FOREIGN PRINCES IN FAR OFF LANDS: A BRIEF HISTORY OF HOW INTERNATIONAL LAW GOVERNING MERCENARIES HAS AIDED COLONIAL AND NEO-COLONIAL EXPLOITATION OF 'UNCIVILISED' NATIONS

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Introduction

The term "mercenary" carries with it an implication of moral bankruptcy matched by few other rubrics of international law. Terrorists, at least, are moved ultimately by a desire to achieve some ideological goal: that is to say, it is their violent means, not necessarily their aims, which are deplorable. Mercenaries peddle this same violence but for their own personal gain.

Yet mercenaries have not always carried with them this cultural capital. As this paper will show, while mercenaries have fought around the world for over 3000 years, their treatment by international law has varied greatly over the last 300, and most particularly over the last 60 years. It is the argument of this article, however, that this variation has been by no means the result of chance or the random shifting of attitudes or legal norms over time. Rather, this article will argue that the way international law has applied to mercenaries and, what may or may not be viewed as their modern manifestation, private military companies, reflects what Antony Anghie has termed "the civilising mission" of international law.

To do this, Part A will begin by examining Anghie's hypothesis that international law absorbs and reifies the division between self and other – between the civilised and the barbarian. Then, in Part B, the paper will examine the way international law governed mercenaries prior to 1907. This Part will show that, while a norm against mercenary use may have crystallised by the beginning of the twentieth century, this did little to prevent European powers from hiring soldiers to further

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colonial aims away from the European continent. Part C will track the strengthening of an international prohibition on mercenary use during the period of African decolonisation, led predominantly by those African countries against which mercenaries had been used to thwart self-determination and strong nationhood. This part will also show, however, how deference to the interests of powerful, European, and civilised states endowed this norm with a number of fatal inherent weaknesses. Finally, in Part D, the article will examine the most recent and controversial development in this area of law – private military companies – and will argue that their tacit legitimisation, as well as the prevailing argument that these companies are not affected by anti-mercenary laws, reflects the continuing colonial undercurrents that Anghie sees ever-present in international law. In the article's concluding remarks, I will reflect upon what this analysis tells us more broadly about Anghie's theory of international law's civilising mission.

A. Anthony Anghie

Anghie's claim is that the "colonial confrontation" was and is central to the formation of international law.[1] He develops his argument in the following way. While international law claims to be universal, authoritative, and advanced, in reality it is predicated on an implicit division between those who are civilised and those who are not: between the European and non-European worlds.[2] This perceived cultural difference animates what Anghie terms the "civilising mission":[3]

> [T]he grand project that has justified colonialism as a means of redeeming the backward, aberrant, violent, oppressed, undeveloped people of the non-European world by incorporating them into the universal civilization of Europe.

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[1] This argument can be found in a number of pieces of Anghie's work. See e.g. Antony Anghie "Colonialism and the Birth of International Institutions: Sovereignty, Economy, and the Mandate System of the League of Nations" (2001–2002) 34 NYU J Int'l L & Pol 513 ["Birth of International Institutions"]. However, this central thesis can also be found in Antony Anghie *Imperialism, Sovereignty and the Making of International Law* (Cambridge University Press, Cambridge, 2005) ["*Making of International Law*"] and several other articles, which will be cited as appropriate.

[2] Anghie, Birth of International Institutions, ibid 518–519.

[3] Anghie *Making of International Law*, above n 1, 3.

The civilising mission leads jurists to create legal doctrines that seek to overcome this dichotomy and achieve uniformity and universality. It is this process, this "dynamic of difference", that lies behind many of the central doctrines and structures of international law.[4] For Anghie, therefore, the economic exploitation, territorial dispossession, and cultural subordination – understood to be an inevitable part of the colonising methodology – cannot be considered to be "epiphenomenal aberrations in the international system that were remedied by the project of decolonisation and self-determination".[5] To the contrary, they endure in contemporary international relations and serve to generate the categories of analysis that crucially affect our understanding of the international legal system.[6]

B. Mercenaries and International Law to 1907

In 1294 BC, Ramses II led an army of mostly Numidian mercenaries[7] in the Battle of Kadesh.[8] Nearly a thousand years later, when Alexander the Great crossed the Hellespont to invade Persia, he did so with an army in which one-third, 11,900 men, were mercenaries, mainly foot soldiers.[9] More recently – that is, in this millennium – Britain used 18,000 Hessian mercenaries during the United States War of Independence.[10] Indeed, hired soldiers have been an indispensable part of many armies throughout recorded history. Neither is the concept of private, hireable companies of military skill a recent invention. In medieval Europe "free companies" of soldiers were formed with the aim of making profit,[11] while in the subsequent era of mercantile imperialism, corporations such as the Dutch East India Company

