Bogle-L’Ouverture Publications, 1972); or Fernando Henrique Cardoso and Enzo Faletto, *Dependency and Development in Latin America* (Berkeley: University of California Press, 1979).

heaviest burden when it came to realising the treaty's aims.<sup>24</sup> This privileging of Western interests in the supposedly neutral treaty is highlighted by scholars like David Bewley-Taylor, who argues that 'US dominance in the UN control system ensured that the Single Convention created a Western-orientated prohibitive framework for international drug control.'<sup>25</sup> Yet a key insight to theoretical biases of the Single Convention may be offered not in the main body of the treaty but in the preamble and it is the wording of the preamble that will occupy my focus for the remainder of this chapter. The emphasis I place on the language of the preamble follows the *Vienna Convention On The Law Of Treaties*, which determines that when interpreting international treaties, the preamble must hold significant weight on top of the provisions of the treaty.<sup>26</sup>

### **The Spectre of Evil in the Single Convention**

A close reading of the preamble shows the full significance of interpreting and understanding the provisions of the Single Convention through it. Undertaking such a close reading of the language of the law follows in the wake of a notable linguistic turn in critical legal studies in recent decades.<sup>27</sup> With key engagements with technologies of language such as semiotics, hermeneutics and deconstruction, legal scholarship has advanced the idea that if the law indeed does contain, in both senses of the word, the violence of the society within it, then that violence will be notably

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<sup>24</sup> Julia Buxton, *The Political Economy of Narcotics: Production, Consumption and Global Markets* (London: Zed), 56.

<sup>25</sup> David R. Bewley-Taylor, *The United States And International Drug Control, 1909-1997* (New York: Continuum 2001), 160.

<sup>26</sup> *The Vienna Convention on the Law of Treaties*, 1969, Article 31, 2.

<sup>27</sup> For examples of this, please see Bernard Jackson, *Law, Fact and Narrative Coherence* (Roby: Deborah Charles, 1988); Peter Goodrich, *Languages of Law: From Logics of Memory to Nomadic Masks* (London: Weidenfeld & Nicolson, 1990); Costas Douzinas, Ronnie Warrington and Shaun McVeigh (eds.), *Postmodern Jurisprudence: The Law of Text in the Texts of Law* (London: Routledge, 1991); or Drucilla Cornell, Michel Rosenfeld, David Carlson (eds.), *Deconstruction and the Possibility of Justice* (London: Routledge, 1992).

present upon the body of the law, i.e. the text of the treaties, statutes and judicial decisions. Particular attention is drawn to the section stating:

*Addiction to narcotic drugs constitutes a serious evil for the individual and is fraught with social and economic danger to mankind.*

*Conscious of their duty to prevent and combat this evil, [the parties agree upon] ... coordinated and universal action.<sup>28</sup>*

The reference to the concept of ‘evil’ within this international legal treaty appears to illustrate the extent to which drug policy runs counter to the historical trend of international law. Law functions through the presumed relegation of the theological onto the/a mystic past, now overcome through a secular turn to modernity. Law is taken to constitute its authority through determinate sovereign power, as positivists would claim, or perhaps through an anchoring of a greater sociality, according to utilitarianism, but explicitly drawing on a religious framework to justify legal authority has ostensibly disappeared from modern jurisprudence as it is read as contravening modernity’s commitment to rationality. Therefore, critics of human rights and drug policy have queried why drugs have called up the lost spectre of theology in law, when other legal treaties escape reliance on such eschatological language. Rick Lines highlights that treaties that seek to address historical moral crimes such as the *1973 International Convention on the Suppression and Punishment of the Crime of Apartheid* manage to legislate against the act they seek to suppress without describing apartheid as ‘evil’. The same applies to how the *1970 Treaty on the Non-Proliferation of Nuclear Weapons*, the *1956 Supplementary Convention on the Abolition of Slavery* or even the *1948 Convention on the Prevention and Punishment of the Crime of Genocide*, none of which refer to their respective issues as

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<sup>28</sup> *The United Nations Single Convention on Narcotic Drugs, 1961, Preamble.*

