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The Sacrificial International:
The War on Drugs and the Imperial Violence of Law

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Submitted for the degree of Doctor of Philosophy of the University
of London

September 2017

School of Law
Birkbeck College, University of London

Declaration Against Plagiarism

I declare that all the material presented in this thesis is my own original work. I also declare that all quotations and references have been duly acknowledged and attributed.

Signed:

A handwritten signature in black ink, appearing to be 'J. ...', written over a horizontal line.

Date: 06/09/17

Abstract

The *United Nations Single Convention on Narcotic Drugs*, 1961 is presumed to be a testament to the progressive teleology of post-war liberal international law. In establishing the prohibition of the illegitimate trade of drugs as a global norm, this treaty serves as the legal grounding for what is popularly referred to as the War on Drugs. International drug prohibition offers a potent example of the humanitarian discourse taken to anchor the international legal order in the second half of the twentieth century. In practice, the failure of realising ‘A Drug Free World’ has been outright; international law’s declaration of a War on Drugs has produced little more than the same mass of casualties that all wars tend to produce. In an attempt to enforce the unenforceable, the drug war has visited social death (through mass imprisonment) and material death (through violent state enforcement) onto untold millions. Moreover, empirical studies reveal a sharp racial and geographical asymmetry in the violence that emerged through drug prohibition

In this thesis, I will theoretically unpack the apparent contradiction between the humanitarian rhetoric of the international laws governing drug prohibition and the racialised violence of the War on Drugs in practice. Rejecting the orthodoxies that seek to decouple the violence of the war from the law itself, I read the drug war as a telling instantiation of a violence that is not only consistent with but also productive of the liberal international legal order. Through unpacking the discursive association that has been produced between drugs and racial others posited as the negation of idealised ‘human’ underlying liberal international law’s humanitarianism, this thesis will employ a critical study of the War on Drugs in order demonstrate how the operative coherence of twentieth-century liberal international law remained indebted to a violence that I have termed as ‘sacrificial.’

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The theoretical strand of this thesis explores the productive force of sacrifice and it is a fitting topic for a project that is truly the result of the sacrifices made by so many people who have surrounded and supported me.

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The Sacrificial International:

The War on Drugs and the Imperial Violence of Law

Introduction

Let us begin with the catastrophe.¹

The international legal project of drug prohibition offers a significant theoretical challenge to legal scholars. How can the violence produced through the law by the War on Drugs be reconciled with international law's stated commitment to end the 'scourge of war'?² Before engaging with the theories of violence, empire, sacrifice and communality that will animate my response to this problematic, I must first mine through the piling of wreckage upon wreckage that initially provoked my interest in the workings of drug prohibition in international law. As the preamble from the *United Nations Single Convention on Narcotic Drugs, 1961*, makes clear, the prohibition of trading narcotic drugs aims to 'prevent [...] social and economic danger for mankind.'³ However, even a brief review of the empirical data collected by the institutions that monitor the drug war presents a problem that exceeds social scientific measurement and demands some form of theoretical explanation. Despite international law aligning the project of drug prohibition and its protection of mankind alongside a wider post-war commitment to humanitarianism and facilitating a universal peace, the War on Drugs has produced little more than the same mass of casualties that all wars tend to produce.⁴ The drug war has visited catastrophe upon untold millions; it has been the cause of social death (through mass imprisonment) and material death (through violent state enforcement) throughout the globe. For instance, the United States of America has been shown to domestically imprison more

¹ This metaphor is taken from Walter Benjamin, 'Theses on the Philosophy of History', in *Illuminations*, trans. by Harry Zohn, ed. by Hannah Arendt (London: Penguin, 1969), pp.253-265.

² The Preamble to the Charter of the United Nations states its aim as 'to save succeeding generations from the scourge of war'. *The Charter of the United Nations* (San Francisco: 1945) <<http://www.un.org/en/sections/un-charter/preamble/index.html>> [accessed 3 August 2017].

³ United Nations Office on Drugs and Crime (UNDOC), preamble to the *United Nations Single Convention on Narcotic Drugs 1961* (United Nations, 1961), <<https://www.unodc.org/unodc/en/treaties/single-convention.html>> [accessed 2 October 2015].

⁴ The 'War on Drugs' will be capitalised throughout this thesis as this grammatical decisions aligns with the wider aim of the thesis to emphasise the violence produced through drug prohibition as being on par with traditional military conflict.

than half of all federal prisoners because of drug offences.⁵ Internationally, the U.S.A has driven the construction of a global security apparatus through being the *de facto* enforcer of drug laws; a role that escalated to the point of openly engaging in targeted assassinations of suspected drug-traffickers.⁶ While much of the focus of this thesis will be on the U.S.A and its operation of drug prohibition both domestically and internationally, the failings of the drug war are apparent when examining a plethora of localities. In Rio de Janeiro, where the whole objective of law enforcement has been ‘a war against gangs and drug traffickers,’ on-duty police officers are estimated to kill at a rate of three people every day.⁷ Shifting to Colombia, we can see how in the War on Drugs, violence is not only confined to law enforcement but quickly escapes from the boundaries of the law and threatens to engulf society at large. At the height of the Colombian drug wars, the annual murder rate was one per 1000 of the population.⁸ On top of the deaths, there were also 300,000 Colombians driven from their homes.⁹ This story of death and displacement is repeated across the Americas, where peoples, particularly indigenous communities, routinely lose their livelihood through the crop eradication and land seizure programmes invoked to enforce the drug laws.¹⁰ In Mexico, murders between 2006 and 2012 totalled 60,000, a number widely accredited to an escalation of the drug war.¹¹ The scale of the violence is better appreciated when compared with the 14,728 civilian deaths in Afghanistan over the same period, a

⁵ Heather C. West and William J. Sabol, *Prisoners in 2007*, NCJ 224280. Bureau of Justice Statistics Bulletin (2008). See appendix, table 12: ‘Number of sentenced prisoners in federal prison by most serious offense’, 2000, 2006, and 2007.

⁶ See Patrick Gallahue, ‘Targeted Killing of Drug Lords: Traffickers as Members of Armed Opposition Groups and/or Direct Participants in Hostilities’, *International Journal on Human Rights and Drug Policy*, 1 (2010), 15-33.

⁷ Philip Alston, ‘Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions – Mission to Brazil’, *Human Rights Council, Eleventh Session, A/HRC/11/2* (2008), p.13.

⁸ Steven Levitt and Mauricio Rubio, ‘Understanding crime in Colombia and what can be done about it’, *Institutional Reforms: The Case of Colombia* (Boston: MIT Press, 2005), p.132.

⁹ Noam Chomsky, *Rogue States: The Rule of Force in World Events* (London: Pluto Press, 2000) p.64.

¹⁰ Damon Barrett, *Reflections on Human Rights and International Drug Control*, (London: LSE IDEAS, 2013). <http://www.lse.ac.uk/IDEAS/publications/reports/pdf/SR014/Barrett_Damon.pdf> [accessed 3 August 2017].

¹¹ See Human Rights Watch Report: ‘Mexico’s Disappeared: The Enduring Cost of a Crisis Ignored’, Human Rights Watch (February 20, 2013), <<https://www.hrw.org/report/2013/02/20/mexicos-disappeared/enduring-cost-crisis-ignored>> [accessed 7 September 2015]; or Nick Miroff and William Booth, ‘Mexico’s Drug War at a Stalemate as Calderon’s Presidency Ends’, *Washington Post* (November 27 2012) <https://www.washingtonpost.com/world/the_americas/calderon-finishes-his-six-year-drug-war-at-stalemate/2012/11/26/82c90a94-31eb-11e2-92f0-496af208bf23_story.html> [accessed 5 October 2015].

nation officially at war.¹² To continue to tally the drug war's piling of wreckage upon wreckage could exhaust the word count of this thesis, but it aids my argument to detail at the outset what has been the ultimate result that the prohibition of drugs has had upon the real bodies of peoples.

Such a catastrophe should at least offer some qualification by pointing to the achievement of a stated purpose, yet this claim also remains beyond the drug war. Through a universal prohibition of the drugs trade, international law explicitly stated that it aimed to bring about '*A Drug-Free World*.'¹³ This ambition emphasises the belief in the omnipotence of the law. International drug prohibition held that it was within the power of the law to make the natural world conform to its word. The underlying belief of prohibition is that it is possible for the law to universally reduce and finally abolish the illegitimate production and use of substances drawn from naturally occurring plants such as cocaine, opium and cannabis.¹⁴ Furthermore, the prohibition of drugs was posited as a humanitarian endeavour through the claim that the reduction of the use of these plants would 'ensure the health and welfare of humankind.'¹⁵ The idea was that the law would, through its force, suffocate the supply of drugs, while, concurrently, the authority of the law would inspire a reduction in the demand, by deeming these substances to be transgressive and against the accepted norms of society. In practice, the defeat of this plan has been outright. Even the institutions of international law invested in proclaiming prohibition to have been a success, such as the United Nations Office on Drugs and Crime (UNODC), have recognised the durability of the drugs, estimating that between 162 million and

¹² Statistics from 'The United Nations Mission in Afghanistan Review, 2012', *Guardian*, April 2013. <<http://www.theguardian.com/news/datablog/2010/aug/10/afghanistan-civilian-casualties-statistics>> [accessed 6 October 2015].

¹³ This is made explicit upon a review of the history of the United Nations engagement with the prohibition of drugs. The most prominent example is offered by the 1998 United Nations General Assembly Special Session on Drugs, which was held under the slogan: "*A Drug Free World – We Can Do It*".

¹⁴ This overarching ambition of the international drug control system is clearly stated in the Transitional Reservations of Article 49 in *The Single Convention on Narcotic Drugs, 1961*. See Article 49, 2 (g): 'The production and manufacture of and trade in the drugs referred to in paragraph 1 for any of the uses mentioned therein must be reduced and finally abolished simultaneously with the reduction and abolition of such uses'. This ambition was further reaffirmed in the 'UNODC Political Declaration and Plan of Action on International Cooperation towards an Integrated and Balanced Strategy to Counter the World Drug Problem 2009'. See paragraph 2: '[We] Reaffirm also that the ultimate goal of both demand and supply reduction strategies and sustainable development strategies is to minimize and eventually eliminate the availability and use of illicit drugs and psychotropic substances in order to ensure the health and welfare of humankind.'

¹⁵ *Ibid.*,

324 million people used illicit drugs recreationally in 2012.¹⁶ Following prohibition, the continuing prevalence of drug use has led to the trade in illegal drugs emerging as amongst the most lucrative of all global criminal industries, accounting for one fifth of global criminal proceeds by the UN's own admission (rising to half if tax evasion is discounted).¹⁷ This is all despite over \$100 billion per annum being spent globally on enforcing the War on Drugs.¹⁸ All of the successful drug seizures or arrests of traffickers have, in practice, been of only a trivial significance, yet they are presented by officers of the law, policemen, presidents and UN officials, as markers of victory in the never-ending war that the international community is engaged in.¹⁹ It is a war with no point of conclusion, with the enacting of the war being the result in itself. The ostensible futility of these laws, combined with the empirical devastation of life that has resulted in their wake, demands further theoretical investigation. This theoretical investigation is the task that I am undertaking with this thesis. I argue that the urgency of such an investigation is revealed by the absence, by both practitioners and academics, of viewing stated empirical failings of the drug war as revealing any wider problem of law.

Firstly, there are those who, despite the figures offered above, do not recognise the War on Drugs as a catastrophe. They look upon the history of drug prohibition and the people who have suffered it as, at best, unfortunate victims in the necessary march of progress. For the generals of this drug war, who continue to 'dream of a world free of drugs', despite the aforementioned failure of international drug laws to reduce recreational use of prohibited substances, they still claim that 'the conventions' success [...] is undeniable.'²⁰ Any negative consequences of the attempts to enforce prohibition are seen to reinforce the dangers of the drugs and therefore the need for prohibition, rather than as evidence of any failure of law. Their

¹⁶ 'World Drug Report 2014', UNODC (New York: United Nations, 2014), p.1.
<https://www.unodc.org/documents/wdr2014/World_Drug_Report_2014_web.pdf> [accessed 3 August 2017].

¹⁷ 'Estimating Illicit Financial Flows Resulting from Drug Trafficking and Other Transnational Organized Crimes: Research Report', UNODC (October, 2011), p.20
<https://www.unodc.org/documents/data-and-analysis/Studies/Illicit_financial_flows_2011_web.pdf> [accessed 3 August 2017].

¹⁸ Steve Rolles, George Murkin, Martin Powell, Danny Kushlick, Jane Slater, *The Alternative World Drug Report, Counting The Costs Of The War on Drugs: Executive Summary* (Count the Costs, 2012)

¹⁹ Desmond Manderson, 'Possessed: Drug Policy, Witchcraft and Belief', *Cultural Studies* 19 (2005) 36-63, p.51.

²⁰ Antonio Marie Costa (Head of the UNDOC), 'Legalise Drugs and a Worldwide Epidemic of Addiction Will Follow', *Guardian*, 5 September 2010
<<http://www.theguardian.com/commentisfree/2010/sep/05/legalisation-drugs-antonio-maria-costa>> [accessed on 9 August 2015].

response to the evident failures of the drug war has been to call for more law: more enforcement programmes, more institutions, greater surveillance powers, stronger punishments for those who defy the law.²¹ Outside of their consideration is potential of the law actually being implicated in ills of the drug war. However, not only do prohibitionists remain invested in the infallibility of law, the dissociation of the catastrophe from the actual law itself is also echoed by some critics of universal prohibition, who read the drug war as an ‘approach [that] might be tempting in theory but in practice is murderous and self-defeating.’²² This understanding portrays prohibition as a benevolent project, albeit one that, due to unforeseen complications, has created worse harms than those it initially aimed to address. Theoretically, while it recognises a problem, it reinforces the idea that problem is not one of law- the failure is with the external reality of politics and economics that make the noble intentions of the law impossible.

My thesis rejects both perspectives on the War on Drugs; I read international drug prohibition over the twentieth century as neither an essential humanitarian endeavour, requiring only further commitment to the determinations of the law in order to succeed, nor a misguided application of a benevolent legal project. I will instead focus on the ways in which the violence detailed above is actually inscribed into and produced through the law. Furthermore, I seek to illuminate the function that such violence serves in constituting and sustaining the international legal order. The drug war must be reinterpreted: no longer held as a necessary undertaking or as an unfortunate misstep in international law’s teleological march to universal peace but instead read as an instantiation of a recurrent struggle that gives the modern international legal order its very form. In short, my thesis will argue that the apparent contradiction between the violence of the War on Drugs and the humanitarian rhetoric through which the law speaks prohibition into being, reflective of a wider humanitarianism of post-colonial liberal international law, no longer appears contradictory upon reading the violence as operating as ‘sacrificial.’ Through the concept of a ‘sacrificial’ international law, I propose a reading of legal violence that stresses a function as law-making/law-preserving, which in the international arena

²¹ See Robert M. Kimmitt, ‘International Law in the War on Narcotics’ published in Proceedings of the Annual Meeting of the *American Society of International Law (ASIL)*, 84 (1990), pp. 302-307. Kimmitt calls for greater international cooperation and greater legal force in pursuit of realising the goal of universal prohibition.

²² Philip Alston, *Report of the Special Rapporteur*, p.13.

aims at the taming of global rivalry through the facilitation of global community. As the community in this instance acclaims universality, the ‘sacrificial’ violence can only be served against an internalised negation of the communal order and I argue that for the humanitarianism of international law this translates into the representations of ‘failed’ humanity, which in the discourse of law is imposed upon racial subaltern subjects. This thesis will aid understanding of its central topic by offering an original theoretical lens through which to understand both the persisting violence of the drug war and asymmetry in its impact upon different peoples of the world. The traditionally legalistic demands of my thesis will meet by the detail I will supply regarding the emergence, production and application of international law against drugs. However, the theoretical thrust of my research is to expose and displace the malignity of what is being recorded in the legal instruments that establish drug prohibition. This argument proceeds from a presumption that in order to fully understand the international law against drugs, you must with a concern for those reduced to rubble by the history of prohibition, those at the receiving end of the violence produced through this war. Such a theoretical perspective seeks to make an explicit claim about the persisting imperial violence of international law through the focal instantiation of drug prohibition. This is to act as a corrective against much of the literature of War on Drugs that have sought to examine the war as though it was independent of the legal institutions that produced and sustained it.

The Origin and Innovative Contribution of Thesis

It is my assertion that surveying the wreckage of the drug war invites a set of questions that scholars of international law must address: How was it possible for this scale of violence to have been performed through the workings of international law without disturbing its claim to effecting a universal peace? How does the law sustain a claim to rationality and objectivity in the face of continuing with such a destructive but ultimately futile legal project? How did the limited idea of prohibition of particular drugs by the law, originating from the U.S.A at the turn of the twentieth century, become universally applicable by that century’s end? If drugs are a threat to ‘all mankind’ and the force of international law is required to be deployed against it, what is the ‘kind of man’ that is acclaimed; what is the conception of the human that international law is seeking to protect? How does the drug war work? As much as it is

a war, i.e. a violent, destructive undertaking, could it also be understood as a productive process, productive of a shared system of norms and a general communality in international law? If so, what are these norms? And finally, if international law, particularly post-1945, sought to enshrine the essential equality of all nations and peoples through an arrogated universal humanitarianism, why has the violence of universal drug prohibition been implemented with such geographical and racial asymmetry? What does the political and racial identity of those who have been the predominant victims of the drug war tell us about the enemy of this war? These are the questions I will develop an answer to over the course of my thesis. These questions emerge from previous some of the previous practical legal work I have undertaken that gave me first hand experience of the consequences of the drug war. Prior to my PhD, I worked with the Capital Post-Conviction Centre of Louisiana, a law firm committed to challenging mass incarceration in the U.S.A., amongst other aims. Furthermore, for the first two years of my doctoral studies, I also worked with Release, the national centre of expertise on drugs and drugs law in the U.K., as a legal advisor committed to the reform of drug prohibition. Both of these roles aided me in developing the questions that underpin this thesis and I bring the empirical experience gained in the jobs to the following study.

Having taken account of the questions I seek to answer, I move on to reviewing a set of distinct theoretical approaches that can offer some guidance in responding to the problem at hand. The concrete questions stated above make clear the requirement to think theoretically: for instance, how do we conceptualise the War on Drugs if by ‘war’ we don’t mean the traditional concept of war and if by ‘drugs’ we don’t mean to describe all psychoactive substances? In seeking to address these issues and others, this thesis makes an intervention in the current body of critical scholarship on international law to enrich understandings of the relations between legal violence, the order of the international community and a persisting imperial legacy within the contemporary world. My original contribution will be illustrate the contradiction between the violence of the War on Drugs and the humanitarian rhetoric of drug prohibition and liberal international law more widely, can be better understood as an instantiation of the sacrificial structure that international law appeals to in order to allow the system to produce itself. This illustration of how legislation presumed to be peripheral in terms of international law actually provides a telling instantiation for how violence operates with the liberal humanitarianism of post-

colonial international law serves to advance my primary field of study - critical international law – as well as the many sub-fields that are connected to this field by my project, such as drug policy studies, post/decolonial studies, political philosophy and political theology.

In order to make a distinct contribution to these disciplines, as well as display an immersion in the scholarship already produced, my thesis will embark upon several theoretical innovations, built upon primary and secondary bodies of knowledge. Firstly, I will read together the empirical research detailing the failures of drug prohibition alongside traditions of critical legal scholarship, especially those that draw on the post/decolonial and political-theological readings of legal violence. The connections between these fields of study have yet to be drawn out in the literature. A further contribution will be my extension of post/decolonial critical readings of international law into an understanding of the theological underpinnings of persisting imperial relations. This contribution will be offered through my development of the concept of a ‘sacrificial’ international law that will be laid out in full in *Chapter Two*, before being employed as a lens through which to understand the history of drug prohibition across the following chapters.

Original historical work will also be employed in order to anchor my theoretical argument, particularly the unpacking of the professional and philosophical connections that existed between the moral reformers and Christian missionaries who drove drug prohibition, figures like Bishop Charles Henry Brent, Wilbur Crafts and Hamilton Wright, and the jurists who developed an American tradition of liberal, humanitarian international law such as Elihu Root and James Brown Scott. The argument offered in *Chapter Five* emphasises not only the lines of communication and professional alliances that developed between the prohibitionists and the jurists in the early twentieth century but also the way that a shared theoretical vision of constructing a ‘single standard of morality’ across the globe facilitated these alliances. This unpacking of the political and philosophical connections between the moral reformers and international lawyers allows an under-researched element of the narrative of early American international law to be recovered, helping to explain why drug prohibition, far from being a peripheral concern, was one of the main vehicles through which the U.S.A. entered the international legislative arena and therefore has much to tell us about the direction that American internationalism (and international law more widely) would take over the course of the century.

Foundational Data: The Racial Asymmetry of Drug Prohibition

Returning to the empirical for the moment, only the most myopic of observers could ignore the asymmetry in the way the violence of the War on Drugs has been apportioned amongst the peoples of the world. Despite adopting a liberal posture, couched in terms of the impartiality and universality claimed of law, the international laws on drugs have disproportionately impacted specific categories and territories of peoples. This contradiction is now well established in drug policy studies. The impact of prohibition of certain drugs has fallen heaviest on the peoples of Latin America, the Caribbean and the racially subaltern populations of Europe and the United States of America. The scale of the catastrophe in Latin America is only hinted at by the statistics presented above regarding the death toll and rate of displacement in Colombia, Mexico and Brazil. However, it is also important to note how, within Western nations in general and the U.S.A. in particular, drug prohibition is inextricable from the perpetuation of a racially discriminatory legal system. As Michelle Alexander points out in her essential book, *The New Jim Crow*, ‘Black men have been admitted to prison on drugs charges at rates of 20 to 50 times that of White men’ in the U.S.A., despite the fact that there is no discernible discrepancy regarding the use, supply or production of prohibited substances amongst different racialised groups.²³ 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 committed violent crimes.’²⁴ Therefore, a body of scholarship has now established the drug laws in America as interwoven with that country’s particular history of legalised, racialised violence. Before Michelle Alexander, Ira Glasser also named America’s drug laws as that nation’s ‘New Jim Crow.’²⁵ Doris Marie Provine offers an extensive review of the history of race as it has functioned within anti-drug campaigns, from the moralist temperance movements of the early twentieth century to

²³ Michelle Alexander; *The New Jim Crow: Mass Incarceration in the Age of Colorblindness*, Reprint Edition (The New Press, 2012), p.7.

²⁴ Craig Reinerman and Harry G. Levine; ‘Crack in the Rearview Mirror: Deconstructing Drug War Mythology’, *Social Justice* 31, 1-2 (2004) 182-199.

²⁵ Ira Glasser, ‘America's Drug Laws: The New Jim Crow’, *Albany Law Review* 703 (2000), p.63.

the panic of the crack epidemic in the 1980's.²⁶ Provine draws a direct line of continuum between these distant moments to illustrate the debt that drug prohibition in America owes to racial fears and paranoia.²⁷ Legal professor David A. Sklansky has further argued that the mandatory federal sentences for trafficking in crack cocaine contravene the assumption of equal protection for all races under the law.²⁸ Sklansky highlights how crack cocaine, as a substance that is, in its form, not significantly dissimilar from its derivative of powder cocaine, receives far harsher penalties as a result of those penalties being imposed almost exclusively on the Black population of America. For Sklansky, 'it is hard to find contemporary laws that fail this prophylactic requirement [for equality before the law] more blatantly than the federal crack penalties.'²⁹

However, whilst scholarly attention has been largely directed at the racial discrepancies in drug law enforcement in the U.S.A., this phenomenon is not isolated to that country. While Alexander is particularly elegant in her tracing of the continuum between America's drug-war fuelled model of mass incarceration, and plantation slavery, it is important to remember when discussing race, drugs and transatlantic slavery, that Alexander is addressing topics that cannot be analysed in full from within the confines of any one nation-state. Therefore, in this thesis I will try to expand the frame in which the 'New Jim Crow' is set in order to include the parallel manifestations of the same racialised dynamics it identifies occurring in other nation states. For instance, empirical research in the United Kingdom shows how race is also a key determinant in that jurisdiction when it comes to punishments for contravening the drug laws. In the U.K. people racialised as Black are disproportionately imprisoned when they are convicted as guilty of drug offences, whereas white counterparts are far more likely to receive a simple informal caution for the same drug offence.³⁰ The discrepancy in the application of drug laws has

²⁶ Dorine Marie Provine; *Unequal Under Law: Race and Law in the War on Drugs* (Chicago: University of Chicago Press, 2007).

²⁷ Ibid.

²⁸ David A. Sklansky, 'Cocaine, Race, and Equal Protection', *Stanford Law Review* 47, 6 (1995), 1284-1355.

²⁹ Ibid, p., 1301.

³⁰ 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'. *Release*, 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

helped create a situation in which the proportion of black people imprisoned, in relation to their proportion of total population, is in fact larger in the U.K. than in the U.S.A.³¹ This trend in terms of clear evidence of racial discrimination in the application of drug laws continues in Brazil, where drug prohibition has similarly propelled a similar disproportionality in the impact it has had upon Afro-Brazilian and indigenous communities.³² Enforcing drug prohibition in Brazil has facilitated an imagining of the space of the favela and the primarily racially subaltern inhabitants of this space as legitimate victims whose suffering at the hands of draconian methods of law enforcement maybe necessary in the quest for order. Those from the favela are therefore naked to the violence of the law – ‘whether or not they are involved in drug trafficking’, their deaths are *jus necessitates* for legal ordering.³³ Further examples of this trend in prohibition can be seen in Colombia where Michael Taussig connects the violence of the contemporary cocaine trade to the racialised history of slavery and gold production in Colombia.³⁴ Again, in Colombia, the forced crop eradication and aerial fumigation has particularly affected Afro-Colombian and indigenous communities, reinforcing the ‘historic marginalisation’ of these communities.³⁵ It is because of the consistent racial asymmetry in the application of drug laws detailed above that the theoretical traditions that have extensively considered the problem of race in the modern world, postcolonial/decolonial studies and critical race theory will be resources that I will mine over the coming chapters. My theoretical choices emerge from the problems in the world. The racial and geographical discrepancies that have been produced in the application of the international laws on drugs across a variety of jurisdictions, to my account, offer a key insight for addressing the question of how the

with regard to sentencing, with Black people being imprisoned for drug offences at almost 6 times the rate of White people.

³¹ Randeep Ramesh, ‘More Black People Jailed in England and Wales Proportionally than in US’, *Guardian*, 11 October 2010: “the proportion of black people in jail in the UK was almost seven times their share of the population, whereas in the US the proportion of black prisoners is four times greater than their population share”. <<http://www.theguardian.com/society/2010/oct/11/black-prison-population-increase-england>> [accessed 21 October 2015]; Equality and Human Rights Commission, *How Fair is Britain: Equality, Human Rights, and Good Relations in 2010* (EHRC, 2010), p.172. “There is now greater disproportionality in the number of Black people in prisons in the UK than in the United States”. <https://www.equalityhumanrights.com/sites/default/files/how_fair_is_britain_-_complete_report.pdf> [accessed 3 August 2017].

³² 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 Professor Anita Kalunta-Crumpton, (Ashgate: 2015), pp.248-292.

³³ Denise Ferreira da Silva, “Law, Race and Violence,” *Griffith Law Review* 18 2 (2009), p.232.

³⁴ Michael Taussig, *My Cocaine Museum* (Chicago: University of Chicago Press, 2004).

³⁵ 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.

violence of the drug war can be reconciled with international law's acclaimed commitment to universal peace.

Outline of Chapters

The following sections of this thesis will be arranged in three parts. Firstly, *Part A* will explain the theoretical and historical understanding of international law that I am applying in this study of the international laws on drugs. *Chapter One* will commence with an engagement with the critical scholarship produced on the concept of 'drugs', drawing on the work of drug policy experts as well as canonical philosophers who have touched on their topic in order to unpack the discursive ground that informs normative understandings of what differentiates a 'drug' from other plant-life/psychoactive substances. Over the course of this chapter, I will illustrate how the concept of 'drugs' cannot be divorced from the legal act of prohibition, for it is in the determination of law that the discursive ground for drugs is fixed; rather than being objects in the world over which law is legislating, the law speaks the idea of drugs into being as it prohibits it. Only their legal status is able to collate the diverse set of plant-life/psychoactive substances that are now known as drugs into collective. Furthermore, in unpacking 'drugs' I will show how indebted the fear of their 'transgressive' nature is to racialised conceptions of 'non-humanity' with drugs feared as being the conduit between ideal and denigrated states of humanity. The understanding of discursive grounding for drugs developed over this chapter will provide theoretical underpinnings behind the reasons why the history of drug prohibition was intertwined with explicit racist sentiments, even by early lawmakers, as will be detailed over the later chapters. *Chapter Two* will focus on critical readings of international law, drawing particularly from traditions of scholarship that are concerned with the impact that the colonial encounter between the European and non-European worlds had upon the emergence and orientation of international law.³⁶ A distinct subgenre of critical international legal scholarship taking seriously such questions has emerged under the nomenclature of Third World Approaches to

³⁶ See Peter Fitzpatrick, *Modernism and The Grounds of Law* (Cambridge: Cambridge University Press, 2001); Sundhya Pahuja, *Decolonising International Law: Development, Economic Growth and the Politics of Universality* (Cambridge: Cambridge University Press, 2011); Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal* (Cambridge: Cambridge University Press, 2011); Jennifer Beard, *The Political Economy of Desire: International Law, Development and the Nation State* (Routledge-Cavandish, 2006).

International Law (TWAIL). TWAIL provides a useful framework for engaging with international law in a manner that seeks an explanation for the condition of ‘the suffering humanity.’³⁷ TWAIL has been described as seeking to ‘understand, deconstruct and unpack the uses of international law as a medium for the creation and perpetuation of a racialised hierarchy of international norms and institutions that subordinate non-Europeans to Europeans.’³⁸ By making explicit a desire to address ‘the material and ethical concerns of third world peoples,’ TWAIL illustrates how European colonialism shaped the very character of international law and its institutions.³⁹ However, my distinct contribution to critical readings of international law will be to read the racial and geographic exclusions detailed in TWAIL scholarship, particularly the work of Anthony Anghie, alongside appreciations of the theological undercurrents that persist within the ostensibly secularised international law. This will require developing an understanding of ‘third world peoples’ that functions not merely as a descriptor of populations from a fixed geographical location, but also a descriptor that captures how particular peoples are produced by the discourse of Euro-modernity as the erased underpinnings of the mutual recognition of dialectics. To be ‘third world’ is to be the excluded third term upon which the relationality of modern subjectivity is sustained; it is to be the unseen third part on which the rivalry of ‘realised subjects’ is built, whilst remaining devoid of the reciprocity upon which the dialectic of the modern is founded.⁴⁰ In short, to be ‘third world’ is to be ‘damned’ within an ostensibly secular world of Euro-modernity modern secular, as captured in the title of Frantz Fanon’s magnum opus *Les Damnés de la Terre*.⁴¹ It is this element of the racial/colonial subaltern subject as ‘damned’, shamefully erased in the English translation as ‘The Wretched of the Earth,’ to which I will turn throughout this thesis and which will be read alongside the concept of ‘sacrifice’ as a lens through which to explain understand the political-theological underpinnings of the colonial relations that TWAIL scholars see as persisting within

³⁷ Upendra Baxi, ‘New Approaches to the History of International Law’, *Leiden Journal of International Law* 19 (2005), p.560.

³⁸ Makua Matua, ‘What is TWAIL?’, *American Society of International Law Proceedings* (2000), p.31.

³⁹ B.S. Chimni, ‘Third World Approaches to International Law: A Manifesto’, *International Community Law Review* 8 (2006), p.3-5; Antony Anghie, *Imperialism, Sovereignty and the Making of International Law*, (Cambridge: Cambridge United Press, 2005), p.311.

⁴⁰ For a full discussion on the misrecognition of the colonised subject as the excluded third-term on which the modern dialectic is built, see Frantz Fanon, *Black Skins, White Masks*, (Pluto Press, 2008), particularly ‘The Negro and Hegel’, pp.168-173.

⁴¹ Frantz Fanon, *The Wretched of the Earth* (London: Penguin, 2001).

the discipline of international law. In *Chapter Two*, I will draw on the work of French philosophical anthropologist René Girard, amongst others, in order to illustrate the potency of the concept of ‘sacrifice’ for understanding how violence, such as that produced by the drug war, can be theoretically reconciled with the acclaimed humanitarianism of a communal international legal order and its task of externalising violence from within its midst. *Chapter Three* will take up the task of historically rooting the notion of a ‘sacrificial international’ at the birth of European imperialism, showing how international law emerged through the colonial endeavour. Francisco De Vitoria will serve as the primary point of reference at this juncture, and I will draw on critical scholarship that has argued for a ‘dynamic of difference’- a structural inequality between those he deems civilised and those deemed uncivilised- persisting within the Salamancan theologian’s bold claim to a universal humanity. As Anthony Anghie details Vitoria’s ‘dynamic of difference’, allows for law to cleave ‘a gap between two cultures, demarcating one as ‘universal’ and civilized and the other as ‘particular’ and uncivilized’ and continues to animate many of contemporary international law’s central doctrines and institutions.⁴² Looking at this sixteenth-century jurisprudence as an ‘origin’ for the liberal international law of the twentieth century, I will study how the interior/exterior positionality that Girard mandates as necessary for the scapegoat to exorcise the intra-communal violence will be shown to marry with Vitoria’s inclusion of the colonial subject within a humanitarian framework for the law of nations but in a condition of primary exclusion which ultimately licences violence upon the colonised.

Part B will focus on the emergence of international drug prohibition at the turn of the twentieth century, illustrating how this particular project functioned as a vehicle through which the U.S.A emerged as a major actor in international law and this section of the thesis will also explore the correlative (re)turn towards a ‘sacrificial internationalism’ that came along with emergence of American liberal internationalism. *Chapter Four* will detail the American recovery of Vitoria, who had fallen behind jurists such as Grotius or Vattel in the consideration of the ‘origin’ of international law by the end of the nineteenth century. However, I will review how, propelled by the endeavours of the ‘father of American international law’ James Brown Scott and a generation of forthright American internationalists, Vitoria was

⁴² Anghie, *Imperialism, Sovereignty*, p.4

recovered and his jurisprudence began to influence the orientation that international law would take over the coming century. Through a review of the early history of American international law in this chapter, I will establish the importance of the recovery of the Victorian legacy upon American internationalism and its correlative legal projects. *Chapter Five* will study the concurrent births of American international law and international drug prohibition, showing drugs not to be peripheral but actually central to the story of America's turn to internationalism. I will focus on the juridical crisis provoked by the U.S.A's acquisition of the Philippines in the Treaty of Paris 1898- and therefore, inheriting, in the eyes of prohibitionists, an international opium problem. I will subsequently explore the theoretical parallels between the 'sacrificial internationalism' and the prohibition of drugs to suggest an understanding for why under Scott's tenure at the US State Department, religious missionaries such as Bishop Brent gained significant mileage in their campaign to establish drug prohibition as international law. This chapter will also examine how the explicit racism of domestic drug prohibition in the U.S.A would come to inform the structure and form of the drug prohibition it would argue for internationally. *Chapter Six* will argue for a critical reading of the development of drug prohibition over the interwar period. I will unpack why the institutionalisation of international law provided such fertile ground for prohibitionists as well as illustrate the connection between the desire for communality that emerged in jurisprudential takes on international law following the crisis of the Great War and the holistic conceptualisation of the globe as one required for drug prohibition to realise itself. I will also examine what were the limitations of international drug prohibition in this inter-war era that resulted in its failure to concretely establish itself.

Part C will focus on the manifestation of what we now call the War on Drugs that emerged following the crisis of the Second World War, as drug prohibition became a key element in the contemporary international legal order. *Chapter Seven* will take up a review of the context that produced the key touchstone for contemporary drug prohibition, the *United Nations Single Convention on Narcotic Drugs, 1961*. I will undertake a close reading of this treaty in search for evidence of the West-Non West dichotomy that TWAIL scholars read into international law's promise to protect a 'universal mankind.' Furthermore, in contrast to the prevailing trend in drug policy studies to emphasise the discontinuities between drug prohibition and the humanism of post-war international law, I will read drug prohibition

alongside other major treaties of that epoch such as the U.N Charter and the Universal Declaration of Human Rights to search for any shared theoretical assumptions about the order of international law that may allow these historically co-current legal instruments to compliment each other. Drug prohibition is under-researched as a project of the post–Second World War international law. By reading the UN drug laws alongside the contemporaneous emergence of international criminal law and international human rights law, I will explore how drug prohibition provides insights to some of the wider dynamics of post-war international law. *Chapter Eight* will focus on the declaration and escalation of the War on Drugs in the final decades of the twentieth century once the international legislative framework for drug prohibition was firmly in place. This chapter will seek to draw together the insights collected from the previous chapters and their review of the chronology of drug prohibition in international law to try to answer the question of what kind of war was the War on Drugs? Returning to the material violence, the statistics of death, detention and displacement detailed at the start of this introduction, I will enquire as to whether the War on Drugs can offer any insight into the changing nature of conflict following international law’s turn towards universalism humanism.

Conclusion

My task over the course of this thesis will be to establish the theoretical value of reading the War on Drugs as an instantiation of a sacrificial internationalism: a reading of the violence that has been produced through this specific legal project as being interwoven with the humanitarian, universal peace acclaimed by liberal international law. The concept of sacrifice, which will be illustrated by my post/decolonial and political-theological reading of the drug war, captures the way in which international law’s management of violence functions through the legitimising of violence onto a signifier taken as the negation of the community. Recognising the sacrificial victim as both included within and utterly excluded from the community, I will posit that those who have been the ultimate victims of the drug war, the racially and geographically subaltern populations taken as the embodiment of non-humanity in association with the transgressive plant-life collectively termed as ‘drugs’, can be read as functioning as sacrificial victims within the operation of twentieth century international law.

PART A

Chapter 1

Speaking Drugs into Being: 'Drugs' as a legal construction

1.1 Introduction

There has been range of approaches taken by scholars in order to produce greater understanding of the War on Drugs. For instance, David Bewley-Taylor's historical studies have done much to illustrate the central role that the U.S.A has played in driving international drug prohibition.¹ Alternatively, Ross Coomber and Nigel South's collection of essays unpack how the socio-cultural context influences perceptions of drug use and the relative beneficial or harmful impact of drugs.² Taking in cultural practices as diverse as ritual use of Ayahuasca in Brazil to the use of Khat in Yemini culture, Coomber and South's work argues that although drug prohibition has expanded to the scale of becoming a truly global project, it is a distinctly 'Western, ethnocentric view of progression and humanist thinking that led (without irony) to the declaration of a 'War on Drugs.'³ However, few scholars have taken up the War on Drugs as a theoretical question of law, or of international law specifically. The underdevelopment of this literature is curious because, as Neil Boister tells us, 'the international drug control system is a creature of international treaty law.'⁴ The drug war should be read as a child of international law. International law requires nation states to implement drug prohibition, as well as limits the parameters that any calls reform of drug laws can achieve.

Yet despite the War on Drugs being sourced and justified in specifically international legal terms, there has been a relative absence of engagement with this area of law by critical legal scholarship. A review of the literature reveals that much

¹ David R. Bewley-Taylor, *The United States and International Drug Control, 1909-1997* (New York: Continuum, 2001), p.43.

² Ross Coomber and Nigel South (eds.), *Drug Use and Cultural Contexts 'Beyond the West': Tradition, Change and Post-Colonialism* (London: Free Association Books, 2005).

³ *Ibid.*, p.14.

⁴ Neil Boister, *The Suppression of Illicit Drugs Through International Law* (doctoral thesis, University of Nottingham, 1998), p.27.

of the legal academy has remained silent of the significance of the drug laws. In this chapter, I will address this omission by unpacking the way ‘drugs’ are discursively produced by the law. This chapter will analyse how the law speaks the very concept of ‘drugs’ into being, for rather than being independent objects that are then legislated over, drugs are discursively produced by the act of prohibition and therefore cannot be decouple from it. Furthermore, the debt that the process of discursively producing drugs owes to the legitimisation of violence against the ‘nonhuman’, associated by Euro-modernity with both ‘transgressive’ plant-life and racially subaltern peoples, will be unpacked, providing some initial theoretical insight into the relationship between violence and ‘humanitarianism’ in the War on Drugs.

1.2 Critical Scholarship on Drugs

From a critical standpoint, Seddon’s contributions to advancing a genealogical reading of drug prohibition in the U.K. and the U.S.A is particularly useful in illustrating how the concept of drugs is itself a legal construction.⁵ Seddon pursues the genealogy of the concept of the drug, arguing that rather than being an inanimate object over which the juridical can legislate, drugs as we currently understand them, are in fact produced through the law; we should understand that juris-diction speaks the idea of drugs into being, for ‘the modern drug concept is, in a fundamental sense, a legal one.’⁶ The law produces the very idea of drugs themselves. Drugs offer an example of a quintessential legal fiction; by that I mean it is the law that first creates and then legislates what we commonly categorise as drugs. The only solid criterion through which to differentiate what is commonly referred to as ‘drugs’ from other psychoactive substances is the determination of the law. The law is what ties together as one group cannabis, cocaine and opium and then places that group in contradistinction to alcohol or caffeine. It is law that ultimately separates the medical from the recreational, from the prohibited psychoactive substances and a recognition of this point encourages further work in thinking about the drug war as a problem of a juridical nature. Furthermore, Seddon reads two elements as being present within the law’s transformation of certain psychoactive substances into drugs ‘the association of

⁵ Toby Seddon, ‘Inventing Drugs: A Genealogy of a Regulatory Concept’, *Journal of Law and Society*, 43, 3 (September 2016), pp. 393-415.

⁶ *Ibid.*, p.414.

a substance with 'deviant' or disliked groups, and perceptions that use of a particular substance may threaten the future of the collective.'⁷ The understanding of drugs being discursively interwoven with groups of people held to be inherently deviant has been further developed through scholarship on how the drugs laws have generated and amplified racial discrimination within the law. Keeping her attention confined to the domestic context of the U.S.A, Michelle Alexander's study on mass incarceration famously described the drug laws in America as bringing about a *New Jim Crow*, a reinstatement of racial division and legalised violence on Black peoples within the formal equality of the American body politic in the post-civil rights era.⁸ This reading of how drug laws produce racial oppression in the U.S.A has also been taken up by Angela Davis and Ruth Wilson Gilmore, who have also touched upon the racial consequences of the War on Drugs within America in their work on America's prison industrial complex.⁹ Desmond Manderson, following in the wake of canonical critical theorists such as Jacques Derrida and Michael Taussig, has interrogated the symbolic value of drugs, reading the 'undoubted racism' of the drug laws as being underwritten by a fear of an uncivilised state of humanity that drugs use came to symbolise.¹⁰ However, still largely unexamined are questions around the context of international law that produced drug prohibition? In a world in which global consensus often appears impossible, drug prohibition initially suggests an example of a functioning universal legal project. Despite the plethora of different traditional and ritualistic uses of narcotics that have long existed across the world, The Single Convention remains a particularly powerful exemplar of modern international law's arrogation of the universal, commanding an unusually high level of compliance: 184 of the 193 members of the United Nations became signatories, while the few non-signatories largely followed the demands of the convention.¹¹ Drug prohibition has largely overridden the protections offered to of cultural or customary practices offered by international human rights law in the context of the coca-leaf chewing in the

⁷ Ibid., p.409.

⁸ Michelle Alexander, *The New Jim Crow: Mass Incarceration in the Age of Colorblindness* (London: The New Press, 2012).

⁹ See Angela Y. Davis, 'Race and Criminalization: Black Americans and the Punishment Industry'. Wahneema Lubiano (ed.), *The House That Race Built*, (New York: Random House, 1999), pp.265-279; and Ruth Wilson Gilmore, *Golden Gulag: Prisons, Surplus, Crisis, and Opposition in Globalizing California* (Berkeley: University of California Press, 2007).

¹⁰ Desmond Manderson, 'Possessed: Drug Policy, Witchcraft and Belief', *Cultural Studies*, 19, pp.36-63.

¹¹ Christopher Hobson, 'Challenging "evil": Continuity and change in the drug prohibition regime', *International Politics*, 51, 4 (2014); pp.525-542, p.526.

indigenous communities of the Andes or the traditional consumption of Khat by Arabian and North African.¹² We must therefore ask what is the “international” of the international War on Drugs? Has there been spontaneous universal agreement about the existential danger of particular psychoactive substances and the need to deploy the force of law against them? Or can drug prohibition illuminate more critical understandings of international law and its claim to universality? Drawing from the insights of the works cited above, but expanding then into the register of the international, this Chapter will explore what drug prohibition can illuminate about the wider theoretical underpinnings of international law.

Drug prohibition encompasses many of the key antagonisms of international legal theory: the debate between a natural law anchoring a universal humanity against positivist law enshrining the rights of each sovereign state; between international law facilitating colonialism as a legal project and law as the vehicle through which formal decolonisation would be realised; between international law as the limitation of violence throughout the globe and international law’s power to legitimise violence in the name of a universal humanity. Therefore, turning to the international legal realm that is the primary concern of this thesis, a gap in the literature is created on account of the work on the international drug laws having been more conventional in its methodological approach, with these larger theoretical questions that drug prohibition could provide an entry point into being generally overlooked. S.K. Chatterjee and Neil Boister have each produced a comprehensive review of how the international laws on drug function, Boister also producing further work that focused upon the penal aspects of the UN drug conventions.¹³ Kjetil Bruun, Lynn Par and Ingemar Rexed produced perhaps the most comprehensive historical review of the emergence of international drug prohibition in the twentieth century, stressing the full transformative significance of this project when they argue that ‘few movements wielded as great an influence or had quite as many repercussions as the anti-opium

¹² For further on the tension between international drug prohibition and international rights to traditional culture see Sven Pfeiffer, ‘Rights of Indigenous Peoples and the International Drug Control Regime: The Case of Traditional Coca Leaf Chewing’, *Goettingen Journal of International Law*, 5, 1 (2013), pp.287-324.

¹³ See S. K. Chatterjee, *Legal Aspects of International Drug Control* (The Hague: Martinus Nijhoff, 1981); Neil Boister, *The Suppression of Illicit Drugs through International Law* (PhD thesis, University of Nottingham, 1998); Neil Boister, *Penal Aspects of the UN Drug Conventions* (Kluwer Law International, 2001).

protest at the turn of the century.¹⁴ Rick Lines has furthered the critique by illuminating the contradictions between the laws prohibiting drugs established by the United Nations and the concurrent human rights framework erected by post-war international law.¹⁵ Also, in a brief but exciting engagement with the topic, Alvaro Santos explored a critical examination of the role international law plays in actually producing the ideological anchoring of this failing, indefinite war.¹⁶ However, the aforementioned contributions notwithstanding, the War on Drugs, remains under-theorised as a problem of law, particularly when considering the implications that drug laws may have for conceptual understandings of international law in general or for understandings of how international law developed over the course of recent history. At stake in the question of the War on Drugs is an understanding of amongst the most ambitious, universalizing and, by its own metrics, unsuccessful legal projects of the twentieth century. The inconsistency between the consequences of drug prohibition and the contemporaneous institutionalization of international law and its turn to humanitarianism invites further theoretical exploration. This chapter will provide a fresh theoretical lens through which to view the War on Drugs. I will draw on traditions of critical international legal scholarship, including TWAIL scholars who emphasize the indebtedness of international law to European imperialism and scholars of political-theology who read international law as functioning as a deific surrogate. Interrogating how the law aims to expand so as to sustain an operative communality across a disparate globe, my argument is a reading of the violence of the drug war as not contradictory to the acclaimed peace of post-war, liberal international law, but rather as co-constitutive of that order. This argument will require introducing the concept of a ‘sacrificial international’, drawing together the theological and post/decolonial strands of critical international legal scholarship to present the drug war as an instantiation of a wider relationship between law and violence, particularly following international law’s turn to a post-colonial, universal humanism post-Second World War. As Oscar Guardiola-Rivera argued in a challenge to critical legal scholarship ‘any general theory of law and society that wishes to be relevant at the time of globalisation must make the intra- and trans-national experience of

¹⁴ Kjetil Bruun, Lynn Parr and Ingemar Rexed, *The Gentlemen's Club: International Control of Drugs and Alcohol* (Chicago: University of Chicago Press, 1975), p.13

¹⁵ See Richard Lines, *Drug Control and Human Rights in International Law* (Cambridge: Cambridge University Press, 2017).

¹⁶ Alvaro Santos, ‘International Law and Its Discontents: Critical Reflections on the War on Drugs or the Role of Law in Creating Complexity’, *ASIL Proceedings* (2012), pp.172-176.

antagonism and violence, motivated by imitation and envy, and its containment, its object of study.¹⁷ The concept of a ‘sacrificial’ international law seeks to respond to Guardiola-Rivera’s challenge and provides an insightful lens through which to review the history of international drug prohibition over the twentieth century.

1.3 The Inter of International Drug Prohibition

The end of the Second World War provoked a reconstitution of international legal order. As law had failed twice that century to act as a restraint upon the outbreak of contagious violence within the international community, post war international law was imbued with a greater commitment to humanism and universality through the embrace of human rights, the dissolution of the formal colonial division of the world and the recognition of the Nuremberg principles for governing warfare. Over the later half of the twentieth century, particular in the wake of the neoliberal turn, an expanded conception of the international community began to cohere itself, with scholar Denise Ferreira de Silva identifying three interwoven elements of a ‘global contract’ as tying this community together.

First, this global contract would facilitate expansion and consolidation of global market capitalism (free trade), restrict labor laws, and cut social rights—all of which negatively affect economically dispossessed populations. Second, it would institute a pluralist (inclusive) democracy, based on multiculturalism and diversity, which demands institutional inclusion of groups that have been legally discriminated against for their gender/sexual, racial, and/or ethnic difference, and demands the protection of human rights that were recognized in the neoliberal agenda, including cultural and political rights. Finally, it would promote deployment of the police and the military to curb non-state armed group activities involved in drug trafficking in the urban and rural spaces where the economically dispossessed populations live and die (internal security).¹⁸

While the substantive theoretical engagements with neoliberal globalization and human rights have been produced in critical legal scholarship there has been a relative absence of such attention upon the third strand of contemporary universalism that

¹⁷ Oscar Guardiola-Rivera, ‘Law in Other Contexts: Stand Bravely Brothers! A Report from the Law Wars’, *International Journal of Law in Context*, 4, 2 (2008), pp. 111–134, p.114.

¹⁸ Denise Ferreira de Silva, ‘An Outline of a Global Political Subject: Reading Evo Morales’s Election as a (Post-)Colonial Event’, *Seattle Journal For Social Justice*, 8, 1 (2009), pp.25-49, p.35.

Silva highlights, the global security and militarised policing network involved in drug prohibition. Despite the huge profits that were being generated in the major European empires that enjoyed colonial monopolies over coca, opium and others at the start of the twentieth century, by the new millennium, the international community, including those former European empires, were wholly invested in a War on Drugs that sought to erase the non-medical use of these substances from the face of the earth. How did such a dramatic and widespread shift occur across a disparate global order in less than a century? How was such consensus by international law achieved in a twentieth century that was heavily marked by global war and division?

As aforementioned, I will engage with the problem of drug prohibition at the level of the international, in contrast to domestic focus offered by scholars such as Michelle Alexander. As was recognised by the American lawyers who first advocated drug prohibition at the start of the twentieth century, since the traffic of drugs is an inherently globalised industry, any attempt to combat this traffic must itself function at the level of the global.¹⁹ The ‘necessity for international cooperation’ allowed the prohibition of drugs to be conceptualized as an issue for the international community.²⁰ It was this need for ‘international cooperation’ that Richard Nixon would emphasise when he announced the ‘War on Drugs’ in a 1971 speech.²¹ However, it should be recognised that Nixon’s speech did not create the ‘War on Drugs’, a project that has several contested birthdays, as the subsequent chapters will illustrate. The evolution of the prohibition of drugs lies at several key junctures in the history of international law over the twentieth century, as the idea transitioned from being a marginal concern of missionaries and temperance groups to becoming a governing norm adhered to by the international community at large. The establishment of the United Nations following the Second World War provided prohibitionists with the ideal forum in which far-reaching legislation on drugs could be produced. The result was the three United Nations treaties that, at present, define the illegality of drugs in international law: *The Single Convention on Narcotic Drugs, 1961*; *The Convention on Psychotropic Substances, 1971*; and *The Convention*

¹⁹ Editorial Comment, *The American Journal of International Law*, 19, 2 (1925) pp. 327-361, p.354.

²⁰ Ibid.

²¹ Richard Nixon, ‘Special Message to the Congress on Drug Abuse Prevention and Control’, 1971: ‘To wage an effective war against heroin addiction, we must have international cooperation. In order to secure such cooperation, I am initiating a worldwide escalation in our existing programs for the control of narcotics traffic’. *The American Presidency Project*, ed. by Gerhard Peters and John T. Woolley <<http://www.presidency.ucsb.edu/ws/?pid=3048>> [accessed 11 August 2017].

Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 1988. The spine of this thesis will be the critical examination these treaties, as well as a review of the earlier drugs conventions that entered into force in the interwar period, before being subsumed by the bedrock of the current system, *The Single Convention on Narcotic Drugs, 1961* (hereafter referred to as the Single Convention). The Single Convention required signatories to make illegal the ‘cultivation, production, manufacture, extraction, preparation, possession, offering, offering for sale, distribution, purchase, sale, delivery on any terms whatsoever, brokerage, dispatch, dispatch in transit, transport, importation and exportation of drugs contrary to the provisions of this Convention’ the apotheosis of a trajectory of increasing prohibition of drugs in international law since the 1909 Conference of Shanghai Opium Commission.²² The question that presents itself is why after centuries of drug use and trade being not only tolerated but commercially exploited by Western powers, and before that being enjoyed in cultures across the globe, does the project of universal drug prohibition emerge at this point in history?

1.3.1 De-positioning the concept of ‘Drugs’

The laws on drugs provide a particularly telling example of the challenge to positivist readings of law as fully comprehensible through the formalities of its provisions. I draw on historical, political and philosophical insights in my study of drug laws as substantive understanding of the system of norms in which these laws are placed requires reading the treaties outside of their *four corners*. For instance, the very title of the bedrock of drug prohibition, *The Single Convention on Narcotic Drugs, 1961*, betrays in its reference to ‘narcotics’ the distinction between the scientific understanding of narcotics as a sleep-inducing substance and the juridical definition of narcotics which, since it is based not on a drugs effect but on a drug’s illegality, allows the descriptor of ‘narcotics’ to be extended to drugs that are scientifically stimulants (Cocaine) or hallucinogens (Cannabis). Without an appreciation of the discursive field in which drug treaties are situated, the contradictions contained such as those above are irresolvable. In their understandings

²² Article 36 of the UN *Single Convention on Narcotic Drugs, 1961*.

of the object of their prohibition, drug laws draw upon political, historical and theoretical constructions of ‘narcotics/drugs’ as inherently dangerous substances.

Jacques Derrida provides one resource for illuminating the discursive field in which drug prohibition is situated, understanding the social and historical contingencies that are required to constitute the very concept of ‘drugs’ that the law acclaims legislation over. Derrida states:

There are no drugs “in nature.” There may be natural poisons and indeed naturally lethal poisons, but they are not as such ‘drugs.’ As with addiction, the concept of drugs supposes an instituted and institutional definition: a history is required and a culture, conventions, evaluations, norms, an entire network of intertwined discourses.²³

Derrida’s reading of prohibition commences from an understanding that ‘the concept of drugs is not a scientific concept, but is rather instituted on the basis of moral or political evaluation.’²⁴ Within the drug laws, we find a prime example of the law discursively creating a distinction that does not objectively exist. Derrida recognises the extent to which drugs are not something external to law to which the law is applied, but rather our very conceptualisation of drugs is rooted in the law itself, that the idea of drugs ‘carries in itself both norm and prohibition, allowing no possibility of description or certification -- it is a decree.’²⁵ Derrida’s reading of the discursive construction of drugs begins to point us towards the imperial structure of world order. Following the Adorno and Horkheimer, Derrida reminds us that ‘drug culture has always been associated with the other of the Occident’ and therefore the threat that drugs pose to social order becomes synthesised with the corporeal threat of the colonial other.²⁶ Sociologist and cultural theorist Jean Baudrillard echoes this argument with his own reading highlighting how indebted the presumed scientific and objective condemnation of the psychoactive substances collectively grouped together as ‘drugs’ is to a Weberian conception of the economic and social good in western society.²⁷ For Baudrillard, the West arrogates onto itself a specific capacity for delayed gratification, which is then taken to underlie presumptions of civilisation. The

²³ Jacques Derrida, ‘The Rhetoric of Drugs: An Interview, 5 *Differences: A Journal of Feminist Cultural Studies*, 5, 1 (1993), pp.1-25.

²⁴ Ibid.

²⁵ Ibid.

²⁶ Ibid,

²⁷ Jean Baudrillard, ‘A perverse logic’, *UNESCO Courier*, July (1987), pp.7-9.

condemnation of drugs functions as a stand-in for a wider fear of the potential loss of that capacity for delayed gratification, the defeat of reason and the will at the hand of the appetite. Baudrillard argues that '[t]races of this long-standing condemnation linger on in our own vision of modern drugs and of the occult power they derive from their ancient symbolic virtues.'²⁸ As opposed to the 'evil' of drug addiction residing in the drug itself and infecting Euro-modernity from the outside, Baudrillard shows us how the 'evil' is instead 'a consequence of the very logic of the system, of the excessive logic and rationality of a system-- in this case society in the industrialized countries--which, having reached a certain level of saturation, secretes antibodies which express its internal diseases, its strange malfunctions, its unforeseeable and incurable breakdowns.'²⁹ Within the discourse of Euro-modernity, where the social relations between subjects are taken to be fully secularised and consequently mediated through the mutual recognition by each subject of their counterpart's capacity for reason and a predisposition to delay the appetite, the fear has been that 'drug use threatens the social bond' and summons up the spectre of the sub or non-human that persists within.³⁰ This discursive association between drugs as the symbolic opposition to Euro-modernity and racially subaltern subject as the embodied figure serving a similar role provides a starting point from which to begin exploring how the violence of the War on Drugs is co-constituted with the humanitarianism of international law. Violence enacted on what remains essentially plant-life is given a moral imperative through the imbuing of the drug with the power to serve as an existential threat to an idealised (European) social order, facilitating an easy association with those peoples taken as Europe's constitutive outside. The drug war provides us with an instantiation of the relationship between colonial and environmental violence that Shela Sheik illuminates, showing how a shared discursive terrain connects the contemporary wars against plant-life with the wars against the bodies of racially subaltern subjects.³¹ Furthermore, to commence from a perspective of recognising the relationship between environmental and racialised violence helps to contextualise the contemporary attitude to drugs, which, once produced by law, is retrospectively projected backwards so that today's current fear of drugs is read as objective and natural. If there are no drugs in nature then there is no natural history of

²⁸ Ibid., p.7

²⁹ Ibid., p.9.

³⁰ Derrida, 'The rhetoric of drugs'.

³¹ See Shela Sheikh, "Translating Geontologies" 21 *The Avery Review* (2017)

drugs: the history of drugs can only be human. Within the given histories of supposedly biological facts that are presumed as natural persist social presuppositions and in the case of drugs, these presuppositions are heavily indebted to imperial context that first brought drugs onto the world market.

Like the discipline of international law itself, drug prohibition cannot be uncoupled from the imperial context through which it emerged. As will be discussed in greater length in later chapters, drug prohibition emerged onto the international stage through the U.S.A's imperial endeavours in the Philippines. However, it is important to recognise how this imperial origins of drug prohibition also help us historicise a legal determination that is now presented as self-evident. The inherent biological and social danger presented by prohibited drugs is taken as objective and indisputable within the law. However, the very idea of 'drugs' is only a recent construction, as the historian Roy Porter reminds us:

If you'd talked about the 'drugs problem' two hundred years ago, no one would have known what you meant. There was no notion then of 'drugs', in the sense of a small group of substances scientifically believed to be harmful because addictive or personality destroying, the availability of which is restricted by law. The term 'drugs' as a shorthand for a bunch of assorted narcotics is in fact a twentieth-century coinage.³²

Historical study therefore betrays drugs as inseparable from drug prohibition; rather than the law in this instance legislating over an object that is external to itself, drugs and drug laws are co-constituted in the moment of prohibition. Prior to prohibition the substances now referred to by common parlance as 'drugs' were not immediately differentiated from other goods and resources that were being commercially exploited in the world market produced by European imperialism. As the historian David Courtwright identifies 'European expansion in the sixteenth, seventeenth, and eighteenth centuries turned psychoactive drugs, including spirituous alcohol and tobacco, into global products.'³³ Substances such as opium and cocaine were sources of great wealth for the British, Dutch and French empires amongst others. Furthermore, intoxication was glamourised within certain European artistic and literary circles, as seen in the works of Samuel Coleridge, Thomas De Quincey and

³² Roy Porter, 'The history of the "drugs problem"', *Criminal Justice Matters*, 24, 3 (1996), p.3.

³³ David T. Courtwright, 'A Short History of Drug Policy or Why We Make War on Some Drugs but not on Others', *LSE IDEAS!*, *Governing the Global Drug Wars* (October 2012), pp.17-24, p.17.

Charles Baudelaire.³⁴ However, with American missionaries and moral reformers leading the way, the end of the nineteenth century saw a wave of international anti-vice activism emerge, of which the birth of global drug prohibition remains perhaps the most dramatic legislative change achieved.³⁵ Thereafter, the course of the twentieth century would see drugs and drug use overtake other popularly held signifiers for ‘denigrated’ humanity such as homosexuality or vagrancy to serve as arguably the prevailing example of depravity and moral failing in societies across the world.³⁶

1.3.2 Drugs as ‘Transgressive Substances’

This thesis takes up the task of tracing how this transition occurred.³⁷ A key resource for my understanding how these ostensibly inanimate objects, naturally occurring plants and chemicals, became discursively infused with such demonic social power is the work of anthropologist Michael Taussig. Through his scholarship, Taussig has stressed how the social histories of commodities are interwoven within the symbolic potency that they wield once crystallised in material form. As opposed to the orthodox understanding of ‘man’ creating commodities through extractive labour and capital, before economically exploiting them for commercial gain, Taussig emphasises how in practice this relationship is not as unilateral as often envisioned, for once created it can be that, in fact, ‘commodities rule their creators.’³⁸ Writing with a fidelity to the full significance of idea of fetishisation, Taussig recognises the

³⁴ For artistic engagements with opium use see Thomas De Quincey, *Confessions of an English Opium-Eater* (London: Penguin Classics, 2003), Samuel Taylor Coleridge, ‘Kubla Khan; or, A Vision in a Dream: A Fragment’, *The Complete Poems of Samuel Taylor Coleridge* (London: Penguin Classics, 1997), pp.249-252; and Charles Baudelaire, *Artificial Paradises (Les Paradis Artificiels)* (London: Kensington Publishing Corp., 1998). For further reading on this trend, see Alethea Hayter, *Opium and the Romantic Imagination* (London: Faber and Faber, 2009).

³⁵ Courtwright, ‘A Short History’.

³⁶ See Erich Goode and Nachman Ben-Yehuda, *Moral Panics: The Social Construction of Deviance* (Hoboken: Wiley-Blackwell 1994), Chapter 11 – Drug Abuse Panics.

³⁷ Different cultures and societies have for a plethora of reasons imposed some form of a ban on particular substances, however the scale and the impact of twentieth century drug prohibition in international law, as well as the operation of universality underpinning these laws make them something quite apart from these other moments of prohibition. For other, more localized histories of prohibition see Benjamin T. Smith, ‘Drug Policies in Mexico, 1900-1980’, Beatriz C. Labate, Clancy Cavnar, & Thiago Rodrigues (eds.), *Drug Policies and the Politics of Drugs in Latin America*. (Cham: Switzerland, Springer International Publishing, 2016), pp. 33-53; or Lee V. Cassanelli, ‘Qat a quasilegal commodity’, Arjun Appadurai (ed.), *The Social Life of Things: Commodities in Cultural Perspective* (Cambridge: Cambridge University Press, 1986), pp.236-261.

³⁸ Micheal Taussig, *The Devil and Commodity Fetishism in South America* (Chapel Hill: The University of North Carolina Press, 1980), p.xvi.

power for humans to transform objects into totems, and for those totems to then consequently transform the human upon connection. The theological undercurrent to the material relations of a modern capitalist society is unmasked by Taussig's work, which argues for an appreciation for the particularly Christianised fetishisation of being, in which rituals and sacred objects stand in for the antagonisms between God/the Devil and good/evil, as well as anchoring the capitalist fetish in which 'commodities are held to be their own source of value.'³⁹ This theoretical perspective, combined with his geographical focus on Latin America, has aided Taussig in developing an innovative understanding of the social life of 'drugs.' Speaking to the discursive production of cocaine as a 'drug', Taussig provides us with the insightful concept of drugs as 'transgressive substances.'⁴⁰ Through the term 'transgressive substances', Taussig illustrates how drugs are fetishized to become totems for the disruption of the order of the given world, drugs such as coca 'make a mockery of the notions of 'laws' of supply and demand. They decidedly sabotage the notion of "demand" riddling it with phantasmic properties unknown to conventional economics.'⁴¹ Within the conceptualisation of prohibitionist law, drugs are not taken as the standard commodity but instead are recognised as commodities that have the power to rule their creators. Drugs are imbued with the phantasmal powers to able to use and consume the human subject as opposed to allowing humanity to use and consume it.

To appreciate the social function of the concept of drugs, a concept only created in the twentieth century, helps us to understand the moral panic that they engender. Drugs are not seen as mere plant life in the manner that they appear in nature, nor are they seen as commodities, natural resources to be exploited for capitalist gain. Drugs are instead discursively produced as 'transgressive substances', elements of the natural world that are turned into a universal enemy of 'humanity'. As Desmond Manderson argues, the fear of drugs is not merely the fear of the substances themselves, rather 'what lies beneath is undoubtedly a fear of contamination', a fear of the failed state of humanity they are commonly read as bringing about.⁴² Drugs are taken to facilitate movement between different states of being, transferring its consumers from the realm of the human to the non-human. The contemporary

³⁹ Ibid.

⁴⁰ Michael Taussig, *My Cocaine Museum* (Chicago: University of Chicago Press, 2004), p.xiii.

⁴¹ Ibid., pp.118-119.

⁴² Manderson, 'Possessed: Drug Policy, Witchcraft And Belief', p.38.

conceptualisation of drugs takes much from the classical notion of *pharmakon*, which Derrida recovers to describe the discursive process for how difference is produced. The *pharmakon* – which can be taken to be both remedy and poison- captures how an ambivalence through dichotomies can be constructed but it also facilitates ‘the movement and the play that links them [...] (soul/ body, good/evil, inside/ outside, memory/ forgetfulness, speech/ writing, etc.)’ threatening an notion of ‘internal purity and security.’⁴³ René Girard picks up Derrida’s interpretation of *pharmakon* and links its use to how sacrifice is used to produce and sustain a community, he reads *pharmakon* within the enacting of a ‘maleficent violence on a double, who is arbitrarily expelled from the philosophic community.’⁴⁴ Further engagement with the significance of Girard’s understanding of the violent process of community formation will be unpacked in the following chapter, however, it is important to acknowledge when exploring the discursive field unpinning ‘drugs’ the way in which classical philosophical concepts continue to inform modern juridical concepts such as ‘drugs’, only within the objective discourse of the law, this debt is both mystified and denied.

The same mystification of drugs also contributes towards the relative absence of scholarly attention that the topic has received in comparison to the global commodities whose histories can also provide a glimpse into the shaping of the modern world.⁴⁵ As aforementioned, it is the law itself that separates drugs from other psychoactive substances. The ‘economy of illegalities’ was produced through, and functions so as to anchor, the legitimate capitalist global marketplace.⁴⁶ Drugs contain within themselves the same world-making histories that can be read in ‘legitimate’ psychoactive substances such as coffee or sugar.⁴⁷ Yet while scholarship has traced how the role that international law played in turning the sugar cane plant into a global commodity that reveals an entire network of imperial and societal relations and

⁴³ Jacques Derrida, ‘Plato’s Pharmacy’, *Dissemination* (Chicago: The University of Chicago Press, 1983), pp.61-172, pp.127-128

⁴⁴ René Girard, *Violence and the Sacred* (Baltimore and London: The Johns Hopkins University Press, 1977) p.296

⁴⁵ For such study of commodities and world-making histories see Kwasi Kwarteng, *War and Gold: A Five-Hundred-Year History of Empires, Adventures and Debt* (London: Bloomsbury, 2014); Brian C. Black, *Crude Reality: Petroleum in World History* (New York: Rowman & Littlefield, 2012); or Anthony Wild, *Black Gold: The Dark History of Coffee* (London: Harper Collins, 2010).

⁴⁶ Michel Foucault, *Discipline and Punish: The Birth of the Prison* (New York: Vintage, 1995), p.87.

⁴⁷ For historical studies of sugar as an object that facilitated hegemony, see April Merleaux. *Sugar and Civilization: American Empire and the Cultural Politics of Sweetness* (Chapel Hill: University of North Carolina Press, 2015) or Sidney Wilfred Mintz, *Sweetness and Power: The Place of Sugar in Modern History* (London: Penguin Books Ltd, 1986).

exclusions, drugs have not been afforded equivalent attention.⁴⁸ This thesis aims to demystify drugs as a potential source of study, in addition to providing an account of the War on Drugs that unpacks its violence.

A key element to grasp in order to appreciate the fear that underwrites prohibition is to understand that prohibition sees a mimetic or contagious power within drugs. The collective fear that drugs might consume the subject that themselves sought to consume the drug is not only a fear of the damage drugs might cause to a specific consumer or even to those susceptible members of the community, the drug addict, the narco-trafficker etc. Rather the fear of these drugs is that they threaten the stability of the social order as a whole, functioning as what Stanley Cohen termed as the societal folk-devil, through their suspected ability to spread their affliction amongst the whole community.⁴⁹ David Courtwright states that ‘absent the idea of addiction, the whole system of controlling drug supply that has developed over the last two centuries would make little moral or practical sense.’⁵⁰ I would add to this that an understanding of the fear drug addiction causing, and importantly spreading, the denigration of an idealised figure of the human being is necessary for a theoretical appreciation of how the system of laws persisted despite the devastation in brought upon particular peoples. This fear underwrites the law’s turn towards prohibiting vegetation/plant-life through the drug war. Drugs become imbued with a sovereign power over human life, which Taussig captures with a description of how “death stalks these substances in equal measure to the way they enliven life, enchant and compel.”⁵¹ Prohibition draws on the fear that drugs are able to drive human passions beyond the containment required for the fixing of a legal order. The correlative response to this fear is the aim of expelling this toxic substances from the collective social order, along with those who might be addicted or particular susceptible to addiction to this substances. This metaphysical quality read into drugs emphasises what is taken as being at stake in the project of drug prohibition, the very communality of the universal legal order as imagined.

⁴⁸ Michael Fakhri, *Sugar and the Making of International Trade Law* (New York: Cambridge University Press, 2014); or Michael Fakhri, ‘The Institutionalisation of Free Trade and Empire: A Study of the 1902 Brussels Convention’, *London Review of International Law*, 2, 1 (2014), pp.49–76.

⁴⁹ Stanley Cohen, *Folk Devils and Moral Panics* (London: Routledge, 2011).

⁵⁰ Courtwright, ‘A Short History’, p.18.

⁵¹ Taussig, *My Cocaine Museum*, p.253.

