Mercenaries: Strong Norm, Weak Law

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Abstract In this article I examine how a weak international law can be created despite the presence of a strong norm, and I use weak law to probe the relationship between social and legal norms. International law dealing with mercenaries is notoriously flawed. These flaws have been attributed to the idea that state interest (or lack of interest) led to the development of intentionally weak law. In fact, ineffective anti-mercenary law is the result of the influence of norms. A strong norm against mercenary use has led states to devise a definition that indicated what they found problematic about mercenaries, and differentiated mercenaries from other actors. This definition followed the anti-mercenary norm but created a number of loopholes, which were made worse by the fact that commitment to the norm was so strong that states were unable to make adjustments necessary to create more effective law. The development of the law against mercenaries was further undermined by the pressures of a competing norm. During the 1980s, creation of a UN Convention to deal with mercenaries was stymied by the fact that many states were seeking to protect the norm of state responsibility, and the conflict between this norm and the anti-mercenary norm delayed the Convention to such a degree it was superseded by events. Weak anti-mercenary law, created in the presence of a strong anti-mercenary norm, can demonstrate four things about the relationship between social and legal norms: that states advocate the creation of law because of what it is rather than what it does; that legal institutionalization is not necessarily good for the further development of a norm; that strong commitment to a norm can lead to the creation of weak law; and that social and legal norms might not differ because the latter is more effective.

Private security companies and their mercenary predecessors appear to be uncontroversial actors in international relations. States have a long history of turning to the private sector to provide military services. Indeed, mercenaries are referred to as the world's second-oldest profession[1] and played important roles in state militaries until the midnineteenth century.[2] Today, the United Kingdom and the United

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1. See Samuel E Finer, "The Second Oldest Trade," *New Society*, 15 July 1976, 129–31; and Schreier and Caparini 2005.
2. Thomson 1994.

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States are so reliant on the private sector that going to war without private security company support would be difficult, if not impossible. Private security company personnel were the second-largest contingent in the U.S.-led coalition during the 2003 war in Iraq.[3]

Another sign of the apparent acceptability of private force is that the international law designed to deal with it is so weak that it is virtually unusable.[4] The only remotely applicable international laws, those dealing specifically with mercenaries, are full of serious flaws. Surely, if mercenaries and private security companies were deemed to be problematic or unacceptable actors, states would have responded with effective law designed to control them. Legal scholars argue that in fact states have not been concerned about mercenaries, and have devised purposely weak law to ensure that states are able to use private force themselves against adversaries who cannot turn to the private sector.[5] The weakness of international law and the commonplace use of private security today seem to suggest that the use of private force by states is unobjectionable.

In this article I argue that in fact, mercenaries were once considered profoundly objectionable, and that weak law does not indicate the absence of concern about the mercenary issue. A strong norm against mercenary use existed throughout the 1960s, 1970s, and 1980s. Anti-mercenary law is weak as a direct result of state attempts to abide by this norm, not the consequence of state attempts to preserve the right to use mercenaries themselves. States were so committed to the anti-mercenary norm that they refused to dilute it or adjust it in any way during the lawmaking process, resulting in law that precisely reflects the norm but is legally flawed. The conventional wisdom about mercenaries and anti-mercenary law is inaccurate, and the study of a weak law caused by a strong norm provides a revealing window into the relationship between social and legal norms.

There is no question that anti-mercenary law is full of flaws. The two documents of international law with potentially universal application dealing with mercenaries, Article 47 of Protocol I Additional to the Geneva Conventions[6] and the International Convention against the Recruitment, Use, Financing, and Training of Mercenaries,[7] share a definition of a mercenary that creates significant prob-

3. Schreier and Caparini 2005. The issue of whether or not private security companies can be considered mercenaries is dealt with below.

4. On the unusability of law, see Kassebaum 2000; Nossal 1998; Singer 2004; and Walker and Whyte 2005. There is a related debate about whether or not private security companies can be considered mercenaries. The majority of scholars argue that they cannot: see, among others, Holmqvist 2005; Nossal 2001; and Zarate 1998.

5. See Cassese 1980; and Green 1979. The current literature adopts Green's and Cassese's arguments: see Kassebaum 2000; and Singer 2004.

6. 1977. Hereinafter referred to as Article 47.

7. 1989, entered into force 2001. This Convention was created by the United Nations. I will refer to this particular Convention as the UN Convention or the Convention, and specify when I am referring to another UN Convention. This article will focus on these two documents, as they are the most universal and the most often criticized. There is also an Organization of African Unity Convention for the Elimination of Mercenaries in Africa (OAU Convention), which was created in 1977 and came into force 1985.

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lems for enforcement. This definition renders the law so weak that is has become commonplace to note that "any mercenary who cannot exclude himself from this definition deserves to be shot—and his lawyer with him!"[8]

This article explores the paradox that weak law can be the result of strong norms, and it argues further that weak law is an important object of study. I do so in five stages. First, I outline conventional explanations for the weakness of mercenary law, highlighting loopholes in Article 47 and the apparent Western lack of interest in both Article 47 and the UN Convention. The second section defines the norm against mercenary use and explains its influence. The third section argues that the loopholes in Article 47 were caused by a clear attempt to abide by the norm against mercenary use rather than a lack of commitment to the creation of law. The fourth section argues that Western states did believe that mercenaries ought to be controlled but strongly disagreed about the best way of doing so, slowing down the creation of the UN Convention. The fifth section assesses the implications of the argument that strong norms do not always lead to strong law for the study of the relationship between social and legal norms.

Explanations for Weak Mercenary Law

There are four possible explanations for weak anti-mercenary law, including the conventional view of legal scholars outlined above. If these explanations are accepted, then it would appear that anti-mercenary law reveals little of interest. This discussion is concerned primarily with Article 47, and the UN Convention, as these are the two most universal pieces of international law and the most often criticized.

The first, and most obvious, explanation of why the law against mercenaries is so weak is that in the 1970s and 1980s states did not care enough to create effective law because mercenaries did not cause enough practical difficulty nor did they prompt enough moral concern to require legal attention. The first task of this article is to demonstrate that states were indeed concerned about the mercenary issue and made multiple attempts to control mercenaries, both because of the practical problems they caused and because of normative discomfort with mercenaries themselves.

A second argument is that states purposely created loopholes in the law on mercenaries. Because Western states did not care about the issue, African states were able to create law that would enhance their power. Cassese contends that African states have used international law to protect themselves from mercenary

8. Originally, quoted in Best 1980. Hampson 1991; Kassebaum 2000; and Kritsiotis 1998 repeat the assertion. Singer 2004 notes that a private military industry representative used this phrase "without any kind of attribution to another source, indicating that Best's legal lessons have been internalized in the private military industry" (531 n39).

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attacks while retaining the option to use mercenaries themselves,[9] thus preserving an advantage over their adversaries. To make the argument that the law's creation has been influenced by a norm against mercenary use, this article must demonstrate that the flaws in the law come from adherence to the norm rather than from a self-interested attempt to create weak law.

A third explanation of the weakness of anti-mercenary law might be that the most affected states, mainly weaker African states, were the most interested in creating international law to deal with mercenaries, and that more powerful Western states were not interested. All the main documents of international law dealing with mercenaries had significant African involvement,[10] and Africa was supported only by the politically sympathetic Soviet bloc. Additional Protocol I was not ratified by, among others, the United States, and contains Article 47. By the end of the 1980s, the UN Convention on mercenaries had been signed only by African states and Belgium became the first Western state to accede in 2002.[11] To demonstrate that in fact the law is based on a strong norm against mercenary use, this article must show that Western states were involved in the creation of law despite not having a direct interest in the issue, and that moreover, they actively promoted the creation of law on the basis that mercenaries were normatively problematic and so required legal control.

Finally, the law against mercenaries could be ineffective because it reflects the lowest common denominator on which states could agree, and this minimal agreement has resulted in weak law. A variation of this argument is that ineffective law usefully sends a message to concerned domestic and international constituencies that states are acting on the issue at hand, with the advantage of practical weakness that will prevent any real action.[12] This article disproves these arguments by demonstrating that in fact states deeply agreed about the need to control mercenaries, and were committed to doing so. It was, perversely, the depth of their commitment and agreement that resulted in the unworkability of the law.