‘evil’.<sup>29</sup> Christopher Hobson echoes Lines’ critique in asking why drugs but not genocide or slavery summons the spectre of ‘evil’, stating that, ‘among all the possible wrongdoing and bad things that exist in the world, it is slightly counterintuitive that drugs are the only one to be labelled as “evil” in international law’.<sup>30</sup> The description of drugs as ‘evil’ has a longer historical legacy than the UN drug control apparatus. The rhetoric that had been used to drive drug prohibition since the turn of the twentieth century, particularly within the United States where the idea of drugs as ‘evil’ helped turn what had been a fringe concern of Christian moralists into global legal norm. From the reports of early international drug prohibition crusader and US Opium Commissioner Dr Hamilton Wright to the writings of influential jurist, diplomat and scholar Quincy Wright, the first half of the twentieth century saw prohibitionists regularly forward their campaign by characterising drugs and drug use as ‘evil’.<sup>31</sup> The ‘evil’ of drugs is not simply a reference to the potential physical harm of addiction, as Jacques Derrida argues, other addictive substances such as alcohol and tobacco are not discursively branded with the stigma of existential evil.<sup>32</sup> The conceptualization of drugs as ‘evil’ not only speaks to the religious and missionary roots from which international drug prohibition emerged through actors such as Bishop Charles Henry Brent and the Reverend Wilbur Crafts, but, I would argue, also betrays the extent to which law continues to draw on a conception of the universal indebted to the religious, despite the secularised presumptions of UN-era international law. Of the various political and juridical projects of the twentieth

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<sup>29</sup> Rick Lines, ““Deliver us from evil”? – The Single Convention on Narcotic Drugs, 50 years on”, *International Journal on Human Rights and Drug Policy*, 1 (July 2010), 8

<sup>30</sup> Christopher Hobson, “Challenging ‘evil’: Continuity and change in the drug prohibition regime” *International Politics* 51, No.4 (July 2014), 526.

<sup>31</sup> See Hamilton Wright, “The International Opium Commission” *The American Journal Of International Law*, Vol 3 (1909), 670 and Quincy Wright, “The Opium Question”, *The American Journal Of International Law*, 18, No.2 (1924), .293

<sup>32</sup> Jacques Derrida, “The rhetoric of drugs: an interview”, *5 differences: A Journal of Feminist Cultural Studies* 5, 1 (1993), 1-25.

century, the laws prohibiting drugs draw perhaps the clearest line of continuum to the Christian project to capture all the lost souls of the earth, as the early drug wars were driven as it was by institutions such as the World's Woman's Christian Temperance Union (WWCTU), the Young Men's Christian Association (YMCA), and the Young Women's Christian Association (YWCA).<sup>33</sup>

To face the task of discerning what form 'evil' takes within a godless discourse such as modern international law requires us to engage with the tradition of scholarship known as political-theology: the study of the way that 'secularised' political concepts remain indebted to theology. How should we understand evil in the 'secular' world or, as Mark Fisher challenges, what is the content of evil 'for an age that no longer believes in evil'?<sup>34</sup> A key to decoding this question of evil within the Single Convention is to note the placement of evil in the preamble in opposition relationally to a universal 'mankind'. The invocation of 'mankind' as being in existential danger from drugs provides a telling instance of international law's arrogation of the universal, its claim to speak on behalf of all humanity. Particularly following half a century of warfare, post-World War II international law was committed to advocating a universal notion of 'humanity' shared by all peoples equally, turning away from the divisions and hierarchies produced by nineteenth and early-twentieth century imperialism. Yet whilst this shift appears unifying, a counter narrative can be offered: taking up the task of translating the transcendent office of God for a secularised world, German jurist Carl Schmitt adapted Proudhon's classic claim that 'he who invokes God is trying to cheat' into the idea that in the modern age,

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<sup>33</sup> For further on the role of Christian missionary groups in emerging drug prohibition, see Ian Tyrrell, *Reforming the World: The Creation of America's Moral Empire*, Reprint edn (Princeton: Princeton University Press, 2013).