1.4 The Problem of ‘Drugs’ and the Ground of Law

The theoretical and conceptual questions at play in the construction of drugs and drug prohibition only reinforce the importance of correcting the gap in legal scholarship on this topic. The international laws on drugs remain under-theorised. The drug war has largely escaped the attention of historical or theoretically inclined legal scholars. To engage with the relation between the drug war and international law’s acclaimed containment of the ‘scourge of war’ demands an engagement with the intellectual tradition for accounting for how law can be productive of violence. To clarify, with regard to the instantiation of the drug war, I am not making the claim that all of the violence from the drug war, detailed in the introduction, is the result of state and international enforcement of prohibition, that is patently untrue with drug traffickers and drug users clearly contributing to the carnage in places such as Baltimore and Bogota in their own ways. Instead, what is being argued for is an understanding of law being productive of the conditions for both law enforcement to violently police drug prohibition and for the traffickers to violently attempt to circumvent drug prohibition. It is important to recall that drugs have not always been interwoven with violence, the cultivation and usage of these substances were practiced for centuries in various cultural traditions without being a generator of any violence comparable to that which has been realised through the War on Drugs.⁵² The violence, emerging both from and against drug enforcement can be better understood as actually rooted in the law, rather than in the drug, itself. Alvaro Santos clarifies this point in the passage below:

The dominant paradigm for thinking about drug trafficking is to consider it a problem, external to law, that can be solved by a "law and order" strategy. Under this paradigm, drug traffickers are bad people who need to be prosecuted and jailed. The point that the illegal drug market is a result of the law, in the form of a legal prohibition, and that drug cartels-and their morally abhorrent acts-are a direct consequence of this legal regime is known but often remains invisible.⁵³

⁵² For further reading on the long history of different cultural traditions of drug use, see Ross Coomber and Nigel South (eds.), *Drug Use and Cultural Context ‘Beyond the West’* (London: Free Association Books, 2004); or Jordan Goodman, Andrew Sherratt, Paul E. Lovejoy (eds.), *Consuming Habits: Drugs in History and Anthropology* (London: Routledge, 1995).

⁵³ Santos, ‘International Law and Its Discontents,’ p.174.

In short, the international laws on drugs releases ‘legitimised’ violence in an attempt to enforce its determination of prohibition and when, the law is unable to control the powers it has called up, it associates the excess of violence produced with the object of prohibition, drugs, rather than the law of prohibition itself.

1.4.1 The War on Drugs and the Violence of Law

My thesis offers a reading of the War on Drugs that disturbs any such protection offered to law. To associate the violence of the War on Drugs intimately with the workings of the international law is to call into question an orthodox understanding of the law: that law acts as an external limit on violence. Law derives much of its authority from the presupposition of its ability to restrict the human inclination to violence, thereby laying the basis on which society can be founded. With regard to law’s operation in the international, this belief in the law’s ability to restrain violence is extended so as to traverse the globe, the expansion of international law presumed to aid the realisation of a peaceful global order. An illimitable international community is therefore read as produced through international law’s promise of universal peace.⁵⁴ The centrality of this presumed pacifying capacity of law to international ordering becomes apparent when examining the historical moments in which international law has been most stringently (re)invoked. Whether at the Peace of Westphalia to conclude The Thirty Years War, the establishment of the League of Nations at the end of the First World War or the founding of the United Nations following the conclusion of the Second World War, potential ‘origins’ for international law tend to take the form of an attempt to reign in a transnational outbreak of contagious violence. When war appears to have become universally contagious, a turn to the law is offered as the solution to re-establish order; international law is presented as a solution to the crisis, a pacifying force to be acclaimed and celebrated as the diametric opposition of the violent crisis.

However, legal scholarship has complicated understandings of the relationship

⁵⁴ The Preamble to the Charter of the United Nations states its aim as to ‘save succeeding generations from the scourge of war’, ‘to unite our strength to maintain international peace and security’, and ‘to develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace.’ *The Charter of the United Nations* (San Francisco: 1945) <<http://www.un.org/en/sections/un-charter/preamble/index.html>> [accessed 3 August 2017].

between law and violence.⁵⁵ Scholars have shown that the relationship between law and violence escapes such an easy binary opposition, as multiple forms of violence are performed everyday through the law and its institutions. The focal instantiation of this thesis, the War on Drugs, is one example that illustrates how violence can be produced not through an absence or lack of law but can emerge from law. Robert Cover provides a canonical contribution to work on the violence of the law by arguing that ‘legal interpretation takes places in a field of pain and death.’⁵⁶ Cover shows that it is this ability to inflict ‘pain and death’ which gives law its authority. Law must be violent in order to take effect; without the ability to wield violence, the law is not the law. And yet violence cannot be the totality of what the law is, for if law were only violence, it would not invoke the reverence that the law requires.⁵⁷ This paradox is also unpacked by Walter Benjamin’s *Critique of Violence*, which canonised the concept that legal violence possesses a distinguishing ‘mythical’ quality. By mythical, Benjamin is referring to the function of legal violence, which he sees as law-making or law-preserving.⁵⁸ Furthermore, rather than merely concern itself with legal violence as only the inflicting of physical force through the word of the law, recent scholarship has further illustrated the multiplicity of law’s violence. Violence informs law’s discourse as well as its actions, the way law uses languages and representational practices to silence perspectives, the way law denies alternatives of experience and the way law delimits legitimacy through its objectifying epistemology.⁵⁹ The violence of the drug war draws on these refined, discursive understandings of violence in addition to the singular impacting of force. While the violence of the drug war does often manifest as the material inflicting of force, the theoretical enquiries of this thesis will examine this material violence as merely the superlative form of a preceding discursive violence. I do not wish to separate these two dimensions of legal violence: the material is, in itself, always already discursive. Discourse functions to reduce

⁵⁵ For scholarship on the relationship between law and violence, see Walter Benjamin, ‘Critique of Violence’, *Reflections: Essays, Aphorisms: Autobiographical Writings*, ed. P. Demetz (New York: 1978), p. 287; Robert M. Cover, ‘Violence and the Word’, *Yale Law Journal*, 95 (1986), p. 1609; Gary Boire, ‘Legalizing Violence: Fanon, Romance, Colonial Law’, M. Freeman and A. Lewis (eds.), *Law and Literature, Current Legal Issues*, 2 (1999), pp. 581–601; Austin Sarat (ed.), *Law, Violence, and the Possibility of Justice* (Princeton: Princeton University Press, 2001).

⁵⁶ Cover, ‘Violence and the Word’, p.1609.

⁵⁷ Austin Sarat, ‘Situating Law Between The Realities Of Violence And The Claims Of Justice: An Introduction’, *Law, Violence, and the Possibility of Justice* (Princeton: Princeton University Press, 2001), p.1.

⁵⁸ Benjamin, ‘Critique of Violence’, pp.278-300.

⁵⁹ Sarat, ‘Situating Law’, p.4.

things beyond what they possibly could be, before it enacts force upon them. The material and discursive are part of the same process of violence and it will be this process, over and above the inflicting of force to which I refer throughout this work. The distinctive element of legal violence is that its functions to create the systems of norms, rendering it unintelligible as violence within the context of that system.

The War on Drugs therefore offers a paradox: this violence cannot be the opposite of law – after all, it is a violence spoken into existence by the law; yet neither can this violence be simply all that the law is, since this would destabilise an international law understood to self-authorised the peaceful order of an international community. Therefore, the evidential problem of the violence of the War on Drugs requires a far more challenging analysis of tension between order and violence within the law. To seek to explain how the violence of the drug war does not disturb the coherence of a liberal international law, self-acclaimed as founded on sovereign equality and universal humanitarianism, requires a setting of the drug war within a critical picture of international law more generally. A different framework from conventional theories of international legal order is called for to reconcile the apparent contradictions we see when we look at the War on Drugs. Firstly, this requires integrating the violence of the War on Drugs into a longer genealogy of violence produced through, rather than read in opposition to, international law. Furthermore, when analysing the potential source and/or operative function of the violence of law, international law offers further theoretical challenges. In contrast to the force of law within the jurisdiction of a state, violence in the international arena does not derive from an exceptional, sovereign centre holding a monopoly on violence; instead the force of international law, tasked with sustaining as cohesive a diffuse international, must respond to a potential for disorder ever present within relations between autonomous, sovereign nations. There is a normative pull underneath the order of international law governing the distribution of violence throughout the globe.⁶⁰ Moreover, the challenge for international law to contain violence across the globe intensified over the course of the twentieth century. It must be emphasised that the first half of the century was marked by the escape of violence from its confines in two world wars. The response of international law was to restate a commitment to the rule of law as the opposite of war and violence and the only force

⁶⁰ For more, see Anne-Charlotte Martineau, 'Concerning Violence: A Post-Colonial Reading of the Debate on the Use of Force' *Leiden Journal of International Law*, 29, 2 (2016), pp.95-112.

able to contain a destructive crisis of international order.

Critical legal scholars have sought to challenge this narrative of twentieth century international law being the opposite of violence by exploring how contemporary global reveal international law as a discipline and practice that functions as a mode of violence itself.⁶¹ Jenifer Beard brings the Benjaminian critique of legal violence to bear upon international law, reading international law's claim to producing a peaceful order of reciprocal sovereign states in the Treaty of Westphalia 1648 against the law-making violence of the colonisation of the new world that was masked by the Westphalian myth. For Beard the violence of colonisation persist within the contemporary claims to universal peace, meaning that rather than expelling violence from the world 'international laws operate as a form of sanctioned violence to maintain the Westphalian system of sovereign states.'⁶² By disturbing the foundations of international acclaimed peace, Beard reminds us that if international law is produced through the colonial encounter, then that violence is still operative within the discipline, though it may be masked.

1.5 Conclusion

This chapter has focused on how the juris-diction of the law speaks the very concept of drugs into being, while legislating over it. The distinctions applied by society to different plant-life is a product of the legal determination, it is the law that cleaves the difference between, for example, the sugar cane plant that is cultivated and commoditised and the coca-leaf plant that is prohibited and subject to eradication through aerial fumigation. The works of Derrida, Baudrillard and Taussig have been used to illustrate how 'drugs' do not exist in nature but they are instead a concept discursively produced through human (mis)relation with particular psychoactive substances. Furthermore, prohibition not only produces these drugs as an existential threat to humanity, it then retrospectively projects this threat backwards to de-historicize our contemporary relationship to these drugs. An understanding of the different socio-cultural perceptions of drug use that have existed historically and

⁶¹ For critical legal scholarship on the violence of international law see Jennifer Beard, 'The International Law in Force: Anachronistic Ethics and Divine Violence', Fluer Johns, Richard Joyce and Sundhya Pahuja (eds.), *Events: The Force of International Law* (London: Routledge, 2011); or Vanja Hamzić, 'International Law as Violence: Competing Absences of the Other,' Dianne Otto (ed.), *Queering International Law: Possibilities, Alliances, Complicities, Risks* (London: Routledge, 2017).

⁶² Beard, 'The International Law in Force: Anachronistic Ethics and Divine Violence', p.27.

globally helps to contextualize the current existential fear of drugs and provokes questioning about what underlies this fear. This chapter has analysed the debt the concept of ‘drugs’ owes to the Euro-modern association of these drugs with the spectre of the ‘non-human’- taken as embodied by racially subaltern peoples and transgressive plant-life. Finally, I concluded by unpacking how the production of drugs as what Taussig describes as ‘transgressive substances’ leads to further understanding of the imperative behind the War on Drugs. The paradox of the War on Drugs, the question of how can the violence detailed in the introduction be theoretically reconcilable with humanitarian claims of the law itself, begins to offer a telling insight into how law, particularly international law in its post-colonial, universalist instantiation, seeks to cohere itself.

The War on Drugs serves an instantiation for what I am terming a ‘sacrificial’ international law, in which the humanitarianism and universal peace acclaimed by international law is constituted negatively through the legitimisation of violence against an enemy simultaneously included and excluded from the global order. The following chapter will unpack the concept of a ‘sacrificial’ international law, showing its relationship to both post/decolonial and political-theological readings of international law, before illustrating in subsequent chapters how it can be seen as operative within the War on Drugs.

Chapter 2

Theorising A ‘Sacrificial’ International: The Persisting Imperial Violence of Law

2.1 Introduction

The first chapter of this thesis engages with the literature produced on the focal instantiation of this thesis, the War on Drugs and drew on the more critical works in order to unpack how the very concept of ‘drugs’ is not an objective scientific category but one that is discursively produced by the law. The chapter analysed the relationship between the conceptualisation of particular plant-life as transgressive and the transgressive subjectivity imposed by Euro-modernity onto racially subaltern peoples, before concluding with an examination of how the violence of the War on Drugs troubles the orthodoxies that posit law as both the alternative and antidote to violence. However, such a reading raises the question of how this element of law can be reconciled with a claim to coherence. Particularly with regard to international law, which claims to constitute a communal order devoid of a sovereign authority that could monopolise violence, the questions of how violence is legitimised within this order invites significant theoretical engagement.

This chapter advances a notion of international law functioning as ‘sacrificial’ in order to both address the apparent paradox between the ‘humanitarianism’ of post-war international law and the violence of the drug war. Drawing on a wealth of scholarship that highlights both the theological and colonial undercurrents that persists within the humanitarianism of international law, the idea of a sacrificial international law will be shown to be indebted to the inclusive/exclusion of the racially subaltern subject within the universal humanity of post-colonial, liberal international law. Furthermore, I will explore how this inclusive/exclusive positionality serves to legitimise violence upon this figure that is discursively produced so as to traverse the boundaries of humanity.

2.2 The Sacrificial Mechanism of International Law

As aforementioned, a central claim of this thesis will be to respond to the question of how international law can be reconciled with the violence of the drug war, through a notion of ‘sacrifice’. By sacrifice, I refer to the idea that a particular legitimised violence actually constitutes, rather than destabilises, international law. The potency of sacrifice, specifically as a (re)generative mode of violence, is most clearly illuminated in the work of French philosophical anthropologist René Girard. Girard offers through his literary scholarship and his philosophical anthropology an expansive understanding about the origins of violence and the mechanisms for its containment as employed for communal ordering.¹ Girard ties together our conceptions of violence with our notions of the sacred recognising theology as being rooted in the social need to contain and regulate violence. Through his reading of archaic ritual, Girard’s understanding of religion reminds us that religion functions not solely to facilitate the worship of the deific but, moreover, 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.² Girard begins his study through examining archaic societies ‘where institutions such as political or penal systems have not yet come into focus.’³ In these societies, an immediate problem becomes one of community formation, how does the group externalise violence from within its midst, Girard offers an instructive guide through which to understand operative function of the religious. Girard’s theory can be describe in two movements: firstly the mimetic nature of violence leading to escalation that engulfs social order and secondly, the reliance on the scapegoat mechanism to contain this violence and therefore allow a social order to be founded despite of this mimetic competition.⁴ Girard traces the ritual of sacrifice through the mythology and religions of human culture, reading its recurrence as betraying a subterranean mechanism for neutering the reciprocal violence that results from rivalry within any community. He begins with an understanding of violence as functioning

¹ See René Girard, *Violence and the Sacred* (Baltimore and London: The Johns Hopkins University Press, 1977); René Girard, *The Scapegoat*, Yvonne Freccero (trans.) (Baltimore: The Johns Hopkins University Press, 1986); René Girard, *Things Hidden Since the Foundation of the World* (New York: Continuum, 2003).

² Sarah F. Hoyt, ‘The Etymology of Religion’, *Journal of the American Oriental Society*, 32, 2 (1912), pp.126-129, p.126.

³ Michael Kirwan, *Discovering Girard* (London: Darton, Longman & Todd, 2004), p.41.

⁴ See Girard, *Violence and the Sacred*, Chapter 2 ‘The Sacrificial Crisis’, pp.39-68.

mimetically; it is prone to escalate unless contained by some sort of limiting system. In short, for Girard, the sacrificial ritual facilitates this catharsis by transferring that violence onto a legitimate victim, a victim that the community somehow justifies as deserving of violence. Girard's schema suggests an alternative understanding of international law's arrogation of a universal peace in the making of a community of nations. Through Girard, we can revisit the relationship between the production and renewal of the international legal order and an outbreak of violence – such as the War on Drugs – considering how certain modes of violence may actually facilitate, rather than destabilise, the peace of the international community.

For international scholarship, Girard's model can be particularly useful as we can see conflict as the default condition for an international community of sovereign states in the absence of an over-arching authority. This presents a challenge particularly for thinkers of international law that subscribe to a wider tradition of liberalism, which can be defined as 'the tradition of thought whose central concern is the liberty of the individual.'⁵ Liberalism as theorised by canonical European philosophers including, John Locke, Adam Smith and John Stuart Mill celebrates property rights, free trade and the rule of law as the pillars of social order. However, as Domenico Losurdo details, the liberal order, while projecting its tenets as universal and inalienable, has contained a tradition of 'exclusion clauses' categories of peoples that were disqualified from the sphere of liberal recognition and exchange.⁶ When translating liberalism into the international realm and examining its ability to organise relations not only between peoples but also between states, I ask if we see the persistence of these exclusion clauses and if so, what is their theoretical function? Liberalism as it emerged in the eighteenth and nineteenth centuries presumed that the inherent liberating force of open trade between autonomous capitalist states could realise an enlightened, peaceful world order.⁷ International law in this era functioned to try to reconcile the tension between the economic prosperity produced through open capitalist rivalry and the tendency for such rivalry to fuel inter-state conflict and war. International law presumed to externalise violence from the 'civilised' world by demarcating an order of law- the order of mutual sovereign recognition described by

⁵ Domenico Losurdo, *Liberalism: A Counter-History*, Gregory Elliott (trans.) (London: Verso, 2011), p.1.

⁶ *Ibid.*, p.173.

⁷ For a full reading of liberal international law, see Tarik Kochi, 'Dreams and Nightmares of Liberal International Law: Capitalist Accumulation, Natural Rights and State Hegemony', *Law and Critique*, 28 (2017), pp.23–41.

Carl Schmitt as ‘Jus Publicum Europaeum’- from the colonial world that was ‘beyond the line’ where violence was released in full.⁸ However, the challenge that faced liberalism in the international arena over the twentieth century was to respond to the explicit failure of that ideal as shown by the World Wars. After the Second World War, formal sovereign equality across all nations was established as the basis for international law, elevating the defining contribution of a liberal international jurisprudence.⁹ With the institution of a new economic framework through the end of formal colonial relations and invitation of new states into the capitalist marketplace through the rubric of development, the struggle to synthesise global capitalist accumulation with global pacification would befall international law. William Rasch details how this reading of international law seeks to depoliticise such structural antagonisms.¹⁰ He reads within the liberal legal order of the twentieth century the reduction of questions of ‘the political’ to becoming merely an issue of ‘policing’, with the combination of doctrines of universalism, development and human rights taking law from the sphere of politics into questions of morality. Therefore, liberal international law operates by reducing politics to the legal (and military) implementation of morality.¹¹

However, this raises the question of what is the cohering force of an all-inclusive liberal international legal order? The cohering force that constitutes the international, famously described as the ‘anarchical society’ by Hedley Bull, has been a topic of interest for a ‘realist’ tradition of analysing the international which this tradition of scholarship understands as being predisposed to conflict.¹² Girard aids the attempt to respond to Rasch’s challenge through a reading of conflict as resulting from what he terms as the mimetic quality of desire. Girard suggests instead that human desires are determined, not by one’s own mind, but in reflection of the desires of those others to whom we award the recognition of being. Upon perceiving that another might desire an object, humans come to share the desire for that same object, thereby turning the

⁸ Carl Schmitt, *The Nomos of the Earth in the International Law of the Jus Publicum Europaeum* (New York: Telos Press, 2006).

⁹ Martti Koskenniemi, *From Apology to Utopia the Structure of the International Legal Argument* (Cambridge: Cambridge University Press, 2006), p.93.

¹⁰ William Rasch, *Sovereignty and its Discontents: On the Primacy of Conflict and the Structure of the Political* (London: Birkbeck Law Press, 2004).

¹¹ Rasch, *Sovereignty and its Discontents*, p.59.

¹² Hedley Bull, *The Anarchical Society: A Study of Order in World Politics* (London: Macmillan, 1977).

other human into the figure of ‘the rival.’¹³ A structure is therefore set in place for perpetual, intensifying violence between all those who claim complete subjectivity in themselves. Rivalry, following desire, functions mimetically, and, as a result, a state of crisis emerges which threatens to engulf all participants. A contagious cycle of violence materialises, multiplying as more and more subjects reflect each other by directing their desire towards the objects of contestation. Therefore, the basic requirement for a community to be established becomes the need for this intensifying violence to be quarantined. For Girard, this abiding peace is not achieved through a spontaneous truce or through the relevant parties engaging a capacity for reason, as a narrative of international law that placed the Peace of Westphalia as the origin of order might presume. Rather, unanimity is only brought about by displacing the violence felt by rival for rival, onto a surrogate victim, a figure Girard names as *The Scapegoat*. The scapegoat becomes a ‘sacrificial substitute’, tasked with absorbing the violence that has plagued the rival subjects and expunging this violence through its own sacrifice, allowing a community to emerge. Sacrificial violence cordons off the eruption of the maleficent violence that promised only perpetual disorder. Girard illuminates the workings of this mechanism 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.¹⁴

For Girard, this act of legitimate violence has served as the prerequisite for social orders to emerge, however its very operationality depends upon its invisibility. The sacrificial mechanism must remain concealed in order to achieve this catharsis: if the act of violence is not read as justified then it will merely add to the crescendo of violence emerging from the mimetic rivalry. Only when read by the social order as legitimate does the sacrifice of the scapegoat facilitate ‘the very real metamorphosis of reciprocal violence into restraining violence,’ bringing about a societal mode of relations.¹⁵ Therefore, following Girard, the externalisation of violence onto the scapegoat creates as it destroys. The bounding of violence becomes also an enabling of

¹³ Girard, *Violence and the Sacred*, p.147.

¹⁴ Girard, *Violence and the Sacred*, p.93.

¹⁵ Girard, *Violence and the Sacred*, p.96.

violence, since a particular category of violence-sacrifice- becomes that which is (re)generative of the social order as a whole.¹⁶ Girard's model for the emergence of a peaceful social order is an inviting lens through which to analyse international law's relationship to an enacting of violence, such as that offered by the War on Drugs. As Roy Rappaport details in his comprehensive anthropological study on the operative function of the sacred, prohibitions have long been used as the default mechanism by human societies in order to keep at bay feared monsters and spectres of disorder.¹⁷ What a serious engagement with notions of sacred prohibitions or sacrifices reveals is that these rituals are not enacted in service of transcendent gods but in fact is an offering onto the social order itself. Particularly within the modern world, self-constituted as being devoid of an external reference point, devoid of a transcendent unifying deity, legitimate violence 'becomes an "introverted" sacrifice, a sacrifice to the perfected immanence of a now disenchanted world.'¹⁸ Through the process of ritual, social orders can achieve normative categories that could not otherwise be imposed upon an ambiguous and raw nature, allowing unity to be constituted, however temporally.¹⁹ I argue that an understanding of the (re)generative capacity of sacrifice enriches the current scholarly appreciation for how violence is not only inscribed into the law, but is operates as law-making and law-preserving. As the law posits itself as ontological complete in itself, is masks a crucial element of law for 'what the sustaining of modern law requires [...] is sacrifice.'²⁰ Girard provokes the question of whether, for the international legal order to constitute itself, particularly the expansive, universal liberal international law of the late twentieth century, there has been referral to a sacrificial form of violence that services the cohesion and preservation of the legal order.²¹ A particular mode of violence therefore becomes not only tolerated within this order, rather it becomes sacred to this order; it is not read as violence but the legitimate process of making the order a constitutive whole. Rappaport recognises that within human communities the 'sacred forms an unchanging ground upon which all else in

¹⁶ Greg Noll, 'René Girard and the Use of Force in International Law', *Leiden Journal of International Law*, 21 (2008), p.568.

¹⁷ Roy Rappaport, *Ritual and Religion in the Making of Humanity* (Cambridge: Cambridge University Press, 1999).

¹⁸ Peter Fitzpatrick, 'The Triumph of a Departed World: Law, Modernity and the Sacred', Martha Umphrey, Austin Sarat and Lawrence Douglas (eds.), *Law and the Sacred* (Stanford: Stanford University Press, 2007), pp.155-183, p.160.

¹⁹ Rappaport, *Ritual and Religion*, p.87.

²⁰ *Ibid.*, p.160.

²¹ Noll, 'René Girard and the Use of Force In International Law', p.565.

adaptive social structures can change continuously without loss of orderliness.’²² In this thesis I will explore if we can understand the contemporary international legal order as anchored on a sacrificial violence that allows the fluidity of the liberal doctrines and provisions to operate.

2.2.1 On Law and Sacrifice

Filtering a critical approach to international law through the ‘sacrificial’ model provides a new perspective on the peace that is acclaimed by the international community, especially in its post-war, post-colonial liberal instantiation. The concept of sacrifice and the sacrificial mechanism as a structure provides an insightful lens through which to engage with the question of what is international law; the sacrificial mechanism commences from the same place as orthodox international legal theory in presupposing a state of rivalry between subjects as the default (rather than interrupted) state of relations. Canonical political philosopher Thomas Hobbes shared this perspective of international order, which he offered as the exemplar par excellence of the rivalry that he felt to be the natural condition of human beings *sans* government. For Hobbes, international relations between sovereign states served as an archetype for the ‘war of all against all’ (*bellum omnium contra omnes*) that anchored his theory of the state of nature:

Though there had never been any time wherein particular men were in a condition of war one against another, Kings, and Persons of Sovereigne authority, because of their Independency, are in continuall jealousies, and in the state and posture of Gladiators; having their weapons pointing, and their eyes fixed on one another; that is, their Forts, Garrisons, and Guns upon the Frontiers of their Kingdomes; and continuall Spyes upon their neighbours; which is a posture of War.²³

Hobbes conceptualised the ‘war of all against all’ as the condition of being that prefigured the emergence of any social order. Subsequently, the Hobbesian understanding of a social that is devoid of the overarching sovereign being the sphere of unending violence became a predominant influence on classical theories of

²² Rappaport, *Ritual and Religion*, p.427.

²³ Thomas Hobbes, *Leviathan*, Richard Tuck (ed.) (Cambridge: Cambridge University Press, 1996), p.90.

international law, particularly what would emerge as the realist tradition of internationalism.²⁴ Hobbes' treatise was concurrent with the Peace of Westphalia, the event credited by orthodox historiography as founding event of modern international legal order. Reading together Hobbes' insights and the Westphalian moment, which brought a formal end to the thirty years war, we can see how even the mainstream account of international law admits the containment of 'continuall jealousies' between sovereign powers essential for the imagining of any form of coherent order. The subsequent celebration of Westphalia as a triumph of reason functions to try and satisfy the task that befalls the discipline of international law: to account for the transfer from 'continuall jealousies' to a peaceful order without recourse to the Hobbesian narrative for domestic social orders, in which submission to an overarching sovereign authority resolves perpetual conflict. For Hobbes, it is the institution of government that abates contagious warring and it is in recognition of this fact that humans are willing to give up their independence for the security of being ruled.²⁵ This solution is not available to theorists of international law, which has sought to bring about a peace absent the institution of world government. As a result there arose a strain of positivist thinking, particularly in the nineteenth century, which dismissed international law being no true law; John Austin, for example, summarised that due to the lack of sovereign command, international law was not law as it depended upon the good will of the legal subjects to follow its determinations.²⁶ The Girardian structure offers another answer to the question of how does the international community cohere itself absent the referral to an overarching sovereign. Girard points us towards a mechanism of constituting community through negation, rather than the submission to the sovereign of Hobbes' *Leviathan*, the creation a 'scapegoat' as a figure that can bring the order into being through opposition to it. Sacrifice becomes an unrecognised element in producing the communality in the contemporary moment, becomes accredited to the rational power of law.

²⁴ For further reading on Hobbes' influence on international legal thought, see Charles Covell, *Hobbes, Realism and the Tradition of International Law* (London: Palgrave Macmillan, 2004). Covell details the place that Hobbes occupies amongst the primary international legal theorists Grotius, Pufendorf and Vattel, as well as the realist tradition of international politics.

²⁵ Thomas Hobbes, *Leviathan* Richard Tuck (ed.) (Cambridge: Cambridge University Press, 1996).

²⁶ John Austin, *The Province of Jurisprudence Determined* (London: Weidenfeld & Nicolson, 1954).

Critical legal scholarship has begun to pay attention to the extent to which the transcendent power of the law is grounded in sacrifice.²⁷ For instance, Johan Van Der Walt's exploration of a Post-Apartheid theory of law argued for a recognition of the sacrifice that is contained in every law or every legal decision.²⁸ Van der Walt employs a Derridian notion of the 'cut' contained in every decision to illuminate how the law in producing 'the social benefits pursued by deciding a case in favour of one party' simultaneously produces a series of 'harms resulting from deciding the case against the other party.'²⁹ For Derrida, any positing of determinacy comes at the cost of sacrifice, what 'is' only can be on account of the violence of what is done to whatever else could be.³⁰ The law, as an order, is dependent on the positing of determinacy. In its bid to present itself as a cohesive whole, with every decision, declaration or determination, the law sacrifices the plethora of possibilities contained in the alternative paths it could have taken. For Van der Walt the legal decision functions so as to puncture multiplicity in terms of modes of humanity, the law retreats from such plurality in order to produce a oneness in the social order.³¹ Placing a specific focus on the laws of apartheid South Africa, Van Der Walt shows how the racial violence can be performed through the law as a result of the disregard of the sacrifices contained in each determination of law.³² The relation between racial violence and sacrifice through the law will be a theme I take up again later. Anne Orford also follows Derrida in reading the inner workings of international trade deals through the lens of 'sacrifice', with law acting as a 'transcendent god' governing a globalised marketplace.³³

In the realm of critical theory and political philosophy, a particularly influential contribution to scholarship on the link between juridical order and sacred violence has been the work of Giorgio Agamben.³⁴ Agamben reads the construction

²⁷ See Peter Goodrich, *Languages of Law: From Logics of Memory to Nomadic Masks* (London: Weidenfeld and Nicolson, 1990); or Thanos Zartaloudis, *Giorgio Agamben: Power, Law and the Uses of Criticism* (New York: Routledge, 2010).

²⁸ Johan Van Der Walt, *Law and Sacrifice: Towards a Post-Apartheid Theory of Law* (London: Birkbeck Law Press, 2006).

²⁹ *Ibid.*, p.187.

³⁰ Jacques Derrida, *The Gift of Death*, David Wills (trans.) (Chicago: University of Chicago Press, 1996).

³¹ *Ibid.*, pp.11-12.

³² *Ibid.*, pp.11-14.

³³ Anne Orford, 'Beyond Harmonization: Trade, Human Rights and the Economy of Sacrifice', *Leiden Journal of International Law* 18, 02, (2005) pp.179-213.

³⁴ See Giorgio Agamben, *Homo Sacer: Sovereign Power and Bare Life* (Stanford: Stanford University Press 1998)

of political community is fundamentally based on the ritualistic stripping of the *homo sacer*, a sacred figure of Roman legal ordering, of the protections of citizenship. Sovereignty is then constituted by this distinction between the bare life of the *homo sacer* and the qualified life of the recognised citizens. The *homo sacer* is thereby excluded from a legal order that its own exclusion is productive of. Agamben's work on the *homo sacer* has made him amongst the most influential theorist in contemporary juridical thought.³⁵ Girard shares Agamben's reading of community as fundamentally indebted to the process of scapegoating. However, whilst Agamben has attracted the attention of international legal theorists, Girard remains underexplored as a resource.³⁶ This oversight persists despite Girard's model of community- formed through the scapegoat being collectively turned into the embodiment of the contagious violence which must be expelled to produce peace- drawing more immediate parallels for international law than Agamben's model which remains fundamentally based on the power of the sovereign to declare an exception and cast out the *homo sacer*. Agamben's theory, following Carl Schmitt, leads him to envision the totalitarianism of a continued state of exception as the apotheosis of sacrificial juridical ordering, however, as illustrated through his citing of Nazi Germany as his telling example, Agamben's theory is indebted to the presumed power of the state.

2.2.2 Sacrificial Mechanism Against The Myth of Westphalia

Girard's schema of community (re)generation through legitimate violence, I argue, provides a richer theoretical grounding for the international legal order as it recognises the paucity, not the strength of the law as underwriting this referral to sacrifice. Orthodox international legal theory relies on a teleological understanding of the international community and, through reference to Westphalia, attempts to construct a geographically and historically specific moment of origin for international

³⁵ For legal scholarship engaging with Agamben's work, see Thanos Zartaloudis, *Giorgio Agamben: Power, Law and the Uses of Criticism* (London: Routledge, 2011); Stephen Humphreys, 'Legalizing Lawlessness: On Giorgio Agamben's State of Exception', *The European Journal of International Law*, 17, 3 (2007), pp. 677–687; or Thanos Zartaloudis (ed.), *Agamben and Law: Edited Collection in Series Philosophers and Law* (London: Routledge, 2015).

³⁶ For international legal engagements with Agamben, see Humphreys, 'Legalizing Lawlessness'; or Dianne Otto, 'Remapping Crisis through a Feminist Lens', Sari Kouvo, Zoe Pearson (eds.), *Feminist Perspectives on Contemporary International Law: Between Resistance and Compliance?* (Oxford: Hart Publishing, 2011).

law. Westphalia is posited as marking the transfer from the religious to the secular, from the medieval to the modern, from a violently contested Christendom to a community, or moreover, a society of sovereign states guaranteed by international law.³⁷ This sharp periodization between a pre-modern international community plagued by a ‘war of all against all,’ and the modern construction of order attributes international law with simultaneously facilitating and then exemplifying the relegation of the irrational, the superstitious, and the ritualistic onto the category of the pre-modern.³⁸ This familiar narrative underpins accepted truisms about international law: that international law is founded upon an objective scientific rationality; that international law operates as teleological, ever-progressing towards a greater peace; that international law- unlike the mysticism of the pre-modern- is a system of rules that can be objectively known and applied; that international law has no structural constraints that may contaminate its pursuit of universal justice.³⁹ This orthodox understanding of international law invites us to accept that peace exists as immanent within the very establishment of the international legal order. Bringing an end to the era of cyclical religious violence that preceded it, the Westphalian Peace of 1648 is offered as the event that brought the universal jurisdiction of the divine into the law itself. However, understandings of international law as a self-animating mechanism for peace, such as those contained in the popular memory of the Westphalian moment, betray themselves by the sharpness of the temporal break to be retrospectively constructed to provide the illusion of a fixed theoretical ground: the movement of history does not demark epoch from epoch in such determinate terms. Upon closer inspection, the Westphalian treaties show, as is often the case with artefacts of modernity, the shadowing of the modern by the pre-modern.⁴⁰ To seek to effect a clean separation between the modern age and its precursor on account of the Westphalian moment would require a disregard for the exclusive control enjoyed by

³⁷ Peter Fitzpatrick, ‘Westphalia and The Poetics of Law’, *London Review of International Law*, 2, 1 (2014), p.156.

³⁸ Kathleen Davis, ‘Timelines: Feudalism, Secularity and Early Modernity’, *South Asia: Journal of South Asian Studies*, 38, 1 (2015), pp.69-83, p.72

³⁹ This list is a development of B.S. Chimni’s list offered in ‘An outline of a Marxist course on public international law’, Susan Marks, *International Law on the Left: Re-examining Marxist Legacies* (Cambridge: Cambridge University Press, 2008), p.54.

⁴⁰ For further discussions on the inability of The Peace of Westphalia to fully determine the modern see Stephen Krasner, ‘Westphalia and all that,’ J. Goldstein and R.O. Keohane (eds.), *Ideas and Foreign Policy: Beliefs, Institutions and Political Change* (Ithaca: Cornell University Press, 1993), pp.235–64; Stephane Beaulac, ‘The Westphalian model in defining international law: challenging the myth’, *Australian Journal of Legal History*, 8 (2004), p.181.

political entities over defined territories prior to the Peace, in a manner that would too easily substitute for orthodox definitions of sovereignty. It also would require a disregard for how political authorities that would be retrospectively defined as ‘medieval’ – the Holy Roman Empire, the Papacy – persisted as hegemonic well after the Peace.⁴¹ An examination of the treaties by Richard Joyce confirms that:

The provisions in the Westphalian treaties [...] did not reveal the unequivocal emergence of a widespread notion of modern sovereignty or the establishment of a coherent system at the heart of which lay the sovereign state. Instead, they revealed the continued influence of medieval ideas and institutional forms.⁴²

The notion of a ‘sacrificial’ international rejects such orthodoxies regarding international law as a self-animating discipline. The use of the myth of Westphalia to allow international law to account for itself in positive terms collapses too easily into tautology. For instance, an immediate challenge is presented in recognising that international law is not simply applied to or founded upon the sovereign nation state, but is actively involved in its production.⁴³ The Westphalian myth reads ‘the anarchical society’ as emerging through the authority of equal yet independent sovereign states, who, in their autonomy, undertake a condition of communality. Yet to be in accordance with this model, international law would be tasked with recognising and authorising the sovereignty of the nation state, whilst also receiving its force as an order through the authority of its component nation states. Westphalia is therefore tasked by its conventional to simultaneously birth both the principle of states constituting their own authority in and of themselves and a new international order based on the authority of these new nation states.⁴⁴ This gives us a paradox of international law being founded by categories it is itself charged with bringing into existence. This circular logic is indicative of a critical indeterminacy at the heart of standard conceptions of international law. It is the same indeterminacy that presents itself when considering how independent, singular sovereign subjects manage to remain in common with each other, while retaining their independence and

⁴¹ Richard Joyce, ‘Westphalia: Event, Memory, Myth,’ Fluer Johns, Richard Joyce and Sundhya Pahuja (eds.), *Events: The Force of International Law* (London: Routledge, 2011), p.59.

⁴² Ibid.

⁴³ Sundhya Pahuja, *Decolonising International Law: Development, Economic Growth and the Politics of Universality* (Cambridge: Cambridge University Press, 2011), p.28.

⁴⁴ Peter Fitzpatrick, ‘Westphalia and the Poetics of Law’, *London Review of International Law*, 2, 1 (2014), pp.156-157.

singularity. As Peter Fitzpatrick tells us, for the sovereign states to remain held in common with each other, their commonality has to be assuredly determinate but not ultimately determinate; in addition, the commonality must be illimitably responsive but not ultimately responsive.⁴⁵ Such indeterminacy becomes a persistent feature in the workings of international law. Martti Koskenniemi, explains how it reoccurs when considering the structure of juridical argument, which, through a critical openness, often results in contradictory positions both claiming justification from the authority of international law. The classic instantiation of this is the irresolution that emerges in the face of a conflict between international law and the law of a nation state – the sovereign authority from which the international claims legitimacy. To avoid ‘utopianism,’ international law must correspond with the state’s sovereign will, but to avoid ‘apologism,’ said law must be binding upon states, regardless of singular will.⁴⁶ This same indeterminacy reoccurs when the attempt to ground international law in the authority of the sovereign nation state confronts the irresolution underpinning the nation state’s claim to permanence and determination. The impossibility of a static definition of a nation state – language, territory or history all unsatisfactory– troubles the claim of international law to be based, as an order, upon the sovereignty of nations. To take as a given the model of the fixed, singular nation state ignores both the question of what constitutes a nation, as boundaries and histories remain perpetually in flux.⁴⁷ This indeterminacy betrays a gap at the heart of the law, between law as it exists and law as is promised through the claim to universality.⁴⁸ Orthodox narratives of international law require a leap of faith, they take the law as promised by modernity to be already realised. To think critically about international law is to realise that there is ‘a *void* at the very heart of international society which is marked by the myth of international legal order.’⁴⁹ When this void is acknowledged, the secular rationality that modern law self-ascribes lies embarrassed. As Oscar Guardiola-Rivera makes clear, ‘for all its ‘realism’, ‘pragmatism’ and ‘post-metaphysics’, even the most refined or expert orientations of IL/IR [international

⁴⁵ Peter Fitzpatrick, ‘Latin Roots: The Force of International Law as Event’, *Events: The Force of International Law*, p.46.

⁴⁶ Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (Cambridge: Cambridge University Press, 2006), p.66.

⁴⁷ Peter Fitzpatrick, *Modernism and The Grounds of Law* (Cambridge: Cambridge University Press, 2001) pp.112-113.

⁴⁸ Pahuja, *Decolonising International Law*, p.5.

⁴⁹ Anthony Carty, ‘Myths of International Legal Order: Past and Present’, *Cambridge Review of International Affairs*, 10, 2 (1997).

law/international relations] turn out to be metaphysical. Its post-metaphysical self-perception is therefore a myth.’⁵⁰ From this perspective, Westphalia retains an importance but more as a recognition of the persistence of mythological within the modern than as a historical record.⁵¹ It necessarily conceals the workings of ‘sacrifice’ underpinning international law as ‘law can operate only through its mythical supplement, but the myth that sustains the law has to be excluded from the public eye.’⁵²

The notion of a ‘sacrificial international’ does not ignore the indeterminacy at the heart of the structure of international law, but rather attempts to account for the very necessity of this indeterminacy and of the mythological masking of its presence. From this perspective, the inability to offer a total account of the grounding of a legal order is the very element that allows for the institution of that legal order through bounding violence. Drawing a continuum from ‘rudimentary sacrificial rights’ he first read in archaic societies to ‘advanced judicial forms’ of the contemporary, Girard sketches not a sharp break between the pre-modern and modern forms of cohering communality but the persistence of a religious (in its broadest sense) orientation in our secularised moment, which allows the workings of sacrificial mechanism to function.⁵³ Noll states this idea most clearly by suggesting that:

If we follow Girard and read international law as religion, its incompleteness, its obscurity might be absolutely necessary for the law’s ‘transcendental effectiveness’ in containing violence.⁵⁴

The bond that ties members of the international community becomes one that must remain hidden. The circularity of its presumed grounding betrays an unprocessed element of the constitution of the international legal order – that the unity that appears miraculous amongst the ‘anarchical society’ draws on a subterranean, sacrificial violence. Recalling the insights of Benjamin and other scholars of the nexus of law and violence, Girard illuminates how a particular form of violence can actually be

⁵⁰ Oscar Guardiola-Rivera, ‘Absolute Contingency and the Prescriptive Force of International Law’, *Events: The Force of International Law*, p.38.

⁵¹ Richard Joyce, ‘Westphalia’, p.57

⁵² Oscar Guardiola-Rivera, ‘Paradise Lost...: The Meaning of Modernity and the Antinomy of the Law’, *Law and Critique* 17 (2006), pp.107–127, p.110.

⁵³ Girard, *Violence and the Sacred*, p.24.

⁵⁴ Gregor Noll, ‘The Miracle of Generative Violence? René Girard and the Use of Force in International Law,’ *Leiden Journal of International Law*, 21 (2008), pp.563–580, p.569.

productive, rather than destructive of a legal order. Christopher Menke also adds to this reading of legal violence as interrupting the mimetic structure of rivalry stating ‘Law breaks with the violence of revenge by interrupting this merciless logic of the same, and thus an endless repetition.’⁵⁵ Menke shows how the law therefore differentiates itself from the violence of rivalry, by positing itself as *justified* violence—a violence that could be termed as law making or law-preserving—as it creates or renews the social norms that rivalry threatens to upend. Girard offers clarity regarding the relationship between law and archaic sacrifice, stating that the work of the sacrificial mechanism persists in ‘one of our social institutions above all: our judicial system.’⁵⁶ Following modernity, the law functions so as to secularise the sacrificial ritual employed to expel contagious violence from the society. The law also inherits the obscurity of its workings required for the sacrificial mechanism to be effective, 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.⁵⁷

This is an immediate challenge to the ideas of secularity, modernity and universality on which orthodox understandings of international law are taken to rest. The claim to universality, particularly becomes central to international law over the course of the twentieth century, the period over which this thesis will trace the emergence of drug prohibition. As Anthony Anghie states, ‘the association between international law and universality is so ingrained that pointing to this connection appears tautologous.’⁵⁸ Encapsulating the totality of the globe, international law functions as a genuine world religion, in a manner that exceeded even the great Abrahamic faiths. To view the international legal order through Girard’s understanding of community formation illuminates the extent to which law remains hostage to the metaphysical grammar of the religious in order to constitute an ostensibly secular, liberal universality. As opposed to merely being a set of practices and provisions that are universally

⁵⁵ Christoph Menke, ‘Law and Violence’, *Law and Literature*, 22, 1 (Spring 2010), pp. 1-17, p.5.

⁵⁶ Girard, *Violence and the Sacred*, p.15.

⁵⁷ *Ibid.*, p.24.

⁵⁸ Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge: Cambridge University Press, 2005), p.1.

subscribed to, the law produces universality through the development of an idealised standard, which can then be imposed upon the world. The sacrifice of that which is deemed other to the universal allows the law to contain – in both senses of the word, both keeping it at bay and keeping it within – the escalating violence of ‘continually jealousies’ without sovereign power. Oscar Guardiola-Rivera recognises how this ‘foundational sacrifice’ provides international law its ‘prescriptive force’ stating:

Group survival is seen in the context of the predominant doxa as necessarily desirable and violence appears paradoxical: violent conflict, often seen as a foreign element threatening group survival, is necessarily undesirable and must be contained by means of...violence.⁵⁹

Understanding international law’s indeterminacy as necessarily obscuring the continued reference to sacrifice aids my attempt to reconcile the violence declared by the law- exemplified by the War on Drugs, with the maintenance of order amongst the ‘anarchical society.’ However, where does the international legal order’s inability to justify ontological completeness leave its claim to function as an ‘all’? Is it possible to be foreign to an order of universal jurisdiction? Put simply, the corollary to follow a sacrificial reading of international law must be the question of: who could serve as a scapegoat for the modern international community and what moment could serve as the ‘foundational sacrifice’?

2.3 The Racial Subaltern as Sacrificial Victim

With the notion of a ‘sacrificial international’ at hand, the immediate problem presented by a review of the drug war- why does legal violence upon certain bodies seem not disturb the grounding of humanitarian, international law- can be unpacked. For the sacrificial mechanism to function, the scapegoat must be constructed as a figure on who violence can be licensed in order to produce a commonality amongst rivals. The construction of the scapegoat must be such that it reads as familiar enough to expunge violence from the community, yet foreign enough for its sacrifice to appear justified.⁶⁰ Girard details the position that the sacrifice must occupy as:

⁵⁹ Oscar Guardiola-Rivera, ‘Absolute Contingency’, p.30.

⁶⁰ Girard, *Violence and the Sacred*, p.272.

Neither outside nor inside the community, but marginal to it [...] situated [...] between the inside and the outside, they can perhaps be said to belong to both the interior and the exterior of the community.⁶¹

Following Girard, we should appreciate the victim of legitimate violence as necessarily taking on the condition of being inside and outside the boundaries of the social order. It is inside so as absorb the spiralling violence that threatens to destroy the entire community, and yet outside, so that there remains a perceived discontinuity between the victim and the community, allowing the sacrifice to expunge, rather than perpetuate, the mimetic violence from the community.⁶²

In terms of international law, where the community being ordered is acclaimed as universal humanity, the scapegoat would have to correlate to a figure read as traversing the boundary of humanity. This leads us onto engaging the European colonialism, where many critical scholars locate the birth of international law, and its intertwinement with the discourse of racism. Racism is, at its core, the (impossible) attempt to push certain humans outside of the boundaries of humanity. In declaring certain peoples as not human, racism hopes to justify violence upon them but the violence that is then done in racism's name actually serves to expose the lie of this declaration. To vehemently insist on the inhumanity of your victims through your brutalisation of them is, conversely, to betray that without that brutalisation, the claims of their inhumanity would dissolve. The international community as a whole self-identifies with 'the civilised world.' In doing so, it depends upon a boundary that differentiates outsiders from insiders as members of the community, while continuing to arrogate juristic claims of universality.⁶³ Those who form the other must remain outside of the universal, so as to offer, as Sundhya Pahuja puts it, 'a screen onto which the negative definition of universality itself may be projected.' Yet in the post-colonial era in which international law is now taken to extend to all peoples equally, those who form the other must also 'answer a demand for inclusion within the universal without disrupting the assertion of those values as universal.'⁶⁴ It is this interior/exterior ambiguity, paralleling the positionality essential to the cathartic function of the sacrifice, which encourages a reading together of the conditions of

⁶¹ Ibid., pp.271-272.

⁶² Ibid., p.273.

⁶³ William E. Conklin, 'The Exclusionary Boundary of the Early Modern International Community', *Nordic Journal of International Law*, 81 (2012), p.137.

⁶⁴ Pahuja, *Decolonising International Law*, p.23.

Girard's scapegoat and the history of the racial subaltern subject.

The racial subaltern subject is a conceptual model for collectively describing the populations that the discourse of racism seeks to relegate from the category of the fully human. The post-colonial concept of subalternity was initially developed in the work of Gayatri Spivak, before being applied to the categories of race by scholars such as Denise Ferreira da Silva.⁶⁵ Especially within the liberal discourse of the internationalism that arose over the twentieth century, the racial subaltern subject is conscripted into the modern universal order (so that the universal may act as it is named). However, with the persistence of racial and colonial relations of power within the promised equality of contemporary liberalism, the racial subaltern continues to stand as the embodiment of the barbarism against which the modern universal is formed: the constitutive outside that the universal can hold in contradistinction to itself. Returning to Girard, his model of sacrifice sees the community as positing its own self-ascribed antithesis as an embodied scapegoat. Within the international community we can see the same mechanism at work, although its workings are amplified as a consequence of the universal claim to illimitability: if international law is universal then that which is exterior is utterly excluded from law. But it must also be simultaneously be entirely included within the law, otherwise the claim to universality is punctured.⁶⁶ This is the paradox, I argue, that befalls the racial subaltern subject, it is ensnared within the universal order whilst being excluded from it. Oscar Guardiola-Rivera details the functioning of this process stating:

According to this logic, that which is excluded is not, for this reason, simply without relation to the rule since the rule maintains itself in relation to the exception in the form of suspension. Put another way, the rule maintains itself (and reintroduces order in the social) by subtracting the exceptional element from the society and focusing on it the violence of the whole of society.... In order to do so it introduces in society forms of internal differentiation or mediation, more often than not in the form of distinctions between what is normal or standard (and is thus on the side of society) and what is pathological (and becomes the outside of society).⁶⁷

⁶⁵ See Gayatri Chakravorty Spivak, 'Can the subaltern speak?', Cary Nelson and Lawrence Grossberg (eds.), *Marxism and the Interpretation of Culture* (London: Macmillan, 1988), pp.271–313; Denise Ferreira da Silva, 'Bahia Pêlo Negro: Can the subaltern (subject of raciality) speak?', *Ethnicities*, 5, 3 (2005), pp.321-342.

⁶⁶ Fitzpatrick, *The Revolutionary Past*, p.121.

⁶⁷ Guardiola-Rivera, 'Law in other contexts', p.132.

Moreover, Peter Fitzpatrick recognises how the orientation of the international legal order recalls the structure of modern racism, stating that ‘Universal ius could match the idea of the unity of the species in racist discourse.’⁶⁸ Fitzpatrick is highlighting the way in which the racial subaltern subject cannot be removed from the universal humanity invoked by international law, while being fixed in an opposition to that universal humanity through an inscribed difference. The aim of racist discourse is to cleave a division within a biological continuum, to hold the racial subaltern apart from a universal humanity that it is always unable to escape from.⁶⁹

2.3.1 The Sacrificial Victim and The Damned of The Earth

Frantz Fanon captures the paradoxical position imposed upon the racial subaltern subject with his description that this figure as ‘rooted at the core of a universe from which he must be extricated.’⁷⁰ It is this positionality that ontologically structures the racial subaltern subject as naked to violence. Colonialism is understood as ‘violence in its natural state’.⁷¹ Fanon’s work remains an essential resource for scholars who try to think through race or coloniality as primary organizing principles of the global political order, including scholars engaging in questions of law.⁷² For Fanon, colonialism is driven by ‘the necessity to establish law and order among the barbarians’⁷³ As aforementioned, recent international legal scholarship has turned towards viewing the colonial encounter as originating the Euro-modern world order.⁷⁴ An engagement with Fanon only enriches these readings of imperial roots of modern world order. The reading on colonialism and the post-colonial inheritance of colonial relations as systems of violence brings the recent critiques of international law

⁶⁸ Fitzpatrick, *The Revolutionary Past*, p.120.

⁶⁹ Michel Foucault, ‘[t]hat is the first function of racism: to fragment, to create caesuras within the biological continuum [...]’ *Society Must be Defended: Lectures at the Collège de France 1975-76*, (trans. D. Macey) (London: Penguin Press, 2003), p.255.

⁷⁰ Frantz Fanon, *Black Skins, White Masks* (New York: Grove Press, 1991), p.8.

⁷¹ Frantz Fanon, *The Wretched of the Earth* (London: Penguin, 2001), p.65.

⁷² See Patricia Tuitt, *Race, Law, Resistance* (London: The GlassHouse Press, 2004); or Balakrishnan Rajagopal, *International Law from Below: Development, Social Movements and Third World Resistance* (Cambridge: Cambridge University Press, 2003).

⁷³ Frantz Fanon, *Toward an African Revolution* (New York: Grove Press, 1994), p.57.

⁷⁴ See for example Antony Anghie, *Imperialism, Sovereignty and the Making of International Law*; Matthew Craven, Malgosia Fitzmaurice, Maria Vogiatzi (eds.), *Time, History and International Law* (Leiden: Martinus Nijhoff Publishers, 2007); Diane Kirkby and Catherine Coleborne (eds.), *Law, History, Colonialism: The Reach of Empire* (Manchester: Manchester University Press, 2001).

together with the aforementioned tradition of legal scholarship concerned with the intimate relationship between law and violence.⁷⁵ Echoing Benjamin's conception of the law-making potential of legal violence, Fanon's reading of colonial law illuminates 'how and why this violence operates as a constitutive-yet paradoxical-legal force: how and why this violence both creates and tries to preserve an interpellative legal system of civil society.'⁷⁶ Fanon's understanding of violence is again not merely a singular impacting of force but as the full tapestry of the discursive and material techniques used to disqualify a subject against a given system of norms. Fanon's reads together the violence of the coloniser and the law imposed by colonial legal order as one and the same and crucially, this legal system does not merely separate the colonised from means of subsistence outside of capital relations but is further constitutive of colonial legal personality as what Fanon describes as 'damnation.'⁷⁷ Far from being simply a codified set of rules, 'colonial law is, for Fanon, a multivalent phenomenon: a material force, a form of representation, a multidimensional constitutive discourse, a system that forms colonial subjects and subjectivities.'⁷⁸

Fanon recognises that race is not a natural state of being. He understands that the subalternity of the 'negro' or the 'amerindian' or the 'oriental' is the result of discursive production that creates this social (non)relation. Discourse disqualifies the racial subaltern from the category of full humanity and the law is implicated in this discursive field. By identifying the pre-social misrecognition that underwrites the social order of the modern international community, Fanon illuminates how a single standard of humanity, elevated to circumnavigate the globe, was constituted negatively through the attempt to exclude whole categories of people from the register of humanity, by deeming them as racially subaltern. Fanon's can also be read

⁷⁵ For scholarship on the relationship between law and violence, see Walter Benjamin, 'Critique of Violence', *Reflections*, p. 287; Robert M. Cover, 'Violence and the Word', *Yale Law Journal*, 95 (1986), p.1609; or Austin Sarat (ed.), *Law, Violence, and the Possibility of Justice* (Princeton: Princeton University Press, 2001).

⁷⁶ Gary Boire, 'Fanon, Romance, Colonial Law', *Law and Literature: Current Legal Issues*, 2, Michael Freeman and Andrew Lewis (eds.) (Oxford: Oxford University Press, 1999) p.583.

⁷⁷ *The Wretched of the Earth* is entitled *Les Damnés de la Terre* in its original language of French and I posit, as has been argued by earlier Fanonian scholars, that much of the philosophical significance of this concept of 'damnation' is lost through English translation into 'Wretched.' For further, please see Lewis R. Gordon, *What Fanon Said: A Philosophical Introduction To His Life* (New York: Fordham University Press, 2015); or Lewis R. Gordon, 'Through the Hellish Zone of Nonbeing: Thinking through Fanon, Disaster, and the Damned of the Earth', *Human Architecture: Journal Of The Sociology Of Self-Knowledge*, 5, Special Double-Issue (Summer 2007), pp.5-12.

⁷⁸ *Ibid.*, p.582.

alongside the insights of critical race theory, a rich tradition of scholarship that has focuses on a critical analysis of racism.⁷⁹ Ruth Wilson Gilmore's now canonical definition of racism defined it as 'the state-sanctioned or extralegal production and exploitation of group-differentiated vulnerability to premature death.'⁸⁰ This definition can be extended to go beyond the mechanisms of the state violence in order to understand race as a global discourse, as legal violence does not derive solely from the state. Denise Ferreira da Silva takes up this task in her exploration of the global idea of race. Silva reads the material and psycho-social subaltern position that Black people occupy across the globe, placing a particular focus on Brazil and the U.S.A., as not merely a contradiction within but fully constitutive of a juridical universality.⁸¹ Connecting the very production of a conception of a universal human subject, which she entitles 'homo modernus', to the 'logics of exclusion/obliteration' that she reads as underwriting racial difference, Silva offers a pertinent challenge to legal scholars who may wish to appeal to the law to allay racial violence by outlining the ways in which the modern conception of the law and of its idealised human subject is indebted to production of the figure of the racial subaltern as the geo-historically confined negation of the universal.⁸² For Silva 'the racial delimits the reach of the law and humanity.'⁸³ This returns us to the question of if race can be read alongside the scapegoat as a model for the communality for international law.

A position of interior/exteriority to humanity would be essential for any scapegoat of international law, as would any signs of scapegoat as the cause of violence by corporeal markers of their irregular humanity. Girard explains that scapegoats are often chosen 'because they bear the signs of victims': they are already marked in their physicality as somehow abnormal.⁸⁴ The legitimacy of their victimhood is constructed as rooted in their physical being; they are damned through their corporeality, which marks them as a person or group of people who are

⁷⁹ See Gilmore, *Golden Gulag*; Fred Moten, 'Blackness and Nothingness (Mysticism in the Flesh)', *The South Atlantic Quarterly*, 112, 4 (Fall 2013); or Frank B. Wilderson, *Red, White & Black: Cinema and the Structure of U.S. Antagonism* (Durham: Duke University Press, 2010).

⁸⁰ Gilmore *Golden Gulag*, p.28.

⁸¹ Denise Ferreira da Silva, *Toward a Global Idea of Race* (Minneapolis: University of Minnesota Press, 2007).

⁸² *Ibid.*, part III.

⁸³ *Ibid.*, p.11.

⁸⁴ René Girard, *The Scapegoat*, (trans. Yvonne Freccero) (Baltimore: The Johns Hopkins University Press, 1986) p.21.

susceptible to selection for the sacrificial role.⁸⁵ As aforementioned, the sacrifice serves as the superlative manifestation of the discursive violence already performed on the victim. Fitzpatrick notes how ‘the enclosing of [...] identity, is always a denial of what could otherwise be or have been, and when explicit that denial is a sacrifice.’⁸⁶ When this difference from the norm is embodied it can give rise to political culture where, as Shela Sheikh argues, ‘certain bodies are culturally and politically constructed as “disposable” or “sacrificeable.”’⁸⁷ With the discursive and material violence of European colonialism working in tandem with each other, Racism can be understood as a process that produces the colonised as disastrous subjects of people, peoples physically marked through their deviation from a predetermined standard and therefore read as a sign of ill fate and ruin. As the standard is geo-temporally located within Euro-modernity, the cleaving of difference necessarily demarcates a European exceptionalism that is also expressed through the language of body, and the political project of colonialism bleeds into the corporeal project of racialization. Fanon illuminates how the mythopoetics behind the language of racism centre on the construction of particular bodies as ‘damned.’⁸⁸ Racism employs corporeal markers (skin colour, hair type, facial features, etc.) to impose a discursive language of branding upon human bodies.⁸⁹ Those branded as racially subaltern are understood to be anatomically marked through their bodies as a deviation from the model of the ideal subject of modernity, that is, the European man. The language of race translates the demarcating physical features into the signs of damnation for the victims of the social order. The social order is then able to amplify those features, so as to reinforce the polarisation between itself and the victim. Girard himself recognises how the sacrificial process ‘is clearly observable in racist cartoons.’⁹⁰ Such racist caricatures show how racially subaltern features are not only emphasised as physically repugnant, they are further imbued with a moral failing. The body is made into an indicator of its owner’s nature and fate ‘physical and moral

⁸⁵ Ibid., pp.17-18.

⁸⁶ Peter Fitzpatrick, ‘The Triumph of a Departed World: Law, Modernity and the Sacred’, *Law and the Sacred*, pp.155-183, p.162.

⁸⁷ Shela Sheikh, “Translating Geontologies” 21 *The Avery Review* (2017)

⁸⁸ Jane Anna Gordon and Lewis R. Gordon, *Of Divine Warning: Reading Disaster in the Modern Age* (Boulder: Paradigm Publishers, 2009), p.28.

⁸⁹ Ibid., p.9; Stuart Hall, *Race, The Floating Signifier* (transcript) available at Media Education Foundation https://www.mediaed.org/assets/products/407/transcript_407.pdf [Accessed 05 December 2014].

⁹⁰ Girard, *The Scapegoat*, p.18.

monstrosity go together.’⁹¹ Race thereby functions as the pathogen, an infection that disturbs, and if left unchecked could consume, the social order.

The grammar of racism outlined above maps onto the production of the sacrificial scapegoat. Hidden within the workings of the sacrificial mechanism is the way in which selection for the sacrifice is not completely arbitrary.⁹² Though the scapegoat is innocent, in that they are not the actual cause of the conflict that their sacrifice is to abate, their guilt, in the eyes of the community, is written upon their body. The scapegoat’s responsibility for the crisis is a question not of facts but of mien: physical appearance is taken to betray guilt.⁹³ As the process of victimisation remains at all times concealed to those who perpetrate it, a physical deformity of the victim – as in their deviation from the model, from the ideal – allows the community to rationalise its licensing of violence. The community understands itself to be simply reading the signs of doom written on the scapegoat’s body and, in a bid to restrain the spiralling mimetic violence upon the horizon, it looks to those in their midst who are somehow already marked as the embodiment of crisis, to those who can serve as scapegoat or as Girard alternatively calls the figure, ‘a sacred monster’.⁹⁴ In referring to the scapegoat as a ‘sacred monster,’ Girard emphasises that the interior/exterior positionality of monsters disturbs us because they appear as human and not human at the same time.⁹⁵ Furthermore, the etymology of the word ‘monster’ demonstrates how monstrous appearance is deemed to prophesise an emerging threat. Derived from the Latin ‘*monstrum*,’ from the verb ‘*monere*,’ meaning ‘to warn or admonish’, the word illuminates how, in the midst of a crisis, the monster is read as both the representation of the outbreak of violence and a warning of greater violence to come.⁹⁶ The monster holds within its body the disharmony that has come to plague the community. Consequently, violence against the monster becomes a form of sacrifice, a bounding

⁹¹ Ibid., p.35.

⁹² Girard, *The Scapegoat*, p.17. Girard initially considered the choice of victim to be arbitrary. See *Violence and the Sacred*: ‘anybody can play the part of surrogate victim.[...]The crucial fact is that the choice of the victim is arbitrary’ (p.257). This position is adjusted in *The Scapegoat*: ‘the persecutors choose their victims because they belong to a class that is particularly susceptible to persecution rather than because of the crimes they have committed’ (p.17).

⁹³ Lars Ostman, ‘The Sacrificial Crisis: Law and Violence’, *Contagion: Journal of Violence, Mimesis, and Culture*, 14 (2007), p.109.

⁹⁴ Girard, *Violence and the Sacred*, p.272.

⁹⁵ Alex Sharpe, *Foucault’s Monsters and the Challenge of Law* (London: Routledge-Cavendish, 2011), p.30.

⁹⁶ Jane Anna Gordon and Lewis R. Gordon, *Of Divine Warning: Reading Disaster in the Modern Age*, (Boulder: Paradigm Publishers, 2009) p.9.

violence which re-establishes order rather than contravening it.⁹⁷ Their lives become, what Judith Butler terms as ‘ungrievable’ in that their deaths are not mourned, their suffering of violence does not disturb the prevailing order of the law.⁹⁸

2.4 The Sacrificial Orientation of Universalism

The concept of a ‘sacrificial’ international law problematizes international law’s universality. A notion of sacrifice offers insight into the role that legal violence plays into what Sundhya Pahuja calls ‘the operationalisation of universality’, by which she refers to ‘how a meaning for the universal is produced through and within international law, both institutionally and conceptually, and how this meaning is held, or stabilised, in that ‘universal’ position.’⁹⁹ This differs from simply an argument that dismisses the universality of international law as just another particularism. It is a recognition that international law is, in a certain way, universal. The drug laws, with their near total compliance amongst all governments provide an example of this form of universalism. Post-colonial theory has done the necessary work of arguing that the universalism of the West as just another particularism. However, what the theoretical focus of this thesis seeks to address is what sustains this operative universality if it is not an authentic product of a universal, humanitarian consensus as the mainstream liberal history of the twentieth century would suggest. With the emergence of universalism becoming particularly insistent following the post-war dissolution of the colonial division in world ordering, I ask what is the universal figure on which international law, such as the project of drug prohibition, is grounded? This question, particularly when examining the provisions of the drug prohibition treaties, points us towards an idealised human subject that international law invokes as a conceptual grounding. In the legal order of the late twentieth century, an ideal image of humanity informs notions of international human rights law, international humanitarian law and international crimes against humanity. This image of humanity was, in terms of its historical production and defining cultural characteristics, distinctly western, an image of humanity that Frantz Fanon’s describes as ‘homo occidentalis’¹⁰⁰ However, it continued to operate as universal in spite of this. Scholars have critiqued the

⁹⁷ Ibid., p.51.

⁹⁸ See Judith Butler, *Frames of War: When is Life Grievable?* (London: Verso, 2015).

⁹⁹ Pahuja, *Decolonising International Law*, p.16.

¹⁰⁰ Fanon, *Black Skins, White Masks*, p.147.

presumption that the claims to universality invoked by international law do in fact capture of something truly universal amongst all humans, cultures and societies; instead they argue that international law is prone to take a specific form of humanity and arrogate it into a condition of universality.¹⁰¹ However, I argue that still under-theorised within this critique is the role the legal violence plays in producing that universality. The concept of sacrifice as I offer it describes the process of legal violence being licensed upon a particular subjectivity-that of the negation of humanity, of the non-human- in order to cohere a universal. As Judith Butler has stated, ‘the problem is not with universality as such but with an operation of universality.’¹⁰² The subsequent chapters of this thesis read the history of international drug prohibition as a particular ideal of social relations and social practices developed in the West, specifically by the moral crusaders of the U.S.A, arrogated by international law into the position as universal, all the while taking seriously the question of how prohibition attained operation as a universal truth discourse. The drug war provides a telling narrative setting and a historical backdrop against which to explore these wider fundamental questions about how international law coheres itself.

Returning to the specific example of international legal violence that functions as my primary focus, the War on Drugs, I argue, provides a telling instantiation of the relationship between sacrificial violence and international law. A review of the populations who stand as primary victims of the drug war immediately betrays a connection with the former colonial populations and racially subaltern subjects who served as the underside to European modernity. The damage that the drug war has caused to Amerindian, African-American and ‘oriental’ populations encourages a tying-together of Fanon’s account of international order emerging through violence against the colonised, with Girard’s schematic of a sacrificial mechanism hidden underneath communal social order. Girard tells us how ‘the prohibitions that appear arbitrary stem neither from some sort of "neurosis" nor from the resentment of grumpy men eager to prevent young people from having a good time’ but are rather the attempt to ritualise a norm that can be the basis of social order.¹⁰³ Through this theoretical lens we can understand prohibitions that may immediately appear

¹⁰¹ For scholarship that has focused on how international law’s conceptualisation of humanity can be based on exclusion, see for instance Shelly Wright, *International Human Rights, Decolonization and Globalization: Becoming Human* (London: Routledge, 2001).

¹⁰² Judith Butler, *Giving an Account of Oneself* (New York: Fordham University Press, 2005), p.6.

¹⁰³ René Girard, *I See Satan Fall Like Lightning* (trans. James G. Williams) (Macyknoll: Orbis Books, 2001), p.12.

arbitrary, such as the prohibition of specific psychoactive substances, masked attempts to keep the crescendo of mimetic violence at bay. As aforementioned in the introduction, only the most myopic of observers could ignore the asymmetry of the apportioning of the violence of the War on Drugs amongst the peoples of the world. Despite adopting a liberal posture, couched in terms of the impartiality and universality claimed of law, the international laws on drugs have disproportionately impacted specific categories and territories of peoples, and the makeup of its victims recalls the Fanonian category of ‘the damned.’

The international laws on drugs provide an archetypal, yet under-researched instantiation of the West-Non West dichotomy that TWAIL scholars have identified within the universal promise of international law. The impetus behind international law’s prohibition of drugs came from the desire of Western nations to control the fear of a growing demand for psychoactive substances amongst their population, with the treaties drafted so as to discriminate against the interests of producers and suppliers.¹⁰⁴ Manderson illuminates the on-going tension between liberalism and drugs, stressing an anxiety inherent in law’s presumptions of “liberal individualism as a baseline of social policy, coupled with an identification of drugs [...] as the corporeal manifestation of the virus that threatens it.”¹⁰⁵ There are unarticulated binaries operating within the ostensible universality of international drug prohibition—a diametric opposition drawn between civilised human and the barbarous drugs, of rational thought against madness and hysteria, of the triumph of reason over submission to the appetite. These binaries are then pasted onto longer held discursive models of differences between races and regions of the earth. We can also read modernity’s poorly constructed sacred claims about human dominance over nature within these laws that demand the eradication of many naturally occurring substances.¹⁰⁶ Yet, the drug laws themselves offer no ostensible indication of the difference that its application would cleave amongst the peoples of the world. Couched in the language of universal humanity, one would not, by merely reading the treaty, be made aware that the drafting process was dominated by hegemonic Western powers, who moulded the law to their own interests and particular notions of ideal

¹⁰⁴ William McAllister, *Drug Diplomacy in the Twentieth Century* (London: Routledge, 2000), p.209.

¹⁰⁵ Manderson, ‘Possessed: Drug Policy, Witchcraft And Belief’, p.56.

¹⁰⁶ Rappaport, *Ritual and Religion*, p.457.

social ordering.¹⁰⁷ Nor do the treaties governing the War on Drugs offer any indication of the early drug prohibition, so indebted to the explicit racial prejudice that the *New York Times* would aid the movement for prohibition by printing scare stories of cocaine making ‘the negro’ impervious to bullets.¹⁰⁸

2.5 Conclusion

This chapter has built on scholarship on the post-colonial element of international law to theorise its sacrificial structuring. Speaking to the productive force of international legal violence, Jennifer Beard articulates this argument in stating that, ‘international laws operate as a form of sanctioned violence to maintain the Westphalian system of sovereign states with an established order.’¹⁰⁹ However, moving beyond the post-colonial critique of liberal international law the notion of sacrifice offers an appreciation for the theological underpinnings of racialised legal violence for the cohering the communality of a diffuse international. Anghie focuses on how international law creates a subterranean distinction amongst peoples, critiquing the classical approach to international relations by stating how ‘a focus on the problem of order among sovereign states cannot illuminate the prior question of how certain states were excluded from the realm of sovereignty in the first place.’¹¹⁰ However, as Robert Knox identifies, the myopia within Anghie’s separation of the ‘dynamic of difference’ between the colonising/colonised worlds from the production of coherent order of an international community is that ‘it falsely assumes there is a duality between these two approaches’ when they are in fact ‘part of the same process of imperialism.’¹¹¹ The theorisation of this process is what I have termed ‘sacrificial’ and it offers a lens through which to read the War on Drugs as a project of international law. My reading of the drug war follows the challenge Oscar Guardiola-Rivera’s sets for legal scholarship to reveal ‘the logic of exclusion and surrogate

¹⁰⁷ Julia Buxton, *The Political Economy of Narcotics: Production, consumption and global markets* (London: Zed Books, 2013), p.2.

¹⁰⁸ Williams, Edward Huntington, ‘Negro Cocaine Fiends Are The New Southern Menace’, *The New York Times* (February 8, 1914).

¹⁰⁹ Jennifer Beard, ‘The International Law in Force’, *Events: The Force of International Law* (London: Routledge, 2011) p.27.

¹¹⁰ Anghie, ‘Finding the Peripheries’, p.6.