The Norm Against Mercenary Use and Its Influence

Defining and explaining the influence of the norm against mercenary use requires three steps. First, I outline the concepts of a norm and of a proscriptive norm.

9. See Cassese 1980. Singer 2004; Taulbee 1985; and Zarate 1998 make the same argument in relation to the OAU Convention, which by implication suggests that African leadership on Article 47 and the Convention was self-interested.

10. The OAU Convention was obviously African in origin; the UN Convention and Article 47 were both created under Nigerian leadership.

11. As of 2007, there are seventeen signatories and twenty-eight parties. See ⟨http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterXVIII/treaty6.asp⟩. Accessed 20 December 2006.

12. See Reisman 2000. Downs 2000 makes a similar argument.

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Second, I define the term "mercenary" and explain how the norm against mercenary use derives from a common understanding of what constitutes a mercenary. Third, I provide evidence for the influence of the anti-mercenary norm on states.

Katzenstein defines norms as "collective expectations for the proper behaviour of actors within a given identity."[13] Kratochwil and Keohane concur that a norm is a standard of behavior defined in terms of rights and obligations.[14] A norm that constrains behavior or prohibits a course of action, such as a norm against the use of mercenaries, might be described as a taboo or a prohibitionary norm.[15] Price uses these terms interchangeably,[16] and the term proscriptive connotes the same thing.

The norm against mercenary use derives from the commonly accepted definition of a mercenary. The definition of a mercenary has two generally agreed-on components: mercenaries are foreign, having no national association with any of the parties to the conflict in which they fight; and their dominant motive is financial gain.[17]

The norm against mercenary use stems from the idea that mercenaries are financially motivated fighters who use force outside the bounds of the sovereign state. There are two reasons mercenaries are considered to be objectionable and in need of legal regulation. First, mercenaries lie outside state control and so pose both a practical threat to states and a threat to the normative idea that states ought to have a monopoly on the use of force.[18] Second, mercenaries do not fight for a cause deemed by society to be appropriate; they are motivated by money rather than by patriotism or ideology, and so their actions are perceived as immoral or dangerous or both. The anti-mercenary norm thus builds from the definition of a mercenary: states object to mercenaries because of the factors that make them different from other fighters.[19]

It is important here to note that there are inherent logical difficulties with asserting that mercenaries are defined by their financial motivation. It is perfectly plausible that a mercenary might be ideologically motivated and a national soldier motivated by financial concerns. However, the two components of the definition must be taken together: it is not just that mercenaries are financially motivated, but also that they use force outside state control. Many of the difficulties of the

13. Katzenstein 1996.
14. See Kratochwil 1989; and Keohane 1984.
15. See Price 1995, 1997a, and 1997b; and Price and Tannenwald 1996.
16. Price 1995.
17. See Adams 1999; Beshir 1972; Burmester 1978; Nossal 1998; Sandoz 1999; Shearer 1998a; Singer 2003; Thomson 1994; Yusuf 1979; and Zarate 1998.
18. Mercenaries can, of course, be used under state control. However, in the 1960s, 1970s, and 1980s, mercenaries were not used this way and were considered objectionable for this reason. Historically mercenaries became less objectionable once they were placed under state control. See Percy, forthcoming.
19. For a longer discussion of the difficulties of defining mercenaries, see Percy 2003.

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law discussed below stem from the fact that the definition has two related components, which led to the creation of a complex legal definition, and from the fact that financial motivation is a logically problematic way to differentiate mercenaries from other fighters on the battlefield.

A second point worth highlighting is that the anti-mercenary norm is less concerned with the nationality of fighters than the cause for which they fight. There are many foreign fighters who are not mercenaries. Volunteers fighting in the Spanish Civil War,[20] *mujahideen* fighters in Afghanistan, UN peacekeepers, and soldiers on official secondment to another state,[21] such as British soldiers in Oman,[22] are all types of foreign fighter not normally considered to be mercenary. Being foreign does not render a soldier automatically problematic, but fighting for money rather than a cause and doing so outside control does. Even though these two criteria are imperfect, as I show below, states rely on them.

Having defined the term mercenary and explained the components of the norm against mercenary use, I turn now to explaining the norm's influence. It is hard, given the common use of private security in conflicts like Iraq, to imagine a world where the appearance of mercenaries was unusual, if not unknown. This difficulty is compounded by the fact that mercenaries were common actors in international relations up until the mid- to late nineteenth century, when states began to employ their own citizens exclusively.[23] However, mercenaries were strikingly absent from warfare from the 1870s until the 1960s. Even the mercenary action of the 1960s and 1970s did not erode the sense that the use of mercenaries was abnormal. Krasner argued in 1989 that "American policymakers do not have the option of buying a regiment or two of Gurkhas"[24] while Thomson argued in 1994 that "today real states do not buy mercenaries."[25] Thomson further argues that a specific norm against mercenary use had become extremely durable. Since "the norm [against mercenary use] was implemented, no state has attempted to reinstate eighteenth-century practice by reversing or even challenging the norm."[26] Of course, the mere absence of mercenaries from the international stage does not indicate that there is a norm against mercenary use. No one argues that there is a norm against the use of longbows now that longbows are not commonplace on today's battlefields. Evidence for the continued influence of the norm against mercenary use comes from how mercenaries were used in the 1960s, 1970s, and early 1980s, and the international community's reaction to their reappearance.

When mercenaries returned to the international stage in the 1960s, they were used only in Africa, and in every case but one were hired by insurgent groups,

20. See Thomson 1994; and Yusuf 1979.
21. Zarate 1998.
22. Thomson 1994.
23. See Avant 2000; and Thomson 1994.
24. Krasner 1989, 91.
25. Thomson 1994, 96.
26. Ibid.

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former colonial interests, or coup plotters considered to be illegitimate.[27] There was some suggestion that the American mercenaries captured and ultimately tried in Angola in 1976 might have been covertly funded by the Central Intelligence Agency (CIA), an allegation that George H.W. Bush, the director of the CIA, categorically denied. The assistant secretary of state for African affairs, however, was unable to provide an answer to the question of whether or not U.S. funding for the National Union for the Total Independence of Angola (UNITA) and the National Front for the Liberation of Angola (FNLA) was used to recruit mercenaries in the United States.[28] What is most interesting about this allegation is that U.S. funding, if it existed, was covert; there was no attempt to hire mercenaries openly.[29] Thomson argues that the various mercenary actions of the twentieth century "appear to us as anomalies precisely because they are only marginally legitimate."[30]

Global reaction to the presence of mercenaries in the 1960s underlines the notion that they were perceived as illegitimate actors violating norms of international relations. One of the ways to trace the influence of a norm is to examine violations of the norm and assess how states respond to such violations.[31] If an influential norm against mercenary use exists, states should protest the use of mercenaries and argue that their presence violates a norm. States should refer to the norm against mercenary use in their activities, and if the norm is strongly held, actively respond to mercenary use. Indeed, the UN General Assembly has created more than 100 resolutions criticizing mercenaries since the late 1960s. Mercenaries are explicitly referred to in the General Assembly's Definition of Aggression[32] in the resolution on the "importance of the universal realization of the right of peoples to self-determination" that states that using mercenaries against national liberation groups is a criminal act and that mercenaries themselves are criminals.[33] The Security Council also adopted several resolutions against mercenary action in the 1960s and 1970s, including a resolution regarding the mercenary situation in Benin that

27. The cases of mercenary involvement were the Congo (1960–64, 1966–68); on both sides during the war between Nigeria and Biafra (1971); Angola (1976); Benin (1977); the Seychelles (1981); and the Comoros Islands (several involvements between 1978 and 1995). Mercenaries were hired by the state itself only in the Congo by Mobutu Sese Seko, to retrain the Congolese army (these mercenaries ultimately turned on him and plotted a coup) and in Nigeria/Biafra, where approximately twelve mercenaries were active (de St. Jorre 1972). The only case where mercenaries even had a claim to legitimacy was Biafra, where some international sympathy with the Biafran cause existed.