<sup>34</sup> Mark Fisher, "The New Problem of Evil" in *Aesthetic Justice: Intersecting Artistic and Moral Perspectives* ed. Pascal Gielen and Niels Van Tomme (Amsterdam: Valiz 2015) 50

whoever ‘invokes humanity is trying to cheat’.<sup>35</sup> Schmitt understands the call to humanity operating as a deific surrogate. To simply claim application to all humanity, as the UN treaties are inclined to do, allows complete circumvention of the more crucial question of *how* the human is produced. Moreover, it ignores the history of exclusion that has underwritten the idea of ‘humanity’ and ‘mankind’. As Peter Fitzpatrick argues, Europeanised notions of humanity have often facilitated the disqualification of people with ‘certain physical characteristics, usually skin colour produced from the order of the law’.<sup>36</sup> International law has been adept at employing this exclusionary capacity of the concept of humanity to facilitate the visiting of violence upon particular subjects.<sup>37</sup> This dual character of the category of humanity – the capacity to both compel within an all-inclusive humanity and to expel utterly from that very same ‘all’ – points towards reading ‘humanity’ as a totalising standard against those who are included in a position of exclusion within this global order of modernity, those that Martiniquais psychiatrist and canonical postcolonial theorist Frantz Fanon would describe as *Les Damnés de la terre* – the damned of the earth.<sup>38</sup> Fanon scholar Lewis Gordon provides guidance towards unpacking the meaning of evil in a godless world by seeing Fanon’s ‘damned’ as ‘the theodicy of European modernity’.<sup>39</sup> Through Gordon’s insightful description, there lies a return to the classical concept of theodicy: the theological tradition of accounting for the evidential problem of evil within God’s omnipotence. While the use of the word ‘evil’ in the preamble of the Single Convention has provoked academic questioning, a reading of

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<sup>35</sup> Carl Schmitt, *The Concept of the Political: Expanded Edition* (Chicago: University of Chicago Press, 2007), 54.

<sup>36</sup> Peter Fitzpatrick, *The Mythology of Modern Law* (London/New York: Routledge, 1992), 65.

<sup>37</sup> See Danilo Zolo, *Invoking Humanity: War, Law and Global Order* (New York: Continuum, 2002).

<sup>38</sup> Frantz Fanon, *The Wretched of the Earth* (London: Penguin Books, 2001) original title *Les Damnés de la Terre*

<sup>39</sup> Lewis R. Gordon, “Race, Theodicy and the Normative Emancipatory Challenges of Blackness”, *The South Atlantic Quarterly*, 112, No.4 (July 2013), 729

this seemingly retrogressive and contradictory reference to drugs as ‘evil’ within longer traditions of conceptualising ‘evil’ remains under-developed so far. Therefore, the relationship between modern, secularised understandings of ‘evil’ and ‘pre-modern’ religious understandings of the concept must be illuminated.

### **Augustine and The Evidential Problem of Evil**

To take seriously the task of unpacking the significance of the idea of ‘evil’ within the Single Convention, a further understanding of the traditional religious analysis of ‘evil’ is required. The full history of Christian thought on the concept of evil is, of course, extensive and beyond the scope of this chapter to review in its entirety; however, a brief engagement can be offered with arguably the most famous theological account of evil, that offered by Saint Augustine of Hippo. Drawing on the wealth of other Christian theological writings on evil, particularly the Manichaean construction of a strict dichotomy in being, Augustine took up the problem of theodicy, seeking to explain through his writings how God’s transcendent goodness and the self-evident presence of corporeal, worldly evil could be reconciled. The problematic that Augustine adopted was one faced by generations of theologians: was it beyond of the power of God to simply erase evil contained in the world? If so, then how could Christians maintain a claim of God’s omnipotence? Or was evil a phenomenon that was included within and existed under God’s totalising will? If this was true, then did it not disrupt God’s essential claim towards the good?<sup>40</sup>

Augustine’s theodicy argued that all that exists comes from God, but once existent, it is no longer able to persist in the same state of immutable goodness as its creator. A deterioration from the form in which it was created always lies in potential

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<sup>40</sup> William E. Mann (ed.), *Augustine Confessions* (Lanham: Rowman & Littlefield Publishers, 2006), 116.



for all that exists, and when something does deteriorate or depart from the form of the good as designed by the creator, it is at that point, for Augustine, that we can diagnose the emergence of what is then termed 'evil'.<sup>41</sup> For Augustine, evil and good are not equal relations, instead he perceives evil as dependent upon the contradistinctive notion of the good, stating that 'the evil cannot exist at all without the good, or in a thing that is not a good. On the other hand, the good can exist without evil'.<sup>42</sup>