¹¹¹ Robert Knox, ‘Race, Racialisation and Rivalry in the International Legal Order’, Anievas, Manchanda, and Shilliam (eds.), *Race and Racism in International Relations: Confronting the Global Colour Line* (London: Routledge, 2015), p.185.

victimage at work in the functioning of the law.’¹¹² The drug addict and drug trafficker remain within the international community and thereby within the scope of international law, however the immorality attributed to these figures emphasises their complete otherness to any universalising notion of humanity, rendering them an infestation that must be purified for the community of ideal humans to realise itself. I choose to place my focus upon the idea of sacrifice because as concept, it shines a light on the relation between those who are the victims of legal violence- in this instance case exemplified by the victims of the global enforcement of drug prohibition known as the War on Drugs - and the coherence or, better yet, the communality produced through this legal violence.

The following chapters will unpack this history of drug prohibition as an international legal project. As I trace the historical trajectory of drug prohibition moving from a fringe idea to a governing norm over the course of a century, I will highlight the ways in which violence upon the subjectivity of the non-human- often embodied in the figure of the racial subaltern subject- informed the development of international law as it transitioned into a liberal, moral universalist posture. I will engage with the legal context that first birthed drug prohibition at the turn of the twentieth century, examining the liberal understanding of international law that influenced American internationalism, which in turn emboldened prohibitionists in their fledging efforts. This will require reviewing the influence of founding fathers of American international law such as James Brown Scott and Elihu Root, as well as the prohibitionists who worked under them, including Bishop Charles Henry Brent and Dr Hamilton Wright, in order to unpack the political and theoretical context in which drug prohibition was able to blossom as a legal project. However, prior to engaging with this twentieth-century story, the next chapter will unpack the philosophical antecedent that was recovered to anchor early American international law, the sixteenth-century jurisprudence of Francisco De Vitoria. Vitoria’s model of a universal legal framework to account for colonial relation between the Spanish and Amerindians at the start of European colonialism will be re-read as an early model of a ‘sacrificial’ international law that would later be an influence on American international law in the early 1900’s and, therefore, on the juridical context in which drug prohibition emerged. An examination of Vitoria’s key texts will illustrate how,

¹¹² Guardiola-Rivera, ‘Law in other contexts’, p.132.

with his recovery providing the jurisprudential background to the birth of drug prohibition, the asymmetry in the violence of the drug war, becomes no longer arbitrary or contradictory, but reconcilable with a model of imperial violence accommodated within international law at its very conception.

Chapter 3

The Colonial Encounter and the Prelude for a Sacrificial International

3.1 Introduction

In the introduction to this thesis, I commenced by illustrating how the catastrophe of the War on Drugs challenges assumptions about the rationality and progressive teleology of the law. The failure of the *United Nations Single Convention on Narcotic Drugs, 1961* to ensure ‘the health and welfare of mankind’ is declared by the bodies of all those who have suffered social and material death in order to enforce a law that has proved unenforceable. The first chapters then built on the existing literature in drug policy scholarship, critical international legal scholarship and third world approaches to international law to outline an argument of reading the War on Drugs not as a contradiction within the progressive trajectory of twentieth century international law, but rather as an instantiation of the sacrificial violence that has been (re)generative of the international legal order in its expansive liberal and universalist guise. As the writings of Baudrillard and Derrida analysed in *Chapter One* show, the law speaks the very concept of ‘drugs’ into being by retroactively associating an existential harm with certain plants/foods and mandating the prohibition of this harm, through the violent capabilities of the law if necessary. As argued over the second chapter, violence does not exist in binary opposition to the law but is embedded within its workings. Moving to the international context, through René Girard’s understanding of social order being produced through sacrificial violence, I argued for a recognition of the role of violence in engendering the communality of the international legal order. This mapped out the understanding of a ‘sacrificial international’ that provides an insightful theory through which to explain international law’s reconciliation of a simultaneous peaceful ‘humanitarianism’ and violence of international drug prohibition, as I will illustrate over the course of this thesis.

In this chapter, I will historicize the notion of a ‘sacrificial international’, commencing the historical arch of this thesis not in the twentieth century’s turn towards liberal, humanitarian international law but with the sixteenth-century antecedent for this turn that would be recovered just as drug prohibition began to

emerge. I will be largely engaging with the Spanish, or more accurately Salamancan jurisprudence that gave international law its form following the colonial encounter, particularly the work of the theologian Francisco De Vitoria. The reason for beginning the historical narrative of a thesis on the twentieth century drug war with a substantive engagement with Vitoria's development of the juridical norms and principles of the Spanish sixteenth-century conquest of the Americas will become clearer over the subsequent chapters, but, in short, Vitoria serves as a crucial, prologue for the mode of international law within which the drug war would come into being, an element of prohibition that has been overlooked by scholarship in drug policy studies. Vitoria's jurisprudence was resurrected and reworked in the early twentieth century to inform a shift towards moral universalism in international law, particularly by American international lawyers theorising the U.S.A's own strand of liberal internationalism and its correlative campaign for international prohibition of drugs. Before engaging with the twin histories of twentieth century liberal international law and international drug prohibition over the course of *Part B* and *Part C* of this thesis, in this chapter, I will re-read both Vitoria's jurisprudence and the more recent scholarship that has been produced on him to argue that the Vitoria's inclusive/exclusion of the colonial subject within a modern notion of universal humanity lays the foundations for the fixing of the colonised in condition of 'damnation', a condition which facilitates the sacrificial violence of the law that is illustrated by the present-day drug war.

A consequence of the narrative I offer in this chapter is that it challenges received theoretical and historical orthodoxies about the development of international law. To read the persistence of an imperial violence within international law places my argument in opposition to the presuppositions of international law always moving towards an ever-greater universal peace.¹ Therefore, it is necessary to commence this chapter by clarifying the methodological approach I am undertaking and the rationale I offer for adopting this 'counter-history' of international law.

¹ The Preamble to the Charter of the United Nations states its aim as to 'save succeeding generations from the scourge of war', 'to unite our strength to maintain international peace and security', and 'to develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace.' *The Charter of the United Nations* (San Francisco: 1945) <<http://www.un.org/en/sections/un-charter/preamble/index.html>> [accessed 3 August 2017].

3.2 Historicizing Sacrificial International Law

‘Laws deceive ... kings wear masks, ...
power creates illusions [and] historians tell lies.’²

Michel Foucault

Questions of history play an essential role in the conceptualisation of international law. Implicit in international law’s claim to bring about a universal peace is an investment in the linear march of progress through history. In seeking to challenge international law’s claim, my argument will require an alternative perspective on international law’s history. Therefore, the historiography of this thesis will follow a perspective best described as the ‘mode of seeing that experiences history as catastrophe.’³ Incommensurable with the triumphalist coupling of the rise of international law with the rise of civilization, this mode of seeing history takes seriously the suffering of those who have experienced modernity as the shattering of culture. As a discipline, history has often presupposed the continuance of a nightmare from which the ‘damned’ are trying to awake.⁴

In this chapter, my focus will be upon reading the colonial encounter as an ‘origin’ of international law, exploring the ways in which notions of sacrifice marry with the jurisprudential accounting for an international legal order. Following on from this claim, the subsequent chapters of this thesis will show how the recovery of the colonial jurisprudence of the sixteenth century provided the intellectual context for the twentieth century international laws on drugs. The constellation of these widespread historical moments opens my thesis up to the challenge of engaging with historical moments too temporally disparate to bear relevance upon each other. I will respond to this challenge by mapping out the connections in the work of particular international jurists of these differing historical contexts. Furthermore, in addition to the tracing of a continuum within the ideas of jurists, to fully assert my claim of international legal order operating as sacrificial, my thesis will require a image of the past that allows history and theory to talk to each other, one in which history is not

² Michel Foucault, *Society Must Be Defended: Lectures at the Collège De France, 1975–1976*, trans. by David Macey (London: Penguin 2004), p.72.

³ Susan Buck-Morss, *Hegel, Haiti and Universal History* (Pittsburgh: University of Pittsburgh Press, 2009), p.127.

⁴ James Joyce, *Ulysses* (London: Penguin, 2000), adapted from Stephen Dedalus quote: ‘History,’ Stephen said, ‘is a nightmare from which I am trying to awake’, p.32.

structured so as to fix the meaning of yesterday but where the past can be allowed to leap across ‘empty time’ and (re)charged with ‘the presence of the now.’⁵

3.2.1 The Turn to History in International Legal Scholarship

By commencing my argument with an engagement of the juridical structure of the colonial encounter, I place my work in the slipstream of a recent ‘turn to history’ in international legal scholarship.⁶ Revisiting the ideas of Grotius, Pufendorf or Vattel have become a common method for showing how the roots of international law can assist our understanding of today’s juridical issues. However, the approach to questions of history undertaken by recent international legal scholarship also invites criticism. International legal historians have been accused of indulging in the ‘the fallacy of constructing a meta-narrative.’⁷ More specifically, critics have disputed the value of trying to bring early modern jurisprudence to bear on a contemporary globalised context, dismissing such expansive histories as producing ‘a false continuity and connectedness that is in fact the work of the interpreter’s mind.’⁸

A common issue of contention concerns whether the attempt to connect disparate historical moments opens up the possibility of drawing historical conclusions in a speculative and casual manner, that is to say reading history *out of context*.⁹ Making claims that sweep together whole centuries, centuries that are in many ways divergent from one another and plural within themselves, is feared to lead to generalisation and anachronism, mortal sins in the study of history. Quentin Skinner is the historian often cited in order to warn against reading history out of

⁵ Walter Benjamin, ‘Theses on the Philosophy of History’, *Illuminations* (trans. Harry Zohn and ed. Hannah Arendt) (London: Penguin, 1969), pp.253-265, p.261.

⁶ See, for example, Antony Anghie, *Imperialism, Sovereignty and the Making of International Law*, (Cambridge: Cambridge University Press, 2005); Matthew Craven, Malgosia Fitzmaurice, Maria Vogiatzi (eds.), *Time, History and International Law* (Leiden: Martinus Nijhoff Publishers, 2007); Diane Kirkby and Catherine Coleborne (eds.), *Law, History, Colonialism: The Reach of Empire* (Manchester: Manchester University Press, 2001); Martti Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870-1960* (Cambridge: Cambridge University Press, 2001).

⁷ Georg Cavaller, ‘Vitoria, Grotius, Pufendorf, Wolff and Vattel: Accomplices of European Colonialism and Exploitation or True Cosmopolitans?’, *Journal of the History of International Law*, 10 (2008), p.207.

⁸ Ibid.

⁹ Ian Hunter, ‘Global Justice and Regional Metaphysics: On the Critical History of the Law of Nature and Nations’, Shaunnagh Dorsett & Ian Hunter (eds.), *Law and Politics in British Colonial Thought: Transpositions of Empire* (London: Palgrave Macmillan, 2010), p.17, ‘set against this dispersed array of contextually specific constructions the modern critical historiography of Jus Gentium begins to unravel.’

context. His manifestos recommend a corrective to the wild sweeping together of history, instead suggesting a methodological approach which tries to look at historical moments in relation to the norms of their time, taking up a responsibility to, as much as possible, represent history as it would have been experienced then and not as it is seen through a modern lens.¹⁰ This approach is taken as being properly sensitive to the oversights that can follow from the transfer of ideas into contexts that would never have been imagined at the time of writing. A contextualist method of inquiry instructs historians to view its ‘sources as the contemporaries of the authors would. And they should relate them to the contexts and concerns of the authors.’¹¹ By tying historical truth to its sources, contextualists hope to free scholarship of speculations, wild leaps and conjecture. In some ways this method agrees with a positivist legal approach, which is itself an approach that seeks to answer the questions of law solely through finding the source of law, thereby separating modern law from a reliance on faith, enchantment or antecedents.

However, to lock the past within the strict confines of its context may satisfy the historian’s demands for rigour, but it is an approach troubled by the lawyer’s disciplinary training. The law specifically relies on judges, legal practitioners or legal scholars reading contemporary obligations in line with determinations of authorities made in a bygone era.¹² To be a lawyer requires a familiarity with the practice of transposing meaning across time.¹³ Robert Gordon is apt in his statement that ‘lawyers are driven by different purposes than historians; our job is to bring the past into the present and to turn it to present purposes.’¹⁴ Lawyers could be described as ‘overtly presentist’ in that their discipline requires them to be ‘concerned to find continuities between past and present,’ while contextualist historians see such ‘naked presentism as a sin.’¹⁵ Furthermore, as Anne Orford has made clear, this element of legal scholarship is only amplified when discussing international law. For Orford, the universal claims of international law makes it ‘inherently genealogical, depending as

¹⁰ See particularly Quentin Skinner, ‘Meaning and Understanding in the History of Ideas’, *History and Theory*, 3 (1969); or Quentin Skinner, ‘Interpretation and the Understanding of Speech Acts’, *Visions of Politics: Volume I, Regarding Method* (Cambridge: Cambridge University Press, 2002).

¹¹ Randall Lesaffer, ‘International Law and its History: The Story of an Unrequited Love’, *Time, History and International Law*, p.38.

¹² Anne Orford, ‘On International Legal Method’, *London Review of International Law*, 1, 1, pp.173-175.

¹³ *Ibid.*, p.175.

¹⁴ Robert W. Gordon, ‘Foreword: The Arrival of Critical Historicism’, *Stanford Law Review*, 49 (1997), pp.1023–9, p.1025.

¹⁵ *Ibid.*

it does on the transmission of concepts, languages and norms across time and space. The past, far from being gone is constantly being retrieved as a source of rationalisation of present obligations.¹⁶ The temporal schema implicit in international law's claims to universality frustrates a strict demarcation of past, present and future. A claim made by international law is always a claim made to be universally applicable, not just applicable for the immediate context. When international law offers a determination- such as certain plant-life called drugs are an evil that must be prohibited- this determination is taken as not only true in that moment but is retrospectively projected back in time to have always been true. While 'professional history's sense-making orthodoxies embrace a [...] careful enforcement of distinction between past and present,' legal scholars should appreciate that 'meanings and arguments do not necessarily heed the neatness of chronological progression.'¹⁷

Contextualist historians concern themselves with recovering 'a dead past; a past unlike the present.'¹⁸ This past, once recovered as completely as possible, is then to be analysed and respected as distant from those of us who are studying it. Martti Koskenniemi argues against adopting a fundamentalist approach to contextualising law, stating:

Regardless of the merits of placing historical subjects in their local contexts, critical legal history ought not rest content with this [contextualism]; it should not dispose of using materials drawn from other chronological moments, including studies of the *longue durée* and structural determination to assess the meaning and significance of the past.¹⁹

In this thesis, I recognise the importance of reading thinkers and their works with regard to the context in which they were produced. Taking care to bare in mind the social and political conditions in which Vitoria and others were producing their ideas allows for a richer understanding of their significance. However, to understand fully a historical context requires more than simply imprisoning a writer and their ideas within a temporal boundary fixed by one's biography. Skinner himself recognised the

¹⁶ Orford, 'On International Legal Method', p.175.

¹⁷ Chris Tomlins, 'The Strait Gate: The Past, History, and Legal Scholarship', *Law, Culture and the Humanities*, 5 (2009), pp.11–42, p.21; Orford, 'On International Legal Method', p.174.

¹⁸ Robert W. Gordon, 'Foreword: The Arrival of Critical Historicism', *Stanford Law Review*, 49 (1997), pp.1023–9, p.1025.

¹⁹ Martti Koskenniemi, 'Vitoria and Us: Thoughts on Critical Histories of International Law', *Rechtsgeschichte – Legal History*, 22 (2014), pp. 119–138, p.123.

problems that are presented by a short-sighted understanding of the relevant context for historical ideas, stating in a later article that revisited the contextualist manifesto ‘There is no implication that the relevant context need be an immediate one.’²⁰ Scholars should engage with ‘whatever context enables us to appreciate the nature of the intervention’, a task that may require them ‘to engage in extremely wide-ranging as well as detailed historical research.’²¹ To myopically dismiss the diachronic is to embark upon a historiography that when applied to the study of law, attempts to turn it, along with other social sciences à la economics or sociology, into a discipline akin to a version of applied mathematics. Walter Benjamin provides ‘the corrective to this way of thinking, [which] lies in the conviction that history is not only a science but also a form of remembrance. What science has "established" can be modified by remembrance. Remembrance can make ... the concluded (suffering) into something open-ended.’²² To seek to fix the meaning of historical moments in only a temporally restricted idea of context suggests that not only is the established past fully determined, fixed as foreign to contemporary eyes but also that the present moment is justified by its own context, alternative sources and narratives from the past obstructed from illuminating another world being possible.²³ Contrastingly, an approach to history that privileges new constellations of historical moments can illuminate the genealogies of contemporary given norms, so that what is presumed to be objective can be revealed to be constructed. Such an approach is, I argue, essential in order to unpack the genealogy of the jurisprudence that produces the contemporary War on Drugs.

3.2.2 Colonial-historiography and The Politics of Erasure

‘The settler makes history and is conscious of making it.’²⁴

Frantz Fanon

²⁰ Skinner, ‘Interpretation and the Understanding of Speech Acts’, p.116.

²¹ Ibid.

²² Walter Benjamin from an unsent letter to Horkheimer, quoted by Richard Wolin, ‘Experience and Materialism in Benjamin’s *Passagenwerk*’, in *Benjamin: Philosophy, Aesthetics, History*, ed. by Gary Smith (Chicago: The University of Chicago Press), p.225.

²³ Oscar Guardiola-Rivera, ‘Absolute Contingency and the Prescriptive Force of International Law’, in *Events: The Force of International Law*, ed. by Fleur Johns, Richard Joyce & Sundhya Pahuja, (London: Routledge, 2011).

²⁴ Frantz Fanon, *The Wretched of the Earth* (London: Penguin 2001), p.50.

A further reason for embarking upon a methodological approach that emphasises a history counter to orthodoxy is that it ties-in with the central argument of this thesis, which is to explain the War on Drugs through a recognition of a sacrificial mechanism underpinning the ‘humanitarianism’ of liberal international law. The argument that international legal order is produced through violence upon the colonised subject necessarily intersects with how the condition of becoming the colonised is itself always a temporally produced condition. In short, to be colonised is to be taken to be a pre-modern subject existing within modernity. Resultantly, the colonised become fixed upon a path of civilisation/progress/development that promises to erase the historical deficiency but serves only to perpetually defer the point of completion. Fanon recognised that the ‘damned’ can only free themselves from their purgatory through a recalibration of the ‘historical process.’²⁵ He emphasises that the ‘immobility to which the native is condemned can only be called in question if the native decides to put an end to the history of colonization--the history of pillage,’ and begins a new programme of time through a new understanding of how the past informs the present.²⁶

My argument takes up this invitation by bringing to the surface the violence enacted on the colonised/racially subaltern subject by the law that is masked by the humanitarian rhetoric of liberal international law. Arguing for an understanding of the contemporary international community as generated through violence enacted on subjects constructed as legitimate victims is an argument that requires unpacking orthodox histories that mask or erase this violence. In other words, history writing often acts itself as a mode of discursive violence that aids the invisibility of the sacrificial mechanism I aim to uncover. To make this argument, a historiography must be adopted that takes account of and sees a connection between how the conquistador’s sword, the slaver’s ship, the plantation master’s whip, the judge’s gabble and the jailer’s keys have shaped the history that we currently understand as legitimate. This places my work in opposition to a narrative which sees international law as just an intra-European phenomenon, ‘a history of rules developed in the European state system since the 16th century which then spread to other continents and eventually the entire globe.’²⁷ Girard’s theory details how the memory of the

²⁵ Fanon, *The Wretched of the Earth*, p.35.

²⁶ *Ibid.*, p.51.

²⁷ Bardo Fassbender and Anne Peters, ‘Introduction: Towards a Global History of International Law’,

sacrificial violence must fade from the collective history of the order for the sacrificial mechanism to be effective.²⁸ Unless the violence upon the colonised is uncovered the cyclical eruption of crisis and sacrifice persist in manner that is not even understood by those who enact the violence. To uncover the history of the sacrificial mechanism is to render its operation as void. My thesis attempts to perform such a history and thereby present a picture of international law that overrides the amnesia necessary for the sacrificial mechanism. In short, the chronology I engage with over the subsequent chapters is chosen not only to follow the spine of the thesis, provided by the drug prohibition treaties but also through emphasising the contexts of colonialism and war in which these treaties emerge. I aim for a constellation of historical moments that force a confrontation with what the law has been actively forgetting.²⁹

In my search for an alternative understanding for international legal order, I turn to the juridical framework that governed the colonial encounter in full recognition that all proclamations of origins are, by nature, contestable. As illustrated by my previous engagement with the Westphalian myth, every chosen origin invites a particular perspective upon the subject of study that is supposed to have been borne in that moment; those who elevate the Peace of Westphalia as the origin of international law, by extension tend to emphasise the secular, rationale and harmonious character claimed by international law. As opposed to assuming to escape such instrumental periodization, I will seek to recalibrate the point of origin in order to illuminate the presence of an alternative cohering anchor for international law. Through a concentrated focus on the juridical architecture of the colonial encounter, I will bring out that which has been forgotten so that the order formed can remain as it is. Rather than examining the legal framework of the colonial encounter in an impossible attempt to grasp a better understanding of that historical moment, I engage with it in order to cast a new light upon the problems of today. The historical work of this thesis will aim at the cracking open of the potential ordering of the globe offering a resistance against an understanding of the story of law or history as a story of

in *The Oxford Handbook of the History of International Law*, ed. by Bardo Fassbender and Anne Peters (Oxford: Oxford University Press, 2012), p.1.

²⁸ René Girard, *Violence and the Sacred* (Baltimore and London: The Johns Hopkins University Press 1977), p.303; ‘the memory of the generative violence fades from the collective consciousness.’ Also see René Girard, *Things Hidden Since the Foundation of the World* (New York: Continuum, 2003).

²⁹ Christopher Tomlins, ‘The Strait Gate: The Past, History, and Legal Scholarship’, *Law, Culture and the Humanities*, 5 (2009), pp.11-42, p.42.

completion, of closure.³⁰ It is a history responding to a contemporary problem in terms of the piling of bodies on top of bodies through the drug war and to make an intervention in this concrete juridical and political issue. This approach is following the dictum of Susan Buck-Morss, who explains that the ‘question of history's meaning cannot be asked outside of time but only in the thick of human action, the way the question is posed, the methods of the inquiry, and the criteria of what counts as a legitimate answer all have political implications.’³¹ Ultimately, the historical trajectory offered by this thesis takes aim at a violence of the law and aspires to make it contingent, as opposed to inevitable, through exposure.³²

3.3 Vitoria, De Indis and The Making of a Sacrificial International

Having defended the historical methodology I am applying, the remainder of this chapter will trace a history of international law that places its formative jurisprudence from the sixteenth century in conversation with the sacrificial structure I read within twentieth century liberal international legal order. My argument carries within it a claim about the origin of international law, yet one that continues my rebuttal of Westphalia as the most instructive point of departure from which to trace the formation of an international legal order. An alternative origin suggested by international legal historians is the works of Francisco de Vitoria, a sixteenth-century Spanish theologian and jurist who remains perhaps the most celebrated scholar to emerge from the famed School of Salamanca.³³ More specifically, it is in two sets of Vitoria’s lectures- *De Indis Noviter Inventis* and *De Jure Bellis Hispanorum in Barbaros*- that international legal jurisprudence has accredited as being born.³⁴The

³⁰ Christopher Tomlins and John Comaroff, “‘Law as...’: Theory and Practice in Legal History”, U.C. Irvine Law Review, 1, 3 (2011), pp.1039-1079, p.1056.

³¹ Susan Buck-Morss, *Hegel, Haiti and Universal History*, p.109

³² A guiding example is provided by Peter Linebaugh and Marcus Rediker, *The Many-Headed Hydra- Sailors, Slaves, Commoners, and the Hidden History of the Revolutionary Atlantic* (Boston: Beacon Press, 2000).

³³ See David Kennedy, ‘Primitive Legal Scholarship’, *Harvard International Law Journal*, 27, 1 (1986), pp.1-98; James Brown Scott, *The Spanish Origins of International Law* (Oxford: Clarendon Press, 1934); or Anthony Pagden, ‘Dispossessing the barbarian: The language of Spanish Thomism and the debate over the property rights of the American Indians,’ Anthony Pagden (ed.), *The Languages of Political Theory in Early-Modern Europe* (Cambridge: Cambridge University Press, 1987), p.80. ‘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.’

³⁴ See Antony Anghie, *Imperialism, Sovereignty and the Making of International Law*; or Peter Fitzpatrick, ‘Latin roots: The force of international law as event’, in *Events: The Force of International Law*.

topic of these lectures are the juridical conceptualisation of the relations between the Spanish and the Amerindians, 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 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.'³⁵ This shift towards seeing the colonial encounter as generative of international law is the first step towards illuminating a sacrificial international. The Vitorian schema of international law not only creates a new universal through marking difference but his juridical thought also corresponds with Girard's understanding of community production through sacred violence. Specifically, 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 Amerindian into the international legal order by fixing it in the condition of primary exclusion. This marrying of Vitoria with Girardian sacrifice will be revisited at length during later stages in this chapter. However, it is incumbent to firstly take stock of the scholarly conversation surrounding Vitoria in which I am intervening.

3.3.1 Vitoria's Contested Legacy

The significance of Vitoria's thought has been cause for contestation within international legal scholarship. The most celebrated scholar of the famed School of Salamanca, Vitoria commenced a tradition of Thomist interpretation of natural law that extended to the early seventeenth century through the work of his followers, including Luis de Molina and Francisco Suarez. Yet by the turn of the twentieth century, Vitoria's influence was often reduced in histories of international law, his role in the formation of the discipline overshadowed by other forefathers, particularly Hugo Grotius.³⁶ However, Vitoria's influence upon Grotius and his overall contribution to the birth of international law was resurrected by American legal scholar James Brown Scott in a series of writings and lectures in the early decades of

³⁵ See Anghie, *Imperialism, Sovereignty*, p.15.

³⁶ Martti Koskenniemi, 'Vitoria and Us', p.121.

the twentieth century.³⁷ For Scott, Vitoria's insistence on the humanity of the Amerindian in opposition to the prevailing consensus of his time, was an ideal point of origin in which he could ground his own conception of an international law founded a moral universalism. Following Vitoria, Scott argued that the source of communality lay within the liberal production of a single moral standard to be applied to all humanity.³⁸ Scott claimed that 'the corner-stone of Victoria's [sic] system was equality of states, applicable not merely to the states of Christendom and of Europe but also to the barbarian principalities in the Western World of Columbus.'³⁹ Through this formulation of world order, Vitoria was celebrated for 'for espousing the interests of indigenous populations against a predatory Spanish colonization of the Americas.'⁴⁰ Consequently, juridical thought in the early twentieth century promoted an image of Vitoria as 'a man of peace and religion... heroically turning against the colonial violence of his own countrymen.'⁴¹

However, this image of Vitoria was punctured in by a rise of post-colonial critique against the Spanish Theologian, especially Antony Anghie's book *Imperialism, Sovereignty and the Making of International Law*, published in 2005. Vitoria image as a liberal humanitarian was built upon his recognition of the legal rights of the Amerindian natives, decoupling the recognition of legal personality from the exclusive possession of the European or Christian he stated that 'the conclusion of all that has been said is that the barbarians undoubtedly possessed as true dominion, both public and private, as any Christians.'⁴² However, Anghie revisited Vitoria's jurisprudence and argued that within it lay an eventual accommodation of, rather than an opposition to, the brutalities of the Spanish *conquista*. Furthermore, as Martti Koskenniemi notes, there is an additional danger of Vitoria's humanitarian accommodation of violence compared to explicit colonial apologists, 'precisely because it is presented in the language of liberty and even equality.'⁴³ Anghie did

³⁷ See James Brown Scott, *The Spanish Origin of International Law* (Union, New Jersey: The Lawbook Exchange Ltd, 2000); or James Brown Scott, *The Catholic Conception of International Law* (New Jersey: The Lawbook Exchange 2007)..

³⁸ Christopher Rossi, *Broken Chain of Being: James Brown Scott and the Origins of Modern International Law* (Leiden: Brill, 1998) p.10.

³⁹ Scott, *The Spanish Origin of International Law*, p. 281.

⁴⁰ Fitzpatrick, 'Latin roots', *Events: The Force of International Law*, p.48.

⁴¹ Koskenniemi, 'Vitoria and Us', p.121.

⁴² Francisco de Vitoria, 'On the American Indians', in *Vitoria: Political Writings*, ed. by Anthony Pagden and Jeremy Lawrance, trans. by Jeremy Lawrance (Cambridge: Cambridge University Press, 1991), pp.233-290, p.250

⁴³ *Ibid.*, p.122.

recognise that Vitoria departed from justifying colonial violence through characterising the Amerindians as inferior species and natural slaves, a position that held sway with preceding influential jurists such as Juan Ginés de Sepúlveda.⁴⁴ However, rather than uncritically celebrate Vitoria as a prototypical altruistic liberal humanist, Anghie spies within Vitoria's thought a stipulation to his generosity; for while he may have seen the Amerindians as human, he did not see them to be quite as human as the Spanish (the pre-determined standard for humanity) leaving Vitoria to understand his task as 'creating a system of law to account for relations between societies which ... belong to two very different cultural orders.'⁴⁵

Anghie's critique was the apotheosis of a significant counter-narrative that had emerged to dissent against the celebration of Vitoria as the benevolent 'defender of the Indians.'⁴⁶ Robert Williams had already identified that Vitoria's jurisprudence 'justified the extension of Western power over the American Indians as an imperative of the European's vision of truth.'⁴⁷ Furthermore, Carl Schmitt had also critiqued the humanitarian image of Vitoria, arguing that Vitoria's 'conclusions ultimately justified the conquista.'⁴⁸ Anghie expanded on this line of critique by bringing in clearer focus the extent to which Vitoria's schema, including the Amerindian within an international community yet forgiving the violence of the conquista, laid the structure for a 'dynamic of difference' within the single universal.⁴⁹ This 'dynamic of difference', Anghie argues, is the process through which international law produces and sustains an operative distinction between peoples presumed to be civilised and those presumed to be savage.⁵⁰ Anghie traces this 'dynamic of difference' from Vitoria through to the Mandate System of the League of Nations in the interwar period, to the establishment of United Nations right up to the justifications for foreign intervention in the 'war on terror.'⁵¹

However, Anghie's critique of Vitoria has, in turn, provoked a response by

⁴⁴ For more on Sepúlveda's thought, see Lewis 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*, (DeKalb: Northern Illinois University Press, 1994). Hanke tells us that for Sepúlveda, the natives were as inferior to the Spanish 'as monkeys were to men' (p.84).

⁴⁵ Anghie, *Imperialism, Sovereignty*, p.16.

⁴⁶ Koskenniemi, 'Vitoria and Us', p.121.

⁴⁷ Robert A. Williams, *The American Indian in Western Legal Thought. The Discourses of Conquest* (Oxford: Oxford University Press, 1990). pp. 6-8.

⁴⁸ Carl Schmitt, *The Nomos of the Earth in the International Law of the Jus Publicum Europaeum* (New York: Telos Press, 2013), p.113.

⁴⁹ Anghie, *Imperialism, Sovereignty*, p.4.

⁵⁰ Ibid.

⁵¹ Ibid., see chapters 3-6.

those who consider it important to retain Vitoria's humanitarian legacy. Georg Cavallar accused Anghie of making 'fanciful connections between Vitoria and the discipline of 19th century international law' emphasising that the key concepts that being read in Vitoria's work by post-colonial critique- race, colonialism, legal positivism etc- would have been alien to Vitoria and the time in which he delivered his lectures.⁵² Cavallar continues by arguing that it is 'one-sided to present him [Vitoria] as an unequivocal accomplice of European colonialism' and cites Vitoria's personal letters commenting on the conquest of Peru by Pizzaro as evidence of the extent to which he was deeply horrified at the bloodlust displayed by the conquistadores.⁵³ Vitoria's reluctance to condemn them in more vehement terms publically should be accredited to the fear of political costs he would have had to endure for doing so.⁵⁴ Ian Hunter also critiqued Anghie's argument, claiming that Anghie and other postcolonial critics of Vitoria actually fail to extract themselves from the project of constructing a universal history that is itself inadvertently the product of a Eurocentric philosophical perspective.⁵⁵ Charging Anghie with committing the contextualist sin of anachronism, Hunter suggests that Vitoria's jurisprudence would not have been received in the terms of facilitating or failing to facilitate a 'global normative order or 'international justice', and cannot be understood by modern historians in this way either.'⁵⁶ For Hunter, both Vitoria's critics and defenders make the mistake of projecting his jurisprudence against a failed or already realised concept of 'a transcendent global justice and universal history.'⁵⁷

However, in addition to the aforementioned limitations of contextualist histories for the study of law or jurisprudence, it should be noted that Anghie was not anachronistically reading a modern internationalism into the Vitoria's thought. Rather, the value of Anghie's argument lies in its insightfully appreciation of how, particularly through James Brown Scott, Vitoria's jurisprudence 'was systematically and carefully reconstructed in the United States of America at the dawn of the

⁵² Georg Cavallar, 'Vitoria, Grotius, Pufendorf, Wolff and Vattel: Accomplices of European Colonialism and Exploitation or True Cosmopolitans?', *Journal of the History of International Law*, 10 (2008), p.207.

⁵³ *Ibid.*, pp.209-211.

⁵⁴ *Ibid.*, p.191.

⁵⁵ Ian Hunter, 'Global Justice and Regional Metaphysics: On the Critical History of the Law of Nature and Nations,' in *Law and Politics in British Colonial Thought: Transpositions of Empire*, ed. by Shaunnagh Dorsett and Ian Hunter, (New York: Palgrave Macmillan, 2010), pp.11-29.

⁵⁶ *Ibid.*, p.12.

⁵⁷ *Ibid.*

twentieth century to make sense of practices and institutions that were already reshaping the world.’⁵⁸ It is this Vitoria, the ‘Vitoria in Washington’ that I will hold in conversation with the violence of drug prohibition.⁵⁹ The ways in which Vitoria was recovered in Washington will be engaged with in greater depth in *Part B* where I will illustrate how this recovery emerged conterminous with the move towards drug prohibition. However, it is first necessary to engage fully with Vitoria’s jurisprudence before speaking to the significance of his recovery and the guidance it may provide towards recognising the War on Drugs as an instantiation of international law’s sacrificial structure.

3.3.2 Vitoria, Colonialism and Modernity’s Theological Inheritance

Having taken account of the scholarly debate surrounding Vitoria, my intervention will be a reading of his thoughts in relation to my own argument regarding the sacrificial moorings of international law. Vitoria provides an appropriate point of departure for unpacking the role of sacrifice in international law for not only does his thought directly concern the colonial context but it also disrupts the presumption of international law’s claim to an immanent ontological completeness as it ‘straddles the divide between a medieval world ... and a secularized modernity.’⁶⁰ In comparison with other potential ‘forefathers’ of international law, such as Grotius or Vattel, Vitoria’s work and biography is more challenging to force into modernity’s claims to a rational disenchantment of the world; even at his most humanist, the spectre of theology consistently haunts Vitoria’s jurisprudence. The twentieth-century recovery of Vitoria sought a secularisation of the Dominican friar through a celebration of his rebellion against medieval political authority. Vitoria not only rejected presumptions of the natural slavery of the colonised, he also turned against the received arguments that justified Spanish colonialism on the basis of the universal authority of the Christian church. For Vitoria, just because the colonised are heathens who have still be to brought into Christian faith, it does not allow the law to ‘deny to them, who have never done us any wrong, the rights we concede to Saracens and Jews, who have been continual

⁵⁸ Anne Orford, ‘The Past as Law or History? The Relevance of Imperialism for Modern International Law’, *IILJ Working Paper* (2012/2), *History and Theory of International Law Series*, p.16.

⁵⁹ *Ibid.*

⁶⁰ Fitzpatrick, ‘Latin roots’, *Events: The Force of International Law*, p.43.

enemies of the Christian religion.’⁶¹ At 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] at the time.⁶² However, it must also be stressed Vitoria remained a theologian throughout, his Thomistic training, as well as his concern with the internal rivalry between Catholicism and Protestantism plaguing the Christian church at the time, remained central to his entire jurisprudence.⁶³ In this bestriding of the divide between the modern and pre-modern, Vitoria’s thought contained a recognition of international law as focused on ‘not just on the assertion of a sovereign statehood but also on the quality, the communal quality, of the international.’⁶⁴ In other words, Vitoria concerned himself with what would hold together an international legal order in the manner once performed by a transcendent external point of authority such i.e God.

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 the system of law that could account for and govern Spanish-Amerindian relations.⁶⁵ His position made Vitoria an authority upon the important moral issues of the day and in 1537 a particularly pressing issue was the question of the legality of colonial governance. From the moment that confirmation of Christopher Columbus’ arrival in the Americas was received in Spain, the question of law became an urgent one. Upon his ‘discovery’, Columbus had dispatched a letter to Luis de Santangel, finance minister to the crown of Castille 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.’⁶⁶ Implicit within Columbus’ statement is a provocation: ‘what meaning could his legal ceremonies have for the people who were ostensibly to be bound by them?’⁶⁷ In other words, when the Spanish encountered the Amerindian on the American continent, what was the law that should be followed? Was there a universal law that could be referred to and if so, what held it together? This is the problematic that Vitoria was engaging

⁶¹ Francisco de Vitoria, ‘On the American Indians’, p.251

⁶² Upendra Baxi, ‘New Approaches to the History of International Law’, *Leiden Journal of International Law*, 19 (2005), pp.555-566, p.560

⁶³ Pagden, ‘Dispossessing the barbarian’, p.83.

⁶⁴ Fitzpatrick, ‘Latin roots’, *Events: The Force of International Law*, p.44.

⁶⁵ Pagden, ‘Dispossessing the barbarian’, p.79.

⁶⁶ Christopher Columbus, ‘Letter of Columbus on the First Voyage’, in Cecil Jane (ed. and trans.), *The Four Voyages of Columbus* (New York: Dover, 1988), p.1.

⁶⁷ Anghie, *Imperialism, Sovereignty*, p.16.

with in his *relectiones*.

3.3.3 Bringing the Transcendent into the World

Vitoria's first step in thinking through the communality of the international was to eschew an explanation for a universal law that solely rested upon the dominion of *respublica Christiana*. Vitoria's celebration as a prototypical liberal humanist came not only from a reading of his 'generosity' to the Amerindians, but also because he did so through the discourse of natural law rather than deferring to a divine law, claimed by the Christian Church as proffering upon it universal jurisdiction. Following Thomas Aquinas, Vitoria conceived of a natural law that was not opposed to divine law, but was accessible to human reason in a way that divine law was not. The natural law of Vitoria is still informed by a divine law but performs a shift in the scholastic tradition, but rejecting the claim of access to divine law as a potential ground for worldly jurisdictional authority. Divine law had provided the default mode of justifying the Spanish claim to dominium over the Americas prior to Vitoria's intervention. Divine law invested into the Pope a universal jurisdiction on account of his divine mission to spread Christianity and therefore Christian sovereigns found their actions to be justified if recognised by the Pope. The Papal Bulls of Donation made by Alexander VI in 1493 had granted the Spanish dominion over all non-Christians lands they might encounter in the western hemisphere and therefore, had seemingly provided the answer to question of law in relation to the *conquista*.⁶⁸ However, Vitoria revisited the question of Spanish-Amerindian relations commencing with 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. Vitoria does not deny the universal spiritual authority of Christ, but recognises that this does not translate into stable grounds for a universal political authority to be claimed by the Pope being Christ's earthly vicar. Vitoria tells us that while Christ 'may have spiritual power over the whole world, over unbelievers as much as the faithful...the Pope does not have that power over unbelievers' evidenced by his inability to 'excommunicate them or prevent them from marrying.'⁶⁹ Ultimately, Vitoria makes apparent his shift away from the hegemony of Rome when he declares

⁶⁸ Pagden, 'Dispossessing the barbarian', p.82.

⁶⁹ Francisco de Vitoria, 'On the American Indians', pp.260-261.

‘the Pope is not civil or temporal lord of the whole world in the proper sense of the words “lordship” and “civil power.”⁷⁰ Following Vitoria, for the Amerindians to be held to the laws of the Spanish crown on the grounds of divine law does not answer the question of law facing the colonial project, but rather serves only to displace from the Spanish onto the Papacy the imperative question of law. Vitoria instead argues that the grounds for a law governing the Spanish-Amerindian would ultimately have to be sourced from the human world.

This humanist shift informed the subsequent image of Vitoria as a proto-secularist. It is an image attested to not only by those who celebrate Vitoria, but also by critics like Anghie, who claims that ‘Vitoria clears the way for his own elaboration of a new, secular, international law’, reading his refusal of the papal missionary mandate to justify Spanish title over the Americas as creating ‘a new system of international law which essentially displaces divine law and its administrator, the Pope, and replaces it with natural law administered by a secular sovereign.’⁷¹ However, the secularism of Vitoria’s thought can be overemphasised. It should be noted that Vitoria always held himself to be a theologian. Vitoria did not distinguish theology from jurisprudence, which were intertwined within his schematic.⁷² Furthermore, Vitoria’s biography also offers qualification against the fixing of him as the forefather of law’s secularisation, it should be noted that Vitoria never sought to be a crown counsel or advocate and in his writings referred to jurists with derision.⁷³ Ultimately, when Vitoria addressed the legal questions of his day, he did so in recognition of their interlinkage with, rather than separation from, the questions of a theological nature. Vitoria’s writings betray the religious as anchoring the humanitarianism of the juridical in a manner denied by secularism of the twentieth century liberal international lawyers who recovered him.

The extent to which the theological continued to inform Vitoria’s jurisprudence becomes of relevance when considering his understanding of the communality that held together international law. Vitoria’s refusal of the papal bulls set the terms for a new universal order, it was a shifting of the global order, away from a template which divided between ‘areas of Christian lawfulness and areas

⁷⁰ Ibid., p.260.

⁷¹ Anghie, *Imperialism, Sovereignty*, p.28; p.18.

⁷² China Miéville, *Between Equal Rights: A Marxist Theory of International Law* (Boston: Brill, 2005), p.174.

⁷³ Schmitt, *The Nomos of the Earth*, p.110.

without law, and thence ripe for free acquisition.’⁷⁴ The delinking of the rights offered by law from a Christian monopoly signals an emerging shift from a notion of the Christian and the proselytising mandate, as the universal subject towards a notion of the ‘human’ and its eventual apotheosis in civilising mission. However, any sharp temporal demarcation between the medieval and the modern assumed by discourses of modernity is betrayed by Vitoria’s thought as well as his biography. Where my reading of Vitoria departs from Anghie’s post-colonial critique is in terms of extent to which we recognise the theological as still persisting within Vitoria’s jurisprudence. Vitoria’s shift from a world governed by divine law to one governed by natural law is not a shift that ‘displaces divine law ... and replaces it with natural law’ as suggested by Anghie, but rather a shift that seeks to draw the transcendence of divine law into the natural world. As Kathleen Davis makes clear:

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.⁷⁵

There is not a break but rather a continuity from a monotheistic Christianity to a univocal ‘humanitarian’ international law. The resultant universal order that Vitoria seeks to ground in natural law continues to attribute to itself the totalising force of a transcendent deity. The interweaving of a theological notion of the transcendent with the leap affected to bring about the claim of Euro-modernity is indicated in the extent to which the Spanish colonialism, and therefore the birth of European colonisation of the globe, operated as a seamless joint Church-State venture.⁷⁶ Vitoria’s universal legal order set the stage for a community of sovereign nation states to function as a deific surrogate in the age of Euro-modernity, arrogating upon itself an omnipotence that was previously the sole preserve of a jealous God. Vitoria may extract the political order of law from a reliance on this external authoritative reference point of a Christian God but he does so not by detaching from the reverential power of the

⁷⁴ Fitzpatrick, ‘Latin roots’, p.49.

⁷⁵ Kathleen Davis, ‘Timelines: Feudalism, Secularity and Early Modernity’, *South Asia: Journal of South Asian Studies*, 38, 1 (2015), pp.69-83, p.78

⁷⁶ Anthony Pagden, *Lords of All the World* (New Haven: Yale University Press, 1998) pp. 32-33.

transcendent via atheistic mutilation, but rather, in a Promethean gesture, by stealing the transcendent reference point so as to bring it into the law itself. In short, there is much of the old theological epoch that persists in Vitoria's schema. China Miéville goes some way towards illuminating the fallacy of Brown Scott's characterisation of Vitoria as a modern, liberal secularist by identifying '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.'⁷⁷ With this analysis, Miéville is correct in identifying the extent to which the 'pre-modern' continued to inform Vitoria's schema but he also misrecognises this as evidence of Vitoria producing a 'paradoxical proto-modernity.'⁷⁸ Stressing the concerns of materialism over the political-theological, Miéville overlooks the extent to which the pre-modern persistently informs not only Vitoria's thought but also modernity itself more widely. 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 nature of modernity, puncturing its claim to be founded on the disenchantment of the world. Modernity, with modern law as an exemplar par excellence, requires a transcendent move to advocate a settled origin, a fixed ground on which a secularised truth regime can be built. The paradox does not indicate a proto-modernity; the containment of the paradox is the act of modernity itself, helping us to understand 'modern law as the realization yet denial of the sacred,' rather than its binary opposition.⁷⁹

Therefore, the readings of Vitoria, by both champions and critics, which see the theologian as fathering a secular system of international law fail to appreciate the extent to which modernity and its correlative internationalism remained indebted to a religious metaphysics. In its claim to being ontologically complete, international law inherits the surpassing claims of a monotheistic deity. Read as a purely secular system of law, international law is then charged with offering the grounds for its own authority, inviting the questioning of how a social order can account for itself in entirety? However, if perceived in terms progressing from, rather than being a sharp break from, the preceding religious order of the Christendom then international law can be better understood 'as an ironic apotheosis of the sacred rather than its utter

⁷⁷ Miéville, *Between Equal Rights*, p.174.

⁷⁸ Ibid.

⁷⁹ Fitzpatrick, 'The Triumph of a Departed World', *Law and the Sacred*, p.158.

denial.’⁸⁰

The argument that modernity continues to derive its functionality from the religious is an argument that has found favour with critical scholars recently, prompting claims of a ‘return to theology.’⁸¹ Questions of law offer a prime location for this ‘return to theology.’ Girard offers guidance as to why the law has been a prime candidate for scholars searching for modernity’s religious inheritance by clarifying the role that religion served in preceding epochs. Rather than religion being simply the worship of an invisible God as it is now retrospectively constructed as, Girard shows how religion’s primary purpose was to provide a transcendental architecture through which to ‘subdue violence, to keep it from running wild.’⁸² A unitary social order was taken to be only possible through the invocation of a ‘religion [which] tames, trains, arms, and directs violent impulses as a defensive force against those forms of violence that society regards as inadmissible.’⁸³ Girard recognises that it is this responsibility for containing violence within society that has been inherited by our modern legal systems. With law holding contagious violence in check, the modern mind is able to hold itself in contradistinction to the mind of the religious follower, whose consciousness is thereby temporally relegated to be a condition befitting of a darkened past.⁸⁴ As Girard tells us, modernity’s dismissal of religion is a luxury only afforded by law’s inheritance of the cathartic mandate, it is only ‘because we have no need for it, religion itself appears senseless.’⁸⁵ Yet not only does the law take over the mantle of containing contagious violence, it does so whilst being more adept at concealing of its workings. 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 by stating:

The "curative" measures ...become increasingly mysterious in their workings as they progress in efficiency. As the focal point of the

⁸⁰ Ibid., p.157.

⁸¹ See for instance Hent de Vries and Lawrence E. Sullivan (eds), *Political Theologies: Public Religions in a Post-secular World* (New York: Fordham University Press, 2006); or Slavoj Žižek, *The Puppet and the Dwarf. The Perverse Core of Christianity* (Cambridge: MIT Press, 2003).

⁸² Girard, *Violence and the Sacred*, p.20.

⁸³ Ibid.

⁸⁴ The Darkened past is a space occupied by both euro-modernity’s past and its contemporary others. See Kathleen Davis, *Timelines: Feudalism, Secularity and Early Modernity*, p.69 ‘irrational, superstitious, traditional, and have long been applied both to Europe’s past and to contemporary peoples who serve to constitute modernity’s outside – whether the colonized, rural outliers, or the urban poor’

⁸⁵ Girard, *Violence and the Sacred*, p.20.

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.⁸⁶

Following Girard, it can be seen how imperative it is for the machinery of the law to deny its cathartic mandate and insist upon an exclusive concern with justice or order, relegating concepts such as sacrifice to the darkened past and darkened people law constitutes itself in opposition to. In short, as stated earlier, the law contains, in both senses, the violence and the sacred of the 'primitive' but misrecognises these elements within itself. This masking of the persisting sacred quality of law underwrites the recovery of Vitoria. As Peter Fitzpatrick argues, 'the intensity of the opposition between modern law and the sacred is not because they are different but, rather, the same yet having to appear different and opposed.'⁸⁷ This is only amplified when discussing international law and its claim to universal authority. If Vitoria does offer an 'origin' for modern jurisprudence, he does so through bringing his scholastic theological training to bear on questions of the colonial encounter, resulting in a universal schema that remains transcendent but no longer requires a unifying positive, external point of reference. Instead the impasse at the heart of the international legal order, the absence of an overarching authority to quell violent rivalry, is resolved by way of a negative move, the cathartic inclusive/exclusion of the other. Vitoria's innovation is that he provides the structure for an international community to be brought into some sort of coherence by way negation; it is what other is not, despite the other being dammed to exist within its universal jurisdiction. This shift recalibrates our reading of Vitoria's refusal to justify the *conquista* in the authority of Rome from being a critique of the violence of colonialism to in fact opening up a space for a further totalising form of violence. Kathleen Davis illustrates:

This transcendent, spiritual claim [of Vitoria's natural law of nations] is a far more sweeping and powerful argument for Spanish dominion in the Americas than any claim based on the Pope's universal jurisdiction over the world. It is likewise more violent for it is 'in the interests of the preservation of the peace' that Vitoria can approve mass violence and the slaughter of innocents, which he otherwise finds unacceptable.⁸⁸

⁸⁶ Girard, *Violence and the Sacred*, p.21.

⁸⁷ Fitzpatrick, 'The Triumph of a Departed World', *Law and the Sacred*, p.182.

⁸⁸ Kathleen Davis, *Timelines: Feudalism, Secularity and Early Modernity*, p.80

Once Vitoria's meditation on the Spanish-Amerindian relations is no longer held as a secular break from the past but rather understood as a reworking of the sacred into the modern at the point of origin, the door is opened to reinterpret his ultimate justification of the violence of colonialism along the contours of sacrifice.

3.4 A Sacrificial *Jus Gentium*: The Inclusive/Exclusion of the Colonised

As aforementioned, along with the picture of Vitoria as a proto-secularist, the other image of him that was propelled by his twentieth-century recovery was that of him being a great humanist, 'a broad-minded, high-minded and charitable person' who could serve as an inspiration for a new age of international humanitarianism.⁸⁹ Vitoria was characterised as a jurist who was able to recognise the humanity of the Amerindian at a time that few others could. Scholars continue to celebrate Vitoria on account of how 'his concept of human rights suggests a form of moral cosmopolitanism.'⁹⁰ Again, it is important to recognise that Vitoria's characterisation of the Amerindian did mark a shift from the naked dehumanisation contained in previous meditation upon Spanish-Amerindian relations as offered by the likes of Sepulveda. Sepulveda invoked a neo-Aristotelian concept of natural slavery to emphasise the inhumanity of the Amerindian's, justifying Spanish pillaging of their lands and riches because the Amerindians existed in violation of the laws of nature. In contrast, Vitoria acknowledged the humanity of the Amerindians, a position that helped fuel his reputation as an audacious dissident against the excess of colonial violence. However, Vitoria's bringing of the Amerindian inside the borders of a universal humanity, ultimately only 'endorses the imposition of Spanish rule on the Indians by another argument.'⁹¹ Building on this point made by Anghie and others, a further understanding of Vitoria's inclusive/exclusion of the Amerindian into the universal order can be offered by the concept of sacrifice which highlights not only the theological underpinning of Vitoria's schema but also guides us towards the productive role that the violence that would ultimately be endured by the colonised

⁸⁹ James Brown Scott, *The Catholic Conception of International Law* (New Jersey: The Lawbook Exchange 2007), p.3.

⁹⁰ Georg Cavaller, 'Vitoria, Grotius, Pufendorf, Wolff and Vattel: Accomplices of European Colonialism and Exploitation or True Cosmopolitans?' 10 *Journal of the History of International Law* (2008), p.192

⁹¹ Antony Anghie, *Imperialism, Sovereignty and the Making of International Law*, p.22.

once within the jurisdiction of a universal humanity whose vary basis was developed in opposition to them. Illustrating how Vitoria serves as a prototype for a ‘sacrificial’ liberal international law informs this innovative reading of Vitoria alongside Girard’s sacrificial mechanism.

3.4.1 On the American Indians

Vitoria begins his reflections *On the American Indians* by recognising that ‘before the Spanish arrived, these barbarian’s possessed true dominion’ over their land as any Christian did over theirs.⁹² Deviating from Sepulveda’s strict take on Aristotle, Vitoria dismisses the idea that Amerindians fitted the model of natural slaves and therefore all excesses were licensed upon them. Vitoria read the Amerindian against the rivals of the Christian world, the ‘Saracens and Jews’, arguing that if the Spanish could recognise the humanity and legal rights of their ‘continual enemies’ then they could not deny that same recognition to the Amerindian.⁹³ Vitoria invoked the authority of Aquinas in concluding that ‘it is no impediment for a man to be a true master, that he is an unbeliever.’⁹⁴ To be a heathen did not cancel the humanity of unbelievers, therefore nor can it override the legal rights they enjoy in law.

However, the Amerindians were invited in the universal community of mankind with a qualification: that if they were to be recognised as human, they had to behave like human beings and to be human was a predetermined standard already embodied by the Spanish. This is the inclusive/exclusion of the Vitorian schema. For Vitoria, the Indians’ possession of universal reason was a pre-requisite to being human and therefore being bound by *jus gentium*. However, this *jus gentium* presumed as ‘universal’ the particularities of Christian Spain. The presumption of ‘human’ was developed in comparison to a standard already determined. Vitoria invites the Amerindian into the category of humanity but as Anghie states, this invitation can only be realised through the ‘adoption or the imposition of the universally applicable practices of the Spanish.’⁹⁵

The cost of entering Vitoria’s universal humanity was that the Amerindian

⁹² Francisco de Vitoria, “On the American Indians” in *Vitoria: Political Writings*, p.251.

⁹³ *Ibid.*, p.250-251.

⁹⁴ *Ibid.*, p.250.

⁹⁵ Antony Anghie, *Imperialism, Sovereignty and the Making of International Law*, p.23.

was now be 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.’⁹⁶ If the Amerindians denied the Spanish these rights, this would constitute ‘acts of war’ in accordance to Vitoria’s jurisprudence. As a result, the Spanish would then be fully justified in unleashing violence upon the Amerindians 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.

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. Scott reads Vitoria’s ‘unlimited’ and ‘universal’ rights as evidence that Vitoria ‘treats Christians and non-Christians, Europeans and non-Europeans, upon a like footing.’⁹⁷ However, even if the privileging of the terms ‘Christian’ and ‘European’ in each respective binary was ignored, Vitoria’s rights could only be read as neutral when divorced from the material history they were being derived from. This myopia even strikes Scott, who acknowledges how Vitoria’s exemplar for illustrating a reciprocal right to trade being the Spanish having a right to dig for Amerindian gold and silver, items ‘in which his [Vitoria’s] countrymen were particularly interested,’ may betray an imbalance in this reciprocity.⁹⁸ The postcolonial critique of Vitoria is at its most penetrating when addressing how a misrecognition of the lived reality of the Spanish-Amerindian encounter underwrites Vitoria’s apparent humanism⁹⁹ Vitoria’s generosity in articulating a universal ‘right to travel’ ignores that movement between the Iberian peninsula and the ‘new-world’ was strictly one-way; to invite the Amerindian into an emerging world market through a universal ‘right to trade’

⁹⁶ Francisco de Vitoria, “On the American Indians” in *Vitoria: Political Writings*, p.278-284.

⁹⁷ James Brown Scott, *The Catholic Conception of International Law* (New Jersey: The Lawbook Exchange 2007) p.22.

⁹⁸ *Ibid.*, p.22.

⁹⁹ Antony Anghie, *Imperialism, Sovereignty and the Making of International Law*, p.22

overlooks the extent to which the Spanish-Amerindian trade took the form of plunder rather than exchange. The universal ‘right to proselytise’ did not envision the Amerindians having ‘the same rights of propaganda and intervention for their idolatry and religious fallacies as Spanish Christians.’¹⁰⁰ In short, the material realities of the context to 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. China Miéville captures the contradiction inherent in Vitoria’s universalism, labelling it ‘colonialism-in-equality.’¹⁰¹ For Miéville, this contradiction in Vitoria’s jurisprudence is what gives international law its form.¹⁰² Miéville suggests ‘colonialism is in the very form, the structure of international law itself, predicated on global trade between inherently unequal polities, with unequal coercive violence implied in the very commodity form.’¹⁰³ This statement illuminates how international law is structured so as to be formally inclusive while masking a violent exclusion of damned subjects from its universal order.

Anghie’s work furthers the critique by recognising that for Vitoria ‘the issue of Indian personality’ is the question that anchors his reflections on the Spanish-Amerindian encounter.¹⁰⁴ His jurisprudence aims to fix the Amerindian as a being, one that is simultaneously inside and outside the boundaries of humanity. Vitoria’s invitation of the Amerindian into the universal realm simultaneously encloses the Amerindian within a purgatorial existence. Identifying the template for the paradox of colonial subjectivity, Anghie shows that in Vitoria’s scheme:

The Indians belong to the universal realm like the Spanish [...], Vitoria asserts, they have the faculty 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.¹⁰⁵

¹⁰⁰ Carl Schmitt, *The Nomos of the Earth in the International Law of the Jus Publicum Europaeum* (New York: Telos Press) p.113.

¹⁰¹ China Miéville; *Between Equal Rights: A Marxist Theory of International Law*, p.178.

¹⁰² *Ibid.*, p.176.

¹⁰³ *Ibid.*, p.178.

¹⁰⁴ Antony Anghie, *Imperialism, Sovereignty and the Making of International Law*, p.22

¹⁰⁵ *Ibid.*

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 the humanity of the colonised becomes contingent upon their improvement. This (im)possible development of the colonial subject underwrote the Vitorian schema as was recognised by Scott, the scholar largely responsible for Vitoria's twentieth century recovery, within his celebration of Vitoria's humanism:

Victoria recognized that there were peoples in an imperfect state of civilization; 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.¹⁰⁶

However, the inclusion promised is always an inclusion deferred, as the Amerindian is invited into the universal whilst also becoming the constitutive outside against which the Spanish are contrasted. The Amerindian is 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 Amerindian's exclusion.¹⁰⁷ Vitoria's translation of a theological schema onto this question of the new universal order is made most apparent when he draws on Aquinas, himself following Aristotle, to define the legitimate sovereign subjects of international law as 'perfect communities', states that are self-sufficient, complete and ontologically whole within themselves.¹⁰⁸ The totality of the godhead is imported into the sovereign states, who now constitute the basis for their own authority. In contradistinction to the perfect community, exemplified by Spanish (ergo European) community were the imperfect communities such as those inhabited by the Amerindians.¹⁰⁹ It must be emphasised that for Vitoria, the imperfection of the Amerindian communities was not an essential feature of them, it was simply an indication of "something lacking."¹¹⁰ Their potential made them not perfect but 'perfectible', however the persistence of this logic into the twenty-first century

¹⁰⁶ Scott, *The Spanish Origin of International Law*, p.11.

¹⁰⁷ Fitzpatrick, *The Revolutionary Past*, p.121.

¹⁰⁸ Vitoria, 'On the Essence of Law', *Vitoria: Political Writings*, pp.260-261.

¹⁰⁹ *Ibid*, p.301: "A perfect community or commonwealth is therefore one which is complete in itself...such commonwealths are the kingdom of Castille and Aragon, and others of the same kind."

¹¹⁰ Vitoria, p.301.

rhetoric of ‘developed and developing’ countries demonstrates just how indefinite Vitoria’s the promise of perfectible for the colonised has been.¹¹¹ Here is the production of the purgatorial existence for the colonised that Fanon elegantly captures as damnation.

That Vitoria was not merely speaking to the condition of the Amerindian, but actively constructing them as a novel subjectivity through his jurisprudence, is suggested within the lecture title of *De Indis Noviter Inventis*. *Noviter* translates from Latin to English as to ‘reconstitute’ whilst the word ‘inventis’ can mean both ‘discovery’ and ‘invention.’ These translations give suggestion to the dual work being undertaken by Vitoria’s lectures: to account for Spanish Amerindian relations post-discovery’ but, moreover, to constitute the Amerindian, the prototypical colonial subject, as an innovative subjectivity. Ultimately, it is a subjectivity which is rendered naked before a legitimising and (re)generative violence. Vitoria’s jurisprudence allows the European to posit that ‘we’ are complete while ‘they’ are provisional, they can only become complete by becoming like us and to facilitate this development, any violence required to force them to do so is justified.¹¹² In fact, the aforementioned violence is read as not so, for it is now the purifying force exorcising the problem that had disturbed the completion of the whole, in this case a Europeanised universal. The universal human community can come into being by perfecting the ‘imperfect’ human subjects by violence if necessary.

3.4.2 Vitoria’s Jurisprudence and the Spectre of Rivalry

By unpacking Vitoria’s ultimate justification of the violence of the conquista whilst reading it alongside the cathartic properties of sacrificial violence, Vitoria’s model of colonialism-in-equality no longer appears contradictory but coherently mythic. By mythic, I refer to how sacrificial violence functions so as to be lawmaking. The mythic element of law serves as the ‘mute ground which enables ... a unified ‘law’ and which brings together law’s contradictory existences into a patterned coherence.¹¹³ The ease of reading Vitoria alongside a notion of ‘sacrifice’ is facilitated by the context in which Vitoria was writing being one of contagious

¹¹¹ Oscar Guardiola-Rivera, *What If Latin America Ruled the World? How the South Will Take the North Through the 21st Century* (London: Bloomsbury), p.84.

¹¹² Guardiola-Rivera, ‘Absolute Contingency’, *Events: The Force of International Law*, p.37.

¹¹³ Peter Fitzpatrick, *The Mythology of Modern Law* (London: Routledge, 1992), p.2.

rivalry. The schism in the Christian church was an abiding concern of the day, as Ramon Hernandez describes:

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.¹¹⁴

It is instructive to consider Vitoria 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 the Christendom. Anthony Pagden acknowledges 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.’¹¹⁵ Hernandez offers further support for this viewpoint observations when he argues that as ‘Vitoria ascended to his professorship, war appeared to be an invincibly malignant tumour that had infected all of Christendom.’¹¹⁶ Therefore, if we follow this argument, we can read Vitoria’s writings as a reaction to a context in which ‘there was an urgent need to invoke the supreme argument of the natural unity of all peoples in order to definitively dissolve armed conflicts’¹¹⁷ For it should be recalled that, in response to the reformation which would shatter the Christendom within Vitoria’s lifetime, the ‘discovery’ of the Americas served as a release valve for a political order that was descending into the crisis of rivalry.¹¹⁸ Vitoria, along with the other juridical theologians of that time, can be read as trying to bring about unity within the European world as well as founding a universal order of legal recognition and it is by beginning with an understanding of the inclusive/exclusion of colonised within Vitoria’s jurisprudence as a response to fundamental rivalry, that the argument I have pursued in this chapter, that the resonance between Girard and Vitoria becomes further apparent.

¹¹⁴ Ramon Hernandez, ‘The Internationalization of Francisco de Vitoria and Domingo De Soto’, *Fordham International Law Journal*, 15, 4, pp.1031-1059, p.1031.

¹¹⁵ Pagden, ‘Dispossessing the barbarian’, p.83.

¹¹⁶ Hernandez, ‘The Internationalization’, p.1031.

¹¹⁷ *Ibid.*, p.1042.

¹¹⁸ See Lewis Hanke, *All Mankind is One*, p.4-7 for discussion on the relationship between colonialism and the reformation. ‘Luther and Cortez were to be born in the same year: one to destroy the church the other to rebuild it’.

Once Vitoria's jurisprudence is recast as a project concerned with resolving contagious violence, the Girardian corollary would anticipate the production of a sacrificial victim on whom violence could be licensed in order to contain the exploding rivalry. In accordance with Girard, such a 'victim should belong both to the inside and the outside of the community.'¹¹⁹ In order to produce such a subject, a discourse must be offered which rationalises a subject to be both alike and unlike the community, a distortion of the model, a failed realisation of what should be. It is through this process that the goal of making 'the victim wholly sacrificeable' is satisfied.¹²⁰ As outlined above, Vitoria's construction of the Amerindian mirrors the subjective qualities required of the Girardian victim. Traversing the boundaries of a projected universal humanity, the Amerindian of the Vitorian schema is 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 Amerindian into a universal humanity, so celebrated by Scott and others, becomes merely a necessary precursor for the violence that is ultimately visited upon the Amerindian, for unless the victim is initially read as within the bounds of the community, it cannot become a signifier for the rivalry within the community and the violence performed upon the victim's body cannot to do its purifying work. In order to expunge the internal violence 'continuity must be maintained' between the community and victim.¹²¹ However, 'there must also be discontinuity', which Vitoria effects with formulation of the Amerindian personality.¹²² The violence upon the colonised is taken as necessitated by their own monstrosity. Anghie describes the paradoxical position Vitoria leaves the Amerindian in and how this position is naked to not only violence but a violence that is total and without any fixed point of conclusion, stating:

Spanish war against the Indians is inevitable and endless. The Indian is ascribed with membership within an overarching system of *jus gentium*, with intention and volition; as a consequence of this, violence originates within Vitoria's system through the Indians' deviance.¹²³

¹¹⁹ Girard, *Violence and the Sacred*, p.272.

¹²⁰ Ibid.

¹²¹ Ibid., p.271.

¹²² Ibid.

¹²³ Anghie, *Imperialism, Sovereignty*, p.16

The structure of this violence will be shown to mirror the structure of the violence that the twentieth-century drug war would take in *Chapter Eight*. When read through a Girardian lens, international law's mandate of producing a universal peace both within Vitoria's response to a disintegrating Christendom and contemporary liberal international law seeking to contain the crisis of the First and Second World Wars in the twentieth century becomes intimately tied with empire and the violence visited upon the included/excluded subject.

3.4.3 The Model of the Colonial Subject

Vitoria's theorisation of Spanish-Amerindian relations allows the juridical response to initial European colonial encounter to lay the groundwork for the creation of a novel ontological position, the modern colonial subject. The Amerindian served as the prototype for the subsequent colonial subjects that would emerge within and against European modernity. By the colonised subject, I specifically refer to an ontological category produced specifically through and in oppositional relation to European colonialism. Fanon takes us to the heart of the subjective identity in his mediation of the condition of blackness when he determines that 'to understand the being of the black man... not only must the black man be black; he must be black in relation to the white man.'¹²⁴ While Fanon himself focuses on the condition of blackness, he declares that his analysis can be expanded to all colonised peoples, to 'every people in whose soul an inferiority complex has been created by the death and burial of its local cultural originality.'¹²⁵ Fanon illustrates that the connection between different colonial identities is their ontological position in relation to European modernity. The category of the Black or the Negro is a product of occidental misrecognition, the same dynamic that had produced the Amerindian, the Oriental and other colonised subjectivities.¹²⁶

The colonised subject exists under and is structured by what Fanon terms as an 'atmosphere of violence', referring to a mode of existence that is at all moments open

¹²⁴ Fanon, *Black Skins, White Masks*, (New York: Pluto Press, 2008), p.83.

¹²⁵ *Ibid.*, p.9. 'I will broaden the field of this description and through the Negro of the Antilles include every colonized man.'

¹²⁶ For further discussion on the production of the oriental, see Edward Said, *Orientalism* (London: Penguin Books, 2003).

being impacted upon by the force of the law.¹²⁷ The violence serves an ordering function for the international community. Vitoria schema recognises importance of wrestling with law's responsibility to effect a bringing together and once unpacked, offers a glimpse of the force that generates community in international law. Reading Vitoria alongside Girard points towards a violence upon the colonised subject from which the model for the liberal, humanitarian international legal order that would be recovered in the twentieth-century derives its unity. The narrative of the birth of the international community through the European colonial project is incompatible with contemporary international law's universalist self-image. The violence upon the colonised must be recalibrated, misrecognised as legitimate in the manner of Vitoria's innovative reworking of Spanish-Amerindian relations. The unpacking of this historical misrecognition, as performed in this chapter, is necessary in order expose the mechanism of sacrifice lying underneath the liberal humanitarianism acclaimed by international law.¹²⁸

3.5 Conclusion

In reading Vitoria's works alongside Girard and his notion of social orders being produced through a sacrificial mechanism, I have attempted to show how Vitoria's humanistic critique prefiguring an ultimate validation of *the conquista* provides an illustrative starting point through which to perceive the international legal order as being generated through violence upon the colonised subject. After clarifying the reasons for undertaking this engagement with history, I reviewed the current literature on Vitoria by taking account of the on-going contestation over his legacy. Appreciating how the model of the sacrificial mechanism maps onto the Vitorian schema helps to understand the concerns that informed both a recovery of Vitoria in the crisis of international order in the early twentieth century and the continuing relevance of his ideas for international legal scholarship today. My reading worked to reconcile the contemporary scholarly debate over whether Vitoria is a liberal humanitarian or a colonial apologist by illustrating how liberal humanism within Euro-modernity has itself been the result of and dependent upon a sacrificial relation to those held to traverse the boundaries of humanity. This is particularly important for

¹²⁷ Fanon, *The Wretched of the Earth*, p.70.

¹²⁸ Girard, *Violence and the Sacred*, p.10.

the trajectory of thesis as the ultimate focus of my engagement with Vitoria is not so much placed on his influence on early modern jurisprudence but on how his jurisprudence was recovered to guide international law and, in particular, a distinctly Americanised notion of liberal humanism in the twentieth century. Therefore, this chapter placed a focus on the historical antecedents for what I argue as a ‘sacrificial internationalism’ in contemporary international law, bringing together Vitoria’s image as a secular modernist with his biography as a trained and committed theologian in order to reveal the theological inheritance of our current international law. The impulse behind these claims has been to clarify the intellectual context that would ultimately produce the War on Drugs, before I offer a focused study of this particularly instantiation of a ‘sacrificial’ international law.

In the next section of the thesis, I will show how, in the shadow of rivalry within the international order, a resurrection of interest in Vitoria occurred amongst jurists seeking to facilitate in new order of universal peace.¹²⁹ An idealised Vitoria emerged as an intellectual forefather for international law, at a time in which the universal order of peace required regeneration, particularly by major jurists from the U.S.A. A major figure I will draw on in this section is leading American international legal theorist, Dr. James Brown Scott, who carried forward this recovery of Vitoria, as a generation of forthright American internationalists sought to reshape international law for the twentieth century. Moreover, *Part B* of this thesis will illustrate how, emerging contemporaneously with the recovery of Vitoria, and being propelled by the same group of early twentieth century American internationalists, movement for international law to universally prohibit drugs was born. Moral reformers and Christian missionaries, whose anti-vice campaigning was largely dismissed as a fringe movement at the start of the twentieth century, found that their arguments for first anti-opium and then wider anti-drugs legislation aligned with the political and economic objectives as well as the general theoretical orientation of the founding generation of American international lawyers as the U.S.A emerged as a new major world power. In short, over the course of *Part B* of this thesis, I will show how the drug prohibitionist movement, in both its religious origins and construction of colonised and racial subaltern peoples as the included/excluded subject within a universal order, can be read to not only historically coincide with the recovery of

¹²⁹ Schmitt, *The Nomos of the Earth*, p.117.

Vitoria for American international law but also theoretically to carry more than a faint echo of Vitoria's 'sacrificial' legal framework as has been discussed in this chapter.

