Challenging the Strength of the Antimercenary Norm

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Abstract

This article questions the prevailing view that there is a strong international norm against mercenary activity. We argue, instead, that international restrictions placed upon mercenaries are the tangential expressions of more basic and pervasive international norms, namely those of state neutrality, the right of peoples to self-determination, and freedom of movement. To buttress our claim, we draw upon documentary evidence specific to critical moments in the norms’ expansion, including the Napoleonic Wars to 1840, the Crimean War, and conflicts of national liberation in the decolonization era. The evidence suggests a broad indifference to mercenaries among policymakers during such pivotal periods. We conclude that the antimercenary norm grounded in moral objections is not as strong as its supporters suggest and often becomes compromised when national interests dictate.

Keywords: antimercenary norm, state neutrality, right of peoples to self-determination, national liberation, decolonisation, mercenary

Introduction

Permeating the literature on mercenarism is the contention that the modern decline of mercenary activities is attributable to the development of a strong antimercenary norm at the international level (Percy 2007a; Percy 2007b; Percy 2014). Implicit within this perspective is that mercenary opprobrium was generated by states, which restrict mercenary activity on the basis of moral objections. As Percy (2007b, 121) argues,

The norm against mercenary use, in particular the argument that mercenaries are morally undesirable because they do not fight for an appropriate cause, is crucial to understand why states abandoned the use of foreign soldiers and took a great leap of faith in opting for citizen armies. As the concept of citizen duty to the state grew, and as patriotism and nationalism became increasingly seen as desirable and practical for armies, a selfish and financial motivation

A strong norm is more than just a matter of degree, nor is it merely an adjective moderating norm, but is categorically different than simply strong and norm. It is unclear, however, what Percy means because she does not define strong norm. She describes a strong norm as a prohibitory norm, but ascribes characteristics that set it apart from other weak/average norms. This indeterminacy makes it difficult to directly engage with her position. If a strong norm is not a matter of prohibition, perhaps it is a matter of agreement; strong norms exhibit greater international consensus and weak norms exhibit less consensus (or a greater degree of thwarting when circumstances arise). As a result of the lack of moral opprobrium, the norms surrounding mercenarism are merely instrumental or functional. This results in a lack of consensus and cohesion regarding mercenarism, thereby allowing states to compromise on their position regarding mercenaries when national interests dictate). We owe the clarification of this point to Laura Hosman.
became morally inappropriate and practically inferior.² (Emphasis added)

In making the argument that the modern decline of mercenarism was propelled by a change in the normative environment, Percy highlights this moral objection as reflecting upon the identity and civility of the state (2007b, 121–23). Thus, her normative claim emphasizes the overlapping moral shifts in the relationship between citizens and the state that together crowded mercenaries out of the armies of civilized nations (Percy 2007b, 165–66).

While we accept that the modern decline of mercenary activity was underpinned by a degree of moral reasoning, we argue that Percy has overstated its importance and overlooked the impact of confluent international norms on mercenary decline.³ We dispute that an antimercenary norm grew from only, or even predominantly, moral objections to the mercenary. We garner support for our claims from recently unearthed evidence that casts light upon different state motivations underpinning the transition away from mercenary armies. Our evidence is consistent with Thomson’s claim that the decline of mercenarism resulted from the countervailing international norms that states should control nonstate violence (1990, 1994). While Percy rightly recognizes the limitations of Thomson’s argument that restrictions imposed on the supply of foreign military actors need not result in the suppression of the mercenarism phenomenon (Percy 2007b, 112–19), Thomson’s logic excavates only one aspect of the argument we offer here. We present two additional complementary international norms that cemented the position against mercenarism without moral opprobrium: (1) state neutrality and (2) the right of people to self-determination.

More concretely, while we accept an observable decline of mercenary activity during the modern era, we question the argument that a specific international norm crystallized against mercenarism per se. The historical record indicates two diverging impulses undergirding state initiatives to restrict mercenary activities that have been conflated by those arguing in favor of a strong antimercenary norm. On the one hand, states are seeking to limit the exodus of their citizens to participate in foreign armed conflicts through neutrality laws (including European mercenaries in the nineteenth century). On the other hand, states are attempting to curtail the influx of foreign military actors meddling with their internal affairs by appealing to the right of peoples to self-determination (considering here mercenaries in the Congo and Angola).

In support of such claims, we present archival evidence and consider the presence or absence of formal regulation. The logic of examining formal regulation is that states would not seek to elevate minor or parochial concerns, and so the presence of formal regulation should be indicative of an issue’s perceived seriousness among all states.⁴

Elucidating state response to mercenarism highlights the fundamentally different interests that did and did not result in efforts to restrict mercenarism. States supplying mercenaries objected to the practice on significantly different grounds than those states in which mercenaries were operating. This divergence of state interest challenges the perceived unity of the international community in castigating mercenarism as morally repugnant. Thus, even if the international community were in unison in reprimanding mercenarism, this difference in their underlying rationale contradicts the possibility of a unified moral objection.

As Riemann (2016) notes, the mercenary himself has been treated as a trans-historical figure even though the antimercenary norm is seen as socially constructed (170). This creates an incongruity between the emergence of an antimercenary norm as a social construct and the mercenary as an implicitly stable figure despite fluctuating historical circumstances. To limit this effect, we focus on the period after citizen armies had consolidated and cast mercenaries into their modern characterization. Subsequently, we provide particularized discussion of the periods covered by the Foreign Enlistment Bill (1819) to the Enlistment of Foreigners Bill (1854), and the period of African decolonization.

If Percy is correct, the nature and strength of political responses against the use of mercenaries should have become firmly entrenched in European thought during the period after citizen armies had consolidated and cast mercenaries into their modern characterization. Subsequently, we provide particularized discussion of the periods covered by the Foreign Enlistment Bill (1819) to the Enlistment of Foreigners Bill (1854), and the period of African decolonization.

² Percy conflates the purposes for which one fights (such as material gain) with the cause that one fights for (such as self-determination). The distinction is critical because one might fight for a just cause but for inappropriate purposes and vice versa. See Lynch and Walsh (2000). A different way of approaching this is that it is not evident that mercenaries should be phased out as a means of pursuing warfare because of shifting reasons to go to war.

³ Even with the strong formulation of the moral objections, Percy’s quote above remains infused with instrumental reasoning, specifically that citizen service was perceived as both being more efficient for states as well as being practically superior in the field.