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[4] Ibid 4.
[5] Anghie, Birth of International Institutions, above n 1, 518.
[6] Ibid.
[7] The definition of "mercenary" is a central point of contention in this area of law, and during the course of this paper this debate will be elaborated upon. At present, it is sufficient to note that the Oxford English Dictionary defines mercenary as a "hired soldier in foreign service" and it is on this general proposition that the article will proceed.
[8] Major Todd Milliard "Overcoming Post Colonial Myopia: A Call to Recognize and Regulate Private Military Companies" (2003) 176 Mil L Rev 1, 2.
[9] Ibid.
[10] Juan Carlos Zarate "The Emergence of a New Dog of War: Private International Security Companies, International Law, and the New World Disorder" (1998) 34 Stan J Int'l Law 75, 82.
[11] Ibid 83.

fielded private fleets and armies to protect their own economic interests.[12] It was not until the middle of the 19th century that military knowledge and labour were seen as anything other than a freely alienable commodity in an international market;[13] only with the rise of the notion of nation-state sovereignty, and the establishment of national standing armies, was it considered objectionable for a person to fight for a foreign power.[14] The nation-state construct allowed governments to be held accountable for the coercive extra-territorial activities of their "citizens", and the sudden strength of the link between an individual and his or her land of origin threatened to draw states into foreign wars in which "their" mercenaries were involved.[15] Consequently, recruiting mercenaries within the borders of a state was seen as an attack on sovereignty itself.[16] To counter this, states began to pass neutrality laws, which prevented the recruitment of their citizens to foreign military forces.[17] The United States promulgated the first of these laws in 1794,[18] the same year that it signed the Jay Treaty with Great Britain,[19] which prohibited nationals of each state serving in the foreign armies at war with the other.[20] Hand in hand with the perceived threat to state sovereignty and legitimacy posed by uncontrollable private military corporations, this saw the use of mercenaries between European nations gradually diminish.[21]

The writings of various international legal publicists over this time document these changes. Vitoria was of the opinion that those who were prepared to fight for pay, not caring whether the war was just or

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[12] Ellen Frye "Private Military Firms in the New World Order" (2005) 73 Fordham Law Review 2608, 2618.

[13] Montgomery Sapone "Have Rifle with Scope, Will Travel: The Global Economy of Mercenary Violence" (1999) 30(1) Cal W Int'l L J 1, 10.

[14] Milliard, above n 8, 6.

[15] Sapone, above n 13, 30.

[16] Ibid.

[17] Ibid 29.

[18] Neutrality Act 1794 ch 50 § 5, 1 Stat 381 (US). Congress later repealed this Act in 1818; however, concern over citizen involvement in the Spanish Civil War led to a second Neutrality Act being passed in 1935.

[19] Opened for signature 19 November 1794, TS 105 (entered into force 29 February 1796).

[20] H C Burmester "The Recruitment and Use of Mercenaries in Armed Conflicts (1978) 72 Am J Int'l L 37, 42.

[21] Christopher Lytton "Blood for Hire: How the War in Iraq has Reinvented the World's Second Oldest Profession" (2006) 8 Or Rev Int'l Law 307, 308.

not, committed a mortal sin, not only where they were actually went to battle, but also whenever they were thus willing.[22] However, this moral issue had largely disappeared by 1737, when Bynkershoek argued that there was no difference between the hire of mercenaries and any other contract.[23] Even by the latter part of the 19th century there were few objections: writing in 1863 Twiss saw no problem in allowing recruitment on neutral territory if that territory allowed it,[24] and in 1888 Calvo countenanced the employment of foreign troops assimilated into a national army.[25] Yet, by the early 20th century, there was a perceived difference between active participation in recruitment and a duty to prevent individual citizens leaving national territory to recruit abroad. It was this distinction that was drawn in the Hague Conventions of 1907 – the first international attempt to regulate mercenary activity. Article 4 of the Convention Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land ("Hague V")[26] prevented corps of combatants being formed or recruiting agencies being opened on neutral territory to assist belligerents. Article 6, however, denied that states had any duty to prevent individuals crossing their frontier separately to offer their services to one of the belligerents. Therefore, Hague V only affected mercenaries to the extent that a state implemented its obligations as a neutral.[27]

Frédéric Mégret has followed a similar path of analysis to Antony Anghie, but has focused more specifically on international humanitarian law ("IHL") (known also and equally as the law of armed conflict).[28] His work is a useful entry point to any post-colonial critique that may be developed. Mégret's view is that the laws of war have acted as one of the foremost instruments of forced socialisation of

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[22] F Vitoria *De Bello* art I § 8 quoted in H C Burmester above n 20, fn 12.
[23] Burmester, above n 20, 41.
[24] Travers Twiss *The Law of Nations Considered as Independent Political Communities* (Clarendon Press, Oxford, 1863) 456.
[25] Burmester, above n 20, 41.
[26] Opened for signature 18 October 1907, TS 540 (entered into force 26 January 1910) ("Hague V").
[27] Milliard, above n 8, 21. These articles were only agreed after a German proposal, which would have had belligerent states prohibited from accepting the service of foreigners, was rejected.
[28] See Frédéric Mégret "From 'savages' to 'unlawful combatants': a postcolonial look at international humanitarian law's 'other'" in Anne Orford (ed) *International Law and its Others* (Cambridge University Press, Cambridge, 2000).

non-European states into the international community.[29] The requirements that these laws impose is the product of a Western fantasy about how wars should be waged:[30]

> [A]nalogously constituted armies: adversaries rather than enemies, endowed with the same military ethos and mores, and who fundamentally situate their violence in the context of the exercise of sovereign prerogatives.