PART B

Chapter 4

The (Re)Turn Towards A Single Standard of Morality: Early American International Law and The Vitorian Recovery

4.1 Introduction

In the previous chapter I reviewed the jurisprudence of international law's 'forefather, Francisco De Vitoria and placed his thoughts in conversation with a theory of community production through sacrifice. I argued for a reading of Vitoria's jurisprudence as sacrificial, placing his ultimate justification of violence upon the colonized subject, as articulated by postcolonial critics of Vitoria, in conversation with theoretical approaches that stress the persistence of a theological undercurrent to the presumed secularity of modern law. In addition, I made a further argument for understanding the colonized subject as operating as the sacrificial victim for the modern international legal order. The purpose of the previous chapter's focus on sixteenth-century Salamanca in a thesis whose central concern is the contemporary War on Drugs was to unpack a key historical prelude to the liberal humanism that would emerge in international law over the twentieth century. I illustrated that not only does law mask the violence that is applied through its workings under the rubric of liberal humanism but that this form of productive masking, that I argue can be understood as 'sacrificial', has a much longer history than often accounted for. However, as I acknowledged in the previous chapter, an approach taking Vitoria as 'an origin' for international law necessarily engages the on-going conversation concerning who is the ideal forefather of international law.

Therefore, it is crucial to emphasize that, after initially influencing a generation of scholars who followed in his wake at the School of Salamanca in the sixteenth and early seventeenth centuries, the conversation regarding the origin of international law became a conversation in which Vitoria was for a long-time absent, his legacy going into decline along with the loss of Iberian global hegemony. At the

height of European colonialism over the eighteenth and nineteenth centuries, jurists such as Grotius or Vattel would override Vitoria's influence as the Dutch, the Belgians, and most prominently the British and the French competed for global supremacy. It would only be once the rivalry within the European community had intensified beyond the point of crisis and it was essential that contagious violence be contained, that Vitoria's ideas were resurrected. Carl Schmitt tells of how 'after World War I, a "renaissance" of Vitoria and late Spanish scholasticism marked an especially interesting phenomenon in the history of international law.'¹ The colonial order produced by the European empires had divided the globe into distinct spheres of sovereign states/empires and non-sovereign colonies, with the peoples inhabiting these divergent spaces becoming imbued with differing standards of international legal personality. However, the turn of twentieth century would bring about a shift in this theoretical basis of international order, with an expansive liberalism returning to the fore. It is this period of the early twentieth century, in which moves towards a renewal of the universalism and moralism of international law are made in the face of persisting crisis, that I will be engaging with, not only in this chapter, but across this entire second part of the thesis. In this chapter, I begin by emphasising the significance of the recovery of a jurisprudence of moral universal humanitarianism during this historical moment, propelled by Vitorian scholar James Brown Scott and a generation of forthright American internationalists that Scott would himself inspire. The importance of understanding how Vitoria's legacy was recovered for the twentieth century and particularly the influence it would enjoy over an emerging American internationalism will be necessary to fully illuminate the intellectual context in which international drug prohibition would transition from a fringe idea championed by marginal moral reformers towards making its first steps into being a given norm of international law. It is my argument that this transition was able to gain currency in this era as a result of the turn of international law towards imposing what James Brown Scott called a 'single standard of morality' upon the world at large, a turn that was particularly influential upon an emergent internationalism in the U.S.A.²

¹ Carl Schmitt, *The Nomos of the Earth in the International Law of the Jus Publicum Europaeum* (New York: Telos Press), p.117.

² James 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), p.20.

4.2 James Brown Scott, Vitoria's Recovery and American internationalism

This section of my thesis will cover the twin histories of American drug prohibition and American international law over the first half of the twentieth century. How drug prohibition is theoretically reconciled with the liberalism of American international law will be the focus of my following chapters, however this chapter will offer a sustained engagement with the influence that Vitoria's recovery had upon early American international law.

Vitoria's contribution to the birth of international law was resurrected in the early decades of the twentieth century and in the Anglosphere, the international lawyer largely responsible for Vitoria's recovery was famed doyen of American internationalism, late nineteenth-century and early-twentieth century jurist Dr. James Brown Scott. Scott read Vitoria as the theoretical example that American International Law should draw upon as it emerged into the status of a global power.³ Scott is himself now heralded as a major figure in the chronology of international law, celebrated as the man who 'fathered and fostered the development of international law during its greatest period of history.'⁴ At the birth of the 'American century', Scott committed, in both thought and practice, to reinvigorating the idea of moral internationalism as the U.S.A. began to succeed the European continent as the world's hegemonic power. Scott's most prominent accolades include serving as the solicitor of the United States Department of State (1906-1911) and then becoming president of the American Society of International Law (1929-1939), as well as serving as the first editor of their journal, a position he held for seventeen years.⁵ The influence that Scott exerted upon early American international law can be read alongside the expansion of American internationalism and the emergence of what Ian Tyrell has referred to as 'America's moral empire' a mode of global hegemony that justified its power on the moral uplift of all peoples of the world.⁶ Scott would be closely tied, in both his personal and professional life, to Elihu Root, another jurist and statesman who would

³ See James Brown Scott, *The Catholic Conception of International Law* (New Jersey: The Lawbook Exchange, 2007).

⁴ Manley O. Hudson, *Harvard Alumni Bulletin*, XXXIII, 14 (1931), <<http://www.lawbookexchange.com/pages/books/58233/george-a-finch-william-e-butler/adventures-in-internationalism-a-biography-of-james-brown-scott>> [accessed 09 March 2016].

⁵ George A Finch, 'James Brown Scott, 1866-1943', *American Journal of International Law*, 38, 183 (1944), pp.188-194.

⁶ Ian Tyrrell, *Reforming the World: The Creation of America's Moral Empire*, Reprint edition (Princeton: Princeton University Press, 2013).

himself serve as the Secretary of the War Department (1899–1904) and Secretary of the State Department (1905–9) and as the first president of the American Society of International Law (ASIL) until 1924.⁷ In his practice career, Scott embraced the legalist project for world order, working towards the establishment of the Permanent Court of International Justice and serving in Woodrow Wilson’s delegation for establishing the League of Nations. Scott has been described as ‘a faithful disciple of Root, sharing Root’s belief in an incremental approach to the creation of institutions and practices that would lead to a peaceful world.’⁸ Together Root and Scott would be ‘crucial to the development’ of American international law, serving as mentors for an entire generation of American internationalists actively reconstructing the global legal order.⁹ They drove both the study and practice of international law in America around the turn of the twentieth century, acting as the ‘legalist’ branch of a wider collection of missionaries and world federalists who historians have named the ‘American peace movement’ - a movement concerned with constructing a new model for peace among the international community in response to the violence that was erupting within the competing European imperial states.¹⁰ Root and Scott provided much of the organisational and intellectual energy for the ASIL, an organisation ‘driven almost entirely by the desire to give vitality to a mechanism for peace through law.’¹¹ A study on the emergence of international law as a major discipline in the U.S.A, both academically and in practice, requires substantive engagement with the early years of the ASIL and the role that Root and Scott played within it, providing the intellectual and political foundation for the coming moral empire.

A further element to appreciate is how a historiography of Root, Scott and the ASIL must position this emerging American international law within the moment of an international legal order in crisis. At the start of the century, mimetic violence between imperial European rivals was rapidly escaping any mechanisms for its suppression, requiring a reworking of theoretical models of the production of global

⁷ Hatsue Shinohara, *US International Lawyers in the Interwar Years: A Forgotten Crusade* (Cambridge: Cambridge University Press, 2012), p.14.

⁸ Frederic L. Kirgis, ‘Elihu Root, James Brown Scott and the Early Years of the ASIL’, *Proceedings of the American Society of International Law at its Annual Meeting*, 136 (1996), p.139 [accessed 19 April 2016].

⁹ *Ibid.*

¹⁰ *Ibid.*, p.139. For more on the American Peace Movement and its interconnections with early American international law, See C. Roland Marchand, *The American Peace Movement and Social Reform, 1889-1918* (New Jersey: Princeton University Press).

¹¹ Frederic L. Kirgis, Jr, *The American Society of International Law's First Century: 1906-2006* (Boston: Brill, 2006), p.105.

peace. The rise of American international law paralleled the descent of the European continent into an extended period of unchecked war that has been termed by historians as ‘the Second Thirty Years War.’¹² This specific term of periodization seeks to capture how the outbreak of violence between European empires in the Great War was never fully contained by the ambitious, inter-war efforts to re-establish legal order and instead the wars of the first half of the twentieth century can be better read as one, continuous conflict that ran until the end of the Second World War. Under the shadow of this crisis, Root, Scott and the ASIL began to think through ‘international law as a war-prevention structure’, seeking to enhance an understanding of the discipline so that it functioned more effectively at forestalling the barbarism of international violence.¹³ The concern with producing a legal framework for responding to the task of containing mimetic violence offers some suggestion behind Scott’s appeal to Francisco De Vitoria. Scott conceptualised ‘international order’ as a synonym for peace and it is this concern with the production of peace amongst an order structured to be in Hobbesian conflict that provokes my reading of him, and the generation of American jurists he influenced, alongside Vitoria and the notion of a ‘sacrificial international’ illuminated in earlier chapters.¹⁴ It is important to recognise that, as biographers have stated, for Scott ‘international law was more than a study or a profession; it was, in fact, a religion.’¹⁵ Scott invested in ‘international law as the basic ordering system for peace’;¹⁶ this vision of international law parallels the Giradian understanding of how law, acting as the religion after the end of religion ‘invariably strives to subdue violence, to keep it from running wild,’ and therefore allow for the communal production of peace.¹⁷ As was the case with Vitoria, Scott produced his ideas under the auspices of crisis; his jurisprudence should be understood as a response to an urgent need for unity within an international community plagued by internal conflict.

¹² For references to ‘the Second Thirty Years War’, see Michael Howard, ‘A Thirty Years’ War? The Two World Wars in Historical Perspective’, *Transactions of the Royal Historical Society* 3 (1993), pp. 171-184; or Enzo Traverso, *Fire and Blood: The European Civil War, 1914-1945* (London: Verso 2016).

¹³ Kirgis, ‘Elihu Root’, p.141.

¹⁴ James Brown Scott, ‘Introduction’, Otfried Nippold, *The Development of International Law after the World War*, trans. by A. Hershey (Clarendon: Oxford, 1923), p.viii.

¹⁵ Frederic R. Coudet, ‘An Appreciation of James Brown Scott’, *American Journal of International Law*, 37, 4 (1943), pp.559-561, p.559.

¹⁶ Frederic L. Kirgis, Jr, *The American Society of International Law's First Century: 1906-2006*, p.161

¹⁷ Rene Girard, *Violence and the Sacred*, (Baltimore and London; The Johns Hopkins University Press 1977), p.20

Scott's prominence as an international lawyer would span the era surrounding the First World War, meaning that he was practically, as well as intellectually, engaged with questions regarding the juridical possibilities and limitations of international peace. At the war's beginning in 1914, Scott was appointed Special Advisor to the Department of State in matters of international law arising out of World War I, and at its conclusion he served as legal advisor to the American Commission to Negotiate Peace with Woodrow Wilson in Paris in 1918, assisting with the drafting of *the Treaty of Versailles*.¹⁸ It is in the shadow of this escalating conflict in the international order that Scott and a surrounding collection of American international jurists, diplomats and missionaries advanced a distinctly moralistic universalism that would lay the groundwork for the emergence of America's moral empire over the course of the twentieth century.¹⁹

4.2.1 Vitoria in Washington

The emergence of the U.S.A onto the world stage accompanies a reworking of international law by its leading jurists. The concept of an 'American international law' becomes popular as a distinct term at the end of the nineteenth century and in the early twentieth century.²⁰ Root and Scott, as the leaders of the first generation of American international lawyers, aided the development of this notion of 'American international law' that would inform both American foreign policy and wider international law over the twentieth century.²¹ Scott would be the figure most concerned with doing the theoretical and historical work required for grounding an American conception of a liberal international law and his search for historical antecedents drew him to the work of sixteenth-century Vitoria. Scott read Vitoria's jurisprudential accounting for the relations between the Spanish imperialists and native Amerindians at the very birth of European Colonialism as being the origin of international law and the illustration of ideal legal order based on a moral universalism. As aforementioned, Scott's championing of Vitoria did much to

¹⁸ Anne Orford, 'The Past as Law or History? The Relevance of Imperialism for Modern International Law,' IILJ Working Paper 2012/2, *History and Theory of International Law Series*, p.12.

¹⁹ Ian Tyrrell, *Reforming the World: The Creation of America's Moral Empire*, Reprint edition (Princeton: Princeton University Press, 2013).

²⁰ Juan Pablo Scarfi, *The Hidden History of International Law in the Americas: Empire and Legal Networks* (Oxford: Oxford University Press, 2017), p.xxii.

²¹ *Ibid.*

distinguish his vision of American international law from the prevailing jurisprudence of the time; the value of Vitoria had to be re-stated as the sixteenth century theologian had become a historical figure of decreasing relevance by the turn of the twentieth century.²² As Carl Schmitt states, it was ‘only after 1919 did Vitoria's name suddenly become known and famous’ in mainstream juridical debates.²³ The apex of Scott’s public campaign to recover Vitoria and his legacy would come in the 1930’s, with Scott, through his influence as a grandee of American international law at this stage, championing the Spanish theologian as international law’s forgotten paterfamilias in a flurry of writings and lectures. He eventually became the driving force behind the establishment of the Vitoria-Suarez society, established in 1932 with a Spanish counterpart being instituted in 1936.²⁴ However, Scott had been engaging with Vitoria’s work from his first reading of *De Indis* and *De Belli Relectiones* in 1906.²⁵ Scott elevated the legacy of Vitoria over the early decades of the twentieth century with the aim of placing international law in ‘its true historical light’ just as the discipline was being established in the U.S.A.²⁶ As well as writing on Vitoria’s legacy himself, Scott directed his energies towards proliferating resources to support the wider study of the Salamancan, facilitating new English additions of Vitoria’s work through the Carnegie Endowment for International Peace while it was under the presidency of mentor Root.²⁷ The new issues of Vitoria’s writings, published in 1917, give an indication of the growing interest in his work in the early years of American internationalism.

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.’²⁸ In Vitoria’s writings were the jurisprudential antecedents for the international law that American internationalism was seeking to ignite; that is, an international law that was unitary, cohesive and ontologically complete in its

²² Fernando Gomez, ‘Francisco de Vitoria in 1934, Before and After’ *MLN*, 117, 2 (Mar 2002), pp. 365-405, p.365.

²³ Schmitt, *The Nomos of the Earth*, p.117.

²⁴ Christopher Rossi, *Broken Chain of Being: James Brown Scott and the Origins of Modern International Law* (Leiden: Brill, 1998), p.40.

²⁵ *Ibid*, pp.7-8.

²⁶ Edmund A. Walsh, ‘Foreword’, James Brown Scott, *The Spanish Origins of International Law* (Oxford: Clarendon Press, 1934).

²⁷ See Carnegie 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*, ed. by Ernest Nys, *Classics of International Law*, 7 (Washington D.C.: Carnegie Institution of Washington 1917).

²⁸ Gomez, ‘Francisco de Vitoria in 1934’, p.368.

encapsulation of all humanity. American internationalism took the form of being anchored to an abstract universal equality but one that conceals an actual material and juridical inequality in which only one of the terms in the relation is posited as the ideal, whilst the other term is set the (impossible) task of mimicking the ideal. We can see the structure of legitimised violence arising as the ideal can be taken to function as a unified background space for the world to be organised as it was once thought to be organised for God; this allows the protection of that ideal, even by warfare, to be just, in the same manner as Vitoria's ultimate justification of Spanish violence upon the colonies if they failed to reach the standards of pre-determined universal norms was legitimate. The interweaving of Vitoria and his ideas with the early twentieth century construction of American 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 Vitoria... 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 Vitoria 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 who expounded the law of nations one hundred years before the classic treatise of Grotius.²⁹

The image of the body of Vitoria combined with the face of American international law's founding intellectual figure, James Brown Scott, provides an apt visual metaphor for the way Vitoria's sacrificial-humanitarian *jus gentium* was recovered and remade in the service of America's rising moral empire. 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

²⁹ George A Finch, 'James Brown Scott, 1866-1943', *American Journal of International Law*, 38, 2 (1944), pp.183-217, p.199.

ideological justification for the universal law of the American century.³⁰ 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)

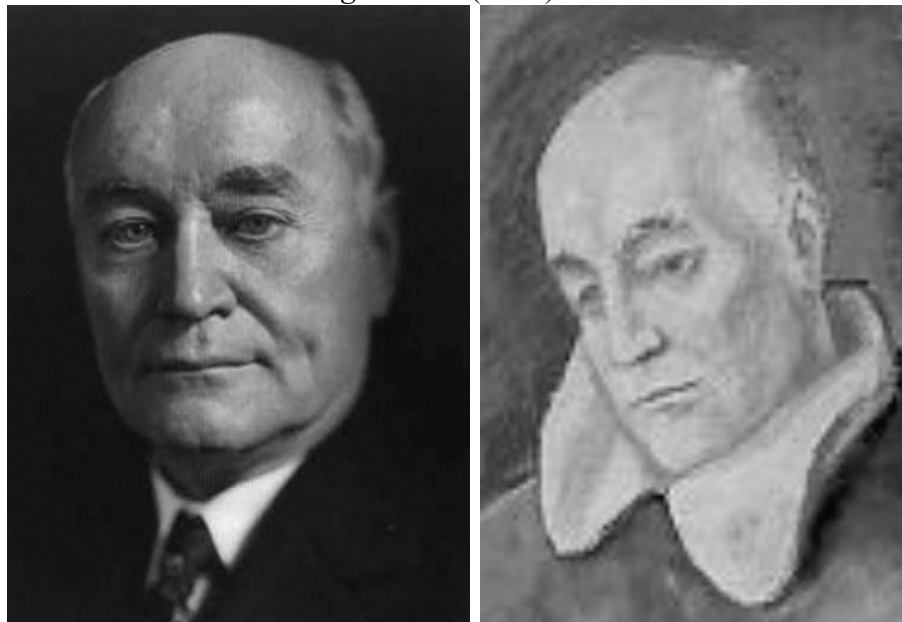


Fig. 2 Image of Dr James Brown Scott alongside the depiction of Vitoria. Reproduced from Edward Gordon “The Art Of *Justice*, Or *Queen For A Day*”, available at *The Green Bag* Vol.15. (2012)

The images above depict Scott, dressed as the figure of Vitoria, inheriting his

³⁰ Anne Orford, ‘The Past as Law or History?’, p.17.

panoramic perspective of the world, overseeing a globe over which a single standard of morality can be cast. The making of the world into a singular whole, ontologically complete in itself, is suggested by this image and can be read in the theoretical approach to international law that the American mode of liberal international law would undertake. It presumes that the overseer has a panorama that can only be obtained from a fixed vantage point, making it the standard for the world, the objective norm judging and measuring the development of others. This is what is being depicted in the entrance to the US DoJ building: Scott as Vitoria contemplating the world, with an omniscient perspective of life on earth, as the world becomes an orb ready-at-hand, visible, and accessible.

Vitoria's legacy was recovered and reimagined by Scott as the model for an expanded moral universalism that would provide a jurisprudential alternative to the strict demarcation of sovereignty that separated the colonial and non-colonial worlds. However, in contrast to the ostensible humanitarian impulses acclaimed by intellectual forefathers like Scott and Root, Robert Vitalis has argued that American internationalism emerged through an intellectual focus on protecting the privileges of European peoples in the face of a rising tide of colour, specifically the anti-colonial struggles which were gathering momentum during the first half of the twentieth century. Consequently, for Vitalis, the study and practice of American internationalism was 'shaped by and often directly concerned with advancing strategies to preserve and extend that hegemony.'³¹ Historian Benjamin Allen Coates furthers this argument by providing an extensive study of the connection between the rise of international law as both a profession and academic discipline in early twentieth century America and the emergence of an American 'legalist empire' following the conclusion of the Spanish-American War, which was, despite humanitarian proclamations, concerned with entrenching American hegemony.³² Emphasising the influence of lawyers like Elihu Root, John Bassett Moore and particularly James Brown Scott, Coates illustrates how an American model of international law managed to accommodate and rework older notions of empire for a world order that was losing its ability to contain inter-communal violence.³³ With the

³¹ Robert Vitalis, *White World Order, Black Power Politics: The Birth of American International Relations* (Ithaca, New York: Cornell University Press, 2015), p.2.

³² Benjamin Allen Coates, *Legalist Empire: International Law and American Foreign Relations in the Early Twentieth Century* (Oxford: Oxford University Press).

³³ See Coates, Chapters 2 and 3.

establishment of the American Society for international law (1906) and the Carnegie Endowment for International Peace (1910) the aforementioned jurists acquired institutional centres from which this reworking of the international legal order could be produced. And with Vitoria as a key intellectual antecedent for this emergent movement of international law in America, we can see how the sixteenth century theologian connects to one of the major projects for this generation of American internationalism, America's steering of early twentieth century drug prohibition. The correlative question is can Vitoria also be read as the intellectual antecedent for a new mode of empire for the 'American century', one that did not rely on the acquisition of territorial supremacy or on an explicit racialised hierarchy of peoples but instead perpetuated a 'dynamic of difference' along new delineations?³⁴ To explore this question it is worth reviewing the way in which the theory and practice of international law changed from the nineteenth to the twentieth century.

4.2.2 Breaking From Nineteenth-Century Jurisprudence

'The Western world is in a perpetual state of crisis,
and the crisis is always spreading.'³⁵
René Girard

The early twentieth-century recovery of Vitoria should be understood not as a marginal intellectual counter-culture but as indicative of a wider shift effecting international law at that historical moment. Scott's engagements with Vitoria, in particular, have been misread by critics as unscholarly flights of fancy that do not offer much wider significance for historiographies of international law. For instance, Arthur Nussbaum derided Scott's 'extreme religious and political views' as having caused him to have an 'uncritical exaltation and bias' for Vitoria.³⁶ However, while Nussbaum is perceptive in his identification of the religious undercurrent to Scott's Vitorian recovery, he is myopic in his under-appreciation of how this undercurrent was not merely a personal failing of Scott but a signpost for the theologically informed moralism re-emerging in international law in general at this time. This

³⁴ Anthony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge: Cambridge University Press, 2005).

³⁵ Girard, *Violence and the Sacred*, p.28.

³⁶ Arthur Nussbaum, *A Concise History of the Law of Nations* (New York: Macmillan Co., 1947), pp.296-306.

moralism would go on to sustain twentieth century developments in international jurisprudence, beyond merely the recovery of Vitoria in the academy, as the focus of my subsequent chapters on the institutional developments of international law in the twentieth century will reveal. Christopher Rossi provides an apposite response to Nussbaum and other critiques, by arguing that ‘these attacks miss the lingering, albeit unrecognised power of his [Scott’s] significance, which now permeates international law.’³⁷ Scott’s recovery of Vitoria’s moralistic universal humanism cast a shadow beyond the academic community invested in the sixteenth century theologian and even beyond the emergent generation of American internationalists that Scott was a mentor for; Scott’s anchoring of international law on a single standard of morality applicable to all humans continues to inform even contemporary appeals to ‘international law’s universality and systematic completeness.’³⁸ When, with an evangelical zeal, 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 provided a historical-philosophical grounding for the expansion in scope and depth that international law would undertake over the course of the century.³⁹ While he endorsed the separation of church and state upon which the U.S.A was built, Scott read the fundamental problem of a collapsing of religion into law to be a problem of how ‘the church became political, without the state becoming moral.’⁴⁰ Therefore, through recycling Vitoria in the service of his own historical moment, Scott offered a jurisprudential account of law that was cohered by a notion of ‘a single standard of morality’, one engaged with the 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

³⁷ Rossi, *Broken Chain of Being*, p.10.

³⁸ *Ibid.*

³⁹ James Brown Scott, *The Spanish origins of International Law* (Oxford: Clarendon Press, 1934) p.11a.

⁴⁰ 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), p.10

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.⁴¹

Counter to Nussbaum's critique, such declarations are not evidence of Scott's tendency to override reason with faith but rather illustrate the extent to which Scott was perceptive in understanding the point of transcendence that the recalibrated international law would have to occupy to be capable of realising 'its perfected fruit, peace.'⁴² This is the same omniscient perspective that is captured in the synthesised mural of Vitoria and Scott that is painted at the DoJ building in Washington. Scott advanced a holistic conception of international law, envisaging an intimacy in the relationship between domestic and international legal systems that realised what he referred to as the 'oneness of the world.'⁴³ Scott's international law erased 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 state...[which] in fact have no existence separate and distinct from their incorporators, -the people who have made them what they are.'⁴⁴ 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 would concern 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.⁴⁵

While Scott was perhaps the most eloquent articulator of international law's (re)turn to a moral humanism, he was far from a sole actor affecting this shift. Other American internationalist theorists of this era engaging with Vitoria included Quincy Wright

⁴¹ Ibid, p.20.

⁴² Finch, "James Brown Scott," p.198.

⁴³ Rossi, *Broken Chain of Being*, p.15.

⁴⁴ Scott, "A single standard of morality for the Individual and the State," p.20.

⁴⁵ Ibid, p.21.

would draw on the Spanish theologian's work, particularly in his writings on the problem of preventative war.⁴⁶ Also, while Arthur Nussbaum critiqued the reading of Vitoria as an idealised liberal forefather for American international law, he still celebrated Vitoria as being 'the first to set forth the notions (though not the terms) of freedom of commerce and freedom of the seas in international law.'⁴⁷ The translation, publication and engagement with the writings of primarily Vitoria but also some of his Salamancan colleagues such as Francisco Suarez and Luis de Molina can be traced to the increased interest in Spanish jurisprudence after the America's victory in the Spanish-American War turned the U.S.A into an empire, albeit reluctantly. Ignacio de la Rasilla del Moral is one scholar who has stressed the importance of this 'unstudied cultural act of silent heritage that took place between the moribund Spanish Empire and the United States after the Spanish American War.'⁴⁸ Furthermore, the interest in Vitoria only intensified with the crisis of the Great War, exposing the incapacity for international law as it was functioned at that moment to contain the violence of imperial rivalry. It is difficult to overstate the impact that the Great War had upon theoretical conceptions of the international legal order. Confidence in an exclusive international community of 'civilised' sovereign states disintegrated as the war provided the murderous apotheosis of inter-communal, imperial rivalry. The crisis of war had exposed the paucity of the theoretical grounding that anchored international law, as the discipline proved unable to contain the crescendo of violence that drew in empire after empire in mimetic rivalry, betraying the impotency of an overly-rationalised, amoral international law in the face of sovereign excess. Moreover, the very structure of international law was radically transformed, with the post-war institution of the League of Nations providing the central body for facilitating a greater communality in the international arena. The recovery of Vitoria corresponds with these wider shifts in global politics and law. As Moral states, the universalism of the Vitorian recovery gained currency during the inter-war period as 'a gradual restoration of natural law was argued against the perceived excesses of the attraction of positivism.... This renewed interest in natural law was, structurally, triggered by

⁴⁶ See Quincy Wright, *Problems of Stability and Progress in International Relations* (Berkeley: University of California Press, 1954); and Quincy Wright, *Mandates Under the League of Nations* (Chicago: The University of Chicago Press 1930).

⁴⁷ Nussbaum, *A Concise History*, p.62.

⁴⁸ Ignacio de la Rasilla del Moral, 'Francisco de Vitoria's Unexpected Transformations and Reinterpretations for International Law', *International Community Law Review*, 15 (2013), p. 92.

the establishment of the first international institution with a permanent character.⁴⁹ The return of Vitoria to inform American internationalism, as it emerged into hegemonic status, was both productive and indicative of the moral universalist turn that international law would undertake during the twentieth century.

Over the course of the nineteenth century, international law became preoccupied by an intra-disciplinary debate between naturalism and positivism, a debate in which positivism would eventually gain pre-eminence.⁵⁰ At the height of European colonialism, the influence of positivist jurisprudence directed international law away from its theologically-informed, natural law moorings 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.⁵¹ The consequence of this shift for the international arena was to fix the state and its sovereign authority as ‘the most basic doctrinal and philosophical underpinnings for international law.’⁵² In conjunction with this insistence upon the authority of the sovereign state, positivism devised a clear set of objective rules, grounded in sovereign authority, which could be deduced solely through the engagement of reason.⁵³ This meant that international law began to be shorn of its moralistic element through this turn towards ‘the very understanding of law as a science, which went global in the mid-nineteenth century.’⁵⁴ The scientific method had become the preferred epistemological lens for a variety of disciplines within the European

⁴⁹ Moral, ‘Francisco de Vitoria’s Unexpected Transformations’, p.302.

⁵⁰ 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).

⁵¹ For examples of positivist international jurisprudence, see Lassa Francis Oppenheim, *International Law: A Treatise*, 1 (London: Longmans, Green, 1905); and Hans Kelsen, *Principles of International Law* (New Jersey: The Lawbook Exchange, 1952).

⁵² David Kennedy, ‘International Law and the Nineteenth Century: History of an Illusion’, *Nordic Journal of International Law*, 65 (1996), pp.385-420, p.386.

⁵³ Anghie, *Imperialism*, p.45. Positivism was taken up by International Legal Scholarship despite Austin critique of international law lacking of a sovereign determinate point. Anthony Anghie explains how scholars such as ‘Lawrence [and Oppenheim]... argue, in effect, that law can be said to exist as long as states observe a set of norms; it is irrelevant whether or not these norms are enunciated by some supreme, sovereign authority’.

⁵⁴ Ignacio 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), pp.80-97, p.86.

enlightenment and law would be no exception. Anghie captures the significance of this nineteenth century shift to reading law as matters of technical difficulties:

This scientific methodology favoured, then, a movement towards abstraction -- a propensity to rely upon a formulation of categories and their systematic exposition as a means of preserving order and arriving at the correct 'solution' to any particular problem. Legal science in the latter half of the nineteenth century was conceived of [...] as a struggle against chaos, which could be won only by ensuring the autonomy of law, and establishing and maintaining the taxonomies and principles, which existed, in fixed relations to each other.⁵⁵

Scott did not completely discard the efficacy of the scientific method; in fact he championed a scientific case method of scholarship as the preferred pedagogical tool of international legal education.⁵⁶ However, in terms of a jurisprudential model for keeping the universal order cohesive, Scott warned against the dangers of an overemphasis on state sovereignty as the grounding unit of international law. Stressing the need to remember 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.'⁵⁷ Scott credited the conflicting interests of great states as the source of the great explosions of violence in the international arena, illustrating an appreciation of the dangers of escalating rivalry amongst states unless constrained by a restraining force, what could be termed a shared universal culture.⁵⁸ 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, particularly in America, towards a reworking of Vitoria's moral humanism for a renewed universal international community.⁵⁹ In fact, Scott's recovery of a natural law jurisprudence for the twentieth century but one (at least ostensibly) detached from Christian foundations of medieval thought betrays a shared imperial orientation that underwrites the presumptions of any crude

⁵⁵ Anghie, *Imperialism*, p.51.

⁵⁶ Shinohara, *US International Lawyers*, p.16.

⁵⁷ Scott, 'A single standard,' p.19.

⁵⁸ Gerry Simpson, *Great Powers and Outlaw States: Unequal Sovereigns in the International Legal Order* (Cambridge: Cambridge University Press 2004), pp.141-142.

⁵⁹ *Ibid*, p.21.

distinction between natural law and positivism. As Rose Parfitt recognizes, the (re)turn of natural law at this historical moment remained as indebted to a euro-centric theoretical foundations as nineteenth-century positivism. Grounding the sources of international law in the treaties of men like Vitoria and Suarez, who were seen to be able to ascertain, through the application of reason, an ‘unchanging natural law’ which could then be arrogated onto a universal humanity, the natural law conception of history continued to proffer a European conception of being as the basis for its own authority. As Parfitt states ‘[n]aturalist approaches to international law are, in other words, no less co-reliant on their positivist alternative than vice versa. Equally, natural law conceptions of history are therefore no less restrictive than their positivist successors.’⁶⁰ The recovery of the Spanish ‘origins’ of international law offered a challenge to the presumptions of positivism as it had emerged in the nineteenth century but continued to share some of the same conceptual ground. While natural law jurisprudence stressed the necessary connection between law and morality, a deeper notion of morality remains insufficient to address international law’s indebtedness to the violence of European imperialism. The natural law tradition envisions that ‘international law consists of a set of universally applicable standards of morality, which are substantive (not simply procedural), discernable through reason or faith [...] and which give rise to moral obligations on the part of the people who make state policy.’⁶¹ The grounding for order that positivists placed on the relations of independent sovereigns is deepened in natural law to be based on the universality of norms that in-turn produce a shared imaging of lived condition for a universal subject of the human. What it fails to address is the European particularity of the universal human subject.

4.2.3 The Return to a Moral Universalism

The question of universalism becomes a pertinent one when tracing the shifts in jurisprudence from the nineteenth to the early twentieth century. In addition to decoupling law from its moral foundations, the positivist turn also stunted the universalism of the international legal order as had been imagined by the naturalists

⁶⁰ Rose Parfitt, ‘The Spectre of Sources’, *The European Journal of International Law*, 25, 1, pp. 297–306, p.298.

⁶¹ Rossi, *Broken Chain of Being*, p.13.

like Vitoria. Jurists in the nineteenth century instead began to see international law as the exclusive property of civilized societies.⁶² With the delusions of scientific racism reaching their zenith at this time, jurists began to read the sovereignty of colonising and colonised peoples in terms of absolute difference. The invitation of colonised/racially subaltern peoples into a single universal subject entitled ‘humanity’ was curtailed in the face of the mainstreaming of scientific racism, which sought to fix, essentialize and explicitly hierarchize categories of peoples. Within legal discourses, positivism facilitated the exclusion of colonised societies from the international legal order through accentuating the sovereignty of a state as the fundamental condition for legal recognition. Contrasting with the Vitorian formulation in which the sovereignty of the colonised was never erased but rather deferred onto an indeterminate future, the over-determined distinction between the legal status of civilised and non-civilised societies offered by the legal positivists in essence ‘expelled the non-European world from the realm of law and society.’⁶³

Colonial expansion over the course of the nineteenth century had been justified through the unequivocal exclusion of the colonised from the obligations that members of the international community held for each other. In this sense the Vitorian paradox of the inclusive/exclusion condition for the colonised had slipped into a more rigid model of exclusion, in line with *de riguer* racial theories that emphasised the absolute difference of people. Jurists such as Edwin De Witt Dickinson and Lassa Francis Lawrence Oppenheim advocated for the disqualification of the colonised peoples from the international community, with Oppenheim declaring that they ‘remained as yet outside the circle of the family of nations [...] and they were for those parts treated by the Christian powers according to discretion.’⁶⁴ In offering the imperial states unbounded power over their colonial properties, positivist jurisprudence had ultimately severed international law’s aspirations towards a single universal order based on shared morals. Arnulf Becker Lorca illustrates further by explaining:

⁶² Anghie, *Imperialism*, p.52. See further the work of Henry Wheaton, *Elements of International Law* (Boston: Little, Brown & Co, 1866).

⁶³ Anghie, *Imperialism*, pp.55-57. For examples of late nineteenth century positivists jurisprudence in international law, see Thomas Lawrence, *The Principles of International Law* (Boston: D.C. Heath, 1895); or John Westlake, *Chapters on the Principles of International Law* (Cambridge: Cambridge University Press, 1894).

⁶⁴ L.F.L. Oppenheim, *International Law: A Treatise*, 1 (London: Longmans, Green 1905), p.180.

Nineteenth-century international law achieved global geographical scope by including two separate regimes: one governing relations between Western sovereigns under formal equality, and the other governing relations between Western and non-Western polities under inequality, granting special privileges to the former.⁶⁵

The positivist juridical model served to expedite European dominance of the world, a dominance that was spoken into being through treaties, conventions and other such techniques of law. The turn towards legal scientism demarcated the international legal order into separate spheres, resulting in a model of the international community that explicitly disregarded the majority of the world. Vitoria's espousal for a moralistic universal humanism receded into the distance in the face of a jurisprudence that acclaimed the final disenchantment of the world.

However, the jurisprudence of the nineteenth century would fall into crisis when 'international law died its first death on 1 August 1914.'⁶⁶ The international community, as in the internal group of sovereign imperial states, had indulged in voracious expansion into the colonised world, working under the presumption of internal peace amongst the community being sustained through a general balance-of-powers, with each empire and its potential for violence pre-emptively cancelling out the threat of the other. However, with international legal jurisprudence now shorn of its moralism and universalism, its restraining powers would prove incapable of curtailing the contagion of violence once it did break out inside of the exclusive community. Overly-rationalised and detached from a concern with effecting communality, by the outbreak of the First World War, international law had deteriorated to being considered as little more than 'a scrap of paper' by the major world powers.⁶⁷ The belief in an organic balance of power emerging amongst the European empires was exposed as a mere fantasy. Rather, as Anghie provocatively argues, 'the balance of power system not only failed to prevent, but indeed, may have

⁶⁵ Arnulf Becker Lorca, 'Universal International Law: Nineteenth-Century Histories of Imposition and Appropriation', *Harvard International Law Journal*, 51, 2 (2010), pp. 475-552, p.477.

⁶⁶ Martti Koskenniemi, *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), p.3.

⁶⁷ The Treaty of London, which enshrined the neutrality of the Kingdom of Belgium, was famously dismissed by German Chancellor Theobald von Bethmann Hollweg as a 'scrap of paper.' For further discussion on the significance of this phrase for international jurisprudence, see Isabel V. Hull, *A Scrap of Paper: Breaking and Making International Law during the Great War* (Ithaca: Cornell University Press 2014).

contributed to the conflagration of the Great War.’⁶⁸

It is in this context that American international law emerges and in the face of this crisis that Scott’s recovery of Vitoria occurs, although not expressly stated in such terms. However, an appreciation of the scale of the challenge that the mimetic rivalry of the Great War presented international law helps explain the fervour with which Scott would call for a re-conceptualised jurisprudence that could produce a oneness in the world. At it’s most ambitious, such a vision of international law would realise a complete, universal moral framework governing individual human relations as well as statecraft. The inverse of such a law would be to turn those who transgress its dictates into universal negative figures, as Carl Schmitt identified when reading Scott’s return to Vitoria as facilitating an order in which in opponent would not be a rival but a criminal:

Even in official and semi-official United States declarations there is a “return to older and sounder concepts of war,” by which is meant, above all, Vitoria’ s doctrines on free trade, freedom of propaganda, and just war.’ In this formulation ‘War should cease to be imply a legally recognized matter or only a matter of legal indifference; it again should become just in the sense that the aggressor...is declared to be a felon, meaning a criminal.’⁶⁹

The moral universalism of the liberal American international law while informing the humanitarianism of conceptual international law also clears much of the conceptual terrain for producing legal imaginings of existential universal threats that must be not only defeated but eradicated.

4.3 The First Generation of American International Law

Scott serves not only as a major figure in the narrative of American international law but as an instantiation of a juridical movement that sought to develop a distinctly American approach to international law to then serve as a model to be imitated globally. In Juan Pablo Scarfi’s comprehensive intellectual history of how a distinctive idea of American international law spread across the Americas, he highlights that Scott, in his role as the founder of the Pan-American American

⁶⁸ Anthony Anghie, ‘The War on Terror and Iraq in Historical Perspective’, *Osgoode Hall Law Journal*, 43. 1/2 (2005), pp.45-65, p.50.

⁶⁹ Schmitt, *The Nomos of the Earth*, p.119.

Institute of International Law (AAIL), acted as an ‘ethnocentric, conservative and anti-pluralist international lawyer... affected by imperial ambitions and anxieties.’⁷⁰ Scott’s universalism emphasized the importance of exporting a US ideal into Latin America and the Caribbean, endeavouring to facilitate greater bonds across the region whilst maintaining or at least not questioning the existent hierarchal relationship between the US and its neighbours, including the right of intervention.⁷¹ Ignacio Moral supports Scarfi’s reading of Scott’s imperial ambitions for American international law, arguing that the Scott’s commitment to the AAIL was driven by a desire to see whether the principles of the US Declaration of Independence might be applicable across all continents of the Americas and thereby allow the US and its neighbours to begin to develop a universal notion of American international law, founded upon an American conception of the state-formation and an American conception of ideal, liberal government.⁷² Tracing the actions and discourse of American legalism at this moment disturbs the U.S.A’s given self-image as an anti-imperial nation, particularly at this historical point in which it emerged onto the world stage through a certain contradistinction from the European empires. This informed a certain ambiguity within American international law towards the prevailing mode of conceptualizing international order at the turn of the century: empire. As Coates states in reference to the early generation of American jurists, ‘it is important to recognize that international lawyers were simultaneously idealists and imperialists, dreamers of world order and participants in imperial politics and administration.’⁷³ Around the same time as the acquisition of Spanish territories, the U.S.A saw the establishment of the prominent and influential anti-imperialist league. With America’s founding myth being one of it’s own independence being achieved through anti-colonial struggle, a transition into the status an imperial power obviously provided a challenge to that identity. However, much of the force that law was able to exert was to bring together this anti-imperial undercurrent to American foreign policy with its status as an emerging global hegemonic power. In his history of the birth of the American Journal of International Law, Carl Launder argues that within the generation of early American internationalists ‘almost everyone’s anti-imperialism was an admixture of

⁷⁰ Scarfi, *The Hidden History*, p.xxv.

⁷¹ Ibid.,

⁷² Moral, ‘Francisco de Vitoria's Unexpected Transformations’, pp.298-299.

⁷³ Coates, *Legalist Empire*, p.4.

imperialism and vice-versa.⁷⁴ Furthermore, he also stresses, following the insights of historian E.T.L. Love, that racial fears about the demography of the body politic of the U.S.A itself informed the argument across the imperialist/anti-imperialist divide, with even the anti-imperialist argument against the annexation of territories such as the Philippines in the late nineteenth century being couched in the language of preserving the whiteness of America.⁷⁵ With American jurisprudence containing both the liberal, humanitarian element identified in Vitoria's writings by those who champion him as an anti-imperialist and the insidious imperialism of the civilizational 'dynamic of difference', the question of what maintains a cohesiveness to this vision international law therefore presents itself again.

Some insight about a cohering anchor may be suggested by looking into the differentiating aspects of American internationalism when compared to European imperialism. As aforementioned, a central feature of positivist international law, prevalent in the European imperialist jurisprudence of the nineteenth century was a sharp distinction drawn between civilized and uncivilized states.⁷⁶ This facilitated a more explicit 'dynamic of difference' between the colonised and colonising worlds, with different legal rules being applied to differing worlds and peoples. American international law elevated to a greater extent a totality of world order, captured by Scott's image of 'a single standard of morality for the Individual and the State.' The anti-imperialist line informed the stressing of a juridical equality of nation- states with a shared humanitarian notion of being at its centre. Of course, this is the model of international law that would become preeminent over the course of the twentieth century, particularly after the Second World War, with decolonisation, development and human rights taking up central roles in this ideological reconceptualization. However, the American model of liberal international law provided an essential prologue to this shift, with the impact of jurists in the early decades after 1900 helping to reshape both the theory and practice of international law. The (re)turn to morality and the notion of international law penetrating the lives of the individual mirrored the times in which wider culture, from the literature of T. S. Eliot, Henry James, and

⁷⁴ Carl Landauer, 'The Ambivalences of Power: Launching the American Journal of International Law in an Era of Empire and Globalization', *Leiden Journal of International Law*, 20 (2007), pp. 325-358, p.351.

⁷⁵ Landauer, 'The Ambivalences of Power', p.349. For further on the role that race played in U.S imperialism, see E. T. L. Love, *Race over Empire: Racism and US Imperialism, 1865-1900* (Chapel Hill: University North Carolina Press, 2004).

⁷⁶ Anghie, *Imperialism*, p.52.

Virginia Woolf to scientific investigations of Sigmund Freud, took up a concern with the exploring the internal sphere of human existence. Anghie argues that we should read the liberal and moralistic turn in international law as a response to this wider cultural movement, 'it enabled international law and institutions to enter the interior, to address the unconscious, and thereby to administer 'civilizing therapy' to the body politic of the sovereign state.'⁷⁷ As the cultural epoch now defined as modernism raised the wider understanding of matters of the individual human mind, law began to perceive human consciousness as a terrain that could be legislated over. As will be discussed further in the following chapter, this concern can be seen with the growing interest in matters of vice and morality that would emerge in international law over the early decades of the twentieth century.

A further aspect to be considered in the making of early American international law is the role it played in facilitating the interests of American capitalism overseas.⁷⁸ The ideal of a universalist, liberal international law also contained the promise of levelling out the terrain of international trade, eschewing the competition of economic (and military) rivalry for the production of a shared legal framework in which American capital could operate. The jurisprudence of American international law is often silent on this economic aspect to its universalist vision, as Gomez identifies when he argues that what 'Scott does not explicitly say is that this vision of an inevitable and desirable incorporation, by force if necessary, of all nations under one unified world-system, will unmistakably materialize into the modern civilization of industrial capitalism.'⁷⁹ However, an appreciation of the capitalist incentive behind the jurisprudence of American international law helps in understanding why the study and practice of international law in the U.S.A in this era was indebted to the wealth of major industrialists such Andrew Carnegie. Carnegie, a close friend of Root, was one of the few non-lawyers in attendance at the 1905 dinner where Scott laid out the plans for the American Society of International Law.⁸⁰ Furthermore, through the Carnegie Endowment for Peace, established in 1910, he supported the endeavours of Root, Scott and their colleagues with extensive financial backing.⁸¹ Funds from the Carnegie Endowment for International Peace provided for

⁷⁷ Ibid.,p.135.

⁷⁸ Coates, *Legalist Empire*, p.178.

⁷⁹ Gomez, 'Francisco de Vitoria', p.369.

⁸⁰ Kirgis, Jr, *The American Society*, p.9

⁸¹ Ibid,

the ASIL's annual meetings, published journals, the growth of the study of international law in law schools and generally elevated the prominence of American international law.⁸² American international law's turn away from the colonial order of the European empires was intertwined with this imperative for a legal terrain that was more amenable to capitalist interests than the intensifying order of imperial rivalry. Furthermore, accompanying this change in the vision of the ideal legal terrain for capitalist exchange can be was a change in understandings of war, moving away from the colonial assumptions of war being a method to increase economic accumulation towards an image of war as being an impediment to trade.

It is crucial to appreciate the interconnection of the concerns about global legal order being unable to contain war or facilitate trade when unpacking the American internationalism of the early twentieth century. International legal scholar Gerry Simpson reads Scott jurisprudential contribution as arguing for an international law that recognised the importance of facilitating the interests of industry and commerce within a system of law that contained the potential for conflict presented by the rival economic interests of the major world powers.⁸³ Despite producing his theories of international law in, first, the run up-to and then the aftermath of the Great War, Scott does not explicitly address the shadow of war that hangs over the international order at this moment. However, it is difficult to decouple his scholarly engagement with Vitoria's model for a communal international order through free trade and a single standard of morality from the concerns of international law being unable to restrain war within Scott's own era. Even critical American international lawyers like Nussbaum cited Vitoria as being 'the first to set notions of...of freedom of commerce' in the jurisprudence of international law. Vitoria acts as a key antecedent for the synthesising of economic liberalism and moral humanitarianism that would characterize not only American international law at that moment but come to infuse international law at a more institutional level across the twentieth century.⁸⁴

4.4 Conclusion

This chapter has focused upon a review and analysis of both the actors and

⁸² Coates, *Legalist Empire*, p.3.

⁸³ Gerry Simpson, *Great Powers and Outlaw States: Unequal Sovereigns in the International Legal Order* (Cambridge: Cambridge University Press, 2004), p.141.

⁸⁴ Nussbaum, *A Concise History*, p.62.

theories that informed American liberal international law at the turn of the twentieth century. In conversation with the preceding chapter, I emphasised how Vitoria's sixteenth century jurisprudence not only resonated with America's coming moral empire but was a major influence on one of its leading figures, Dr James Brown Scott, who through his influence over institutions such as the American Society of International Law and the Carnegie Endowment for International Peace contributed greatly to both the emergence of American internationalism and the early twentieth century recovery of Vitoria as the 'father of international law.' It is through Scott's resurrection of Vitoria in service of a crisis-ridden twentieth century, that we can connect Vitoria's humanitarian critique of the naked colonial violence of Spanish imperialism with a (re)turn to a universal humanism within international law, which would provide the context for the birth of twentieth century drug prohibition. Scott's explicit drawing on Vitoria accompanied and gave historical-philosophical substance, to a wider trend in American internationalism that gained prominence in the aftermath of the Spanish-American War at the end of the nineteenth century. Subsequent chapters of this thesis will illuminate how the conclusion of the Spanish-American War provided the geographical incentive for not only a theoretical recalibration in American internationalism, but also a practical instantiation of the problems that would arise for 'America's moral empire' through the colonies acquired in *the Treaty of Paris*, particularly the question of opium in the Philippines. However, it is important to clarify, as I have done so above, the intellectual context that would inform the approach to this problem, hence the undertaking of the task in this chapter to show how a further consequence of America inheriting Spanish colonies was the proximity this engendered between the legacy of Spanish jurists like Vitoria and the American mode of international law that would dominate the twentieth century.

A renewed moral universalism, inherited from sixteenth century Salamanca, provides a telling intellectual background to Elihu Root, James Brown Scott and the ASIL's construction of a liberal tradition of American international law. In the early twentieth century, international lawyers would act as a 'foreign-policymaking elite' within the U.S.A and to a level 'unmatched before or since, the US government—the executive branch if not always the US Senate—embraced legalist proposals' as a mechanism for constructing world order.⁸⁵ As Coates' historical scholarship tells us,

⁸⁵ Coates, *Legalist Empire*, p.4.

in practice it was a ‘relatively small group of men ... present at the creation of the international law profession in the United States.’ These men, especially Root and Scott, along with the founding generation of the ASIL that they led, created the legal framework for an informal overseas American empire that continues to raise ‘difficult questions about international law’s promises of universalism and justice.’⁸⁶ Scott’s recovery of Vitoria and the wider elevation of liberal humanitarian international law by these actors should be read as part of a committed project aimed towards developing an American tradition of international law, which would then feed into the institutionalisation of international law and the wider trajectory of universal order in the twentieth century.⁸⁷ Though, it would ostensibly distinguish itself from the colonial legal order, this trend towards moral universalism in international law would not erase the colonial ‘dynamic of difference’ between the peoples of the world, but in keeping with Vitoria’s sixteenth-century jurisprudence, buried persisting material and juridical inequality within a totalising conception of humanity.

The following chapter will follow on from the analysis of the birth of American international law conducted above by showing how it was also in this context, and again provoked by the inheritance of the Spanish colonies after 1898, that drug prohibition would take its first steps in the international arena. In addition to international drug prohibition being theoretically indebted to the notion of ‘a single standard of morality’ and fitting in with a notion of international law as concerned with the regulation of individual human life across the globe, drug prohibition also shares a historical point of origin with American international law. Many of the same actors discussed in this chapter play crucial supporting roles in the birth of international drug prohibition as previously fringe moral reformers mobilised the American government into making the first forays into multi-lateral drug prohibition in international law. It was under Root’s terms as Secretary of War and Secretary of State, and under Scott’s term as Solicitor of the State Department that the U.S.A would start the clock on international drug prohibition.⁸⁸ Scholarship on this founding era of American international law has stressed how Root and Scott facilitated an

⁸⁶ Ibid, p.14.

⁸⁷ Martti Koskenniemi, ‘Vitoria and Us: Thoughts on Critical Histories of International Law’, *Journal of the Max Planck Institute for European Legal History*, 22 (2014), pp.119-138, p.134.

⁸⁸ Elihu Root served as the Secretary of the War Department (1899–1904) and Secretary of the State Department (1905–9) and James Brown Scott served as solicitor for the U.S. State department (1906–1911). A will be discussed at length in next chapter, International Drug Prohibition began with the 1909 Shanghai Conference.

extension of America's interests in the international arena through the joining of a number of international institutions and participating in the drafting of numerous international conventions.⁸⁹ However, a still largely unexplored element of this internationalism is the role that Root, Scott and early American international law played in empowering the crusaders who would at this same moment bring about the first international laws on drugs.⁹⁰

⁸⁹ Moral, 'Francisco de Vitoria's Unexpected Transformations', p.94.

⁹⁰ Arnold H. Taylor, *American Diplomacy and the Narcotics Traffic, 1900-1939: A Study in International Humanitarian Reform* (Durham: Duke University Press, 1969), p. 58. Taylor tells us how it was by charge of Scott that Dr Hamilton Wright and others were empowered to call the Hague Opium conferences.

Chapter 5

The Intertwinement of Drug Prohibition and American Internationalism

5.1 Introduction

The previous chapter reviewed the emergence of American liberal international law and focused on the leading figures such as Elihu Root and James Brown Scott, who drew on the moral universalism of Vitoria to envision a single standard of morality as the response to the crisis of the international community in the first half of the twentieth century. However, an under-researched element of this historical moment in international law is the manner in which this founding moment of American international law provided the context for the first international laws on drugs to emerge, driven by the same generation of forthright American internationalists. As mentioned in the first chapter of this thesis the early drug laws have been historicized by scholarship in drug policy studies but absent from the existent literature is a sustained reading of these laws in conjunction with the changes in American internationalism and wider international law in this era. Drug prohibition was in part both informed by, and helped produce, the hegemony that the U.S.A. would enjoy in the so-called ‘American century.’ The drive to prohibit drugs marks one of the U.S.A.’s first attempts to take a proactive role in international law, using ‘drug diplomacy’ to not only increase its hegemonic status upon the international stage but, moreover, to recalibrate the wider structures and the operative function of international law.

This chapter will place its focus on illuminating the interconnections that existed between Root, Scott and their influence at the U.S. state department as well over American international law more widely, and the early drug prohibitionists who would succeed in establishing the first multi-lateral, anti-drug treaties in international law. My argument will orientate around showing the ways in which the vision of a liberal international law, founded on a moral humanism, and driving American foreign policy at this time, was theoretically as well as historically consistent with the early moves towards draconian legal prohibition of drugs in the emerging moment American hegemonic power. In addition, I will illustrate the role that racial and

imperial anxieties played in bringing the first drug laws into being, showing how Anghie's 'dynamic of difference' persists within the proclaimed humanitarianism of the moral reformers and Christian missionaries who drove prohibition into law. In short, this chapter will tell the story of the pre-War on Drugs and the debt it owed to a particular recalibration of the universal order that I have already described as 'sacrificial', illustrating how the seeds of the contemporary drug war were laid in the emergence of an American moral universalism.

5.2 Confessions of A European Opium Empire

'I do not readily believe that any man having once tasted
the divine luxuries of opium will afterwards descend
to the gross and mortal enjoyments of alcohol.'
Thomas De Quincey¹

With international drug prohibition becoming a given universal norm in the twentieth century, it becomes a challenge to recall how historically contingent our contemporary approach to 'drugs' are. The use of psychoactive substances for medicinal, social, religious, or nutritional purposes has been common throughout the world.² Cultures have practiced a variety of methods of intoxication over time and with European colonialism producing a new framework for an interconnected world market, a wider assortment of psychoactive substances became more accessible to a greater array of the world's people than they had been before.³ Furthermore, the wealth of European empires owed much to the trade of various psychoactive substances, whose value as commodities contributed much to the emergence of modern global capitalism through the expansion of European commerce into new regions and the expropriation of their resources.⁴ The Victorian insistence on international law guaranteeing the 'right to trade' realised itself through the mercantilism of early modern Europeans trading in resources 'discovered' in new

¹ Thomas De Quincey, *Confessions of an English Opium-Eater*, Revised edn (London: Penguin Classics, 2003), p.295.

² William McAllister, *Drug Diplomacy in the Twentieth Century* (London: Routledge, 2000), p.9.

³ For further reading on how European imperialism produced a world market in Drugs, see David T. Courtwright, *Forces of Habit: Drugs and the Making of the Modern World* (Cambridge: Harvard University Press, 2001).

⁴ Sidney Wilfred Mintz, *Sweetness and Power: The Place of Sugar in Modern History*, Revised edn. (London: Penguin Books Ltd, 1986); or Carl A. Trocki, *Opium, Empire and the Global Political Economy: A Study of the Asian Opium Trade, 1750-1950* (London: Routledge, 1999).

lands, prominent amongst which were ingestible, psychoactive substances such as tobacco, coffee, cacao, tea, sugar and distilled liquor, all of which were then turned into commodities to be mass produced and mass consumed. Included in this colonial commercialisation were also psychoactive substances such as opium, cannabis and cocaine, substances nowadays seen as morally and economically distinct from the aforementioned substances such as coffee and sugar. However, this is a distinction that has been produced through prohibition that is then retrospectively projected onto the past. For the merchants, the planters and the imperial industrialists engaging in the remaking of the world in Europe's image, the various plants that we would later call 'drugs' were seen as merely further sources of profit. Drugs like opium, cannabis and cocaine did not spread through the world by happenstance, many regionally popular psychoactive substances that European imperialists encountered - popular traditional drugs include such as qat, peyote or kava - did not become global commodities in the way the drugs now referred to in drug policy studies as 'the big three' did.⁵ A concerted effort was made by European imperialists to cultivate the supply of these substances due to their popularity with European consumers, particularly opium. Paralleling the increasing supply was a growing demand for such intoxicants within the European market. David Courtwright credits the increased demand for drugs like opium in Europe to the growing ability for the wealth of Europe to satisfy the basic needs of its population leaving them now free to give increasing focus to matters of pleasure and adventure. Courtwright explains that 'drug commerce [...] flourished in a world in which the hungry psyche was replacing the hungry belly.'⁶ This was particularly true for the bourgeois class of European society, who, with new-found wealth and a detachment from the narrow behavioural norms of old aristocratic society, encouraged experimentation with new substances and states of mind.

The attraction of drug use in this era was perhaps best captured by Thomas De Quincey's 1822 memoir *Confessions of an English Opium Eater*, which popularised an image of privileged drug dependence. De Quincey, along with fellow canonical literary figures who openly celebrated drug use, such as Samuel Coleridge and Charles Baudelaire, epitomised the fashion for drugs, particularly opium, that had taken hold within decadent European artistic circles in the eighteenth and nineteenth centuries. Opium was indulged in across all classes of European society, the

⁵ Courtwright, *Forces of Habit*, p.3.

⁶ *Ibid.*, p.4.

cheapness of the drug also allowing it to be an attractive intoxicant for those toiling masses of the newly industrialising cities.⁷ However, it was the artistic and wealthy classes who would eulogise the drug's properties, celebrating opium as a facilitator of romantic sensibilities and a poetic imagination.⁸ For large swathes of the European bohemian class, opium promised the pathway to what Baudelaire termed an 'artificial paradise.'⁹ The association between drug use and transgression was nascent at this time, drugs often symbolising a bohemian counterpoint to the conservative European values; however, drugs were not read as conduits to physical and spiritual decay in the way they would be by twentieth century law. The absence of widespread moral or medical indictment against drug use in nineteenth century Europe is illustrated by the accommodation of opium trade displayed by the largest of the imperial powers and the hegemonic actor in the international community of that time, the British Empire. In 1895, the British government published a report by the Royal Commission on Opium, which had been tasked to investigate opium and potential problems from its use and trade over the course of two years. The Royal Commission on Opium concluded in its report that there was "no evidences of extensive moral or physical degradation" resulting from the use of opium in its colonial jewel of India.¹⁰ At the time of the late nineteenth century, the profits that the British Empire, along with its imperial rivals, acquired from the international trade in drugs overrode any concerns regarding the morality of their usage. The commercialised drugs trade and the taxes accrued from it were a major fiscal cornerstone for the European empires.¹¹

To remember that in the recent past, drugs were traded as legitimate commodities within the legal globalised marketplace provides an important point of departure from which to trace the emergence of prohibition in international law. Within the international legal order of formal colonialism, the European imperial states cultivated substantial traffic in opium, cannabis, coca and other psychoactive

⁷ Thomas De Quincey, 'The immediate occasion of this practice was the lowness of wages, which at that time would not allow them to indulge in ale or spirits, and wages rising, it may be thought that this practice would cease', *Confessions of an English Opium-Eater*, p.3.

⁸ For further reading see Alethea Hayter, *Opium and the Romantic Imagination* (London: Faber and Faber, 2009); or Virginia Berridge, *Opium and the People: Opiate Use in Nineteenth-century England*, Revised edn (London: Free Association Books, 1998).

⁹ Charles Baudelaire, *Artificial Paradises: Baudelaire's Classic Work on Opium and Wine*, First Edn (New York: Herder and Herder, 1971).

¹⁰ Final Report of the Royal Commission on Opium Great Britain, Sessional Papers of the House of Commons (1895), XLII, p.124.

¹¹ Courtwright, *Forces of Habit*, p.5.

substances that would latterly be labelled as drugs.¹² The apex of European exploitation through the trade in drugs was reached with the Opium Wars of the mid-nineteenth century. The Opium Wars saw the British Empire, with occasional support from their French imperial rivals, wage war in order to force the Qing dynasty of China to accept the legal trade of opium from British merchants, thereby extending European control over the region as a whole.¹³ Contrasting with the way prohibition would be understood in the twentieth century drug war, in the nineteenth century English liberalism ‘had no difficulty construing the Opium War as a crusade for free trade and for liberty’, the moral imperative lay with those who wanted to trade the drug while the prohibitionists were characterized as the instance of an uncivilized violation of free capitalist exchange.¹⁴ In his seminal text unpacking liberalism as a political philosophy, *On Liberty*, John Stuart Mill critiques the idea of China attempting to legally prohibiting the trade of opium into their country for being ‘interferences [that] are objectionable, not as infringements on the liberty of the producer or seller, but on that of the buyer.’¹⁵ Mill’s position on opium would be the argument that one would presume if taking liberalism’s claims at face value, as it claims to protect the individual liberty to engage in activities that do not harm any members of the community other than one’s own self. To consider why the rise of American liberalism coincided with a retreat from the classical liberal presumption of freedom of the drugs trade will be one of the tasks of this chapter but it is important to recognise how in the period of the Opium Wars, the European empires were willing to defend their right to trade these substances, even through warfare.

The Opium Wars were a particularly violent moment in the European exploitation of the drugs trade at the time, however they do also provide an illustration of the extent to which the default position amongst the major empires was that psychoactive substances were further resources to be extracted from the colonial world, turned into a commodity and sold in a legal market in order to accumulate wealth. The extent to which the drugs trade was normalised at this time is evident by the lengths taken by the colonial powers to maximise their production of drugs. For

¹² Julia Buxton, *The Political Economy of Narcotics: Production, Consumption and Global Markets* (London: Zed Books, 2006), pp.14-26.

¹³ For more on the Opium Wars, see Julia Lovell, *The Opium War: Drugs, Dreams, and the Making of Modern China* (London: Picador, 2012).

¹⁴ Domenico Losurdo, *Liberalism: A Counter-History*, trans. Gregory Elliott (London: Verso, 2011), p.151.

¹⁵ John Stuart Mill, *On Liberty and The Subjection of Women* (London: Penguin Classics, 2006), p.125

example, the British instituted wide-scale coca leaf cultivation in Jamaica, Sri Lanka and British Guyana. British coca production was then superseded by the Dutch, as the establishment of cocaine-manufacturing facilities in the colony of Java (Indonesia) made the Dutch the world's leading cocaine producer.¹⁶ To appreciate the extent to which drugs served as a source of wealth for European empires invites the questioning of how their transition to being seen as existential dangers to idealised human social relations came about. David Courtwright identifies the anomaly of the criminalisation of drugs, as 'political elites do not ordinarily kill the geese that lays their golden egg. Yet during the last hundred years, they have selectively abandoned a policy of taxed, legal commerce for one of greater restriction and prohibition achieved by domestic legislation and international treaties.'¹⁷ In the next section of this chapter, I will map out the historical trajectory that would take drugs from being profitable commodities within the global market to 'transgressive substances' universally prohibited by international law. Moreover, I will illuminate the ways in which this transition, spearheaded by America, would require a reconceptualization of the international community as whole, one which would recall Vitoria's universal schema.

5.3 Drug Prohibition as 'the American Experiment'

Quincy Wright, a protégée of James Brown Scott and a leading American international theorist himself, provided in his 1924 article an illustrative historical framework to follow when tracing the development of early drug prohibition.¹⁸ Wright identifies the first stage of prohibition as being the Chinese prohibition of opium, particularly from the British East Indies. He also includes bilateral treaties, agreed at the end of the nineteenth century by China with the U.S.A. and with Great Britain, both of which contained some element of control or restriction on the opium trade. The second stage for Wright 'was inaugurated by the United States through President Roosevelt's call for an international Commission, which met at Shanghai in 1909.'¹⁹ It is at this point that a consideration of drug prohibition as a problem of

¹⁶ Buxton, *The Political Economy of Narcotics*, p.16.

¹⁷ Courtwright, *Forces of Habit*, p.5.

¹⁸ Quincy Wright, 'The Opium Question', *The American Journal Of International Law*, 18, 2 (1924), pp.281-295.

¹⁹ *Ibid*, p.284

multi-lateral international law can be seen to really commence. Moreover, when analysing drug prohibition as a multi-lateral, international juridical norm rather than just a temporary agreement between certain states at a particular moment, ‘universal’ drug prohibition only begins in earnest with the emergence of American prohibitionists on the international stage. Wright then offers the third stage of prohibition as beginning with the creation of the League of Nations, providing a new institutional centre for both drug prohibition and international law more widely.²⁰ This era will be the focus of the next chapter which centres on the development of prohibition in the League of Nations; *Part C* of this thesis will then address what legal scholar Rick Lines, following Wright, has called the ‘fourth state’ of prohibition, referring to the United Nations establishing our contemporary drug laws and the subsequent War on Drugs that followed in their wake.²¹ However, this chapter will engage with Wright’s second stage, with the birth of drug prohibition as a governing norm and specific focus of international law. Through an analysis of the theological, imperial and racial undercurrents beneath the ostensible ‘humanitarianism’ of drug prohibition in this moment, I will illustrate how the sacrificial dynamic that I argue anchors the War on Drugs in the second half of the twentieth century was present in the conceptualisation of prohibition at its very origin in international law.

The contribution of the United States of America to the emergence of international law’s prohibition of drugs is difficult to overstate. As Wright’s ‘first stage’ of prohibition reveals, there are of course distinct histories of the domestic or even bilateral prohibition of particular drugs by other countries that occurred prior to the twentieth century project of universal drug prohibition. However, when considering the distinctiveness of the multi-lateral, international legislative project to categorise whole collections of dangerous ‘drugs’ and prohibit them, historiography requires substantive consideration of the American campaign of prohibition. Moreover, the role that the U.S.A. would play in the transition of drugs from an accepted commodity for exchange in the global market into being an existential threat to the international community was both a product of, and would itself help produce, a wider reorientation of international law in the twentieth century under the shadow of rising American hegemony. William Butler Eldridge, in one of the first scholarly

²⁰ Ibid, p.285-288

²¹ Richard Lines, *Drug Control and Human Rights in International Law* (Cambridge: Cambridge University Press, 2017), chapter 1.

engagements with drug laws, christened international drug prohibition as ‘The American Experiment.’²² Following in this trend, David Musto, would describe drug prohibition as quintessentially an ‘American Disease.’²³ Therefore, through a focus on the distinctiveness of the American project of universal drug prohibition, the previous chapter’s engagement with the intellectual context of early American internationalism can be seen as necessary to prepare the terrain for this chapter’s analysis of why drug prohibition became a successful crusade for moralists and missionaries at this time.

In taking up the role of the leader in the area of drug prohibition at its very origin, the U.S.A. would establish a unique level of influence over the international laws on drugs that is maintained up to and including the contemporary epoch. The prominent early prohibitionist Dr Hamilton Wright, for example, insisted that ‘the United States is due the credit of having initiated an international and national movement’ against drugs.²⁴ The leadership role that America would play with regard to the War on Drugs would persist for the duration of the next century, as ‘the United States came to define and shape the drug “problem” and responses’ across the Globe.’²⁵ Furthermore, the impact that the move towards international drug prohibition had on the United States, particularly in relation to its own role as an international actor, is also of crucial importance. Drug prohibition has been described as the ‘first significant foray by the United States onto the stage of global diplomacy’ pre-figuring, and in many ways providing the template for, the American vision of internationalism that it would promote over the rest of the ‘American Century’.²⁶ As a result, despite the primary concern of this thesis being the question of what the War on Drugs betrays about the operation of international law, it is essential to engage with the history of how drug prohibition emerged within the domestic context of the U.S.A., considering the unique impact of that particular nation upon the course that international law would take in relation to drugs. Moreover, it is my argument that the very structure of international drug prohibition can be described as theodician: an

²² William Butler Eldridge, *Narcotics and the Law: A Critique of the American Experiment in Narcotic Drug Control*, 2nd Revised edn (Chicago: University of Chicago Press, 1968).

²³ David Musto, *The American Disease: Origins of Narcotic Control*, 3rd edn (Oxford: Oxford University Press, 1999).

²⁴ Hamilton Wright, ‘The International Opium Conference’, *American Journal of International Law*, 6 (1912), p.865.

²⁵ Julia Buxton, ‘The Historical Foundations of Narcotics Control’, *Innocent Bystanders: Developing Countries and the War on Drugs*, eds. Philip Keefer and Norman Loayza (New York: Palgrave Macmillan, 2010), pp.61-94, p.62.

²⁶ Ibid.

envisioning of the drug problem as an external infestation of the pure community to be addressed by violence against the source. This theodician structure of drug prohibition owes much to America's own distinct legal order and its history of constituting political community through legalised violence upon the bodies of racially subaltern subjects. Therefore, an essential question to consider is the question of the role that race played within the U.S.A. and the whether the particular structure of relations between the races in that country would inform its history of drug prohibition, which would in turn inform drug prohibition at the international level.

5.3.1 Race, Drugs and the Constitution of America

Race underwrites the very juridical structure of America. In contrast to the major European empires, whose racialised colonial subjects were largely located overseas and thereby removed from the metropolitan body politic and the country's internal legal systems, as a settler colony itself which became a hegemonic world power, the U.S.A. was required to confront the question of race inside of its own borders, resulting in the repeatedly-flawed answers to this question being etched within constitutions, statues and court cases that compose the national law. The question of race became an immediate corollary to American independence, did the self-evident truth 'that all men are created equal' extend to *all* men within America's borders?²⁷ Michelle Alexander explains that 'the structure and content of the original [American] constitution was based largely on the effort to preserve a racial caste system.'²⁸ The task of cohering a functional national community of unequal-equality is further challenged by the American constitution's further task of having to hold together a popular democracy without the embodied sovereign of a ruling monarch. The language of America's founding document promises 'justice' and 'liberty' within 'a more perfect union', but the very constitution of that union was predicated upon a restriction of the humanity of the Black population through the three-fifths compromise.²⁹ The idea within the U.S. constitution that Blacks were only three-fifths

²⁷ The American Declaration of Independence, Available at http://www.archives.gov/exhibits/charters/declaration_transcript.html [accessed 2 April 2016].

²⁸ Michelle Alexander; *The New Jim Crow: Mass Incarceration in the Age of Colorblindness*, Reprint edn (New York: The New Press, 2012), p.27.

²⁹ The Constitution of the United States, the preamble declares 'to form a more perfect Union', while the three-fifths compromise refers to the construction of slaves as worth three-fifths of a person for the

of a person offers a codification of the essential impulse of all racist discourse, the impossible attempt to construct other human beings as not human. Reading the U.S. constitution from this perspective recalls Fanon's notion of racism as a condition not of subjugation but of non-recognition, in that the resulting failure to recognise a social relation between the races means that that the minimal condition for law- a system of rules to be applicable to all- are not in place. The racist imperative to push certain humans outside the boundaries of humanity persisted through the American legal system beyond the abolition of slavery, informing laws from the Black Codes that followed the post-civil war Reconstruction to the Jim Crow laws that maintained legally segregated populations until the 1960's. The story of America was, to a large extent, written through the mobilisation of the force of law to insist upon the fiction of race.³⁰ By fiction of race, I refer to how 'race' as in distinct difference between peoples being attributable to skin colour does not exist in biological terms, however the colonial project and correlative racist laws have imbued this fiction with a material effect. The emergence of drug prohibition within America would take this story on to a new chapter.