⁴ In the case of the UK government, it was thought that the mercenary problem was a Congolese issue and therefore did not warrant remedial legislation. Rather, it should be dealt with as a local issue (see FCO 53/29 [13], FCO 53/68).
the aftermath of the French and American Revolutions.\textsuperscript{5} Subsequently, the events we examine should be expected to uncover staunch political opposition to and international outcry regarding the use of mercenaries. This is not, however, what emerges. Rather, we find that in the period starting immediately after the Napoleonic Wars to the end of the first Carlist War in 1840, there was considerable mercenary activity throughout Southern Europe and South America unofficially supported by the governments of the United Kingdom and France (Rodríguez 2009, 2006a, 2006b). More importantly, such activity did not generate the moral outrage that Percy (2007b) predicts, but instead emphasized neutrality and the right of peoples to self-determination as motivating factors.

Indeed, antimercenarism results from competing logics in each of the periods we examine. Using empirical evidence from Hansard records of UK parliamentary debates surrounding nineteenth century foreign enlistment legislation, along with declassified official US and UK documentation covering mercenary activity in the Middle East and Africa during the 1960s and 1970s, we argue such logics fail to reflect a sense of moral objection to mercenarism and favor existing norms grounded in competing state interests. While the United Kingdom was concerned about the moral hazards attached to the hiring of mercenaries, the evidence shows that these moral concerns were never sufficiently strong to prevent mercenary activity per se and subsequently failed to construct an international normative consensus. Instead, the international norms of state neutrality and the right of peoples to self-determination played significant roles in restricting mercenary activity during these periods, thereby reflecting the primacy of state interest over moral outcry.

Framing the Theoretical Approaches

Mercenarism cannot usefully be analyzed as a monolithic phenomenon, and to imbue it with features of stability and universality is to misunderstand its fluid and adaptive nature. As we discuss below, a significant factor that undermines the notion of a strong antimercenary norm is that it overlooks the different manifestations and diverging objectives of mercenary activity. Mercenarism is merely an instrument utilized by political elites, as was the case of mercenaries operating in the Yemeni Civil War (Jones 2004), or by governments, typified by the Central Intelligence Agency’s (CIA) employment of mercenaries in the Congo. As such, it is evaluated according to its suitability and effectiveness for the relevant task at hand (see Michaels 2012). Assessing the merits and demerits of mercenarism in isolation would limit our ability to understand its characteristics, and adopting a common denominator approach to mercenarism would obscure subtleties that mislead conclusions regarding its usage.

Instead, we propose that analyses of mercenarism need to be undertaken within a broader normative context, accounting for the content, direction and objective of other international norms, and their relationship to the type of mercenary activity in question. Such norms include: (1) freedom of movement,\textsuperscript{6} (2) nonintervention,\textsuperscript{7} and (3) the right of peoples to self-determination.\textsuperscript{8} We argue that perceived restrictions to mercenary activity are only the tangential effects of these international norms and thus suggest that the form and intensity of the reaction to mercenarism can be predicted by the effect of these norms (Rosén 2008, 86–90) without recourse to a specific antimercenary norm.

We posit two axes along which regulation can be plotted to structure the challenge against the notion of an integrated and targeted international norm against mercenarism. First, we posit the relative position of the regulator state. This dimension questions whether the state is seeking to curtail the outflow of its citizens or is attempting to prevent foreign military actors from interfering in its internal affairs. Second, we posit the formal level of the regulation. This dimension considers whether the regulator state desires to govern itself domestically or is aiming to influence the international community.

It is important to distinguish between these impulses because their underlying interests diverge significantly. The primary concern of a state seeking to maintain its neutrality in relation to a foreign conflict is to prevent

5 We owe this point to Malte Riemann.

6 Enshrined in article 13 of the Universal Declaration of Human Rights (UDHR), article 12 of the International Covenant on Civil and Political Rights (ICCPR), and UNGA Resolution 2200A (XXI) of December 16, 1966.

7 Enshrined in the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States, in accordance with the Charter of the United Nations, UN General Assembly Resolution 2625, October 24, 1970. The International Court of Justice (ICJ) held that, “the principle of nonintervention involves the right of every sovereign state to conduct its affairs without outside interference … the Court considers that it is part and parcel of customary international law,” (1986, para. 202). The ICJ has since reaffirmed this position (ICJ 2005).

8 Enshrined in article 1 section 1, common to the ICCPR and the International Covenant on Economic, Social, and Cultural Rights (ICESCR), General Assembly Resolution 2200A (XXI), December 15, 1966.
becoming embroiled within it. By contrast, the primary aim of a state seeking to limit foreign interference is instead to deter and punish transgressors.

**Normative Restrictions Imposed upon Sending States**

In *Corfu Channel*, the International Court of Justice (ICJ) recognized as a “general and well-recognized principle...every State’s obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States” (ICJ 1949, 22). This principle suggests that states are obliged to undertake actions that curtail the outflow of private military actors from its territory, provided that the failure to curtail them would threaten the rights of other states. However, this position does not suggest that mercenarism is internationally unlawful as exemplified by the inclusion of the qualifier that relevant acts are those that operate against the rights of other states. Similarly, while “the 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,” fall within the international legal definition of aggression, it does not follow that all outflows of private military actors fall within this definition. Rather, the definition of aggression hinges upon two qualifiers: (1) the state possesses agency and direction with regard to forces sent abroad by the state, and (2) acts of armed force are in fact deployed against the interests of another state.

Two inferences can be drawn. First, a simple nexus between a state or its territory and the outflow of private military actors does not necessarily contravene international law. Second, even if a state is organizing, directing, or sending private forces to operate within another state’s territory, this also is not necessarily repugnant to international law as such because those forces might not be deployed in an otherwise detrimental fashion against that state. International law requires that such forces operate against the interests of the country within which they operate. Regarding the former inference, Hague V, article 4 is instructive via the stipulation that “[c]orps of combatants cannot be formed nor recruiting agencies opened on the territory of a neutral power to assist the belligerents.” This codification implies that a state’s neutral status is unaffected when individuals leave on their own accord for foreign military service. Impugned actions are only those in which the state itself organizes or assists in the formation of military units for foreign wars. Regarding the second inference, consider an exodus of armed personnel leaving a state in order to participate in the self-defense of another state. Such actions are not unlawful under international law as they are not detrimental to the state within which the military forces operate. Importantly, a strong and unified norm against mercenary activity would make such activity internationally objectionable. Instead, the operative principle here is that of noninterference, and restrictions imposed upon nominally nonstate actors function to prevent interstate violence by private proxy.