28. See the letter by Bush appended to the Report of the Special Subcommittee, and the Report itself. U.S. Congress Special Subcommittee on Investigations of the Committee on International Relations 1976.

29. Avant 2005.

30. Thomson 1994, 97.

31. See Kratochwil and Ruggie 1986; and Price 2004.

32. UN Doc. GA/Res/19/3314 (1974).

33. UN Doc. A/Res/31/34 (1976). This resolution has been reaffirmed annually until 2005 and "*reaffirms* that the practice of using mercenaries against national liberation movements and sovereign States constitutes a criminal act and that the mercenaries themselves are criminals" and calls on legislation to be enacted by states.

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"condemns any State which persists in permitting or tolerating the recruitment of mercenaries" and calls upon states to "exercise the utmost vigilance against the danger posed by international mercenaries."[34] The actions of the main UN bodies demonstrate that the international community perceived the reappearance of mercenaries as violating norms of international behavior and demonstrate significant international commitment to the anti-mercenary norm.

There is also a wealth of evidence suggesting that states argued that the presence of mercenaries violated a specific norm against mercenary use. With legal norms, the presence of *opinio juris* indicates that states believe that a particular norm exists despite state practice that violates that norm.[35] With social norms, international reaction and the reaction of international institutions reveal whether or not behavior is perceived to violate a given norm. In the rest of the article, I argue that the international community clearly treated mercenary action as a violation of an existing norm and worked actively to control such activity. The record of international lawmaking on the mercenary question provides evidence for the thesis that states in the 1960s saw mercenary activity as violating a specific anti-mercenary norm.

While this article focuses on the positions taken by negotiators during the creation of the two legal instruments dealing with mercenaries, it is useful to remember that states were expressing anti-mercenary sentiment in a variety of ways during the 1970s and 1980s. The United Nations, particularly the General Assembly, as noted above, was a particular source of anti-mercenary sentiment. However, the Organization for African Unity (OAU) made a number of statements and resolutions condemning mercenaries[36] and in 1976 created a convention designed to deal with mercenaries.[37] In 1976, after a group of mercenaries was captured and tried in Angola, the Angolan government convened a Commission of Experts to monitor the trial, to prepare a general declaration about mercenaries, and to write a draft convention outlawing mercenaries. While the trial was flawed because of its extreme politicization, the Commission of Experts included fifty-one experts from around the world, including the United States, Brazil, Mexico, Sweden, France, Belgium, England, the Netherlands, Italy, Australia, and Germany; the majority were lawyers.[38] The Canadian representative, George Lockwood, later wrote that while the Commission of Experts were concerned with the legality of the charges, the draft convention they created was the necessary first step in a process that might take years.[39] The trial of the captured mercenaries in Angola led to an outburst of protest about mercenaries in the United Kingdom. British Prime Minister

34. UN Security Council Resolution S/Res/405 (1977). The resolution reiterates a 1967 resolution in relation to mercenaries in the Congo.
35. See discussion of torture in Higgins 1994.
36. Zarate 1998.
37. For the text of the OAU Convention, see Mourning 1982.
38. Lockwood 1977.
39. Ibid.

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Harold Wilson argued in the House of Commons that the speed at which mercenaries were recruited for Angola demonstrated the threat to democracy that could come from the ability to raise a "vast private army"[40] and moreover that recruitment was "utterly abhorrent to our system and standards in this country."[41] Interestingly, he also differentiated between mercenaries and volunteers, on the basis that fighting for money made the former less acceptable.[42] Wilson announced at the same time that there would be an inquiry to determine which instruments of British law could be used to control mercenaries.[43] Finally, in the 1980s, the crime of mercenarism was included in the Draft Code of Crimes against the Peace and Security of Mankind[44] alongside crimes such as genocide and slavery.

However, the large-scale use of private security companies in Iraq and Afghanistan demonstrates that the anti-mercenary norm strongly held in the 1960s, 1970s, and 1980s has been eroded. The final section of this article asserts that the creation of weak law might be partially responsible for this erosion.

It remains now to explain precisely what is meant by the notion of "ineffective" law and "strong" norms. When I refer to the strong influence of the anti-mercenary norm, I refer to the idea that, as in the presence of an emergent legal rule, actors behave differently in the presence of a norm than they would in its absence.[45] An ineffective law is not merely a law that fails to control behavior, but a law that contains flaws that make it impossible to control behavior, even if the will to do so exists. Anti-mercenary law is ineffective because its inherent flaws mean that it could never be used to control mercenaries, even if states wished to do so.

How Norms Explain Legal Loopholes

This section explains that the evident weakness of the law reflects the fact that the norm against mercenary use was strongly influential but impossible to translate into legally sensible terms. I assess the argument that Article 47 is fatally flawed and demonstrate that the documentary evidence does not suggest that any gaps in the law were the result of intentional state attempts to preserve the right to use mercenaries. I then argue that another major weakness in the law, the difficulty of proving financial motivation, in fact directly reflects the influence of the anti-mercenary norm. The law's problems were the side effects of trying to solve problems and make sure that the law would apply only to mercenaries.

40. Hansard 1976, 239–40.
41. Ibid., 240.
42. Ibid., 243.
43. Lord Diplock led the inquiry that resulted in the Diplock Report, discussed at length below.
44. See McCormack and Simpson 1994 for a draft of the code. Mercenaries were ultimately left out of the 1996 Draft Code submitted by the International Law Commission to the General Assembly, but their inclusion still reflects hostility toward private force.
45. See Kratochwil and Ruggie 1986; Price 2004; and Wheeler 2000.

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The First Loophole: Incorporation into a State's Armed Forces

Article 47 states in full:

1. A mercenary shall not have the right to be a combatant or a prisoner of war.

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.

The provisions of Article 47 are cumulative; if fighters do not meet even one of the criteria, they will not be considered mercenaries. Cassese points out that Article 47(2)(e) indicates that states can avoid the "mercenary" label merely by integrating private fighters into their own forces,[46] allowing states to use mercenaries with impunity, and permitting individuals who would otherwise be considered mercenaries to avoid the legal consequences.

This paragraph is one of the most criticized aspects of a heavily criticized article. Only "the most foolish or unlucky"[47] could ever be considered mercenaries under it, as surely intelligent private fighters would avoid it by making integration into their employers' armed forces a condition of employment.[48]

Article 2(e) was a protective device rather than a loophole. Attention to the *travaux préparatoires* reveals that states were not trying to use paragraph 2(e) to ensure that they retained the right to use mercenaries themselves. Rather, the inclusion of this paragraph serves to protect fighters not considered to be mercenaries from the punitive elements of Article 47, which could lead to "life or death con-

46. Cassese 1980.
47. Hampson 1991, 29.
48. This is common practice in today's private military industry. See Shearer 1998b; Singer 2004; and Zarate 1998.

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sequences for a person charged with being a mercenary."[49] States were trying to exclude actors they did not perceive to be mercenaries from the definition and so inserted paragraph 2(e) to protect regular soldiers and foreign fighters permanently enrolled in the armed forces of a state.

During the creation of Article 47, states were firmly committed to the idea that mercenaries are financially motivated, and there was little debate on this point.[50] Once that commitment was made, it created a further problem: how could soldiers, who might be fighting for financial gain, be distinguished from mercenaries? The delegates agreed that the definition must be framed so that a soldier who enlists "because he is attracted by the good pay is not on that account deemed to be a mercenary."[51] States were also explicit about the fact that they did not consider permanently incorporated foreigners, such as the Gurkhas or the French Foreign Legion, to be mercenaries. During discussions at the Diplomatic Conference on International Humanitarian Law, which led to the creation of Protocol I, states reached "general agreement"[52] on the idea that "the mercenary may be a career fighter or killer, but if a person makes a career of fighting in support of one and only one State, it seems rather difficult to regard him as a mercenary."[53]

States came up with a single solution to this dual problem. They would exclude "from the legal category of mercenaries those who are members of the armed forces of a party to the conflict. The addition of this criterion would exclude from the legal status of mercenary such troops as Gurkas [sic] . . . and the French Foreign Legion."[54]

Some delegations noted that this paragraph created a potential loophole. States could use mercenaries themselves and avoid the consequences by incorporating them into national forces, and so some delegations "opposed excluding members of the armed forces from the category of mercenaries."[55] But these delegations did not suggest that states were trying to do so by including the paragraph, just that it might present a future problem.