For most of the nineteenth century, as was the case in Europe, the legal use and trade of substances like cannabis, opium and cocaine was tolerated in America.³¹ However, towards the close of that century, a pocket of municipal and state jurisdictions began to turn towards drug prohibition. A close interrogation of this historical moment finds both the early drug laws and the surrounding discourse saturated in the language of the fear of the racialised 'other'. David Bewley-Taylor argues that America's earliest recorded drug law, the *1875 City Ordinance against opium dens* passed in San Francisco, was a law produced on 'strictly ethnic grounds', aimed against 'Chinese immigrants' practice of smoking opium' and fuelled by a popular media obsessed with 'images of 'yellow fiends' debauching white women and the youth of the nation.'³² Following San Francisco's lead, other municipal and state legislators began to pass laws prohibiting the opium trade, laws shadowed by newspaper stories that portrayed opium as an insidious threat to all Americans,

purposes of calculating a states total population within Section 2. Constitution available at http://www.archives.gov/exhibits/charters/constitution_transcript.html [accessed 06 April 2016].

³⁰ For more on law's role in constituting race in America, see Karla FC Holloway, *Legal Fictions: Constituting Race, Composing Literature* (Durham: Duke University Press, 2014).

³¹ Musto, *The American Disease*, pp.1-10

³² David Bewley-Taylor, *The United States and International Drug Control 1909-1997* (London: Continuum 2001), p.17.

causing even those with ‘respectable parentage’ to be lured into deviancy through the ‘unmitigated evil’ of the Chinese opium dens.³³ Opium functioned as a prime signifier of the orientalism that Edward Said famously critiqued.³⁴ As a space, the opium den became associated in the popular imaginary with dark, smoky, licentious immorality. The first opium laws set a precedent for other drugs laws in their preoccupation to ban not only the drug itself but also the very subjectivity it is presumed to engender.

The extent to which the first laws prohibiting opium required a shift in understandings of law’s power to produce particular subjects should also be recognised. As further initiatives were proposed in the wake of the San Francisco ordinance, legislators were initially nervous regarding this encroachment upon the individual freedom that, by orthodoxy, was credited as underwriting American liberal democracy. For instance, in 1887 the Californian Supreme court responded to a writ of habeas corpus against another city ordinance prohibiting opium, passed in the neighbouring city of Stockton, by declaring that ‘to prohibit vice is not ordinarily considered within the police power of the state [...] The object of the police power is to protect rights from the assaults of others, not to banish sin from the world.’³⁵ Such deference towards personal liberty within the private sphere recalls the presumptions of liberalism as articulated earlier by John Stuart Mill’s position on drug prohibition and had been the norm in American law up until this moment, however, as drug prohibition began to be adopted by an increasing number of states, a shift of the boundaries of American liberalism would be affected.

Following quickly in the wake of the first laws against opium came the prohibition of cocaine, with laws against its use and trade being implemented in several states.³⁶ The trend of drug prohibition was further extended in the early years of the twentieth century as states also began passing laws against cannabis.³⁷ These three plant-based psychoactive substances would become the main targets of the ‘War on Drugs’ that would be waged across the globe over the coming century. Scholars who have historicised drug laws have credited the prohibition of opium, cocaine and

³³ ‘The Opium Dens’; San Francisco Chronicle; Nov 16, 1875, Available at <https://earlydruglaw.files.wordpress.com/2011/02/ordinance-passes.pdf> [accessed 08 April 2016].

³⁴ Edward W. Said, *Orientalism*, Reprint edition (London: Penguin Books 2003)

³⁵ *In re Sic* 73 Cal. 142, 1887 Cal. Lexis 617, Available via LexisNexis Library [accessed 09 January 2016].

³⁶ The first states to prohibit cocaine in the U.S.A. were Oregon in 1887, Montana in 1889, Colorado and Illinois in 1897, Massachusetts in 1898.

³⁷ First states to ban cannabis in the U.S.A. were Massachusetts in 1911 and Wyoming, Indiana, Maine, and California in 1913.

cannabis in America to the popular association between these three drugs and America's different racially subaltern populations. For example, David Musto emphasised how the preponderance of racialised drug stories at that time, such as the *New York Times*' now infamous report shown below, entitled 'Negro Cocaine 'Fiends' Are a New Southern Menace', illustrates the 'white fear' behind the shift away from the laissez-faire approach to drugs.³⁸



Fig. 3 *New York Times*, Sunday February 8, 1914. Available at <http://stopthedrugwar.org/taxonomy/term/189> [Accessed 07 January 17]

William McAllister reinforces this argument by detailing how 'in the United States cocaine's popular association with blacks fuelled regulatory passions based on racial discrimination.'³⁹ For Musto, the prohibition of cocaine cannot be unlinked from other mechanisms of legal violence inflicted on peoples racialised as black in early twentieth century America.⁴⁰ Musto understands the prohibition of cocaine as just another instrument of control to be used by the law upon black bodies in conjunction with an arsenal that included segregation, voter restrictions and criminalisation. By extension, other scholars have read this same process of racialising, and thereby demonizing, particular drugs to have been applied, *mutatis mutandi*, to opium/Chinese immigrants and to cannabis/Mexican immigrants. The trajectory of state-by-state drug prohibition would eventually culminate with the establishment of drug prohibition as

³⁸ Musto, *The American Disease*, p.8.
³⁹ McAllister, *Drug Diplomacy*, pp.18-19.
⁴⁰ Musto, *The American Disease*, p.7: 'The fear of the cocainized black coincided with the peak of lynchings, legal separation and voting laws all designed to remove political power from him.'

the national law of the U.S.A. through the passing of *the Harrison Narcotics Act of 1914* at the federal level. The *Harrison Narcotics Act of 1914* was instituted just 10 months after the New York Times published the aforementioned story on the menace of ‘Negro Cocaine Fiends’. This led the act to be read by historians who see American drug prohibition as a mere veneer for continued racial violence as the apotheosis of the narrative in which drug prohibition was being produced in response to fear of the racial ‘other.’

Legal scholar George Fisher has gone some way towards complicating the narrative of American drug prohibition emerging as solely a proxy-war against racial subalterns however, by revisiting the chronology of the first anti-drugs laws. Emphasising the extent to which the early American drugs laws were geographically dispersed, often being passed in States with a nominal presence of racial minorities, Fisher argues that prohibition laws could not have simply been a cynical attempt to visit legalized violence upon the racial minorities, whose being had become discursively interwoven with these drugs.⁴¹ Instead, Fisher provides a counter-narrative which privileges the role that the fear of addiction spreading among the white population of America played in prompting legislators to ban certain substances, rather than the demonization of drug use amongst racial others. Fisher shows that newspaper stories of a brewing drug epidemic amongst Americans racialised as white often preceded the now more infamous articles demonizing racial minorities. For Fisher, it was the effect drugs had upon the white youth, rather than effect they had on the negro or the oriental, that really concerned the local and state authorities pioneering drug prohibition.⁴² Fisher ultimately argues that when historicizing prohibition, we should remember that ‘the earliest anti-drug laws sought to protect whites’ morals’ and it was only ‘in time...[that]... racial hatred infected enforcement of these laws and colo[u]red depictions of their violators.’⁴³ Fisher accepts that drug laws did engender racialised violence in America but he places the source of the violence within the general society rather than within the laws themselves.

Fisher’s rigorous engagement with the timeline of the early American drug laws does reveal the limitations of viewing the emergence of drug prohibition as

⁴¹ George Fisher, ‘The Drug War at 100’, Available at <https://law.stanford.edu/2014/12/19/the-drug-war-at-100/> [accessed on 11 January 2016].

⁴² Fisher, ‘The Drug War at 100’.

⁴³ George Fisher, ‘The Drug War at 100’.

simply a surreptitious project to visit violence onto racial subaltern subjects. Fisher is correct in noting that a close reading of the history of the prohibition law's troubles any narrow theoretical notion of racism being the driving force of these changes in law. However, Fisher's understanding of the function of racism carries its own limitations, particularly when a Girardian perspective of racism as intertwined with the sacrificial purification of the community that Fisher's argument recognises as being undertaken. In his push back against the history of drug laws as violence against racial others by another name, Fisher over-determines racism, reading it as purely the prejudiced construction of others and correlatively, if those others are not present, then questions of race is no longer at play. However, this perspective belies the extent to which race as a discourse produces 'the self' and 'the normal' as much as 'the other' and 'the abnormal.' As discussed earlier in this thesis, discourses of race allow the self to be produced and cohered through negation. In America racism was employed to produce a particular property called whiteness, a property that must be policed vigorously. Once you appreciate the productive power of racism and take the purification and protection of the idealised community as its centre of gravity, then the absence of racial others does not by itself preclude a particular community from undergoing persistent process of racial purification. It is the lie of racism that undesirable characteristics can be negatively projects to be the sole possession of racial subaltern; stalking this lie is the knowledge that all can regress, all can fall. The real fear of racism is the potential of those determined to be within the protected category of 'whiteness' to still descend into barbarity and monstrosity, if not consistently disciplined. An appreciation of this aspect of racism reconciles the rationale offered for early state-by-state drug prohibition by Fisher with the arguments those forwarded by Musto, Bewley-Taylor and others. The drug laws were driven in their early instantiations by the desire to protect a racialised fallacy of humanity, and the denial of failure to realise this fallacy would continue to inform drug prohibition throughout the twentieth century.⁴⁴ The desire to establish a purified insular group is not opposed to the demonization of the other but the predicate for it.

Fisher importantly redirects our focus towards the important role that the fear of white America to protect its community from contagion played in driving early

⁴⁴ For further on the role that denial plays in sustaining the laws on drugs see Eva Bertram, Morris Blachman, Kenneth Sharpe, and Peter Andreas, *Drug War Politics: The Price of Denial* (Berkeley: University of California Press, 1996).

drug prohibition, rather than this being driven by the mere fear of racial others, but he overlooks the interconnection between these two elements of the same sacrificial racial dynamic. Furthermore, a dismissal of the racial undercurrents to early drug prohibition in the U.S.A. fails to appreciate the ways in which these transforming of these plants into Taussig's transgressive substances is indebted to an association between racialised others and non-human conditions of existence under Euro-modernity. As discussed at length in the first chapter of this thesis, the discursive fear of drugs is heavily indebted to the intertwining between the substances themselves and the condition of racialised peoples, who are presumed to be weak of reason and will and instead constituted of pure appetite, therefore unable enter into social relations. As Taussig teaches us, drugs become transgressive when they are discursively read as the conduit to that condition of abjection embodied by the racial subaltern subject, no longer just a plant but drugs are now a source of contagion for the idealised community of rational and civilised humans.⁴⁵ Once the ways in which the fear of drugs as contagion that married with the embodied contagion of race is fully appreciated, it is easier to understand why drugs caught the imagination as the enabler of violence from racial others, despite the fact that many of the early states to pass the laws had negligible racial minority populations. However, this thesis has advanced a reading of race not as merely material oppression but also the political-theology of turning particular peoples into what Fanon perceptively described as the 'dammed'. Therefore, as my descriptor of drugs laws as operating 'sacrificially' suggests, prohibition in its early instantiation was also indebted to theology and the Christian proselytizing mission.

5.3.2 The Religious Foundations of Drug Prohibition

'Therefore our mission is, or should be, one of self-conversion.
How can we hope to convert others if we ourselves are not converted?'⁴⁶

James Brown Scott

The history of drug prohibition, both within the U.S.A. and internationally, requires that proper credence be paid to the Christian leanings of the moral humanism

⁴⁵ Taussig, *My Cocaine Museum*, p.xiii

⁴⁶ James Brown Scott, 'A Single Standard of Morality for the Individual and the State', p.22.

that informed it. The seeds of U.S. hegemony were sown through a transnational network of proselytising missionaries. The exporting of Christianity had been a persistent component of European imperialism, however it would acquire new impetus through the prodromal emerging of the U.S.A. as a world power. In seeking to reform the vice that they saw as infesting the lost souls of the world, 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) would clear the ground for the coming American moral empire.⁴⁷ Moreover, international drug prohibition provides an archetypal example of the dialectical interplay between the church and state, through the early laws against drugs we can see how the 'American government adapted to the new moral lobby and used drug reform as an instrument in regional and ultimately global policy.'⁴⁸ Missionaries such as William Dix, Wilbur Crafts and perhaps most famously Charles Henry Brent emerged as major actors crossing the religious and political arenas who were able to colour international drug policy and, by extension, the wider foreign policy aims of the Root-Scott led U.S. State department. Root's own turn from accepting the drugs trade as legitimate part of the global marketplace towards pursuing international prohibition can be directly credited to his dialogue with missionaries; it was in the wake of receiving a flurry of letters and petitions from Wilbur Crafts that Root declared to the U.S. administrators in the Philippines: 'the more I study the opium question the more reluctant I become to have your government sell opium.'⁴⁹ The influence that the missionaries wielded over legislators had become a distinctive feature of American politics by the end of the nineteenth century. A convergence can be read between the Christian mission to eradicate vice from the world and the desire of U.S. hegemony to distinguish itself from European imperial powers. With an intertwinement of theological and imperial objectives fostered, the potential of international law as an increasingly prominent instrument for the enacting of both of these ambitions allows the drug prohibition to be theoretically synthesised with humanitarian protestations. As stated above, the American drive towards drug prohibition would aid the reshaping of international law towards a

⁴⁷ For further on the role of Christian missionary groups in emerging American hegemony see Ian Tyrrell, *Reforming the World: The Creation of America's Moral Empire*, Reprint edn (Princeton: Princeton University Press, 2013).

⁴⁸ Tyrrell, *Reforming the World*, p.147.

⁴⁹ *Ibid*, p.151.

concern with questions of the internal morality of individuals, a focus not only on prohibiting vice, but paying particular attention to prohibiting the traffic of vice, of policing the potential for vice to spread, infect and become contagious.⁵⁰

The interweaving of the Christian mission to save souls with the fledging era of the crusade against drugs is encapsulated by the biography of Bishop Charles Henry Brent. Bishop Brent was the most influential of the Christian missionaries who would leverage, and be leveraged by, Elihu Root in furtherance of the prohibition of drugs, notably the Reverend Hampden C. Du Bose of Soochow, the Reverend Wilbur Crafts and Bishop Homer C. Stuntz.⁵¹ Charles Henry Brent was elected as the first Episcopal Bishop of the Philippine Islands in 1901, after the U.S.A. acquired the territory following victory in the Spanish-American War. However, along with the Islands came the inheritance of an ‘opium problem’ through the drug being used by the indigenous population. Missionaries in the Philippines, like Brent, began to consider the prohibition of opium as an extension of their proselytising mandate. Acting as the vanguard of America’s moral empire, these reformers perceived the drug as an impediment to ‘the natives’ conversion to Christianity and a potential source of barbaric ‘contagion that must be prevented from infecting the American bodies.’⁵² Disavowing the strict coloniser/colonised division common of formal European colonialism, the liberal humanitarianism of American ‘informal’ empire placed the Americans conceptually in greater proximity to the indigenous populations, thereby inviting greater vigilance against potential sources of contagion being transferred from the ‘native’ to the American.

5.3.3 Bishop Brent, Opium and the Civilising of the Native

The development of prohibitionist drug laws should be read alongside the production of a distinct jurisdictional sphere for the people of the Philippines following the Spanish-American War. American expansionism over the course of the nineteenth century had functioned through the annexation of land, followed by the incorporation of that land into the Union, then to be repopulated with Americans of

⁵⁰ For further on the moral turn of early twentieth century international law, See Stephen Legg, ‘The Life of Individuals as well as of Nations’: International Law and the League of Nations’ Anti-Trafficking Governmentalities’, *Leiden Journal of International Law*, 25 (2012), pp. 647–664.

⁵¹ For further on the contributions of these missionaries, See Taylor, *American Diplomacy and the Narcotics Traffic*, Chapter 2.

⁵² Tyrrell, *Reforming the World*, p.152.

European descent.⁵³ However, the Spanish ceding of sovereignty over several territories to the U.S.A. in the *Treaty of Paris, 1898* provoked an innovative juridical response in America, as ‘law and policymakers were interested in developing a new expansionist policy that would enable the U.S. to permanently annex territories without being bound to create new states or incorporate the non-Anglo-Saxon inhabitants of these territories into the U.S.’⁵⁴ The resulting legal contestations over this question, collectively referred to as the Insular Cases, have been read by legal scholars as betraying the form of American inclusive/exclusive internationalism.⁵⁵ Informed by the juridical framework that had been applied to address America’s indigenous problem of the ‘Indian’, the Insular cases established in law the disqualification of America’s ‘colonial’ subjects from the rights and protections enjoyed by U.S. citizens through the constitution.⁵⁶ America included the peoples of the former Spanish colonies within an aggregated jurisdictional sphere but without them acquiring the full rights of a citizen of the U.S.A. Therefore, while American jurisprudence did not construct the islands of the Philippines, along with Cuba, Puerto Rico, and Guam as colonial states equivalent to the prevailing model of European empire, there was also no plan for their full incorporation into the Union as had been America’s default practice upon acquiring new states over the nineteenth century. As a result, the people of these islands were suspended in a juridical condition that has been described by scholars of American expansion as a state of ‘inclusive exclusion.’⁵⁷ This descriptor immediately recalls the positionality of Vitoria’s Amerindian ward and Girard’s scapegoat, read together at length in earlier chapters. The inclusive/exclusion of America’s newly acquired colonised subjects underwrote the emergence of America’s moral empire, as well as providing the context for the birth of international drug prohibition. The innovations of the colonial juridical structure to facilitate the governance of the Philippines and America’s other acquisitions from the *Treaty of Paris, 1898*, served as essential pre-conditions for the

⁵³ Charles R. Venator-Santiago, ‘Extending Citizenship To Puerto Rico: Three Traditions Of Inclusive Exclusion’, *Centro Journal Volume*, 25, I (Spring 2013), pp.50-75, pp.51-54.

⁵⁴ Venator-Santiago, ‘Extending Citizenship To Puerto Rico’, p.52.

⁵⁵ For readings of how Insular cases informed the distinct nature of American twentieth century imperialism see Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge: Cambridge United Press, 2005), pp.282-283; or Peter Fitzpatrick, *Modernism and the Grounds of Law* (Cambridge: Cambridge University Press 2001), pp.176-178.

⁵⁶ Peter Fitzpatrick, *Modernism and the Grounds of Law*, p.178.

⁵⁷ For further reading, see Venator-Santiago, ‘Extending Citizenship To Puerto Rico’; or Bartholomew H. Sparrow, *The Insular Cases and the Emergence of American Empire* (Kansas City: University Press of Kansas, 2006).

success that the missionaries and moral reformers who were championing opium prohibition would enjoy.

Initially, the U.S. government rebutted the missionaries' concerns, citing that 'opium was tolerated in other colonial regimes'; however, the legal trade of opium challenged the core basis of what the missionaries saw as the distinguishing quality of American informal imperialism which was acting as 'moral uplift and an example to imperial powers.'⁵⁸ In the run-up to the 1904 presidential election, President Roosevelt relented to the pressure of the missionaries, and instructed his Secretary of War, Elihu Root, to have the Philippine Commission, the U.S. body governing the Philippines, establish a committee to investigate the opium problem.⁵⁹ Root chose Bishop Brent to head up this committee, encouraged by the fact that, despite Brent being 'one of the sternest opponents of opium amongst the missionaries', he was not as fanatical as the likes of Crafts and instead displayed a finer understanding of diplomacy and statecraft.⁶⁰ Brent's approach to the indigenous populations reflected the inclusive/exclusion of America's juridical approach to the Philippines. While Brent refuted formal colonialism as it had been exercised by the European powers, he always remained 'certain of the natives' inability to govern themselves.'⁶¹ Brent's interweaving of an 'informal' imperialism with his prohibitionist advocacy was indicative of how the opium problem fitted within the wider orientation of American internationalism. As Ian Tyrell tells us:

In the treatment of the opium issue, it was not simply a moral coalition triumphing over a passive government. The American government adapted to the new moral lobby and used drug reform as an instrument in regional and ultimately global policy. Collusion between reformers and governments began to shape American diplomacy in distinctive ways.⁶²

An example of the way the state and the moral reformers converged can be seen in Brent's collusion with the Presidency to mobilise the international community against opium. Brent raised the need for an international meeting addressing the opium problem in his letters to President Roosevelt from as early as 1906.⁶³ This pressure

⁵⁸ Tyrell, *Reforming the World*, p.148.

⁵⁹ *Ibid*, p.153.

⁶⁰ *Ibid*.

⁶¹ Musto, *The American Disease*, p.26.

⁶² Tyrell, *Reforming the World*, p.147.

⁶³ Musto, *The American Disease*, p.31.

eventually bore fruit with the first international meeting on drug prohibition held in Shanghai, China in 1909. Although only a set of agreed recommendations emerged from this meeting as opposed to a full treaty, it commenced the trend towards prohibition that would intensify over the century. The Shanghai meeting followed in the wake of the *Brussels Sugar Convention 1902*, which scholars have read as being the first modern, multi-lateral international trade treaty.⁶⁴ The interplay between the legitimate economic sphere- exemplified by the regulation of one psychoactive substance, sugar- and the transgressive, illegitimate economic sphere- exemplified by the prohibition of another psychoactive substance, opium- is apparent in these two early examples of the multi-lateral, international agreement.

The 1909 meeting of the Shanghai Opium Commission provides the first marker in international law's shift towards universal drug prohibition.⁶⁵ Root appointed Brent to serve as the chairman for the Commission, establishing a structure in which an American drug crusader is able to guide the meeting as a whole.⁶⁶ In attendance at this meeting were representatives from the United States of America, Austria-Hungary, China, France, Germany, United Kingdom, Italy, Japan, Netherlands, Persia, Portugal, Russia and Siam.⁶⁷ The driving force behind this meeting remained the U.S.A., which had canvassed the largely indifferent European powers and pressured them into beginning to conceive of the drugs trade along moral and not just economic terms. Moreover, as Ian Tyrell tells us, the American 'objectives were not merely moral...they were strategic as well. Brent and Roosevelt wished to use the opium issue to effect regional political change.'⁶⁸ The U.S.A. employed the issue of drug prohibition to begin to insert itself at the head of an international legal order, make drug prohibition one of the first examples of the U.S.A. taking up the omniscient, panoramic positionality that we see Scott (in the guise of Vitoria) taking up in the mural in Washington, as analysed in my previous chapter. Brent's ally and America's chief negotiator at the 1909 meeting, Dr Hamilton Wright would later admit that it was "not entirely from altruistic motives that the state

⁶⁴ Michael Fakhri, 'The Institutionalisation of Free Trade and Empire: A Study of the 1902 Brussels Convention', *London Review of International Law*, 2, 1 (2014), pp.49-76.

⁶⁵ McAllister, *Drug Diplomacy*, p.31.

⁶⁶ *Ibid*, p. 35.

⁶⁷ United Nations Office on Drugs and Crime, *A Century of Drug Control* (2008), Available at https://www.unodc.org/documents/data-and-analysis/Studies/100_Years_of_Drug_Control.pdf [accessed 12 December 2015], p.33.

⁶⁸ Tyrell, *Reforming the World*, p.159.

department went about the crusade against opium... [But]... it looked like a good business move as well as a long stride in the direction of the good of mankind.”⁶⁹ Historians of drug policy have echoed this reading by arguing that the U.S. State department threw its weight behind the drive for anti-opium legislation partly due to the economic advantages afforded by the erosion of European domination of the trade with China, allowing a synthesis to emerge between the objectives of moral crusaders coincided with and economic objectives of the U.S.A as a rising world power.⁷⁰ The Shanghai Commission was ultimately unable to establish binding international law upon the attending countries, the European imperial powers remained unenthusiastic about pushing their lucrative drug industries outside of the bounds of legal commerce and instead the delegates settled upon a set of diluted recommendations to present back to their signatory governments. However, Brent and the U.S.A. had been successful in sounding the starting gun on what would become the War on Drugs over the course of the American Century.⁷¹

Following the Shanghai meeting, the next challenge for the drug crusade was to apply pressure on the attending states to codify the recommendations that had been produced into a binding, multi-lateral international treaty. The continuing pressure led to The Hague Opium Conference in 1911, once again chaired by Brent.⁷² This time the countries did agree to binding law, as the delegates signed up to the first international, multi-lateral legal treaty prohibiting drugs, *the International Opium Convention of The Hague, 1912*. The preamble of this treaty declared an ambition of ‘advancing a step further on the road opened by the International Commission of Shanghai of 1909’, which meant committing to bringing about ‘the gradual suppression of the abuse of opium, morphine, and cocaine, as also of the drugs prepared or derived from these substances.’⁷³ The provisions of this treaty, which were scheduled to enter into force in 1915, instructed that signatory parties must ‘enact effective laws or regulations for the control of the production and distribution

⁶⁹ ‘Nations Uniting To Stamp Out The Use Of Opium And Many Other Drugs’, *The New York Times* July 25, 1909, Available at http://druglibrary.net/schaffer/History/e1900/nations_uniting_to_stamp_out_the.htm [accessed 09 April 2016].

⁷⁰ Kettil Bruun, Lynn Parr and Ingemar Rexed, *The Gentlemen's Club: International Control of Drugs and Alcohol* (Chicago: University of Chicago Press, 1975), p.9

⁷¹ McAllister, *Drug Diplomacy*, p.30.

⁷² *Ibid*, p.33.

⁷³ *The International Opium Convention of The Hague, 1912*, preamble.

of raw opium.’⁷⁴ Parties also signed up to ‘enact pharmacy laws or regulations to confine to medical and legitimate purposes the manufacture, sale, and use of morphine, cocaine, and their respective salts.’⁷⁵ However, the stringency of this first international drug prohibition treaty was watered down by the colonial powers in the negotiations, still, at this moment in time, reluctant to give up their profitable drug trades. As a result, the drafting of the treaty was ‘loosely worded’ and did not contain the necessary mechanisms to oversee the implementation of its determinations.⁷⁶ Moreover, a condition of the treaty that was agreed was for its provisions to not come into effect until they had been ratified by all signatory governments, a consensus that proved impossible to achieve within the pre-World War I context of heightened rivalry between major imperial powers. However, by lobbying for and then chairing the 1909 and 1912 conferences, Brent had overseen the birth of drug prohibition in international law. In his fruitful collaborations with the Root-Scott State Department, Brent had established the legislative ground on which future prohibitionists could build.

That an Anglican minister, committed to fulfilling the civilising mission through the church and the law, should have been one of the midwives bringing international drug prohibition as we know it into being, disturbs the contemporary presumption that though the drugs laws’ contradict the orthodoxies of liberalism, they do so through a pure scientific concern with harm. The religious undercurrent to the prohibitionist narrative was essential in fuelling not only the changes in law but also changes in common understandings of the word ‘drugs’, which during this era was gradually imbued with the connotations of existential evil.⁷⁷ This religious influence informs the general arguments of this thesis regarding the operative function of the global ‘War on Drugs’. Brent served to ‘exert considerable influence upon the course of the movement’ for drug prohibition, not only by drawing upon a Christian metaphysics in his understanding of the drug problem, but also by utilising his connections through the global Christian network in order to emphasise the danger of drug use to governments across a variety of different cultures and traditions.⁷⁸ By

⁷⁴ Ibid, Chapter 1, Article 1.

⁷⁵ Ibid, Article 9.

⁷⁶ Buxton, “The Historical Foundations of Narcotics Control,” p. 74.

⁷⁷ For a study on the semantic change regarding the word ‘drug’, see John Parascandola, ‘The Drug Habit: The Association of the Word “Drug” With Abuse in American History’, Roy Porter, *Drugs and Narcotics in History* (Cambridge: Cambridge University Press, 1995).

⁷⁸ Taylor, *American Diplomacy and the Narcotics Traffic*, p.56.

revisiting the work of Brent and his contemporaries, the religiosity inscribed into drug prohibition from its offset becomes evermore perceptible, supporting the theoretical argument of the international laws on drugs acting as an instantiation of sacrifice and the religious inheritance of the modern juridical system.

The religiosity of drug prohibition helps to unpack the basis for law's dogmatic commitment to its provisions in the face of empirical failure. Drug laws betray the underlying ease of translation between religious proscription and the prohibitions of the law. Girard provides guidance in his writings on the full significance of the final of the Ten Commandments being a prohibition not of an action, but of a desire: the imposition that "You shall not covet."⁷⁹ For Girard, the prohibition of desire is not installed to be 'needlessly repressive', rather social orders necessarily erect symbolic prohibitions in an attempt to forestall a Hobbesian war of all against all.⁸⁰ Through Girard we see how both religious prohibitions and international law's prohibition of drugs rest on a presupposition that there is a violence implicit in desire, encased only by the total prohibition of it, that is far more destructive to the social order than the violence required to reinforce the prohibition.⁸¹ The interconnection laid out above between Christian proselytization of American missionaries and the early international drug laws speaks further to the extent to which the 'War on Drugs' can be understood to marry with the structure of sacrifice.

5.3.4 Hamilton Wright and the Racial Underpinnings of Drug Prohibition

The early history of drug prohibition also lends itself towards a collapsing of the binary between the international and national legislative spheres. Drug laws can be understood as a textbook example of Scott's espousal of an international law inseparably interwoven with municipal systems of law.⁸² As illustrated above, the domestic movement towards drug prohibition within America propelled the emergence of the first international laws against drugs. However, the dialectic

⁷⁹ 'You shall not covet the house of your neighbor. You shall not covet the wife of your neighbor, nor his male or female slave, nor his ox or ass, nor anything that belongs to him' (Exodus Chapter 20: Verse 17).

⁸⁰ Rene Girard, *I See Satan Fall Like Lightning*, trans. James G. Williams (Macyknoll: Orbis Books, 2001), p.8.

⁸¹ Ibid, Girard tells us 'Once prohibitions are transgressed, another kind of obstacle rises up that is more tenacious still, though it is concealed at first by the very protection the prohibitions offer, as long as they are respected'. p.33.

⁸² Christopher Rossi, *Broken Chain of Being: James Brown Scott and the Origins of Modern International Law* (Leiden: Brill, 1998), p.20.

between these two legal spheres remained open as the authority of the new international laws would in turn compel Federal legislation against the drug trade to be enacted in the U.S.A. Following the aggressive drug diplomacy practised overseas by Brent, Wright and others, it was clear that ‘it would be humiliating for the United States to demand controls by other nations but have no exemplary laws of its own.’⁸³ After the first international treaty prohibiting drugs, the *1912 Hague International Opium Convention*, was signed, Wright returned to the U.S.A. ‘with two goals: increasing the number of signatories to the Convention and dispelling any doubt that this nation [U.S.A.] would pass the necessary domestic legislation.’⁸⁴ Renewed calls for the Federal government to pass nationwide drug prohibition were now cast explicitly in terms of the U.S.A. failing to satisfy its international obligations.⁸⁵ Once the U.S. Senate had ratified the treaty in 1913, it invited further pressure to enact the relevant domestic legislation as was mandated by treaty provisions. This pressure would ultimately bear fruit with the *Harrison Act 1914*, despite dissent about law taking such an invasive role in individual lives.⁸⁶ A shifting of American liberal democracy, from the aforementioned assumption that ‘to prohibit vice is not ordinarily considered within the police power of the state,’ was realised through the Harrison Act.⁸⁷ It was a shifting provoked by the authority of international law, at the same time as the presuppositions of American liberalism were being brought to bear on a reorientation of the international. The moral reformers were able to leverage the universal authority of international law to produce a national consensus on drug prohibition. McAllister details how ‘in the ensuing decade, the Harrison Act underwent numerous court challenges. [However], Federal officials often cited the international obligations incurred under the *1912 Hague Opium Convention* as a key justification in defending the statute.’⁸⁸ The interplay between national and international spheres of legal ordering is illustrated through drug prohibition’s birth. The international laws on drugs were the universalization of a particular American

⁸³ Musto, *The American Disease*, p.37.

⁸⁴ *Ibid.*, p.54.

⁸⁵ Hamilton Wright, ‘Report on the International Opium Commission and on the Opium as seen within the United States and its Possessions’, Senate Doc. No. 377, 61st Congress, 2nd Session (February 21, 1910). Wright states ‘this report on the problem of habit-forming drugs in the continental United States is a direct issue of the attempt on the part of our Government to solve the international problem’.

⁸⁶ McAllister, *Drug Diplomacy*, p.35.

⁸⁷ *In re Sic* 73 Cal. 142, 1887 Cal. Lexis 617, Available via LexisNexis Library [accessed 09 January 2016].

⁸⁸ *Ibid.*

moral humanism, while in-turn redefining that very particular that had informed it. The early days of drug prohibition serve as an exemplar of the fluid interplay between the concentric spheres of national and international law, as can be traced through the career of one of Bishop Brent's main collaborators in the production of these first international drug laws, Dr Hamilton Wright.

Dr Hamilton Wright is another major figure in the story of the international laws on drugs but he also played a significant role in domestic American drug prohibition, to the extent that historians have dubbed him 'the father of American narcotic law.'⁸⁹ Hamilton Wright was a neuropathologist, with a purely scientific interest in opium, prior to being approached, unsolicited, by Elihu Root and James Brown Scott's State Department to head up the American Opium Commission in 1908. This position resulted in Wright serving as the U.S. delegate for the 1909 meeting of the Shanghai Opium Commission and the 1911 Opium conference at The Hague that led to *the 1912 Hague International Opium Convention*. It was by charge of Scott, then Solicitor for the State Department, that Hamilton Wright represented the U.S.A. at these conferences.⁹⁰ Wright had not been involved in the debate around the legality of drugs prior to his appointment. However, upon taking up position with the State Department, Wright would develop a convert's fanaticism with drug prohibition, making the banning of drugs, rather than the study of drugs, the primary focus of his work for the rest of his life. Even following Wright's early death in 1917, his wife Elizabeth Wright carried on the prohibitionist cause as a Member of the League of Nations Opium Committee.⁹¹ In these early days of international drug prohibition, Hamilton Wright was 'entrusted with the framing and carrying out of American foreign policy in regard to traffic in narcotics.'⁹² However, Wright also credited the leadership of the State Department for setting the tone for drug prohibition, stating that 'Elihu Root, the then Secretary of State, formulated a plan, the design of which was to bring the Far Eastern opium traffic to an end, it being plain that that traffic was generally regarded as deplorable.'⁹³ Furthermore, Wright also cited James Brown Scott as giving the direction under which his report on the

⁸⁹ Musto, *The American Disease*, p.31.

⁹⁰ Arnold H. Taylor, *American Diplomacy and the Narcotics Traffic, 1900-1939: A Study in International Humanitarian Reform* (Durham: Duke University Press, 1969), p. 87.

⁹¹ Ibid.

⁹² Ibid, p. 55.

⁹³ Hamilton Wright, 'The International Opium Conference', *American Journal of International Law*, 6, 4 (1912), pp.865-889, p.866.

Shanghai opium Commission was delivered.⁹⁴ The influence of the leadership on the State Department on Wright's prohibition is confirmed in the following statement:

Secretary Root [...] was largely responsible for the fixed determination of the United States not to tolerate the misuse of opium in the Philippines by any class of their inhabitants. Although no formal declaration was made as to further international action in regard to opium production, traffic, and misuse, it was nevertheless recognized that such action was necessary.⁹⁵

Wright's scientific background would suggest a grounding of his evaluation of the harms of psychoactive substances in the language of objective and neutral scientific rationalism. However, reference to a State Department report he delivered to Congress in 1910 finds Wright's arguments littered with the same racialised demonization and anxieties regarding contagion that had been popularized through the American media at the time. In his report, presented between the international conferences at which he would represent the U.S.A., Wright argues that 'it has been authoritatively stated that cocaine is often the direct incentive to the crime of rape by negroes of the South and other sections of the country.'⁹⁶ Wright's report consistently conflates the threat of the drugs with the threat of the racial other, claiming that 'cocaine [...] has proved to be a creator of criminals and unusual forms of violence, it has been a potent incentive in driving the humbler negroes all over the country to abnormal crimes.'⁹⁷ Moreover, further extracts lend themselves to George Fisher's argument regarding drug prohibition being driven by the fear of a corruption of the idealised (ergo whitened) American subject. Wright describes cocaine as 'used by those concerned in the white-slave traffic to corrupt young girls, and that when the habit of using the drug has been established it is but a short time before the latter fall to the ranks of prostitution.'⁹⁸ Within this report, drugs are imagined not only as vessels for the inherent monstrosity of racial others but also as potential provocation

⁹⁴ Hamilton Wright, 'Report of Dr. Hamilton Wright, Of Washington, D. C.' *Third Annual Meeting of the American Society of International Law*, Available via *Proceedings of the American Society of International Law at Its Annual Meeting*, [Accessed 08 April 2016], pp.88-95, p.89. Wright: 'I was asked, rather unexpectedly, by Dr. Scott to address you informally on the organization of the International Opium Commission which has just broken up at Shanghai, and to outline the results of the conference so far as they have brought forward the settlement of the opium question.'

⁹⁵ Wright, 'Report on the International Opium Commission'.

⁹⁶ Ibid.

⁹⁷ Ibid.

⁹⁸ Ibid.

for white Americans to ‘denigrate’ themselves, recalling all the racial implications etymologically contained in the very word denigrate.⁹⁹

Wright’s report provides a microcosm for how the fear of contagion amongst the white population sat comfortably alongside the demonization of the racial other in the early days of prohibition; for, as aforementioned, they function not in contradiction to each other but as different sides of the same coin, two elements of a single dynamic, which I have termed as ‘sacrificial’. The attempt to produce a rarefied, idealised subject through the enclosure of negative characteristics with the body of ‘the other’ is troubled by the impossibility of fully determining either the idealised subject or the damned other in a fixed condition. To take one’s identity from the negation of the other, whilst at the same time arrogating one’s identity into a universal, mandates having to contain the discarded negative characteristics. Violence upon the embodied figure of negation, upon ‘the damned’ subject is enacted with the aim of expunging negative characteristics, lest they infect the purified social order. However, underlying the sacrificial structure is the recognition of its proscribed categories being porous, that the signs of infection that are projected onto the body of the damned have always already escaped and multiplied. The fear of classifications of difference being in fact porous stalks the modern discourse of race; the violence, the animalism, the deviancy projected onto the racial subaltern subject is a betrayal of what exists in-potential within the idealised human subject of Euro-modernity. James Baldwin poetically captured the misrecognition that grounds the discourse of racism when he asked white America: “if it’s true that your invention reveals you, then who is the nigger?”¹⁰⁰ In more juridical terms, Foucault also argues that what drives the law’s forceful insistence upon given norms is this same fear of the ever-present potential for the resurrection of the abnormal within the social order.¹⁰¹ The normal is constituted through the invention and then casting out of the abnormal. Law sought to produce society as a cohesive whole through the violent exclusion of negative characteristics, yet underlying the violent exclusion of the abnormal remains the

⁹⁹ To denigrate derives from the Latin for 'black- Niger', translating in directly as ‘to blacken completely’ For more on the racial implications of the word denigrate, see *The New York Times*, ‘On Language: Dark Words of Disapproval’, January 28, 1990. Available at <http://www.nytimes.com/1990/01/28/magazine/on-language-dark-words-of-disapproval.html> [accessed 02 April 2016].

¹⁰⁰ James Baldwin, ‘Who is the nigger?’ Clip taken from film *Take this Hammer*, Available at <https://www.youtube.com/watch?v=L0L5fciA6AU> [accessed 09 April 2016].

¹⁰¹ Michel Foucault, *Abnormal: Lectures at the College de France 1974–1975*, First English Edn (London: Verso, 2003).

actual impossibility of that exclusion in absolute terms, leaving always open possibilities for ‘transgression of natural limits, the transgression of classifications, of the table, and the law as a table.’¹⁰² Wright’s 1910 State Department report to the U.S. Congress, serves as an artefact illustrating the extent to which the birth of prohibition relied on drugs being imagined as a conduit to this transgression, an enabler through which the contagion that was refined out of a cohesive social order could re-enter and re-infect the community. In other words, Wright’s report reinforces Michael Taussig’s argument of drugs being read as ‘transgressive substances.’¹⁰³ A review of the early drug laws, both within the U.S.A. and in the international arena through American leadership, support Taussig reading of the fear of drugs as indebted to drugs being imagined as a ‘contagion that is material, spiritual and deadly.’¹⁰⁴ Furthermore, this imagining is facilitated by an ease of transfer between the demonised figure that emerged at this time of the junkie- the addict, the user enslaved by drugs, thereby robbed of the reason and will that make them human- and the racially subaltern subject- the oriental, the nigger, the amerindian- with both figures constructed as a failed realisation of the ideal human subject of Euro-modernity.

5.4 Conclusion

This chapter has placed a critical focus on an under-researched project of early American international law, the birth of international drug prohibition, and placed it in conversation with wider conceptual framework of a ‘sacrificial’ liberal humanitarianism driving American international law at the turn of the twentieth century. Reading together the emergence of international drug prohibition as a multi-lateral, totalising universal norm with the reworking of the international law by American jurists looking to engender what Scott termed as ‘a single standard of morality’ to globe, we can see how the birth of drug prohibition owed much to intellectual and political context of ‘sacrificial’ moral universalism that facilitated a dramatic turn away from the liberal presumptions of free-trade. When we look at the critique of Vitorian moral universalism that has been offered by post-colonial legal theorists such as Anthony Anghie and Peter Fitzpatrick, we gain a richer

¹⁰² Ibid, p.63.

¹⁰³ Michael Taussig, *My Cocaine Museum* (Chicago: University of Chicago Press, 2004) p.xiii.

¹⁰⁴ Ibid, p.253.

understanding of how the persistence of masked racial hierarchies and imperial standards of civilization could operate within the acclaimed humanitarianism of early drug prohibition.¹⁰⁵ Scott and Root constructed a tradition of American international law that departed from the strict colonial relations of European empires but maintained a veiled hierarchy between ‘the West and Rest’ within its universalism. Similarly, we can see how the racialised persistence of a discursive association of different bodies with differing levels of civilization within a single moral standard informed the prohibition of drugs, combined with drugs becoming discursively constructed as an internal pathogen endangering a reciprocal universal humanity. This theoretical understanding of drugs invites Brent, Wright and others to seek to save the souls of natives and racial subalterns, sounding the legislative start gun on a war that was to devastate these communities over the coming century.

As stated in the introductory chapters, the notion of a sacrificial international law maintains a relation to the process of how violence is used to cure violence, a mode of expansive universalism arises in an attempt to contain an outbreak of warfare but maintaining the dynamic of difference between peoples. Therefore, the importance of the crisis of the Great War in allowing both American international law and American-led international drug prohibition to transition into the global norm is a necessary focus of an analysis of the history of the international laws on drugs. Therefore, the next chapter will engage with how the legislative response to the Great War provided a new institutional centre for international law in the League of Nations, which would, in turn, become fertile terrain for prohibitionists to produce a number of stricter and more expansive international drug laws.

¹⁰⁵ See Anghie, *Imperialism, Sovereignty and the Making of International Law* or Fitzpatrick, *Modernism and the Grounds of Law*

Chapter 6

The Turn to Institutionalisation: Drug Prohibition in the League of Nations

6.1 Introduction

The previous chapter reviewed the history of the emergence of drug prohibition as a multi-lateral project of international law, detailing the central role that prohibitionist missionaries played in mobilising the U.S. State Department into organising the first major drug prohibition conference, the International Opium Commission meeting in 1909 in Shanghai. Furthermore, in that chapter, I emphasised the relationship that existed between prohibitionists such as Bishop Charles Henry Brent and Dr Hamilton Wright, and the leading actors of American international law, particularly Elihu Root and James Brown Scott. I also argued for reading an understanding of early drug prohibition as intellectually as well as politically indebted to the shift towards a ‘single standard of morality’ in American liberal international law as theorised by Scott. Drug prohibition, an idea that began the century as the reserve of fringe moral reformers, began to turn into the universal norm that it is today through the conceptualisation of drugs as a contamination of a single standard for humanity. This argument, as developed within the context of American trusteeship of the Philippines, encouraged the State Department to lend its considerable support to the task of making drug prohibition a key innovation of an emergent American internationalism.

This chapter bridges the origin of international drug prohibition with the legal and political structure for the late twentieth-century War on Drugs, which will be performed over the final chapters. In this chapter, I will show how the outbreak of war facilitated a wider turn towards moral universalism in the international order and this provided fertile terrain for drug prohibition to grow and become institutionalised. This turn previews the organisational and legislative framework that will be discussed in the forthcoming chapters in the *Part C*, which focuses on the United Nations legislation that governs the contemporary War on Drugs. This chapter will focus on the importance of the role played by the precursor to the United Nations, the inter-war period’s fledging attempt at institutionalising international law, the League of

Nations, in establishing and expanding drug prohibition as a norm of international law.

The League of Nations provided a space for an increase in the scope of international law, which would now not only concern itself with questions of war, trade or territory but also with the individual lives of the peoples of the world, making issues of welfare, health, and hygiene into new concerns of international law.¹ As Stephen Legg has said the League was ‘central to an emergent transnational (if inherently Eurocentric) epistemic community investigating the causes of poverty and disease.’² However, I seek to further Legg by stressing how this community was constituted not just through a fixing of Europe as its centre but also through the inclusive/exclusion of the non-European, colonised subject in a condition of perpetual ‘trusteeship’ that to bring it within the inner identity of the community whilst being always already disavowed. Furthermore, in this chapter, I also show how drug prohibition, shown previously to be the prohibition of psychoactive substances discursively associated with colonised peoples, benefitted from the reimagined horizons of international law in this period. In addition, I will read the League as being influenced by the vision of a liberal, humanitarian international law that, as has been argued, characterised American internationalism since the turn-of-the century. Despite the U.S.A’s ultimate failure to join the League, the institution remains a key marker and moment of acceleration in the general trajectory of international law towards operating on an expansive moral basis. As Ignacio de la Rasilla del Moral suggests ‘the pre-Wilsonian generation of US international lawyers, their work in favour of these internationalist goals contributed to nurture the intellectual international legal soil on the eve of the Great War in the United States and, undoubtedly, inspired the post-Great War establishment of the League of Nations.’³ Finally, my subsequent argument will read the theoretical and organisational changes occurring in international law at this period as a response to a period of contagious violence that has been historicised as ‘the second thirty years war.’ This term of periodization arises from historians who read the continuities between the Great War and the Second World War as not only one singular period of international crisis but

¹ Stephen Legg, “The Life of Individuals as well as of Nations’: International Law and the League of Nations’ Anti-Trafficking Governmentalities” *Leiden Journal of International Law* 25 (2012), pp. 647–664, p.653

² Legg, p.655.

³ Ignacio de la Rasilla del Moral, ‘The Ambivalent Shadow of the Pre-Wilsonian Rise of International Law’, *Erasmus Law Review*, 7, 2, (2014) pp.80-97, p.82.

also argue for its similarity of to the ‘first’ Thirty Years War in which early modern Europe imploded into contagious, violent rivalry until contained by the Peace of Westphalia, the conventional birthdate of international law.⁴ With an escape of warfare from its confines being a consistent threat over the first half of the century, the crusade of drug prohibition would increasingly be posited as a project that an international community could cohere around, leading to the imperial powers accepting greater and greater restrictions on their drugs trades despite the potential profits on offer. In addition to the consistent threat of an outbreak of violence between the rival empires haunting international law, this era also had to contend with the growing potential of violent decolonisation. The invitation of the colonised into the international community, which I will show as commencing though the League, sought to abate the potential of violent decolonisation as jurisprudence of international law (re)turned to a focus on cohering a communal global order. However, drug prohibition becoming an increasing norm of international law over this same period shows how a new axis of imperial relations was beginning to concretise within the ostensible move away from colonisation, only masked by sanctification in the name of universal humanity. Therefore, this chapter will further the historical narrative illuminating the ways in which international drug prohibition and the changing structure of international law were not merely contemporaneous but were also theoretically consistent with each other and with the general trajectory towards a ‘sacrificial’ international law.

6.2 A New Actor for A New Order: The League of Nations and the Shadow of Contagious Violence

‘There was no large difference between the principles of the Mandate System and those of the Berlin Conference.’⁵

David Lloyd George, British Prime Minister

⁴ The ‘Second Thirty Years War’ is a term used by historians to refer to the continuous period of international rivalry that spans the First and Second World Wars. For further, see Charles Feinstein, Peter Temin, and Gianni Toniolo, *The World Economy between the Wars* (Oxford: Oxford University Press, 2008); or P.M.H. Bell, *The Origins of the Second World War in Europe* (London: Routledge, 2014).

⁵ Nathaniel Berman, ‘In the Wake of Empire’, *American University International Law Review*, 14, 6, p.1526. <<http://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1339&context=auilr>> [accessed 24 June 2013].

The outbreak of contagious violence during the Great War shattered prevailing conceptions of how communality was generated in the international community. Subsequently, when the war finally concluded with the *Treaty of Versailles*, there was a widespread reinvestment in the power of international law to act as a ‘reconstructive doctrine’ and bring about the return to an order on peace.⁶ The problem of the structure of international order became a primary concern of the politicians, jurists and diplomats tasked with reorganising the international order, provoking immediate questions regarding law’s ability to engender community. As discussed in previous chapters, the presumptions of nineteenth-century positivism, producing order through the recognition of sovereignty and accompanied by a strict demarcation between the international community of sovereign states and the non-sovereign colonised world, had been exposed as unable to contain violence. With confidence lost in nineteenth-century assumptions, lawyers recognised that ‘peace and development had to be artificially created.’⁷ In response to this challenge, novel legal forms and unprecedented institutional frameworks were constructed in order for international law to be rejuvenated.

The establishment of the League of Nations served as the most dramatic innovation of the inter-war period. As David Kennedy explains, the jurisprudential panic caused by the Great War provoked ‘the move to institutions’ in international law, with the League of Nations (referred to as the League hereafter) providing a novel attempt to establish an organisational home for international law.⁸ This institution signalled an increased collective responsibility for the administration and organisation of the international community and promised to serve as a new bulwark against the mimetic violence that had been seen in the Great War. The League was innovative in terms of both structure and ambition. As Susan Pedersen argues ‘the League was always imagined as something more than a meeting ground for sovereign states: it was to rise above national hatreds and defend nothing less than ‘civilisation’ itself.’⁹ The League can also be read as providing institutional form to an already on-

⁶ For further details on the ‘reconstructive doctrine’ see Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal* (Cambridge: Cambridge University Press, 2011).

⁷ Martti Koskenniemi, ‘Nationalism, Universalism, Empire: International Law in 1871 and 1919’, paper presented at the Conference, *Whose international Community? Universalism and the Legacies of Empire*, Columbia University, April 29-30 (2005), p.41.

⁸ David Kennedy, ‘The Move to Institutions’, *Cardozo Law Review*, 8, pp.841- 988.

⁹ Sue Pedersen, *The Guardians: The League of Nations and The Crisis of Empire* (Oxford: Oxford University Press, 2015), p.6.

going, wider theoretical departure from nineteenth-century positivism, which, in its fetishized separation of law from morality, was taken to ‘have endorsed, if not facilitated, the tragedy of the First World War.’¹⁰ As Martti Koskenniemi recognises, for international law to effectively function as a ‘reconstructive doctrine’ following the end of the Great War, it was necessary for the discipline to reengage, at least in a qualified manner, with the ideas of natural law with the aim of tightening the binds of international order.¹¹ Positivism had discredited the theological naturalism of the sixteenth and seventeenth-century law of nations to the extent that it could no longer function as an explicit basis for international order. However, Koskenniemi details how more sophisticated international lawyers in the inter-war period sought to respond to positivism’s own crisis after the Great War by cloaking a partial reconsideration of naturalist ideas under the guise of a general jurisprudence of international law.¹² This jurisprudential shift, while dismissing the latent Christian mysticism of early-modern thinkers like Vitoria, imbued the League with an emboldened utopian federalism, grounded on a vision of liberal humanism that recalled the earlier imaginings of the law of nations. Natural law’s philosophical assertion of law as deriving its coherence from a transcendent, universalising point of centre- traditionally the figure of God but in the secularised discourse of modernity replaced by a conception of universal humanity- allowed for a certain resonance with the post-Great War settlement seeking to ground international law on a set of common principles, whilst remaining explicitly tied to an order to sovereign, nation-states. However, in this iteration, the anchoring of a vision of universal humanism would be achieved by way of a negative move. As will be shown below, a persisting standard of civilisation within the League allowed its fledgling vision of an international community to be constituted in opposition to a colonial subjectivity that it simultaneously sought to bring within its ‘trusteeship’. In its ambition to serve as a space in which the international community could not only congregate but also actively produce a broader communality amongst the international order, the League can be read, as argued by Pedersen, as both a product of and response to the twentieth century’s crisis of empire.¹³

¹⁰ Anghie, *Imperialism, Sovereignty*, p.125.

¹¹ Koskenniemi, *From Apology to Utopia*, p.187.

¹² Martti Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870–1960* (Cambridge: Cambridge University Press 2001) pp.353-365

¹³ Pedersen, *The Guardians*, pp.1-15

6.2.1 A Restructuring of Empire

The creation of the League serves as a historical marker for the shift away from an international order predicated on the demarcation between sovereign empires and subjugated colonial peoples to a universal order of formally equal, independent states. Though the process of formal decolonisation is often attributed to the era of the United Nations, it was the League that first provided an institutional setting in which the calls for decolonisation began to gain traction.¹⁴ The League also initiated a change in the juridical condition of the colonised subject, offering through the Mandate System a structural innovation that began the process of international law transitioning away from direct colonialism. The Mandate System was the response devised by the League to the problem of managing the colonial territories of the defeated Central Powers of the Great War. Rather than the victors simply acquiring the colonies of the German, Ottoman and Austro-Hungarian empires as the spoils of war, the victors were instead appointed as mandatories or administrators of the colonies on behalf of the League, with an explicit requirement ‘to protect the interests of backward people, to promote their welfare and development and to guide them toward self-government and, in certain cases, independence’ interwoven into the new roles.¹⁵ Envisioned by a plan for the League of Nations drafted by General Jan C. Smuts, the Mandate System sought to bring about a world in which the ‘European Empires will all have disappeared’ and an open-door approach to global trade that engenders ‘no reason for bitterness or rivalry among the great States.’¹⁶ It exemplified the League’s departure from an order of imperialism, seen as the root cause of the inflamed passions that led to war, instead presenting itself as a neutral, technocratic institution, opposed to the naked self-interest that drove the internationalism of the colonial powers.¹⁷ While maintaining an underlying vision of a difference between the ‘advanced’ and ‘backwards’ people of the worlds along colonial lines of division, the League moved away from explicitly racialised explanations for this division

¹⁴ Anghie, p.115.

¹⁵ Ibid, p.120.

¹⁶ J. C. Smuts, *The League of Nations: A Practical Suggestion* (New York: The Nation Press, 1919), p.28 Available at <https://archive.org/details/leagueofnationsp00smutuoft> [Accessed 06 April 2016]

¹⁷ Donatella Alessandrini, ‘The World Trade Organization and Development: Victory of “Rational Choice”?’ in *Events: The Force of International Law* ed. by Fleur Johns, Richard Joyce & Sundhya Pahuja (London: Routledge, 2011), pp.207-222, p.209.

towards ideas that preview the contemporary discourse of development, justifying the division through different political and economic capabilities. Moreover, this alternative model for persisting imperial relations promise a temporal change from the scientific racism of the apex of European colonialism, the notion of ‘advanced’ nations placing ‘backwards’ peoples under their ‘tutelage’ until they reach a stage of development in which they can rule themselves suggests that the hierarchical relations are not designed to be permanent, however, the presence of this rhetoric in Vitoria’s sixteenth-century schema and in contemporary discussions on development betray the indeterminacy of this promise.¹⁸ The League acclaimed an ambitious new vision for international law, while all the time continuing to take for granted the colonial division between an industrial core and agricultural periphery that would inform the spatial and juridical order of this changing world.¹⁹

In the negotiations that created the League at the end of the Great War, the Americans had argued for the creation of the Mandate System, with the ideological inspiration for the system being the U.S. trusteeship of the Philippines and other territories acquired following the Spanish-American War, which was the focus of earlier chapters of this thesis.²⁰ The Mandate System fixed within international law the concept of ‘trusteeship’ in a manner that recalled how American ‘imperialism’ privileged a conceptualisation of a temporary rather than fixed hierarchy and one that would saw its sole purpose as for the benefit of the colonised. Supporting the thread connecting Scott and American internationalism to the establishment of the League, the ‘trusteeship’ of the Mandate System carried more than a faint echo of Vitoria’s conception of the Amerindian ward, as Anthony Anghie has illustrated at length.²¹ Anghie highlights how the jurists of the League sought to draw upon Vitoria inclusive/exclusion of the colonial subject within his communal international law, justifying a continuing hierarchy between the colonial and colonised worlds as a necessary precursory for a coherent notion of universal humanity to emerge.²² The infantilising of the Amerindian performed by Vitoria’s jurisprudence once the ideas of

¹⁸ See Article 22 of Covenant of The Leagues of Nations, Available at <http://avalon.law.yale.edu/imt/parti.asp> [Accessed 06 April 2016]. Refer to previous chapters for discussions on Vitoria’s jurisprudence as a precursory for development discussions

¹⁹ Michael Fakhri, ‘The 1937 International Sugar Agreement: Neo-Colonial Cuba and Economic Aspects of the League of Nations’, *Leiden Journal of International Law*, 24, 4, pp.899-922.

²⁰ Anghie, p.140.

²¹ Ibid, p.145.

²² Ibid

natural slavery had been rejected, had that consequence of masking the violence of European conquest whilst never delegitimising the project outright. Anghie argues for seeing the Mandate System as a recovery of this schematic, stating:

The Mandate System was now presented as an elaboration of the important ideas first enunciated by Vitoria, that had been neglected and dismissed, together with so much else of value in international jurisprudence, as a result of the dominance of positivism, which now was itself discredited. The circle was complete: in seeking to end colonialism, international law returned to the origins of the colonial encounter.²³

Therefore, it must be emphasised that the Mandate System, whilst it served as a shift away from the high-point of European imperialism, should still be read as a (re)turn to international legal order that gestured towards a universal community while maintaining a ‘dynamic of difference’ between the European and non-European worlds.

Through the Mandate System, the League brought about a mutation in the workings of empire but it did not fully decouple itself from international law’s colonial legacy. Rather, the jurists that oversaw its administration ‘took it as a given that the Mandates System should aim to uphold humane principles of colonial rule, not to plan its supersession.’²⁴ The Mandate System, and the wider League of Nations, can be understood as being caught in what Nathaniel Berman has termed as a ‘perilous ambivalence’; in that it was beginning to imagine ‘an enlightened, supranational world’ and, yet, remained ‘inextricably tied to a colonially demarcated legal order.’²⁵ Moreover, it is important to emphasise, as historian Sue Perseden detailed at length, that the Mandate System was not an ambitious yet marginal initiative of the League, but instead represented the crux of the League’s *raison d’être*- the challenge of reconceptualising empire in the wake of the European intra-imperial violence of the Great War.²⁶ While the recovery of the League’s role in emergent decolonisation struggles can tend to emphasise an overly positive picture of the institution as a key historical marker in the shift towards the formal recognition of

²³ Ibid

²⁴ Pedersen, *The Guardians*, p.109.

²⁵ Nathaniel Berman, ‘A Perilous Ambivalence: Nationalist Desire, Legal Autonomy, and the Limits of the Interwar Framework’, *Harvard International Law Journal*, 33, pp.353-379, p.356.

²⁶ For further reading on the full importance of the Mandate System to the ideology of the League of Nations and interwar international law more widely, see Pedersen, *The Guardians*.

universal sovereign equality in international law, the institution can also be read as a moment of the reworking and restructuring of empire. As Rose Parfitt details, rather than being a project solely committed to the facilitation of universal equality, ‘the manufacture of sovereign inequality was one of the League’s most characteristic functions’ and the Mandate System, with its explicit notions of humanitarian trusteeship and debt to the American model of protectorate offers a telling example of how sovereign inequality was fortified within this shift towards equality.²⁷

The Mandate System was topic of interest to American internationalists, as might be expected when considering the aforementioned similarity to America’s own paternalistic universalism. International theorists such as Quincy Wright and Parker Moon produced extensive studies of the Mandate System.²⁸ This interest in the Mandate System reflects how it was through the interwar period, the relation between the colonising and colonised worlds began to be translated from the language of fixed, essential superiority into the language of differing gradations of progress and development. The changing axis of imperial relations can be seen as already present within the founding Covenant of The League of Nations, where Article 22 declares the League’s responsibility to the colonised world:

To those colonies... which are inhabited by peoples not yet able to stand by themselves under the strenuous conditions of the modern world, there should be applied the principle that the well-being and development of such peoples form a sacred trust of civilisation.²⁹

The League, particularly through the Mandate System, provided the institutional form for international law’s inclusive/exclusion of the colonised subject, that would serve as a telling precursory to the position racially subaltern peoples would occupy in the formally decolonised world that would emerge after the Second World War, as will be reviewed in subsequent chapters. Moreover, this qualified expansion of the boundaries of international law, was also an important organisational development in facilitating the exponential growth of drug prohibition over the interwar period.

²⁷ Rose Parfitt, ‘Empire des Negres Blancs: The Hybridity of International Personality and the Abyssinia Crisis of 1935-36’, p.851.

²⁸ See Quincy Wright, *Mandates Under the League of Nations* (Chicago: The University of Chicago Press 1930), or Parker Moon, *Imperialism and World Politics* (New York: MacMillan 1930).

²⁹ See Article 22 of Covenant of The Leagues of Nations, Available at <http://avalon.law.yale.edu/imt/parti.asp> [Accessed 06 April 2016].

6.2.2 Individuals As Well As Nations

A further element of the project undertaken by the League was to widen and deepen the terrain of issues that became the concern of international law. This mirrored the theoretical shift in international law that Scott sought to recovery in championing of ‘international law’s completeness, universality, perfectibility and inseparable connection to municipal systems of law.’³⁰ At the centre of this vision is an international law moored upon morality, with the dictates recovered from Vitoria interwoven into a twentieth century universal order in which ‘a single standard of morality’ would be shared not just by all states but by all peoples.³¹ A concern with international law going beyond matters of statecraft towards questions of normative morality provides another point of connection between Vitoria’s writings and the international jurisprudence of the interwar period. This concern would acquire institutional force through the engagements of League of Nations. Stephen Legg illustrates how the League, in a further break from the positivism of the nineteenth century, took up the task of intervening in the everyday lives of the peoples within nations, taking up questions of health, economics and moral standards of people as questions that would now become the concern of international law.³² The League institutionalised an idea of the maintenance of global peace being no longer just a matter of international relations but also dependent on the production of a universal ideal of human life, one conforming to a single moral standard. International law would, from now on, be concerned with producing idealised human subjects through the regulation of individuals as well as of nations and in addition to issues of sex and morality, drugs can be understood to play a central role in this shift.³³ This moralism was still constituted through geo-politics. Despite the rise of domestic alcohol prohibition across a variety of jurisdictions in this period, there was no great appetite for international legislative control outside the liquor traffic control that was exercised by the Mandate system in Africa. The failure of alcohol prohibition to be taken up by this moralist turn in international law could be credited to the fact that but as ‘the

³⁰ Christopher Rossi, Christopher Rossi, *Broken Chain of Being: James Brown Scott and the Origins of Modern International Law* (Leiden: Brill 1998) p.20.

³¹ James 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, Vol. 26 (1932) p.20.

³² Legg, p.648.

³³ *Ibid.*, p.664.

League of Nations was almost entirely European and alcohol use was deeply embedded in European culture' while drug use, as shown before was more closely associated with the racial other and therefore, it had to be prohibited in order to facilitate the emergence of an idealized international community.³⁴ This increased scope of the League indicated a return to the idea of the international as communal, and to law as moral norms that span through and across national borders and sovereign authority, tying the universal together.³⁵ This turn towards issues of a communal nature would marry with suspicions regarding potential sources of contagion that could corrupt the morality of the international community. This concern with morality caused the League to direct a significant amount of energy on policing illicit traffic between states.³⁶ The League therefore provided fertile terrain for the escalation of international drug prohibition.

6.3 The Chronology of Drug Prohibition within The League of Nations

The shift towards international law taking on questions of individual morality meant that the era of the League would prove to be particularly fruitful for drug prohibition. As Toby Seddon has said, we must read, 'the First World War as a critical moment of change in the positioning of different psychoactive substances.'³⁷ The war itself expanded the vision of what international law was capable of, with inter-allied resource co-ordination efforts during the war influencing the scale and ambition of the multi-lateral treaties produced in the post-war, institutionalised legal order.³⁸ This can help account for the exponential increase in drug prohibition treaties that would emerge in the decades following the war. The first drug prohibition treaty, the *1912 Hague International Opium Convention*, was only universalised through a provision within the *Treaty of Versailles*. The *Treaty of Versailles* contained a clause requiring ratification of the *1912 Hague International Opium Convention* by all signatories to the peace treaty.³⁹ It also founded the League of Nations, and ensured

³⁴ Kettil Bruun, Lynn Parr and Ingemar Rexed, *The Gentlemen's Club: International Control of Drugs and Alcohol* (Chicago: University of Chicago Press, 1975), p.13

³⁵ *Ibid.*, p.648.

³⁶ *Ibid.*, pp.647–664.

³⁷ Toby Seddon, 'Inventing Drugs: A Genealogy of a Regulatory Concept', *Journal of Law and Society*, 43, 3 (September 2016), pp. 393–415, p.408.

³⁸ Michael Fakhri, 'The 1937 International Sugar Agreement', p.904.

³⁹ Article 295 of the Treaty of Versailles states: 'Those of the High Contracting Parties who have not yet signed, or who have signed but not yet ratified, the Opium Convention signed at The Hague on

that this institution granted drug prohibition a place of importance within its very constitution. In the *Covenant of The League of Nations*, Article 23 (c) declares that member states will entrust ‘the League with the general supervision over the execution of agreements with regard to... the traffic in opium and other dangerous drugs.’⁴⁰ The inclusion of a provision to control drugs within the founding of the League furthered the movement of drug prohibition towards being an established norm for international law. Furthermore, an early resolution of the League would establish the Opium Advisory Committee (OAC) in 1920, an organ within the League tasked with overseeing the drugs trade as the law shifted towards greater prohibition.⁴¹

A famous weakness of the League at large is that, despite it being the vision of Woodrow Wilson, the internal politics of the U.S.A. eventually blocked its entry. Resultantly, internationalists both within the League and within the U.S.A saw drugs as an issue that could entice America back towards joining her abandoned progeny.⁴² Therefore, the actions undertaken regarding drug prohibition within the League were all still generally framed by the ideas of American prohibitionists. David Begley-Taylor identifies the extent to which the U.S.A continued to operate as an anchor for the international drug laws in this period, stating ‘the League’s philosophy and accompanying legislation reflected the US preference for supply-side approaches to drug control over any etiological and demand-side considerations.’⁴³ The U.S.A, as ‘the world’s most remorseless advocate of stringent drug control measures’ ensured that the League placed its ‘emphasis on supply control and law enforcement’ meaning that the problem of drugs continued to be associated primarily with the areas and peoples understood to produce the substances, not with the reasons for their growing demand in Western society.⁴⁴ William McAllister highlights how in its approach to

January 23, 1912, agree to bring the said Convention into force, and for this purpose to enact the necessary legislation without delay and in any case within a period of twelve months from the coming into force of the present Treaty.’ <<http://avalon.law.yale.edu/imt/parti.asp>> [accessed 6 April 2016].

⁴⁰ See Article 23 (c) of the Covenant of The Leagues of Nations, <<http://avalon.law.yale.edu/imt/parti.asp>> [accessed 06 April 2016].

⁴¹ United Nations Office on Drugs and Crime, *A Century of Drug Control* (2008), <https://www.unodc.org/documents/data-and-analysis/Studies/100_Years_of_Drug_Control.pdf> [accessed 12 December 2015], p.51. The OAC was the forerunner of the Commission on Narcotic Drugs (CND).

⁴² William McAllister, *Drug Diplomacy in the Twentieth Century* (London: Routledge 2000), p.43-45, p.51: ‘the drug question presented a pivotal opportunity to foster US-League ties.’

⁴³ David R. Bewley-Taylor, ‘The American Crusade: The Internationalization Of Drug Prohibition’, *Addiction Research and Theory*, 11, 2 (2003), pp. 71-81, p.72.

⁴⁴ McAllister, p.133.

the drug problem ‘the League concentrated on helping “normal” and “deserving” people, not least because doing so enabled all parties to avoid troublesome questions about societal factors contributing to deviant behaviour.’⁴⁵ Efforts by different organs within the League to expand the approach of the law beyond the supply-side bias were explicitly stifled by American pressure, despite her non-membership.⁴⁶

A plethora of new international treaties on drugs were passed in the era of the League, establishing the model of the multi-lateral international treaty as the primary instrument of drug prohibition going forward, as had been argued by Bishop Brent and other American prohibitionists earlier. The inter-war prohibition would first bear fruit through an opium conference held in Geneva in 1924, which led to a second international treaty on opium being signed, namely the *1925 Agreement Concerning the Manufacture of, Internal Trade in, and Use of Prepared Opium*. This agreement promised ‘to bring about the gradual and effective suppression of the manufacture of, internal trade in and use of prepared opium.’⁴⁷ Also signed at the time was the new *International Opium Convention, 1925*, which in addition to reinforcing the restrictions on opium, marked a crucial turning point in international laws on drugs as, for the first time, an international treaty extended the scope of prohibition to include the drug of cannabis.⁴⁸ However, the United States ultimately refused to sign the *International Opium Convention, 1925* after the treaty failed to satisfactorily limit the prohibition of the another major plant-based drug that had been demonised by American prohibitionists, coca.⁴⁹ The decision by the U.S.A to pull out of *International Opium Convention, 1925* as there was no likelihood of obtaining complete control of all opium and coca leaf derivatives was, however, described by Quincy Wright as ‘not in accord with the procedure of cooperation as outlined by Mr. Root in 1907’ for how America should try to cultivate universality in the project of

⁴⁵ Ibid., p.50.

⁴⁶ Ibid., pp.49-50. ‘Philanthropic organizations interested in health and welfare issues generally preferred to fund narrowly defined projects that appeared solvable... The dispute between the Mixed Subcommittee and the League Health Committee delayed OAC discussions about etiology... Subsequent American interventions derailed internationally oriented investigations into the factors contributing to drug abuse.’

⁴⁷ United Nations Office on Drugs and Crime, *A Century of Drug Control*, p.52.

⁴⁸ Ibid., p.52. It is important to note that although the 1925 Convention brought cannabis under international prohibition for the first time the control was limited. ‘The Convention only dealt with the international dimension of the cannabis trade. It did not prohibit the production of cannabis as such; it did not ask to control domestic traffic in cannabis; it did not prescribe measures to reduce domestic consumption.’

⁴⁹ Ibid., p.53.

internationalizing drug prohibition.⁵⁰ Coca, and its derivative cocaine, had been suppressed to a partial extent in the *1912 Hague International Opium Convention*, but drug prohibitionists now wished to use this latest opium convention to limit production to only ‘medical and scientific needs’, following the supply-side heavy prohibitionist policy referred to as ‘the American principle’ by the President of the conference.⁵¹ However, America’s non-membership of the League limited its ability to dictate the terms of treaties, therefore allowing European empires still invested in the production of cocaine to resist the inclusion of such strenuous prohibition terms. The U.S.A continued to advocate for drug prohibition to be enacted through the heavy control of the supply of drugs, a structure that would of course have the consequence of ‘externalising’ its own drug problem. Wright even admits that ‘if large areas of American land had long been given to the production of the poppy we would be less anxious to extend the domain of international questions to this field.’⁵² The U.S.A did sign up to the next drug treaty produced through the League, the *Convention for Limiting the Manufacture and Regulating the Distribution of Narcotic Drugs, 1931*. The impact of the Great Depression on the global economy at the end of the 1920’s invited a reinforcement of prohibition laws as the illegal market in drugs emerged as a major shadow economy.⁵³ However, in a manner that would prove prophetic, increasing prohibition only saw drug markets continue to expand. The League convened a further conference on drugs in 1936, the main outcome of which was the signing of the *1936 Convention for the Suppression of the Illicit Traffic in Dangerous Drugs*.⁵⁴ The 1936 treaty was the first time international law explicitly focused on drug trafficking and declared drug trafficking as criminal. Article 2 of this convention, by recommending that drug trafficking should result in ‘imprisonment, or other penalties of deprivation of liberty’ introduced into international law the connection between drug offences and criminal sanctions that would become inextricable as the War on Drugs intensified over the latter half of the twentieth

⁵⁰ Quincy Wright, ‘The American Withdrawal from the Opium Conference’, *The American Journal Of International Law*, 19, pp.348-355, p.355.