In the face of "*levee en masse*, spontaneous resistance under occupation and the use of guerrilla tactics from South Africa to Cuba", the laws of war worked to consolidate the state's monopoly on the use of violence.[31] A further important, and related, point to note is that until the 1910s, and even the 1920s, these rules were thought simply not to apply to non-Europeans.[32] From a formalistic point of view, this was because these laws applied only between those states parties that ratified the constituent agreements, something from which non-civilised nations were excluded because they were not considered sovereign.[33] An anthropological rationale lay in the belief that the "savages" of Asia and Africa were not capable of showing restraint in battle: they were not capable of waging "civilised warfare". Obviously, therefore, it was impossible to wage "civilised warfare" against them.[34]

Accepting Mégret's argument means that, from the start, the body of international law that has regulated hired military skill has been complicit in a civilising and universalising mission. It comes as little surprise, therefore, that in spite of whatever code against the use of mercenaries may have developed between European states by the 19th century, these powers freely hired foreigners to wage war extra-continentally.[35] While the 1854 Crimean War is the most frequently given final instance of a European state (Great Britain) raising an army of foreigners to fight on European soil,[36] only twenty years previously King Louis of France established the Légion Étrangère (the French

[29] Ibid 308.
[30] Ibid 307.
[31] Ibid 305.
[32] Ibid 279.
[33] Ibid 284–286.
[34] Ibid 289–295.
[35] Zarate, above n 10, 86.
[36] Ibid.

Foreign Legion) referring to "the traditions of foreign troops who have served France since the Middle Ages".[37] Similarly, the British established the equally famous Brigade of Gurkhas after defeating these Nepalese fighters in 1816.[38] With the former used extensively in Africa and Indochina,[39] and the latter serving in Burma, China, India, and Malaya, among many others,[40] both of these forces were means by which foreign soldiers could further imperial aims in colonial battles. Yet, while the argument above is an important setting and beginning for this discussion, the intention of this article is to search for colonial structures beyond this. That international law endorsed the exploitation and conquest of non-European peoples, prior to the 20th century, is unsurprising because during this time it did not claim to be truly open or universal: it palpably distinguished between the "civilised", which it would protect, and the "uncivilised" that it would not. The focus of this article is, rather, on the period following the process of decolonisation, for it was after this that a more powerful argument regarding the universality of international law was made – that it was "not merely equally applicable to all societies, but that all societies participated on equal terms in its formulation".[41] In this next part, therefore, the focus will be on the specific laws and conventions applied to mercenaries since the latter half of last century.

C. Mercenaries and Decolonisation

Decolonisation led to a mercenary renaissance. From the 1960s onwards, colonial powers used mercenaries against national liberation groups in the third world, almost exclusively in Africa.[42] The use of mercenaries by the Katanga secessionists in the Congo from 1960 to 1963, and, subsequently, by the Tshombe and Mobutu governments against the Simbas from 1964 onwards, was supported by missions sent to Belgium and France in 1960, and the opening of recruiting offices in South Africa in 1961.[43] The United Nations ("UN") condemned Portugal, too, for allowing foreign mercenaries to use Angola as a base

[37] Frye, above n 12, 2617.
[38] Zarate, above n 10, 86.
[39] Ibid.
[40] Frye, above n 12, 2617.
[41] Anghie, "Birth of International Institutions", above n 1, 517.
[42] Frye, above n 12, 2625–2626.
[43] Burmester, above n 20, 48.

for this interference in the Congo's internal affairs.[44] The French Secret Service recruited 53 French and German mercenaries to aid the unsuccessful secessionist attempt by Biafra, from Nigeria, in 1967,[45] while the Rhodesian government recruited British mercenaries to support white minority rule.[46] There are suggestions also that the United States' Central Intelligence Agency ("CIA") might have covertly funded the mercenaries subjected to the infamous Luanda trial of 1976,[47] something made more believable by the fact that the agency aided recruitment for Tshombe's government in the Congo between 1964 and 1965.[48]

The period of decolonisation also opened the door to increased participation in international law by newly independent states, which, for example, quickly ratified the Geneva Conventions.[49] While the colonial powers attempted to avoid discussing the issue, second and third world countries were successful in pressuring the UN to confront the mercenary problem, especially given the number of countries in which mercenaries operated and the notoriety that they enjoyed for the brutality of their actions.[50] In 1968, the General Assembly ("GA") adopted Resolution 2465, the Declaration on the Granting of Independence to Colonial Countries and Peoples, by 53 votes to 8, with 43 abstentions.[51] The resolution included the following:[52]

> [T]he practice of using mercenaries against movements for national liberation and independence is punishable as a criminal act and ... mercenaries themselves are outlaws.... Governments of all countries [should] enact legislation declaring the recruitment, financing and training in their territories to be a punishable offence and prohibiting their nationals from serving as mercenaries.

