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Deploying Race, Employing Force: 'African Mercenaries' and the 2011 NATO Intervention in Libya

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ABSTRACT

This Article reflects on the ongoing synergies between international law, race, and empire, as they are articulated in the regulation of mercenarism. It does so by examining the role of the racialized and gendered narratives about “African mercenaries” in the context of the UN Security Council authorization of the 2011 NATO intervention in Libya. By recovering the efforts of the Global South to outlaw the use of (white) mercenaries for the promotion of imperialist causes, and the resistance of Western states against these initiatives, this Article documents the reversal of these attitudes in the case of Libya. In so doing, the authors argue that international law is deeply implicated in the reproduction of racial domination and exploitation.

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TABLE OF CONTENTS

INTRODUCTION.....	1582
I. RESOLUTIONS 1970 AND 1973, OR THE IMPERIAL DEVIL IN THE TEXTUAL DETAIL.....	1586
A. Beyond (Il)legality: Narratives of Race and Violence in International Law.....	1588
B. Regional Anxieties: Qaddafi and the Turn to Africa.....	1589
C. Imagining the South: Racialized and Gendered Narratives of Conflict.....	1591
II. "THESE BASTIONS OF COLONIALISM AND RACISM": COOPTATION OF AFRICAN CONCERNS ABOUT RACE AND THE MERCENARY THREAT.....	1599
A. Longstanding Race-Based Objections to Mercenarism.....	1599
B. The Practice of the UN and the OAU.....	1601
C. The Treaty Law.....	1607
CONCLUSION.....	1609

INTRODUCTION

Optimism was the order of the day for the internationalists who, in 2011, cheered the passage of United Nations (UN) Security Council (UNSC) Resolution 1973.¹ The Resolution authorized a North Atlantic Treaty Organization (NATO) military intervention in Libya—invoking the “responsibility to protect” doctrine—and ultimately resulted in the toppling of the Qaddafi government.² Supporters of intervention saw Resolution 1973 as a moment of redemption for international law, exorcising the double specters of Iraq and the “lawless” Bush administration³ and helping close the gap between power, law, and morality.⁴ Moreover, the invocation of the “responsibility to protect” doctrine by the UNSC revived hopes for a “humanized” international law centered around fundamental human rights rather than state sovereignty.⁵

Despite this initial optimism, 2011 was probably the brief apogee of multilateral (neo)liberalism. The hope for a wholly new era in international

1. S.C. Res. 1973 (Mar. 17, 2011).

2. See, e.g., CHRISTOPHER S. CHIVVIS, *TOPPLING QADDAFI: LIBYA AND THE LIMITS OF LIBERAL INTERVENTION* (2014) (detailing the role of the North Atlantic Treaty Organization (NATO) in the process of regime change in Libya as well as internal struggles over the specifics of the intervention).

3. See, e.g., PHILIPPE SANDS, *LAWLESS WORLD: AMERICA AND THE MAKING AND BREAKING OF GLOBAL RULES FROM FDR'S ATLANTIC CHARTER TO GEORGE W. BUSH'S ILLEGAL WAR* (2005) (raising concerns about the perceived disregard of the Bush administration toward a wide range of international legal fields).

4. Members of the United Nations (UN) have felt compelled to distinguish the intervention in Libya from the 2003 invasion of Iraq. During the debate in the UK House of Commons, the then leader of the opposition, Ed Miliband, argued:

The right hon. and learned Gentleman has huge expertise in this area and he makes an important point. This is a very important moment for multilateralism because a UN resolution has been passed without opposition at the Security Council. This is a real test of the international community and its ability to carry through not just our intentions but the intentions and values of the United Nations.

21 Mar. 2011, Parl Deb HC (2011) col. 718 (UK). The comments of a Member of Parliament (MP) of the Scottish Nationalist Party likewise encapsulate this pressing concern: “A great many people in this House and in the country had difficulty supporting previous international operations, because they did not have the backing of the United Nations, but this case is different as it does have the backing of the United Nations.” 21 Mar. 2011, Parl Deb HC (2011) col. 701 (UK).

5. See Anne Peters, *Humanity as the A and Ω of Sovereignty*, 20 EUR. J. INT'L L. 513 (2009) (arguing that the rise of the responsibility to protect doctrine radically reconfigured the foundations of the international legal order); Ramesh Thakur, *Libya and the Responsibility to Protect: Between Opportunistic Humanitarianism and Value-Free Pragmatism*, SEC. CHALLENGES, Summer 2011, at 13 (offering a laudatory evaluation of the events in Libya as a move toward the consolidation of a more humanitarian international law).

law—marked by the international community’s embrace of the notion of a “responsibility to protect” vulnerable populations—was shortlived. In fact, the legal and political honeymoon came to an abrupt end when both Russia and China—whose abstention from the UN voting process enabled the passage of UNSC Resolution 1973—and an increasing number of international legal scholars began to question the lawfulness of NATO’s actions that assisted Libyan rebels in toppling Qaddafi’s government.⁶

The challenges to NATO’s actions broadly undermined the notion that the Libyan intervention represented a major turn for international legal theory and practice, with critiques generally assuming two distinct forms. Some liberal legalists challenged the specific actions taken in Libya while reaffirming their faith in the “responsibility to protect” doctrine. This approach assumes a good theory that is corrupted by impure practice. Others questioned the reliance on, and implementation of, the “responsibility to protect” doctrine in a world of competing geopolitical and economic interests.⁷ Such an approach represents a direct challenge to the soundness of the theory underpinning the “responsibility to protect” doctrine itself, and it is on this approach that we focus in this Article.

The 2011 Libyan intervention is not an instance of good theory undermined by problematic implementation. Rather, a closer reading reveals the racialized underpinnings of the theory and the racially stratified global

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6. See, e.g., Christian Henderson, *International Measures for the Protection of Civilians in Libya and Côte d’Ivoire*, 60 INT’L & COMP. L. Q. 767 (2011) (pointing out that the reliance of the United Nations Security Council (UNSC) on external actors for the implementation of its resolutions inevitably results in interpretative disagreements about the meaning of such resolutions); Julian M. Lehmann, *All Necessary Means to Protect Civilians: What the Intervention in Libya Says About the Relationship Between the Jus in Bello and the Jus ad Bellum*, 17 J. CONFLICT & SEC. L. 117 (2012) (positing that Resolution 1973 needs to be interpreted through a combination of *jus in bello* and *jus ad bellum* and that this combination further supports the argument that NATO overstepped its mandate); Geir Ulfstein & Hege Føsund Christiansen, *The Legality of the NATO Bombing in Libya*, 62 INT’L & COMP. L. Q. 159 (2013) (arguing that NATO overstepped its mandate when it moved from protecting civilians to assisting the overthrow of the government). For an early critical international legal account, see Anne Orford, *Rethinking the Significance of the Responsibility to Protect Concept*, 106 AM. SOC’Y INT’L L. PROC. 27, 29 (2012) (arguing that the significance of the “responsibility to protect” doctrine lies in the authorization of executive rule by international authorities).
 7. See, e.g., MATTHIAS DEMBINSKI & THERESA REINOLD, PEACE RSCH. INST. FRANKFURT, *LIBYA AND THE FUTURE OF THE RESPONSIBILITY TO PROTECT—AFRICAN AND EUROPEAN PERSPECTIVES* (2011) (offering a positive evaluation of the doctrine, while also accounting for the impurity of motives when it comes to military interventions); Andrew Garwood-Gowers, *China and the “Responsibility to Protect”: The Implications of the Libyan Intervention*, 2 ASIAN J. INT’L L. 375 (2012) (suggesting that the controversies over the implementation of Resolution 1973 might have undermined the legitimacy of the concept in the long term).

order reinforced by Resolutions 1970 and 1973. More specifically, we argue that racialized imaginaries of sub-Saharan Africans as especially prone to excessive violence, coupled with an inversion of the concerns of postcolonial states about mercenarism, heavily informed the decision to intervene. Indeed, these tropes were incorporated in the relevant UNSC Resolutions themselves. Drawing from the work of Anne Orford, we contend that “[t]he bombing of Libya in the name of revolution may [have been] legal, but the international law that authorises such action has surely lost its claim to be universal.”⁸

To substantiate our claim, we focus on how the UNSC invoked the issue of the “African mercenaries” who were allegedly fighting on the side of Qaddafi’s government, characterizing them as threats that warranted foreign intervention. These mercenaries drew local and international attention for their purported brutality and engagement in sexualized violence, as well as for the instrumental role they supposedly played in the government’s military successes prior to the NATO intervention. In this Article, we focus specifically on how the UNSC advanced narratives that equated blackness with savagery and sexual deviancy.⁹ We show that it went on to translate these narratives into the technical language of international law, thereby lending legitimacy to hegemonic narratives and assigning concrete legal consequences to them. In so doing, the UNSC ratified and exacerbated already existing hierarchies and exploitative relations based on race, gender, class, and migration status (and their different intersections) that rendered black Libyans and sub-Saharan migrants in Libya particularly vulnerable to violence, exploitation, and displacement.¹⁰

The importance of race in the treatment of mercenaries in 2011 becomes impossible to ignore if we place it in historical context. Previously, Western nations, and the predominantly-Western permanent members of the UNSC