Augustine's schematic commences from a recognition that, before being made by the omnipotence of God, non-being was the state of existence for all creation, therefore the denigration of the form from which God made his worldly creations functions through the re-emergence of that initial state of non-being into the lived condition of being. Evil is always already included within the good in a manner that echoes the Platonic understanding of non-being as always already present within being. It is through this synthesis of Platonic philosophy and monotheistic Christianity that Augustine develops his notion of evil as 'not a nature but a kind of non-being'.<sup>43</sup> The resulting structure maintains evil as being within the omnipotent good of God, whilst still its antagonist. Crucially, for Augustine, evil is not good's opposite but its negation. Evil should not be imagined as an entity in itself as he argues '[f]or what is that which we call evil but the absence of good?'.<sup>44</sup> Evil does not possess a nature itself; it rather better understood as the failed realisation of what should be: the good. Evil is merely privation, an explicit lack, in the manner analogous to sickness as the absence of health or darkness as the absence of light. For Augustine evil does not exist externally to God, therefore God's omnipotence contains evil while sustaining an oppositional relationality to it. Evil is the lack that came before God's goodness.

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<sup>41</sup> St Augustine, *The Enchiridion; Faith, Hope and Charity* (Washington D.C.: Regnery Publishing, 1961), 12.

<sup>42</sup> St Augustine, *The Enchiridion*, 12.

<sup>43</sup> William E. Mann (ed.), *Augustine Confessions* (Lanham: Rowman & Littlefield Publishers, 2006).

<sup>44</sup> St Augustine, *The Enchiridion*, 11

Augustine's famous response to the problem of theodicy provides a starting point from which to begin to unpack the presence of 'evil' in the preamble of the Single Convention, which makes a humanistic, secularised claim to ontological completeness through an invocation of a universal 'mankind', a movement Schmitt has warned against as being a cheating claim to totality in the same manner as God operates in religious schematics. Having brought the transcendent reference point of God into the world itself through modernity's construction of universal humanity, international law mirrors the movement of the Augustinian schema, by placing the contradictions of this universal legal order as exterior to the community. However, for the law to remain universal, those contradictions, as with evil in theodicy, must also be included within the totality. A resultant paralysis befalls those who are deemed outside this universal humanity, for they must be utterly excluded by law whilst simultaneously being ultimately included. This is the damnation that Fanon speaks to when translating the metaphysical structure of theology into the material reality of our modern global order.

### **Fanon and the 'Theodicy of Modernity'**

Staying with Fanon, we can assert that his writings offer further understanding of what serves as evil in a secularised world, as he describes a paradoxical space that the 'damned' find themselves inside as 'the zone of non-being'.<sup>45</sup> This 'zone of non-being', for Fanon, encapsulates the lived experience of the racial/colonised other that has long been interpolated as the deformed version of the ideal human. With the idea of 'non-being' immediately recalling Augustine's classic description of evil, Fanon illustrates how the racial other remains trapped in a condition of privation. Through

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<sup>45</sup> Frantz Fanon, *Black Skins, White Masks* (New York: Grove Press, 1991), 2

invoking such meta-physical and theological language to describe the experience of racialization, Fanon gives indication to philosophical and religious training that is an oft-overlooked element of his revolutionary biography.<sup>46</sup> Even prior of Augustine, Christian theology, particularly in the Gospel of John, offered an understanding of darkness as symbolic invitation towards non-being and necessary negation of God as the way, the truth and the Light.<sup>47</sup> The echo of Plato's understanding of the conflict between being and non-being, an understanding already influential in Hellenistic Judaism, informed John's easy translation of darkness into the symbolic manifestation of evil. Darkness functioned as non-being as it was not created but the failed realization of the light, the empty vacuum against which creation existed. Fanon's understanding of racial otherness performs a similar philosophical manoeuvre. For Fanon, as a subject, the racial other functions not as a thing itself but as the failed realization of what should be: the rational, autonomous, modern (white/European) human. It therefore follows that within 'the totalitarian character of colonial exploitation the settler paints the native as a sort of quintessence of evil'.<sup>48</sup> The racial/colonial other exists only in 'negation' and it is through this state of negation that it can be seen to function as a surrogate for 'evil' within an ostensibly secularised world. Fanon provides further theoretical guidance for understanding race as negation by describing how within modernity's structure of being the racial/colonial other 'is the corrosive element, destroying all that comes near him; he is the deforming element, disfiguring all that has to do with beauty or morality; he is the depository of