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[44] See e.g. SC Res 241 22 SCOR, 1378th Meeting, UN Doc S/RES/241 (1967).
[45] House of Commons *Private Military Companies: Options for Regulation: HC 577* (2002) 29.
[46] Ibid.
[47] Sarah Percy "Mercenaries: Strong Norm, Weak Law" (2007) 61 International Organization 367, 373.
[48] House of Commons, above n 45, 28.
[49] Mégret, above n 28, 296.
[50] Zarate, above n 10, 128.
[51] GA Res 2465, UN GAOR, 23rd sess, Supp No 18 at 4, UN Doc A/7218 (1968).
[52] Ibid [8].

This resolution was not indicative of an existing international or domestic crime of mercenarism, an observation that leads Milliard to conclude that it was a principle promoted by some UN member states in the hope that it would eventually become, through state practice, customary international law.[53] The fact it received only slightly more than half the votes in the General Assembly at the time supports this.[54]

In contrast, the GA adopted Resolution 2625 by consensus in 1970.[55] This differed from Resolution 2465 in three ways: it did not refer to individual mercenaries as criminals per se; it did not limit itself to national independence and liberation movements; and rather than prohibiting states from knowingly tolerating mercenary activities that led to incursions into other states, it proscribed their organisation or encouragement.[56] It thus was a retreat from the position stated in Resolution 2465: not only did it lack its political overtones, but also it was consistent with the principles enunciated in Hague V. These two factors are credited with the Resolution's unanimous acceptance.[57] Three years later, however, Resolution 3103 returned to these earlier themes, declaring the use of mercenaries by colonial and racist regimes a criminal act and mercenaries punishable as criminals.[58] This was passed by 83 votes to 13, with 19 abstaining.[59]

These resolutions could not modify the rules of the Geneva Conventions signed in 1949. Neither was subsequent state practice sufficiently uniform to suggest that a customary law rule had evolved as a result. Nevertheless, writing in 1980, Cassese concluded that the resolutions, insofar as the non-European states managed to gain acceptance of their view from numerous others, could be viewed as laying the foundations for an adequate modification of the relevant international law.[60]

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[53] Milliard, above n 8, 26. This is to say it was a *de lege ferenda* principle, as opposed to a *de lege lata* principle that represents an emerging customary law rule.
[54] Antonio Cassese "Mercenaries: Lawful Combatants or War Criminals" (1980) 40(1) ZaöRV 1, fn 23.
[55] GA Res 2625, UN GAOR 25th sess, Supp No 28, at 123, UN Doc A/8028 (1970).
[56] Ibid.
[57] Milliard, above n 8, 27.
[58] GA Res 3103, UN GAOR 28th sess, Supp No 30, at 142, UN Doc A/9030 (1973).
[59] Ibid.
[60] Cassese, above n 54, 11.

In 1963, newly independent African states formed the Organisation of African Unity ("OAU"), which at that time was the world's largest regional grouping.[61] Its charter elevated state sovereignty, calling for the inviolability of national borders and denouncing uninvited interference in member states' internal affairs.[62] Given this, it did not take long before it looked to confront the destabilising effect of mercenaries. In 1971, the OAU issued a declaration stating that foreign domination in some African states enabled mercenaries to operate, and that their liberation was an essential factor in eliminating mercenaries from the continent.[63] The following year it produced the Draft Convention for the Elimination of Mercenaries in Africa ("Draft Convention").[64] The text's intention was to criminalise mercenarism and mercenary recruitment. It also defined mercenarism, without reference to motivation, to cover anyone who was not a national of the state against which the actions were directed, and who was employed, enrolled or linked themselves willingly to a person, group or organisation whose aim was to overthrow a government of a member state, undermine the independence of a member state, or to block the activities of a liberation movement recognised by the OAU.[65] In this way, it "correctly identif[ied] what needed to be proscribed"[66] and "define[d] mercenaries narrowly according to their purpose."[67] The Draft Convention also did not address mercenary status under the laws of war.[68] In 1976, the International Commission of Inquiry on Mercenaries, created by the Angolan government, issued its own draft convention.[69] During this time, 13 foreigners were on trial in Luanda, Angola, for mercenary activity, and it was this politically charged atmosphere that incubated the agreement, something that has led to it being roundly criticised.[70] It, too, declared mercenarism to be an

[61] Milliard, above n 8, 43.
[62] Charter of the Organisation of African Unity, opened for signature 25 May 1963, 479 UNTS 39 (entered into 13 September 1963).
[63] OAU Declaration on the Activities of Mercenaries in Africa, OAU Doc CM/St 6(XVII) (1971) cited in Milliard, above n 8, 45.
[64] OAU Doc CM/433/Rev L Annex I (1972) ("Draft Convention").
[65] Ibid art 1.
[66] Milliard, above n 8, 43.
[67] House of Commons, above n 45, 7.
[68] Milliard, above n 8, 46.
[69] Frye, above n 12, 2629.
[70] Milliard, above n 8, 47–52.

international crime and an obstacle to self-determination, and called on states to prevent it from occurring within their jurisdiction.