⁵¹ Ibid., p.53. ‘The president of the conference, Sir Malcolm Delevingne (UK) concluded: “The American principle for a limitation of production to medical and scientific purposes, though accepted as a principle both by the Advisory Committee on the Traffic in Opium and the Assembly, has not been included in the Convention as a contractual obligation.”’

⁵² Wright, ‘The American Withdrawal From The Opium Conference’, p.353.

⁵³ Ibid., p.53.

⁵⁴ Ibid., p.56.

century.⁵⁵ The *1936 Convention for the Suppression of the Illicit Traffic in Dangerous Drugs* illustrates the rising emphasis on using law's punitive capabilities to enforce drug prohibition over the course of the interwar years. However, the 1936 treaty was still not stringent enough for the United States, who would once again refuse to sign and ratify this convention.⁵⁶ Moreover, the spectre of inter-imperial rivalry had again begun to haunt international law by this time, with countries such as Germany and Japan no longer participating in international conferences. Ultimately, just 13 countries signed and ratified the 1936 trafficking convention, a treaty that only came into effect in 1939, by which time the international community was once again engulfed by contagious violence with the onset of the Second World War.

6.4 Drug Laws as fixed in International Law

The League of Nations did much to advance drug prohibition, normalising many of the tenets and structures that would eventually form the War on Drugs. However, from the standpoint of an advocate for drug prohibition, the ultimate failure of the League to bring about uniformity, both within drug control and within wider international relations, would frustrate the project of universal drug prohibition at this historical juncture. The re-emergence of the spectre of rivalry amongst the international community would bring a close to this chapter of international law's engagement with drug prohibition. The League had been conceptualised so as to affect a restraint on such rivalry, with the Wilsonian American internationalists imagining the institution as a forum for the production of a collaborative and communal international order. However, with the U.S.A ultimately unable to take up membership, a problem compounded by the exclusion from the League of major powers such as the Soviet Union and Germany, the universalist ambitions for the League were permanently stunted.⁵⁷ Despite imaginings of a new universal order, the League remained 'very much an imperialists' club.'⁵⁸ The League would eventually disintegrate as nation after nation withdrew from the institution in preparation for

⁵⁵ Article 2, 'The 1936 Convention for the Suppression of the Illicit Traffic in Dangerous Drugs', <https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=VI-11&chapter=6&lang=en> [accessed 9 March 2016].

⁵⁶ *Ibid.*, p.58.

⁵⁷ Pedersen, *The Guardians*, p.8.

⁵⁸ *Ibid.*, p.61.

another global conflict.⁵⁹ As a result, drug prohibition would not become a priority for the international community again until this explosion of inter-nation-state violence had been abated and a new international legal order had to be constructed.

However, the failure of inter-war drug prohibition does not diminish the significance of transition that occurred in international law's approach to drugs during this era. Julia Buxton captures the importance of the innovations of the League's moves towards drug prohibition, describing how:

The control model was all the more remarkable as it was the first instance in which states had surrendered overview of their sovereign affairs to an international body. Drug control was also groundbreaking, because it led to the introduction of uniform penal sanctions across countries and established principles of criminal law on an international basis.⁶⁰

Overall it was in the early twentieth century in which the U.S.A began to take its first steps into the office of global hegemonic power and the early drug prohibition was both a cause and product of this shift. However, these laws would not achieve the necessary universality they required to take full effect, as the U.S.A still lacked the 'sufficient international muscle to dictate its drug control policies and therefore export the ideal of prohibition.'⁶¹ Still inter-war drug prohibition served to clear the ground for the laws that would later emerge in the post-Second World War international community.⁶²

⁵⁹ United Nations Office on Drugs and Crime, *A Century of Drug Control*, p.57. 'Germany left after the National-socialists came to power. Japan left the League of Nations in 1933 after the League had voiced opposition to the invasion of the Chinese territory of Manchuria. Italy withdrew in 1937, of its invasion of Ethiopia. The Soviet Union, which had only joined the League of Nations in 1934, had to leave it in 1939 following its aggression against Finland.'

⁶⁰ Julia Buxton, 'The Historical Foundations of Narcotics Control', *Innocent Bystanders: Developing Countries and the War on Drugs* ed. by Philip Keefer and Norman Loayza (New York: Palgrave Macmillan, The International Bank for Reconstruction and Development, and The World Bank, 2010) 61-94, p. 78.

⁶¹ Bewley-Taylor, 'The American Crusade: The Internationalization Of Drug Prohibition', p.73.

⁶² United Nations Office on Drugs and Crime, *A Century of Drug Control*, p.55.

TABLE I: Pre-WWII International Law on Drugs

(1909) <i>Final Resolutions of the International Opium Commission</i> (not a treaty)	Did not enter into force
(1912) <i>International Opium Convention</i>	Entered into force 28 th of June 1919
(1925) <i>Agreement concerning the Manufacture of, Internal Trade in, and Use of Prepared Opium</i>	Entered into force 28 July 1926
(1925) <i>International Opium Convention</i>	Entered into force 25 th of September 1928
(1931) Convention for Limiting the Manufacture and Regulating the Distribution of Narcotic Drugs	Entered into force 9 th of July 1933
(1936) Convention for the Suppression of the Illicit Traffic in Dangerous Drugs	Entered into force 26 th of October 1939

6.4.1 Quincy Wright and The Three Tenets of Drug Prohibition

For this final section of the chapter, in order to fully unpack the relations between the American imagining of a moral humanistic international law and the emergent drug war of the early twentieth century, I turn to the writings of one of James Brown Scott's successors as a major theorist of American internationalism, Quincy Wright.⁶³ With another international crisis- the Second World War- appearing on the horizon, a new generation of American internationalists, who had been produced through the ASIL, began to take the reins from figures like Root and Scott. Amongst the most notable members of this new guard was Quincy Wright, a noted political scientist who had made his name in the arena of international law.⁶⁴ The influence of the founding ASIL generation upon Wright's world-view is clear, he had

⁶³ Quincy Wright has also been read as engaging in a conflict of politics with the Root-Scott generation of the ASIL. Hatsue Shinohara describes Wright as part of an upstart generation which seized power from the traditionalist wing of the ASIL. While it is true Wright had points of disagreement with Scott and especial Root and Lasing, it cannot be denied that they influenced his jurisprudence greatly, as well as gave him the platform from which to construct a fully realised universal international law.

⁶⁴ Frederic L. Kirgis, Jr, *The American Society of International Law's First Century: 1906-2006*, (Boston: Brill 2006), p.77.

been in epistolary dialogue with Scott from the time he wrote his doctoral dissertation on “The Enforcement of International Law through Municipal Law in the United States,” completed in 1915.⁶⁵ Wright served as an instructor of international law at Harvard University, before becoming amongst America’s foremost theorists of internationalism after joining the University of Minnesota.⁶⁶ Quincy Wright would eventually serve as an adviser to the U.S. State Department in 1943–45 and to the International Military Tribunal in Nuremberg in 1945, before following in the footsteps of Root and Scott to become the President of the ASIL in 1955-56.

A prolific writer, Wright would publish 515 articles during his lifetime on a plethora of issues of international law.⁶⁷ However, two questions that Wright repeatedly engaged with were the two issues that I seek to interweave over the course of this thesis, the emergence of the international laws that prohibit drugs and the production of an international ‘community of nations’ that could maintain a peace within a coherent universal order. Wright aggravated the re(generation) of a universalist jurisprudence that I have traced earlier in Scott’s writings and in the general orientation of early American international law. Emerging in the wake of Scott’s endeavours, Wright crafted his understanding of international law in explicit opposition to the claims of nineteenth-century jurisprudence that non-European peoples were outside the boundaries of international law.⁶⁸ Quincy Wright advocated an international community that did not insist upon a juridical distinction between the European and non-European worlds, following in the wake of Vitoria and Scott, in expanding the scope of international law to include those previously dismissed as too savage to be bounded within the law.⁶⁹ Overcoming intellectual rivals who sought to

⁶⁵ Hatsue Shinohara, *US International Lawyers in the Interwar Years: A Forgotten Crusade* (Cambridge: Cambridge University Press, 2012) p.27. In a Letter: ‘Wright asked Scott about the possibility of publishing his dissertation through an arrangement with the Carnegie Endowment, but Scott suggested that publishing the entire work would be difficult, and instead offered to publish one chapter in the AJIL.’

⁶⁶ *Ibid.*, pp.27-28

⁶⁷ *Ibid.*, p.27.

⁶⁸ Quincy Wright, ‘The Bombardment Of Damascus’, *American Journal of International Law*, 20 (1926) pp.265-266.

⁶⁹ James Lorimer, *The Institutes of the Law of Nations: A Treatise of the Juridical Relations of Separate Political Communities Vol.1* (Edinburgh: William Blackwood and Sons, 1883), pp.100-102. In the nineteenth century, noted English jurist, Lorimer established a triparted conception of both the earth and the humans that inhabited it. His first zone, the innermost core was the fully civilised Europe. The second sphere was the barbarous states, states that did not standard of civilisation set by the European states but could be recognised as enjoying a quasi-sovereignty. Lorimer’s final category was the ‘savage peoples’ who he dismissed as the ‘residue of mankind’ their dominance by the European states, simply natural.

maintain the strict demarcation between civilised and uncivilised peoples, he confirmed an expanded moral universalism as the essential quality of American internationalism.⁷⁰ However, as with the above theorists, Wright's inclusion of the colonised subject carried an asterisk. Echoing Article 22 of the League Covenant and its description of 'peoples not yet able to stand by themselves,' Wright moved away from talk of the barbaric or savage, recasting the civilised/colonised divide as one based on 'immaturity.'⁷¹ Wright's jurisprudence took note of Vitoria's legacy, tying the sixteenth-century theologian into a tradition of moral humanitarianism, alongside Bartolome de las Casas, Thomas Clarkson and William Wilberforce.⁷² Like the individuals he names in the above lineage, Wright was himself informed by an abiding Christianity, his political work serving as an 'expression of his invigorating Unitarian faith', Unitarianism being the belief in the singularity of God as a ontological complete whole, as opposed to the tripartite structure of the trinity.⁷³ Wright's interventions in international law remained informed by the moral humanitarian tradition, therefore making his consistent interest in international drug prohibition unsurprising.

With drug prohibition established within international law, the theoretical grounding of these new drug laws invited cause for reflection by international legal scholars. Quincy Wright responded at length in his 1924 essay on 'The Opium Question.'⁷⁴ In this essay, Wright systematized drug prohibition by grounding it upon three specific tenets and, in doing so he articulated the tenets that would underwrite the War on Drugs as it intensified over the century. Wright's first tenet is that there is a general acceptance that 'the use of opium for purposes other than medicinal or scientific is an evil.'⁷⁵ In an early invocation of the theodicy that would eventually play out on the very body of law that birthed the drug war and that I will unpack in my next chapter, Wright firmly fixed the idea drugs being theorized as an existential threat. Wright's second tenet proclaims that 'the non-medical use of opium and

⁷⁰ See Elbridge Colby, 'How To Fight Savage Tribes', *The American Journal of International Law*, 21, 2 (Apr. 1927), pp. 279-288. Colby's article was a response to Wright's 'The Bombardment Of Damascus', rebuking Wright for ignoring the essential distinction between European and non-Europeans.

⁷¹ *Ibid.*, p.265.

⁷² Wright, *Mandates Under the League of Nations*, p.9.

⁷³ Karl Deutsch, 'Quincy Wright: Author of A Study of War, 1890-1970', <<http://www.harvardsquarelibrary.org/biographies/quincy-wright/>> [accessed 4 April 2016].

⁷⁴ Wright, 'The Opium Question', pp.281-295.

⁷⁵ *Ibid.*, p.293.

narcotic drugs can only be suppressed by curtailing their production.’⁷⁶ The structuring of the violent enforcement of drug prohibition alongside the axis of production, as opposed to consumption, would, of course, have major racial and geopolitical consequences. Crucially, the asymmetry that this approach would facilitate between European and non-European worlds was not unrecognised by Wright, he acknowledges that drugs such as opium and coca require the ‘peculiar climate’ of non-European countries, making clear the underlying connections between place, peoples and proximity to universalised norms of human subjectivity that anchor the understanding of these drugs as ‘transgressive substances.’⁷⁷ As discussed in the first chapter of this thesis, the idea of particular climates producing not only groups of peoples predisposed to indolence, profligacy and appetite over reason but also certain plants/foods that if ingested can exacerbate and disseminate these characteristics, has a long history dating back to inter-connection between biology and colonialism imagined through the European conquest of the ‘new world.’ Wright’s argument for supply-side prohibition, targeting the force of law against the areas (and therefore peoples) seen as the source of drugs echoes this the early identification between racialised others and ‘transgressive substances’ that Taussig illuminates.⁷⁸ Finally, Wright’s third general tenet for drug prohibition declared that ‘drug control cannot be effective unless it is international.’⁷⁹ For him it was clear that ‘production must be restricted everywhere or it will be useless,’ making the only form through which drug prohibition could conceivably be realised a universal form. The multi-lateral, international legal treaty became the primary vehicle for drug prohibition as had been argued for by the American missionaries and moral reformers at the turn of the twentieth century.

Wright’s argument supports a reading of drug prohibition in this era providing a path through which an Americanised vision of international order could be fully brought into being. As aforementioned, Wright sharply criticised the withdrawal of America from the 1925 Geneva Opium conference and the subsequent *International Opium Convention*.⁸⁰ For Wright, drug prohibition should be prioritised as an area of law that exemplified the general trend of international law, stating that:

⁷⁶ Ibid., p.295.

⁷⁷ Ibid., p.294.

⁷⁸ Taussig, *My Cocaine Museum*, p.xiii

⁷⁹ Wright, ‘The Opium Question’, p.295.

⁸⁰ Wright, ‘The American Withdrawal from the Opium Conference’, pp.349-52.

Domestic questions are continually travelling to the domain of international. Recognition of the need of international co-operation to achieve national ends...[means that] questions formerly domestic is no longer so. It therefore [...] no surprise that the country which five years ago was ready to declare the suppression of traffic in opium and dangerous drugs wholly domestic, should now take the lead in insisting that not only traffic in but also production of such drugs is subject to international regulation.⁸¹

Wright's critique of America's uneven engagement with the drug treaties illustrates the developments and limitations that international drug prohibition faced in the interwar period. Aware of how a residual parochialism in American domestic politics risked puncturing a communal international law, Wright's theorization of the interwar drug treaties offered a template for the resonance between moral humanitarianism and drug prohibition that would be achieved in the era of the United Nations.

6.5 Conclusion

In this chapter I unpacked the changes in the interwar period on the level of restrictions placed on the international trade of particular psychoactive substances. In explaining the sudden plethora of international drug prohibition treaties in the interwar period, I argue for the importance of placing the changes in law in the context of a wider shift in international law towards institutionalisation, moralism and universalism. Recalling international law's foundational challenge of attempting to produce peace amongst an order of rivals absent a cohering sovereign authority, the crisis of the Great War encouraged a turn away from nineteenth-century positivist jurisprudence and presumptions of a balance of power. Moreover, the aftermath of the Great War saw international take its first steps away from the formal colonial division of the world with the construction of the 'Mandate System' promising a (re)turn to moral, humanitarianism. Finally, there was also an expansion of the interests of international law to encompass issues of the health and morality of individual peoples. The prevailing tendency in both popular discourse and mainstream scholarship is to read to the League of Nations as a failed attempt at institutionalizing an international legal framework. On the contrary, critical legal scholars have shown the institution as

⁸¹ Ibid., p.354.

being considerable successful in turning the formal colonial world order of European imperialism towards the expansive, moral universalism of contemporary international law.⁸²

The early international drug laws that have been historicized in *Part B* of this thesis are not peripheral but central for understanding the changes in American internationalism and wider international law in this era. With the drive to prohibit drugs, the United States began to take a proactive role in international law. This persisted even as a non-member of the League, however, as was detailed above, the U.S.A's ultimately uneven embrace of the institution would cripple both the international drug laws and the restructured international legal order more widely. Moreover, within a turn towards humanitarianism, international law continued masking the persistence of discursive colonial distinctions under a renewed imagination of single international community with shared standard of morality. As jurists sought to expand the depth and scope of international law in response to the overspill of violence from the Great War, the workings of empire were reoriented, but not erased. This chapter traced how the trend towards the structure of what I have termed as a 'sacrificial' international law intensified over the interwar period. To read the League as another marker in the trend across the twentieth century to a 'sacrificial' international law is to follow Susan Pedersen and place the League's reworking of empire at the heart of the project as a whole.⁸³ Within this wider shift, the narrative of drugs produced in the U.S.A at the turn of the century, as a contagion that threatened the thoroughly racialised conception of the universal 'human' subject, was internationalised through a series of treaties and conferences. As we can see through Quincy Wright's three tenets of drug prohibition, the international laws on drugs can be read as being structured so as to already suggest the violence that would be legitimised upon the racial subaltern subject in service of prohibition. However, with the spectre of rivalry never fully abating within this era of the 'Second Thirty Years War', the full extent of the violent impact of drug prohibition would not be appreciated until new set of laws, drafted in a post-Second World War international legal order, would give rise to what is now known as the War on Drugs.

⁸² See Fleur Johns, Thomas Skouteris & Wouter Werner (eds.), 'The League of Nations and the Construction of the Periphery', *Leiden Journal of International Law* 24, 4, pp.797-798.

⁸³ Pedersen, *The Guardians*, pp.1-15

PART C

Chapter 7

Evil and Humanitarianism: Exploring the ‘Theodicy of European Modernity’ through Drug Prohibition in the United Nations

7.1 Introduction

Part B read the emergence of international drug prohibition alongside the revision of international legal order that occurred during the first half of the twentieth century. I conducted a historical review of the rise of the U.S.A. as a major power and highlighted the importance of American jurists theorising a liberal tradition of international law through a recovery of a Victorian legacy. Moreover, I unpacked the historical and theoretical connections between pioneering American international lawyers such as James Brown Scott and Elihu Root and the early generation of drug warriors, such as Hamilton Wright and Bishop Brent who came to prominence during Root and Scott’s period in control of the U.S. State Department. The final chapter of the previous section detailed how the international laws governing drugs expanded at an exponential rate in the League of Nations and placed that development in the context of the changing scope and focus of international law in this era. However, I also highlighted the limitations and failure of the early drug control treaties to exert any significant control over the drugs trade. The inter-war period made a fledgling attempt at synthesising a single moral standard with a changing axis of empire in which infantile/backwards people could be offered protection from themselves in the name of humanity itself, as illustrated by the institutionalisation of the idea of colonialism as ‘trusteeship’ through the mandate system. However, this vision of a universal moral humanism was drowned under a tidal wave of conflict, requiring a renewed investment in the communality of international law before universal drug prohibition could be realised.

In this chapter, I will continue to unpack the interconnection between international legal order and international drug prohibition. I will trace the

(re)generation of a renewed international legal order following the violence of the Second World War – with the U.S.A crystallising its status as the hegemonic actor – alongside the establishment of the legislative basis for what would eventually be termed the War on Drugs, visiting violence upon so many in the latter-half of the twentieth century.

The chapter will begin with a reflection upon the tensions that underlay the reconstruction of the international legal order following the Second World War, particularly the establishment of a new institutional centre in the United Nations. I will be tracing the extent to which the United Nations maintained the ambitions of the preceding League of Nations, while at the same time seeking to overcome the failures of the League through the facilitation of a more thoroughly realised synthesis of universalism and hierarchy. I will also review the specific laws that produced the legislative framework that continues to govern contemporary international drug prohibition. The legal treaties that confirmed international drug prohibition as a norm of international law, particularly the *United Nations Single Convention on Narcotic Drugs, 1961*, will be read alongside other founding documents of the post-war international order such as the *UN Charter*, the *Universal Declaration on Human Rights* and the *1948 Convention on the Prevention and Punishment of the Crime of Genocide*, in order to illustrate how drug prohibition was not peripheral but rather played a key role in cohering the post-war international legal order.

Also, in this chapter, I will unpack the significance of the U.S.A. continuing to exert a disproportionate influence upon international drug prohibition. In the efforts to fully establish universal drug prohibition as a given norm of international law over the second-half of the twentieth century, drug treaties are produced in a context of formal colonisation giving way to a post-colonial, liberal international law. The geo-political structure of the post-war drug treaties facilitated the later inequality of the spread of violence that would emerge in the endeavour of enforcing a ‘drug-free world’. Drug prohibition provides a lens through which to trace the turn towards what can be termed as the militarization of peace. Recalling the juridico-theological, Vitorian roots of modern liberal international law, the problem of theodicy- of accounting for the presence of evil within an order acclaimed as ontologically complete in itself- will be argued to have been transferred from medieval scholasticism to the

economic and political questions of the contemporary international law. Critical legal scholarship has produced some telling contributions towards unpacking the underlying imperialism or secularised theology of the United Nations and its correlative legal projects such as development and human rights.¹ However, in centring the international of laws on drugs, I will further this theoretical line through making explicit not only one more instance of how the theological was smuggled into the secular, but also, unpacking how the explicit theological roots and language of drug prohibition, combined with its asymmetrical distribution of the violence across the globe illustrate the theodicy of post-war international law endeavoured to outlaw violence by employing its purifying force on an imagined negation deemed legitimate. However, before applying my focus to the role of drug prohibition within post-war international law, it is again necessary to analyse the context of international law in which these laws emerged.

7.2 The Second Attempt at Institutionalising a Communal International Legal Order

The crisis of the Second World War exceeded even the Great War. Mimetic violence erupted within the borders of Europe again, with inter-war international law proving insufficient at containing conflict. Moreover, the violence released within Europe bore the mark of the processes of racialization that had been cultivated through European imperialism, this process reaching its apogee with genocide now being perpetrated within the inter-European community. The unique nature of the horrors of the Jewish Holocaust is fully recognised, however, scholars – in their efforts to better understand the holocaust – take care to show that it did not emerge free of historical precedents.²

¹ See Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge: Cambridge University Press, 2005); Sundhya Pahuja, *Decolonising International Law: Development, Economic Growth and the Politics of Universality* (Cambridge: Cambridge University Press, 2011); Samuel Moyn, *Christian Human Rights* (Philadelphia: University of Pennsylvania Press, 2016); or Jennifer Beard, *The Political Economy of Desire: International Law, Development and the Nation State* (Oxford: Routledge-Cavendish, 2006).

² For scholarship that links colonialism and genocide in a systematic way, see *Colonialism and Genocide* ed. by Dirk Moses and Dan Stone (London: Routledge, 2007); or Enzo Traverso, *The Origins of Nazi Violence* (New York: The New Press, 2003).

When examining the causes of European Fascism, intellectuals as diverse as Hannah Arendt and Aimé Césaire have diagnosed its origins in the excesses of nineteenth and early twentieth century European colonialism.³ This argument has been given renewed strength by contemporary historians such as Enzo Traverso and Domenico Losurdo.⁴ The racial theory underpinning European colonialism- predicated on a belief that physical characteristics signified an absolute difference in nature between humans- was applied to Europeans in the mid-twentieth century as the political project of Fascism, at least as it manifested in Germany, sought to concretise the racial hierarchies in a fixed political structure. Fanon, following Césaire, perhaps best described the lineage behind Fascism when he stated that ‘Nazism transformed the whole of Europe into a veritable colony.’⁵ Nazism can be understood as essentially a colonial project now imported into the European body politic: a model of settler-colonialism in which self-determined racially superior peoples sought to expropriate living space (*lebensraum*) and resources from those deemed inferior. However, as a colonial project, Nazism did not confine these processes of plunder and dispossession to those outside Europe but applied them to Europeans themselves, thereby producing finer dynamics of difference, distinctions internal to the nation (such as the enemy within, the partisan, the unreconstructed immigrant). The racialised process of what is termed later in this chapter as ‘the theodicy of modernity’, the process of turning a peoples into ‘a problem’ provides the ontological structure for genocide, with the ‘problem’ always carrying the potential resolution of a ‘final solution.’ The Second World War had meant that international law had not only failed to restrain the eruption of violence within Europe but had also failed to provide any semblance of protection to vulnerable Europeans targeted for extermination. However, the response to this crisis was not the abandonment of international law but rather a recommitment to producing a communal international law. The need for international law to check the possible excesses of national law had been only reaffirmed by horrors that had been performed through valid national laws

³ See Hannah Arendt, *The Origins of Totalitarianism* (Fort Washington: Harcourt, 1973); and Aimé Césaire, *Discourse on Colonialism* (New York: Monthly Review Press, 1950).

⁴ See Traverso, *The Origins of Nazi Violence, and Domenico Losurdo, War and Revolution: Rethinking the Twentieth Century* (London: Verso, 2015).

⁵ Frantz Fanon, *The Wretched of the Earth* (London: Penguin, 2001), p.100.

within European fascist states.⁶ Consequently, the crisis of war provoked a full-scale commitment to the theoretical and institutional regeneration of international law.

However, a result of the limitations of inter-war international law meant that the post-war international law was always going to be imagined in contradistinction to the League of Nations. As an institution, the League had become politically toxic post-war, thereby mandating that any successive international organisations effect a clean break from it, at least publicly, in order to establish legitimacy.⁷ The successor to the League would ultimately emerge in the form of the United Nations, a new anchoring institution for international law that promised to succeed where the League had failed. Looking to close the book on the period of mimetic conflict in the international community, the Preamble to the Charter of the United Nations boldly promises to ‘save succeeding generations from the scourge of war.’⁸ The post-war legal order was structured to aim for the ‘outlawing’ of war; in addition to the Charter’s commitment to end the ‘scourge of war’ the Nuremberg tribunal cemented into international law the idea of war as a crime and dismissed sovereign prerogative as any defence for wars of aggression.

However, the United Nations was not as much of a break from the League as popularly conceived; the *raison d’être* for the new organisation was inherited from its predecessor: it too sought to provide an administrative centre for the function of international law, only this time imbued with an even more ambitious utopianism. In its tripartite governing structure of legislature, executive and Security Council the UN was, in many ways, a continuation of the earlier institution. Rather than discarding the underlying aims and institutional structures of the League, the UN ‘was the product of evolution not revolution’ and it would be largely determined by the success and the limitations of the League.⁹ In analysing the context in which drug prohibition would finally be established as a universal norm, it is important to recognise the

⁶ Pahuja, *Decolonising International Law*, p.33.

⁷ Mark Mazower, *No Enchanted Palace: The End of Empire and the Ideological Origins of the United Nations* (Princeton: Princeton University Press 2009), p.14.

⁸ ‘Preamble’, *The Charter of the United Nations* (San Francisco: 1945)

<<http://www.un.org/en/sections/un-charter/preamble/index.html>> [accessed 3 August 2017].

⁹ Mazower, *No Enchanted Palace*, p.17.

extent to which post-war international law continued the trend towards liberal jurisprudence within international law that had been emerging since the turn of the century.

Also, it should be stressed that before the United Nations became a peacetime organisation, it was a wartime alliance.¹⁰ The planning of the United Nations and the new international legal order began in the midst of the war, with the outlines of the UN system becoming visible in the conclusions of the meetings of the great allied powers in Moscow (1941), Dumbarton Oaks (1944) and Yalta (1945).¹¹ These meetings furthered the need for the U.S.A, the U.S.S.R. and the British Empire to maintain their wartime alliance. The failure of great powers to transcend their rivalries in the 1930's had contributed to the international community's inability to contain the rise of fascism.¹² As a result, the proposals that emerged for a post-war international order were underwritten by the concern to achieve a universalism that had largely escaped the League. Alternative structures for international organisation (such as a formal Anglo-American alliance or a system of powerful regional councils with a small coordinating centre run by the main allied structures) were floated but ultimately discarded. The proposal produced at these preliminary meetings – particularly at the Dumbarton Oaks Conference– would form the basis of the discussions that would take place at the United Nations' formative conference in San Francisco in 1944, and these proposals sketched out, what has been termed, essentially 'a warmed-up League.'¹³

7.2.1 The Synthesising of Hierarchy and Egalitarianism

The proposals for the UN offered a shift in the structure of international community but never fully decoupled from the hierarchy produced through imperialism. Whilst ostensibly motivated by an impetus to imagine a new egalitarian institution of peace, there was a darker side to the inclusivity being

¹⁰ Ibid., p.273.

¹¹ Gerry Simpson, *Great Powers and Outlaw States: Unequal Sovereigns in the International Legal Order* (Cambridge: Cambridge University Press, 2004), p.169.

¹² The Nazis had exploited the growing rivalry between the Capitalist and Communist states, signing different treaties with each side, whilst at all times preparing for war.

¹³ Mazower, *No Enchanted Palace*, p.15.

championed by the Dumbarton Oaks proposals.¹⁴ Whilst the UN would eventually offer a vision of all nations as equally self-governing, in practice only a few nations would retain within their sovereignty a licence to enact violence in the international arena.

As detailed in the previous chapter, the League was hampered by the driving force in its creation, the U.S.A, abandoning it, before being subsequently further undermined by the withdrawal of other countries, including the U.S.S.R., Germany, Japan, Italy and Spain. In order to not repeat the failings of the League, the new post-war international legal order was designed to ensure the major world powers would be fully embedded from the outset. However, the imperative to ensure the participation of major powers highlights a tension with the principle of sovereign equality acclaimed by the reformulation of the international community. Mazower illuminates the way that the discussions that preceded the UN were read by globally, stating:

The proposals that emerged from the Dumbarton Oaks discussions left the rest of the world distinctly underwhelmed. Bearing in its fundamentals a remarkable resemblance to the prewar League, the proposed new peacetime organization differed [from the League] in one important respect only – in the extensive new power it gave to the permanent members of the Security Council.¹⁵

Ultimately, the Dumbarton Oaks proposals would crystallise in a conference held in San Francisco in 1945, which resulted in the establishment the United Nations. The popular memory of the founding of the UN is now one linked to universal commitment to a new order of peace, an order based on the idea of equality of nations.

The founding of the UN is further historicized as the apotheosis of the U.S.A's engagement with the international legal order, which had been increasing over the course of the twentieth century. However, as detailed in my previous chapter, the condition of America's increasing embrace of international law was predicated upon and implemented through the internationalisation of American liberalism. As aforementioned, a tradition of

¹⁴ Pahuja, *Decolonising International Law*, p.63.

¹⁵ Mazower, *No Enchanted Palace*, p.60.

jurisprudence had emerged, particularly through the first generation of international lawyers that orbited the American Society of International Law, which understood American liberalism as devoid of violence, particularly racialised violence, and therefore presented as being in opposition to ideology, empire and domination. America's leadership was to bring into being a new model of international community, and this was to be reflected in the United Nations as its institutional centre. To a certain extent, the founding of the UN did reflect a shift in the mode of international legal ordering. Gerry Simpson describes how in San Francisco 'there was an egalitarianism or democracy that had been missing at, say, Versailles or Vienna.'¹⁶ However, the shared vision of the wartime alliance pre-determined the boundaries of this egalitarianism. With regard to the general orientation of post-war international law, underneath the rhetoric of universality and equality persisted a presupposition that 'international organisation was to be worked out in advance by the elite states' thereby ensuring the persistence of material and juridical inequality.¹⁷ In no area of the UN was this imbalance of power made more explicit than in the permanent status and exceptional powers that the allied victors of the Second World War were granted on the UN Security Council. Seeking to address a major failing of the post-Great War international legal order which had been hamstrung by an absence of enforcement power, the Security Council was established as one of the six principal organs of the United Nations, imbued with the power not only to recognise new members of the UN, but also to authorise military intervention by the institution.¹⁸ The UN was granted the military provisions required to enforce the determinations of international law, with the Security Council enjoying exclusive jurisdiction over this violence wielding/peacekeeping element of the new international legal order. However, the Security Council was also designed so as to be the most hierarchical of the UN's organs, with permanent seats being granted to the wartime alliance of the U.S.A., France, the U.S.S.R, Great Britain and China. The structure of the Security Council theoretically allowed the Great Powers, in their new role as permanent members of the Security Council, to determine the administering of

¹⁶ Simpson, *Great Powers and Outlaw States*, p.179.

¹⁷ *Ibid.*, p.172.

¹⁸ See 'What is the security Council?' Available at <https://www.un.org/en/sc/about/> [accessed 9 April 2016]

violence within the post-war universal legal order. Moreover, the Security Council structure was designed to ensure a permanence of this hierarchy within the UN, as it became a requirement for the five states with permanent seats on the Security Council (often referred to as the P5) to all agree on any fundamental reforms of the UN system before those reforms become effective, thereby making attempts to recalibrate the distribution of power within the UN reliant on the generosity of those who currently hold power.¹⁹

Therefore, while sovereign equality was formally crystallised within the UN the persistence of inequality in the structure of the institution ensured that some states would remain more equal than others. No recognition of this structural inequality is present within the text of the UN's founding documents, as Gerry Simpson argues, 'the Great Powers did not wish to have this justification articulated in the UN Charter itself' which professed only equality amongst nations.²⁰ Furthermore, these dynamics underwriting the UN were not unique but can be tied to a tradition of American liberalism that was internationalised through the work of lawyers like Elihu Root and James Brown Scott, as Simpson makes clear.

The problem for the drafters of the UN Charter was exactly that which faced [...] the likes of James Brown Scott during The Hague Conference of 1907. How could the principle of sovereign equality [...] be reconciled with the realist imperatives of Great Power hegemony?²¹

Following in the wake of reading drug prohibition within the context of American liberal international law, the drug prohibition conventions that emerged through the United Nations can be understood as the culmination of a trend towards a moral universalism in international law across the twentieth century. Dispensing with the strict demarcation of humanity into the categories of civilised/colonised that had been established in international law through European imperialism, a shift towards a universal model of international community sought to contain all of humanity, even the deviant elements, within a single totality. The strict colonial division of humanity was impossible to sustain, with the horrors of two World

¹⁹ On the role of the Security Council and the P5, see Simpson, *Great Powers and Outlaw States*, Chapter 6.

²⁰ Simpson, *Great Powers and Outlaw States*, p.170.

²¹ *Ibid.*, p.176.

Wars undermining the presumptions of civilisation that the European world had bestowed upon itself. Yoriko Otomo's argument of post-war international law functioning as a technology to manage the risk of war that lay underneath the promise of globalised trade across a post-colonial international community is a convincing one.²² A key element of the management of risk can be seen in the outlawing of violence present in the UN's promise to end the 'scourge of war' but also through how in practice, the ability to wield legal violence was entrusted into the exclusive hands of a few great powers. To understand the structural inequality within the international law's promise of equality helps to clarify the uneven nature of how violence would continue to be visited upon particular peoples, even within the egalitarianism of the post-war UN system.

7.2.2 The United Nations and the Legacy of Empire

The persistence of empire within the UN's promise of universality is particularly well illustrated by Mark Mazower's scholarship on the history of the institution.²³ Highlighting the relation between the old colonial world order and the UN, Mazower details how career-long imperialists such as Winston Churchill and Jan Smuts took an active role in the design of the post-war legal order because they 'saw the proposed new international security architecture centred on the UN as a way to cement white rule, not give it up.'²⁴ Though the UN Charter speaks of a desire 'to employ international machinery for the promotion of the economic and social advancement of all peoples', for Mazower such a proclamation is compromised when we 'remember that it was Jan Smuts, the South African premier and architect of white settler nationalism, who did more than anyone to argue for, and help draft, the UN's stirring preamble.'²⁵ Despite the United States now assuming the reigns of global leadership, the requirement to maintain a unity amongst the Great Powers ensured that any explicit anti-colonialism within American visions of world order was, at least partially, muted when transferred to the international arena. As a result, the issue of 'the colonial problem' was

²² Yoriko Otomo, *Unconditional Life: The Postwar International Law Settlement* (Oxford: Oxford University Press, 2016).

²³ See Mazower, *Governing the World* and Mazower, *No Enchanted Palace*,

²⁴ Mazower, *Governing the World*, p.342.

²⁵ Mazower, *No Enchanted Palace*, p.9.

decentred in the conversations that professed to be creating a truly universal legal order. The Dumbarton Oaks proposals did not address the issue of colonialism, and in the lead-up to the San Francisco Conference, British pressure forced the U.S.A. to surrender its initial proposals to have the UN enjoy supervisory powers over to all colonial territories.²⁶ The UN's subsequent emergence as a vehicle for decolonization has tended to obscure the extent to which, much like the League, it was an institution indebted to empire and envisioned by the colonial powers as a mechanism that would entrench their privileges not, dismantle them.²⁷

For the peoples still under colonial rule, the promise of the United Nations was recognised to be qualified, at best. Seeing the contradictions in the new institution, 'they feared that the UN represented a step backward, and that the Great Powers were seeking, under the guise of internationalism, to create a new world directorate, far more frightening than the old Holy Alliance because of the awesome technology at its disposal' which gave them the exclusive control over legitimised international violence.²⁸ At the founding conference in San Francisco, the interests of colonial territories were minimised, despite the rhetoric of inclusivity. Mazower explains:

Many left the founding conference at San Francisco in 1945 believing that the world body they were being asked to sign up to was shot through with hypocrisy. They saw its universalizing rhetoric of freedom and rights as all too partial a veil masking the consolidation of a great power directorate that was not as different from the Axis powers, in its imperious attitude to how the world's weak and poor should be governed, as it should have been.²⁹

The masking of a persisting colonial antagonism can be read even within the Charter of the UN, which largely abdicated the task of anti-colonialism. In the Charter, the problem of persisting colonial oppression was masked through recasting colonies as 'non-self-governing territories'.³⁰ Moreover, the European empires escaped any direct admonition, as the Charter did not require that they make any moves towards decolonization, or subject their colonial territories to UN supervision, only that they

²⁶ Mazower, *Governing the World*, p.344.

²⁷ Mazower, *No Enchanted Palace*, p.17.

²⁸ Mazower, *Governing the World*, p.289. The *Holy Alliance* was a loose organization of European sovereigns, who formed an alliance with the Second Peace of Paris after defeating of Napoleon.

²⁹ Mazower, *No Enchanted Palace*, p.8.

³⁰ *UN Charter*, Chapter XI.

‘recognize the principle that the interests of the inhabitants of these territories are paramount and accept as a sacred trust the obligation to promote. . . the well-being of the inhabitants of these territories’.³¹ As a result, the United Nations, at least initially, suppressed any drive to decolonise the colonial world, ultimately bringing into being a legal order that recalibrated but also resurrected the hierarchical structure of the previous epoch.³²

7.2.3 The UN and the Vitorian Legacy

The re-reading of the United Nations’ origin offered above reconciles the organisational centre of the contemporary international legal order with jurisprudence produced by Francisco de Vitoria in the sixteenth century. Earlier chapters of this thesis focused on Vitoria’s theorisation of a communal international law and illustrated the extent to which his inclusive/exclusion of the colonial subject operated as sacrificial. The Vitorian recovery provides an intellectual tradition in which the UN can be rooted. Pekka Niemela emphasises the ways in which the establishment of the UN carries forward the Vitorian legacy by showing how the UN Charter paralleled Vitoria’s jurisprudence, echoing the Salamancan theologian in the following ways:

That Vitoria's vision and the Charter acknowledge the equal standing of all nations, at least formally; that Vitoria's international law and the "Charter-led" international law impose normative demands on state behavior, efficiently delimiting state behavior horizontally and vertically, and as a corollary, that law and politics are distinct phenomenon; and, finally, that there is an agency that embodies these benevolent ideas and in which crucial decisions affecting their realization are made. For Vitoria the agency is the European-universal culture in general, whereas the constitutionalist's agency is the United Nations whose operation embodies the pursuit of European-universal ideals.³³

Both the universalizing ambition of the UN and its arrogation of universalism masking a particular image of Euro-modernity operating within a totalising claim can be connected back to Vitoria’s original schema for international law. The Salamancan friar’s influence upon the UN was memorialised in physical form with a bust being

³¹ Mazower, *Governing the World*, p.346.

³² Mazower, *No Enchanted Palace*, p.60.

³³ Pekka Niemela, ‘A Cosmopolitan World Order? Perspectives on Francisco de Vitoria and the United Nations’, *Max Planck United Nations Year Book*, 12 (2008), pp.301-344, pp.308-309.

displayed in the halls of the UN in New York City, the bust inscribed with the title ‘fundador del derecho de gentes’- founder of international law.



Fig 4. Bust of Francisco De Vitoria at United Nations Headquarters in New York. Reproduced from UN Multimedia.org, available at <http://www.unmultimedia.org/photo/detail.jsp?id=118/118523&key=75&query=%22Mark%20Garten%22%20AND%20category:%22UN%20Headquarters%22&sf> [Accessed 09 September 2016]

Critical scholars have read the creation of the United Nations in 1945 as the institutional realisation of Vitoria's doctrine.³⁴ Rather than being only relevant to the context of the sixteenth century, ‘Vitoria's work resembles, in many ways, the vision and ethos of today's international lawyers.’³⁵ Moreover, Vitoria’s tradition would not only be carried forward in the halls of the UN by lawyers and diplomats, theologians from Vitoria’s order would gain consultative status in the UN in 1998 under the title of "Dominicans for Justice and Peace" and understood their rationale for engagement with the juridical to be the continuation of Vitoria’s foundational theorisation of human rights.³⁶ The Fray Francisco de Vitoria Justice Fund was created by the Dominican Order in 2004 to sustain the Vitorian legacy within the UN, a gesture that arguably cements the line of continuum from the Salamancan juridico-theology of the

³⁴ Ramon Hernandez, ‘The Internationalization of Francisco de Vitoria and Domingo de Soto,’ *Fordham International Law Journal*, 15, 4 (1991), pp.1031-1059, p.1032.

³⁵ Niemela, ‘A Cosmopolitan World Order?’, p.308.

³⁶ *Ibid.*, p.306.

sixteenth century to the halls of the modern United Nations and geopolitics.³⁷

The extent to which a theological inheritance would come to bear on the United Nations project has been illuminated by critical legal scholarship with regard to UN laws on international development, international criminal law and international human rights.³⁸ Sundhya Pahuja attests that the post-war legal order's investment in the concept of development for former colonies 'operates as just such a faith, most particularly as a belief in the way to bring salvation to mankind'³⁹ Similarly, Samuel Moyn locates the emergence of the UN human rights framework within a recalibration by Christianity of the arena of religious action, highlighting how both the Protestant and Catholic churches turned to universal human rights in the 1940's in response to their own failure to halt the slide of religious conservatism into European Fascism in the preceding decades.⁴⁰ Moyn's reading of post-war human rights recasts the *Universal Declaration of Human Rights* as hailing from the Christian tradition of trying to constitute and sustain social order in the face of crisis, as opposed to the more orthodox reading of UN human rights as the apotheosis of the secularised promise of the rights of man rooted in late eighteenth-century's era of revolution.⁴¹

To unpack the theological underpinning of the UN's attempt to facilitate a universal community points us towards the debt that the promise of ending the 'scourge of war' owed to a vision of law outlawing violence unless enacted in a name of a universal humanity, a task could only be undertaken by a chosen, exclusive group of states. With the international order being envisioned as a totalised whole, war becomes a sacred mechanism for defending that whole and we begin the shift from war as model "politics" to war as (international) "policing" and only the 'civilised' nations who claimed for themselves the office of being able to oversee the globe could be entrusted with the powers of policing. It within this context that drug prohibition would re-emerge as a universal norm of international law. The UN would become the institutional site for the ultimate success in the mid-to-late twentieth

³⁷ The Delegation of the Order of Preachers to the United Nations, 'De Vittoria Fund', <<http://un.op.org/en/background/de-vittoria-fund>> [accessed 8 September 2016].

³⁸ For a reading on the theology of international law and development, see Pahuja, *Decolonising International Law*; or Beard, *The Political Economy of Desire*. For a reading on theology and international criminal law, see Edwin Bikundo, *International Criminal Law: Using or Abusing Legality?* (New York: Routledge, 2016).

³⁹ Pahuja, *Decolonising International Law*, p.102.

⁴⁰ For an extended unpacking of this argument, see Samuel Moyn, *Christian Human Rights* (Philadelphia: University of Pennsylvania Press, 2016).

⁴¹ Moyn, *Christian Human Rights*, pp1-25

century of the idea of international drug prohibition, an idea that at the start of that century had been confined to fringe moral reformers. Drug prohibition offers an exemplary site through which to examine international law's theological inheritance, with the religious roots from which drug laws emerged being so explicit. Whilst the missionaries who first brought drug prohibition into the arena of international law would wield decreasing influence in legislative debates within the UN, the jurists, diplomats and scientists who would carry their project forward would also preserve, in both their language and their world-view, the theological imaginary that modernity had claimed itself as constituted against.⁴² Drug prohibition in the UN setup the legislative framework for what would become the War on Drugs and this was an early instantiation of how war after the end of war would be explicitly presented as being in the interests of mankind as a whole. The rest of this chapter will review the history of drug laws within the early years of the post-war international legal order, before unpacking the presence of this theological inheritance within the body of these laws, opening the door for the violence of the War on Drugs to operate as sacrificial.

7.3 Drug Prohibition during the Crisis of War

With the United Nations providing an institutional home, the issue of drug prohibition once again emerged as a concern for this international community. The crisis of the war had disrupted the legislative framework of drug prohibition that had been constructed over the course of the first half of the twentieth century. However, war also helped rectify what had been a growing division in international drug prohibition between the U.S.A., as the nation that had driven prohibition since the 1909 Shanghai Opium Commission meeting, and the League of Nations, the institution that, despite America's abandonment, had become the forum that housed the laws on drugs. War brought these two constitutive parts back together again; the League had been headquartered in Geneva, Switzerland, but with Europe imploding

⁴² It should be recognized that although drug prohibition became more bureaucratic and less explicitly missionary, Christian groups such as the International Conference of Catholic Charities, the International Federation of Women Lawyers, the World Alliance of Young Men's Christian Associations, and the World Women's Christian Temperance Union continued to attend the CND's running up to Single Convention, with some even being permitted to sit at public meetings of the UN Conference for the Adoption of a Single Convention. See S. K. Chatterjee, *Legal Aspects of International Drug Control* (The Hague: Martinus Nijhoff, 1981), p.57; or the UN Bulletin on the Tenth Session of the Commission on Narcotic Drugs, <https://www.unodc.org/unodc/en/data-and-analysis/bulletin/bulletin_1955-01-01_2_page005.html> [accessed 4 June 2015].

into violence, the League's drug control apparatus moved to Washington, allowing the system as a whole to come under increased American influence once again.⁴³ Counter-intuitively, the war resulted in unifying international drug control and solidifying America's hegemonic role within this transnational system.⁴⁴ The U.S.A. ensured that the existent drug control treaties did not cease to function during the war, employing its considerable national resources to maintain the global monitoring of legitimate and illegitimate international narcotics trade.⁴⁵ Moreover, it is worth restating the dual mandate of drug prohibition is to demarcate which legal, medicinal and palliative drugs are legitimate, as well determine illegal 'transgressive substances' as illegitimate. War only intensified the need for countries to ensure a consistent supply of the first category of drugs, those deemed by law to offer medical benefits. Prior to the war, the market for legitimate pharmaceutical products was dominated by the European imperial powers, who cultivated the drugs in raw materials form in their colonies, before manufacturing and then selling the drugs to a global medical and scientific community. The Second World War disturbed this chain of production, with trade routes between empires and colonies being cut off by the conflict. For example, 'the Japanese occupation of Java, combined with British and American naval blockades of the Atlantic, cut off the European market from supplies of coca leaves and crude cocaine' thereby crippling production and supply.⁴⁶ However, with America's trade routes to sources of drugs in their raw material form – particularly in Latin America – being relatively uninterrupted, the U.S.A. was able to establish control of the global pharmaceutical market as a consequence of the war.⁴⁷ The U.S.A. would use the chaos of the international conflict to consolidate control over the coca markets of Bolivia and Peru – which now lacked alternative customers for their raw materials – thereby emerging as the major provider able to satisfy the increasing demand for manufactured pharmaceuticals in the Western Hemisphere.⁴⁸ When the war ended, the U.S.A was firmly in control of both the legal drugs market and the apparatus erected to police the illegal drug market. The U.S.A. also took the

⁴³ John Collins, 'Regulations and Prohibitions: Anglo-American Relations and International Drug Control, 1939-1964'. (doctoral dissertation, the London School of Economics, January 2015), p.74.

⁴⁴ For further reading on how the war resulted in increased American influence over drug prohibition, see Suzanna Reiss, *We Sell Drugs: The Alchemy of US Empire* (Oakland: University of California Press, 2014), Chapter 1.

⁴⁵ Reiss, *We Sell Drugs*, p.20.

⁴⁶ Ibid., p.25.

⁴⁷ Ibid., p.15.

⁴⁸ Ibid., Chapter 1.

opportunity to implement their own drug control laws in the occupied territories acquired from the defeated Axis powers at the end of the conflict, ensuring that the American model of supply control would remain the default model of drug prohibition.⁴⁹

7.3.1 Harry Anslinger and The Battle for Post-War Drug Control

The most influential prohibitionist of the mid-twentieth century was the first commissioner of the U.S. Treasury Department's Federal Bureau of Narcotics, Harry J. Anslinger. Scholarly consensus maintains that 'few public officials have waged as relentless a War on Drugs as Harry Anslinger'.⁵⁰ Anslinger enjoyed an extensive reign as America's leading drug warrior, his period as the head of the Federal Bureau of Narcotics stretched over thirty-two years, from 1930-1962, making him 'the only man ever to run a U.S. security agency longer than J. Edgar Hoover'.⁵¹ Anslinger elevated drug prohibition into a central tenet of American domestic and foreign policy and in doing so, he managed to secure both his own position and that of his fledging agency.⁵² Anslinger's campaign for drug prohibition borrowed heavily from the tactics that were employed at the birth of American drug prohibition in the early twentieth century. He advanced drug laws by equating them with existential threats that promised to infest and corrupt the American body politic, interweaving with an insistence on associating the drugs trade with ethnic and ideological threats. Anslinger's beliefs would manifest in public proclamations that insisted that 'various "third world" communist nations functioned as the foreign source of illicit drugs', with distribution in America being facilitated by immigrants and racial others, whose loyalty to the American state was always already in question.⁵³ Douglas Kinder encapsulates Anslinger's approach to prohibition when he states that, 'ultimately,

⁴⁹ Ibid., p.48.

⁵⁰ William O. Walker III, *Drugs in the Western Hemisphere: An Odyssey of Cultures in Conflict* (Washington: Scholarly Resources Inc, 1996), p.46. For further reading on the influence of Anslinger on the history of drug prohibition, see John C. McWilliams, *The Protectors: Harry J. Anslinger and the Federal Bureau of Narcotics, 1930-1962* (Newark: University of Delaware Press, 1990).

⁵¹ Johan Hari, *Chasing the Scream: The First and Last Days of The War on Drugs* (New York: Bloomsbury, 2015), p.45.

⁵² For further reading on the way in which Anslinger established the foundations for the late twentieth century War on Drugs, see Hari, *Chasing the Scream*. Hari credits not only Anslinger's personal racist opinions but also the insecurity of his Bureau as driving his extreme commitment to prohibition.

⁵³ Douglas Clark Kinder, 'Bureaucratic Cold Warrior: Harry J. Anslinger and Illicit Narcotics Traffic', published in *Pacific Historical Review*, 50, 2 (May, 1981), pp.169-191, p.181.

Harry Anslinger updated the early twentieth century drug restrictionists' pattern of linking ethnic and foreign elements with drug trafficking'.⁵⁴ It should also be noted that this vision of drugs as linked with ethnic and foreign sources was only one element of Anslinger's personal racist opinions, which also informed his disgust with music and culture that he associated with racial subalterns.⁵⁵ However, drugs were the central issue Anslinger saw at the heart of these other cultural fears.

Anslinger further mirrored the path of earlier prohibitionists like Hamilton Wright by endeavouring to internationalise his vision of prohibition, painting a picture of a drugs trade that characterised it as an existential threat to the international community. Rising American hegemony infused Anslinger and his network of drug diplomats with the power to realise this vision. During the crisis of the war, Anslinger, supplemented by the efforts of old League-era prohibitionists such as Hamilton Wright's widow Elizabeth Wright, began to construct a post-war legislative basis for universal prohibition by merging prohibitionist drug policy ideology with desired wartime outcomes.⁵⁶ The chaos of war had upturned the given order of the international, and the U.S.A. sought to re-cohere this order around a universalization of American economic and social norms

However, initially the efforts of Anslinger and his acolytes, referred to by scholars of drug prohibition such as John Collins as 'the inner circle', were frustrated, as drug prohibition received minimal attention during the San Francisco conference that would found the major institution of the post-war international legal order, the United Nations.⁵⁷ At the San Francisco conference founding the UN there was a concern with the new institution avoiding the mistakes of the League by ensuring that all the major countries were included as member states. Therefore, the State Department minimised the issue of drug prohibition as it was a contentious and potentially divisive point amongst America's allies, particularly the European imperial powers. As a result, the UN Charter, unlike the League's founding Charter, would contain no provision for addressing prohibition. The San Francisco conference placed Anslinger and his 'inner circle' of American prohibitionists on the back foot. With the UN Preparatory Commission

⁵⁴ Ibid., p.191.

⁵⁵ For an in-depth biographical engagement of Anslinger's personal racist views and actions, see Hari, *Chasing the Scream*, Chapter 3, pp.42-48.

⁵⁶ Collins, *Regulations and Prohibitions*, pp.84-85.

⁵⁷ Ibid., p.42.

negotiations scheduled to take place in London, where the proposal of the Charter was turned into a functional organisation, Anslinger drew on his connections with the *Hurst* newspapers to begin to orchestrate a press campaign to pressure the State Department to reprioritise drug prohibition.⁵⁸ The Women's Christian Temperance Union again aided the cause of prohibition by publically campaigning that the UN Charter left 'the world open to traffic' and that opium control was 'left out of the Charter in deference to the profit motive of certain nations', referring to America's European allies.⁵⁹

In London, Anslinger's acolyte Helen Moorhead was able to ensure, through the support of Chinese ally of the 'inner circle' Victor Hoo, that a Commission on Narcotic Drugs (CND) was to be established at the first session of the UN's Economic and Social Council.⁶⁰ The CND would become one of the UN's principle instruments for managing drug prohibition, emerging as the primary forum in which international drug policy would be formulated. The establishment of the CND, alongside an independent Division on Narcotic Drugs (DND) within the Department of Social Affairs of the Secretariat of the UN established by the UN Secretary General as well as the transfer of the Drug Supervisory Body (DSB) and the Permanent Control Opium board (PCOB) from the League into the UN, put in place the architecture for governing drug prohibition in the post-war international law. Collins emphasises the line of continuum that exists between the technical instruments through which the League had sought to enforce its drug treaties and those that would be adopted by the UN, crediting Anslinger and the 'inner circle' for having 'salvaged the system's key apparatus during the war, overseen its transfer to the new UNO and ensured it was highlighted as a priority for post-war international cooperation'.⁶¹ Moreover, the endeavours of the drug warriors ensured that within the post-war international legal order, the control of drugs would continue to be approached as an issue of law and morality, requiring enforcement and punishment, rather than based upon alternative perspectives which prioritised health or economic concerns.

7.3.2 The 1953 Opium Protocol and Exhaustion of Moral Prohibitionism

⁵⁸ *Ibid.*, pp.116-117.

⁵⁹ 'WCTU Urges Control of Opium Continues', *Newark News*, 12 October 1945.

⁶⁰ Collins, *Regulations and Prohibitions*, p.123.

⁶¹ *Ibid.*, p.127.

With the operational structure for drug prohibition in place at the UN, the prohibitionists turned their attention to reinforcing the laws upon which the system stood. As aforementioned, the treaties that had been established through the League had been limited in their effectiveness, meaning prohibition would require a more ambitious legislative framework if the UN was to succeed where the League failed. The most ambitious project undertaken was to clear the confusion produced through multiple, overlapping drug treaties by creating a single, comprehensive drug convention. The aim of synthesising and consolidating the preceding international drug prohibition 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 a major project of totalising post-war legal ordering but is comparatively under-researched. Drafting on the Single Convention commenced alongside these other treaties in 1948, but it was not until 1961 that an acceptable third draft was ready.⁶² The scale of the task of consolidating the existing drug treaties into a single, unified treaty is demonstrated by the fact that it would take thirteen years to produce the Single Convention, with further drugs laws emerging in the meantime, most notably *The Protocol for Limiting and Regulating the Cultivation of the Poppy Plant, the Production of, International and Wholesale Trade in, and Use of Opium, 1953* (referred to as *The 1953 Opium Protocol* hereafter). The Opium Protocol Conference met in May 1953 in New York, the location of this conference being in the U.S.A. as opposed to Geneva only amplifying the influence that Anslinger, as the President of the Conference, and his ‘inner circle’ of hard-line prohibitionists enjoyed over the process. In the face of opposition – even from some of America’s major international allies – the draconian negotiating attitude taken up by ‘the inner circle’ at this conference ensured that ‘the 1953 Opium Protocol contained the most stringent drug-control provisions yet embodied in international law.’⁶³ Its provisions extended the import and export controls from opium trade to opium poppy cultivation, a development that was a breakthrough for the American prohibitionists, who had been agitating for cultivation limitations in previous agreements.⁶⁴ The 1953 Opium Protocol was taken as a personal victory for

⁶² William McAllister, *Drug Diplomacy in the Twentieth Century* (London: Routledge, 2000), pp.204-209.

⁶³ *Ibid.*, p.181.

⁶⁴ Julia Buxton, *The Political Economy of Narcotics: Production, Consumption and Global Markets* (London: Zed Books 2006) p.55.

Anslinger.⁶⁵ Despite the fact that the 1953 Opium Protocol had only been viewed as an interim agreement that the PCOB could use to administer prohibition until the Single Convention could be agreed, Anslinger, as the President of the Conference, celebrated the treaty – particularly its limitation of opium use to exclusively medical and scientific purposes – as the great culmination of 44 years of international efforts by prohibitionists.⁶⁶ The aggressive mode of advocacy pursued by ‘the inner circle’ ensured that the 1953 Opium Protocol was pushed through to completion, however the shortcomings of these forceful tactics were that they failed to inspire the universality that would be required for the treaty to ultimately take effect. Analysing the 1953 Opium Protocol, it becomes apparent that Anslinger and his supporters misunderstood the nature of legal force, believing that directly dictating the terms of the agreement was as effective as ensuring governing norms through masking particular interests through arrogating universality. While France supported the agreement, the aggressive restrictions driven into the treaty by Anslinger and his acolytes alienated other major allies, particularly the U.K.⁶⁷ As a result, though the 1953 Opium Protocol was signed, it did not receive the sufficient number of ratifications to come into force for the remainder of the decade. Traditional imperial powers Britain and the Netherlands, both with large drug trades, would not ratify the treaty, neither would the Soviets, who shunned it, claiming its provisions infringed on state sovereignty.⁶⁸ Furthermore, the 1953 Opium Protocol required the adherence of three of the seven recognised opium-producing countries in order to come into force, and it was the refusal of opium producing nations Turkey, Yugoslavia, and Greece to ratify the treaty that would ultimately frustrate its ability to enter into force.

Anslinger aimed for the 1953 Opium Protocol to herald a new era of draconian international drug prohibition. However, in effect, the 1953 Opium Protocol represented the conclusion of this style of international drug prohibition advocacy.⁶⁹ While prohibition had been driven by the efforts of American moralists since the turn of the century, the focus on universality that anchored the post-Second World War international community did not lend itself to laws being forced through by a small band of well-organised, committed anti-drug zealots. Displeased with the 1953

⁶⁵ McAllister, *Drug Diplomacy*, p.181.

⁶⁶ Collins, *Regulations and Prohibitions*, p.218.

⁶⁷ *Ibid.*, p.219.

⁶⁸ McAllister, *Drug Diplomacy*, pp.202-204.

⁶⁹ McAllister, *Drug Diplomacy*, p.185.

Opium Protocol the international community turned its attention to the on-going drafting of the Single Convention, with the aim of influencing the new treaty, aware that if realised, it would have the effect of overshadowing all previous international drug prohibition treaties.

7.4 The Road Towards the Single Convention

As the most ambitious legal treaty of drug prohibition yet attempted, the drafting process for the Single Convention was particularly protracted, requiring three drafts in order to produce a workable document, with a fledging CND struggling to cohere the multiple interests into a workable text. The first draft, produced in the early 1950's, was rejected in 1955. The second draft, produced in 1956, 'proved too confusing to act as a serviceable document because it contained many conflicting clauses'.⁷⁰ Finally, in 1958, the CND produced a third draft that could be taken to a UN conference to iron out. In January 1961, 73 national delegations met in New York for the United Nations Conference on Narcotic Drugs. There was a shared incentive for both producer states and the imperial drug powers to create a treaty less onerous than the 1953 Opium Protocol, itself still frustrated in limbo.⁷¹ Moreover, the American delegation were also less dogmatic than at previous conferences; Anslinger's influence had begun to decline as he took greater time away from Washington to care for his wife and the State Department had begun to tire of his belligerent style.⁷² He had taken to boycotting the CND meetings when they were held in Geneva, however he did appear as chairman in 1957 when the CND assembled in New York – further reducing his influence as his erratic and domineering style isolated him from his international allies.⁷³ The State Department did not share Anslinger's passion for the 1953 Opium Protocol, preferring a Single Convention that could consolidate drug prohibition in a unified, functioning regime, without alienating too many of America's allies or upsetting the balance of the post-war international order.⁷⁴

The states that were unhappy with the 1953 Opium Protocol were able to

⁷⁰ Ibid., p.205.

⁷¹ Ibid., p.195.

⁷² Collins, *Regulations and Prohibitions*, pp.220-222.

⁷³ Ibid., p.243.

⁷⁴ McAllister, *Drug Diplomacy*, p.207.

ensure that it would be among the nine previous drug treaties that would be terminated when the Single Convention entered into force.⁷⁵ However, the Single Convention would not fully decouple international law on drugs from Anslinger's draconian vision of drug prohibition. Article 2 confirmed that use of the most heavily prohibited substances would be limited to 'medical and scientific research only' as Anslinger had envisioned.⁷⁶ The Single Convention also further extended licensing, reporting and certification mechanisms for drugs to apply to raw drug plant materials, particularly targeting the 'the opium poppy, the coca bush, the cannabis plant, poppy straw and cannabis leaves'.⁷⁷ The focus on these raw material drug plants recalls how the project of prohibition seeks to make illegal the very plant life/vegetation of the earth through a discursive association with transgressive subjectivities. The Single Convention's attempt to categorise the world's vegetation is revealed by the scheduling system that the treaty would employ. The scheduling system, first introduced in the 1931 *Convention for Limiting the Manufacture and Regulating the Distribution of Narcotic Drugs*, was extended to four schedules, with the drugs considered to be most dangerous classified as Schedule I or IV. The major plant based drugs – cannabis, opium, heroin and cocaine – were all listed in the most dangerous schedules. However, as Taussig and Sheik have illustrated in earlier chapters, the synthesis of biology and racialisation helps produce the global geographical imbalance. As will be discussed further in the following chapter, the rendering of raw drug plant materials as illegal established the foundation for the aerial fumigation and agrarian reform programmes of the drug war, which, due to the supply control focus of prohibition would impact producers and suppliers of the Global South disproportionately. 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.⁷⁸

The distinction drawn between plant-based or raw drugs and 'manufactured' narcotics

⁷⁵ Ibid., p.208.

⁷⁶ Article 2, 5(b), the *United Nations Single Convention on Narcotic Drugs, 1961*.

⁷⁷ Article 2, 7, the *United Nations Single Convention on Narcotic Drugs, 1961*.

⁷⁸ McAllister, *Drug Diplomacy*, p.209.

parallels the distinction between raw materials and added-value commodities that dependency theorists and critical economists 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.⁷⁹ The turning of warfare into the reserve of a weapon of a (Europeanised) universal humanity fuelled the environmental devastation visited upon nature as conceptualised in a dichotomy of either resources for extraction or threats to be eradicated. 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 heaviest burden when it came to realising the treaty's aims.⁸⁰ In terms of enforcing those aims, a further innovation of the Single Convention was that it restructured the administrative apparatus of international drug control, with the PCOB (now named the Permanent Central Board) and the DSB merged into a single body of experts to be called the International Narcotics Control Board (INCB).⁸¹ The INCB was given the power to collect estimates of drug use from states, calculate its own estimates for states that failed to comply, and recommend an embargo on the import and export of drugs to a country if it was unsatisfied with its conduct.⁸² The INCB would join the CND as another institutional pillar for the UN apparatus for drug prohibition.

In Anslinger's absence, and under pressure from the State Department to be conciliatory, the US delegation that attended the Single Convention conference had failed to produce an agreement that was as hard-line as he had envisioned. Anslinger responded to the treaty by denigrating it public, while focusing his energy on trying to activate the 1953 Opium Protocol, which could be achieved through the ratification of one more of the opium-producing states recognised by the treaty. Anslinger aimed to override the Single Convention by bringing the 1953 Opium Protocol into effect and making it, rather than the Single Convention, the basis for post-war international drug prohibition.⁸³ He took his opposition to the Single Convention onto the international stage, ending his policy of boycotting CND meetings held in Geneva rather than New

⁷⁹ 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).

⁸⁰ Buxton, *The Political Economy of Narcotics*, p.56.

⁸¹ Article 45, 2, the *United Nations Single Convention on Narcotic Drugs, 1961*.

⁸² *Ibid.*, Article 12, 14.

⁸³ McAllister, *Drug Diplomacy*, p.216.

York, by going to Geneva in 1962 to lead a US delegation committed to promoting support for the 1953 Opium Protocol.⁸⁴ If the ratification of the 1953 Opium Protocol could be secured, it could then form the basis of a more extensive and strict Single Convention in due time.⁸⁵ Anslinger's efforts were initially successful, as he was able to convince Greece to ratify the 1953 Opium Protocol, thereby bringing it into effect. However, Anslinger's attempt to upend the Single Convention ultimately proved ineffective. Completing the trend of the centre of gravity of international drug prohibition moving from emerging from American internationalism into a norm of an institutionalised international law, the UN responded to Anslinger's aggression by focusing their efforts on ensuring the success of the Single Convention. The treaty entered into force in December 1964 when it met Article 41's requirement of 40 ratifications.⁸⁶ Once the Single Convention came into force, the 1953 Opium Protocol was extinguished. The United States initially boycotted the Single Convention but the State Department eventually won its internal dispute with Anslinger, allowing the U.S.A. to ratify the Single Convention in 1967.⁸⁷

7.4.1 The Fixing of the Structure of Prohibition

Harry Anslinger retired from his post as FBN Commissioner in 1962 but continued to represent the U.S.A internationally. For the remainder of the decade he attended CND sessions as the chief American delegate, still playing a key role in formulating and promoting drug policy.⁸⁸ He resigned from his post as head of the American CND delegation in 1969, before passing away in 1975. Anslinger remains the most significant prohibitionist of the twentieth century and the international diplomat whose contribution helped to ensure that drug prohibition would survive the transition from the League to UN.⁸⁹ Moreover, as a bridge between the early twentieth-century American moral crusaders, such as Bishop Brent and Hamilton Wright, and the post-World War II realisation of a universal legal architecture for drug prohibition, Anslinger's career offers a lens through which we can see the extent to which the jurisprudence behind contemporary drug prohibition remains informed

⁸⁴ Ibid., p.217.

⁸⁵ Collins, *Regulations and Prohibitions*, p.244.

⁸⁶ Article 41, the *United Nations Single Convention on Narcotic Drugs, 1961*.

⁸⁷ McAllister, *Drug Diplomacy*, pp.217-218.

⁸⁸ Ibid., p.221.

⁸⁹ Hari, *Chasing the Scream*, p.45.

by the moralism of the past. Though it ultimately escaped Anslinger's control, the Single Convention remains indebted to the norms of drug prohibition that had been produced through half-a-century of moralist advocacy and campaigning and these norms continued share much of Anslinger's fear about the existential danger of drugs. The Single Convention confirmed in international law that the approach that would be universally pursued in order to combat recreational use of opium, cocaine and cannabis – the big three 'narcotics' – was to target the 'sources' of this infestation. The orientation of 'supply control' strategy functions to externalize this problem, locating it as invading from outside of the boundaries of the good, international community, and therefore imagining the community as being able to cohere itself, if only it could be without this problem. Unlike Anslinger, the Single Convention does not explicitly associate the danger of drugs with racialised others but this association remains an unspoken presumption of the law.

The extent of American influence over the Single Convention has been a topic of scholarly contestation. David Bewley-Taylor argues that 'US dominance in the UN control system ensured that the Single Convention created a Western-orientated prohibitive framework for international drug control.'⁹⁰ Alternatively, John Collins stresses the importance of a struggle between Britain and the U.S.A as informing the orientation of post-war drug prohibition. For Collins, it is the interplay between the emerging hegemony of America and the declining hegemony of the British Empire with 'the US favouring immediate and strict prohibition and the UK favouring incrementalism and various forms of regulation, [that] would determine not just their own relationship, but also the shape of the international drug control system going forward'.⁹¹ Collins' study describes how, once the chaos of war had disrupted Britain's connections to her imperial drug monopolies, both major powers recognised their shared role in cohering the various global interests into a consensus around prohibition, 'deploying a mixture of sticks and carrots, which only a joint Anglo-American effort could effectively wield'.⁹² Whilst accepting that US prohibitionists, led by Anslinger, initially drove this partnership, Collins reads the British response as ultimately determining the ground for the international drug laws. For Collins, 'Anslinger's failure reflected a broader shift in international drug diplomacy' with the

⁹⁰ David R. Bewley-Taylor, *The United States And International Drug Control, 1909-1997* (New York: Continuum 2001), p.160.

⁹¹ Collins, *Regulations and Prohibitions*, p.75.

⁹² *Ibid.*, p.160.

zealotry advocacy of the moral reformers giving way to the more technocratic regulators of the new international order.⁹³ However, an overemphasis on reading of the Single Convention as an example of US failure minimises the extent to which the norms that Anslinger, or more accurately the tradition of American moral prohibitionism of which he was representative, discursively constituted the very grounds on which this treaty would emerge. Also, I would argue that the shift from the moralistic missionaries to technocratic management indicates not so much a dramatic sea-change in drug prohibition but a glimpse of how the turn to management allowed for the uneven distribution and application by a single bureaucratic centre of the unleashing of violence. As will be discussed at greater length in the following chapter, to assume that post-war international drug prohibition becomes a matter of apolitical regulation would be to overlook the extent to which the violence that would be unleashed in the War on Drugs, despite the empirical evidence of its futility, can be found as present in the laws enacted in this period. The bureaucrats can play the role of moral zealots themselves, especially when the actions of the law are posited in the name of universal humanity. The international secretariat does not overwrite the zealotry of American prohibitionism but rather absorbs and then masks this zealotry within itself.

7.5 Evil In The Single Convention

An indication of the extent to which discursive norms of juridical-theological prohibitionism informed the orientation of the Single Convention can be appreciated through a close reading of the treaty, and particularly the preamble of the treaty, which is the section charged with the task of summarising and holding the document together as a cohesive whole. A specific emphasis on the importance of 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.⁹⁴ The importance of the preamble in international law is only reinforced in the Single Convention, where the

⁹³ Ibid., p.259.

⁹⁴ *The Vienna Convention on the Law of Treaties*, 1969, Article 31, 2.

preamble was drafted so as to ‘encapsulate the core aims of the Convention.’⁹⁵

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.⁹⁶ With notable 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 spied as present upon the body of the law, i.e. the text of the treaties, statutes and judicial decisions. In following with a textual analysis of the law, a close reading of the preamble of the Single Convention synthesises with my reading of drug laws as sacrificial by providing an immediate challenge to any presumptions of scientific objectivity. 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.⁹⁷

Drug policy scholarship has already highlighted the curiosity of the reference to the concept of ‘evil’ within this international legal treaty. Law is the presumed relegation of the theological to the past through a secular turn to modernity. Therefore, recent scholars, particularly Rick Lines, have queried why specifically drugs demanded the return of such theological language when other defining legal treaties of the post-war international legal order escape such description. Lines highlights that other treaties such as the *1973 International Convention on the Suppression and Punishment of the Crime of Apartheid* contain no allusions to apartheid being an ‘evil’, neither does the *1970 Treaty on the Non-Proliferation of Nuclear Weapons*, the *1956 Supplementary*

⁹⁵ Christopher Hobson, ‘Challenging “evil”: Continuity and change in the drug prohibition regime’, *International Politics*, 51 (2014), pp.525–542, p.532.