Converging with this position is the tendency for national neutrality laws to be cited as evidence of an antimercenary norm. As the nomenclature suggests, these are pieces of domestic legislation enacted to maintain the official neutrality of the state with regard to armed conflicts of which it is not a party. First instigated by the United States in the form of the 1794 Neutrality Act, the passage of neutrality laws was subsequently mimicked by other states, resulting in a globalized standard of state neutrality (Lobel 1983, 2). Transplanting such legislation into the mercenarism context, Thomson (1994, 55) identified the essential question as...
to whether a state could retain a credible claim to neutrality when nominally private individuals leave its territory to participate in foreign conflicts. In a nutshell, is the mercenary to be understood as a political actor who triggers the international responsibility of the state? We suggest that the development and proliferation of domestic neutrality laws serve primarily to limit state responsibility for private military actors operating in another’s territory, by excluding them from the realm of state action, and that restrictions to their movement are incidental to the core objective of insulating the state from foreign conflicts. Furthermore, the popularity of such legislation is indicative of states seeking to limit their international liability, rather than specifically to curtail mercenarism.

The features of domestic neutrality legislation draw out these points, and we take the United Kingdom’s Foreign Enlistment Act (FEA) of 1870 as the exemplar. The illegality of foreign enlistment for the purposes of the act has a tripartite characterization: (1) absence of sovereign permission, (2) acquiescence to participate in the armed forces of another state, and (3) the state is at war with another state on friendly terms to the United Kingdom.16

Taken together, these features of the FEA imply that the United Kingdom is not legislating a broad repugnance of mercenarism (Committee of Privy Counsellors 1976, 7), but instead neatly curtails a narrow category of private military activity. In essence, the act only purports to restrict the embarkation of individuals who have designs to join the forces of a state engaged in conflict with states otherwise friendly to the United Kingdom. Important caveats exculpate the individual from the ambit of the act, including the permission of the sovereign, activities conducted outside of the armed forces of another state, and whether the martial objectives of the individual align with those of the United Kingdom and its allies.17 Thus, the FEA needs to be understood as a method of curtailment designed to protect the vital strategic and economic interests of the United Kingdom.18 Neutrality laws ensure that a state’s own nationals do not undermine its own or its allies’ interests through military activity.

Restricting the embarkation of individuals, however, causes friction with the freedom of movement. As enshrined in article 12 section 2 of the ICCPR, this norm explicitly provides for the unqualified right of the individual to leave any country. While neutrality legislation goes well beyond the requirements imposed by the principle of nonintervention by stipulating proactive measures aimed at preventing entanglements in foreign conflicts, rather than merely dictating that the state is not to be involved in the organization and deployment of the force, it remains bounded by the normative imperatives of the freedom of movement. The pervasiveness of this norm limits the justifiable incursions made by countervailing interests, which in part account for the specificity exhibited by neutrality legislation. Nowhere is this more obvious than in the case of the UK government’s attempt to withdraw passports of individuals who wished to engage in, or were returning from participating in, mercenary operations. While known mercenaries had their passports withdrawn, notably in 1961, 1968, and 1974, such an approach was viewed as unlikely to be an effective deterrent and very difficult, if not impossible, to administer.19 Given the human rights dimensions of revoking an individual’s passport, it would have been a controversial move by Parliament, resulting in government criticism for implementing arbitrary restrictions upon travel (FCO 45/1889). As one parliamentarian, objecting to the foreign secretary, stated “while . . . the grant[ing] or withdrawal of a passport is within the prerogative of the foreign secretary, this is a power that has been very rarely used, and should . . . be used only with the greatest of circumspection” (FCO 45/1889). The same parliamentarian, comparing the practice with that of communist countries, strongly deplored by the UK government that refused their citizens passports (FCO 45/1889).20

By contrast, a strong antimercenary norm would be expected to converge with neutrality legislation by allowing greater inroads against the individual right of free movement. We find little supporting evidence for this proposition. The overriding interest of states enacting neutrality legislation was to stay out of foreign wars (and possibly to remain on good terms with other states government took the opportunity to proclaim its neutrality to protect important economic interests with both belligerent parties (See Arielli, Frei, and Hulle 2016, 7–11). 19 See CAB 148/112, FCO 53/29, FCO 38/319 for specific details regarding why passports were withdrawn. 20 For a brief commentary, see Percy (2007b, 195–98).
in spite of any mercenary activity) and not to restrict the flow of private military actors. Thus, despite numerous occasions on which the United Kingdom’s FEA of 1870 could have been applied, it is telling that it has never actually been relied upon in litigation. Thomson (1994, 84) had suggested that the increasing number of states imposing restrictions upon their citizenry in relation to foreign military service led directly to a decline in availability of armies for hire internationally. This in turn accounted for the observable decline in mercenarism. But as Percy (2007b, 112) accurately observes, “for Thomson to be right, ‘we should see countries trying to buy mercenaries and failing; but there is little evidence of this phenomenon’” (quoting Avant 2000, 67). While Thomson’s (1994) conclusion concerning the decline of mercenarism may have missed the mark, it does provide further evidence of the freedom-of-movement norm at play. The lack of evidence of supply shortages, combined with the limited use of neutrality legislation in prosecutions, suggests that states were not concerned with restricting the outflow of nationals to foreign conflicts. The freedom-of-movement norm constricted this decision-making process by creating difficulties for states, including those with a vested interest in suppressing the foreign military service of their nationals.

Normative Restrictions Imposed upon Receiving States

The existence of an antimercenary norm can be more readily deduced from the reaction of states upon whose territory these activities occur. The expectation is that receiving states will have a strong interest in minimizing the adverse impacts of foreign military actors on the state’s domestic activities and will seek to do so by the means of deterrence and punishment. In this regard, recourse to the criminal law is unsurprising as many of the activities constituting mercenarism would independently satisfy domestic penal provisions. The drive to criminalize mercenarism is thus predictable, but arguably superfluous as the legal tools for prosecution are in place. Indeed, while the status of being a mercenary, including association with such individuals, may arguably constitute aggravating factors, determining such status is both convoluted and controversial. Furthermore, the thrust of criminalization initiatives, however, must necessarily remain confluent with state interests, thereby constituting a significant challenge for the existence of a morally derived antimercenary norm. Even states affected by mercenarism only prohibit very specific forms of mercenarism, generally leaving open the possibility of bolstering their own military ranks with mercenaries.