The next important step came at the Diplomatic Conference on the Reaffirmation and Development of International Law Applicable in Armed Conflicts, the ultimate result of which was, in 1977, to add a protocol to the Geneva Conventions of 1949 ("Protocol I").[71] Article 47 of this protocol covered the activities of mercenaries, and resulted from a proposal of the Nigerian delegation in 1976. Article 47(1) denied mercenaries the rights of combatant or prisoner of war status, something African states had fought hard for throughout the conference.[72] However, its effect is largely neutralised by the definition found in art 47(2):

> **2. A mercenary is any person who:**
> (a) Is specially recruited locally or abroad in order to fight in an armed conflict;
> (b) Does, in fact, take a direct part in the hostilities;
> (c) Is motivated to take part in the hostilities essentially by the desire for private gain and, in fact, is promised, by or on behalf of a Party to the conflict, material compensation substantially in excess of that promised or paid to combatants of similar ranks and functions in the armed forces of that Party;
> (d) Is neither a national of a Party to the conflict nor a resident of territory controlled by a Party to the conflict;
> (e) Is not a member of the armed forces of a Party to the conflict; and
> (f) Has not been sent by a State which is not a Party to the conflict on official duty as a member of its armed forces.

Article 47, therefore, embodies the intention, on the part of African and Socialist states, to equate mercenaries with war criminals and deprive them of any legal protection.[73] Yet, at the behest of Western states, it neither makes mercenarism a crime nor prohibits the recruitment, training, or financing of mercenaries.[74] Further, art 47(2) is cumulative, and because each criterion must be satisfied, the

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[71] Protocol additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, opened for signature 8 June 1977, 1125 UNTS 3 (entered into force 7 December 1979)("Protocol I").
[72] Fris Kalshoven and Liesbeth Zegveld *Constraints on the Waging of War: An Introduction to International Humanitarian Law* (3rd ed, ICRC, Geneva, 2003) 90.
[73] Cassese, above n 54, 28.
[74] Ibid.

definition is exceedingly narrow.[75] It is also widely regarded to be so flawed as to be unusable, for well-known reasons.[76] The financial motivation at the heart of the definition is at best difficult, and at worst impossible, to prove. Paragraph 2(e), furthermore, allows states to incorporate mercenaries into their own armed forces and avoid liability.[77] Ultimately, therefore, art 47 did not serve to suppress the use of mercenaries, but merely provided options for states that wish to do so.[78] Cassese's assessment is both apt and eloquent:[79]

> Incompleteness, reticence, ambiguity—this is the price that must be paid ... to the forces in favour of the *status quo* and the protection of vested interests.

Less than a month after Protocol I opened for signature, the OAU issued its Convention for the Elimination of Mercenarism in Africa ("OAU Mercenary Convention").[80] It abandoned the more considered language of the 1972 Draft Convention, instead referring to "colonial and racist domination"—language that also appears in the general provisions of Protocol I.[81] Further, while it adopted the problematic definition of mercenary found in Protocol I,[82] it also incorporated the crime of mercenarism adopted by the Luanda Convention.[83] This could perhaps be indicative of the disappointment of OAU members with the result of the international negotiations. Certainly, it was in response to these member states' dissatisfaction with the limited curtailment of mercenary activities that, in 1980, the GA created an ad hoc committee with the responsibility for drafting an international mercenary convention.[84]

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[75] Percy, above n 47, 377.
[76] House of Commons, above n 45, 8.
[77] Percy, above n 47, 377.
[78] Lindsey Cameron "Private Military Companies and their Status under International Humanitarian Law" (2006) 88(863) International Review of the Red Cross 573, 579.
[79] Cassese, above n 54, 28.
[80] Opened for signature 3 July 1977 OAU Doc CM/817 (XXIX), Annex II Rev I (entered into force 22 April 1985) ("OAU Mercenary Convention").
[81] Milliard, above n 8, 52.
[82] OAU Mercenary Convention, above n 80, art 1(1).
[83] Ibid art 1(2).
[84] Milliard, above n 8, 65.

Not until 1989, however, did the GA adopt and open for signature the Convention against the Recruitment, Use, Financing and Training of Mercenaries.[85] It adopted nearly entirely the definition of art 47(2) of Protocol I, but also included a complementary definition in art 1(2), which states that a mercenary is, in any other situation, a person recruited to overthrow a government or undermine the territorial integrity of the state. In all likelihood, this was added to protect the fragile sovereignty of nascent African states, at the expense of the groups of irregular forces still vying for power within them.[86] A similar concern is evident in the OAU Mercenary Convention.[87]

The UN Convention imposes criminal liability on mercenaries and those who recruit them.[88] It also imposes on states an affirmative obligation to "prohibit" these activities generally and "prevent" them if they oppose a self-determination movement.[89] Finally, for the first time, States Parties are prohibited from directly or indirectly using mercenaries.[90] Therefore, it would seem that the concerns of the African states, evident in Resolution 2465, and the OAU and Luanda Conventions, largely found protection in international law. However, as this article will show, the colonial drive Anghie identifies has by no means been exorcised from the law in this area.