Indeed, the protection afforded to national soldiers on the basis of this paragraph alone suggests that states saw it as a protective device rather than a loophole. Moreover, it seems clear that states did not consider foreigners permanently

49. Doc. CDDH/236/Rev. 1, para. 98, 405. Article 47 paragraph 1 removes the protection of combatant and prisoner-of-war status from mercenaries. The *Conference Diplomatique de Droit Humanitaire* was held in 1974–76, and resulted in the two Additional Protocols. Hereinafter referred to as the Diplomatic Conference. The proceedings of the conference are available in *Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Geneva (1974–77)*, 17 vols. These documents are identified throughout by CDDH.

50. See below for a longer discussion about the financial motivation component of Article 47.

51. Doc. CDDH/236/Rev. 1, para. 99.

52. Doc. CDDH/236/Rev. 1, para. 100.

53. Ibid.

54. Van Deventer 1976, 813.

55. Doc. CDDH/236/Rev. 1, para. 102.

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incorporated into the armed forces, foreign soldiers who made a career of serving "one and only one State," to be mercenaries.

Further evidence for the fact that states did not consider foreigners permanently incorporated into their armed forces as mercenaries comes from other sources. In practice, the Gurkhas and the French Foreign Legion are generally not considered to be mercenaries. Even Cassese asserts that the French Foreign Legion are an integral part of the French Army and represent the disappearance of mercenaries from the international stage.[56] In 1982, Britain differentiated Gurkhas from mercenaries on the basis of their permanence and their long and distinguished record of service to the British crown, and emphasized that they did not fall under the definition of Article 47.[57] Without paragraph 2(e), venerable military traditions, such as the British use of Gurkhas, the Vatican's Swiss Guards, and the French and Spanish Foreign Legions, would be considered mercenaries when they previously had not been so considered. These arrangements persisted throughout the period in which mercenary use was deemed to have largely disappeared from the international stage; institutionalized use of foreign troops was not perceived as mercenary behavior by the international community.

Finally, the perception that permanently incorporated foreigners are not mercenaries is perfectly in line with the norm against mercenary use. The norm against mercenaries relies on the fact that mercenaries are outside state control and that they are financially motivated. There is nothing inherently objectionable about foreign fighters, and indeed, state soldiers fight alongside foreigners and are often commanded by foreigners as a matter of routine, either through alliance arrangements or during UN peacekeeping missions. What makes a British soldier from the North Atlantic Treaty Organisation (NATO) working in the Pentagon a soldier rather than a mercenary is that he or she is part of state forces and has not enlisted specifically for financial gain. Fighters operating outside the legitimate control of sovereign states are regarded with suspicion, but those operating inside it are acceptable. There is nothing unusual about excluding permanently incorporated foreigners from the definition of a mercenary.

Without the inclusion of paragraph 2(e), both regular soldiers and foreigners employed under long-standing arrangements would be in danger of losing their rights as combatants and the right to prisoner-of-war status.

The Problems of Article 47 Represent Strong State Agreement on the Anti-Mercenary Norm

There are two further frequently cited problems with Article 47. First, it is legally difficult to rely on motive as the defining factor of a mercenary. Second, there is

56. Cassese 1980.

57. United Kingdom Materials on International Law, in Marston 1982. While it could be argued that Britain had an interest in making this argument and protecting its use of Gurkhas, it is important to note that the argument was made in terms of long and loyal service, which implies that that the Gurkhas were deemed to share the cause of their employers.

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an argument that Article 47, which seeks to punish mercenaries for their motivation, is out of place in Protocol I, which as a document of international humanitarian law ought to be concerned with governing war as it actually occurs and not with governing the motives of those who fight. These problems exist purely because of strong state agreement about the definition of a mercenary, and the legal impracticality of implementing that definition. Article 47 demonstrates that law can be weak because of a high level of agreement, which states are unwilling or unable to water down.

Legal problems with relying on motivation. One of the main concerns about the definition of a mercenary adopted in Article 47 and the similar definition adopted later in the UN Convention is that both rely so heavily on personal motivation. The Working Group at the Diplomatic Conference charged with creating Article 47 had an area of "core agreement" in their definition of a mercenary. A "mercenary is a person who is motivated to fight essentially or primarily by the desire for . . . 'hard cash.' "[58] This definition reflects the anti-mercenary norm: mercenaries are objectionable because they are not motivated by an appropriate cause, but by financial gain.

Converting the belief that mercenaries are financially motivated into a workable legal document is fraught with obstacles. Such a motivation, as many commentators have pointed out, is at best difficult or at worst impossible to prove.[59] In 1976, several UK nationals were among thirteen mercenaries charged and put on trial in Angola,[60] prompting the UK government to commission an inquiry led by Lord Diplock to examine relevant British law. The resulting Diplock Report pointed out that fighters may have a variety of mixed motives ranging from "sheer desire for private gain accompanied by indifference to the cause which that force is supporting, to a conscientious conviction that the merits of the cause are so great as to justify sacrificing his own life."[61] It would be impossible to prove "to the standard of proof called for in a court of law" that any one of these motives is dominant.[62] The report concluded that any definition relying on positive proof of motivation would "either be unworkable or so haphazard in its application as between comparable individuals as to be unacceptable."[63]

The Working Group that created the draft of Article 47 at the Diplomatic Conference foresaw that "the establishment of a person's motivation may pose some problems of proof"[64] and tried to account for this problem by suggesting that mercenaries must be paid substantially more than regular soldiers,[65] to provide a

58. Doc. CDDH/236/Rev. 1, para. 99.
59. See Burmester 1978; and Kwakwa 1990.
60. See Cesner and Brant 1977; Hoover 1977; and Lockwood 1977 for details.
61. United Kingdom 1976.
62. Ibid.
63. Ibid.
64. Doc. CDDH/236/Rev. 1, para. 99.
65. Article 47 (2) (c).

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practical test for mercenary status.[66] If it is legally difficult to argue that a soldier is a mercenary on the basis of motivation, and the framers of various international legal instruments recognized and tried to account for this difficulty, why retain the criterion of motivation at all?

The debate at the Diplomatic Conference was colored by the norm against mercenary use to such an extent that delegates included an article they knew might be legally problematic because it reflected what they believed was the defining characteristic of a mercenary.

Article 47 is out of place in a document of international humanitarian law. The incompatibility of Article 47 with the rest of Protocol I provides further evidence of the influence of the anti-mercenary norm. Article 47 undermines the basic thrust of the rest of the Protocol, which is predicated on the idea that fighters should not be discriminated against on the basis of their motivation[67] and undermines the idea that international humanitarian law ought to be universal and apply to all those in a theater of war.[68] The Holy See, Switzerland, the Netherlands, and Colombia expressed a specific concern about this aspect of Article 47.[69] By insisting on relying on motivation as the defining mark of a mercenary, states created a fundamental inconsistency in the Protocol.