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<sup>46</sup> Fanon was raised in a Roman Catholic church-going family. Furthermore, whilst his lycée was formally secular, it was culturally French Catholic and emphasised a strong philosophical training. Finally, in his medical training Fanon would strive to combine science and philosophy, bringing Sartrean phenomenology to the doctrines of psychiatry. See David Macey, *Frantz Fanon: A Biography* (London: Verso 2012)

<sup>47</sup> For an extensive engagement with the gospel of John's reading of darkness as non-being/evil, see Jonathan A. Draper, "Darkness as Non-Being and the Origin of Evil in John's Gospel", in Chris Keith and Loren T. Stuckenbruck (eds.), *Evil in Second Temple Judaism and Early Christianity* (Göttingen: MohrSiebeck 2016), 122-141

<sup>48</sup> Fanon, *Wretched of the Earth*, 8

maleficent powers, the unconscious and irretrievable instrument of blind forces.’<sup>49</sup>

Echoing the ‘pre-modern’ the structure of theodicy, the racial subaltern subject cannot be wholly other to the universal humanity of international law, lest humanity not be truly universal. Yet they cannot be fully human either, as it is a category contrasted against their savage characteristics. Therefore, they exist as existential lack within this legal order, damned by an invitation to civilise, progress or, in the UN-era, ‘develop’ towards a ‘perfect’ state of humanity that is indefinitely deferred and ultimately unreachable as it is constructed in opposition to them. Much as Schmitt reminds us of the theological operation of God, the modern standard of ‘secularised mankind’ functions with a theological undercurrent through claiming its own anti-thesis within its totality. The discourse of modernity is exposed as theologically informed when we appreciate how, within its Eurocentric logic, the racially subaltern subject takes on what Fanon calls, ‘the principle of evil’.<sup>50</sup> Fanon guides us in appreciating how the ontological structure Augustine called upon to account for evil is transformed under modernity into the explanation for the racial subaltern subject. For within modernity’s universal mankind, the racial other ‘is not a man’.<sup>51</sup> Instead, Fanon describes how under modernity the subject understood as racially inferior ‘represents not only the absence of values, but also the negation of values. He is, let us dare to admit, the enemy of values, and in this sense he is the absolute evil’.<sup>52</sup> Race is used to describe the human in privation.

The unpacking of the ‘theodicy of modernity’ provides a telling lens through which to re-read the curiosity of ‘evil’ being used in the preamble of the Single Convention, particularly thinking of its placement in oppositional

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<sup>49</sup> Fanon, *Wretched of the Earth*, 41

<sup>50</sup> Fanon, *Black Skins, White Masks*, 147

<sup>51</sup> Fanon, *Black Skins, White Masks*, 8

<sup>52</sup> Fanon, *Wretched of the Earth*, 8

rationality to a 'mankind' in need of protection. The call for the force of law to be deployed against drugs in defence of a universal humanity functions not simply as a call against the drugs as an entity, but moreover, as a call for the force of law to purify from a global order of 'mankind' the very subjectivity that these drugs are feared to engender: the irrational, savage, insatiable non-human. The discourse that supported prohibition has long relied on an image of drugs as these 'evil' intoxicants, that once ingested can turn the even most reasonable of modern human beings into a wild, primitive non-subject, no longer capable of rational thought. This narrative has underwritten both the promise and the panic about drugs within Euro-modernity. For proponents of drug use such as Baudelaire, drugs such as opium and absinthe provoked allusion to the 'flowers of evil', substances that could aid a desired escape for the imposition of bourgeois morality towards the pleasures of decadence and eroticism.<sup>53</sup> As such corporeal characteristics- licentiousness, idleness or wildness for instance- were also assumed by the same discourse of Euro-modernity to be over-developed within the racial other, it allowed for an easy conflation between the two conceptual models of 'drugs' and 'race', or a sense that the two concepts correspond with each other in a way that negates production of the ideal human subject. This helps illustrate why the popular description of the spectre of the drug addict, the 'junkie' maps seamlessly onto subject position that has been embodied by the racial other, the 'nigger', the 'oriental' etc. As Fanon's work helps us to see, racism has been justified precisely on the basis that particular (non) humans are formed as deviant in their subjectivity. Primitive and incapable of rational deliberation, these humans are walking examples of a negation of the ideal human subject. This conceptual