D. Private Military Companies

The resistance of Western states to the proposals for mercenary regulation was to be expected. Mercenaries were, for some time, a means by which colonial powers could delay progress towards African self-determination, often in furtherance of the aim of economic exploitation.[91] Yet, as reports of mercenary brutality emerged, and the former colonies were able to win support for their plight internationally, both ideological and legal norms hardened against any link to mercenary activity. The reason mercenaries were to be regulated

[85] Opened for signature 4 December 1989, A/Res/44/34 (entered into force 20 October 2001) ("UN Mercenaries Convention").
[86] Milliard, above n 8, 62.
[87] Zarate, above n 10, 125.
[88] UN Mercenaries Convention, above n 85, arts 2–4.
[89] Ibid art 5.
[90] Ibid.
[91] Frye, above n 12, 2623; House of Commons, above n 45, 15–16.

lay in the fact they did not fight for an "appropriate cause" – they were motivated by money, rather than by patriotism or ideology – and so their actions were to be viewed as immoral, dangerous, or both.[92] Further, they were unaccountable: they operated outside any type of legitimate (that is, state-administered) authoritative control.[93] The relevant legal instruments reflect these fears.[94]

Yet, from the early 1990s, an ostensibly new phenomenon confronted international legal discourse on the subject of mercenaries: the Private Military Company ("PMC").[95] This term was and is understood to cover a number of different profit-orientated entities that offer military services.[96] And it was these companies that became the predominant form of hired military skill active in non-European countries. The best-known example is that of the South African firm "Executive Outcomes" ("EO"). The Angolan government hired this PMC, first to secure an oil field owned by Western oil companies and, second, to train government troops attempting to suppress rebel movements inside the country.[97] EO brought with them infrared capabilities, advanced communications, not to mention Mi-8, Mi-17, and Mi-17 gunships, and was widely credited with regaining territory with mineral wealth and forcing the rebel movement to agree to the UN-brokered Lusaka Protocol of 1995.[98] After this success, the Sierra Leonean Government hired EO for roughly the same purposes.[99] Another commonly cited example is Military Professional Resources ("MPRI"), a United States company with strong links to its national military. MPRI was hired by the Croatian Government to improve the capabilities of its armed forces in 1995, and, that year, Croatian forces performed unexpectedly well in "Operation Storm" – an offensive against Serb forces in the Krajina region.[100] Demand for PMCs

[92] Percy, above n 47, 371.
[93] Sarah Percy "This Gun's for Hire: A New Look at an Old Issue" (2003) 58 Int'l J 721, 736 ["This Gun's for Hire"].
[94] Percy, above n 47, 379–380.
[95] Zarate, above n 10, 75–76.
[96] PW Singer "War, Profits, and the Vacuum of Law: Privatized Military Firms and International Law" (2004) 42 Colum J Transnat'l L 521, 522. Note that this, too, is a vexed definition and the interpretation given to it in this article is a broad one.
[97] House of Commons, above n 45, 11.
[98] Zarate, above n 10, 94–95.
[99] House of Commons, above n 45, 12.
[100] Sapone, above n 13, 25.

exploded with operations in Iraq and Afghanistan, with an estimated 20,000 to 30,000 PMC employees in Iraq making them the second largest contingent in the country after the United States Army.[101]

The obvious question attached to the rise of PMCs and their operation in numerous countries all round the world is why they are neither prohibited nor even regulated by international law. After all, they and their employees would seem to meet the definition of forces foreign to a conflict that engage in warfare with the object of private gain. Their theatres of operations would appear also to encompass many, if not most, of the states and territories in which mercenaries were most active and considered the most problematic.[102] Yet the use of PMCs is widespread because international law has not evolved to meet the challenges that their operations pose.[103] It is the hypothesis of this article that Anghie's thesis, detailed above, is capable of explaining this lacuna.

The first point to address is why the services of PMCs are in such demand. While they are an "overwhelmingly Western phenomenon",[104] most of their work takes place in weak and non-European states.[105] And it is not just military operations conducted openly by Western governments, such as the imposed change to a democratic regime in Iraq, that rely on PMC assistance. Both the United Kingdom and the United States have long been prominent users of private contractors to execute foreign policy in parts of the world where they would prefer not to be seen.[106] Added to this must be the strong links between PMCs and the governments and militaries of their home states, especially given the fact that PMCs usually include former members of national armed forces or intelligence services.[107] Further, while PMCs commonly claim to work for legitimate governments only, and thus not