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8. Anne Orford, *What Kind of Law Is This?*, LONDON REV. BOOKS: BLOG (Mar. 29, 2011), <https://www.lrb.co.uk/blog/2011/march/what-kind-of-law-is-this> [<https://perma.cc/M5U8-6UQG>].
 9. Hillary Clinton, then-U.S. Secretary of State, claimed the Qaddafi regime was using mass rape as a weapon of war. *Libya: Clinton Condemns Rape as Weapon of War*, BBC (June 17, 2011), <https://www.bbc.com/news/world-africa-13803556> [<https://perma.cc/95NV-TXKS>]. For a summary and critical engagement of the then prevailing idea that regime change was the only effective solution to mass rape in Libya, see Júlia Garraio, “*Arresting Gaddafi Will Be the Most Effective Way to Stop These Rapes*”. *Sexual Violence in the Western Media’s Coverage of the War in Libya*, 16 E-CARDENOS CES 111 (2012).
 10. See Hamid Bahri, *Race and Color in North Africa and the Arab Spring*, in MULTICULTURALISM AND DEMOCRACY IN NORTH AFRICA: AFTERMATH OF THE ARAB SPRING 135 (Moha Ennaji ed., 2014) (detailing the scapegoating of sub-Saharan migrants in Libya before, during, and after the 2011 revolution); Julien Brachet, *Policing the Desert: The IOM in Libya Beyond War and Peace*, 48 ANTIPODE 272 (2015) (documenting the persistence of administrative practices of migration control that target black bodies in Libya).

in particular, have exhibited their unwillingness to tightly regulate the use of mercenaries; yet, in UNSC Resolutions 1970 and 1973, the UNSC departed from its earlier practice, adopting a wholly novel and noteworthy approach to the political and legal treatment of African mercenaries, real or imaginary. We argue that race, proximity to Western interests, and relationships to corporate structures largely dictate the legal treatment of paid foreign fighters in international law. In other words, the application of the international law of mercenarism in its current fragmented form affords much more extensive privileges to those who are considered to be white or to those being employed by Western—or white-controlled—security firms who cross borders for the purposes of remunerated fighting. To the contrary, fighters who are not white or do not serve white-controlled companies, or individuals whose deployment of violence takes place outside of corporate structures and which does not directly further imperial interests, have been singled out by the UNSC as distinctive threats to international peace and security.

In Part I, we offer an overview of the legal and political landscape surrounding the 2011 intervention. We focus on UNSC Resolutions 1970¹¹ and 1973, both of which invoke the notion of the “responsibility to protect” in the context of Libya. We read these texts closely to unearth the ways in which both resolutions indirectly, but decisively, incorporated racialized narratives about the excessive violence of “African mercenaries.” Furthermore, we offer an explanation for the (continuing) popularity and appeal of these narratives. We argue that stories about sexually aggressive black mercenaries appealed to geopolitical anxieties about Libya’s reorientation toward Africa as well as liberal understandings of conflict in the Global South. Within that framework, the narratives seemed intuitively plausible and actionable. In Part II, we place the UNSC resolutions in their historical and juridical context. We examine the UNSC’s sudden interest in “African mercenaries” as not only a threat but a threat significant enough to warrant military intervention. We conclude that this sudden interest is starkly at odds with Africa’s long-held insistence on an international prohibition of mercenarism and the West’s concomitant efforts to undermine the development of a strong antimercenary norm at international law. It was through a unique convergence between racism, imperialism and international law that the question of mercenarism entered the Security Council agenda in 2011.

11. S.C. Res. 1970 (Feb. 26, 2011).

I. RESOLUTIONS 1970 AND 1973, OR THE IMPERIAL DEVIL IN THE TEXTUAL DETAIL

On February 17, 2011, protests aiming to overthrow the Qaddafi government erupted in Libya. In response, the government deployed the army, authorizing it to use disproportionate force and even to shoot at unarmed protestors.¹² Despite Qaddafi's unequivocal resolve to quell the uprising, the army itself was less than unanimously resolute and ultimately fragmented in its loyalties, with large sections of the army defecting to the opposition.¹³ The armed violence from both sides escalated rapidly.

On February 26, amidst the mounting violence, the UNSC adopted Resolution 1970.¹⁴ The Resolution imposed an arms embargo and travel bans for high-ranking government officials and referred the situation to the International Criminal Court for consideration.¹⁵ Even though the Resolution did not authorize the use of force, Resolution 1970 invoked the doctrine of the "responsibility to protect," and, by implication, alluded to the possibility of using force if the situation deteriorated even further.¹⁶

On March 5, the Interim Transitional National Council of Libya (TNC) published its founding declaration, positioning itself as the only representative organ of the Libyan people.¹⁷ As though in response to the language in the Resolution, the declaration concluded with a plea to the "international community": "We request from [sic] the international community to fulfil [sic] its

12. For an early, detailed account of the human rights violations in Libya, see AMNESTY INT'L, *THE BATTLE FOR LIBYA: KILLINGS, DISAPPEARANCES AND TORTURE* (2011), <https://www.amnesty.org/download/Documents/32000/mde190252011en.pdf> [<https://perma.cc/L2X6-XDWP>].

13. For an overview of the different responses of national armed forces during the Arab Spring, see Zoltan Barany, *Comparing the Arab Revolts: The Role of the Military*, J. DEMOCRACY, Oct. 2011, at 28 (documenting the multiple reasons that led to the division of the army's loyalties in Libya).

14. S.C. Res. 1970, *supra* note 11.

15. *See id.* ¶¶ 4–14.

16. *Id.* at 2 ("[r]ecalling the Libyan authorities' responsibility to protect its population").

17. Founding Statement of the Interim Transitional National Council, Mar. 5, 2011, <https://web.archive.org/web/20110310051658/http://ntclibya.org/english/founding-statement-of-the-interim-transitional-national-council> [<https://perma.cc/P828-G79R>] ("The Council derives its legitimacy from the city councils who run the liberated cities, and who had been formed by the revolution of the 17th February to fulfil the revolutionary gains in order to achieve their goals."). On the recognition of the TNC as the legitimate representatives of Libyans by other states and its legal implications, see Stefan Talmon, *Recognition of Opposition Groups as the Legitimate Representative of a People*, 12 CHINESE J. INT'L L. 219 (2013).

obligations to protect the Libyan people from any further genocide and crimes against humanity without any direct military intervention on Libya soil.”¹⁸

Shortly thereafter, reports about the strife started to dominate the Western press. The media portrayals told of thousands of deaths and mass rapes at the hands of black mercenary troops under Qaddafi’s command. Despite some impressive early victories, the opposition forces soon faced a heavy counteroffensive, rendering the recapture of Benghazi by governmental forces a mere matter of time. The sentiment that a bloodbath of genocidal proportions was imminent gained steam abroad, and it was only reinforced by Qaddafi’s infamous threatening speech on February 22.¹⁹

On March 17, the UNSC adopted Resolution 1973 with ten positive votes and five abstentions. In paragraph four of the Resolution, the UNSC authorized Member States acting in cooperation with the Secretary-General to:

take all necessary measures . . . to protect civilians and civilian populated areas under threat of attack in the Libyan Arab Jamahiriya, including Benghazi, while excluding a foreign occupation force of any form on any part of Libyan territory, and requests the Member States concerned to inform the Secretary-General immediately of the measures they take pursuant to the authorization conferred by this paragraph which shall be immediately reported to the Security Council.²⁰

Individual state military campaigns commenced within hours and “[o]n 31 March 2011, NATO commenced Operation Unified Protector, formally assuming responsibility for enforcing the arms embargo, enforcing the no-fly zone, and protecting civilians and civilian-populated areas under threat of attack.”²¹ Despite the repeated diplomatic efforts of the African Union for a ceasefire, the rebels were determined to achieve a clear victory assisted, either directly or indirectly, by NATO.²² In October 2011, the first phase of the Libyan civil war came to a conclusion with the assassination of Qaddafi, which was enabled by the NATO targeting of his command and control structures.

18. Founding Statement of the Interim Transitional National Council, *supra* note 17.

19. See Ian Black, *Gaddafi Urges Violent Showdown and Tells Libya ‘I’ll Die a Martyr’*, GUARDIAN (Feb. 22, 2011), <https://www.theguardian.com/world/2011/feb/22/muammar-gaddafi-urges-violent-showdown> [<https://perma.cc/W63D-8JN3>].

20. S.C. Res. 1973, *supra* note 1, ¶ 4.

21. Anne Orford, *NATO, Regionalism, and the Responsibility to Protect*, in CHARTER OF THE NORTH ATLANTIC TREATY ORGANIZATION: TOGETHER WITH SCHOLARLY COMMENTARIES AND ESSENTIAL HISTORICAL DOCUMENTS 302, 315 (Ian Shapiro & Adam Tooze eds., 2018).

22. See Alex de Waal, *The African Union and the Libya Conflict of 2011*, WORLD PEACE FOUND. (Dec. 19, 2012), <https://sites.tufts.edu/reinventingpeace/2012/12/19/the-african-union-and-the-libya-conflict-of-2011> [<https://perma.cc/5QDK-K3R7>] (offering a positive evaluation of the initiative).

A. Beyond (Il)legality: Narratives of Race and Violence in International Law

Most international lawyers and (neo)liberal political actors tend to emphasize the *prima facie* legality of the NATO intervention. Simultaneously, they attempt to distinguish the 2011 events from the Second Iraq War. In their account, the Second Iraq War's indefensibility stemmed from the unilateral and illegal nature of the actions taken by the United States. The involvement of the UNSC in the intervention in Libya, the argument went, was a direct counterweight to the unlawful and unilateral intervention of 2003 and it was on account of this multilateralism that the Libyan intervention was not of imperial nature. In so doing, the defenders of the Libyan intervention adopt a hopeful yet unsustainable historical narrative wherein international law and UNSC multilateralism negate the possibility of imperialism.²³ In this process, liberal defenders of multilateral interventionism render invisible instances of "multilateralism as terror."²⁴ As Miéville has argued in another (yet related) context:

Haiti should forcefully remind us that relatively uncontroversial 'legality' and multilateralism need stand in no opposition at all to strategies of murderous imperial control. If, indeed, that very legality helps mute criticism, as seems to have been the case here, one might go further, and suggest that multilateral UN-sanctioned imperialism is *more* of a threat to justice and emancipation than its unilateralist Rumsfeldian sibling. The only thing more oppressive than a lawless world might be a lawful one.²⁵

Indeed, to study oppression through legality, one need look no further than UNSC Resolutions 1970 and 1973. These legal documents evidence numerous imperial and racist readings of the situation in Libya and their connections to the authorization of the 2011 intervention. For instance, a closer reading reveals that the herculean efforts of legal scholars to distinguish between lawful humanitarian

23. For the close ties between international law and imperialism since the emergence of the discipline, see generally ANTONY ANGHIE, *IMPERIALISM, SOVEREIGNTY AND THE MAKING OF INTERNATIONAL LAW* (2004). For the expansive role of the UN in the construction and maintenance of imperial patterns of exploitation, see generally ANNE ORFORD, *INTERNATIONAL AUTHORITY AND THE RESPONSIBILITY TO PROTECT* (2011).