International legal regulation of mercenaries could have gone down two different paths. The first path would have been to regulate mercenary actions using existing international law. Under this approach, mercenaries would be accountable for breaking the laws of war as would any other combatant. Mercenaries could be punished for what they do, rather than for why they do it.[70] The second path, the one ultimately taken in Article 47, is to regulate mercenaries on the basis of their status. This approach required a definition of a mercenary sufficiently clear to differentiate mercenaries from other fighters, a solution to the problems inherent in defining actors on the basis of their motivations, and a way to provide evidence for those motivations. It is more difficult to regulate mercenaries on the basis of their status than on the basis of their actions, prompting the question of why states took the less efficient path. The answer can only be that it is the fact of being a mercenary that is repugnant, as much as any actions undertaken by that particular mercenary. Mercenaries "are being penalized for the fact of being mercenaries and nothing else."[71]

The law's focus on motivation may well be practically unworkable, but it reflects a profound belief that it is wrong to be motivated by money, and that an inappro-

66. Doc. CDDH/407/Rev. 1, para. 26.
67. See International Committee of the Red Cross 1987; and Kwakwa 1990.
68. Burmester 1978. According to this argument, spies, who are excluded from protection in Article 47, might also be an awkward fit with the overall thrust of the treaty. However, spies are condemned on the basis of what they do (espionage) rather than on why they are motivated to do it.
69. Doc. CDDH/SR.41.
70. The Diplock Report recommends this approach. Diplock, Walker-Smith, and de Freitas 1976.
71. Kwakwa 1990.

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priate motivation is what makes a mercenary. If the factor of motivation were removed from the definition, the definition would be meaningless.[72] Bad law on mercenaries indicates substantial agreement among states that mercenaries are motivated by financial gain, and this agreement was made into law despite concerns about practicality. The depth of agreement that mercenaries are actors who must be controlled and can be distinguished by their inappropriate motivation has resulted in unworkable law.

The Anti-Mercenary Norm Is Undermined by Another Norm

Another explanation for the weaknesses of the law on mercenaries is that for law to be effective, it must be supported by powerful states. The fact that the creation of anti-mercenary law was largely spearheaded by African states and apparently ignored by Western states might provide evidence for this argument. However, the debate between Western and non-Western states did not concern whether mercenaries ought to be controlled, but how to do so. Western states had difficulty agreeing to some of the proposed mechanisms to deal with the mercenary problem because these mechanisms violated an existing norm, and as a result, the UN Convention took nearly ten years to create, dealing a final blow to a problematic legal regime. By the time the Convention was written, it had been rendered largely meaningless: the main form of private military service on offer was now provided by private companies, rather than individual mercenaries.[73] Not only did the Convention retain the problematic definitional elements of Article 47, but it could not be used to control the headline-grabbing private military industry.[74]

To make this argument, I first outline and refute the argument that Western states were not concerned about mercenaries, and then I explain how the norm of state responsibility, rather than a lack of interest, slowed down the creation of the law.

Evidence Against and for Western State Support

Western states did not seem enthusiastic about developing and ratifying laws against mercenary use. The only Western interest seemed to come from states directly affected by mercenary action. For example, both the United States and the United Kingdom ordered governmental inquiries and reports after their nationals were involved in the Angolan mercenary trials of 1976.[75] However, the debates in the

72. Taulbee 1985.
73. Singer 2004.
74. Zarate 1998.
75. The United States responded with a congressional hearing: see U.S. House Special Subcommittee on Investigations of the Committee on International Relations 1976. The British inquiry resulted in the Diplock Report.

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Ad Hoc Committee suggest that other Western states were interested in controlling the mercenary problem even when their national interests were not at stake. Countries such as Canada,[76] Sweden,[77] Norway[78] and the Netherlands[79] actively supported international legal instruments controlling mercenaries, even though none of them faced problems caused by their citizens acting as mercenaries.

Closer examination reveals that there was an international consensus on the mercenary question. Western states actively participated in the creation of legal instruments dealing with mercenaries. The Americans worked with the Nigerians to create the draft article put before the Diplomatic Conference in the mid-1970s.[80] None of the Western states involved disputed the basic idea that mercenaries ought to be controlled.[81]

From the beginning of the Ad Hoc Committee's meetings in 1980, there was widespread agreement about the necessity of creating a convention. The Committee's chairman reported in 1981 that "the use of mercenaries had been unanimously condemned and no one questioned the advisability, utility or importance of the Ad Hoc Committee's mandate."[82] The statements of the Western members of the committee reinforce the Chairman's point.[83] The UK delegate, speaking on behalf of what were then the European Economic Community (EEC) members, stated that they "strongly condemned the use of mercenaries, shared the concerns of African States and others in Asia and Latin America in that regard, and were very conscious that the involvement of mercenaries could make the settlement of internal disputes more difficult by introducing an international dimension,"[84] and the U.S. delegate noted that his country "totally opposed the use of mercenaries and had long since enacted legislation to deal with certain aspects of the problem."[85]

An examination of the specific concerns of Western states, as brought forward during the Ad Hoc Committee debates, demonstrates that while Western states agreed that mercenaries required control, they did not approve of the mechanisms proposed to do so. The discussions in the Ad Hoc Committee were promoting a view of the law that would have had serious consequences for the norm of state responsibility.

76. See below.
77. Doc. CDDH/SR.41, para. 198.
78. Doc. CDDH/III/SR.33–36, Annex, 548, para. 16.
79. Doc. CDDH/SR.41, para. 194.
80. See Cassese 1980; and Gasser 1987.
81. The Western delegations present at the Summary Meeting that discussed Article 47 included Switzerland, Italy, Portugal, Australia, Canada, Sweden, the Netherlands, and France. None of these countries suggested that an article was unnecessary, and the Netherlands and Sweden explicitly refer to their support for the article. The Holy See was also present and supported the article. Doc. CDDH/SR.41.
82. UN Doc. A/C.6/36/SR.15, para. 19.
83. Ibid., para. 16.
84. Ibid., para. 19.
85. UN Doc. A/C.6/35/SR.22, para. 25.

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State Responsibility

The norm of state responsibility, or the extent to which, if it all, states can be held to be responsible for their citizens' private actions under international law, created the most significant problems during the Convention's creation.

The question of state responsibility, which became the sticking point during the Ad Hoc Committee's deliberations, created two responses. Most of the non-Western states in the Ad Hoc Committee concurred that states must be held responsible for their citizens' actions for the law to work. These states argued that there were two crimes associated with mercenaries: the crime of being a mercenary, and the crime of "mercenarism." Mercenarism includes state support for mercenary action and includes state failure to bring the mercenary problem under control.

The Western states in the Ad Hoc Committee argued that the crime of mercenarism should not be included in the UN Convention, and that states could not be held responsible if their citizens became mercenaries, for both practical and legal reasons. These states contended that agreeing to a Convention that explicitly held states responsible for their citizens' actions, even if it also achieved the desirable goal of controlling mercenaries, was simply not worth the threat it would pose to international law.

Holding states responsible for crimes committed by mercenaries challenged the way international law had dealt with state responsibility in the past. States had previously been held responsible for the private actions of their citizens only when they were aware of those actions and did not seek to prevent them. The issue during the Ad Hoc Committee debates, however, concerned "absolute" state responsibility, or whether a state could be held responsible for the mercenary acts of its citizens even in situations where it did not have knowledge of those acts. The Canadian delegate pointed out that absolute state responsibility existed in international law only in specific circumstances: in multilateral treaties concerning nuclear installations, nuclear-powered ships, and damage caused by space objects.[86] This type of absolute state responsibility applied to specific treaties dealing with situations that would have massive international consequences, such as the explosion of a nuclear reactor, and had specific application in international law.

The difficulty with making absolute state responsibility an international rule was fourfold. First, the International Law Commission (ILC) had been considering the problem of state responsibility since the early 1970s and Western delegates felt that any decision they made about state responsibility would preempt the work of the ILC.[87] By the mid-1970s, the ILC had already concluded that states could not be held responsible for their citizens' acts unless they supported, directed, or otherwise approved of those acts.[88] The existence of ILC draft articles making this

86. UN Doc. A/C.6/36/SR.22, para. 25.
87. See Japan, UN Doc. A/C.6/36/SR.19, para. 23.
88. See Rosenne 1991, which contains the ILC's report to the General Assembly and supporting documents on the subject of state responsibility.

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statement about responsibility meant that the Ad Hoc Committee's decision to include state responsibility could indeed have undermined the ILC's work.