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[101] E L Gaston "Mercenarism 2.0? The Rise of the Modern Private Security Industry and Its Implications for International Humanitarian Law Enforcement" (2008) 49 Harv Int'l LJ 221, 223.
[102] Zarate, above n 10, 140–141; Sapone, above n 13, 19.
[103] Percy, above n 47, 368.
[104] House of Commons, above n 45, 12.
[105] Frye, above n 12, 2646.
[106] Geneva Centre for the Democratic Control of Armed Forces *Privatising Security: Law, Practice and Governance of Private Military and* Security *Companies: Occasional Paper 6* (2005) 72 ["GDAF"].
[107] Ibid.

rogue states with suspected links to terrorism like Sudan, or patently unpopular regimes like Mobutu's in Zaire,[108] there are suggestions that this, in fact, may not be the case.[109] In any event, it will be these companies' home states and media that will be the arbiter of which governments are "legitimate" and thus influence those clients PMCs choose to serve. Yet, it is not just by allowing Western states to give military support to its chosen causes that PMCs help perpetuate imperialism. Anghie has argued that the Mandate System heralded a transition from a formal system of colonialism to a "more elusive but nonetheless powerful system of neo-colonialism based on economic control",[110] and, similarly, it is these concerns that are raised by the use of PMCs in third world states, even from within the UN.[111] The Special Rapporteur on the Use of Mercenaries has noted the way that PMCs take advantage of their connections with multinationals – oil, mineral, chemical companies among others – and use their military resources to establish an "economic and financial hegemony of their business partners ... pav[ing] the way for the multinational neo-colonialism of the twenty-first century".[112] The House of Commons has labelled it "striking" that the countries in Africa with readily available mineral wealth are PMCs' greatest employers.[113] Moreover, many analysts have noted EO's close connections with the Branch-Heritage group: a group of companies with interests in energy and mining.[114] This group secured concessions to oil blocks in Angola and diamond blocks in Sierra Leone following EO operations in each of these states.[115] The cost for developing countries in consolidating self-government is to make such government subservient to the corporate interests of the developing world, a move that does not ameliorate the threat to these states' sovereignty but rather shifts and exacerbates this threat to and at the economic level. In short, therefore, PMCs are used

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[108] Zarate, above n 10, 94.
[109] Ibid 101.
[110] Antony Anghie "Time Present and Time Past: Globalization, International Financial Institutions, and the Third World" (2000) 32 NYU J Int'l L & Pol 243, 277 ["Time Present and Time Past"].
[111] Enrique Bernales Ballestros *Report on the Question of the Use of Mercenaries as a Means of Violating Human Rights and impeding the Exercise of the Right of Peoples to Self-Determination* UN ESCOR, 53rd sess, UN Doc E/CN.4/1997/24 (1997).
[112] Ibid [109].
[113] House of Commons, above n 45, 16.
[114] Zarate, above n 10, 100.
[115] House of Commons, above n 45, 16.

overwhelmingly to further the aims of Western powers in poor, non-Western countries. Often this will be in a manner that bypasses the democratic and electoral controls that otherwise serve to regulate initiatives of foreign policy.

Anghie notes too that these techniques of control and management are justified by the formulation of a new and comprehensive moral framework "based on a proper understanding of universal laws on how 'development and welfare' may be achieved".[116] In this context, what is conspicuous is that the moral concern that mercenary activity raised – the precept that it is wrong for strangers to a conflict to seek profit from it – is absent from the discourse surrounding PMCs. Rather, EO claimed that it was "trying to aid growth and democracy by bringing stability and foreign investment".[117] This is a common argument raised in favour of PMCs: many claim that they are vital to upholding the sanctity of developing nation states by safeguarding the rule of legitimate but weak and challenged governments,[118] and, further, that any possible blanket ban could imperil these states' inherent right to self-defence enshrined in art 51 of the UN Charter.[119] Another example can be found in the suggestion, with regard to the recent "rent a coup" episode in Equatorial Guinea involving the South African "Logo Logistics" firm, that although the firm may have fronted for outside interests in the profit-motivated toppling of a government, the results of the coup may have been an improvement. While in this case the president, (who came to power by killing his uncle) may have been legitimate under "archaic international standards", he was, it was noted, a wholly ruthless abuser of human rights.[120] It is this characterisation – as states in need of stability, development, and investment – that legitimises the intervention in domestic affairs by private Western companies.

Despite the international law instruments that have sought to curtail mercenary activity, state practice, which determines the development of customary international law, suggests that there is a general acceptance of PMCs and the basis for an international norm to support their

[116] Anghie, "Time Present and Time Past", above n 110, 284.
[117] Zarate, above n 10, 98.
[118] GDAF, above n 106, 119.
[119] Singer, above n 96, 544.
[120] GDAF, above n 106, 73.

legitimacy.[121] The "unworkable" definition of mercenary at international law, if easily evadable by individuals, certainly poses no danger to private companies. Similarly, the UN Mercenary Convention, which opened for signature in 1989, came into force only in 2001 with the support of none of the major state powers. In January 2008 it had only 30 ratifications, almost exclusively third world states,[122] while no-one has yet been prosecuted under this treaty. This has led some to suggest that it acts almost as a form of "anti-customary law" in that, as a treaty, it weakens the norm it has set out to protect.[123] It is widely acknowledged, furthermore, that IHL is an ineffective possible regulator of PMC activity. As Cameron argues, because the vast majority of PMC employees will have the status of civilians,[124]their accountability falls on domestic criminal justice systems, not international law. This in turn is problematic given that most PMCs operate and commit otherwise punishable abuses in states with weak or non-existent legal systems,[125] and cases brought before national courts of PMCs would likely be long and difficult.[126] The fact that international law has not evolved to restrict these companies reflects the role colonialism plays in its development and formation, as well as the moral framework that is cultivated to justify it. International law's toleration of PMCs furthers the civilising mission by allowing the

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[121] Singer, above n 96, 533; Zarate, above n 10, 114.