24. China Miéville, *Multilateralism as Terror: International Law, Haiti and Imperialism*, 19 *FINNISH Y.B. INT'L L.* 63 (2008) (arguing that the liberal critics of the unilateralism of the Bush administration downplay the imperialism and destructiveness of multilateral interventions in the Global South).

25. *Id.* at 91.

intervention and unlawful regime change are unsustainable.²⁶ Arguments that characterized the intervention as lawful hinged, in part, on the narrative that Qaddafi was recruiting African mercenaries in large numbers from Mali and Chad to fight for his collapsing regime. Rumors that he was providing these African mercenaries with Viagra to fuel mass rape also circulated widely.²⁷ As we show in this Article, however, these were narratives of doubtful accuracy that were more informed by geopolitical and racial panics than by facts. This narrative was also reflected in the final paragraph of the founding statement of the TNC: “Finally, even though the balance of power is uneven between the defenceless protestors and the tyrant regime’s mercenaries and private battalions, we will relay [sic] on the will of our people for a free and dignified existence.”²⁸

B. Regional Anxieties: Qaddafi and the Turn to Africa

As various commentators noted at the time of the intervention, the moniker “African” was a thinly veiled reference to blackness.²⁹ Not surprisingly, “race talk” presented heavily in the rhetoric of the opposition and the characterizations of Qaddafi and the foreign fighters. As to Qaddafi, he and his sons were commonly depicted as apes, with exaggerated lips and an afro (a symbolic blackface of sorts) in opposition-controlled areas at the time.³⁰ As to the foreign fighters, they were presented as especially savage and sexually aggressive, as well as indisputably foreign, and therefore, illegitimate.³¹ In this telling, being African

26. See, e.g., Ulfstein & Christiansen, *supra* note 6 (attempting to draw such a firm line between the initial authorization by the UNSC and the implementation of Resolution 1973).

27. The then prosecutor of the International Criminal Court, Luis Moreno-Ocampo, was perhaps the most high-ranking international official to reproduce this rumor. See *Evidence Emerging of Use of Rape as a Tool of War in Libya—ICC Prosecutor*, UN NEWS (June 8, 2011), <https://news.un.org/en/story/2011/06/377882-evidence-emerging-use-rape-tool-war-libya-icc-prosecutor> [<https://perma.cc/Y6HK-MNMS>].

28. Founding Statement of the Interim Transitional National Council, *supra* note 17.

29. “Africa and Africans were not only rhetorically removed from the ‘Arab spring,’ but they were seen as counter-revolutionaries. More importantly . . . , ‘African mercenaries’ invoked the worst of anti-black racial stereotypes—murderers and rapists.” Jemima Pierre, *Race in Africa Today: A Commentary*, 28 CULTURAL ANTHROPOLOGY 547, 548 (2013) (footnote omitted).

30. See Christiane Gruber, ‘King of Kings of Africa’: Racializing Qaddafi in the Visual Output of the 2011 Libyan Revolution, 11 MIDDLE E. J. CULTURE & COMM. 196 (2018) (detailing the racialization of Qaddafi in cartoons and graffiti).

31. Darryl Li has pushed back against this argument, stating that mercenaries are a problem insofar as they are fighting in support of empire or dictatorships and not because of their (presumed) foreignness. See Darryl Li, *Shades of Solidarity: Notes on Race-Talk, Intervention, and Revolution*, JADALIYYA (Mar. 12, 2011), <https://www.jadaliyya.com/Details/23788> [<https://perma.cc/DKK5-VKSM>].

equated with being foreign. This equation, however, relies on the necessary but far from self-evident assumption that Libya is not African.

In fact, the question of the appropriate regional context for Libya—whether Libya should be primarily associated with Africa or the Arab world—was a matter of great political contestation at the time. Both before and throughout the conflict, different political actors wrestled over whether Libya should prioritize its geopolitical, economic, military and cultural connections with Africa or with the Arab world. Although initially a great admirer of Egypt’s Gamal Nasser, and a self-styled heir of the legacy of pan-Arabism, Qaddafi gradually reoriented his foreign policy toward Africa.³² This trend was solidified after the UNSC imposed sanctions against Libya, an event that triggered a crisis between the state and its Arab neighbors. The foreign policy shift was substantive as well as stylistic. Qaddafi sought to present himself as a traditional African political leader, as the “king of kings.”³³ He also pushed for a temperamental reorientation of Libya’s immigration policy, supplementing for labor shortages with cheap, precarious labor from sub-Saharan Africa.³⁴ He also actively involved Libya in a broad range of conflicts in neighboring states.³⁵ The movement away from the Arab world and the reorientation of Libya toward African regionalisms was indeed a principal objective of Qaddafi’s foreign policy.

The opposition’s tendency to associate Qaddafi and his family with blackness and Africa in a derogatory way needs to be situated within this context of Libya’s pivot toward Africa. Even though it avoided the more overtly colorful depictions used by the opposition forces themselves, the UNSC was certainly not agnostic to the question of whether Libya should situate itself within the context

32. See Hussein Solomon & Gerrie Swart, *Libya’s Foreign Policy in Flux*, 104 AFR. AFF. 469 (2005) (summarizing Libya’s shifts in foreign policy, including its reorientation toward Africa and its participation in the “war on terror” after 9/11).

33. Qaddafi’s full self-description read as follows: “I am an international leader, the dean of the Arab rulers, the king of kings of Africa and the imam [leader] of Muslims, and my international status does not allow me to descend to a lower level.” Dafna Hochman, *Going Legit: Qaddafi’s Neo-Institutionalism*, YALE J. INT’L AFFS., Summer 2009, at 27, 35–36 (quoting a statement from Qaddafi at a meeting with Arab leaders).

34. The presence of migrants in Libya was generally precarious and dependent on the changing demands of a rentier economy. This precariousness was aggravated by the fact that the Libyan government used migration as a tool of foreign policy. In this context, mass expulsions, harassment, and violence against sub-Saharan (and other) migrants were mobilized to exert pressure or punish their states of origin. See Emanuela Paoletti, *Migration and Foreign Policy: The Case of Libya*, 16 J.N. AFR. STUD. 215 (2011) (detailing the instrumentalization of migration and migrants’ lives by Qaddafi’s government for different foreign policy purposes).

35. For an early account of Libya’s interventionist policies in the Sahel and its close ties to Tuareg rebellions, see Oye Ogunbadejo, *Qaddafi’s North African Design*, INT’L SEC., Summer 1983, at 154.

of Arab or African regionalisms. The preamble of Resolution 1973 suggests that the UNSC mandated that Libya's appropriate residual regional context is the Arab world. Although it mentions the African Union,³⁶ paragraph five grants the Arab League a particularly important role.³⁷ This empowerment of the Arab League caused the calls of the African Union for a ceasefire to be ignored. Moreover, proponents of the intervention used the (ex post facto) support of the Arab League to rebut accusations of imperialism.³⁸ This clash between competing regional orientations informed the emphasis on the danger purportedly posed by African mercenaries. As Carina Ray has argued, the rhetoric about African mercenaries gained traction partly because of Qaddafi's increasingly close ties with the continent,³⁹ and perhaps more accurately, because of the anxiety that this realignment evoked in both domestic and international actors.

C. Imagining the South: Racialized and Gendered Narratives of Conflict

The reasons for the international community's emphasis on "black mercenaries" were not, however, entirely contingent upon geopolitical struggles over the regional orientation of Libya. Much more fundamentally, the image of black men raping brown women also resonated with a number of racial and gendered tropes inextricably linked with liberal interventionism dating back at least to the end of the Cold War.

Although race as an analytical category and racism as a system of domination and exploitation have long and systemically been deployed by international law and international institutions to justify interventionist actions, the intersection between international law and race remains largely

36. See S.C. Res. 1973, *supra* note 1, at 1 ("Recalling the condemnation by the League of Arab States, the African Union, and the Secretary General of the Organization of the Islamic Conference of the serious violations of human rights and international humanitarian law that have been and are being committed in the Libyan Arab Jamahiriya.").

37. See *id.* ¶ 5 ("Recognizes the important role of the League of Arab States in matters relating to the maintenance of international peace and security in the region, and bearing in mind Chapter VIII of the Charter of the United Nations, requests the Member States of the League of Arab States to cooperate with other Member States in the implementation of paragraph 4.").

38. *Id.* Note the Arab League's drastic vacillation on the question of whether it supported the NATO campaign. See, e.g., Benjamin G. Davis, *Obama and Libya*, 7 FLA. A & M U. L. REV. 1, 13 (2011).