The influence of the right of peoples to self-determination, which is common to both the ICCPR and the ICESCR, and the prevailing notion throughout the 1960s and 1970s that mercenarism frustrated this process of decolonization complicates this picture. The strength of the international norm of self-determination can be deduced by its prime position in both the International Covenants. Thus, the implication is that the appearance of an antimercenary norm in this period may only be the mirage of the stronger right of self-determination. If this is the case, it should be possible to demonstrate that the objections to mercenarism go only as far as can be justified to prevent conflict with the right of peoples to self-determination.

The United Nations (UN) Economic and Social Council (1986) were explicit about the perceived threat mercenarism posed to self-determination and emphasized the need to,

[c]ondemn the increased recruitment, financing, training, assembly, transit, and use of mercenaries, as well as other forms of support to mercenaries . . . for the purpose of destabilizing and overthrowing the governments of southern African states and fighting against the national liberation movements of peoples struggling for the exercise of their right of self-determination. (Emphasis added)

The motivation to stymie mercenarism as a means of fostering the right of peoples to self-determination is apparent in the preamble to both international conventions on mercenarism. In the Organization of African Unity (OAU) Convention for the Elimination of Mercenarism in Africa (1977), the preamble speaks of “the grave threat

21 See CAB 148/112 for a detailed explanation of the Foreign Enlistments Act 1870.

22 Use of the word receiving here is not meant to imply consent or acquiescence, but merely reflects the actual presence or occurrence of mercenary activity on the territory of a state.
[that] the activities of mercenaries present to the independence, sovereignty, security territorial integrity, and harmonious development of Member States of the Organization of African Unity and the “threat [that] the activities of mercenaries pose to the legitimate exercise of the right of African People under colonial and racist domination to their independence and freedom.” Similarly, the UN General Assembly (1989, 306) was motivated by an awareness “of the recruitment, use, financing and training of mercenaries for activities [that] violate principles of international law such as those of sovereign equality, political independence, [and] territorial integrity of states and self-determination of peoples.”

In subsuming mercenarism within the right of peoples to self-determination, and the political stability and territorial integrity of the state, the international legal position essentially adopted the status of mercenary as a heuristic synonymous with insurrection and human rights violations. The image of the mercenary embodies disparate threats. As such, the label mercenary possesses predominantly rhetorical value, engaged for its pejorative and stigmatizing effect, which operates as an aggravating factor that merits additional punishment. If this is correct, however, the objection to mercenarism is merely instrumental, and not intrinsic to the inherent value of the status, thereby eroding the claim of an independent morally derived antimercenary norm.

The OAU and UN Conventions confirm this instrumental objection to mercenarism and further reflect the predominant concern of safeguarding the political stability of states and the right of peoples to self-determination. Although neither instrument objects to mercenarism per se, article 1 section 2 of the OAU Convention (1977) stipulates that “[t]he crime of mercenarism is committed . . . with the aim of opposing by armed violence a process of self-determination stability or the territorial integrity of another state” (see Ballesteros 2003, 12). Similarly, article 2a of the UN Convention (1989) defines a mercenary as a person “specially recruited . . . for the purpose of participating in a concerted act of violence aimed at [o]verthrowing a [g]overnment or otherwise undermining the constitutional order of a [s]tate . . . or [u]ndermining the territorial integrity of a [s]tate.”

If mercenarism were universally objectionable on moral grounds and expressed as an international norm, the expectation would be that mercenaries and their associates would be unequivocally condemned for their intrinsic qualities without qualification.26 Yet, it is difficult to extract expressions of opposition to mercenarism not directed at preventing the erosion of constitutional order or the territorial integrity of states and preserving the right of peoples to self-determination. The most that can be concluded is that OAU and UN Conventions criminalize very narrow manifestations of mercenarism where these converge with the interests of national stability and the right of self-determination. As such, these constitute the expression and manifestation of norms surrounding mercenary activity, rather than moral condemnation.

Further eroding the contention that mercenaries are morally objectionable is their legal definition as nonstate actors. If core mercenary characteristics include the motivation to fight for material gain, their foreign character in relation to the conflict, and their specific recruitment to fight in a particular conflict (van Deventer 1976, 813–14), it is not immediately obvious why they should be exculpated for alignment with the state.27 Stated differently, if the moral objection to the mercenary is pegged upon their intrinsic qualities, why should external considerations such as the cause for which they fights or the status of their employer factor into the moral calculus?

Along similar lines are the formalistic distinctions drawn by article 47 of Additional Protocol I (API) governing international armed conflicts. As the UN Special Rapporteur on the Use of Mercenaries, Enrique Ballesteros (2003) stated, “[g]iven its nature as an instrument of international humanitarian law, the Protocol does not legislate on mercenaries themselves, but on their possible involvement in an armed conflict” (para. 38).28 Yet only mercenaries who participate in an international armed conflict suffer the disadvantage imposed by article 47, which notably has no counterpart in Additional Protocol II regulating non-international armed conflicts (Liu 2015). This differential treatment of mercenaries undercuts the claim of a strong and universal condemnation of mercenaries, which would necessitate symmetrical treatment regardless of the status of the armed

25 Note that this definition is narrower than that in the OAU Convention and that its focus concerns the protection and stability of the international order.

26 It has proven extremely difficult to convincingly distinguish the mercenary on moral grounds (see Lynch and Walsh 2000).

27 Under the formalistic legal definition, a mercenary employed by a state is an oxymoron because this nexus would immediately exclude him from the purview of that definition.

28 As such, like Percy’s (2007b, 115) own critique of Thomson’s identification of neutrality law as antimercenary legislation, it would be inappropriate to characterize article 47 of API as a measure deployed against mercenaries per se.
conflict. It should be observed that article 47 does evince some condemnation of mercenaries who were historically accorded prisoner-of-war status upon capture (Kwakwa 1990, 85), with reports indicating that suspected mercenaries received preferential treatment (Cotton 1977, 1990, 85), with reports indicating that suspected mercenaries were accorded prisoner-of-war status upon capture (Kwakwa 1990, 85). Yet, this reversal of historical practices does not go as far as might be expected under a strong international norm. Article 47 merely denies mercenaries of the right to be a privileged combatant, but does not deny that status outright (ICRC 1987, para. 1795).