Second, absolute state responsibility for individual criminal activities (as opposed to negligence under a treaty regime) simply did not exist. As early as the nineteenth century, arbitration bodies dealing with the question of state responsibility were advancing the principle that "that the conduct of a private person could, never, by itself, justify holding the state responsible in international law"[89] and that the private person's actions must involve some sort of wrongful conduct or approval on the part of the state.[90] The ILC concluded that "the act of a private person not acting on behalf of a State cannot be attributed to the State and cannot as such involve the responsibility of the State" and that this rule "meets the needs of contemporary international life and does not need to be altered."[91]

Third, Western states were specifically supported by the authority of previous conventions and international legal decisions. Several similar UN Conventions[92] do not suggest that states can be held responsible for their citizens' private actions. If the mercenary convention took this approach, it was argued, it would suggest that the other conventions did not establish responsibility for wrongful acts.[93] Decisions in the International Court of Justice (ICJ), particularly the *Corfu Channel Case*, suggest that states had limited responsibility for individual actions. *Corfu* concerned a British ship damaged by mines placed in Albanian waters by unknown persons. The ICJ found that merely because the mines were in Albanian waters did not indicate that Albania "necessarily knew, or ought to have known, of any unlawful act perpetrated therein, nor yet that it necessarily knew, or should have known, the authors."[94] The mere organization of an illegal activity within a state's territory does not indicate that the state knew or should have known about the activity, which would make it difficult for states to be held responsible for simply being the ground on which mercenaries organized their activities. Other tribunals have tended to minimize absolute state responsibility, suggesting that a state ought to have had knowledge of the individual act in question and the capacity to control it; tribunals have been reluctant to hold states responsible in areas where they could not have controlled the act.[95]

Fourth, Western states were clear from the beginning that the most significant problem with including absolute state responsibility in the UN Convention was

89. Rosenne 1991.
90. Ibid.
91. Ibid.
92. The Convention for the Suppression of Unlawful Seizure of Aircraft (1970); International Convention Against the Taking of Hostages (1979), and the Vienna Convention on Diplomatic Relations (1961).
93. Layeb 1989.
94. International Court of Justice 1949.
95. Taulbee 1985.

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that Western states would not and could not sign it, which would prevent the creation of an important and necessary legal instrument.[96]

Needless to say, non-Western states, including those from the developing world and in the Soviet bloc, saw Western arguments about state responsibility as an attempt to dodge responsibility for the actions of their citizens.[97] While it is true that that state responsibility provisions would affect only South Africa and the West, the principal sources of recruitment,[98] which would make the stakes for Western states particularly high on the question of responsibility, Western states were not merely trying to avoid negative legal consequences. Some Western states advocated this position despite never having been sources of mercenary recruitment.[99]

Nor was the argument that state responsibility should not have entered into the UN Convention an indication that Western states felt that mercenaries should go unpunished at international law. Western states proposed an alternative solution: the harmonization of existing domestic and international law to control mercenaries. There was a precedent for the harmonization solution in dealing with other types of internationally wrongful acts, for example, in conventions on hijacking, diplomatic protection, and hostage-taking. As the UK delegate put it, the approach "adopted in those Conventions had been not to create crimes to be judged by an international criminal court or to lay down rules on state responsibility, but to intensify international co-operation with a view to ensuring that individuals" could be brought to justice.[100] Western states were advocates of an approach that would punish mercenaries but would not undermine the existing norm of state responsibility. During the 1970s, Western states were on the receiving end of hijacking and hostage-taking efforts and yet promoted conventions that would punish individuals, rather than holding their home states responsible. Finally, Western states also recognized that states could be held responsible for the mercenary actions of their nationals if and when they failed in their treaty obligations.[101]

The apparent split between Western and non-Western states on the mercenary question does not represent a challenge to the idea that the law on mercenaries reflects a norm against mercenary use. Western and non-Western states agreed that mercenaries ought to be controlled but differed in the methods by which they proposed to do so. In seeking to implement the proscriptive norm against mercenary use, Western states were prevented from agreeing to provisions of the Convention

96. Japan, UN Doc. A/C.6/36/SR.19, para. 23; and the United Kingdom, UN Doc. A/C.6/36/SR.18, para. 17.

97. Libya, UN Doc. A/C.6.36/SR.18, para. 14. The USSR argued that the majority of the members of the Committee, including the nonaligned states and the socialist states, were in favour of establishing state responsibility while the minority Western states suggested instead the harmonization of domestic and international laws to deal with the problem. UN Doc. A/C.6/36/SR.19, para. 31.

98. Taulbee 1985.

99. For example, the Scandinavian countries; Japan also advocated this position.

100. UN Doc. A/C.6.36/SR.18, para. 16.

101. Ibid., para. 17.

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because they were attempting to protect the norm of state responsibility. Western states universally agreed about the importance of these long-standing norms, suggesting that the disagreement between the two groups of states during the creation of the UN Convention was a conflict between norms, rather than a conflict created by differing interests.

If the international law dealing with mercenaries was undermined by the presence of another norm, then it follows that some states must have considered the norm against mercenary use to be less important than state responsibility norms. This raises the question of how states rank norms in importance. If Western states decided that state responsibility was more important than the norm against mercenary use, does this indicate that the latter was insignificant? One answer might be that in this particular case a norm that was relatively uncodified in international law (the anti-mercenary norm) was coming up against a norm that was well codified (the state responsibility norm). To disrupt codified norms is more difficult and has more striking effects than failing to incorporate a new norm.

As Lowe points out, state responsibility is a fundamental, primary norm, on which other norms are built.[102] Tinkering with state responsibility for the sake of creating law on mercenaries would have disrupted the entire system of international law. It is important to emphasize that a solution—the harmonization of existing domestic and international law—was on the table and would have controlled mercenaries without threatening this norm. The conflict of norms does not signal that the anti-mercenarism norm was unimportant.

Social and Legal Norms

The fact that a strong social norm against mercenary use did not result in similarly strong law not only reveals that weak law does not always represent a normative failure, but also indicates some important features of the relationship between social and legal norms. Anti-mercenary law demonstrates four points worth probing about the process through which social norms are legally institutionalized. First, states often advocate the pursuit of law because of what law is, not because of what it does. Second, institutionalization in the form of law is clearly not always as positive for enhancing the effects and furthering the evolution of a norm as some international relations scholars argue.[103] Third, deep commitment to the creation of a norm is not an unmitigated good for that norm's promotion. Fourth, the relationship between a strong norm against mercenary use but weak anti-mercenary law raises the question of how legal and social norms differ.

102. Lowe 2001.
103. See Finnemore and Sikkink 1998; Kahler 2000; and Nadelmann 1990.

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States Advocate the Pursuit of International Law Because of What It Is Rather than What It Does

Chayes and Chayes argue that the time and energy states expend in the creation of international law demonstrates that states take international law seriously.[104] It is puzzling, then, that in the case of anti-mercenary law states should have spent time and energy creating law that they knew was likely to be ineffective. One possible answer is that the cost of creating law is not that high, and that the creation of international law uses existing state bureaucratic structures and well-developed international instruments. The fact that law might not "cost" a great deal to create, however, does not explain why states invest in creating law that is unlikely to work. As Downs describes it, "states will rarely spend a great deal of time and effort negotiating agreements that will continually be violated."[105] If states rarely make an effort to create law that will be violated, why, in the case of anti-mercenary law, is this precisely what they did? If states were not creating weak anti-mercenary law so they could use mercenaries themselves, what explains why they created ineffective law?