39. See Carina Ray, *Gaddafi and the Mercenary Myth*, HUFFINGTON POST (Sept. 27, 2011), http://www.huffingtonpost.com/carina-ray/gaddafi-mercenaries_b_983506.html [<https://perma.cc/B8BN-9LSK>].

underexamined, even within the critical legal canon.⁴⁰ Still, in recent decades critical scholars have argued that the use of force on humanitarian grounds is invariably informed by racialized and gendered tropes. As Makau Mutua has noted, the legal and political language of humanitarian intervention is structured around a tripartite division between “savages, victims, and saviors.”⁴¹ These three categories are not only racialized (with the saviors being invariably white), but also gendered, since women (often grouped with children) represent the ideal victims to be saved. In the words of Anne Orford: “The operation of intervention narratives, and the pleasures offered to the reader by identifying with the hero’s freedom of action and control over the world, depend upon the acceptance of gendered and racialized metaphors. While blackness represents ungovernability and inferiority, femaleness represents the lack of agency and potency.”⁴² Furthermore, as Frédéric Mégret has argued recently, international humanitarian law is typically permissive of forms of violence that are associated with white masculinity as opposed to both the imagined brutality and hyperaggression of black men and the passivity and helplessness of women.⁴³ In other words, the laws of war have been drafted with a very particular vision in mind, one that is by no means inherently pacifist but rather which seeks to rein in such urges and violent inclinations. In this context, the panic over the question of “African mercenaries” is not simply a factual question. Rather, it emerged from and was ratified by deeply embedded structures of *jus ad bellum* and *jus in bello* that authorized certain, but demonized other, forms of violence. Accordingly, the panic justified and sanctioned the use of approved forms of violence to fight disapproved forms of violence.

40. See, e.g., Robert Knox, *Valuing Race? Stretched Marxism and the Logic of Imperialism*, 4 LONDON REV. INT’L L. 81, 84 (2016). As Robert Knox explains:

Race, therefore, constitutes a remarkable absence from Miéville’s analysis. This Article argues that Miéville’s analysis is symptomatic of a wider trend within Marxist international legal scholarship. These scholars have tended to present their accounts of imperialism as a process driven by the expansion of capitalist value as opposed to work in the postcolonial tradition that emphasises racial and cultural factors. Consequently, the two most prominent radical strands in thinking about imperialism in international law frequently talk past each other.

Id.

41. Makau Mutua, *Savages, Victims, and Saviors: The Metaphor of Human Rights*, 42 HARV. INT’L L.J. 201, 201 (2001).

42. Anne Orford, *Muscular Humanitarianism: Reading the Narratives of the New Interventionism*, 10 EUR. J. INT’L L. 679, 701 (1999).

43. Frédéric Mégret, *The Laws of War and the Structure of Masculine Power*, 19 MELB. J. INT’L L. 200 (2018).

Relatedly, the emphasis on the organized unleashing of sexual violence should be understood as part of a broader singling-out of rape as the primary harm inflicted upon women in the context of conflict.⁴⁴ To return to the Libyan revolution, women played a central role in the uprisings, as they did generally in the Arab Spring. Women actively, and en masse, participated in demonstrations, strikes, and other acts of defiance and resistance. Their courage and determination disrupted both liberal Western narratives about them as well as the patriarchal structures of their own societies.⁴⁵ Nevertheless, even accounts sympathetic to the Libyan opposition explain that the hegemonic strands of the opposition were unwilling to accept a feminist revolution as part of Libya's post-Qaddafi future. As Kamat and Shokr have observed, “[l]aw professor Hana El-Gallal from Benghazi and imprisoned blogger Ghaidaa Al-Tawati from Tripoli both worried that women’s roles—which had been central at the start of the uprising—were being sidelined.”⁴⁶ Even though UNSC Resolutions 1970 and 1973 do not make explicit references to sexualized violence, their heavy emphasis on African mercenaries must be contextualized with the background of widespread rumors about Viagra-fueled mass rape and stories of unrestrained violence. The narrative accompanying and legitimizing the 2011 intervention weaved together a tale of paranoid dictators, Arab victims, and women who disappeared as political actors only to reappear as helpless victims of rape by “black savages.”

Given the revelations of indiscriminate mass executions, imprisonment, and persecution of both sub-Saharan Africans and against “darker” Libyans in the aftermath of the intervention,⁴⁷ we need to better understand the relationship

44. For some critical engagements with this mainstream approach, see generally KAREN ENGLE, *THE GRIP OF SEXUAL VIOLENCE IN CONFLICT: FEMINIST INTERVENTIONS IN INTERNATIONAL LAW* (2020).

45. For example, Mai Taha emphasizes the leading role of working-class women in labor struggles that paved the way for the Egyptian revolution:

Originally, the Mahalla workers went on strike after they did not receive the two months bonus promised by former Prime Minister Nazif. After a week of filing complaints and organizing small protests, 24,000 workers started the strike. Thousands of female workers walked out of their workstations in the Mahalla plant, and started moving to the male section of the plant chanting, “Where are the men? The women are here!”

Mai Taha, *The Egyptian Revolution In and Out of the Juridical Space: An Inquiry Into Labour Law and the Workers’ Movement in Egypt*, 10 INT’L J.L. CONTEXT 177, 186 (2014) (citation omitted).

46. Anjali Kamat & Ahmad Shokr, *Libya*, in *DISPATCHES FROM THE ARAB SPRING: UNDERSTANDING THE NEW MIDDLE EAST* 157, 189 (Paul Amar & Vijay Prashad eds., 2013).

47. Human Rights Watch, who otherwise supported the intervention, stated:

between internationally authorized violence and this resurgence of extreme and extremely violent manifestations of racism. Of course, the acts of racialized violence that followed the 2011 intervention could be characterized as patently unlawful under international human rights and humanitarian law. Such a framing of the problem would draw a clear line between a potentially lawful use of force in the name of civil protection and the illegal and overtly racist violence that followed. A close reading of the two resolutions, however, reveals a much more complicated picture that renders such a clinical separation unsustainable.

The text of Resolutions 1970 and 1973 validated the narrative of sub-Saharan African mercenaries and elevated them into a distinct threat to peace and security. In fact, Resolutions 1970 and 1973 reproduced in a straightforward and unapologetic manner images of “black savagery” and “uncivilized” and irregular mercenary warfare.⁴⁸ More specifically, paragraph nine of Resolution 1970, falling as it does under the subheading of “Arms Embargo,” reads as follows:

Decides that all Member States shall immediately take the necessary measures to prevent the direct or indirect supply, sale or transfer to the Libyan Arab Jamahiriya, from or through their territories or by their nationals, or using their flag vessels or aircraft, of arms and related materiel of all types, including weapons and ammunition, military vehicles and equipment, paramilitary equipment, and spare parts for the aforementioned, and technical assistance, training, financial or other assistance, related to military activities or the provision, maintenance or use of any arms and related materiel, including the provision of armed mercenary personnel whether or not originating in their territories⁴⁹

As NTC forces took control of western Libya in late August, local militias arbitrarily arrested hundreds, if not thousands, more sub-Saharan migrant workers and dark-skinned Libyans from the south, accusing them of being mercenaries. In some cases, the militias subjected these detainees to physical abuse and forced labor in detention. Thousands of African migrants sought shelter in makeshift camps with very poor living conditions and security.

World Report 2012: Libya, HUM. RTS. WATCH, <https://www.hrw.org/world-report/2012/country-chapters/libya> [<https://perma.cc/SBX7-QBGY>] (last visited May 29, 2020).

48. See Frédéric Mégret, *From ‘Savages’ to ‘Unlawful Combatants’: A Postcolonial Look at International Humanitarian Law’s ‘Other’*, in *INTERNATIONAL LAW AND ITS OTHERS* 265, 265–317 (Anne Orford ed., 2006) (arguing that the international law of arms conflict has historically constructed certain categories of fighters as “savage” and, therefore, outside its protective scope).
49. S.C. Res. 1970, *supra* note 11, ¶ 9.

Similar formulations were repeated in Resolution 1973, which “calls upon all Member States to comply strictly with their obligations under paragraph 9 of Resolution 1970 (2011) to prevent the provision of armed mercenary personnel to the Libyan Arab Jamahiriya.”⁵⁰ Moreover, targeted sanctions against Qaddafi’s officials directly adopted the narrative about the mercenaries coming from sub-Saharan Africa. In Annex I of Resolution 1973, a travel ban was imposed on the Libyan Ambassador to Chad because he was purportedly “[i]nvolved directly in recruiting and coordinating mercenaries for the regime.”⁵¹

Unlike other UNSC Resolutions, Resolutions 1970 and 1973 were not concerned with foreign fighters generally,⁵² but rather with armed mercenary personnel specifically. Such a narrow focus does not fit comfortably within the existing legal framework regulating individuals who cross borders in order to labor as fighters. International treaty law governing mercenarism provides a specific and extremely narrow definition. To be classified as a mercenary within the meaning of the Geneva Conventions, according to the 1949 Additional Protocol to the Geneva Conventions (Additional Protocol I), an individual must meet six requirements. A mercenary is a 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.⁵³

This is a notoriously stringent definition.⁵⁴ With respect to Libya, it is uncertain how many individuals would fall within it. For example, to the extent

50. S.C. Res. 1973, *supra* note 1, ¶ 16.

51. *Id.* at 7, annex I.

52. See, e.g., S.C. Res. 2178 (Sept. 24, 2014).

53. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), art. 47(2), June 8, 1977, 1125 U.N.T.S. 3 [hereinafter Additional Protocol I].

54. See, e.g., GEOFFREY BEST, HUMANITY IN WARFARE: THE MODERN HISTORY OF THE INTERNATIONAL LAW OF ARMED CONFLICT 328 n.83 (1980) (famously claiming that “[a]ny mercenary who cannot exclude himself from this definition deserves to be shot—and his

that nonstate militias such as those of the Tuareg peoples were fighting on Qaddafi's side, it is unlikely that a desire for private gain was their primary motivation, given the long-established relation of the regime with Tuareg militias and the existence of training camps in Mali sponsored by Libya.⁵⁵

Departing from the established, narrow definition of mercenary noted above, the UNSC's peculiar and novel formulation of "armed mercenary personnel" suggests an attempt at a category of broader application.⁵⁶ Given the presence of numerous sub-Saharan Africans in Libya presumed to have an affinity for the Qaddafi government and the prevailing narrative blaming mercenaries for particularly heinous acts, the vagueness of the Resolution inherently tying mercenarism to sub-Saharan Africa cannot be disassociated politically or conceptually from the systematic targeting of migrants and "darker" Libyans. Moreover, in Resolution 1973, mercenaries are deprived of their agency, as well as political and legal status, by the use of the words "provision" and "flow."⁵⁷ The first implies the existence of an external force, perhaps a state or some other organized political or economic entity outside Libya, that provided Qaddafi with those mercenaries as tools of war, in the same way they would provide any other military materiel. Since there was no suggestion at the time that Niger, Mali, or Chad were actively intervening in

lawyer with him!"); Katherine Fallah, *Corporate Actors: The Legal Status of Mercenaries in Armed Conflict*, 88 INT'L REV. RED CROSS 599, 605 (2006) (noting that it is "virtually impossible to find an individual who falls within the Article 47.2 definition of a mercenary").