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<sup>53</sup> Charles Baudelaire, *The Flowers of Evil* (Oxford: Oxford University Press 2008)

fallacy is what underlies the translation of certain physical characteristics (skin colour, hair type, facial features) into signifiers for this negation.

### **Drugs, Race and The Long Shadow of Evil**

An appreciation of ‘the theodicy of modernity’ offers potential answers to the questions about the use of ‘evil’ in the Single Convention by showing how ‘evil’ was understood as a negated form of God’s goodness in pre-modern theological thought and how, in the ‘secularised’ modern age, with its new god of ‘mankind’, the structure of ‘evil’ marries with the discourse of the racism. Furthermore, this reading also points towards an explanation of the War on Drugs that would explode over the later-twentieth century following the signing of the Single Convention and that has been critiqued as amongst the most racially discriminatory of modern international legal projects.

It has now been well-established, both within the academic literature and in general public discourse that drug prohibition has been racially discriminatory in its application. As Michelle Alexander has highlighted, in the United States ‘Black men have been admitted to prison on drugs charges at rates of 20 to 50 times that of White men’, despite the fact that there is no discernible discrepancy regarding the use, supply or production of prohibited substances amongst different racialised groups.<sup>54</sup> It is difficult to contest the claim of Craig Reinerman and Harry G. Levine that the ultimate consequence of the drug war has been not the reduction in drug use or the elimination of the drug supply but the production of a ‘bulging prison population [...] disproportionately comprised of poor people of colo[u]r, most of whom had not

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<sup>54</sup> Michelle Alexander, *The New Jim Crow: Mass Incarceration in the Age of Colorblindness*, Reprint Edition (The New Press, 2012), 7

committed violent crimes.’<sup>55</sup> Scholars have taken care to unpack how the US drug laws is deeply indebted to that country’s particular history of legal, racialised violence; they target in particular structural violence on that nation’s Black population through the law. Even before Michelle Alexander’s seminal work, Ira Glasser had already named America’s drug laws as that nation’s ‘New Jim Crow.’<sup>56</sup> The history of race has been shown to have played a prominent role as within anti-drug campaigns in the U.S.A, from the temperance movements of the early twentieth century to the moral panic surrounding the crack epidemic in the 1980s.<sup>57</sup>

However, this dynamic is not isolated to the United States. For instance, research conducted by notable policy and campaign group Release in the United Kingdom has evidenced the extent to which race serves as a key determinant with regards to the punishments that are received for breaking the drug laws. In the United Kingdom people racialised as Black are disproportionately imprisoned when they are convicted as guilty of drug offences, whereas their white counterparts are far more likely to receive a simple informal caution for the same drug offence.<sup>58</sup> This trend in terms of racial discrimination in the application of drug laws continues in Brazil, where drug prohibition has similarly propelled a disproportionality in the impact it has had upon Afro-Brazilian and indigenous

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<sup>55</sup> Craig Reinerman and Harry G. Levine; “Crack in the Rearview Mirror: Deconstructing Drug War Mythology”, *Social Justice* 31, 1-2 (March 2004) 182-199.