That international law proscribes mercenarism only in certain contexts and prohibits the use of mercenaries toward specified ends provides a strong challenge against the existence of a strong international norm against mercenarism. By contrast, Percy (2007a) argues that such flaws pertaining to the international law on mercenaries actually evinces the faithfulness of states to the principles underpinning the antimercenary norm. A preliminary challenge to this logic compares the low ratification rates for the international UN Convention (1989) with the relatively high adoption rates for the regional OAU Convention (OAU 1977). This relative difference in uptake suggests that mercenarism was an important issue in the African context, where mercenaries were active and perceived to frustrate the right of peoples to self-determination, but not for the broader international community. Our deeper challenge pertains to Percy’s (2007a, 381–86) assertion that it was the conflicting

The low ratification of the UN Convention by states, particularly western states, might be explained as an outcome of the UN definition itself, which could affect persons wishing to serve in the armed forces of another country. While an exception was ultimately carved out for individuals who are members of the armed forces of a party to the conflict, the potential curtailment of a state’s freedom of recruitment remained a significant concern. The United Kingdom was concerned about jeopardizing access to Commonwealth countries and Ireland to fill the ranks of its armed forces. At the Geneva Conference, the British delegation was briefed to oppose any proposed definition of a mercenary, which would include any member of an armed force under the control of the government. This insight might apply to other countries also seeking to protect their right to recruit foreign citizens into their military (see DEFE 24 17/59).

The ICRC database indicates thirty-one state parties and fourteen state signatories.

The ICRC database indicates thirty-four state parties and nine state signatories.

A minor point could also be made that a strong antimercenary norm would compel states to ratification, norm of state responsibility that caused state reluctance in the context of the UN Convention. It is unclear from the text of the UN Convention whether it imposes criminal responsibility upon the state. This sits in clear distinction to the terms of the OAU Convention, which provide for the possibility of a state itself committing the crime of mercenarism. Considering the broader international context of the law of state responsibility, a state is only responsible for internationally wrongful acts of nonstate entities where that person or entity is “empowered by the law of that state to exercise elements of governmental authority” or where “the person or group of persons is in fact exercising elements of the governmental authority in the absence or default of the official authorities” (UNGAR 56/83, articles 5 and 8). Taken together, the low international ratification rate espoused in the UN Convention indicates a certain level of apathy in relation to mercenary activities. The norm conflict to which this was attributed appears at closer inspection not to be applicable.

The Historical Context of the International Conventions against Mercenarism

The international reaction to mercenaries was sparked by the United Nations experience in the Congo in 1961 (ICRC 1987, para. 1789). The UN, however, did not raise moral objections to mercenary activity, but rather focused upon the destabilizing effects of foreign military personnel in the civil war. Thus, the focus of the Security Council Resolution 161 (1961) was “the immediate withdrawal and evacuation from the Congo of all Belgian and other foreign military and paramilitary personnel . . . not under United Nations Command, and even if the convention itself proved unwieldy or ineffective, to signal support for the position.

Articles 2 through 4 stipulate offenses, for the purposes of the UN Convention, related to persons. This suggests that the UN Convention establishes individual criminal responsibility for the activities stipulated within the document. While later articles set forth state obligations under the UN Convention, these are phrased in terms of refraining from engaging directly with mercenarism, for establishing mechanisms for punishing the impugned actions, and for cooperation and coordination in these regards.

Article 2 (OAU 1977) provides, “the crime of mercenarism is committed by the individual, group or association, representative of a [s]tate and the [s]tate itself” (emphasis added).
mercenaries, “35 with “mercenaries” seemingly inserted as an afterthought. More importantly, the UN’s focus on foreign military personnel indicates that the object of scorn is not the mercenary, but rather the interference of foreigners more broadly in the context of civil war.36

The international legal provisions specifically targeting mercenaries arose out of the 1976 Luanda Trial in the wake of the Angolan Civil War.37 This narrow historical and geographical context is critical because it questions whether the objection to mercenarism is generalizable and accepted by the international community. A pointed problem persists, however, in the Luanda Trial itself in which the Angolan authorities were criticized for having prosecuted and convicted thirteen mercenaries without legal basis. This raises the specter of a show trial, hinting at competing agendas not directly connected to normative objections to mercenarism.

George Lockwood (1976), a Canadian member of an International Commission of Enquiry on Mercenaries convened by the Angolan government to observe the trial, noted that the principal charge was the crime of being a mercenary, and yet “it would undoubtedly be difficult to argue convincingly that the crime of being a mercenary was part of the law of Angola” (198–99). After analyzing Angola’s operative laws at the time of the trial, Hoover (1977, 340) concluded that substantive due process had been breached because there was no domestic legislation criminalizing the impugned activities that the defendants were accused of committing. He concluded that, “[a]t the time of their arrests, the defendants had not violated existing Angolan law except arguably laws forbidding illegal entry, kidnapping, murder, and robbery. Callan and McKenzie were the only two charged with murder. None of the others [were] even charged with these crimes” (339).38 This led Hugh Byatt (1976), the official British observer, to condemn the Luanda Trial as a show trial conducted for political purposes.39

Cesner (who was the chief defense council for the American defendants) and Brant (1977, 354–55) concur, drawing attention to the additional support provided by the Draft Convention on the Prevention and Suppression of Mercenarism, which recognized the need for domestic legislation to control mercenary activity. They too highlight the problem of insufficient legal footing for the convictions, but further extrapolate the moral hazard implied “as to the propriety in following the mercenary trial as a legal precedent” because no state “can create precedent by its own acts [that] are contrary to existing law” (Cesner and Brandt 1977, 355). Implicit is their concern that the Luanda Trial will be heralded as a legal precedent for the criminal status of mercenaries and the criminalization of mercenarism more broadly. While the Luanda Trial does not serve as direct precedent as such, with the Diplock Report itself concluding that “[t]o serve as a mercenary is not an [offense] under international law” (Committee of Privy Counsellors 1976, 10), it did function as the catalyst for future international agreements curtailing the rights of mercenaries. This elevated mercenarism to criminal status despite the lack of domestic law and international consensus.