55. As one commentator observed:

Throughout the years, the ties between the Tuaregs and Gaddafi have grown stronger in multiple dimensions. Gaddafi's Libya did play a stabilising political role for Mali and Niger through a series of favours it granted to Tuareg communities as well as central regimes. Gaddafi has been the banker of most political and relief campaign [sic] in critical times for those countries.

Magnus Taylor, *Mali and Niger Tuareg Insurgencies and the War in Libya: 'Whether You Liked Him or Not, Gaddafi Used to Fix a Lot of Holes'—By Frédéric Deycard and Yvan Guichaoua*, AFR. ARGUMENTS (Sept. 8, 2011), <http://africanarguments.org/2011/09/08/whether-you-liked-him-or-not-gadafi-used-to-fix-a-lot-of-holes-tuareg-insurgencies-in-mali-and-niger-and-the-war-in-libya-by-frederic-deycard-and-yvan-guichaoua> [https://perma.cc/WU9Q-DFD].

56. See Hin-Yan Liu, *Mercenaries in Libya: Ramifications of the Treatment of 'Armed Mercenary Personnel' Under the Arms Embargo for Private Military Company Contractors*, 16 J. CONFLICT & SEC. L. 293, 303 (2011) ("Conversely, the broad nature of the term 'armed mercenary personnel' raises the question of whether this was an intentional departure rather than simply a rhetorical move.").

57. Paragraph 16 of Resolution 1973 reads as follows: "Deplores the continuing flows of mercenaries into the Libyan Arab Jamahiriya and calls upon all Member States to comply strictly with their obligations under paragraph 9 of resolution 1970 (2011) to prevent the provision of armed mercenary personnel to the Libyan Arab Jamahiriya." S.C. Res. 1973, *supra* note 1, ¶ 16.

the civil war by “providing” Qaddafi with fighters, the denial of agency to these purported mercenaries becomes even more striking and racialized. Similarly, the image of a “flow” of mercenaries suggests a lack of intentionality or agency, and does not sit comfortably with the guarantees of the most basic provisions of international humanitarian law (IHL) and international human rights law (IHRL).⁵⁸

Overall, it would be implausible to draw a straight line between the legal modalities of the 2011 intervention and the subsequent spike of antiblack violence in Libya. The ideational and material continuities between the two, however, are impossible to miss. In our minds, “racism” as a term captures adequately the shared devaluation of black lives and suffering, as well as the overt selectivity as to who may cross borders and who can deploy violence without facing any legal or military consequences. The UNSC’s actions to protect women from the violence of African mercenaries in Libya starkly contrast with global reactions to gender violence at the hands of Western and Western-contracted mercenaries. Indeed, those in opposition to the West’s outsourcing of military violence often cite the disproportionate effects that mercenary and private military abuses have on the vulnerable: women, the poor, those held in indefinite detention, and those detained in clandestine military and paramilitary operations or “black ops.”⁵⁹ Opponents of modern private military violence argue that outsourcing creates the conditions for gender violence and worsens women’s positions in armed conflict.⁶⁰ They

58. See Liu, *supra* note 56, at 311 (“First, that armed mercenary personnel are not treated fully as persons insofar as they are stripped of a dimension of their humanity as a result. Secondly, that because they are not treated fully as human beings they both lose some of their claim to human dignity and the protection afforded by international humanitarian law and human rights law.”).

59. There is a disproportionate concentration of such operations being carried out in the Global South. See, e.g., Jeremy Scahill, *Blackwater’s Black Ops: Internal Documents Reveal the Firm’s Clandestine Work for Multinationals and Governments*, NATION (Sept. 15, 2010), <https://www.thenation.com/article/archive/blackwaters-black-ops> [<https://perma.cc/FUU2-XPUY>]. For detail on contractor abuses against women, see Ana Filipa Vrdoljak, *Women, PMSCs, and International Law*, in GENDER AND PRIVATE SECURITY IN GLOBAL POLITICS 187, 204 (Maya Eichler ed., 2015) (“[T]he circumstances which brought the activities of [private military and security companies] to the consciousness of the general public were acts of violence against women.”).

60. See Jutta Joachim & Andrea Schmeiker, *Of ‘True Professionals’ and ‘Ethical Hero Warriors’: A Gender-Discourse Analysis of Private Military and Security Companies*, 43 SEC. DIALOGUE 495, 503 (2012) (arguing that private military companies “profit from and reproduce social inequalities”); Saskia Stachowitsch, *Military Privatization and the Remasculinization of the State: Making the Link Between the Outsourcing of Military Security and Gendered State Transformations*, 27 INT’L REL. 74, 75 (2013) (demonstrating how the outsourcing of military functions to the private sector “excludes women from newly developing private military

further underscore that the private military sector is dominated by a certain brand of invidious masculinity, rife with hazing rituals and abundant opportunity for gender violence and sexual exploitation of local populations.⁶¹ Modern mercenarism, alongside other forms of military outsourcing, is rightly criticized as an instrument of neocolonialism,⁶² entrenching global patterns of racism and offering a mechanism by which powerful states in the Global North can engage in patterns of coercive ordering in the Global South.⁶³ And yet, we have never seen Western mercenary abuses against women or other vulnerable populations being offered up as a justification for a UNSC-authorized military intervention contrary to Western interests; indeed, the proposition is almost unfathomable. When it came to Libya in 2011, however, the perceived threat posed by black African mercenaries was a central part of the narrative that was deployed to justify the invocation of the UNSC's "responsibility to protect." When we keep this contradiction in mind, it becomes harder still to disentangle race from political and legal framings of the "humanity" said to have been protected by way of the 2011 military intervention in Libya.

labour markets, impedes gender equality policies and reconstructs masculinist gender ideologies").

61. See Paul Higate, *In the Business of (In)Security? Mavericks, Mercenaries and Masculinities in the Private Security Company*, in *MAKING GENDER, MAKING WAR: VIOLENCE, MILITARY AND PEACEKEEPING PRACTICES* 182 (Annica Kronsell & Erika Svedberg eds., 2012); Paul Higate, *Drinking Vodka From the 'Butt-Crack': Men, Masculinities and Fratriarchy in the Private Militarized Security Company*, 14 *INT'L FEMINIST J. POL.* 450 (2012); Jutta Joachim & Andrea Schneider, *(Re)Masculinizing Security? Gender and Private Military and Security Companies*, in *GENDER, AGENCY AND POLITICAL VIOLENCE* 39 (Linda Åhäll & Laura J. Shepherd eds., 2012); Joachim & Schneider, *supra* note 60. Higate stresses that examining the private military industry through the lens of gender "can bring into sharp relief the operation of power across all levels, from everyday company/host population micro-interactions, through company's [sic] meso-level institutional sub-cultures, and on to the macro, where masculinity retains an elevated status in the international sphere when conceived of through its neo-liberalized security guise." Paul Higate, *Solving the Problem of Men and Masculinities in the Private Military and Security Industry*, in *HANDBOOK ON GENDER IN WORLD POLITICS* 289, 290 (Jill Steans & Daniela Tepe-Belfrage eds., 2016).
62. See, e.g., Filiz Zabci, *Private Military Companies: 'Shadow Soldiers' of Neo-Colonialism*, *CAP. & CLASS*, Summer 2007, at 1. Zabci goes so far as to argue that the "main reason" for the recent turn to private military violence "has been the presentation of new opportunities for colonialism." *Id.* at 1.
63. See Stephane Siohan, *Weak States and Private Security in Darkest Africa: Order Behind the Scenes in the Periphery of the World*, 123 *POLITIQUE INTERNATIONALE* 392 (2009).

II. “THESE BASTIONS OF COLONIALISM AND RACISM”:⁶⁴ COOPTATION OF AFRICAN CONCERNS ABOUT RACE AND THE MERCENARY THREAT

There is something particularly galling about the fact that the Security Council took a long-held and often resisted African concern—the threat of mercenarism—and deployed it in order to achieve a particular outcome—foreign military intervention—in a manner that is completely at odds with African approaches to security in the region. In our view, it is difficult to read this as anything other than a cynical cooptation and reversal of a critical norm by which African states have sought to use international law to resist, rather than perpetuate, racism and Western hegemony. In this Part, we place the juridification of the mercenary threat in historical context. We demonstrate that African states, as the drivers of a norm prohibiting mercenarism, have consistently related the need for an antimercenary norm to questions of race and self-determination. Relying on the alleged role of African mercenaries in Libya as part of the basis for authorizing the use of force, the UNSC has cunningly taken the concept of mercenarism from a threat to the peace and self-determination of a formerly colonized state, and has transformed it into a *basis for foreign intervention* in a formerly colonized state.

A. Longstanding Race-Based Objections to Mercenarism

While objections to mercenarism almost invariably center upon the mercenary’s impermissible pecuniary motivation, among the less explicitly acknowledged and discussed objections is the notion that the mercenary stands as both symbol and embodiment of racism.⁶⁵ As one scholar puts it: “No matter who the mercenaries served the scenario has always been the same: white soldiers

64. Lennox S. Hinds, *The Legal Status of Mercenaries: A Concept in International Humanitarian Law*, 52 PHIL. L.J. 395, 402 (1977).