⁹⁶ 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).

⁹⁷ *The United Nations Single Convention on Narcotic Drugs, 1961, Preamble.*

Convention on the Abolition of Slavery or even the *1948 Convention on the Prevention and Punishment of the Crime of Genocide* refer to their subjects as ‘evil’.⁹⁸ Christopher Hobson extends Lines’ critique by problematizing the criteria of harm being employed within the ‘post-war legal order’ when he states 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’.⁹⁹ As detailed in my previous section, the description of drugs as ‘evil’ has a long historical legacy, with the rhetoric of everything ranging from the newspaper article reporting on America’s first drug law, to the report delivered to the US congress by early international drug diplomat Hamilton Wright and the writings of Quincy Wright, all containing the description of drugs and drug use as ‘evil’. 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.¹⁰⁰ The conceptualization of drugs as ‘evil’ not only speaks to the religious and missionary roots from which international drug prohibition emerged, moreover, the appeal not to a legal definition of wrongdoing, or to a moral wrong but to ‘evil’, a specifically theological category, speaks to the extent to which international law would continue to draw on a conception of the universal indebted to the religious. Evil functions so as to render the object as outside of politics, it becomes an existential threat to the social order and thereby all actions required to eradicate it become justified. This externalization not only fuses differential sectors of the global population against a common enemy, but also does so through materialising this symbolic threat in the body of the specified contagion.

The immediate problematic offered by the use of ‘evil’ in the Single Convention is the task of discerning what form ‘evil’ takes within a godless discourse such as that claimed by modern international law. As discussed at length in the introductory chapter, international law understands itself as both informed by and giving rise to the secularising imperative of modernity. Therefore, how should we understand evil in the ‘secular’ world? Mark Fisher captures the theoretical challenge

⁹⁸ Rick Lines, “‘Deliver us from evil’? – The Single Convention on Narcotic Drugs, 50 years on”, *International Centre on Human Rights and Drug Policy*, 1 (2010), pp.1-13, p.8.

⁹⁹ Hobson, ‘Challenging “evil”’, p.526.

¹⁰⁰ Jacques Derrida, ‘The rhetoric of drugs: an interview’, *5 differences: A Journal of Feminist Cultural Studies* 5, 1 (1993), pp.1-25.

provided by the continuing appeal to the concept of evil in our secular world when he explores what he calls ‘the new problem of evil’ -the question of what is the content of evil ‘for an age that no longer believes in evil’?¹⁰¹ Fisher understands our continuing reliance on the idea of evil as a result of an inability to reconcile the ideal models of modernity with the systematic failings these models produce in practice.¹⁰² Law, particular international law with its totalising conceptions of universal humanity, functions as such an imagined systematic ideal, allowing the concept of evil to continue to have currency within its discourse despite its ostensible secularity.

It is unique to find an example of law’s theological anchoring as unmasked as it can be found to be in service of normalising drug prohibition, however. The Single Convention is not the only time the rhetoric of evil has been used in relations to problems of international order, although substantial research has failed to produce another example in which the word itself appears in actual text of an international treaty. Michael Hardt and Antonio Negri overlook the Single Convention when they describe the category of a crime against humanity as ‘perhaps the legal concept that most clearly makes concrete this notion of evil’¹⁰³ Furthermore, Robert Meister critiques the construction of the post-war human rights legal framework as the attempt to use the discourse of human rights to relegate evil onto the past and promises a new international order. Within the discourse of human rights, evil is rendered as a time of ‘cyclical violence’, an era in which violence would escalate and persist without end, which an embrace of the faith of human rights can put an end to.¹⁰⁴ The effect of this discourse is to depoliticise historical crimes and therefore delegitimise demands for human rights to deliver a punitive or financial, rather than moral, form of justice. However, the presence of the conceptualisation of drugs as evil within the text of the law allows drug prohibition to function as a particularly telling instantiation of the dynamics that Hardt, Negri and Meister identify.

While studies of human rights and humanitarian law help illuminate the constitution of post-war international law against a theologically indebted conception of evil, the explicit example of the Single Convention and its preamble remains largely overlooked by critical legal scholarship. The key to decoding this question of evil

¹⁰¹ Mark Fisher, “The New Problem of Evil” in *Aesthetic Justice: Intersecting Artistic and Moral Perspectives* ed. by Pascal Gielen and Niels Van Tomme (Amsterdam: Valiz 2015) pp.45-55, p.50

¹⁰² Fisher, “The New Problem of Evil”, p.50

¹⁰³ Michael Hardt and Antonio Negri, *Multitude* (New York: Penguin, 2004), p.16.

¹⁰⁴ Robert Meister, *After Evil: A Politics of Human Rights* (Columbia University Press, 2011), p.25.

within the Single Convention is to note the placement of evil in oppositional relationally to a universal mankind. The invocation of ‘mankind’ as being in existential danger from drugs in the preamble of the Single Convention provides a telling instance of international law’s arrogation of the universal, law’s claim to speak on behalf of all humanity. Moreover, post-war international law was particularly explicit in anchoring a universal community on a notion of ‘humanity’ as the shared quality of all members.¹⁰⁵ Taking up the task of translating the transcendent office of God for a secularised world, Carl Schmitt adapted Proudhon’s classic claim that ‘he who invokes God is trying to cheat’ into the idea that in the modern age, whoever ‘invokes humanity is trying to cheat.’¹⁰⁶ Schmitt’s understanding of the call to humanity operating as a deific surrogate recognises the importance of this totalising claim to international law’s universal authority. To simply claim that equality applies to all humans, as the major founding documents of the post-war international legal order a fond 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 a universal humanity. As Peter Fitzpatrick argues, Europeanised notions of humanity have often facilitated the disqualification of people with ‘certain physical characteristics, usually skin colour, from the order of the law.’¹⁰⁷ International law has been adept at employing this exclusionary capacity of the concept of humanity to facilitate the visiting of violence upon particular subjects.¹⁰⁸ This dual character of the category of humanity, the capacity to both compel within an all-inclusive humanity and to expel utterly from that same ‘all’, points towards reading ‘humanity’ against those who are included in a position of exclusion within the global order of modernity, those that Frantz Fanon would describe as *Les Damnés*.¹⁰⁹

Fanonian scholar Lewis Gordon translates the concept of evil into the register of the secular modern through reading Fanon’s ‘damned’ as ‘the theodicy of European modernity’.¹¹⁰ Gordon’s oxymoronic description of the relationship between the

¹⁰⁵ Otomo, *Unconditional Life*, pp.10-17.

¹⁰⁶ Carl Schmitt, *The Concept of the Political: Expanded Edition* (Chicago: University of Chicago Press, 2007), p.54.

¹⁰⁷ Peter Fitzpatrick, *The Mythology of Modern Law* (London/New York: Routledge, 1992), p.65.

¹⁰⁸ See Danilo Zolo, *Invoking Humanity: War, Law and Global Order* (New York: Continuum, 2002)

¹⁰⁹ Fanon, *Wretched of the Earth*.

¹¹⁰ Lewis R. Gordon, ‘Race, Theodicy and the Normative Emancipatory Challenges of Blackness’, *The South Atlantic Quarterly*, 112, 4 (2013), pp. 725-736, p.729.

damned, those subjects constituted as legitimate victims through the colonial encounter and the global order they exist within resurrects the 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 – as shown in the work of Lines or Hobson – there has been an absence of scholarly engagements that have sought to read the preamble within longer traditions of characterising evil.

7.5.1 Augustine's Accounting for 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 religious analysis of the concept is required. The tradition of the Christian thought on the concept of evil is extensive, with perhaps no engagement more famous than the one offered by Saint Augustine of Hippo. Augustine took up the problem of theodicy, seeking to explain through his writings how God's transcendent goodness and the self-evident presence of worldly evil could be reconciled. The problematic that had to be faced was whether it was outside of the power of God to simply erase evil contained in the world. If so, how could scholastics maintain a claim of God's omnipotence? Was evil external to God's will? If it was, then it disrupted God's omnipotence and if it was not, then it disrupted God's claim to be the good.¹¹¹

Augustine responded by arguing 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 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 'evil'.¹¹² Augustine recognises evil as dependent upon the 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'.¹¹³ Augustine's schematic commences from a recognition that, before being made by the omnipotence

¹¹¹ William E. Mann (ed.), *Augustine Confessions* (Lanham: Rowman & Littlefield Publishers, 2006), p.116.

¹¹² St Augustine, *The Enchiridion; Faith, Hope and Charity* (Washington D.C.: Regnery Publishing, 1961), p.12.

¹¹³ *Ibid.*, p.12.

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. Augustine reads evil as always already included within the good in a manner that parallels the Platonic understanding of non-being as always already present within being. It is through this synthesis of Platonic philosophy and monotheistic Christian belief that Augustine is able to cast evil as ‘not a nature but a kind of non-being’.¹¹⁴ The resulting schematic maintains evil as being within the omnipotent good of God, whilst always remaining as constituted in opposition to it. For Augustine, 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?’¹¹⁵ Evil does not possess a nature itself; it consists only as the failed realisation of what should be: the good. Evil is merely privation, in the manner roughly analogous to sickness as the absence of health or darkness as the absence of light. As illustrated above, for Augustine evil does not exist outside of God, therefore God’s omnipotence contains evil while sustaining an oppositional relationality to it. Evil is as an anti-thesis, but an anti-thesis that remains included within the totality of the thesis.

Augustine’s schematic provides a starting point from which begin to unpack the presence of ‘evil’ in the preamble of the Single Convention, which makes a secularised claim to ontological completeness through an invocation of a universal ‘mankind’. Furthermore a line of continuum can be drawn from Augustinian principles of evil to the anchoring foundations of international law through Thomas Aquinas, who both carried forward Augustinian thought and served as the primary influence on Vitoria. 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

¹¹⁴ William E. Mann (ed.), *Augustine Confessions* (Lanham: Rowman & Littlefield Publishers, 2006).

¹¹⁵ St Augustine, *The Enchiridion*, p.11.

translating the metaphysical structure of theology into the material reality of our modern global order.

7.5.2 Fanon and the ‘theodicy of Euro-Modernity’

For Fanon, modernity was formed through the encasing of particular bodies within this paradoxical space of included/exclusion; the subject position of the contradictions of modernity is to be damned to reside in what he describes as ‘the zone of non-being’.¹¹⁶ This ‘zone of non-being’, for Fanon, encapsulates the lived experience of the racial/colonised other. Recalling Augustine’s classic description of evil, Fanon understands the racial other as being fixed in a condition of privation. As a subject, the racial other serves as the failed realization of what should be: the rational, autonomous, modern (white/European) human. For Fanon, it was a necessary function that within ‘the totalitarian character of colonial exploitation the settler paints the native as a sort of quintessence of evil’.¹¹⁷ The racial/colonial other exists only in ‘negation’ and it is through this state of negation against the idealised humanity of euro-modernity that it takes on the condition of absolute evil within an ostensibly secularised world. Fanon further clarifies by arguing that within this world order 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 maleficent powers, the unconscious and irretrievable instrument of blind forces.’¹¹⁸ Lewis Gordon emphasises the parallels between Fanon’s understanding of ‘the damned’ and Augustine’s response to the problem of theodicy by stating:

Western thought [...] led to a theodicy of Western civilisation [...] systems that were complete and intrinsically legitimate in all aspects of human life [...] while its incompleteness, its failure to be so, hallmarks the ‘dark side of thought’ lived by those constantly crushed under its heels, remained a constant source of anxiety [...] People of colour, particularly black people live the contradictions of this self-deception.¹¹⁹

¹¹⁶ Frantz Fanon, *Black Skins, White Masks* (New York: Grove Press, 1991), p.2.

¹¹⁷ Fanon, *Wretched of the Earth*, p.8.

¹¹⁸ *Ibid.*, p.41.

¹¹⁹ Lewis R. Gordon, *What Fanon Said: A Philosophical Introduction to His Life* (New York: Fordham University Press, 2015), p.20.

Following the structure of theodicy, the racial subaltern subject cannot be truly other to the universal humanity of international law, lest that humanity not be truly universal and the system not be truly complete. Yet those who have been historically disqualified from the status of humanity exist as ‘the not-yet’ within this schematic, damned by the invitation to civilise, progress or develop towards a ‘perfect’ state of humanity in a process that is indefinitely deferred. Just as Vitoria’s conceptualisation of a universal humanity was thoroughly saturated with the particularities of Spanish cultural and political norms, thereby enclosing the Amerindian within a damning inclusive/exclusion, the deific surrogate of ‘humanity’, so celebrated by post-war international law and proclaimed as the enemy of the ‘evil’ of drugs by the preamble of the Single Convention, contains 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 colonised/racially subaltern subject takes on ‘the principle of evil’.¹²⁰ The modern global order becomes invested in the image of the racially subaltern subject, the human in privation, as evil.¹²¹ 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’.¹²² Instead, he ‘is declared insensible to ethics; he 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’.¹²³ This preceding quote from *Les Damnés de la terre* offers the only reference to Fanon’s previous book *Black Skins, White Masks* in his 1961 posthumous classic, illustrating the importance of the configuration of the native as ‘evil’ within the wider theoretical schema of world ordering that Fanon seeks to illuminate.¹²⁴ This theological connection of the enclosing of the subjectivity of the colonised in privation – detailed in *Black Skins, White Masks* – with the world order that sustains itself through the licensing of violence upon that ‘evil’ subject – as detailed in *Les Damnés de la terre* – provides the key link between Fanon’s two outstanding scholarly contributions, and therefore

¹²⁰ Fanon, *Black Skins, White Masks*, p.147.

¹²¹ Gordon, *Through the Zone of Nonbeing*, p.20.

¹²² Fanon, *Black Skins, White Masks*, p.8.

¹²³ Fanon, *Wretched of the Earth*, p.8.

¹²⁴ *Ibid.*, p.40.

his intellectual project as a whole. The reading of these twin elements of the Fanonian schematic together illuminates its parallels with the logic of sacrifice, which I have analysed across this thesis. Like Girard's scapegoat, Fanon's racial/colonised other orders the community that it is expelled from. The community seeks to take form by casting out its own negative imaginings, encased in a body that can be sacrificed.

The unpacking of the 'theodicy of European modernity' provides a telling lens through which to re-read the curiosity of 'evil' being the anchor of the Single Convention. 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 the very subjectivity that these drugs are feared to engender: the irrational, unhinged, non-human human. This is the subject position that has been embodied by the racial other within the discourse of modernity. An appreciation of 'the theodicy of modernity' offers potential answers to the questions about the use of 'evil' in the Single Convention by pointing towards an explanation grounded in a concern with the consequences of the treaty, which would lay the groundwork the War on Drugs, shown in the my introduction to be amongst the most racially discriminatory of modern international legal projects.

The humanitarianism of post-war international law remained indebted to the theological anchor of world order. Meister uncovers the presence of 'monotheistic violence' underneath human rights by which he means 'a violence that claims to break the cycle of violence.'¹²⁵ For Meister monotheistic violence is not only a matter of 'containing what Girard calls "mimetic rivalry"' but becomes, instead a matter of defending a God who is now revealed to have always been on the side of victims.¹²⁶ Meister argues that the humanitarianism prevalent in post-war international law 'misunderstands itself to be the *last* monotheism because it claims to be the religion of humanity as such'¹²⁷ The impulse for communality through the last religion of 'humanity' would take institutional form in the United Nations. The UN thereby became the site in which drug prohibition could achieve a level of universalism previously unattainable, with the eventual consolidation of previous drug treaties into a Single Convention serving as the legislative

¹²⁵ Robert Meister, *After Evil: A Politics of Human Rights* (New York: Columbia University Press, 2011), p.293.

¹²⁶ Ibid.

¹²⁷ Ibid., p.296.

foundation of this new era of prohibition. However, despite the claims towards universalism, both the UN as an institution and the Single Convention as a treaty contained within their totality an inclusion of the colonial/racial subaltern subject in a condition of primary exclusion. As detailed in my previous chapters, universal drug prohibition emerged into international law through the endeavours of American prohibition missionaries. The signing of the Single Convention, and the accompanying political defeat of Harry Anslinger, marked the conclusion of international laws on drugs being formed through this mode of advocacy. However, the language employed in the preamble of this treaty shows how deeply embedded normative assumptions about the ‘evil’ of drugs and their threat to a universal ‘mankind’ had become.¹²⁸ Christopher Hobson tells us how ‘at the very outset of the conference [for the Single Convention] drugs were defined in reference to evil, and throughout delegates would regularly frame the issue in these terms’.¹²⁹ The equating of drugs as a conduit for a denigrated form of humanity, thereby a correlative evil within the schema of ‘the secular theology’ that is international law, had become so deep-seated as to have entered into the very language of the legal text that announced prohibition, without challenge. The repeated drafts of the treaty, produced over a thirteen-year period, all maintained the description of drug addiction as ‘evil’. Taken in conjunction with the supply-side focus that had also been embedded into universal drug prohibition, the Single Convention can be read to have crystallised in its universalism the structure of sacrifice that would be fully realised through the War on Drugs during the subsequent decades. Anthropologists have detailed how drug use and experimentation has enjoyed cultural and ritualistic significance within human cultures since time immemorial, however with the preamble of the Single Convention, a conceptualisation of drugs that was indebted to Euro-modernity – namely of drugs as a foreign affliction infecting the community of universal mankind to be purged through force of law being directed at the source – was now enshrined as a universal norm in international law. This reading points us towards a better understanding of why an asymmetry of violence would be visited on specific peoples through the drug war.

¹²⁸ Hobson, ‘Challenging “evil”’, p.534.

¹²⁹ *Ibid.*, p.532.

7.5.3 Adolf Lande and Theodicy in the Drafting of the Single Convention

The structure of theodicy that I have argued for drug law above can be read within the output of another influential figure of post-war drug prohibition: Adolf Lande. As a former Secretary of the Permanent Central Narcotics Board and Drug Supervisory Body, Lande took on the significant role of being the primary drafter of the Single Convention.¹³⁰ Unlike Anslinger and other American prohibitionists, Lande was an international lawyer by trade, having cultivated his expertise in this discipline by working in the American government during the Second World War.¹³¹ However, despite his career path making him a bureaucrat within the international secretariat and therefore being formerly separate from Anslinger and his ‘inner circle’, Lande remained ‘a close supporter and associate of Anslinger’.¹³² Lande provides an example of how the norms of American drug prohibition would continue to inform the objective universalism of the UN drug laws despite the break between Anslinger and the international community. Lande would subsequently go on to serve as the first secretary of the International Narcotics Control Board (INCB), the institution established to enforce the UN drug treaties.¹³³ Through his writings on international law and his work as an international drug prohibitionist, Lande provides an exemplar par excellence of the synthesis between a particular vision of international legal order and an impetus towards a moral universalism that was contained in the post-war international laws on drug prohibition.

Lande’s theoretical engagement with international law’s potential to reconcile the legal principle of the equality of states with the hegemony that had been exercised by the Great Powers over history. Referencing the works of American international law forefathers Elihu Root and James Brown Scott, Lande was able to read together the rise of a vision of an equality of states alongside the realisation of a particular tradition of American liberalism.¹³⁴ He understood sovereign equality as having acquired more purchase in the early twentieth century, as the strict hierarchical status of European empires began to dissipate and states began instead to coalesce around

¹³⁰ Bewley-Taylor, *The United States and International Drug Control*, p.79.

¹³¹ McAllister, *Drug Diplomacy*, p.225.

¹³² David R. Bewley-Taylor, *International Drug Control: Consensus Fractured* (Cambridge: Cambridge University Press, 2012), p.272.

¹³³ *Ibid.*

¹³⁴ Adolf Lande, ‘Revindication of the Principle of Legal Equality of States, 1871-1914’, *Political Science Quarterly*, 62, 2 (Jun 1947), pp. 258-286, p.261.

shared interests.¹³⁵ Lande recognised the progression that had been achieved by ‘the discontinuation [...] of the Great Powers to claim by their actions a position of legal superiority’.¹³⁶ In appreciation of the significance of facilitating a unity in international legal ordering, Lande’s writings offered a vision of a system of international law that could organise everyday human life along a shared set of moral norms.¹³⁷ Lande would be presented with an opportunity to realise this vision of international law through the central role he would play in the establishment of a legal structure for post-war drug prohibition.

Lande accepted the basic ideas that had been normalised in the first half of the twentieth century. For Lande, the inter-war drug control system had had ‘considerable success, and no need has been felt for changing its basic features’.¹³⁸ He emphasised that the failures of the system were not so much conceptual as they were structural, the multiplicity of treaties and administrative bodies that had been developed to govern drug prohibition ‘led to an unwieldiness in the law itself, including obscurities and inconsistencies’.¹³⁹ Lande recognised the laws of universal drug prohibition functioned with insufficient universality during the inter-war period. Despite his commitment to realising this universality, Lande would maintain an alliance with Anslinger and his more didactic methods for establishing drug prohibition. Anslinger had introduced Lande to the field of international drug prohibition and despite Lande’s office within the UN requiring impartiality, David Bewley-Taylor’s ‘examination of Lande’s correspondence with Anslinger reveals the extent of the supposedly civil servant’s pro-American stance on international drug control.’¹⁴⁰ Ultimately, Lande shared Anslinger’s vision of drug prohibition as being a universal project, but one that could only be entrusted to the leadership of Western (or more particularly American) prohibitionists.¹⁴¹ The racial and cultural prejudices that had informed American drug prohibition as a whole ensured that ‘Lande, much like Hamilton Wright and other international campaigners, including Anslinger, continued

¹³⁵ Simpson, *Great Powers and Outlaw States*, p.128.

¹³⁶ Lande, ‘Revindication of the Principle’, p.286.

¹³⁷ See Philip Jessup, Adolf Lande, Oliver J. Lissitzyn, and Joseph P. Chamberlain, *International Organization* (New York: Carnegie: Endowment for International Peace, Columbia University Press 1955).

¹³⁸ Adolf Lande, ‘The Single Convention On Narcotic Drugs, 1961’, *International Organization*, 16, 04 (September 1962), pp.776-797, p.778.

¹³⁹ *Ibid.*

¹⁴⁰ Bewley-Taylor, *The United States And International Drug Control*, pp.79-80.

¹⁴¹ *Ibid.*, p.81.

to associate drug use with non-western, particularly non-American peoples'.¹⁴² With his tenure at the UN coinciding with an expansion of nations who were exerting their presence both in the organisation at-large and its drug control institutions in particular, Lande expressed to Anslinger his fears that 'UN drug control apparatus was being staffed increasingly by non-westerners. He felt this lowered the standards maintained by the Western personnel, who, he believed, appreciated the importance of strict international control'.¹⁴³

Lande's personal importance to the Single Convention is evidenced by his role as not only the primary drafter of the treaty but that he was also the writer of the commentary for Single Convention, which would also aid the interpretation of the treaty provisions. Lande concluded his work on the Single Convention confident that through its implementation 'opium eating, smoking, coca leaf chewing, and hashish consumption will thus finally be outlawed throughout the world'.¹⁴⁴ A tracing of Lande's progression into becoming the international jurist responsible for the actual writing of the laws of prohibition offers a telling instance of the elevation of the norms of American drug prohibition into hegemonic status within international law. The understanding of drug use, outside of a narrowly defined register of scientific and medical use, as being an 'evil' which international law had to purify from within humanity was now no longer a fringe position advocate by small group of moralists and missionaries but fixed as universal by the authority of international law, by objective and impartial administrators. The bureaucrats could be understood as the new missionaries.

7.6 Conclusion

This chapter reviewed how drug prohibition was salvaged during the crisis of war by American endeavour, ensuring that in the post-war legal order it finally becoming a norm for international law. The United Nations provided the institutional setting for new drug laws that were more ambitious than any previously attempted, particularly the totalising Single Convention. However, despite the ostensible egalitarianism of the UN, it remains important to recognise

¹⁴² Ibid.

¹⁴³ Ibid, p.80.

¹⁴⁴ Lande, 'The Single Convention On Narcotic Drugs, 1961', p.795.

the extent to which the organisation was both discursively and structurally informed by a persisting ‘dynamic of difference’, especially when seeking to unpack the orientation that the drug laws it produced would take. The particular imagination of what constituted a universal ‘mankind’ would bear significant importance within the drug laws that conceptualised the object of prohibition as an existential ‘evil’ threat to humanity. Recalling the mythical component of law that allows it to attain its operative function discussed in earlier chapters of this thesis, the preamble of the Single Convention illuminates the way the myth of drugs as ‘evil’ – conceptualised in racialised and religious discourse of early prohibition – sustained the determinations of this ostensibly technocratic legal treaty. The international legal order, seizing the reins from Harry Anslinger and his mode of dogmatic American prohibition, managed to cohere the plethora of cultural attitudes and economic interests surrounding drug use across the globe into single statement that could ground a new era of drug law. In doing so, international law confirmed the closure, but also the ascendancy, of the tradition of moralistic drug warriors that had made drug prohibition a norm within the international community. American prohibitionists read the post-war drug laws as ensuring that finally ‘the possibility of stopping the wholesale illicit traffic in narcotic drugs is a reality’.¹⁴⁵ However, the next chapter will analyse the failure of the ambition to end the illegitimate traffic of drugs to manifest, as well as examining the actual impact of Single Convention and other post-war drug treaties.

¹⁴⁵ Norman Ansley, ‘International Efforts to Control Narcotics’, *Journal of Criminal Law and Criminology*, 50, 2 (1959), pp.105-113, p.111.

Chapter 8

The Absolute War on Drugs

8.1 Introduction

The preceding chapter focused on how international drug prohibition, following aborted attempts in the first half of the twentieth century, was realised as an accepted norm of international law with the signing of the *UN Single Convention on Narcotic Drugs, 1961*, the United Nations' major drug prohibition treaty that sought to capture the aims of all the previous drug prohibition treaties signed over the past half-a-century. Following the violence of the Second World War, a reconstituted international legal order – with the United Nations and its promise to save ‘succeeding generations from the scourge of war’ at the centre – accepted universal drug prohibition as a key tenet of post-war international law.¹ Consequently, the Single Convention was informed by the humanitarian impulse acclaimed by post-war international law, expressed in the language of peace and salvation. The treaty's promise to protect ‘the health and welfare of mankind’ from the ‘evil’ of drugs -as it was described in the preamble to the Single Convention - married with the wider recovery of an operative communality in international law following the escalation of violence during the Second World War.²

At that historical moment, the shadows of Auschwitz and Hiroshima both offered a glimpse of the end of days, thereby inspiring a renewed commitment to producing a coherent universal notion of humanity to congeal the legal order. The U.S.A, after half a century of ambitious internationalism, now began to fully embrace its own hegemonic role within the international community. Earlier, I traced the parallel histories of the international laws prohibiting drugs, and the shift of the international legal order from the formal division between the sovereign civilised world and non-sovereign colonies to the expansive moral universalism of the twentieth century. This chapter will conclude the primary narrative thread of my thesis by reviewing how these two histories converged in

¹ Preamble to *The Charter of the United Nations* (San Francisco: 1945)

<<http://www.un.org/en/sections/un-charter/preamble/index.html>> [accessed 3 August 2017].

² *The United Nations Single Convention on Narcotic Drugs, 1961, Preamble.*

realisation of a full-scale, global War on Drugs at the end of the twentieth century, as well as the extent to which the asymmetrical violence of drug war could be considered as what I have termed, following Girard and others, sacrificial. The term ‘sacrificial’ stresses an imperial structuring of international law that forgoes the formal division of the world produced through European colonialism for a totalising conception of a universal humanity, but one within which political and economic relations of empire maintain operative functionality. As described in the previous chapters, a key contribution of this thesis has been to argue for reading this dynamic within both international law on drugs, as an instantiation, and international law more widely. The idea of a sacrificial underpinning to the universalism of liberal international law advances understandings of both drug policy studies and critical international law, opening up potential further avenues of research that ties together scholarship on post-colonial/ decolonial international law with the drug war as an obvious but under-theorised example. Twentieth-century American internationalism, and subsequently, post-war international law, invoked a commitment to the ending of war and facilitating global trade through an investment in universalism, holding itself in contradistinction to the colonial order’s expulsion of swathes of humanity from legal recognition. However, reading the War on Drugs within the context of these wider transformations of international law betrays that, despite the impetus to contain global violence driving the formation of the UN and the post-war legal framework, war would not disappear but rather shift in mode, from crises between rival sovereign states to collective assault upon a ‘threat’ to the universal order.

The focus of this chapter will be on the insight that the War on Drugs can bring to wider theories of violence within the international arena following the peace acclaimed by post-war international law. I will be draw on literature concerned with the emergence of what has been called ‘new war’, the turn of away from interstate conflict.³ The chapter begins with a necessary engagement with the international laws that entered into force in the 1970’s and 1980’s in

³ For critical engagement with the concept of the late twentieth century ‘new war’ see Mark Duffield, *Global Governance and The New Wars: The Merging of Development and Security* (London: Zed Books, 2001); Mary Kaldor, *New and Old Wars: Organised Violence in a Global Era*, 3rd edn (Cambridge: Polity Press 2012); Chris Hables Gray, *Post-modern War: The New Politics of Conflict* (London: Routledge, 1997).

order to strengthen the provisions of the Single Convention. Following an engagement with the provisions of the final drug treaties, I assert a reading of the drug war that acts as a complement and a corrective to the wealth of critical legal scholarship which has, overlooking the historical and theoretical significance of the drug war, identified the subsequent ‘War on Terror’ as the prime contemporary example of the way violence is managed within the acclaimed humanitarianism of post-war international law. This shift in focus is a further original contribution of this thesis, presenting the drug war as not only a precursory but also prophetic instantiation of war after the ‘end’ of war.

Shifting the telling instance of ‘new war’ in the contemporary legal order from the War on Terror to the War on Drugs brings into clear focus the continuum that exists from the current crisis of American hegemony to the very birth American internationalism. As discussed in *Part B* of this thesis, drug prohibition emerged onto the international stage concurrently with a (re)turn to a liberal, humanitarian jurisprudence in international law. However, critical scholarship has ignored it in favour of the War on Terror as a site of analysis.⁴ In one of his final intellectual contributions, *Battling to the End*, René Girard would lend support to this focus on the War on Terror, reading it as representing the final failure of law’s capacity to restrain violence across the globe through sacrifice.⁵ While marked by asymmetrical violence, for Girard, the War on Terror shows global order as unhinged from any mechanism of pacification, with the futility of scapegoating exposed in the ever-increasing state of crisis. In the context of the War on Terror, ‘ancient archaic fears resurface today with new faces, but no sacrifice will save us from them.’⁶ However, this reading of the War on Terror, I argue, while insightful, lacks a substantial appreciation of the extent to which the War on Drugs previewed and cleared a juridical pathway for the later conflict as well as the political distinctions in the presumptions of mimetic violence that weaken Girard’s reading of the War on Terror. The significance of the engagement with the War on Drugs across this thesis comes from its historical trajectory which, through a legislative chronology that

⁴ John Strawson, ‘Introduction: In The Name of the Law’, in *Law after Ground Zero*, ed. by John Strawson (London: Routledge, 2002) p.xix.

⁵ René Girard, *Battling to the End: Conversations with Benoît Chantre* (East Lansing: Michigan State University Press, 2010).

⁶ *Ibid.*, p.24.

commences with *1909 Shanghai Opium Commission*, offers a wider perspective of international law's referral to a sacrificial mechanism than that offered by Girard and other theorists' focus on the 'new' War on Terror. Furthermore, Girard's disregard of the drug war, is not incidental but is borne of his failure to recognise the impact that decolonisation and the entrance of the formerly excluded into the world order impacted the way in which violence would be legitimised in the subsequent epoch. Girard's reading of the War on Terror underplays how the protagonist of these new wars - the excluded subaltern, the formerly colonised, the racial others in the West - marry with the position of the included/excluded 'sacrificial victim' that his own grand theory uncovered. My illustration of how the drug war was born co-currently with shift of international law from the civilised/colonised separation to the liberal, post-colonial order of formal sovereign equality can serve as a corrective to this gap in Girard's reading of contemporary international violence.

Therefore, I argue that by commencing with the post-9/11 re-emergence of the 'scourge of war', scholars overlook the way in which much of the sacrificial dynamic being read in the War on Terror was previewed in the preceding War on Drugs. Moreover, a focus on the asymmetrical violence of the drug war turns attention to the regions and identities that have suffered the disproportionate cost of drug prohibition enforcement. Despite the international laws on drugs being written in language of neutral legal platitudes, the structure that the War on Drugs actually took once enacted allowed for its consequences to be amplified in Latin America, as shown by the successive frontlines of Colombia and Mexico, and for the racially subaltern, particularly Black, populations of U.S.A and Europe.

This chapter will complete that historical narrative by offering a reading of the emergence of the War on Drugs from the 1970's onwards, the culmination of a century of ambitious international legislative innovations, as a telling instance of twentieth century liberal international law's attempt to cohere a 'universal' community through referral to a 'sacrificial' international. First, I will review the international laws signed in the final decades of the century that strengthened legal foundations for drug war, before exploring how the entwinement of the humanitarian rationale behind the drug war with the de-territorialised form that the conflict would take gave rise to a novel form of

managed war. By placing a specific focus on the material impact of the drug war, particular within key battlegrounds such as Cali, Colombia and Juarez, Mexico which will each be engaged with in-depth, this chapter will seek to return to the problem presented in the introduction to this thesis by concentrating on the human casualties of drug prohibition and exploring how they can be theoretically reconciled with the defence of universal humanity espoused within the law itself.

8.2 Reinforcing the Legal Framework and Declaring War

Before unpacking the violence of the drug war, it is important to review the actual laws through which the enforcement of drug prohibition would be executed.⁷ The last decades of the twentieth century would see an expansion and reinforcement of the international laws prohibiting drugs. While the Single Convention aimed to be the final word on the issue of drugs, the impossibility of such a task is betrayed by the subsequent treaties and amendments enshrined in law during the 1970's and 1980's. Furthermore, these new international drugs treaties are best read as the legislative foundation for the War on Drugs, for the enforcement these laws facilitated an escalation of violence that ensured that drug prohibition was not only described as, but also in large parts of the world materially experienced as, a war. Therefore, following a brief review of the most recent international drug treaties, taking seriously the task of reading the drug war as a material, rather than just metaphorical war will be the focus of the remainder of this chapter. The importance of such a reading lies in the insight it offers about the relation between war, law and international order. In understanding the drug war as being informed by the impulse to fix an international order through producing the idealised universal human subject and containing the monstrous contagion that threatens a violent upending of order, a theoretical account for international law's disregard for the victims of the drug war can be made. Furthermore, some guidance can be offered as to how the

⁷ As with the work on the Single Convention in the previous chapter, my engagement with the international drug treaties will be to summarise the key elements of the treaty as a whole. An in-depth review of each provision is not the focus of this thesis. For such an engagement, please see S. K. Chatterjee, *Legal Aspects of International Drug Control*, (The Hague: Martinus Nijhoff, 1981); or Neil Boister, *The Suppression of Illicit Drugs through International Law* (doctoral thesis, University of Nottingham, 1998).

nexus of international law and empire continue to operate in liberal, post-colonial world, allowing for the re-reading of other contemporary global conflicts, particularly the War on Terror.

8.2.1 The UN Convention on Psychotropic Substances of 1971

Following the epochal Single Convention, the next major development in the chronology of international laws on drugs was the *UN Convention on Psychotropic Substances of 1971* (referred to hereafter as the Psychotropic Convention). The Psychotropic Convention was drafted to address the way in which the Single Convention, with its focus on organic plant-based drugs, principally the big three (Opium, Cannabis and Cocaine) and their derivatives, failed to anticipate the next set of ‘transgressive substances’ to attain popularity in the post-war era. Particularly in the U.S.A and Western Europe, the years following the ratification of the Single Convention would ironically see an increase in the use of substances not addressed by that treaty, as a new youth culture began to valorise new drugs such as amphetamines, and hallucinogens like mescaline and lysergic acid diethylamide (LSD), through their music, art and activism.⁸ The 1960’s saw drugs becoming a cultural dividing line for much of the political upheaval occurring across the West in that era.⁹ International law would respond to this shift in counter-cultural drug use in July 1971 in Vienna, as the international community signed a new treaty to expand the list of drugs that would be prohibited by international law.

The Psychotropic Convention was written to operate in a manner that mirrored the structure of the Single Convention. Like its predecessor, it also divided the prohibited drugs into four schedules, ranked according to a perception of harm. The Convention does not limit the cultivation of plants from which psychotropic substances are made; it does, however, place limitations on the manufacture, export and import of the prohibited psychotropic substances through systems of recording and supervision of trade, inspections, licensing and penal provisions.¹⁰ Furthermore, Article 5 continues the norm of limiting the trade and use of these substances to

⁸ Neil Boister, *The Suppression of Illicit Drugs through International Law*, p. 55.

⁹ William McAllister, *Drug Diplomacy in the Twentieth Century* (London: Routledge, 2000), p.219.

¹⁰ Article 3 (3), *The UN Convention on Psychotropic Substances of 1971*.

‘medical and scientific purposes.’¹¹ The treaty further reinforced the authority of the International Narcotics Control Board (INCB), which was established by the Single Convention, ensuring the parties would have to furnish the INCB with reports of their compliance with the treaty’s provisions. Further empowering the INCB was also the inclusion of greater enforcement powers that it could use to hold to account parties not fulfilling their treaty obligations.¹² The INCB reproduces in the Psychotropic Convention the disciplinary position it occupies within the Single Convention. However, the location in which the psychotropic substances were produced limited the weight of prohibition; unlike the organic plant based drugs, grown largely in the former colonial world, that were the target of the Single Convention, this Treaty concerned the interests of Western pharmaceutical companies and scientific communities. The geographical shift was not inconsequential in the outcome of the final Treaty. The provisions were coloured by the way ‘Western industrial powers, [...] argued for the type of loopholes they had opposed in 1961.’¹³ Adolf Lande, whose work in theorising international law and drafting the Single Convention is reviewed in the previous chapter, was instructed to produce the drafts of the Psychotropic Convention despite the fact that ‘Lande had always demonstrated an affinity toward the interests of the principal western powers.’¹⁴ William McAllister’s historical review of the drug treaties illustrates how Lande commenced from the assumption that the same level of control exerted through the Single Convention could not be imposed on Western pharmaceutical industries producing psychotropic drugs. In the treaty conference itself, the United States, so often the driver of stricter control in international drug law, adopted a more reasonable tone under ‘the influence of pharmaceutical firms, the research community, government health bureaucrats, and physicians’ leading to the American delegation pursuing a treaty ‘that struck a balance between legal, administrative, economic, social, and scientific interests.’¹⁵ Moreover, the Psychotropic Convention would recognise the need to provide some counter to the demand for the substances, therefore easing the overall reliance on

¹¹ Article 5, *The UN Convention on Psychotropic Substances of 1971*.

¹² Article 16, Article 16-19. *The UN Convention on Psychotropic Substances of 1971*.

¹³ William McAllister, p.231.

¹⁴ *Ibid.*, p.229.

¹⁵ *Ibid.*, p.231.

supply control.¹⁶ Overall, the Psychotropic Convention included a set of amphetamines, barbiturates and psychedelics into the same sphere of prohibition as the plant-based ‘big three’ of opium, coca and cannabis-based drugs but with a lighter degree of enforcement to be placed upon the producers of these drugs.

Despite the shifts in the degree of prohibition in the Psychotropic Convention, the overall orientation of the Treaty does not disturb the general trend of drug prohibition in international law since the turn of the century. Article 22 of the treaty emphasises how an undertone of punitive prohibition continues to ground this Treaty, mandating that ‘each Party shall treat as a punishable offence, when committed intentionally, any action contrary to a law or regulation adopted in pursuance of its obligations under this Convention, and shall ensure that serious offences shall be liable to adequate punishment, particularly by imprisonment or other penalty of deprivation of liberty.’¹⁷ This ‘penal provision’ remains subject to the domestic law of the Treaty signatories and therefore allows a certain nuance when read in conjunction with the provisions for demand reduction (treatment/education/rehabilitation) that can act as an alternative to imprisonment. Nevertheless, it shows how the underlying link between drug use and criminality was reinforced and expanded upon by the Psychotropic Convention. With this treaty, another major stone was laid in what would be the legislative framework for the War on Drugs.

8.2.2 The Declaration of War

In addition to the signing of the Psychotropic Convention, 1971 also saw the official declaration for the start of the ‘the War on Drugs’ announced in a speech made by President Richard Nixon to the United States Congress on Drug Abuse Prevention and Control on June 17th.¹⁸ By announcing an intensification of drug prohibition, Nixon was responding to not only the growing fashion in drug experimentation through the counter-culture of the 1960’s, but also to the political movements of that era that threatened the prevailing social order. In an era of rising

¹⁶ Article 20 (1), *The UN Convention on Psychotropic Substances of 1971* recognises the need ‘for the early identification, treatment, education, after-care, rehabilitation and social reintegration’ to limit the use of these substances.

¹⁷ Article 22, *The UN Convention on Psychotropic Substances of 1971*.

¹⁸ Richard Nixon, ‘Special Message to the Congress on Drug Abuse Prevention and Control’, June 17, 1971. *The American Presidency Project*, ed. by Gerhard Peters and John T. Woolley. <<http://www.presidency.ucsb.edu/ws/?pid=3048>> [accessed 7 October 2015].

black power, civil rights and anti-war movements, Nixon had been elected under the promise of reinstating ‘law and order.’ Following in the tradition of American prohibitionism, Nixon identified the use and trade of drugs as an existential threat to the functioning of this law and order. Echoing the conception of drugs acting as a ‘contagion’ that, as I have shown across earlier chapters, was established through legislation and discourse since the turn of the century, Nixon decried drugs as ‘a problem which afflicts both the body and the soul of America’ and declared that to combat this affliction, his administration would initiate a host of new laws and policies.¹⁹

It is important to state that not all of Nixon’s anti-drug initiatives were aimed at repressing supply. While many laws did increase law enforcement powers domestically, Nixon also established a Special Action Office to coordinate research, treatment, and educational efforts across the country in a bid to curb demand for drugs.²⁰ However, with regard to the international arena, Nixon’s administration continued the general trend towards advancing prohibition through increasing the force of international law against the producers and suppliers of this ‘contagion’. In the June 17th speech given to the Congress of the United States, Nixon declared that in order to ‘wage an effective war against heroin addiction, we must have international cooperation. In order to secure such cooperation, I am initiating a worldwide escalation in our existing programs for the control of narcotics traffic.’²¹ Acknowledging the use of America’s economic power to further its vision of international law, Nixon mentioned in his speech how ‘the United States has already pledged \$2 million to a Special Fund created on April 1 of this year by the Secretary General of the United Nations and aimed at planning and executing a concerted UN effort against the world drug problem.’²² However, an escalation of drug prohibition would require not only further resources but also further laws, and as a result, the Nixon administration campaigned to reinforce the legislative framework of international drug prohibition, starting by revisiting the Single Convention. As reviewed in the previous chapter, the shift in the centre of gravity of drug prohibition from the U.S.A. to an international bureaucracy resulted in a Single Convention that

¹⁹ Ibid.

²⁰ William McAllister, *Drug Diplomacy in the Twentieth Century* (London: Routledge 2000), p.233-235.

²¹ Richard Nixon, ‘Special Message to the Congress on Drug Abuse Prevention and Control’.

²² Ibid.

was not as strict as that envisaged by Harry Anslinger and the American drug warriors. However, with the declaration of a War on Drugs, American prohibitionists began working towards strengthening the Single Convention.²³ Prohibitionists ‘aggressively solicited the support of other governments throughout 1971’ and under pressure from Washington, the UN decided to host a conference in Geneva in March 1972 to amend the Single Convention.²⁴

8.2.3 The Protocol Amending The 1961 Single Convention, 1972

The Conference in Geneva in 1972 resulted in the signing of The *Protocol Amending The 1961 Single Convention* (herein referred to as the 1972 Protocol). The 1972 Protocol had the effect of expanding the membership and the powers of the INCB, strengthening the laws targeted specifically at the cultivation of drugs, increasing the mechanisms for co-operation amongst international parties, as well as recognising the efficacy of demand-side policies such as education and rehabilitation. Crucially, the 1972 Protocol also focused on increasing the power of extradition to be used as a weapon in the drug war. The power to extradite drug traffickers from the developing world to jurisdictions such as the U.S.A, which acclaimed a superior system of law, became a power tool for universalising the scope of prohibition enforcement. The power of extradition within the treaties further betrays the fallacy that all nations were equal in the project of enforcing drug prohibition, the power to wield the force of law against the producers and suppliers of drugs continued to emanate from the hegemonic western nations, particularly the U.S.A. Extradition Article 14 of the 1972 Protocol replaced the weak extradition clause provided in Article 36(2)(b) of the Single Convention with a more robust clause that required any extradition agreement concluded between two countries to include drug-related offences automatically. Neil Boister clarifies that the ‘aim of the American sponsors of the amendment was to make drug offences automatically extraditable and thus to facilitate extradition between states whose bilateral extradition treaties did not mention drug offences or between states that did not have such treaties at all.’²⁵ The presumption of extradition in drug cases is that the law will, in practice, facilitate only the extradition of traffickers from the Global South being transported to face justice in

²³ William McAllister, p.235.

²⁴ Ibid.

²⁵ Neil Boister, *The Suppression Of Illicit Drugs Through International Law*, p.201.

the Global North, with little thought given to the possibility of this dynamic working in reverse. The extradition provisions would become increasingly potent weapons, particular for the U.S.A against Latin American drug traffickers as the drug war progressed over the following decades.

Overall, the 1972 Protocol continued the trend of the general escalation of international drug prohibition towards fixing as a global legal norm the notion of drug use/drug trafficking as an existential threat to humanity. Extradition would become an increasingly useful tool in establishing the *narcotrafficante* as not just a criminal within a particular state but as an enemy against a ‘universal mankind.’ In Boister’s reading, ‘the 1961, 1971 and 1972 instruments can be seen as a slow and uneven progression towards an extension of jurisdiction and a facilitation of extradition.’²⁶ This progression of increasing legislative power in the area of strict enforcement of drug prohibition would reach fruition with the next major development regarding international laws on drugs.

8.2.4 The United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 1988

Despite (or perhaps as a result of) the plethora of drug prohibition laws enacted over the previous decades, the international drugs trade reached unprecedented heights in 1980’s. As a result in 1984, the UN General Assembly directed the Economic and Social Council to instruct the Commission on Narcotic Drugs to begin to draft another convention, this time dealing directly with the issue of trafficking.²⁷ Eventually, from the 25th of November to the 20th of December 1988, a plenary conference convened in Vienna.²⁸ Delegates from 106 states attended the plenary conference, concluding by agreeing the *United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 1988* (hereafter referred to as the 1988 Convention). International law had previously tried to address specifically the trafficking aspect of the drugs trade with the *1936 Convention for the Suppression of the Illicit Traffic in Dangerous Drugs*. However with this treaty being the last of the League of Nations treaties, its efficacy was subsumed by the conflict of

²⁶ Ibid., p.209.

²⁷ Ibid., p.62.

²⁸ Ibid., p.64.

the coming Second World War.

As with the Single Convention, the 1988 Convention sets out its stall in its preamble, declaring that 'illicit traffic is an international criminal activity.'²⁹ The treaty targeted the wider social and economic elements that facilitate narcotics trafficking, providing new provisions and expanding existing powers for extradition. Article 2 restates that central objective, declaring that the 'purpose of this Convention is to promote co-operation among the Parties so that they may address more effectively the various aspects of illicit traffic in narcotic drugs and psychotropic substances having an international dimension.'³⁰ Furthermore, following the trend of the 1972 Protocol, the 1988 Convention strengthened the extradition provisions in the international drug prohibition legal framework making acts such as money laundering, or the manufacture, transport, and distribution of equipment and precursory substances extraditable offences.³¹ Extradition to the United States became a primary weapon of the drug war over the coming decades. The 1988 Convention further concretised the drugs trade as being not just prohibited but also criminalised in law. While the Single Convention obligated Parties to make the cultivation of drugs 'punishable offences', the 1988 Convention goes a step further and compels Parties to make it a 'criminal offence.'³² The 1988 Convention came into force on the 11th of November 1990, with the new, stringent legislative instrument arriving just in time to mark the commencement of the UN's official 'Decade Against Drug Abuse'. At a plenary meeting on the 23rd of February 1990, the General Assembly adopted a resolution declaring 'the period from 1991 to 2000 the United Nations Decade Against Drug Abuse.'³³ A global programme of action was agreed to ensure further

²⁹ Preamble, *The United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances 1988*. UNODC. <https://www.unodc.org/pdf/convention_1988_en.pdf> [11 August 2017].

³⁰ Article 2, *The United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances 1988*

³¹ Article 12, *The United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances 1988*

³² Article 3, 1, (a) (iv), *The United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances 1988*: 'the manufacture, transport or distribution of equipment used in the manufacture of illicit drugs, as well as the manufacture, transport or distribution of precursor chemicals, knowing that they are used for the illicit manufacture of drugs, have to be made criminal offences'.

³³ Paragraph 29, *Political Declaration and Global Programme of Action* adopted by General Assembly at its seventeenth special session, 'devoted to the question of international co-operation against illicit production, supply, demand, trafficking and distribution of narcotic drugs and psychotropic substances.'

co-operation on a multilateral level to support the drug prohibition mechanisms that had been created by the three major UN drug conventions.

The decision by the UN to label the 1990's as 'Decade Against Drug Abuse' was not mere hype; the decade would see a dramatic escalation in the War on Drugs. The spectre of rivalry that had haunted the international community since the post-war emergence of the Cold War dissipated with the fall of the Berlin Wall in 1989. The U.S.A. became more confident again in its universalist imaginings after the fall of the communist bloc, recovering the connection of American internationalism to a vision of the inevitable triumph of a moral universalism in a manner that echoed James Brown Scott, Elihu Root and the generation of American international lawyers who developed this tradition at the start of the century.³⁴ The delay between the Single Convention as the major post-war international treaty and the height of the drug war in the 1990's resonates with a similar historical arch with regard to Human Rights, as despite the legal framework being implemented in the immediate post-war era, it is only with the Carter government deescalating Cold War rivalry for a renewed vision of globalisation that Human Rights breakthrough as a project with real institutional weight.³⁵ Comparably, drug prohibition only crystallises into a full-scale War on Drugs as what George H.W. Bush described as a 'New World Order' began to appear into view.³⁶ As a result, greater totality in the international legal order allowed for an expansion of laws that operated on a global scale, with the rapid increase in international drug prohibition enforcement amongst the most explosive of instantiations of this trend. As in the first decade of the century, drug prohibition again became a key topic of discussion at the American Society of International Law meetings.³⁷ Representing the U.S Department of State, lawyer Robert Kimmitt exemplified the renewed confidence of American prohibitionists in the international drug war at the American Society of International Law in 1990, stating:

³⁴ See a similar argument made in Robert Vitalis, *White World Order, Black Power Politics: The Birth of American International Relations* (Ithaca, New York: Cornell University Press, 2015), p.165-168.

³⁵ Samuel Moyn, *The Last Utopia: Human Rights in History* (Cambridge: Harvard University Press, 2012).

³⁶ George H.W. Bush gave a speech entitled 'Toward a New World Order', September 11, 1990. (*The American Presidency Project*, ed. by Gerhard Peters and John T. Woolley) <<http://www.presidency.ucsb.edu/ws/?pid=19253>> [accessed 6 January 2017]. For further, see *From Cold War to New World Order: The Foreign Policy of George H.W. Bush*, ed. by Meenekshi Bose and Rosanna Perott (Westport: Praeger Publishing, 2002).

³⁷ Robert M. Kimmitt, 'International Law in the War on Narcotics', in *Proceedings of the Annual Meeting* (American Society of International Law), 84 (1990), pp. 302-307, p.304.

The longer-term prognosis for this effort, based on a number of developments in the past year, is relatively good. Global attention on international narcotics control as a key transnational issue has focused on international law as an effective vehicle for addressing this borderless issue. Policy makers are using the levers of international law more vigorously than ever to address this issue. Indeed, the prospect of enhanced international legal cooperation may find one of its brightest realisations in the world War on Drugs.³⁸

Crediting the U.S.A for leading the way and other governments for co-operating, Kimmitt proclaims the 1988 Convention and the renewed investment in the War on Drugs as the most significant evolution of international law following the conclusion of the Cold War.³⁹ The 1988 Convention is offered not just as the reinforcement of the international laws on drugs but as the manifestation of the universalisation of American legalism; for Kimmitt the stringent measures aimed at erasing drug trafficking in 'this convention represent the internationalisation of many U.S. legal standards to create a level international playing field.'⁴⁰ Legal force in the endeavour of prohibition operates not only through state enforcement against production and supply of drugs, but also through asset seizure, shipment interceptions, crop eradication and extradition procedures.⁴¹ American internationalism would further mobilise subtle pressure in order to ensure further compliance with the drug treaties, resulting in the countries of the Global South carrying the heaviest burden of prohibition. American soft power included tying the enforcement of drug prohibition to other international obligations, providing large amounts of funding to the CND and other UN organisations and developing an annual system of certification, which ensured countries complied with Washington's anti-drug policies on penalty of losing American financial assistance or trade relations.⁴² Through this expansive territorial scope, the universality of the War on Drugs was reinforced so as to provide no jurisdictional exterior to prohibition to which traffickers could escape. Kimmit captures the optimism of this moment in the closing sentence of his ASIL presentation, stating:

³⁸ Ibid., p.304.

³⁹ Ibid.

⁴⁰ Ibid., p.305.

⁴¹ Ibid.

⁴² William McAllister, p.235.

If we can meet the challenge of expanding and adapting international law to assist all nations in this transnational War on Drugs, future casebooks will conclude, in their final chapter, that the potential of international law was well realized and humanity well served.⁴³

Such belief in the War on Drugs as being able to universally eradicate the ‘evil’ of non-legitimate drug use reached its zenith in this epoch. The age of globalisation fully crystallised the understanding of drugs as a contagious embodiment of a negation of humanity that had been cultivated over the previous century of prohibition. With international law’s vision of universal humanity becoming more confident in light of the decline of Cold War rivalry, the temptation to construct a ‘new problem of evil’ as Mark Fisher describes it and to lock any failings of the system within a set of objects that could be then externalised, informed the increasing ambition of drug prohibition in this moment.⁴⁴ The confidence that informed the ‘Decade Against Drug Abuse’ is perhaps most clearly illustrated by the 1998 United Nations General Assembly Special Session on the World Drug Problem, which was held under the slogan: ‘*A Drug Free World – We Can Do It*’.⁴⁵ Yet the empirical failure of the drug war to achieve its stated objectives of ‘a drug free world’ is detailed by the ever-increasing numbers of drug use, trade, addiction and deaths that have accompanied the timespan of prohibition.⁴⁶ After analysing not only the specific laws that govern international drug prohibition but also the historical, political and intellectual contexts in which these laws emerged, I return to the problematic that provoked my argument, asking whether the empirical failure of the drug war, as evidenced by the piling of bodies on top of bodies in the impossible, indefinite attempt to enforce the provisions of the law, can further understandings of the relationship between global legal ordering and legalised violence in the contemporary moment? What does international law’s fidelity to a war that persistently fails to meet its own stated objectives tell us about the workings of war after war and how law seeks to manage global violence?

⁴³ Ibid., p.307.

⁴⁴ Mark Fisher, “The New Problem of Evil” in *Aesthetic Justice: Intersecting Artistic and Moral Perspectives* ed. by Pascal Gielen and Niels Van Tomme (Amsterdam: Valiz 2015)pp.45-55, p.50

⁴⁵ See the 1998 United Nations General Assembly: Special Session on the World Drug Problem, 8-10 June 1998. <<http://www.un.org/ga/20special/>> [accessed 8 October 2016].

⁴⁶ See Introductory chapter

8.3 Why War?

‘We intend to do what is necessary to end the drug menace
...to eliminate... this dark, evil enemy within.’
President Ronald Reagan⁴⁷

Over and above offering a comprehensive review of the international laws on drugs since the 1909 Shanghai Opium Convention, this thesis synthesises post/decolonial theory and political-theological readings of law by arguing for understanding the War on Drugs as an instantiation of a sacrificial international law. As previously mentioned, Richard Nixon first employed the idea of a ‘War on Drugs’ in 1971 and as a phrase to describe the international prohibition of drugs, it was further popularised during the presidencies of Ronald Reagan, George H.W. Bush and Bill Clinton in the 1980’s and 1990’s. Each president advocated a militarisation of drug prohibition at a discursive as well as material level. In a 1982 radio address to the nation, Reagan declared that ‘few things in my life have frightened me as much as the drug epidemic’ before defiantly declaring ‘we’ve taken down the surrender flag and run up the battle flag [...] we’re going to win the War on Drugs.’⁴⁸ In a famous 1989 speech, Reagan’s successor, George H.W Bush, held up a bag of ‘crack cocaine seized [...] by Drug Enforcement agents in a park just across the street from the White House’ advancing an idea that drugs being so close to the seat of American state power being an act of aggression by the transgressive substances themselves that had to be retaliated against. Bush duly responded in kind with escalated military rhetoric, concluding his speech by declaring ‘the War on Drugs will be hard-won, neighborhood by neighborhood, block by block, child by child.’⁴⁹ Following Bush, and illustrating the scale of the embrace of the drug war across the American political spectrum, a change in the government to Bill Clinton and the Democrats did not herald much change in the rhetoric or policies of the U.S. government in pursuit of drug prohibition. In a speech at the end of his presidency made alongside his Colombian counterpart Andres Pastrana, Clinton commended Colombia for having

⁴⁷ Ronald Reagan, ‘Remarks Announcing Federal Initiatives Against Drug Trafficking and Organized Crime’, October 14, 1982. *The American Presidency Project*, ed. by Gerhard Peters and John T. Woolley. <<http://www.presidency.ucsb.edu/ws/?pid=43127>> [accessed 11 August 2017].

⁴⁸ Ronald Reagan, ‘Radio Address to the Nation on Federal Drug Policy’, October 2, 1982, *The American Presidency Project*, ed. by Gerhard Peters and John T. Woolley. <<http://www.presidency.ucsb.edu/ws/?pid=43085>> [accessed 11 August 2017].

⁴⁹ George H.W Bush, ‘Address to the Nation on the National Drug Control Strategy’, September 5, 1989. *The American Presidency Project*, ed. by Gerhard Peters and John T. Woolley <<http://www.presidency.ucsb.edu/ws/?pid=17472>> [accessed 11 August 2017]

taken on the ‘cause of burden sharing in the war on illegal drugs across the globe’ and assured Pastrana that they would no longer have to carry so much of ‘the burden of the international drug war.’⁵⁰ The description of the international effort to prohibit drugs as being a ‘War on Drugs’ has been subsumed into popular discourse, inviting the questions about the attraction of the concept of war to describe an ostensibly humanitarian international legal project that this thesis has worked to unpack. Drug prohibition was characterised in its defining legislative instrument as saving ‘mankind’ from an existential ‘evil’; what form did war take when enacted not by nation against nation but being managed by a collective arrogation of humanity against a common, internal enemy? Moreover, with the drug war being produced through, rather than against the United Nations - an institution established to save ‘succeeding generations from the scourge of war’- how does it reconcile with the international law’s post-war commitment to cohering a universal peace?⁵¹ The following sections will seek to draw some insight from the drug war into the nature of ‘new war’ under contemporary international law.

8.3.1 On Law and New War

Like the description of drugs as ‘evil’ in the Single Convention, the use of the idea of ‘war’, is never merely a question of semantics. Particularly within the discourse of international law, to name something as a war shapes the form in which it is realised.⁵² In his major intervention on the relationship between war and law, David Kennedy argues that when ‘we call what we are doing “war,” we mean to stress its discontinuity from the normal routines of peacetime. Differences among us are now to be set aside.’⁵³ However, as Kennedy’s work further elaborates, while war continues to create unity through opposition to a common enemy, in the current historical moment, war does not so much mark a discontinuity from the everyday, but instead it becomes a force that is performed through our daily routines, including

⁵⁰ William J. Clinton, ‘The President’s News Conference with President Andres Pastrana of Colombia in Cartagena’, August 30, 2000. *The American Presidency Project*, ed. by Gerhard Peters and John T. Woolley <<http://www.presidency.ucsb.edu/ws/?pid=1419>> [accessed 11 August 2017].

⁵¹ Preamble, *The Charter of the United Nations*.

⁵² For more of the impact of the rhetorical use of war in international law, please see Tawia Ansaah, ‘War: Rhetoric & Norm-Creation in Response to Terror’, *Virginia Journal of International Law* 43 (2003) pp.797—860; or Frederic Megret, ‘War? Legal Semantics and the Move to Violence’, *European Journal of International Law* 13 (2002), pp.361—399.

⁵³ David Kennedy, *Of Law and War* (New Jersey: Princeton University Press 2006), p.2.

through the workings of the law. Rather than international law being a pacifying force, or at least an overarching mechanism detached from war and judging its legality, it has become a vehicle which war works itself through. In Kennedy's words, 'warfare has become a modern legal institution.'⁵⁴ War is spoken into being by the determinations of international law, through the construction of a particular enemy as being against a universal humanity, and thereby allowing 'killing, maiming, humiliating, wounding people...[to be]...legally privileged, authorised, permitted, and justified.'⁵⁵ To appreciate war as working its way through international law, rather than against international law, is essential for making sense of the changes that the nature of war has undergone following the end of the Second World War. Violence persists in the international order following law's commitment to banish the 'scourge of war' but violence becomes the protection of a 'universal' conception of humanity that only the transgression of can legitimise a purifying violence as a just response.

The exponential growth of the destructive capacities of military technology over the course of the two world wars made traditional war, as in symmetrical war between rival sovereign nation-states, an increasingly apocalyptic prospect.⁵⁶ The Cold War maintained a state of paralysis between the rival blocs due to the mutually destructive capabilities of both parties. The absence of direct, full-scale military conflict between the U.S.A and USSR added support to the argument that history had moved passed symmetrical warfare. Of course, the Cold War cannot be merely taken as a triumph of a new era of international peace. Globally, the Cold War resulted in a mountain of casualties, mostly in the theatre of what was termed the Third World; the unacknowledged third-term anchoring the two rival power blocs. The post-WWII decline in symmetrical warfare has not caused the end of all international conflict. Rather, scholars of international law and international relations began to talk of the emergence of the 'new wars.'⁵⁷

The fervour that informed the moral universalism of post-WWII international

⁵⁴ David Kennedy, p.5.

⁵⁵ Ibid., p.8.

⁵⁶ Mary Kaldor, 'In Defence of New Wars.' *Stability* 2.1 (2013), 4, pp. 1-16, p.14.

⁵⁷ See Nicholas Lamp, 'Conceptions of War and Paradigms of Compliance: The "New War" Challenge to International Humanitarian Law', *Journal of Conflict and Security Law* 16, 2 (2011) pp. 225-262; Mary Kaldor, *New and Old Wars: Organised Violence in a Global Era*, 3rd edn (Cambridge: Polity Press, 2012) or Mark Duffield, *Global Governance and The New Wars: The Merging Of Development And Security* (London: Zed Books, 2001).

law was indebted to an ostensible opposition to war and violence. The production of a universal peace was the *raison d'être* of the United Nations as it aimed to end 'the scourge of war.'⁵⁸ Not only through the establishment of the UN, but also through the development of the Nuremberg principles and the Universal Declaration of Human Rights, the post-war moment acclaimed a legislative framework that permanently contained the potential of mimetic conflict erupting inter-nationally. However, the grand humanitarian claims masked how the cohering of an international legal order, particularly through normative demands such as the demand for universal prohibition of drugs, continued to require the violence of law to be managed and wielded out. Therefore, while a decline in the mode of conflict that was the concern of this moment of international law came about, – symmetrical war between rival, major sovereign nation-states – the mutation towards what has been termed the 'new wars' has produced conflicts that escape previous theoretical models of war by being indeterminate, abstracted and with no defined point of conclusion. A body of literature has emerged tracing these changes in the nature of war; a common assertion among many theorists of 'new war' is that by the turn of the twenty-first century, understandings of globalised violence must extend beyond those offered by the common reading of Carl von Clausewitz, the major theorist of international war.

Nineteenth-century Prussian military theorist Carl von Clausewitz provided the canonical account of modern international conflict with his famed treatise, entitled *On War*.⁵⁹ Clausewitz's engagement with the nature of war following modern state formation produced the famous description of war as 'the continuation of policy [politics] by other means.'⁶⁰ This description spoke to a continuity that exists between political objectives and acts of war; war is an instrument of politics that is wielded to achieve specific aims.⁶¹ As Michael Hardt and Antonio Negri state, Clausewitz's recognition of war as a continuation of politics 'represented a moment of enlightenment insofar as it conceived war as a form of political action and/or sanction and thus implied an international legal framework of modern warfare.'⁶² However, the Clausewitzian definition as commonly employed is premised on an incompatibility of war with normal human interest, viewing the politics in which war functions as the

⁵⁸ Preamble to *The Charter of the United Nations*.

⁵⁹ Carl von Clausewitz, *On War*, ed. by Beatrice Heuser, trans. by Michael Howard and Peter Paret (Oxford: Oxford university Press, 2007)

⁶⁰ *Ibid*, p.28.

⁶¹ *Ibid.*, p.252.

⁶² Michael Hardt and Antonio Negri, *Multitude* (New York: Penguin, 2004), p.22.

continuation of the competing objectives of sovereign states, as opposed to the everyday ordering of human life. Moreover, the understanding of war as being instrumentalised to produce specific outcomes is complicated by the shift of the nature of war away from conflicts between nation-states to the ‘new wars’ which blur the distinction between a state of war and a state of peace. Hardt and Negri provide a telling account of the birth of new war, historicising its emergence to the United States and the Soviet Union signing the *Anti-Ballistic Missile Treaty* in 1972, after which ‘[w]ar became constrained. Rather than all-out, large-scale combat, the great superpowers began to engage in high-intensity police actions.’⁶³ War in this mode does not threaten the global social and legal order as it had in the first half of the twentieth century; it rather becomes a means for constructing and reproducing that order.⁶⁴

A further element of this paradoxical legitimate violence sustaining order is that the condition of the violence is perpetual; a key marker of new war is an indefinite character. Hardt and Negri elaborate by stating:

A war to create and maintain social order can have no end. It must involve the continuous, uninterrupted exercise of power and violence. In other words, one cannot win such a war, or, rather, it has to be won again every day. War has thus become virtually indistinguishable from police activity.⁶⁵

The historical synchronicity between Hardt and Negri’s birth date for ‘new war’, Richard Nixon’s signing of the *Anti-Ballistic Missile Treaty in 1972*, and the same president declaring a ‘War on Drugs’ less than a year earlier is immediately striking. In colloquial terms, ‘war’ is often used as a metaphor, however, the difference between the drug war and the using war metaphorically is that the violence of the drug war, while perhaps abstracted, is not figurative. Hardt and Negri recognise that it is ‘with the War on Drugs, [...] and more so with the twenty-first-century war on terrorism, the rhetoric of war begins to develop a more concrete character.’⁶⁶ The drug war, paving the way for the War on Terror, was more than the use of war as a metaphor but also employed the methods of armed combat, lethal force, incarceration,

⁶³ Ibid., p.30. For *Anti-Ballistic Missile Treaty* see <<https://www.state.gov/t/avc/trty/101888.htm>> [accessed 3 August 2017].

⁶⁴ Ibid.

⁶⁵ Ibid., p.15.

⁶⁶ Ibid.

violence, asset seizure and land dispossession that are common in traditional war. Drawing upon a synthesis of police and military power, the ‘new wars’ tend to penetrate beyond the realm presumed of traditional sovereign state conflict; in these conflicts ‘there is increasingly little difference between outside and inside, between foreign conflicts and homeland security’ and this is a dynamic that clearly marks the drug war.⁶⁷

The new wars are notably indeterminate, both spatially and temporally; they are not wars executed by one nation-state or one empire against another, but instead invoke for all humanity to be conscripted against a common enemy. Moreover, the abstraction that is common to ‘new wars’ informs the definition of this enemy. The discursive construction of the ‘new objects of War – drugs, terrorism’– function so that these enemies are not antagonisms in the classical mode of an enemy at war, not recognised rivals as most common of inter-state conflict; they are rather conceived as contagions within a universal order, ‘symptoms of a disordered reality that poses a threat to security.’⁶⁸ As explored in my previous discussions on the theodicy of modernity, the conception of the universal as a holistic singularity produces enemies of the universal as internal enemies, denigrated forms of the ideal that serve as ‘an experimentum crucis for the definition of legitimacy’ demonstrating not only what the force of international law opposes but what it saves us from within ourselves.⁶⁹ As Mark Fisher describes, the imagining of our enemies as internal contagions betray a persisting failure of ostensibly secularised discourses, such as law, to imagine alternative ways of constituting themselves outside appeal to the theological, ‘we know there are no grounds anymore for belief in evil, yet we find ourselves unable to give up acting *as if* we believe in it.’⁷⁰ The structure of ‘new war’ illustrates how, in service of a humanitarian impulse, the contagions that are the ‘evil’ enemy in this mode of war become what must be purified for the unified order of humanity to cohere itself.

However, despite being indebted to their work, a point of departure I hold between my reading of the drug war and the functioning of ‘new war’ as described by Hardt and Negri comes in their understanding the ‘new wars’ as signalling the decline

⁶⁷ Ibid.

⁶⁸ Ibid., p.23.

⁶⁹ Ibid., p.31.

⁷⁰ Fisher, “The New Problem of Evil”, p.50

of international law and ‘the rise in its stead of a global or imperial form of law.’⁷¹ Hardt and Negri, taking a narrow, Westphalian understanding of international law as the positive law governing the interactions of competing sovereign nations, seek to employ the concept of ‘global law’ as a distinct mode of reading the totalising scope of legal violence at the turn of the millennium.⁷² In contrast, my reading of the ‘origins’ of international law in Vitorian jurisprudence shifts focus to the totalising, cohering impulse already present within international law.

Hardt and Negri overlook the significance of the recovery of Vitoria within the American internationalism that they then go on to credit as bringing about the rise of ‘global’ law. Moreover, their reading of the ‘new wars’ located them as operating primarily on a biopolitical register, taking new war’s internalisation of conflict within the communal whole to betray a managerialism being enacted on the global body politic, which leads to a disciplinary mechanism producing the ideal post-modern subject. Absent from this mode of critique is a full appreciation of juridical-theological underpinnings of international law’s totalising impulse. The blurring of war and peace effected by ‘the new war’ allows for a violence, I would argue, better understood as sacrificial, in that it aims to produce order through legitimised violence. Placing international law’s ‘origin’ within Vitoria’s translation of the deific order of being onto a jurisprudence accounting for Amerindian-Spanish (mis)relations, allows for a re-reading of Hardt and Negri’s shifting of ‘international law’ into ‘global law’ as instead the (re)turn to the origins of international law. By this I mean a law focused on the ‘inter’ of the international, law as not merely a technology for control and management of globalisation but law as concerned with producing an immanent communality among sovereign states. A longer reading of history sees the shifts in twentieth-century internationalism as not merely the emergence of post-modern, biopolitical violence but as a (re)turn to a sacrificial violence that, I have argued, produced and sustained the arrogated universalism of Euro-modernity.

Reading Hardt and Negri’s conception of ‘new war’ in relation to Vitoria takes us back to Vitoria’s lectures on Spanish-Amerindian relations, and particularly his lectures on the law of war, written as a continuation of his thoughts on the

⁷¹ Michael Hardt and Antonio Negri, *Multitude*, p.29.