Situated within this context, the subsequent drive to criminalize mercenarism arguably seeks to compensate for the embarrassment sparked by the Luanda Trial by pushing for the development of a firm international legal basis for subsequent prosecutions. Yet, the distinctly African interest in pursuing this initiative is evident not only from the OAU Convention for the Elimination of Mercenarism in Africa, but can also be deduced from the comparatively low ratification of the UN Mercenary Convention. The outgrowth of antimercenarism sentiment from events at the conclusion of the Angolan Civil War underscores the partial and parochial interests from which the international reaction blossomed.

### Historical Evidence: European Mercenarism during the First Half of the Nineteenth Century

We now turn to consider the historical evidence challenging the notion that an antimercenary norm is the outcome of moral objections to the mercenary. It is necessary at this point to reassert Riemann’s (2016) thesis that the mercenary is not a trans-historical figure, but rather an identity forged at the turn of the nineteenth century and tempered against the consolidation of the citizen army as

35 Interestingly, the resolution continued by urging states to prevent the departure of such personnel from their territories.

36 **UNSC Resolution 169 (1961)** states as policies and purposes of the United Nations with respect to the Congo (Leopoldville) to include “to secure the immediate withdrawal and evacuation from the Congo of all foreign military, paramilitary, and advisory personnel not under the United Nations Command, and all mercenaries.”

37 The Luanda Trial was unique; a similar case concerning an acknowledged mercenary was undertaken in Sudan, but the trial proceeded upon specific violations of the law (Cesner and Brant 1977, 351–52; see also, Hoover 1977, 336–38).

38 Indeed, the Luanda Trial and its outcome underscore the concern that mercenaries may in fact be vulnerable individuals in need of protection (Fraser 2013).
the benchmark of organized violence. Our aim in the following sections is to begin a process of reorienting mercenary discussions to the appropriate historical period in which the mercenary emerged as a distinct actor with stable and identifiable characteristics on the international stage.

Archival and documentary evidence indicates continued support for mercenaries among many UK parliamentarians during the first half of the nineteenth century. This support, however, was often tempered by the state’s need to remain neutral in times of war. From an instrumental perspective, parliamentary evidence shows that, if the interest of the home state was not affected by the desire of its citizens to wage war on behalf of another state or collude with a revolutionary movement against another foreign state, then the citizen was free to follow such a course of action provided that such action converged with state interests. Only when there was misalignment of home state interest and the action of its citizens were objections triggered. Thus, while the parliamentary debates show mixed feelings toward mercenaries, many parliamentarians supported them provided they fought in defense of liberty.

The focus on the role of the United Kingdom is justified because its national interests were global and, as in the case of secessionist movements in Southern Europe and South America, were often concerned with supporting liberal causes against absolute monarchies. As long as mercenaries fought in support of the former, the United Kingdom would not intervene. As Dakin’s (1955) assessment of Greece makes clear, the governments of France and England, far from looking with entire disfavor upon their nationals who went to Greece as volunteers, welcomed to a certain extent their activities and certainly connived [with] them to an extraordinary degree (as quoted in Rodriguez 2009, 409).

Consequently, mercenaries played a vital role in advancing the liberal cause at a time when the United Kingdom was still recovering from the effects of the Napoleonic Wars. They were, in this respect, favored over the use of regular soldiers, despite the objections of parliamentarians who disliked the general idea of relying on mercenaries. This latter group argued that “warfare [was] something that could only be honorably fought by someone with a personal stake in the matter” (Percy 2007b, 122). The shift away from mercenaries, therefore, cannot be interpreted as a result of a moral abhorrence against them. While questions about their use circulated through parliament, the evidence against them in favor of a citizen army is not conclusive.

The most important event that shaped the United Kingdom’s attitude toward mercenaries in the first half of the nineteenth century, and which ultimately dictated the government’s response to mercenary activity, was the Treaty of Friendship and Alliance with Spain. The treaty effectively obliged the government to introduce the Foreign Enlistment Bill that “[gave] the country the right that every legitimate country should have, to prevent its subjects from breaking the neutrality existing toward acknowledging states, and those assuming the power of states.” The bill was introduced in 1819, immediately followed by attempts to repeal the bill in 1823 and 1833. The former repeal attempt was the result of the belief that it was not necessary to protect the country’s neutrality in war, while the latter reflected a deeper lack of coherence with public concern. According to John Murray, “there was never an act of legislation so little in accordance with the general opinion of the country.” As Wentzell (2014, 62) further notes, “his opinion was hardly unique” among parliamentarians. Notably, it is not until the debates on the Enlistment of Foreigners Bill held in 1854 that parliamentarians began to morally object to the hiring of foreign soldiers. Their reasons, however, suggest little desire to establish an antimercenary norm. Rather, they emphasize the national interest lying at the heart of such objections, particularly the need for a national army similar in size and design to the national armies of France and Prussia.

Returning to the House of Commons debates surrounding the Foreign Enlistment Bill of 1819, it is clear that support for the bill was not unanimous. In particular, there were strong objections to the idea of a prohibition on the purchase of mercenaries because it prevented British subjects who were disposed...
to fight in support of liberty\textsuperscript{50}. As James Mackintosh\textsuperscript{51} noted, it was “a bill for preventing British subjects from lending their assistance to the South American cause, or enlisting in the South American service.” He further argued that the Bill was “an enactment to repress the rising liberty of the South Americans, and to enable Spain to reimpose that yoke of tyranny . . . which they had nobly shaken off, and from which, he trusted in God they would finally be enabled to free themselves.” Nevertheless, it was Colonel Davies\textsuperscript{52} who in the end summarized the feelings of many parliamentarians toward the bill when he stated that

he was convinced that his [honorable] friends who spoke against the measure expressed the sentiments of nine-tenths of the people of the United Kingdom. Were we, whose boast it was to value freedom, and whose duty it was to extend its influence in every part of the globe, to sacrifice our character by restraining the efforts of those patriots in rescuing themselves from bondage imposed on them for centuries? If the real object was neutrality, let the restriction as they affect Spain, be repealed altogether, and let it be open to the people to give their service to whichever party they pleased.

Such feelings resulted in two attempts to repeal the bill in 1823 and 1833, respectively, due to additional concerns that the law was unnecessary and unjust. In the first instance, this sentiment was expressed by Lord Althorp\textsuperscript{53} when he argued that, as long as no man acts to inconvenience or injure the community, and has thus proven the restriction needless, according to the principle of our free constitution, the bill ought to be removed. In the second instance, parliamentarians who moved to repeal the FEA felt it to be unjust. As John Murray\textsuperscript{54} explained,

because it was the natural right of every man, when his country did not want his service, or could not employ him, to carry his industry, his skill, his talent, and his arms, into the service of a foreign country, which might want his assistance.