65. See, e.g., Montgomery Sapone, *Have Rifle With Scope, Will Travel: The Global Economy of Mercenary Violence*, 30 CAL. W. INT’L L.J. 1, 14–15 (1999) (offering an example of mercenaries renegeing on contracts because their racism outweighed their pecuniary motivations to fight: “In 1975, mercenaries who had been recruited for the Rhodesian independence organization backed out when it became known that they would be fighting against the white Rhodesian government. Although the pay was substantial, the recruits were unwilling to fight ‘white soldiers for a black boss.’” (footnote omitted)); James L. Taulbee, *Myths, Mercenaries and Contemporary International Law*, 15 CAL. W. INT’L L.J. 339, 342 (1985) (“[T]he mercenary has become the symbol of racism and neocolonialism within the Afro-Asian bloc.”).

of fortune fighting black natives.”⁶⁶ Indeed, despite the failure to explicitly mention race in the mercenary conventions, race has historically held a prominent place in post-Charter antimercenary narratives, even among Western jurists. To take one example, Antonio Cassese’s account of the recent history of mercenarism pointedly avoids a colorblind framing of the mercenary threat, noting: “It is certain that, in 1976, *white mercenaries* entered from Zaire and helped [the National Liberation Front of Angola] to fight against the armed forces of the Angolan central government. In 1977, *white and coloured mercenaries* . . . tried to overthrow the government of Benin.”⁶⁷

This racial typology is deeply connected to the history of colonial imposition upon Africa, as well as to the particular experience of apartheid regimes.⁶⁸ For Martin, writing in the 1970s, in the immediate aftermath of the sensational Angolan mercenary trials,⁶⁹ race was absolutely central to antimercenary sentiment. This was because:

apart from the usual antipathy towards a mercenary as a hired assassin, the mercenary represents to the African everything he fights to defeat: namely, racism and colonialism. For the mercenary is almost invariably white and his participation in African liberation struggles inevitably carries racist overtones. Moreover, the mercenary is

66. Taulbee, *supra* note 65, at 342; see also Lloyd Garrison, *White Mercenaries on a ‘Rabbit Hunt’*, N.Y. TIMES (Nov. 15, 1964), <https://www.nytimes.com/1964/11/15/archives/white-mercenaries-on-a-rabbit-hunt.html> [https://perma.cc/P6WF-UBA6]. Covering mercenary activity in the Congo, Garrison reports:

The mercenaries are a mixed band of men, most or [all of] them Rhodesians, with a sprinkling of English-speaking South Africans, like Wilson, and whites from Kenya, like “Mike,” an ex-lawyer from Nairobi . . .

. . . .

. . . But “mercenary” is a dirty word in all African capitals, especially when it means Rhodesian or South African whites.

Id.

67. Antonio Cassese, *Mercenaries: Lawful Combatants or War Criminals?*, 40 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT & VÖLKERRECHT 1, 2–3 (1980) (emphasis added) (footnotes omitted).

68. For instance, in the context of Mike Hoare’s arrest and trial in the early 1980s, one reporter observed: “Mr. Hoare was something of a folk hero to South African whites because he had demonstrated, they thought, that 200 whites could be invincible against the black enemy many times their number.” Joseph Lelyveld, *Pretoria Jails Famed Soldier After Failed Seychelles Coup*, N.Y. TIMES (Nov. 30, 1981), <https://www.nytimes.com/1981/11/30/world/pretoria-jails-famed-soldier-after-failed-seychelles-coup.html> [https://perma.cc/K8T9-57QE].

69. Riley Martin, *Mercenaries and the Rule of Law*, 17 INT’L COMM. JURISTS REV. 51 (1976). On the Angolan mercenary trials, see Mike J. Hoover, *The Laws of War and the Angolan Trial of Mercenaries: Death to the Dogs of War*, 9 CASE W. RES. J. INT’L L. 323 (1977).

seen as the accomplice of powerful colonial interests—those which stand most to gain from maintaining the status quo.⁷⁰

The case of Libya illustrates the fact that the stereotype of the “white mercenary interfering with African autonomy” does not strictly hold true today. In the modern context, many mercenaries are not white,⁷¹ a number of black African leaders have sought out the services of mercenaries,⁷² and indeed, mercenary activity occurs in contexts beyond the African continent.⁷³ Nevertheless, race-based views have shaped much of the normative debate and lent particular credence to the push to proscribe mercenarism.

B. The Practice of the UN and the OAU

Over the past half century, race-based and noninterference objections have underpinned all African regional efforts to suppress mercenarism. The UN, on the other hand, has lacked a consistent approach, vacillating between race

70. Martin, *supra* note 69, at 52.

71. For instance, although the 2004 coup attempt in Equatorial Guinea was led by Simon Mann and other white mercenaries, the majority of the troops themselves were black African men. A second coup attempt in 2017 saw scores of African men arrested, tortured, and prosecuted in mercenary trials that have been described as a “travesty of justice.” *Equatorial Guinea: Coup Trial Travesty of Justice*, HUM. RTS. WATCH (Aug. 2, 2019), <https://www.hrw.org/news/2019/08/02/equatorial-guinea-coup-trial-travesty-justice> [<https://perma.cc/7932-L355>] (“The government arrested around 30 men from Chad, Cameroon, and Central African Republic in December 2017, alleging they were mercenaries who had crossed the border into Equatorial Guinea with ammunition to stage a coup.”).

72. See, e.g., Adam Nossiter, *Mercenaries Join Nigeria’s Military Campaign Against Boko Haram*, N.Y. TIMES (Mar. 12, 2015), <https://www.nytimes.com/2015/03/13/world/africa/nigerias-fight-against-boko-haram-gets-help-from-south-african-mercenaries.html> [<https://perma.cc/Q7WV-P2AG>] (reporting that “a senior government official in northern Nigeria said the [role of South African mercenaries] . . . was crucial, part of a new offensive against Boko Haram after a nearly six-year insurrection”); cf. David Smith, *South Africa’s Ageing White Mercenaries Who Helped Turn Tide on Boko Haram*, GUARDIAN (Apr. 14, 2015), <https://www.theguardian.com/world/2015/apr/14/south-africas-ageing-white-mercenaries-who-helped-turn-tide-on-boko-haram> [<https://perma.cc/R7LV-5227>] (citing Nigerian government denials). Smith reports:

Nosiviwe Mapisa-Nqakula, the [Nigerian] defence minister, has said any deployment to Nigeria would be illegal under laws passed in 1998 and toughened in 2006. “They are mercenaries, whether they are training, skilling the Nigerian defence force, or scouting for them,” she was quoted as saying. “The point is they have no business to be there.”

Id.

73. For a recent example, see Tom Phillips, *US Mercenary Says Group Plotted to Seize Venezuela’s Presidential Palace*, GUARDIAN (May 7, 2020), <https://www.theguardian.com/world/2020/may/07/venezuela-us-mercenary-nicolas-maduro> [<https://perma.cc/AM9N-VAN5>] (reporting on an alleged thwarted mercenary attack on President Nicolás Maduro at the *Palacio de Miraflores* in Venezuela in May 2020).

agnosticism at some times, and at other times invoking race and self-determination as normative justifications for an antimercenary position at international law. The early practice of the UN and the Organization of African Unity (OAU)⁷⁴ dealing with mercenaries accords with Hilary Charlesworth's depiction of international law as a "discipline of crisis."⁷⁵ Institutional attention to mercenarism was ad hoc and sporadic, usually taking the form of Resolutions in response to specific crises in Africa,⁷⁶ and did not take care to articulate a principled or uniform stance on the questions of race and the self-determination of newly independent states. As early as 1961, the UNSC authorized the Secretary General to take "vigorous action, including the use of the requisite measure of force, if necessary, for the immediate apprehension, detention pending legal action and/or deportation of . . . mercenaries . . ."⁷⁷ in response to the Katangan secessionist movement's use of mercenaries in the Congo⁷⁸—the "cradle of

74. The Organization of African Unity (OAU) was the precursor to what is now the African Union. For background on the normative, political, and procedural aspects of the transition from the OAU to the African Union, see generally Abou Jeng, *The Genesis of the African Union*, in *PEACEBUILDING IN THE AFRICAN UNION: LAW, PHILOSOPHY AND PRACTICE* 136 (2012), and Tiyanjana Maluwa, *The Transition From the Organisation of African Unity to the African Union*, in *THE AFRICAN UNION: LEGAL AND INSTITUTIONAL FRAMEWORK: A MANUAL ON THE PAN-AFRICAN ORGANIZATION* 25 (Abdulqawi A. Yusuf & Fatsah Ouguergouz eds., 2012).

75. Hilary Charlesworth, *International Law: A Discipline of Crisis*, 65 *MOD. L. REV.* 377, 377 (2002).

76. The focus on Africa is such that there is a tendency to describe mercenarism as an "African phenomenon." Cassese, *supra* note 67, at 1. This disregards opposition to mercenarism elsewhere throughout the Global South, such as in the Pacific and Latin America. See, e.g., SEAN DORNEY, *THE SANDLINE AFFAIR: POLITICS AND MERCENARIES AND THE BOUGAINVILLE CRISIS* (1998) (detailing Papua New Guinea's controversial use of mercenary troops from Sandline to suppress local opposition in the Bougainville Crisis); José Luis Gómez del Prado (Chairperson-Rapporteur), *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 Peoples to Self-Determination*, U.N. Doc. A/HRC/7/7/Add.5 (Mar. 5, 2008); Amada Benavides de Pérez (Chairperson), *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 Peoples to Self-Determination*, U.N. Doc. A/HRC/4/42/Add.1 (Feb. 20, 2007). In its claim against the United States before the International Court of Justice in the 1980s, Nicaragua alleged that "[the] United States has created an 'army' of more than 10,000 mercenaries . . . installed them in more than ten base camps in Honduras along the border with Nicaragua, trained them, paid them, supplied them with arms, ammunition, food and medical supplies, and directed their attacks against human and economic targets inside Nicaragua." *Military and Paramilitary Activities in and Against Nicaragua* (Nicar. v. U.S.), Judgment, 1984 I.C.J. 392, ¶ 85 (Nov. 26) (Jurisdiction and Admissibility); see also *Military and Paramilitary Activities in and Against Nicaragua* (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14, ¶¶ 83, 93, 113–14 (June 27) (Merits).