[122] *Report of the Working Group on the Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of People to Self-Determination* UNHRC 7th Sess UN Doc A/HRC/7/7 (2008) [52]. Interestingly, many OAU states that originally pressured the United Nations to end state use of mercenaries no longer support the convention that resulted from their efforts: they do not wish to efface for themselves the option of hiring military contractors when it is in the interests of their governments to do so – usually to suppress rebel movements intent on loosening their grip on power. See Milliard, above n 8, 64. This, perhaps, is an example of Anghie's observation that the post-colonial government reproduces the civilising mission *internally* in its attempt to control and assimilate minorities in order to create a coherent nation state. See Anghie, *Making of International Law,* above n 1, 10. As the nation state is the primary actor in international law, cementing it as the key political entity – as opposed to smaller community or tribal groupings – strengthens and extends the reach of international law and thus its civilising influence. For Anghie's perspective on the relationship between the state and minorities in post-colonial state see Antony Anghie "Nationalism, Development and the Postcolonial State: The Legacies of the League of Nations" (2006) 41 Tex Int'l L J 447, 458–460.

[123] Singer, above n 96, 531.

[124] Cameron, above n 78, 594.

[125] Frye, above n 12, 2646.

[126] Cameron, above n 78, 595.

values and causes Western states support to be enforced in the developing world. It also allows multinational interests to gain access to developing world resources, thus causing poor states to fall under the West's economic control – perpetuating a third world sovereignty constrained by powerful economic forces. This is justified through the rubric of development. The activities of PMCs in the developing world, unlike those of mercenaries, are not morally reprehensible for seeking to profit from foreign conflicts or unduly interfering with the internal affairs of developing countries; rather, they operate for the benefit of poor "uncivilised" states by ensuring "legitimate" governments can maintain sovereign control and economic interests can be freely developed. It is in this way that racial superiority and economic dominance are embodied in this area of international law.

Conclusion

This article has tracked the development of international law in relation to mercenaries and private military companies. It has argued that, from international law's exclusion of non-Europeans from its protection in the 19th and early 20th century, to weak and unworkable law to regulate the use of mercenaries, to a tacit legitimisation of the use of PMCs, Anghie's thesis of the "civilising mission" remains pertinent throughout. Far from upholding the rights of all nations and their citizens, international law in this area has carried with it a colonial imperative that has privileged those who are regarded as civilised, to the detriment of those who are seen to be not. Instead of protecting weak nations and weak groups within nations from the predatory designs of those in greater positions of power, it has worked to further and strengthen these divisions and reinforce the status quo.

Yet there is nothing surprising in the claim that international law has been shaped to suit the wills of the more powerful states to the disadvantage of the weaker; it has long been made about law in general, and, indeed, Anghie is not the first or only one to argue in this way.[127] Furthermore, it must be noted that this is a theory that began through reflection upon the Mandate System and the process of decolonisation, and that has since been extended to apply to further and increasingly

[127] See e.g. Martii Koskenniemi *From Apology to Utopia* (Cambridge University Press, Cambridge, 2005).

various areas of international law.[128] The test of the theory, therefore, could be seen to be how far the model can stretch; that is, the number of different areas of international law to which it can be applied and still offer lucid explanations for the particular structures that are in place. It could also be argued that this theory is only as good as the way in which specific areas of law are chosen for analysis. However, it would not appear that the essence of Anghie's claim is that international law is absolutely and purely, now as it has been always, a colonial tool. Rather, his broader statement seems to be that not only is it important to study the past to derive better methodologies to analyse the structures of the present, but also that the study of history, and law as well, must be undertaken on the basis that commonly accepted narratives are monolithic and hegemonic, and thus must be challenged and dissected if they are to be more than superficially understood. The resonance of his argument does not lie in his claim that international law is imperial; indeed, he seems to regard this as an obvious and recognised fact. Anghie's thesis is focused instead on the various means and mechanisms by which hierarchies of value can shift, consolidate, and reproduce within disciplines – such as law – that are judged to be disinterested. The message to take from his work, therefore, is that it is only through real critique and scrutiny, through being alive to the capacity for veiled ideologies within discourse, and through a desire to learn from the experience of the past, that the foundation can be laid for better modes of thinking and more equitable structures of international law.

[128] Anghie, *Making of International Law*, above n 1, 1–4.