Notably, it is not until the Crimean War that the debates on the Enlistment of Foreigners Bill take on a moral perspective. Importantly, however, it is not a point of view based upon a general dislike for mercenaries since many chose to fight in defense of liberty in Southern Europe and South America after the Napoleonic Wars (Rodriguez 2009, 2006a). The objection to using mercenaries was more closely related to their inappropriateness as a strategic tool used to protect the country’s geostrategic interests, rather than the idea that mercenaries are bad for the morale of Englishmen.\textsuperscript{55} While these objections were real concerns to parliamentarians, they were contested by those who supported the government’s decision to hire mercenaries to support its Crimean campaign. Adderley\textsuperscript{56} summed up concerns about their inappropriateness as a strategic tool by succinctly noting that “such a measure could be only justifiable in the most urgent case of necessity” and that the urgent need to employ mercenaries had not been made. This position stands in stark contrast to Watson\textsuperscript{57}, who supported the need to use mercenaries because he felt bound to support the government, and “if the government told him on their responsibility, sanctioned by the commander-in-chief, that the army required the support of foreign troops, not by substitution, but as auxiliaries, he would at once give the government his support, and he felt that he would be backed by the whole people of England in so doing.” On this point, Watson\textsuperscript{58} further noted “that troops taken from Germany would be much sooner efficient troops than levies of English lads of eighteen or twenty,” a point supported by other parliamentarians. Strategic concerns, rather than moral disregard, clearly guided parliament’s decision to use mercenaries.

What, then, do we make of other objections? By way of example, numerous parliamentarians felt that hiring German mercenaries was unacceptable as they were thought to abandon their post immediately when danger arose. Such objections, however, were oriented toward character assessments and do not touch the essential characteristics of mercenarism. Rather, the lynchpin of grievances surrounding mercenaries hinged on whether the cause pursued was just.\textsuperscript{59} As other parliamentarians argued, the Crimean War was a European war, not a solely British and French war, and therefore obliged all Europeans to fight Russia; in this manner it was a just cause. As Russell\textsuperscript{60} explained, “what we have always contended for in this House, and what I believe this House concurred in . . . is that we have embarked in a great European quarrel for the sake of the liberties of Europe . . . in which every German, every Swiss, and every other inhabitant of Europe ought to take as great an

\textsuperscript{50} Parliamentary Debates, Commons, 1\textsuperscript{st} series (1819).
\textsuperscript{51} Parliamentary Debates, Commons, 1\textsuperscript{st} series (1819).
\textsuperscript{52} Parliamentary Debates, Commons, 1\textsuperscript{st} series (1819).
\textsuperscript{53} Parliamentary Debates, Commons, 2\textsuperscript{nd} series (1823).
\textsuperscript{54} Parliamentary Debates, Commons, 3\textsuperscript{rd} series (1833).
\textsuperscript{55} Parliamentary Debates, Lords, 3\textsuperscript{rd} series (1854).
\textsuperscript{56} Ibid.
\textsuperscript{57} Ibid.
\textsuperscript{58} Ibid.
\textsuperscript{59} Regarding the argument that “there is no reason to believe that there cannot be mercenaries who only participate in just wars” (see Lynch and Walsh 2000, 141).
\textsuperscript{60} Ibid.
interest as any Englishman.” Thus, many in Parliament believed it was acceptable to hire German mercenaries because German citizens had an equal interest in pursuing the war as any Englishman.

Various parliamentarians, however, felt mercenaries did in fact pose a moral hazard to British soldiers who would not want to fight alongside them. As the Earl of Ellenborough argued, “you are to some extent endangering [their] moral character by placing beside them, and in connection with them, troops for whose moral character you have no security.” This insinuation was that, while German troops hired as mercenaries could make respectable soldiers under good officers, they were not equal to British and French soldiers. This position, however, was fiercely contested by others who sought to protect the reputation of foreign soldiers. Notable among them was the Duke of Richmond and the Earl of Derby, both of whom felt that those who served in the King’s German Legion during the last war did so with equal distinction to any British soldier. Beamish concurred, highlighting the loyalty, bravery, and effectiveness of the legion that, “the King’s German Legion was without doubt [among] the very best troops commanded by Wellington in the Peninsula and at Waterloo” (Beamish 1997). The idea that mercenaries were unworthy soldiers presenting a moral hazard to the citizen soldier was untrue and contested by the time of the Crimean War. The debate proved more nuanced, with many parliamentarians continuing to embrace the idea of the good mercenary in part because of the strategic and economic benefits they conferred.

Those arguing in favor of the existence of an antimercenary norm often overlook this full portrait of mercenary activity during the nineteenth century, including the use of mercenaries fighting against absolute powers in the wars of succession and civil wars throughout Southern Europe and South America (Rodríguez 2009, 2006b).

One may also include the fifty thousand who joined and fought alongside the Union Army, those who fought in defense of the Papal State, and those who fought in the Cuban War from 1868 to 1878 (Wentzell 2014). Our claim is not that moral objections did not exist or that they were not valid during this period, but rather that such objections were subordinated to political, strategic, and economic interests. As the evidence above highlights, parliamentarians offered three perspectives in favor of allowing mercenary activity to continue: (1) the otherwise unjust denial of employment provided the individual did not compromise the neutrality of the state, (2) soldiers as a strategic tool for promoting the national interest at minimum financial cost to the government (Mohlin 2012), and (3) the lack of necessary prohibition via an act of parliament provided they did not harm the national interest. As the next section examines, it was not until mercenaries started to undermine the right of peoples to self-determination that moral objections to mercenary interventions began to take hold among member states of the international community.

**Documentary Evidence: Mercenary Activity in the Civil Wars of Yemen, the Congo, and Angola (1962–1976)**

Unlike their early nineteenth century predecessors, who fought in defense of freedom with the tacit approval of the British and French governments, the mercenaries that plagued Africa throughout the 1960s and early 1970s frustrated and contradicted the consolidating right of self-determination. Simultaneously, the majority of narratives over the last fifty years are overly simplistic, failing to grasp the political and strategic complexities and purposes behind the use of mercenaries by different governments and political movements in the Congo and Angola. This resulted in explanations too narrowly focused on particular events while ignoring contradicting dynamics. These explanations subsequently lack credibility by failing to explicate the precise reasons behind why mercenaries became embroiled in the Congo and Angola. In particular, such explanations ignore the interests of the superpowers, European governments, and the newly established Congolese government that the mercenaries helped to secure. Thus, while these governments publicly objected to the presence of mercenaries, they often supported their usage privately because they directly benefitted from these activities.