<sup>56</sup> Ira Glasser, “America's Drug Laws: The New Jim Crow”, *Albany Law Review* 703, No.3 (Spring 2000), 63

<sup>57</sup> Dorine Marie Provine, *Unequal Under Law: Race and Law in the War on Drugs* (Chicago: University of Chicago Press, 2007)

<sup>58</sup> Niamh Eastwood, Michael Shiner, and Daniel Bear, ‘The Numbers in Black and White: Ethnic Disparities in the Policing and Prosecution of Drug Offences in England and Wales’. (London: Release Publications, 2013) This report showed that Black people in the U.K. are far more likely to be charged and sentenced for the same drug offence, with 56% of White people caught in possession of cocaine receiving cautions, while the remaining 44% were charged. In contrast, when Black people were caught in possession of cocaine, 22% received cautions, while 78 % were charged for the offence. This disparity continues with regard to sentencing, with Black people being imprisoned for drug offences at almost 6 times the rate of White people.

communities.<sup>59</sup> Further examples of this trend can be seen in countries such as Colombia where the violence of the contemporary cocaine trade can be connected to the racialised history of slavery and gold production.<sup>60</sup> Colombia has often been on the frontlines of the international war on drugs and the forced crop eradication and aerial fumigation programmes funded by the American commitment to international drug prohibition has particularly affected Afro-Colombian and indigenous communities, reinforcing the ‘historic marginalisation’ of these communities.<sup>61</sup> This trend extends across many other nations, with the above serving as just a few examples of where drug prohibition has been shown to renew racial divisions within the ostensibly postcolonial era.

### **The Evil of the (non) Human**

An understanding of why drugs take on the character of ‘evil’ in this secular age, and the way in which ‘evil’ maps onto the negated subjectivity placed on the racial other helps us understand why the weight of drug prohibition would consistently fall disproportionately on racially oppressed minorities across the world, despite the neutral, humanitarian language in which the UN drug conventions are couched. The idea of drugs as evil relies on fear of not simply the substances themselves as ‘evil’ but a fear of the (non)subjectivity that they can give rise to. The condemnation of drugs therefore functions as a stand-in for the fear of the threat of the loss of that capacity for civilised humanity, delayed gratification, the defeat of reason and the

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<sup>59</sup> Jamie Amparo Alvez and Dina Alvez, “Drugs and Drug Control in Brazil”, *Pan-African Issues in Drugs and Drug Control: An International Perspective*, ed. by Anita Kalunta-Crumpton, (London: Ashgate 2015), 248-292.

<sup>60</sup> Michael Taussig, *My Cocaine Museum* (Chicago: University of Chicago Press, 2004)

<sup>61</sup> See ‘Peace, Drug Policy, and an Inclusive Society: Eleven Ways Colombian and FARC Negotiators can Reform Drug Policy and Build a Lasting Peace’, Washington Office on Latin America (2013), p.4.



will at the hand of the appetite.<sup>62</sup> On a theoretical level, post-war international law has been able to facilitate a crusade against such an ‘evil’ in the War on Drugs because it has been tasked with the production (and defence) of this universal idealised humanity. Human rights scholar Robert Meister captured it best when stating that UN-era international law ‘misunderstands itself to be the *last* monotheism because it claims to be the religion of humanity as such’<sup>63</sup> The equating of drugs as a conduit for a denigrated form of humanity, thereby a correlative ‘evil’ against the God of ‘mankind’ had become so deep-seated as to have entered into the very language of a UN legal treaty, without challenge. Christopher Hobson tells us how ‘at the very outset of the conference [that produces the Single Convention] drugs were defined in reference to evil, and throughout delegates would regularly frame the issue in these terms’.<sup>64</sup> The jurists, diplomats and national delegates who attended the United Nations Conference on Narcotic Drugs in New York, January 1961 to finalise the draft of the Single Convention would not have been utilizing this theological language in isolation from the general proselytizing trend of post-war international law and that includes the discourse of human rights, which was always already informed by a belief in its powers to save the community of mankind from the horrors of the wars that plagued the first-half of the twentieth century. While ostensibly secularized, the emergence of the UN human rights framework was also indebted to a recalibration by Christianity following the failure of the church to restrain the outbreaks of global violence, with both Catholic and Protestant modes of religious conservatism instead sliding into European Fascism.<sup>65</sup> Following a crisis of

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<sup>62</sup> Jean Baudrillard, ‘A perverse logic’, *UNESCO Courier*, July (1987), 7-9.