77. S.C. Res. 169, ¶ 4 (Nov. 24, 1961).

78. Or Zaire, as it then was.

modern-day mercenarism in Africa.”⁷⁹ The 1961 Resolution related only to the crisis in the Congo, and did not include a general call to action against the phenomenon of mercenarism. In its 1968 Resolution relating to Portugal’s use of mercenaries in Africa, the General Assembly issued a slightly broader call to action, appealing to all states to “take all measures to prevent the recruitment or training in their territories of any persons as mercenaries for the colonial war being waged in the Territories under Portuguese domination and for violations of the territorial integrity and sovereignty of the independent African States.”⁸⁰

Thereafter, the Resolutions became broader in their scope, setting out general obligations under international law. Taken as a whole, the twentieth century mercenary Resolutions shared a number of key themes, such as outrage at the destabilizing effects of mercenaries, affirmation of the entitlement of states to enjoy basic sovereign rights such as freedom from external interference, and emphasis on the right to self-determination in the context of decolonization. The legal principles underpinning the Resolutions, however, diverged into two distinct streams.

The first stream focused on apportioning state responsibility for the use of mercenaries in violation of the UN Charter prohibition on the threat and use of force,⁸¹ as well as the customary obligation to refrain from interfering with the political independence of states.⁸² This was the approach of the UN General Assembly in its 1970 *Declaration of Principles of International Law Concerning Friendly Relations and Cooperation Among States*. Adopted by consensus, the declaration affirms that states have a duty to refrain in their international relations from the threat or use of force against the territorial integrity or political independence of another state, as set out in article 2(4) of the Charter. It specifically provides that this duty encompasses an obligation to refrain from using mercenaries, so that every state “has the duty to refrain from organizing or encouraging the organization of irregular forces or armed bands, including mercenaries, for incursion into the territory of another state.”⁸³

79. Khareen Pech, *The Hand of War: Mercenaries in the Former Zaire 1996–97*, in *MERCENARIES: AN AFRICAN SECURITY DILEMMA* 117, 120 (Abdel-Fatau Musah & J. Kayode Fayemi eds., 2000).

80. G.A. Res. 2395 (XXIII), ¶ 9 (Nov. 29, 1968).

81. U.N. Charter art. 2, ¶ 4.

82. See, e.g., *Military and Paramilitary Activities in and Against Nicaragua* (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14, ¶¶ 203, 208, 228 (June 27) (Merits); G.A. Res. 36/103 (Dec. 9, 1981); G.A. Res. 2625 (XXV) (Oct. 24, 1970); G.A. Res. 2131 (XX) (Dec. 21, 1965).

83. G.A. Res. 2625 (XXV), *supra* note 82, at 123.

Some UN instruments, and at least one OAU instrument,⁸⁴ explicitly characterize mercenary activity as a form of aggression, but (unsurprisingly) this applies only in situations where mercenaries are sent by one state to use force in another state. Most significantly, the General Assembly's Resolution 3314 on the definition of aggression provides that "[t]he sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State" falls within the meaning of aggression for the purposes of the UN Charter.⁸⁵ Even where states are not bound by the international instruments that proscribe mercenarism, they may nonetheless be bound by a parallel obligation at customary international law. For instance, in the *Nicaragua (Merits)* decision, the International Court of Justice found that Resolution 3314 reflected customary international law,⁸⁶ lending force to the argument that mercenarism is likewise prohibited under customary international law. It bears noting here that none of these Resolutions reference a discrete crime of "mercenarism" but rather treat mercenary activity as one facet of the prohibition on aggression.

The second stream of Resolutions related to the use of mercenaries by states to suppress self-determination or national liberation movements within their own territory. This approach was fundamentally different from the first, which centered on the preservation of state sovereignty against interference by external states. Notably, it is at this point that we can observe a fundamental divergence of approaches: an OAU approach, which favored the right of African states to self-determination, and a UN approach, which favored Western interests in the process of decolonization. Whereas the UN response to mercenarism in the Congo in the 1960s was to pass Resolutions in relation to the use of mercenaries against the state in support of the Katangan secessionist movement,⁸⁷ the OAU's approach was to focus on the use of mercenaries by the state to suppress local opposition to General Mobutu.⁸⁸ Subsequent OAU Resolutions stressed that the use of mercenaries in Africa was a means by which foreign states interfered with the decolonization project and represented a specific threat to the security of

84. Org. of African Unity [OAU], Res. 49 (IV), *Resolution on Mercenaries*, OAU Doc. AHG/Res.49(IV), ¶ 1 (Sept. 14, 1967) (strongly condemning "the aggression of the mercenaries against the Democratic Republic of the Congo"). The Resolution further calls on the United Nations to "deplore and take immediate action to eradicate such illegal and immoral practices." *Id.* ¶ 4.

85. G.A. Res. 3314 (XXIX), annex, art. 3(g) (Dec. 14, 1974).

86. *Nicar. v. U.S.*, 1986 I.C.J. at 103, ¶ 195 (Merits).

87. S.C. Res. 169, *supra* note 77, ¶¶ 3–5.

88. Org. of African Unity [OAU], Res. 5 (III), *Resolution on the Congolese Problem*, OAU Doc. ECM/Res.5(III) (Sept. 10, 1964).

member states.⁸⁹ A strong anti-apartheid sentiment was also present in a number of the Resolutions. For instance, in 1968 the OAU condemned the use of mercenaries in Rhodesia to assist the “racist minority regime enabling it to sustain itself in illegality.”⁹⁰ In other words, race was at the very heart of OAU objections and responses to mercenarism.

In line with these objections, the OAU called for strong and uniform action to eliminate mercenarism. For example, a September 1967 OAU Resolution called on “all States of the world to enact laws declaring the recruitment and training of mercenaries in their territories a punishable crime and deterring their citizens from enlisting as mercenaries.”⁹¹ An OAU statement on mercenary activity, adopted in 1971,⁹² proclaims member states’ resolve to work towards a legal instrument to coordinate, harmonize, and promote “the struggle of the African peoples and States against mercenaries.”⁹³

The UN’s contribution to this second stream of Resolutions is well illustrated by the 1968 General Assembly Resolution on the implementation of the *Declaration on the Granting of Independence to Colonial Countries and Peoples*, which declares that “the practice of using mercenaries against movements for national liberation and independence is punishable as a criminal act and that the mercenaries themselves are outlaws”⁹⁴ Pursuant to that Resolution, states are called upon to enact legislation “declaring the recruitment, financing and training of mercenaries in their territory to be a punishable offence and prohibiting their nationals from serving as mercenaries.”⁹⁵ This approach is also evident in the General Assembly’s 1973 *Declaration on the Basic Principles on the Legal Status of Combatants Struggling Against Colonial and Alien Domination and Racist Regimes*. The fifth “basic principle” in the Resolution provides that “[t]he use of mercenaries by colonial and racist regimes against the

89. See, e.g., Org. of African Unity [OAU], Decl. 6 (XVII), *Declaration on the Activities of Mercenaries in Africa*, OAU Doc. CM/St.6(XVII) (June 19, 1971); Org. of African Unity [OAU], Res.17(VII), *Resolution on Guinea*, OAU Doc. ECM/Res.17(VII) (Dec. 12, 1970); Org. of African Unity [OAU], Res. 49 (IV), *supra* note 84.

90. Org. of African Unity [OAU], Res. 153 (XI), *Resolution on Rhodesia*, OAU Doc. CM/Res.153(XI), ¶¶ 5–6 (Sept. 12, 1968). The Resolution also reaffirms “the right of the people of Zimbabwe to freedom and independence on the basis of majority rule, and the legitimacy of their struggle for national liberation.” *Id.* ¶ 1.

91. Org. of African Unity [OAU], Res. 49 (IV), *supra* note 84, ¶ 51.

92. Org. of African Unity [OAU], Decl. 6 (XVII), *supra* note 89.

93. *Id.* ¶ 4.

94. G.A. Res. 2465 (XXIII), ¶ 8 (Dec. 20, 1968). The General Assembly reiterated this aspect of the declaration in subsequent sessions. See G.A. Res. 2708 (XXV), ¶ 8 (Dec. 14, 1970); G.A. Res. 2548 (XXIV), ¶ 7 (Dec. 11, 1969). For background, see H. C. Burmester, *The Recruitment and Use of Mercenaries in Armed Conflicts*, 72 AM. J. INT’L L. 37, 54 (1978).

95. G.A. Res. 2465 (XXIII), *supra* note 94, ¶ 8.

national liberation movements struggling for their freedom and independence from the yoke of colonialism and alien domination is considered to be a criminal act and the mercenaries should accordingly be punished as criminals.”⁹⁶

The language of the 1973 Declaration is more limited than that of the 1968 Declaration. Whereas the 1968 Declaration refers to the use of mercenaries against *all* movements for national liberation and independence, the 1973 Declaration applies only to liberation movements against “colonialism and alien domination.” It bears noting that this language reflects the title of the Declaration; Cassese suggests, however, that it is compatible with the view that, by this stage, African states were keen to maintain a right to use mercenaries against their own people, “in order to strengthen their positions, generally in the security services, or to train African troops,” thereby affirming the “fragility of African States’ structures and their dangerous reliance on external support”⁹⁷ To the extent that the Resolutions reflect a norm prohibiting mercenary activity, it is by no means clear that they prohibit a state’s use of mercenaries to suppress rebellion or self-determination within its own territory.⁹⁸ Instead, they apply to a very specific situation: where mercenaries are used to bolster colonial regimes fighting national liberation movements.⁹⁹

Insofar as the Resolutions in the second stream called for the criminalization of mercenary activity, they diverged from preexisting international criminal law. The use of mercenaries in this context did not fall within the rubric of the definition of aggression, as it lacked the requisite international element; in this sense, the designation of mercenaries as international outlaws was controversial. Further, while the Resolutions in the first stream tended to garner significant, and often unanimous, support within the United Nations, the Resolutions in the second stream generated less support¹⁰⁰ and are, therefore, weak evidence of the

96. G.A. Res. 3103 (XXVIII), ¶ 5 (Dec. 12, 1973).

97. Cassese, *supra* note 67, at 3.

98. Cassese suggests that this question is left to domestic law. *See id.* at 6.

99. Laura A. Dickinson, *Mercenarism and Private Military Contractors*, in 1 INTERNATIONAL CRIMINAL LAW: SOURCES, SUBJECTS AND CONTENTS 355, 358 (M. Cherif Bassiouni ed., 3d ed. 2008).