One answer to this puzzle is that the creation of law is important simply because of what the lawmaking process indicates about an underlying norm. Legal norms "will have distinctive power over other norms precisely because the culture supports and values them."[106] Law can also reinforce state identity,[107] which in this case might mean that states were expressing the fact that only certain actors have the right to use force in the system, and that this group does not include mercenaries. The creation of international law is a clear signal that states believe a particular action or behavior to be problematic. Part of the utility of law is that it serves an expressive function, formally restating social values and norms.[108]

In the case of the norm against mercenary use, part of the reason states pursued a clear yet unworkable definition is because that definition reflected and publicized exactly what they felt to be problematic about mercenaries. A less precise definition might have been more legally effective but would not serve to publicize what states found problematic about mercenaries: their financial motivation and their status as fighters outside state control. Law is a public declaration that the international system considers a particular activity, such as the use of mercenaries, to be wrong. The idea that law is a public declaration can explain why states chose not to harmonize domestic and international law but rather to create a UN Convention to deal with mercenaries. Harmonizing laws would have solved the mercenary problem, but not in the definitive and public way that creating a specific convention outlining what makes mercenaries dangerous and why they ought

104. Chayes and Chayes 1993.
105. Downs, Rocke, and Barsoom 1996, 383.
106. See Finnemore 2000; and Goldstein et al. 2000.
107. Reus-Smit 2004.
108. Lutz and Sikkink 2000.

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to be controlled. The UN Convention had the potential to be a far stronger declaration that mercenaries were normatively problematic than the harmonization approach, and might be one reason why states continued to pursue its creation.

Legal Institutionalization Does Not Necessarily Lead to Enhanced Effects

The failure of the strongly held norm against mercenary use to become effective law reveals that institutionalizing norms as international law will not necessarily lead to the further promotion or enhance the effects of a norm. The notion that transforming norms into law helps increase the impact of a norm runs through both legal and international relations scholarship.[109] The authors of the *International Organization* special issue on legalization and world politics refer to this process as "legalization,"[110] which they take to have a specific meaning and which is discussed in more depth below. International relations scholars refer to "institutionalization" of a norm, which includes the creation of international law.[111] I will refer to both approaches as legal institutionalization. While they are different, as the discussion below demonstrates, each of these perspectives shares the belief that transforming a norm into law has beneficial effects for the influence and development of that norm.

Finnemore and Sikkink argue that institutionalization, including the creation of law, is a crucial stage in the evolution of a norm, transforming it from something held only by activists to something widely held by a number of different players on the international stage. For a norm to reach a threshold level of support and then become broadly accepted, "it must become institutionalized in specific sets of international rules and organizations."[112] Legal institutionalization sets the stage for a norm cascade and the norm's rapid spread.

Finnemore and Sikkink are not alone in arguing that some kind of legal institutionalization strengthens the influence and effect of social norms. The authors of the introduction to the *International Organization* special issue on legalization and world politics not only argue that "legalization may have a direct effect on the institutionalization of international norms" but imply that legalization strengthens norms, which "helps explain patterns of compliance and the expansion of legalized forms into new issues areas."[113] In the same volume, Kahler asserts that "legalization serves to backstop normative evolution against retrogression" because "norm cascades do not run in only one direction."[114]

109. See Finnemore and Sikkink 1998; Kahler 2000; Nadelmann 1990; and Price 1997a.
110. Abbott et al. 2000.
111. Finnemore and Sikkink 1998. Discussed below.
112. Ibid., 900.
113. Goldstein et al. 2000, 399.
114. Kahler 2000, 673.

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One of the ways in which legal institutionalization might improve the impact of a norm and ensure its continued growth is by forcing actors to clarify precisely what they wish to control and how they wish to control it. Precision is an often-cited feature of law,[115] and moreover many scholars see a relationship between precision and the evolution of a norm.

The authors of the *International Organization* special issue take an especially concrete view of the idea of precision. They argue that precision is a necessary part of the concept of legalization, and define it as "rules that unambiguously define the conduct they require, authorize, or proscribe."[116] Precise sets of rules are often, but not always, "highly elaborated or dense, detailing conditions of application, spelling out required or proscribed behavior in numerous situations."[117] Kahler, in the issue's conclusion, argues that "without at least modest legalization and the precision it contributes, the content of norms is likely to remain contested for a longer period of time."[118] Legalization, by rendering law more precise, helps prevent the contestation of norms.

Other scholars have also seen a link between precision and the development of legal institutionalization, and the role legal institutionalization plays in furthering the spread of a norm. Finnemore and Sikkink assert that heightened clarity is a useful aspect of institutionalization, in which they include international law. They assert that moving past the tipping point and into a norm cascade requires "clarifying what, exactly, the norm is and what constitutes violation (often a matter of some disagreement among actors) and by spelling out specific procedures by which norm leaders coordinate disapproval and sanctions for norm breaking."[119] Legro identifies three factors that determine a norm's robustness, one of which is how actors understand the specificity or clarity of a normative prohibition, or how well a rule is "defined and understood."[120]

Approaches such as that of Finnemore and Sikkink, or the authors of the *International Organization* special issue, consider the ways that institutionalization is necessary for a norm to become broadly accepted, but they do not argue how institutionalization might prevent the broad acceptance of a norm. They note only the positive and none of the negative aspects of legal institutionalization.

The anti-mercenary norm's institutionalization as law in Article 47 and the UN Convention may have stopped the norm's growth and influence in its tracks, encouraging rather than preventing retrogression. Institutionalization can be detrimental for a norm's promotion in two respects. First, making a norm more clear and more precise through legal institutionalization does not necessarily mean that the norm will gain in influence. Second, as ineffective law allows more and more instances

115. See Abbott et al. 2000.
116. Ibid.
117. Ibid.
118. Kahler 2000.
119. Finnemore and Sikkink 1998.
120. Legro 1997.

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of proscribed behavior to go unpunished, nonenforcement might have a deleterious effect on the strength of the underlying norm.

The pursuit of precision does not always result in effectiveness and can actually damage the future prospects of a norm. Chayes and Chayes point out that precision in law can create loopholes, making law vulnerable to the maxim "*expressio unius est exclusio alterius* (to express one thing is to exclude the other)."[121] The law governing mercenary use falls into this trap. States knew exactly how they wanted to define a mercenary and attempted to create a legal definition that would be sufficiently precise to include only mercenaries and exclude all other types of fighter. This is part of the reason states insisted that the clauses of Article 47 be cumulative, so that an actor had to meet the criteria set out in each clause to be considered a mercenary.[122] But the combination of a clear idea about the types of actors who were mercenaries (those who fight for money) and the types who were not (national soldiers; troops sent on secondment; permanent foreign troops) created loopholes that could be easily exploited. Precision in the law does not necessarily lead to robustness, because in creating law that is precise, states can create loopholes that make a law easy to avoid.

Institutionalizing a norm in law with precise definitions might be a particular problem for certain types of norm. Hurrell points out that many issues stand "outside the domain of law and would not be helped by legal regulation. Some disputes are unsuited either to framing or to resolution in legal terms."[123] Anti-mercenary legislation reflects the attempt to enshrine a norm against mercenaries that was clear and influential but is itself logically problematic.

Although all states agreed that mercenaries were financially motivated, and indeed, the common definition of a mercenary provided by the *Oxford English Dictionary* is "a person whose actions are motivated primarily by personal gain, often at the expense of ethics,"[124] relying on financial motivation as the central characteristic of a mercenary poses some problems in and of itself. The difficulty is that in reality fighters can have mixed motivations. A mercenary might fight for money and ideals, or a soldier might fight for money rather than ideals. Although there is common agreement about what constitutes a mercenary, the problem of mixed motivations makes it difficult to write law around that concept. The "complex legal standing of the mercenary makes his role an intrinsically difficult matter to legislate."[125] Removing or altering the least enforceable component, the idea of motivation, would have rendered the definition meaningless,[126] so states worked around the problem, making the idea more precise by adding a series of cumulative conditions. Attempting to make this particular norm more precise led states

121. Chayes and Chayes 1993, 189.
122. Burmester 1978, 39.
123. Hurrell 2000.
124. Oxford English Dictionary.
125. Kritsiotis 1998, 5.
126. See above.

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into the creation of weak law, which may ultimately have undermined the very norm they were attempting to enshrine. It might be better to leave some types of norm uninstitutionalized, where they can continue to influence state behavior, rather than attempting to enshrine them in institutions.