⁷² *Ibid.*, p.29-32.

jurisdictional position of the *De Indis*.⁷³ Here, Vitoria posits war as a method through which the universal can bring about the transformation in the subjective condition of the Amerindian. In this lecture, Vitoria anchored the jurisdictional basis for just war in the responsibility to intervene on behalf of the natives: legal violence legitimised by the impulse to save the natives from themselves. Subsequently, contemporary scholars have identified in Vitoria's lecture the origins of what would, centuries later, come to be called humanitarian intervention.⁷⁴ In the post-war international legal order, despite the *United Nations Charter* proclaiming against unprovoked attacks by one sovereign state upon another, humanitarian intervention, militarised action to prevent the abuse of human rights within a state, became an increasingly common basis for war. Returning to the Vitorian origin of humanitarian intervention, a sustaining element can be spied in the recognition of this form of corrective warfare being, in Vitoria own words, 'perpetual.'⁷⁵ Vitoria states that 'when the war is at that pass that the indiscriminate spoliation of all enemy-subjects alike and the seizure of all their goods are justifiable, then it is also justifiable to carry all enemy-subjects off into captivity, whether they be guilty or guiltless.'⁷⁶ We can see that within this schema, where the basis for the war is the transformation of the Amerindian into a universal subject, the war becomes absolute, unbound by the restrictions and limitations that apply in conflicts between recognised sovereign states. The aim of the conflict is not the defeat of another sovereign's military force, which would be achieved through obtaining a recognisable set of objectives, but it is instead to bring a population into communality with a universal mankind, a task that carries the potential for temporal and spatial indeterminacy. The structure of Vitoria's war of intervention is what I have described as sacrificial with its basis being in the marking out of a subject or group of subjects from the totalising universal norm, before it then 'justifies the waging of a limitless war' upon those subjects in order to constitute the oneness of the universal.⁷⁷

⁷³ See Francisco de Vitoria, *On the Law of War*, in *Francisco de Vitoria: Political Writings*, ed. by Jeremy Lawrance, trans. by Anthony Pagden Jeremy Lawrance (Cambridge: Cambridge University Press, 1992), pp.293-329

⁷⁴ Anthony Anghie, *Imperialism, Sovereignty and the Making of International Law*, Chapter 6, pp.273-309; or James Muldoon, 'Francisco de Vitoria and humanitarian intervention', *Journal of Military Ethics* 5, 2 (2006), pp.128-143.

⁷⁵ Francisco de Vitoria, *On the Law of War*, paragraph 42, in *Francisco de Vitoria: Political Writings*, p.318.

⁷⁶ Ibid.

⁷⁷ Anthony Anghie, *Imperialism, Sovereignty and the Making of International Law*, p.30.

8.3.2 Asymmetrical Warfare and the Contemporary Futility of Sacrifice

With a greater appreciation of the sacrificial impulse behind the ‘new war’ than that offered by Hardt and Negri, Rene Girard offers his own sustained engagement with challenge of late twentieth/early twenty-first century war and the shift away from the what has been taken to be the Clausewitzian model of international conflict. In one of his final works, a dialogue with collaborator Benoît Chantre entitled *Battling to the End*, Girard reads the mimetic crisis that always haunts the international society as having escaped the confines of the sacrificial mechanism, reading within Clausewitz’s canonical account of modern international warfare the recognition of this always present potential for absolute war to escape the limitations of legal ordering.⁷⁸ Girard emphasised that Clausewitz’s famed conception of war as instrumentalised for political gain only arrives after the Prussian General’s initial consideration that the real driver of international conflict may in fact be an undercurrent primordial rivalry that lusts after war for war’s sake. Clausewitz acknowledges a potential for mimetic violence to engulf any basis for order. However, after flirting with conceptualising war as an ‘absolute manifestation of violence’, Clausewitz ultimately concludes that, in practice, war is contained by the machinations of political ambitions, stating that ‘war springs from some political purpose, it is natural that the prime cause of its existence will remain the supreme consideration in conducting it.’⁷⁹ Ultimately for Clausewitz the calculations of the practical warfare would function as a restraint against the realisation of the theoretical absolute war. However, Girard reads within Clausewitz’s early speculation on absolute war a shared recognition of war as perhaps always already being not a political but ‘a total social phenomenon.’⁸⁰ For Girard, an ostensible focus on the military strategies and political objectives of ‘real wars’ in *On War* only masks the haunting presence of ‘absolute war’ operating underneath, the fear of violence released from its confines without a point of conclusion in sight. Moreover, Girard continues to argue that as the Second World War had functioned as the apotheosis of symmetrical warfare between sovereign nation states and empires, the new mode of conflict- what Hardt and Negri would independently call ‘new war’- removed the idea

⁷⁸ Rene Girard, *Battling to the End: Conversations with Benoît Chantre* (East Lansing: Michigan State University Press, 2009).

⁷⁹ Carl von Clausewitz, *On War*. p.28.

⁸⁰ Rene Girard, *Battling to the End*, p.11.

of total war from the category of abstraction and made it reality.

Understanding contemporary global conflict as evidence of his theory of mimetic violence, Girard tries to recover the underdeveloped concept of ‘absolute war,’ discarded after the early chapters of *On War*. This apocalyptic shadow, ever-haunting the presupposition of war as the extension of politics, bears relevance for the post-Second World War, globalised legal order. Absolute war exceeds political expediency, it is rather a full expression of the mimetic rivalry Girard shows as underscoring all conflict. Girard reads Clausewitz as having intuitions very similar to his own.⁸¹ Through a re-reading of the work of the Prussian General, Girard was able to translate his work from an anthropological setting to become a lens through which to view international crisis in the late twentieth century.⁸² The mimetic crisis that erupted in the twentieth century had lain in-potential since the Napoleonic expansionism that informed Clausewitz’s writings.⁸³ With the aftermath of the Second World War bring an end to the age of formal empires, the international community ostensibly lacked an organising logic. After this point Girard argues that ‘violence steals a march on politics’, as war becomes an endeavour in which ‘victory can no longer be relative, it can only be total.’⁸⁴ In this structure, enemies in war are no longer political rivals to be defeated but existential threats who must be wholly eradicated. Recalling Vitoria’s criteria for a just war being the transgression of the ‘universal’ norms of *jus gentium*, the ‘universalism’ of post-war liberal international law gives rise to the very spectre it seeks to contain: ‘total war’, only the war of annihilation is not enacted against all but upon just particular embodiments of universal negation.

Written in relation to the aftermath of 9/11, *Battling to the End* conceptualises the international order at the turn of the millennium as functioning as an accelerated ‘worldwide empire of violence.’⁸⁵ The globalisation of post-war legal order had given rise to the acceleration of undifferentiation, escalating the mimetic crisis. However, Girard places his focus on the War on Terror as an example of the contemporary failure of scapegoating to produce unanimity. Whereas in archaic social orders, the

⁸¹ Ibid., p.1.

⁸² Ibid., p.9.

⁸³ For more on Napoleon and the promise of Absolute War, see David A. Bell, *The First Total War: Napoleon’s Europe and the Birth of Warfare as We Know It* (New York: Houghton Mifflin, 2007).

⁸⁴ Rene Girard, *Battling to the End*, p.18.

⁸⁵ Ibid, p.20

sacrificial mechanism could focus violence upon ‘a victim whose destruction made the return to order possible,’ the juridical inheritance of process in modernity was disturbed by the ruptures of violence that marked the first half of the twentieth century, particularly the apocalyptic potential of Auschwitz and Hiroshima. That ‘there can no longer be any unanimity about the guilt of the victims,’ thereby unmasks the fallacy of a distinction between the community and the scapegoat.⁸⁶ However, absent from Girard’s reading of post-war world order is a sustained consideration of the major shift towards undifferentiation following the end of the Second World War: decolonisation. Girard fails to engage with formal decolonisation and the way in which post-war international law tries to erase the strict colonial division between the peoples of the world but only through the (impossible) attempt to ‘develop’ the colonised into the same form of the colonisers, imposing a (Europeanised) single standard of morality across a universal humanity. However, ‘dynamics of difference’ still persist within this universal and this can be seen in how violence in the international order is not released everywhere, rather certain areas and populations provide a vastly disproportionate amount of the casualties.

Girard’s acknowledgement of the massacre of civilians occurring through the War on Terror stops short of accounting for the geographic and racialised asymmetry of the violence being enacted in by ‘new war.’ The frame of war in these conflicts has drawn a preponderance of victims from those categorised within what Judith Butler calls ‘ungrievable life.’⁸⁷ The shift to ‘new war’ crystallised the ‘division of the globe into grievable and ungrievable lives from the perspective of those who wage war.’⁸⁸ Furthermore, this division has not occurred upon arbitrary lines; crucial to the violence of the drug war within a liberal, post-war international legal order is the subjective identities of its predominant victims, peoples disproportionately drawn from peoples and regions formerly colonised. As acknowledged throughout this thesis, the structure of prohibition enforcement has ensured that the force of the law would fall heaviest on those countries where organic, plant-based drugs are produced, upon indigenous peoples whose subjectivity was seen as discursively intertwined with these transgressive substances and upon racially subaltern communities traditionally excluded from the ‘legitimate’ economic sphere, thereby attracted to this illegitimate

⁸⁶ Ibid., p.19.

⁸⁷ Judith Butler, *Frames of War: When Is Life Grievable?* (London: Verso, 2015).

⁸⁸ Ibid., p.10.

counter-side of global trade. While post-war decolonisation erased the formal colonial distinctions between peoples in facilitation of the rise of a universal conception of humanity, the new wars, subsequently invoked in defence of that very conception of universal humanity, re-inscribe the racial and geographical distinctions between European and non-European peoples, while, in law repudiating any hierarchy of life presumed between these categories.

Reading Clausewitz in opposition to his great contemporary Hegel, Girard's insight is in recognising that the Hegelian dialectic offered as productive of the order of Euro-modernity in fact takes the form of a duel; 'merciless battle between twins,' leading to escalation unless contained by the sacrifice of the unrecognised third term.⁸⁹ However, whilst Girard offers a corrective to Clausewitz's ultimate retreat into the prospect of politics rather than sacrifice containing mimetic war, Frantz Fanon offers a further corrective of Girard's myopia over how sacrifice functions in globalised political order by specifying a condition of lived subjectivity – the 'dammed' of the earth- whose endurance of legitimised violence function in much the same manner as scapegoats but in service of a 'universal' humanity. Fanon illustrates that the colonised/racial subaltern figure acts as the unrecognised third term that underwrites the Hegelian dialectic.⁹⁰ Those subjects and geographical regions produced in Euro-modernity as the site of colonial extraction are excluded from the reciprocity that is the foundation not only of Hegelian dialectics but also of international legal subjectivity. Fanon understands the colonised/racially subaltern subject is the invisible third anchoring the Hegelian dialectic of recognition, excluded from the sphere of reciprocity and yet imprisoned within its midst. Oscar Guardiola-Rivera captures this argument in his own critique of the communality within legal ordering, stating that:

The premise according to which Group Survival is necessarily desirable and conflict undesirable serves as a screen that blinds us from the truth: that the security and survival of the group (defined in terms of reciprocal visibility) [...] depends upon the sacrifice of the absent person, Fanon's colonised black person.⁹¹

⁸⁹ Rene Girard, *Battling to the End*, p.41.

⁹⁰ See Frantz Fanon, *Black Skins, White Masks*, (New York: Pluto Press, 2008), for a full discussion on the misrecognition of the colonised subject and an underwriting of the modern dialectic, see particularly 'The Negro and Hegel', pp.168-173.

⁹¹ Oscar Guardiola-Rivera, 'What comes after Sovereignty?', *Law, Culture and the Humanities*, 6, 2 (April, 2010) 185-207, p.187. <<https://doi.org/10.1177/1743872109358511>>.

Through his reading of Clausewitz, Girard understands international order as not realising itself through organic synthesis but rather through reference to sacrifice in order to contain absolute war. However, by overlooking the parallels between the form taken by post-war decolonisation and the process of undifferentiation, Girard fails to appreciate the racial component of the asymmetry of violence within ‘new war.’ Could this oversight be corrected through an engagement with the drug war prior to the War on Terror? Exemplifying much of the post-Clausewitzian shift in warfare, the drug war operates against a symbolic enemy, but one seen as embodied in the figure of the drug addict or trafficker and in the transgressive substances that they trade, in defence of a totalising notion of humanity.⁹² The preamble of the Single Convention, as analysed in the previous chapter, provides a particularly telling example of this structure. As the totalising notion of humanity that grounds international legal order must be consistently reproduced to sustain itself, the drug war becomes perpetual and absolute, a war that is an end in itself. In the laws that established the War on Drugs as a global norm can be understood as a declaration of absolute war against the discursively produced universal negation but masked in the moral language of humanitarianism. The perpetual nature of the drug war is betrayed by the ever-growing numbers of shipments seized, acres eradicated, and drug traffickers arrested as evidence of the success of the law, ignore the on-going impossibility of reducing drug use, supply or trade of drugs.⁹³

A major consequence of the drug war has been the expansion of the black population in prison, not only in the U.S.A but in countries such as the U.K. and Brazil as well.⁹⁴ The war announced by Nixon in the aftermath of the end of formal legal racial discrimination in America and as shown in my earlier chapters the long history of drug prohibition has been indebted to racialised fears of contagion from the onset. The correlative expansion of police power, the prison system and the global scope of American hegemonic power through the drug laws remain informed by these

⁹² For discussions on the drug war as post-Clausewitzian, please see Eva Bertram and Kenneth Sharpe, ‘The Unwinnable Drug War: What Clausewitz Would Tell Us’, *World Policy Journal* 13, 4 (Winter, 1996/1997), pp. 41-51.

⁹³ Eva Bertram and Kenneth Sharpe, p.43.

⁹⁴ 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’, *Release*, 2013; or 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 Professor Anita Kalunta-Crumpton (Ashgate: 2015) p.248-292.

historic fears. A wealth of academic scholarship and empirical policy research has established the links between the enhancement of drug laws century and the late twentieth century explosion of the prison population.⁹⁵ The drug war, famously decried as ‘the New Jim Crow’ by Michelle Alexander, contributed greatly to a situation in which ‘the United States imprisons a larger percentage of its black population than South Africa did at the height of apartheid.’⁹⁶ Angela Y. Davis provides the racial dimension missed by the Foucauldian critique of prisons as disciplinary mechanisms, by emphasising how the phenomenal rise in drug-related imprisonment following the 1980’s escalation of the drug war illuminates the pivotal role played by racism in sustaining society’s ideological investment in prisons.⁹⁷ Moreover, Ruth Wilson Gilmore illustrates the relationship between the drug laws and the three-strikes law implemented in California, leading to a flood of new bodies entering the prison system for life, over three-quarters of which were Black and Latino.⁹⁸ The consequences of imprisonment for drug trafficking, particularly in the U.S.A, are so severe that they are not adequately described as a mere temporary denial of liberty but as visiting upon the convict what Colin Dayan describes as a ‘civil death’, a long-term loss of personhood that goes ‘way beyond the logic of punishment’ though barring the individual from access to many of the necessities of life (employment/housing/political representation) even long after release.⁹⁹ The prohibition of drugs led to a redeployment and crystallisation of notions of the inherent criminality of the Black populations of Europe and America; a discursive symbiosis between illicit peoples and illicit substances result in the contemporary

⁹⁵ See Angela Y. Davis, ‘Race and Criminalization: Black Americans and The Punishment Industry’ in *The House That Race Built*, ed. by Wahneema Lubiano (New York: Random House USA, 1999) pp.265-279; Michael Javen Fortner, *Black Silent Majority: The Rockefeller Drug Laws and the Politics of Punishment* (Cambridge: Harvard University Press, 2015); Peter Reuter, ‘Why Has US Drug Policy Changed So Little Over 30 Years?’, *Crime and Justice* 42, 1 (2013); *The Drug War, Mass Incarceration and Race*, (The Drug Policy Alliance: February 10, 2016) <<http://www.drugpolicy.org/resource/drug-war-mass-incarceration-and-race>> [accessed 1 November 2016].

⁹⁶ Michelle Alexander, *The New Jim Crow: Mass Incarceration in the Age of Colorblindness*, Reprint edition (The New Press: 2012) p.7.

⁹⁷ Angela Y. Davis, pp.275-276.

⁹⁸ Ruth Wilson Gilmore, *Golden Gulag: Prisons, Surplus, Crisis, and Opposition in Globalizing California* (Berkeley: University of California Press, 2007), p.113.

⁹⁹ Colin Dayan, ‘Due Process and Lethal Confinement’, in *States of Violence: War, Capital Punishment, and Letting Die* (Cambridge: Cambridge University Press 2009) ed. by Austin Sarat and Jennifer L. Culbert, pp.127-150.

system of mass incarceration being built on the back of these mythologies.¹⁰⁰ Moreover, drug laws have been utilised to reinforce violent border policing.¹⁰¹ The end of the twentieth century would see Latin America emerge as a major frontier of the drug war. Two countries in particular – Colombia and Mexico – became the main theatres of conflict and the remainder of this chapter will focus on the impact of drug enforcement on these regions.¹⁰²

8.4 Plan Colombia and The Making of a *Limpieza*

An especially potent exemplar of the escalation of the War on Drugs in the 1990's came with an initiative referred to as Plan Colombia. Colombia had become the world's largest cocaine supplier after deindustrialisation and neoliberal agricultural reforms resulted in driving those cast out by the 'legitimate economy' into the illicit production market.¹⁰³ Oscar Guardiola-Rivera reads the drug war and neoliberalism as twin elements of a Janus-faced 'humanitarian intervention' into Colombia by the U.S.A.¹⁰⁴ In this form, 'humanitarianism' has the effect of de-politicizing war, making the destruction of both human and plant life and the seizure of land and resources from indigenous/Afro-Colombian populations appear as a moral endeavour, enacted to save them from themselves. Furthermore, the drugs trade was equated with radical opposition groups such as FARC and ELN.¹⁰⁵ Following a deterioration in relations between America and Colombia over counter-narcotics policy during the 1990's, with the U.S.A refusing to certify Colombia as co-operating in the War on Drugs in 1996 and 1997 over suspicions that Colombian President Ernesto Samper Pizano had ties with the Cali Cartel, his successor President Andrés

¹⁰⁰ For further on the relationship between the drug war, mass incarceration and the mythologies of back criminality see Agozino, Biko, 'Theorizing otherness, the War on Drugs and incarceration' in *Theoretical Criminology*, 4 3 (2000), 359-376.

¹⁰¹ See 'Drugs Across Borders: US Drug Policy and Latin America', *The Drug Policy Alliance* <www.drugpolicy.org/docUploads/fact_sheet_borders.pdf> [accessed 9 October 2016].

¹⁰² *Ibid.*, p.169.

¹⁰³ For further on the relationship between the 'shadow drug economy' and neoliberalism in Colombia see Oscar Guardiola-Rivera, *What If Latin America Ruled the World? How the South Will Take the North Through the 21st Century* (London: Bloomsbury, 2010), p.10-11.

¹⁰⁴ *Ibid.*, p.507-508.

¹⁰⁵ William O. Walker III, 'The Limits of Coercive Diplomacy: U.S. Drug Policy and Colombian State Stability 1978-1997', in *When Policies Collide; The Illicit Global Economy and State Power*, ed. by Richard H. Friman and Peter Andreas (Lanham: Rowman & Littlefield 1999) pp.143-173. FARC refers to The Revolutionary Armed Forces of Colombia and ELN refers to The National Liberation Army, both armed revolutionary groups active in Colombia

Pastrana re-established ties with America. In 1999, Pastrana secured the return of U.S certification before drawing up an aid plan for Colombia to provide sustainable economic support to cultivators. However, as Julia Buxton informs us, American directives redirected what had become 'Plan Colombia' from a peace plan into a battle plan, as 'nearly 80 per cent of the financing provided by the USA was ring-fenced for military assistance, with the entire funding package dependent on Colombian acceptance of an eradication strategy based on aerial fumigation.'¹⁰⁶ Whilst the original intention for Plan Colombia had been to combine an increase in enforcement capabilities with greater investment in development and social programmes, in practice the scheme privileged the militarisation of drug enforcement with the legal and security infrastructure of the country being strengthened in anticipation of an escalation of the drug war as entwined with other counterinsurgency initiatives.¹⁰⁷ Plan Colombia's goal was to reduce the cultivation, processing, and distribution of illegal narcotics by 50% in 6 years.¹⁰⁸ The failure of Plan Colombia is evident from the reports of the United States Government Accountability Office, which found that coca cultivation and cocaine production in Colombia had increased by about 15% and 4%, respectively between 2000-2006.¹⁰⁹ This increase occurred despite the U.S State and Defense departments providing nearly \$4.9 billion to the Colombian military and National Police Force to combat narcotic trafficking and \$1.3 billion for a wide range of social, economic, and justice sector programs between 2000-2008.¹¹⁰ Moreover, in contradiction to the presumption of the Colombian drug war as being 'lawless', Plan Colombia directed much of its funding towards reinforcing the rule of law. \$239 million was spent on expanding legal reach against drug traffickers through judicial reform and legal capacity building.¹¹¹ This expansion of the rule of law, as opposed to bringing about a decline in cocaine production, resulted in the escalation of a 'drug-fuelled conflict [that]

¹⁰⁶ Julia Buxton, *The Political Economy of Narcotics: Production, Consumption and Global Markets* (London: Zed Books, 2006) p.180.

¹⁰⁷ For a full engagement with the overriding military impulse of Plan Colombia, see Noam Chomsky, 'Plan Colombia', *Alternative Press Review* 6, 1 (Spring, 2001).

¹⁰⁸ U.S. Governments Accountability Office (GAO), 'Plan Colombia: Drug Reduction Goals Were Not Fully Met, but Security Has Improved; U.S. Agencies Need More Detailed Plans for Reducing Assistance', *GAO-09-71* (October, 2008), Highlights, p.1. < <http://www.gao.gov/products/GAO-09-71>> [accessed 11 August 2017].

¹⁰⁹ U.S. Governments Accountability Office (GAO), 'Plan Colombia: Drug Reduction Goals Were Not Fully Met...', Highlights, p.1.

¹¹⁰ *Ibid.*

¹¹¹ *Ibid.*, Table 3, p.47.

killed 32,436 people between 1998 and 2008 and displaced an additional 3.4 million,' while cocaine production from Colombia increased by 17% over the same period.¹¹² In this moment the relationship between law and violence appears as complementary rather than oppositional. As legal scholar Alvaro Santos highlights, to read the crisis of the drug war in areas such as Colombia as an example of lawlessness fails to appreciate the extent to which the violence is produced through, rather than against, the law. Santos details that:

The illegal market, its producers, suppliers, distributors, and consumers do not operate in a lawless world but in one constituted by multiple layers of law: international conventions that declare some substances illegal and forbid their commerce, domestic regulation that criminalizes their production, distribution, and consumption, and so on. So the first task is to identify the legal regimes at play, not only the foreground regime governing drugs, but the background regimes governing the sale and distribution of weapons, as well as financial laws governing-implicitly-what cartels can do with their proceeds.¹¹³

Upon understanding the violence of the drug war as working through the laws on prohibition, the increase of the rule of law through Plan Colombia coinciding with an increase in violence and cocaine production no longer appears contradictory; it is rather consistent within a sacrificial legal order. After touring Cali, Colombia in 2001 (in the midst of Plan Colombia) Michael Taussig provides an immersive account of sacrificial violence being visited upon this region through the method of the anthropologist's field diary, later published as *Law in a Lawless Land*.¹¹⁴ Subsuming himself into the communities of Amerindians and peasants who are the primary victims of Colombia's drug war violence, Taussig learns from these communities the operative functions that this legitimised violence plays from the perspective of those who experience it. Subtling this book as the '*Diary of a Limpieza in Colombia*', Taussig places the focus on the purifying power underlying the violence in Colombia, which was popularly described as a *Limpieza* – the cleansing. As a word, *Limpieza*

¹¹² '2010 International Narcotics Control Strategy Report', U.S. State Department, Bureau of International Narcotics and Law Enforcement Affairs.

<<http://www.state.gov/j/inl/rls/nrcrpt/2010/index.htm?goMobile=0>> [accessed 09/10/16], p.217.

¹¹³ Alvaro Santos, 'International Law and its Discontents: Critical Reflections on the War on Drugs or the Role of Law in Creating Complexity', *American Society of International Law Proceedings* (2012), pp.172-176, p.175.

¹¹⁴ Michael Taussig, *Law in a Lawless Land: Diary of a Limpieza in Colombia* (Chicago: University of Chicago Press, 2003).

contains two interwoven understandings in common usage in Colombia: the older meaning referring to a traditional practice of spiritual healing which cleanses the body of sick person or house after it has been infested by malevolent sorcery; however, in the wake political violence within the country, *limpieza* took on an additional meaning as the description for the public acts of purifying violence.¹¹⁵ This time concerned with cleansing the corrupting forces of a body politic rather than the body of a person, *limpieza* came to refer to the, often public, slaughtering of ‘undesirables’ by paramilitary forces. Those determined to be delinquents or degenerates, a category that recycled familiar tropes of peoples involved in drugs or in league with the guerrillas, are purified from the social order through mass execution. Among those rendered most exposed to this violence are those known locally as ‘Vicioso’, meaning ‘druggie’.¹¹⁶ Drugs are awarded a transformative power here again, capable of turning a life into something sacrificial, serving as an agent of the contagion. The *limpieza* carries out the act of sacrifice, purifying the internal contagion with the promise of containing violence with violence but instead just providing the structure for perpetual war.

Taussig’s title captures the presence of the law within this context of sacrificial violence; the *limpieza* doesn’t happen outside of the gaze of the law but again, often realises itself through the law. While the public executions may be carried out by paramilitaries, these killings are often state-sponsored or at best occur under the complicit gaze of the state. Disturbing the presumption that such violence happens in the absence of law, Taussig describes:

The brazenness of the killing today takes your breath away, in broad daylight, in the street – the exact opposite of anonymity. This is not some remote hamlet where are no police or law courts. This is a town just forty-five minutes by road from Cali, police, 5 judges, 3 district attorneys, a jail with 120 prisoners, and an elaborate judicial system.¹¹⁷

Whilst the ostensible targets of the *limpieza* are narcotrafficanes/guerrillas, the expansive scope of the violence and the impunity with which it is enacted allow the production of a constant fear and uncertainty amongst the general population as ‘one

¹¹⁵ Ibid., p. xiii.

¹¹⁶ Michael Taussig, p.44, p.81.

¹¹⁷ Ibid., p.133.

never really knows who next will be murdered, tortured, intimidated, or run-out-of-town.¹¹⁸

The entire region that Taussig visits, Valle del Cauca, in the Cali region of Colombia that endured the brunt of the drug war, could be read to exist in juridical theodicy that parallels Fanon's 'zone of non-being'.¹¹⁹ The population exists within the scope of the law but in a condition of exclusion, allowing for violence enacted upon their being to not sufficiently disturb the order of the law. Instead, one could argue, it even constitutes and sustains the order of the law, recalling the notion of sacrifice. Drawing on both Benjamin and Nietzsche's critique of legal violence, Taussig describes how 'the violence of law is not only a question of guns, handcuffs, and gaols, but, far worse, what gives that violence its edge and its lip-smacking satisfaction is deceit in the service of justice [. . .] is it so surprising that the paras and the police are virtually the same?'¹²⁰ Of course, Taussig does recognise that the representatives of the law are not the only source of violence in the region and he notes that the traffickers are not above employing paramilitaries to wield indiscriminate violence amongst target populations themselves.¹²¹ However, despite their shared contributions to the culture of violence, Taussig does not suggest that we accept any false equivalency between the traffickers and state, as only the violence from the state is infused with the claim to jurisdictional production. Talking of the drug traffickers as a response to the violence of the state, Taussig states that 'criminals become hardened by observing that they and the police use the same methods, except with the police, the methods are worse because the police excuse their actions in the name of justice.'¹²² The impetus to enforce law and order gives the *limpieza* its cleansing quality, with drug laws a key element in this network of violence. We see how the laws on drugs create the conditions for both the state to violently enforce that prohibition and for the traffickers, in response, to violently circumvent the law's determinations. Only the violence of the law is rendered legitimate by post-war legal order's attempt to manage violence across the globe. The violence of the traffickers is read as the deviant aberration of social order that causes the justified violence of the law but if we take seriously the question of causality, it

¹¹⁸ Ibid., p.120.

¹¹⁹ Frantz Fanon, *Black Skins, White Masks*, p.2.

¹²⁰ Michael Taussig, p.49.

¹²¹ Ibid., p.199.

¹²² Ibid., p.47.

must be recognised that the escalating tactics of drug cartels and gangs are at least partly dependent on the laws they are trying to overcome. Drug cultivation, trade and usage existed for centuries without being an excessively violent practice prior to prohibition. The cleansing violence that Taussig describes, both the enforcement and evading of prohibition, can be read as rooted in the law.

8.4.1 The Merida Initiative as Plan Mexico

‘[Juarez] is not a breakdown of the social order. [Juarez] is the new order.’¹²³
Charles Bowden

The failings of Plan Colombia did not precipitate a change of approach in international drug prohibition. As the epicentre of the drug war in Latin America has shifted from Colombia to Mexico, the Merida Initiative was established in 2008 to reinforce the United States’ financial and military support for drug prohibition enforcement to the Central American region.¹²⁴ The similarities between the Merida Initiative and the earlier Plan Colombia are captured by the scheme often being described as ‘Plan Mexico’ by scholars and activists.¹²⁵ Following in the manner of Plan Colombia, the Merida Initiative facilitated American provision of military weaponry, surveillance technology and inspection equipment, technical advice and training of law enforcement units to the Mexican government, all in service of an escalation of the drug war. Between 2008-2010 the U.S government spent \$1.15 billion in Mexico alone through the Merida Initiative with a further \$275 million being spent in other key drug war fronts in Central America and the Caribbean such as the Dominican Republic and Haiti.¹²⁶ The Merida Initiative provided much of the firepower that fuelled Mexican President Felipe Calderón’s government’s embrace of the War on Drugs during his six-year term (2006-2012). Yet, predictably, the consequences of ‘Plan Mexico’ have not been dissimilar to its Colombian

¹²³ Charles Bowden, *Murder City: Ciudad Juarez and The Global Economy's New Killing Fields* (Burlington: Phoenix Books, 2010), p.173.

¹²⁴ ‘The Merida Initiative: Fact Sheet’, the Bureau of International Narcotics and Law Enforcement Affairs, U.S. Department of State (June 23, 2009) <<https://2009-2017.state.gov/j/inl/rls/fs/122397.htm>> [accessed 9 October 2016].

¹²⁵ For references to The Merida Initiative as ‘Plan Mexico’, see Paul Kenny, Monica Serrano, Arturo C. Sotomayor, *Mexico's Security Failure: Collapse Into Criminal Violence* (London: Routledge, 2013) p.151; James D. Cockcroft, *Mexico's Revolution Then and Now* (New York: New York University Press, 2012) p.44; or Kristina Aiello, ‘Obama's Choice: Human Rights First or Plan Mexico’, in *NACLA*, <<https://nacla.org/news/obamas-choice-human-rights-first-or-plan-mexico>> [accessed 11 August 2017].

¹²⁶ ‘The Merida Initiative: Fact Sheet’, 2009.

predecessor; evidence of its empirical failure is shown by how Mexico's 'overall homicide rate grew by over 260% from 2007 to 2010.'¹²⁷ A particularly violent epicentre of the Mexican drug war has been Ciudad Juárez, where 'the rate of killings per 100,000 inhabitants rose from 14.4 in 2007, to 75.2 in 2008, to 108.5 in 2009.'¹²⁸ This resulted in the 2009 murder rate in Juárez's rate being 'one of the highest in the world, far surpassing Rio de Janeiro, Brazil, and Medellín, Colombia.'¹²⁹ Anabel Hernández captures the failings of the Plan Mexico by stating:

Calderón's time in office has left Mexico ablaze. There is only one victor in his so-called War on Drugs: Joaquín Loera Guzmán, El Chapo [...] during Calderón's six-year term, Guzmán became the most powerful drug trafficker in history, while his enemies were decimated. El Chapo's empire is Calderón's chief legacy.¹³⁰

In Jean Franco's analysis of the pattern shared by extreme eruptions of violence across Latin America, she argues that the very construction of modernity is dependent upon the violent exclusion from the realm of subjectivity of those populations not considered to be human.¹³¹ Describing the current situation in Ciudad Juárez, Mexico, as "Apocalypse Now," Franco notes how the spectacular modes of violence across this city (and across Latin America as a whole) often target the already victimised subjectivities of women or indigenous communities.¹³² However, while in agreement with Franco's insights, it is also important to read the escalation of the drug war in Mexico in the early 2000's as the counter-side of a globalised market place of exchange, intertwined with neoliberalism and the rise of trade agreements like the North Atlantic Free Trade Agreement (NAFTA). With NAFTA facilitating the erasure of the economic border between the U.S.A and Mexico for the service of free exchange of goods and services, the City of Juárez emerged as the principal site for Mexico's export economy. This includes drugs where the biggest market for the trade remains the U.S.A., the same country driving the enforcement of prohibition. Deborah

¹²⁷ 'Neither Rights nor Security: Killings, Torture, and Disappearances in Mexico's "War on Drugs", Report by *Human Rights Watch* (November, 2011), p.4. <https://www.hrw.org/sites/default/files/reports/mexico1111webwcover_0.pdf> [accessed 11 August 2017].

¹²⁸ *Ibid.*, p.15

¹²⁹ *Ibid.*,

¹³⁰ Anabel Hernández, *Narcoland: The Mexican Drug Lords and Their Godfathers* (London: Verso, 2013) p.25.

¹³¹ Jean Franco, *Cruel Modernity* (Durham: Duke University Press, 2013).

¹³² *Ibid.*, pp.214-247.

Weissman explains that ‘geography is central to Cd. Juárez's standing as a location from which to understand the consequences of the maquila [factories run by U.S. company in Mexico] development strategies.’¹³³ The proximity of Juárez to the American border aids the transformation of the city into a terrain of transience and contingency, a condition necessary for sacrifice. Juárez's location opens it up to a gravitational pull from the U.S.A. that, over time, erodes the structures and institutions that would ground the city. Juárez becomes a city whose collective subjectivity is determined vis-à-vis its relationship with America as tens of thousands of migrants travel into the city annually.¹³⁴ This transience and precariousness is invited by the economic imperative to create the necessary conditions for a successful free-trade zone along the border. However, the social structure in Juárez has suffered, with overall income levels falling sharply, whilst disparities in wealth have expanded, making the instability of inequality the norm.¹³⁵ The expanding population means that unemployment in Juárez has only increased ‘even as maquilas have created jobs in the export zone.’¹³⁶ The impact of neoliberalisation has been to transform the city into one that is sacrificial before the global legal and economic order. Prior to the neoliberalisation of the city in the 1990's, ‘Ciudad Juárez was considered a reasonably safe place; it is now known as a social disaster and one of the most distressed urban areas in the Western Hemisphere.’¹³⁷ The drug war is not merely a by-product of this process of neoliberalisation: it is an integral part of it. The cartels recruit from the same surplus of population produced by the maquila development strategy; acting as the counter-side of the globalised economy, the cartels supply of an in-demand commodity sparks an eruption of legitimised violence that is facilitated through and justified in international law.¹³⁸

The same conditions that make Juárez a centre-point for free exchange of commodity goods across formal jurisdictional boundaries also make it a place in which illegal commodities can be smuggled along with legitimate ones, the profits

¹³³ Deborah M. Weissman, ‘The Political Economy of Violence: Toward an Understanding of the Gender Based Murders of Ciudad Juárez’, *North Carolina Journal of International Law and Commercial Regulation* 30, 4 (Summer, 2005) 795-868, p.9.

¹³⁴ Ibid.

¹³⁵ Ibid., p.805.

¹³⁶ Ibid. p.805.

¹³⁷ Ibid., p.809.

¹³⁸ For further on the relations between capitalism and the drug war in Mexico see Ed Vulliamy, *Amexica: War Along the Borderline* (London: Vintage, 2011); or Charles Bowden, *Murder City: Ciudad Juárez and the Global Economy's New Killing Fields* (Burlington: Phoenix Books, 2010).

becoming indiscernible from each other upon entering the financial institutions. Juárez, as a point of connection between the drug producing countries of Latin America and the world's largest drug consumption market of the U.S.A, becomes a focal point of drugs trade, a foreseeable development when considering the impact of NAFTA, as a surplus of illegal commerce often accompanies the desired legitimate trade. The potential wealth offered by the drugs trade combined with the insecurity of a transient population only amplifies the tension between the liberal economic imperative for global free trade and the 'humanitarian' legal imperative for global prohibition of drugs.¹³⁹ Furthermore, the impact of NAFTA contributed to Mexico becoming not just a transit country for drugs but also a producer. Similarly to Colombia, the agricultural reforms demanded of Mexico by neoliberal economic dogma to dismantle protectionism, divided up communal lands under the premise of making them more competitive, leading to falling incomes and rising unemployment. Farmers turned to narcotics production to sustain an income; the move into a sector with greater potential profit returns.¹⁴⁰ As a result, drugs became another product to be transported through Ciudad Juárez to satisfy the demand of the U.S.A., as that nation amplified the force of law against drugs as the illegitimate element of the desired global economic order.

8.5 The War on Terror as the Juridical Inheritance of the Drug War

Taking the historical narrative of this thesis up to the contemporary concerns of the international order, the War on Drugs can be read as to clearing the pathway for the War on Terror. The prevailing trend in critical legal scholarship has been to read many of the elements I have sought to illustrate as being at the roots of the drug war—from the debt to sacrifice, to the Victorian influence upon American internationalism—as being key historical and theoretical strands that informed the War on Terror as it emerged at the start of the twenty-first century. However, this reading, while often insightful, overlooks the legislative ground that had been cleared for anti-terror legalism by the preceding War on Drugs. In terms of the rhetoric of militarisation of peace, the abstracted war on nouns, the construction of the universal in opposition to a

¹³⁹ Ibid.

¹⁴⁰ Peter Andreas, 'When Policies Collide: Market Reform, Market Prohibition and the Narcotization of the Mexican Economy,' in *The Illicit Global Economy and State Power*, ed. by Richard H. Friman and Peter Andreas (Lanham: Rowman and Littlefield, 1999); pp.125-127.

deviant contagion, the War on Terror inherited much from War on Drugs as an earlier example of an absolute, new war.

When reading the critical legal scholarship on the War on Terror, the parallels with the sacrificial ordering of the War on Drugs as illustrated over the course of this thesis becomes striking. Peter Fitzpatrick, noting how the War on Terror spans an indefinite, universal scope whilst simultaneously casting its abstracted enemy as excluded from this universal, describes this war as taking the concept of ‘a human rights war to something like its ultimate extent. That is the espousal of human rights along with the values taken as sustaining them-values of civilisation, freedom and democracy – are operatively combined with their extension throughout the globe through the waging of war on those who are deemed opponents.’¹⁴¹ Echoing this focus on the War on Terror as executed in the name of a universal humanity, Costas Douzinas argues that the ‘continuous reference to humanitarianism, therefore, indicate that our recent wars are a return to the premodern idea of just war conducted according to the modern protocols of police action.’¹⁴² Recognising that ‘humanitarian wars return us to... the ancient link between the sacred and the legal,’ Douzinas understands the necessity of the abstracted enemy of the War on Terror being pseudonymous as reflecting the imperative through constituting a universal humanity in opposition to it.¹⁴³ Yet despite the many of the characteristics of the War on Terror identified above being previewed in the War on Drugs, critical legal scholars, including Fitzpatrick and Douzinas, overlook the continuity between the two ‘new wars’, instead reading the War on Drugs as a metaphorical war where ‘military means are not supposed to assume predominance’¹⁴⁴ I propose that the emphasis that the War on Drugs has placed on militarised enforcement of prohibition, such as Plan Colombia or Meridia initiative/Plan Mexico, offers significant challenge to the reading of the War on Drugs as not being a heavily militarised means. As a particularly telling instantiation of the synthesis of police and military power that emerged in the international arena over the later-half of the twentieth century, the drug war cannot be fittingly described as a merely a metaphorical use of the concept of war once we place a focus on the death, displacement and detention that has been

¹⁴¹ Peter Fitzpatrick, ‘Enduring Right’, in *Law after Ground Zero*, ed. by John Strawson, pp.37-44, p.41.

¹⁴² Costas Douzinas, ‘Postmodern Just Wars: Kosovo, Afghanistan, and the New World Order’ in *Law after Ground Zero*, ed. by John Strawson, pp.20-37, p.26.

¹⁴³ Costas Douzinas, p.29, p.34.

¹⁴⁴ Peter Fitzpatrick, p.41.

produced since prohibition.

Critical scholarship on the War on Terror has also read its juridical origin emerging through Vitoria, or more specifically the recovery of Vitoria that drove the emergence of American internationalism over the twentieth century. As emerging in parallel with this recovery, international drug prohibition appears to be a gap in the literature that could enrich critical readings of the later War on Terror. Anthony Anghie in particular draws a direct lineage from the War on Terror, particularly the invasion of Iraq, to the U.S. occupation of the Philippines at the turn of the twentieth century.¹⁴⁵ However, in this reading Anghie misses the importance of the U.S. occupation of the Philippines for provoking international drug prohibition and leading to the first international legal agreement on drugs at the 1909 Shanghai Opium Conference. Anghie credits Elihu Root, U.S. Secretary of War and then Secretary of State, for laying the blueprint for the mode of American internationalism that continued to inform the humanitarian War on Terror in the twenty-first century.¹⁴⁶ However, he makes this argument without full appreciation of Root's role in directing the earlier efforts of international drug prohibition by the likes of Bishop Brent and Hamilton Wright who, under Root and James Brown Scott's State Department, laid the first legislative foundations on which the international War on Drugs would be built.

Ultimately, the importance of the American internationalism of the turn of the twentieth century to the juridical basis of the 'new' wars is recognised not only by scholars but also within case law. In *Boumediene v. Bush*, Supreme Court Justices invoke the territorial precedents developed by the 'Insular Cases' to define the jurisdictional positionality of 'enemy combatants' in the War on Terror.¹⁴⁷ The Insular Cases, engaged with earlier in this thesis as the historical parallel of the emerging drug prohibitionism of American internationalism, allowed the U.S.A. to rule its newly acquired protectorates such as the Philippines as 'unincorporated territories'. As reviewed in *Part B*, the U.S.A. began to develop this inclusive/exclusive juridical personality for the peoples of the territories acquired in the aftermath of the 1898 Spanish-American War. In *Boumediene v. Bush*, the US

¹⁴⁵ For Anghie's reading of the War on Terror as rooted in Elihu Root and the US occupation of the unincorporated territories, see Anthony Anghie, *Imperialism, Sovereignty and the Making of International Law*, Chapter 6: pp.273-309.

¹⁴⁶ *Ibid.*

¹⁴⁷ *Boumediene v. Bush*, 553 U.S. 723 (2008).

Supreme Court explicitly drew on the inclusive/exclusive juridical personality developed in the Insular Cases to reject the denial of habeas corpus to enemy combatants held in Guantanamo Bay. The doctrine of unincorporated territories developed at the very origin of American internationalism was shown to still carry juridical purchase as Justice Kennedy, in delivering the opinion of the court, states that this ‘century-old doctrine informs our analysis in the present matter.’¹⁴⁸ The decision in *Boumediene v. Bush*, consolidated with the decision in *Al Odah v. United States*, allowed the US Supreme Court to temper the excesses of the Bush administration, foreclosing the possibility of placing the enemy combatants in the War on Terror beyond the law, both constitutional and international, in a legal black hole. However, as Charles R. Venator-Santiago makes clear, in *Boumediene* and the other Guantanamo Bay cases, while the Supreme Court was ‘willing to curtail the efforts of the Bush administration to claim “absolute and unlimited” powers, it was unwilling to declare the torture and detention camps altogether unconstitutional.’¹⁴⁹ In alignment with the pattern of American internationalism, the detainees were caught in an inclusive/exclusion, being included within a legal order that continues to tolerate their indefinite detention. For Venator-Santiago, the juridical paradox offered to the Guantanamo detainees exemplified American imperialism, ‘a totalising system, while simultaneously appearing to promote the rule of law and democracy.’¹⁵⁰ Further critical legal scholarship has also highlighted the paradoxical juridical position of ‘enemy combatants’ in the War on Terror as being not excluded but held by the law in an indeterminate, infinitely delayed inclusion.¹⁵¹ This reading is only enriched through an appreciation of way in which the War on Drugs served as a precursory and illustrative instantiation of the mode of new war.

8.6 Conclusion

This thesis began with the paradox of the drug war as posited against law’s claim to expel the ‘scourge of war.’ This chapter has reviewed how the post-war shift

¹⁴⁸ *Boumediene v. Bush*.

¹⁴⁹ Charles R. Venator-Santiago ‘Inverted Totalitarianism and the U.S. Territorial Doctrine’, in *Revista de Pensamiento Juridico* 30, 3 (2012) 295-310., p.303.

¹⁵⁰ *Ibid*, p.306.

¹⁵¹ See for example Stewart Motha, ‘Guantanamo Bay, Abandoned Being, and the Constitution of Jurisdiction’ in *Jurisprudence of Jurisdiction*, (2006) ed. by Shaun McVeigh (London: Routledge-Cavendish, 2007) pp.63-84.

to ‘new war’ was both shaped by and helped shape international law and its relationship to war. The question posited in the introduction of this thesis, of how the piling of bodies upon bodies produced through the drug war could work in conjunction with post-war international law’s ‘humanitarianism’, is responded to by this chapter’s study of how the new mode of warfare blurred the distinctions between police activity and military conflict. Moreover, the century between the birth of international drug prohibition and the mass incarceration, aerial fumigation and paramilitary killings of the War on Drugs, saw international law transition towards a liberal universalism. With international law, or its correlative universal humanity, being invoked in service of new war, the structure of war moves from rivalry to sacrificial as the international community as a whole is claimed to coalesce in order to expel its degenerate elements. From this perspective, the implications of the Victorian recovery and its ‘careful elaboration of the relationship between humanitarianism, intervention, war, and transformation’ can be understood more clearly.¹⁵² The War on Drugs escalated in parallel with the triumph of human rights as they became the default vocabulary through which international law expressed its claim for universal peace.¹⁵³ Yet notions of legal order remained undisturbed by the law-making violence that emerged from drug prohibition. The silence of the discourses of international law or human rights in addressing the plight of the victims of drug war betrays their lives as ungrievable; sacrifices to be made in service of bringing an international community into being, through the casting out the ‘evil’ of drugs.

A secondary concern in this chapter has been to draw the critical attention often focused on the War on Terror towards the drug war. The shared roots of the War on Drugs and the War on Terror are not merely a question of parallel juridical projects. Proper contextualisation recognises the pathway cleared by the former in order to bring the latter conflict into being.¹⁵⁴ For instance, the measures introduced by the *USA PATRIOT Act, 2001*, including extending wiretapping capabilities and widening surveillance powers, were measures ‘recycled from earlier legislative efforts

¹⁵² Anthony Anghie, ‘The War on Terror and Iraq in Historical Perspective’ in *Osgoode Hall Law Journal* 43, 1/2 (2005), pp.45-65, p.61.

¹⁵³ For an in-depth study of the rise on Human Rights from the 1970’s onwards see Samuel Moyn, *The Last Utopia: Human Rights in History*.

¹⁵⁴ See Christopher Ingraham, ‘The Shared Roots of the War on Drugs and the War on Terror, in One Chart’, *Washington Post*, April 14 2015, <<https://www.washingtonpost.com/news/wonk/wp/2015/04/14/the-shared-roots-of-the-war-on-drugs-and-the-war-on-terror-in-one-chart/>> [accessed 11 August 2017].

that were said to be essential for the international War on Drugs.¹⁵⁵ Girard's neglect the impact that decolonisation had upon the orientation of the international community, of the merger of police and military power exemplified by the drug war and of the asymmetry of violence being enacted through 'new war' results in a misreading of the War on Terror as the heralding of the end times, missing the continuances it carries from previous outbreaks of international violence. The bleeding of the War on Drugs into the War on Terror does give credence to Girard's reading of the reference to the sacrificial mechanism as no longer being capable of producing order amongst the contemporary international.

Therefore, a problem presents itself to international law: a problem of articulating a new concept of universalism, untied from a logic of totalisation and sacrifice.

¹⁵⁵ Michael McCahill, 'Globalisation, surveillance, and the "war" on terror', in *Globalisation, Citizenship and the War on Terror*, ed. by Maurice Mullard and Bankole Cole (Cheltenham: Edward Elgar Publishing Ltd., 2007), p.213.

Conclusion

‘If for centuries and centuries there has been coca consumption,
how is it possible to end this with one agreement?’
Evo Morales, CND 2009

Commencing with a review of the empirical failure of the War on Drugs to achieve its stated ambitions, with a specific focus placed on the bodies that have been lost in this failure, the central problematic addressed over the course of this thesis has been the question of how we can theoretically reconcile the rise of liberal international law over the twentieth century, particularly post-war international law’s claim to dispel the ‘scourge of war’, with the violence that has been produced through the War on Drugs. The correlative question also asked was that of how we explain the racial and geographic asymmetry in who has suffered through the drug war if we accept post-war, post-colonial international law’s stated turn towards universal humanism. This question carries significance in contributing to understandings of how violence remains operative in the discipline of law and, specifically, the sub-discipline of international law. My efforts to answer this question has a required reading of the War on Drugs specifically as a problem of law, in contrast to a prevailing trend in scholarship on this topic which has largely either overlooked the failings of the drug war or located them within factors external to the law. I engaged with the drug war as a challenge to conventional understandings of international law.

I began my response to the problem of the violence of the drug war by positioning my reading against conventional understandings of law as constituted in opposition to violence, ‘law as the peaceful alternative to the chaos and fury of a fictive state of nature.’¹ International law, perhaps even more explicitly than a domestic legal order deriving from a central sovereign authority, acclaims a spontaneous production of peace as the foundation for the order, as illustrated by the propensity for conventional theory of international law to read the founding event of modern international law to be the Peace of Westphalia of 1648.² This historical narrative decouples international law from the colonial sphere of violence that produces and continues to sustain it. A reading of the social/material death caused by

¹ Austin Sarat and Thomas R. Kearns (eds), *Law's Violence* (Ann Arbor: University of Michigan Press, 1995) p.3.

² Jennifer Beard, ‘The International Law in Force: Anachronistic Ethics and Divine Violence’, published in *Events: The Force of International Law*, ed. by Fluer Johns, Richard Joyce & Sundhya Pahuja (Routledge, 2011).

the drug war as produced through the law, not through the failings of any outside social factors but a betrayal of the law's foundational opposition to violence, presents a paradox for the general architecture of international law, which, if its promise of constraining violence in the international order is placed alongside the simultaneous commitment to the war on drugs suggests a structure in which law seeks to free the international community from war, by war. Following the work of Benjamin and Cover on the law's ultimate indebtedness to violence, my reading of the drug war took up the mantle of interrogating the wider problematic of constructing and sustaining law as an operative order through violence, through the development of a theory of what I have termed a 'sacrificial' international law. Adding to an understanding of 'law's violence' by also drawing on traditions of scholarship that have read, firstly a persisting imperial structure within the universalism of liberal international law and secondly, a theological undercurrent to the acclaim secularity of modern law, I offered an image of international law operating as 'sacrificial', in order to show the empirical failure of drug laws, as detailed in the introduction, wasn't a suggestion of law as simply inefficient, for law does not cease to possessing the content of law simply because it doesn't achieve its aims. Neither was I claiming that law is merely paradoxical. Instead, through the concept of sacrifice, I have endeavoured to illustrate how universalism of international law as conceptualised over the twentieth century, sought to respond to the central problematic of international order-the maintenance of peace amongst sovereign rivals without a cohering central authority- by accepting legal violence upon populations positioned as both inside and outside the international community. The concept of sacrifice I employ borrows initially from René Girard's conception of communal formation and sustainment through the violent sacrifice of an included/excluded scapegoat.³ However, in order to expand Girard's concept, this notion of sacrifice takes the positionality of inclusion/exclusion that is essential for the sacrificial victim, and synthesises it with Frantz Fanon's understanding of the colonial/racially subaltern subject as 'Damned' within a world in which they are constructed in negation, or as Fanon terms it, caught in the 'zone of non-being'.⁴ Furthermore, I also drew on Michael Taussig's recognition of the relationship between the demonisation of the

³ René Girard, *Violence and the Sacred*, (Baltimore and London: Johns Hopkins University Press, 1977).

⁴ Frantz Fanon, *Black Skins, White Masks*, (New York: Pluto Press, 2008), p.2.

colonial/racially subaltern subject and the fetishisation of mythic commodities. Exploring how this structure of trying to create order through a cleansing violence, a *Limpieza* as called in Colombia, functions in the heart of drug war, Taussig sees how drugs are discursively imbued with a transgressive (or transformative) power, which is to be contained by *Limpieza*. Tying these conceptual frameworks together, I offered an account of how illicit drugs, as the quintessential ‘transgressive substances’ of the twentieth century, function as a signifier for a symbolic notion of sub-humanity against which the communality of international law could be constituted. My critique, following Fitzpatrick amongst others, has been to argue that whenever a particular mode of humanity embarks upon an attempt at universalization and a fixing of itself as the idealised model, ‘there is an inexorable exclusion and sacrificing of others- of those who are other to that emplacement of universal freedom.’⁵ In terms of the drug war, the sacrifice has been borne by those who inhabit Fanon’s category of ‘the damned.’ While the racial and geographical asymmetry of the impact of drug prohibition is already well-established in the literature in drug policy studies, the theoretical significance of this asymmetry has been unexplored, with scholarship largely overlooking the insights of post-colonial, decolonial or critical race theorists in unpacking this problematic. In reading the drug war as a specifically legal phenomenon, as in a war produced through rather than against the workings of the law, I also sought to correct an absence across the field of drug policy studies to significantly engage with either the theoretical readings of legal violence or the wealth of scholarship that illustrates the intimate relationship between international law and empire. Mining the early issues of the *American Journal of International Law* for reports of early prohibitionists, as well as drawing on an as of yet underdeveloped connection between prohibitionists like Bishop Brent and the leading jurists of American international law like Dr James Brown Scott, I argued that drug prohibition in international law was born in the context of a historical shift in the mode of empire. Therefore, the question of empire and the change from the formal division between the civilised/colonised worlds to the expansive moral universalism of twentieth century international law lies at the heart of any examination the emergence of the drug war.

⁵ Peter Fitzpatrick, ‘Enduring Right’, in *Law After Ground*, ed. by John Strawson (London: The Glasshouse Press, 2002), p.39.

A further original contribution of this thesis has been to provide an intervention into the critical legal scholarship that is concerned with persisting imperial violence within the operation of contemporary international law, and to correct the general omission of the drug war from the examples cited as prime sites in which this theory can be illustrated. My argument emphasises how the War on Drugs is not a peripheral, idiosyncratic project of international law but instead betrays the core of liberal international law over the twentieth century. Moreover, alongside post/decolonial readings of international law sits another body of scholarship concerned with the significance of international law's theological inheritance. Again, the literature has looked to the War on Terror or human rights to reveal the political theology of international law while overlooking the example of the drug war, despite this being an international legal project historically born of the Christian mission to save souls that continues to employ the language of theology in supposedly secularised legal instruments. Finally, the last intervention was to show how the War on Drugs fits within a shift in the nature of war over the course of the twentieth century. Tracing the transition from the state-against-state (or more accurately empire-against-empire) conflicts that devastated the first half of the century to the 'new wars', where warfare is now executed in the name of a 'universal humanity' by the international community at large, re-reading the drug war as being not merely a metaphorical offers an early indication of this wider change occurring in international conflict.

Review of The Progression Of Thesis

The arc of the thesis was structured into three parts. In *Part A* the theoretical and historical work required to develop the concept of a 'sacrificial international' was undertaken. *Chapter One* focused on unpacking the concept of drugs, showing how the very discursive ground on which drugs stood was interwoven with the legal prohibition of these transgressive substances and their association with the fear of the negation of humanity, taken as embodied in racially subaltern peoples. Following Derrida and Taussig, we can see how 'Drugs' are taken to act as a conduit towards the form of an imagined non-human. The chapter concluded by illustrating how this vision of drugs, as a internal contagion disturbing the communality of social ordering,

informs the legitimisation of the violence enacted in order to try and eradicate this contagion.

Chapter Two identified the impossibility of international law to account for itself in positive terms and thereby refers to a cohering negation so as to constitute itself as an order. Citing the reading of international law developed by Anthony Anghie and TWAIL scholarship, this chapter advanced understandings of international law as indebted to European colonialism by illuminating the political-theological dimensions of this process through a notion of a 'sacrificial' international law. I commenced with an interpretation of the Girardian theory of sacrifice to show how legitimised violence is deployed to contain, in both senses, any escalation of violence that threatens to engulf community. Crucial is the inclusion of the scapegoat into the community but in a condition of indefinite exclusion, thereby allowing the violence enacted to not take the form of a further act of aggression, but instead to be justified by the scapegoat's own failure to realise the ideal form celebrated by the community into which it was invited. Drawing on Fanon to further the Girardian analysis, I read the sacrificial victim as therefore 'damned' by this misrecognition. The key insight of *Chapter Two* was to offer this notion of sacrifice as a model for reading the persistence of imperial violence after the end of formal colonialism, and its relation to international legal ordering over the course of the twentieth century. From this theoretical standpoint, I argued for a fresh lens that could reconcile the perpetual violence of the drug war with the simultaneous proclamations of peace and universal humanitarianism declared in the drug treaties.

Chapter Three concerns the historical basis for a sacrificial international law, returning to the 'origin' of international law, taken by leading American lawyers of the turn of the twentieth century to be located in the sixteenth century Spanish-Amerindian colonial encounter and the jurisprudence developed by Salamancan theologian Francisco de Vitoria. Engaging with Vitoria's canonical lectures on the topic of Spanish-Amerindian relations, *De Indis Noviter Inventis* and *De Jure Bellis Hispanorum in Barbaros*, I illustrated how Vitoria's juridical schema contained not only the construction of what Anthony Anghie describes as a 'dynamic of difference' within its bold claim to a universal humanity but also highlighting that the inclusion of the colonial subject into a universal notion of humanity was a prefix for a legitimised violence to be enacted if that violence is to do the cathartic work of the 'sacrifice.' The interior/exterior positionality that is occupied by the scapegoat in

order to exorcise intra-communal violence maps onto the legal personality produced by Vitoria for the colonised.

Part B offered an innovative reading together of the birth of drug prohibition alongside early American international law. *Chapter Four* extended the significance of the earlier reading of Vitorian jurisprudence by showing the influence that Salamancan thought had upon international law as it would emerge as a discipline in the U.S.A, most notably through Dr. James Brown Scott. I analysed how Scott recovered Vitoria to serve as the key theoretical antecedent for the U.S.A to follow in its own ‘turn’ towards internationalism. Alongside mentor Elihu Root, Scott influenced the form that American international law would take. Stressing the significance of the Vitorian recovery, I traced how Vitoria’s juridical-theology that informed Scott’s appeal for ‘a single standard of morality’ in international law.

Chapter Five detailed the emergence of drug prohibition as a concern for American internationalists following the acquisition of the Philippines in the 1898 Spanish-American War. Under the tenure of Root and Scott at the State Department, religious missionaries such as Bishop Charles Henry Brent and Wilbur Crafts gained significant mileage in their campaign to establish drug prohibition as international law. Moreover, I also emphasised how explicit racialised fears of drugs as a conduit towards a denigrated form of humanity informed the prohibition of what drug policy scholars call ‘the big three’- opium, cocaine and marijuana- within America, before illustrating how those same fears were internationalised with the first opium treaties. Re-reading the ideas of race held by key prohibitionists like Brent and Hamilton Wright, I argued that the concurrency of the rise of Scott’s investment in the ‘oneness’ of international law with the success that drug prohibitionists would find through under his tenure at State Department was not coincidental but theoretically coherent.

Chapter Six chronicled the creation of multiple drug control treaties over the interwar period alongside the shift towards institutionalisation in international law. I showed how the First World War provoked a crisis within the positivist assumptions of a fixed ‘balance of power’ as international law failed to restrain contagious violence breaking out amongst the European empires. I connect the shifts in the organisation of the international legal order and the greater concern of the questions of communality following war with America’s entry onto the international stage, detailed in the previous chapter, and a correlative, nascent universalist jurisprudence.

This turn was shown to inform the establishment of the League of Nations, despite America's ultimate abandonment of this project. *Chapter Six* also highlighted the importance of the League as a forum for facilitating the early shifts away from formal colonialism through the Mandate System, reading the Mandate System and the transition away from a formal colonial legal order as the central contribution of the League, rather than a peripheral afterthought. In a further example of a changing international legal order, I also detailed how the League became the institutional setting in which prohibitionists would successfully fix drug prohibition- not only opium but now targeting a wider set of 'transgressive substances'- as a norm in international law. However, the final chapter of *Part B* also took lengths to emphasise the stunted nature of the universalism achieved by both drug prohibition and international law more widely in the interwar period. Through a review and then critique of the drug prohibition treaties produced through the League, I illustrated how the failure of universality limited the practical effectiveness of the drug treaties agreed through the League, thereby emphasising the significant role the re-investment in universalism and communality after the Second World War would play in providing the context for the ultimate realisation of a War on Drugs.

In *Part C*, I examined the establishment of the contemporary international drug laws, connecting the early prohibitionists with what we now commonly term the War on Drugs. *Chapter Seven* reviews the theoretical presuppositions that underpinned the establishment of the United Nations and the successful reinvestment in the institutional communality of international law following the Second World War. The importance of the U.S.A superseding the declining European empires as the hegemonic actor in international law was stressed as both producing and being produced by the holistic, post-colonial conception of international legal order. The American influence shifted the theoretical grounding for international law towards a universalist humanitarianism, reflected in *the U.N Charter* and *the Universal Declaration of Human Rights*. My reading of *the Single Convention* alongside these other major post-war international agreements was undertaken so as to illuminate the importance of the concept of universal humanity to drug prohibition. In dialogue with scholarship in the field of drug policy, I also offered this theoretical perspective as a corrective to the literature that has emphasised the tensions between human rights and drug prohibition; I argued instead that a shared conception of the order of the international allows the drug treaties to complement rather than strictly contradict the

humanitarianism of the post-colonial era. Moreover, a close-reading of the *Preamble of the Single Convention* was performed in order to highlight the continuing presence of theodicy within the legal order presumed to be fully secularised. Recalling the insights of Fanon, I read the reference to ‘evil’ within the preamble of the *Single Convention* not as a curious discontinuity, but as a recognition of the figure of negation against which the drug war was always already being waged. The ‘evil’ of ‘universal mankind’ as cited in the preamble can be understood as the sub-human residing in the ‘zone of non-being’ as Fanon described the experience of the racial subaltern in modernity, an echo of the Augustine canonical account of the theological problem of evil. What is ‘evil’ about drugs, I argue, is not the inanimate objects themselves but the subjectivity that they are feared to engender; the subjectivity of these people which is being demonised.

Chapter Eight dealt with the War on Drugs as it was fully realised in the final quarter of the twentieth century, showing how the ‘sacrificial’ structuring of drug prohibition allowed for the victims produced through the enforcement of the legislation reviewed in earlier chapters- victims largely derived from the racial and geographical subaltern populations- to be rendered legitimate within the order of international law. By reading the War on Drugs as a primary example of what scholars have termed ‘New War’, I explore how the drug war operated through a ‘sacrificial’ universalism that superseded traditional sovereign state conflict. Placing the drug war in conversation with scholarship undertaken on other examples of ‘New War’, particularly the later War on Terror, *Chapter Eight* argued that the drug war should be understood as an early instantiation of war waged in the service of an acclaimed universal humanity. My reading of the Drug War allows the concept of ‘New War’ to gain a longer history than merely the post-war, post-colonial investment in juridical universalism. While being largely devoid of theological proclamations and explicitly racist declarations of the early drug prohibitionist at the start of the century, the late twentieth century War on Drugs, I argue, is not best understood as merely a technocratic and ideologically neutral international legal project, but instead one that aimed to facilitate the cohering of disparate international into an operative whole through the opposition to a negation.

In an attempt to further the theoretical depth applied to this problem in drug policy scholarship, my contribution in this thesis has been to attempt to reconcile the apparent paradox between the stated commitment to peace, humanitarianism and

universalism of the post-war, post-colonial international legal order and the asymmetrically violent drug war. This thesis has offered the notion of ‘sacrifice’ as a conceptual lens to unpack how the ‘ungrieveable’ victims of the drug war did not contradict, but were rather structured so as to help produce a communal international through their inclusive/exclusion. This theoretical perspective provides scholars of both international law and drug policy with a tool through which to understand a key question posed at the introduction to this thesis: how has international drug prohibition persisted despite the violence it has invoked and its empirical failure to reduce the consumption and trade of drugs? Moreover, in terms of the wider relevance of this argument, this thesis comes at a crucial time as reformists seek to dismantle the legislative architecture that produced the War on Drugs and begin to obtain early victories in this endeavour. In order to ensure that it is the violent, racially and geographically asymmetrical consequences of the drug war that are challenged and not just the laws themselves, it is important for activists to have a full theoretical understanding of the tacit assumptions and unarticulated presuppositions about international legal ordering, ideal human subjectivity and imperial continuities. As stated in the introduction, the ideas of the early twentieth century drug prohibitionists continue to inform the assumptions that underpin contemporary international laws on drugs and to a certain extent, even the terms in which drug law reform is being advocated for. Those presumptions must be unpacked along with the laws themselves. Without the work of this deep theoretical mining, much like Michelle Alexander has warned regarding policy-focused attempts to reform the drugs laws in the American domestic context, the violence of the drug war at the international level may not disappear with end of the drug war but instead be transferred into a new vehicle for legalised, racialised violence.

Towards Ending the Drug War

‘Let us then do away with this law which the history of conventions and of ethical norms has so deeply inscribed in the concept of ‘drugs’.’
Jacques Derrida⁶

As stated in the introduction, the philosophical notion of ‘sacrifice’ I have

⁶ Jacques Derrida, ‘The Rhetoric of Drugs: An Interview’, 5 *Differences: A Journal of Feminist Cultural Studies* 5, 1 (1993), pp.1-25.

advanced in this thesis is reliant on the construction of sacrificial victims as not victims but legitimate targets, or at the least a necessary cost in the production of order. However, the early twenty-first century has been marked by a growing recognition of the innocence of many of those who have been killed, imprisoned or displaced by the War on Drugs. Voices from the Latin American region have, understandably, been amongst the loudest calling for reform of the international laws on drugs. The Latin American Commission on Drugs and Democracy report in 2009 declared the War on Drugs a failure. Moreover, in 2012, the presidents of Colombia, Guatemala and Mexico issued a formal statement calling for a review of all drug policies, and in 2013 the Organisation of American States published the first ever inter-governmental report entertaining the possibility of future legal regulation of drugs. This trend reached its apotheosis in December 2013 when Uruguay became the first nation-state since the implementation of the *Single Convention* to legislate for the legal production, distribution and possession of cannabis.

A symbolic moment in the shift away from the drug war came in March 2009, at the 52nd session of the United Nations Commission on Narcotic Drugs (CND). Bolivian President Evo Morales travelled to Vienna to petition for the removal of the raw coca leaf from schedule 1 of the drugs that are prohibited by *the Single Convention*. In the midst of his speech calling for support for Bolivia's initiative, Morales pulled out a coca leaf. Holding it up for the audience to verify, he then placed the prohibited substance into his mouth. He continued with this speech while chewing the coca leaf, critiquing "the socio-cultural projections" that resulted in the suppression of the chewing of coca in international law. Placing the blame firmly at the door of the law, Morales condemned the *Single Convention* as 'an attack on the rights of indigenous peoples'. He also decried the drug treaty for contradicting the new Bolivian constitution, which enshrined that 'the State protects the native and ancestral coca as cultural patrimony, as a renewable natural resource of the biodiversity of Bolivia, and as a factor of social unity.'⁷ Furthermore, Morales declared that United Nations Office of Drugs and Crime Executive Director Antonio Maria Costa, seated in the audience, should, by law, take him to jail for what he is doing in an attempt to render visible the violent absurdity of the drug laws. "I am a producer of the coca leaf," he cried out "I am a consumer of the coca leaf. The coca

⁷ Article 384, Constitution of Bolivia,
<https://www.constituteproject.org/constitution/Bolivia_2009.pdf> [accessed 9 March 2017]

leaf represents the culture of the people of the Andean region.”⁸

Following the failure to win support in 2009, Evo Morales’ Bolivia exerted further pressure on the international community by withdrawing from *the Single Convention* in 2011 and only re-adhering to it once a new reservation allowing for the traditional uses of the coca leaf was implemented in 2013. Bolivia’s ability to unilaterally withdraw from the convention and then re-enter as a party on its own terms. I would argue that Evo Morales, not only intervened at the CND as a head of state but he also embraced the subject position of the racial subaltern subject. As the first indigenous Amerindian President of his country Evo Morales has been read as a global/historical political figure that cannot be comprehended outside of a consideration of ‘raciality and indigeneity’ and the significance of his election has been taken to form a challenge to the persistent coloniality of world ordering.⁹ For Denise Ferreira de Silva, Morales functions as ‘an indigenous, racial, peasant...[who]...refigures past and present deployments of physical and symbolic violence that now configure the globe as a political space. That is, he exemplifies the radical political subject and the global subaltern (indigenous/racial) entity, which have been assembled by the threads of previous global/historical (colonial, national) moments.’¹⁰ Following the argument I have laid out over the course of this thesis, a reading of the War on Drugs as indebted to the sacrifice of the negated sub-human as embodied by the racial subaltern subject, Morales’ performance carries weight as a return of the Amerindian, the victim of Vitoria’s inclusive/exclusion at the very birth of international law, back into the realm of the universal on its own terms. The twenty-first century intervention of an Amerindian president at the CND challenged not only the Single Convention but also the geo-temporality presumed within international law. For Morales to interject his raciality and Amerindian indigeneity into the domain of universal, is to challenge the stunted universalism that has been acclaimed by a ‘sacrificial’ international law. As Oscar Guardiola-Rivera tells us:

Following Evo’s election, indigenous and peasant memory and knowledge has become a political force to be reckoned with, regionally and worldwide. It is as if, five hundred years after the genocide that took

⁸ See Evo Morales (2009), Speech at the CND, <<https://www.youtube.com/watch?v=FzuL5vHLMpA>> and <<https://www.youtube.com/watch?v=Ilz6WzdaP14>> [accessed 9 March 2017].

⁹ See Denise Ferreira da Silva, ‘An Outline of a Global Political Subject: Reading Evo Morales’s Election as a (Post-) Colonial Event’, *Seattle Journal for Social Justice*, 8, 1 (2009), pp.25-49.

¹⁰ Denise Ferreira da Silva, p.38.

place in the Americas, we have all been given a second chance. Perhaps now, when the Indians of the Andes and the Amazon speak, we will listen.¹¹

Michelle Alexander has illustrated how the laws on drugs are linked to a lineage of racialised, legal violence in America and that to address the issue of this violence, changes would be required of not only the drug laws but also the given order of the U.S.A as a whole. The same is applicable to the international community. Despite an acclaimed equality amongst all peoples as its foundation, international law in the twentieth century anchored a universalising notion of humanity on assuming a conceptualised sub-human as its enemy. With sub-humanity still encapsulating ideas regarding race and geography, even in this post-colonial world, the bodies of particular peoples continue to signify this enemy. Therefore, the potential for drug prohibition, as a legal project directed against the ‘evil’ of sub-humanity, to impact asymmetrically upon the bodies of racial subaltern subjects was always already present within the laws themselves. However, as argued in *Chapter Eight*, this structure of international law is disintegrating, with international drug prohibition disintegrating along with it. If drug policy reform aims to ensure that the current violence of the drug war is not repeated in a new form, it will require not only a change in law but also a wider reconfiguration of the relation between international law’s use of violence and the people who are subjects of that violence. This would be the starting point towards developing any non-sacrificial international law.

¹¹ Oscar Guardiola-Rivera, *What If Latin America Ruled the World? How The South Will Take The North Through the 21st Century* (London: Bloomsbury, 2010), p.425-426.

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