<sup>63</sup> Robert Meister, *After Evil: A Politics of Human Rights* (New York: Colombia University Press 2011) 296

<sup>64</sup> Hobson, “Challenging ‘evil’”, 532

<sup>65</sup> For an extended unpacking of this argument, see Samuel Moyn, *Christian Human Rights* (Philadelphia: University of Pennsylvania Press, 2016).

faith in the power of religion to sustain global order, scholarship has shown how post-war human rights can be understood as secularising this Christian imperative to save the world from ‘evil’.<sup>66</sup> As Robert Meister explains, human rights informed by an imperative to usher in the world that would exist ‘after evil’, bringing about a new community of universal mankind where all peoples are treated and subjectively constructed, as the same.<sup>67</sup> However, the particular imagination of what constituted a universal ‘mankind’ for post war international law, an imagined idealised human that conformed to European norms of the modern human subject, would impact upon the international drug treaties. The ‘drug’, and the fear of addiction, becomes read as evil through contradistinction with the free, autonomous human.<sup>68</sup>

## **Conclusion**

An understanding of the political-theology that has underwritten the secular concept of humanity provides a clue for how drug prohibition has co-existed with human rights under UN despite the liberalism of human rights and the authoritarianism of drug policy in seeming contradiction. A international legal project that impacts disproportionately on racial others in a order to make them civilised can be read as the underside of an international project that sought to promote and protect an idealised version of humanity. Taken together with the concurrent turn to humanism in international law, what scholars have described as the ‘undoubted racism’ of the drug laws can be seen as being underwritten by a fear of an uncivilised state of humanity that drug use came to symbolise.<sup>69</sup> This is not to suggest that human rights is an

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<sup>66</sup> Moyn, *Christian Human Rights*, 1-25

<sup>67</sup> Meister, *After Evil*, p. 25.

<sup>68</sup> Peter Cohen, “The drug prohibition church and the adventure of reformation” *International Journal of Drug Policy* 14, No.2, (April 2003) 213.

<sup>69</sup> Desmond Manderson, “Possessed: Drug Policy, Witchcraft and Belief”, *Cultural Studies*, 19, No.4 (August 2014) 36-45.

inevitable theoretical complement to drug prohibition. The critique of the modern international human rights system is that it was the product of a Eurocentric worldview, which allowed it to preach universal humanity whilst sustaining imperial inequalities, but this is far from the only possible conception of human rights. Whilst human rights may have functioned with a narrow occidental bias as they have emerged under the UN, theorists like Fanon drew on the same humanism to map out the path towards a ‘new humanity’ following the end of colonial relations, a humanity which ‘mobilizes all classes of the people and which expresses their aims and their impatience’ but also recognizes ‘the value ... of conflict’ that allows those who were the victims of historical injustices to free themselves rather than being remade in the image of the ideal European. Walter Mignolo echoes Fanon’s call when he argues that the twenty-first century calls for a new, decolonised form of human rights, stating:

Human rights invented the anthropos (the less human) to be civilized and defended when the anthropos behave according to expectation. That cycle is closed. Now the anthropos is taking and becoming the saviour of his/her self and by so doing delinks and expands and decolonizes the narrow Western paradigm of Human Rights.<sup>70</sup>

The chasm that separates the “new humanity” that Fanon called for and the humanitarianism remaking the international legal order in the mid to late twentieth century is significant. Whilst human rights as they have functioned under the United Nations have been critiqued for having the structure of calling for the colonized to join a pre-determined western vision of humanity, Fanon challenges the very notion of “humanity” in its Euro-modern instantiation and calls for the West to give up on the rational, autonomous, ‘civilized’ vision of the idealized human subject to offer solidarity not charity to the former colonised peoples. For scholars and activists invested in drug law reform, engagement with this cycle of human rights – one that

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<sup>70</sup> Mignolo, ‘From Human Rights to Life Rights’, 31

explicitly confronts the echoes of historical injustices of racism and colonization that can be perceived not just in drug prohibition but in international law more widely – may offer even greater potential than the promise offered by making drug prohibition comply with conventional human rights standards. For instance, over and above seeing law enforcement engaging in abuses such as indefinite detention or forced crop eradication through drug prohibition, a Fanonian humanism integrates these abuses with a larger framework of racist police practices and neo-colonial economic and security relations. This Fanonian humanism allows for the decoupling of human rights from the production of a rational, autonomous and sacred human subject (one that is implicitly European) and, by extension, the contradistinction with that savage, uncivilized and racialised non-human, the ‘evil’ within the political-theology of modernity.

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