100. G.A. Res. 2465 was adopted with eighty-seven States in favor, seven against, and seventeen abstaining. *See* G.A. Res. 2465 (XXIII), *supra* note 94 (text of resolution); U.N. GAOR, 23d Sess., 1751st plen. mtg. at 11, U.N. Doc. A/PV.1751 (Dec. 20, 1968) (voting record). G.A. Res. 3103 was adopted with eighty-three States in favor, thirteen against, and nineteen abstaining. *See* G.A. Res. 3103 (XXVIII), *supra* note 96 (text of resolution); U.N. GAOR, 28th Sess., 2197th plen. mtg. at 4–5, U.N. Doc. A/PV.2197 (Dec. 12, 1973) (voting record). Kalshoven casts particular doubt on the authority of G.A. Res. 3103, claiming that it “cannot be accepted as an accurate, let alone as an authoritative, statement of the law; on the contrary, it provided a clear case of abuse of block voting power.” Frits Kalshoven, *Reaffirmation and Development of*

existence of a customary international norm.¹⁰¹ Additionally, a number of the OAU Resolutions contained calls for the development of a new convention on mercenaries.¹⁰² One reading of the Resolutions in this stream is that, rather than modifying existing international law through the creation of a new custom, they helped harmonize the positions of Socialist and African states, gained the support of a broader community of states, and set the scene for future revision of the law.¹⁰³

C. The Treaty Law

The divergent treatments of mercenaries is reflected in the treaty laws: International treaties, such as the Geneva Conventions' Additional Protocol I and the UN Mercenaries Convention take a pointedly agnostic approach to the question of why mercenary activities are carried out.¹⁰⁴ In contrast, the African Conventions explicitly restrict the prohibitions to circumstances that involve "opposing by armed violence a process of self-determination,"¹⁰⁵ or in the case of the OAU Convention, conduct performed with the aim of:

[overthrowing] by force of arms or by any other means the government of that Member State of the Organization of African Unity; . . . [undermining] the independence, territorial integrity or normal working of the institutions of the said State; [or blocking]

International Humanitarian Law Applicable in Armed Conflicts: The First Session of the Diplomatic Conference, Geneva, 20 February–29 March 1974, 5 NETH. Y.B. INT'L L. 2, 24 (1974).

101. Cf. *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 I.C.J. 226, ¶ 70 (July 8); *Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.)*, Judgment, 1986 I.C.J. 14, ¶¶ 190–91 (June 27) (Merits) (attaching weight to regional and General Assembly resolutions that had passed with unanimous or close to unanimous support); see also Wil D. Verwey, *The International Hostages Convention and National Liberation Movements*, 75 AM. J. INT'L L. 69, 81 (1981) (claiming that "[e]ven among African circles doubt seems to prevail as to whether the claim formulated in this resolution has in the meantime developed into a rule of customary [international] law").
102. Org. of African Unity [OAU], Decl. 6 (XVII), *supra* note 89, ¶ 4 (where the OAU "proclaims [its] resolve to prepare a legal instrument for co-ordinating, harmonizing and promoting the struggle of the African peoples and states against mercenaries"); OAU Council of Ministers' Committee of Legal Experts, OAU Doc. CM/1/33/Ref.1 (June 1972) (with draft convention at Annex I).
103. Cassese, *supra* note 67, at 10–11.
104. For example, one criticism of Article 47 of Additional Protocol I is that the proscribed mercenary motivation (for material gain) is not necessarily the sole reason for enlisting, so that the possibility of other factors should be considered, such as racism. See Martin, *supra* note 69, at 52.
105. E.g., Org. of African Unity [OAU], *Convention for the Elimination of Mercenarism in Africa*, OAU Doc. CM/433/Rev.L, Annex 1, app. II (1972) (referencing text from the "draft produced by the International Commission of Inquiry on Mercenaries, in Luanda, Angola, June 1976").

by any means the activities of any liberation movement recognized by the Organization of African Unity.¹⁰⁶

Operating according to this definition and historically employing mercenaries to bolster their own forces for use exclusively within their own states, it is highly unlikely that African states ever anticipated that an international norm prohibiting mercenarism would be employed by the West to justify intervention.

Given the existing treaty law, and the associated legal consequences, the antimercenary norm was never intended, or even anticipated, as a basis for foreign intervention in African affairs. In the conventions, the legal consequences of mercenarism are strictly limited: Some conventions envisage individual criminal liability for those who use, recruit, or serve as mercenaries;¹⁰⁷ others explicitly recognize mercenary activity *by foreign states* as a form of aggression under public international law;¹⁰⁸ and in the context of international humanitarian law, the only consequence of mercenarism is the denial of combatant or prisoner-of-war status.¹⁰⁹ Indeed, so much was reflected in the African Union's approach to resolving the situation in Libya: While the United Nations pressed for a military intervention from at least early 2011, the African Union consistently pressed for a diplomatic resolution to the situation and rejected foreign military intervention in any form.¹¹⁰ To the extent that it expressed concern about the possible use of mercenaries by the Qaddafi regime, the African Union merely recalled the provisions of the OAU Convention and requested that the Commission "gather information on the reported presence of mercenaries in Libya and their actions, to enable it, should these reports be confirmed, to take the required measures in line with the Convention."¹¹¹ In

106. *Id.* art. 1.

107. See, e.g., International Convention Against the Recruitment, Use, Financing and Training of Mercenaries, art. 2, Dec. 4, 1989, 2163 U.N.T.S. 75; Organization of African Unity Convention for the Elimination of Mercenarism in Africa, art. 1, July 3, 1977, 1490 U.N.T.S. 89.

108. See G.A. Res. 3314 (XXIX), *supra* note 85, art. 3 annex.

109. Additional Protocol I, *supra* note 53, art. 47.

110. See African Union Peace and Security Council, *Communique of the 265th Meeting of the Peace and Security Council*, ¶¶ 6, 8, PSC/PR/COMM.2(CCLXV) (Mar. 10, 2011). The Peace and Security Council "[reaffirmed] its strong commitment to the respect of the unity and territorial integrity of Libya, as well as its rejection of any foreign military intervention, whatever its form," before moving to a suite of diplomatic steps including the establishment of an AU ad hoc High-Level Committee on Libya, with the mandate to:

(i) engage with all parties in Libya and continually assess the evolution of the situation on the ground, (ii) facilitate inclusive dialogue among the Libyan parties on the appropriate reforms, [and] (iii) engage AU's partners, in particular the League of Arab States, the Organization of the Islamic Conference, the European Union and the United Nations, to facilitate coordination of efforts and seek their support for the early resolution of the crisis.

Id.; see also Davis, *supra* note 38, at 9–10.

111. African Union Peace and Security Council, *supra* note 110, ¶ 11.

other words, the African Union took an exclusively diplomatic and criminal law approach, one that was consistent with its decades-long legal treatment of mercenarism, never once suggesting the allegations of mercenarism ought to be seen as a basis for a military intervention in Libya.

CONCLUSION

This Article maps the links between race, empire, and international law in the case of the 2011 military intervention in Libya. Our purpose has been to illuminate the role that the discourse about black mercenaries and mercenarism played in the authorization of the 2011 intervention, and how that discourse fits within broader concerns about mercenaries that have been articulated by Third World States since the decolonization era. We argue that Resolutions 1970 and 1973 indirectly adopted the racialized and sexualized narratives about hypermasculine and savage black mercenaries, elevating them to a distinct threat and justification for the intervention. By so doing, the UN Security Council drew a line between the humanity that needed to be protected and out-of-place black bodies in Libya that were conceptualized as a threat to civilians and to peace and security more broadly.¹¹² Furthermore, we show that this development entailed a perversion of the arguments against mercenarism articulated by African states since decolonization. More specifically, it involved turning concerns about race and racism on their heads, since African states had long been concerned about white mercenaries subverting antiracist and self-determination movements motivated not only by profit but also by an ideological commitment to white supremacy.¹¹³ The efforts by African states to outlaw mercenarism had been staunchly resisted by the West only to be recovered and repurposed in support of the demonization of black Libyans and migrants, and in support of military intervention on the continent. When situated within the broader struggles around mercenarism, Resolutions 1970 and 1973 emerge as encapsulations of a very particular view of who can cross borders in order to work or fight, reserving for those coded as white a much broader range of rights and opportunities, and placing those coded as black at the bottom of the hierarchy.

112. Here we borrow and paraphrase Darryl Li's expression "out-of-place Muslims," which he uses to describe the anxieties animating the debates about foreign fighters. See Darryl Li, *A Universal Enemy?: "Foreign Fighters" and Legal Regimes of Exclusion and Exemption Under the "Global War on Terror"*, 41 COLUM. HUM. RTS. L. REV. 355, 359 (2010).

113. See generally KYLE BURKE, *REVOLUTIONARIES FOR THE RIGHT: ANTICOMMUNIST INTERNATIONALISM AND PARAMILITARY WARFARE IN THE COLD WAR* (2018) (detailing the importance of overseas anticommunist fighting for the rise and consolidation of the far-right in the United States).