The failure to use a legal instrument can be just as damning as repeated violations of that instrument. If a law exists to control mercenaries but loopholes prevent its application, the repeated nonenforcement of law will begin to look like a series of violations of the law's intent, even though the use of mercenaries in some circumstances might not threaten the letter of the law. Widespread violation (or noncompliance) will begin to undermine the norm enshrined in that law.[127] Institutionalization, by promoting precision and creating loopholes, can actually hinder as well as enhance the influence of a norm.

The norm against mercenaries, which was strong enough to lead to a flurry of lawmaking in the 1970s and 1980s, appears to be far weaker now than before it was institutionalized. State behavior, particularly the fact that several of the leading proponents of anti-mercenary legislation in the 1970s and 1980s used private military companies in the 1990s, suggests that there is little respect for the legal regime dealing with mercenaries. As Singer argues, "not only have states been lax in enforcing . . . international regimes against mercenaries, but the fact that [private military actors] operate in over fifty states, often on behalf of governments, suggests a basis for arguing for a norm of their legitimacy and a general acceptance of the phenomenon."[128]

It would appear that the strong normative feeling against mercenaries present in the 1970s and 1980s has today dissipated. The fact that international law against mercenaries existed but could not be used against the new range of private military actors that appeared on the international stage in the 1990s might well have contributed to the decline of the norm against mercenary use. Anti-mercenary law does not apply to private security companies because they do not engage in combat; moreover, even if they were to engage in combat, as the private military company Executive Outcomes did in Sierra Leone, the definition can be easily avoided by using one of the loopholes. In Sierra Leone, Executive Outcomes became a part of the Sierra Leonean armed forces, which would have excluded them from the definition.[129] The international community's inability to respond to the presence of private military and private security companies appears like a lack of will, and these failures have overshadowed the initial normative commitment to controlling mercenaries. The "general absence of law within this critical realm stands as a clear challenge to the belief that legal norms underscore good behavior in the international arena . . . [I]f laws are absent, unclear, or seen as inappropriate, the

127. See Kratochwil and Ruggie 1986; and Philpott 2001.
128. Singer 2004, 531.
129. See above, and also Schmitt 2005.

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respect for them and their resultant effectiveness certainly will be diminished."[130] Institutionalizing the anti-mercenary norm in such problematic law has meant that the norm has had to hold fast against the erosion of constant failure in the control and regulation of mercenaries and other private actors who use force.

Strong Commitment to a Norm Does Not Lead to Effective Law

Strong commitment to a norm might be counterproductive in terms of the creation of effective international law, as a strong commitment can prevent adaptations necessary to ensure that law will work in practice. The idea that a strong commitment to norms is necessary for a norm to grow and become widely accepted is implicit in most of the arguments about norm evolution. Norm entrepreneurs, be they states, nongovernmental organizations, or individuals, must be deeply committed to the promotion of a norm in order to see it through the obstacles in the way of becoming more widely accepted. Nadelmann, for example, implies that commitment is a prerequisite for the effective transformation of norms into global prohibition regimes, even if it is not by itself sufficient.[131] Or, as Finnemore and Sikkink put it, "norms do not appear out of thin air; they are actively built by agents having strong notions about appropriate or desirable behavior in their community."[132]

It is worth considering whether strong normative commitments are useful beyond the early stages of a norm's evolution. Commitment is obviously necessary to bring a norm to international attention. New norms "emerge in a highly contested normative space where they must compete with other norms and perceptions of interest."[133] If entrepreneurs were not committed to a norm, it might well not survive this period of competition.

But strong commitment might become counterproductive by the time a norm reaches the institutionalization stage. Strong normative commitments might make norm entrepreneurs unwilling to make the compromises sometimes necessary for the creation of effective law. In the case of the anti-mercenary norm, relying on motivation as the defining factor of a mercenary made the law ineffective, as some states recognized it very well might. But their commitment to the norm against mercenary use, in particular to the notion that fighting for money is what makes mercenaries problematic, meant that they believed they could not excise financial motivation from the definition. A slightly less strongly held conviction might have paradoxically resulted in more effective law.

Strong commitment, rather than a lack of commitment, can also lead to weak solutions. The idea that a weak law might represent the lowest common denominator, or the only available compromise, is not always true. Anti-mercenary law is

130. Singer 2004, 524.
131. Nadelmann 1990.
132. Finnemore and Sikkink 1998, 896.
133. Ibid., 897.

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weak because, in a sense, it represents the highest common denominator: states were in complete agreement but unfortunately agreed completely on a concept that was hard to operationalize.

How Do Social and Legal Norms Differ?

The debate over the relationship between norms and law currently suffers from the inability to define the difference between norms and law. Even constructivists, who arguably attach the greatest explanatory weight to the role of norms, do not agree about the differences between social and legal norms,[134] and they disagree on whether they differ at all.[135] Finnemore asserts that political scientists are beginning to ask questions about whether or not legal norms operate differently from other types of norms, and asks, "Does being legal add any particular kind of weight to a norm? If so, why and how?"[136] The complicated transformation of a strong social norm against mercenary use into a weak anti-mercenary law suggests one way in which norms and laws may not differ: their relative effectiveness. Laws might not be any more effective than norms.

Finnemore argues that if laws and norms are different because the former command a higher degree of compliance, "a prominent goal of norm entrepreneurs" ought to be "consolidating unambiguous legal status for their norms."[137] But this is, perhaps, not such compelling evidence for the argument that laws differ from norms because they are more likely to inspire deference or command compliance. As I have shown, norm entrepreneurs can have the creation of law as a prominent goal even when they suspect that law might be ineffective.

The simple fact that the legal norm against mercenaries is less effective than the social norm, and indeed, might have actively undermined the social norm, further suggests that legal norms and social norms do not differ because the former is always more effective than the latter. Brunée and Toope argue that international relations scholars, because of a preference for strong definitions, are "driven to seek out the specificity of legal norms, in an effort to identify their particular effectiveness (or ineffectiveness, as the case might be)."[138] The belief that legal norms are more effective, or command more compliance, than social norms seems to be falling into a trap that many scholars claim they are attempting to avoid: legal norms are not necessarily "better" than social norms, just as hard law is not necessarily better than soft.[139] One of the dangers of making the argument that institutionalization in law is part of the evolution of a norm is that the idea of evolution contains within it a sense of progression, whether in terms of effectiveness, strength,

134. See also Goldstein et al. 2000; and Ratner 2000.
135. Reus-Smit 2004.
136. Finnemore 2000, 701.
137. Ibid, 705.
138. Brunée and Toope 2000, 55.
139. Abbott and Snidal 2000.

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or influence. The argument that social and legal norms differ because of effectiveness precisely demonstrates this problem: legal norms will be more effective because legal institutionalization is the step that follows normative commitment in the "norm life cycle." Analyzing the concept in terms of steps and stages, or evolution and life cycles, leads to an assumption that legal institutionalization is better because it is a step forward. As I have shown, legal institutionalization can in fact be a step backward for the influence and growth of a norm. The story of how the anti-mercenary norm failed to become effective law suggests that scholars of international relations should consider factors other than effectiveness when trying to discover the nature of the difference between social and legal norms.

Conclusions

The international law on mercenaries might be so flawed that any mercenary caught under it is unlucky or foolish and might deserve to be shot in the company of his lawyer, but its flaws provide a remarkable opportunity to analyze the relationship between social and legal norms, and the process through which a social norm becomes a law. Flawed law on mercenaries also allows conventional expectations to be overturned. It is too easy to dismiss weak law as indicating nothing other than a predictable and expected failure. Attention to the normative reasons why law might be weak, however, can lead to understanding that that there is not a clear relationship between norms and law; that in becoming legal norms, social norms do not necessarily become stronger or more effective. Scholars who take the role of norms seriously are perhaps too tempted to examine successful law because it better demonstrates that norms can influence state behavior. And scholars who are suspicious that norms can influence states are too quick to seize on weak law as demonstrating problems with normative commitment. Anti-mercenary law demonstrates that the study of bad law can be good for the study of international relations.

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