61 Such opinions as held by parliamentarians often did not reflect the opinions held by British officers and soldiers who had served with Prussian and Austrian troops in particular (see Wishon 2013).


63 Lord Ellenborough was a keen supporter of organizing a militia to supply the army with the recruits it needed, instead of relying on foreign soldiers. Empirically, there is no basis to Ellenborough’s statement, which probably had more to do with his attempt at politicizing than to gain an advantage over the government. Beamish 1997 (1832-37) has documented the bravery of German troops who served under Wellington.

64 *Parliamentary Debates*, Lords, 3rd series (1854).

65 A paper prepared on the mercenary problem in 1970 by the FCO indicated strong arguments on both sides of the debate (see CAB 148/112).
The notion of an antimercenary norm is anchored upon specific historical periods and geographical regions, and is particularly evident within Africa from 1960 to 1976. This final section challenges the factual basis for such a norm by examining newly identified archival material about mercenary activity during the Cold War. A complex picture emerges where governments used mercenaries to support their national interests, on the one hand, but condemned their usage, on the other hand, should their activities fail to align with national interests. These interests were either narrowly focused on preserving influence in a region or widely focused on the promotion of international norms as in the case of non-intervention. Unfortunately, in the context of mercenary activity, these norms often collided with each other, leaving governmental discretion to choose depending on the exigencies of each particular context.

Yemen

One of the least discussed operations concerning the antimercenary norm is the Yemeni Civil War from 1962 to 1965. Percy (2007b) completely ignores this case study, and to date, the only academic book that gives a concise account of the operation from the UK government’s perspective is Jones’s *Britain and the Yemen Civil War, 1962–1965* (2004).

While it is difficult to account for the near absence of this civil war from the literature, a plausible explanation is one of framing: specifically how we conceive of mercenaries and their attributes. Consequently, mercenaries operating in Yemen stood in opposition to the general conception of the mercenary and hence were not recognized as such. They may have been airbrushed out of the antimercenary norm debate because their purpose, behavior, and motives do not correspond with the stereotypical image of the mercenary, as epitomized by the Congo and Angola operations during the 1960s and 1970s. In the case of Yemen, the purpose of the British mercenaries was to give technical/military support to the mountain tribes fighting the new government, while their motive for doing so was a desire to protect British interests in the region. In this respect, they retained a sense of duty toward their government.

There are several reasons why Yemen ought to be included in this discussion. First, the Yemeni mercenary operation was organized by members of the British government, whose intentions differed significantly from those who organized the mercenary operations in the Congo and Angola. As Jones (2004, 5) explains, the organizers where “individuals associated with influential pressure groups, both inside and outside government, [who] were, at crucial stages, able to usurp the recommendations of the mandarins in King Charles Street.” These individuals included, among others, Julian Amery, Minister for Aviation (Prime Minister Harold Macmillan’s son-in-law), and Lieutenant Colonel Neil “Billy” McLean.67 When the overthrow of Yemeni’s Imam threatened to spill over into the Federation of South Arabia, they believed the future prosperity of Britain was now threatened by Egyptian President Gamal Abde Nasser’s hegemonic ambitions, and that it also served to strengthen Russian influence in the region. Amery, McLean, and their supporters acted to undermine any attempt by the government to recognize the new socialist government in Sana’a, a recognition strongly advocated by the foreign office (Jones 2004, 19). Instead, they chose to support a mercenary operation as a means to protect what they saw as a national interest in maintaining Britain’s influence in the region against an expansionist Egypt. Bernard Mill, a former Special Forces officer who took part in the mercenary operation, succinctly summed up the reasons behind this course of action, stating that at this particular time . . . British governments had lost the will in some ways to engage in this sort of [clandestine] operation, and we could do something the British government no longer had the will to do, help to get rid of a foreign power in Yemen. So it was logical for private enterprise to pick up this particular bill, particularly as we felt it was important for the British national interest. (as quoted in Jones 2004, 4; emphasis added)

And second, as the last sentence highlights, what motivated the mercenaries to participate was the vital nature of British national interest, thereby differentiating their intentions and actions from those of the mercenaries who operated in the Congo and Angola. In particular, their goal was not just monetary but rather the protection of British interests in the region (see Smiley and Kemp 1975, 155). Furthermore, participating British soldiers were handpicked and usually trained as Special Forces. Those who served in the Congo and Angola were recruited via adverts in newspapers and often lacked military discipline and training. Additional reasons reflected the “legacy of Suez, [which] imposed severe limitations

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66 The stereotypical mercenary is motivated solely by money to take up arms, with little or no interest in the politics of war or the outcome of the conflict.

67 The operation did not receive official UK or French government support (see CAB 148/112).
on the extent to which Britain could resort to the overt use of force” (Jones 2004, 86) in the region, and the government’s inability to generate a force quickly enough using either Special Forces or agents.

The above distinctions matter because moral condemnation of mercenaries is primarily based on the mercenary’s financial motivation and lack of moral justification for killing. These objections, however, did not apply to the Yemeni mercenary operation because civil servants, ministers, parliamentarians, and private individuals, both inside and outside government, took diverging views on the merit of using mercenaries for the operation. Some thought it was the only viable option to protect vital UK interests, while others took the opposite view in arguing that mercenaries were unlikely to change the situation on the ground in favor of the United Kingdom over the long-term. Strong objections to using mercenaries, particularly from the FCO, were met with equally strong support for the idea. Moreover, given such diverging viewpoints, it is difficult to substantiate the idea that mercenary operations per se were vilified. Even the Israeli government lent support to the mercenaries and in exchange gained valuable intelligence about the capability and limitations of Egypt’s air force that proved invaluable during the 1967 war (Hart-Davis 2012, 157, 328–29). Saudi Arabia and Kuwait also benefitted from the operation in that Nasser’s reputation and influence on the Arabian Peninsula were severely damaged, and he no longer posed a significant threat to British interests in the region. Ultimately, motivation and justification are important factors in evaluating the morality of using mercenaries. Focusing upon pecuniary motivation collapses the complexity of the relationship between the mercenary and government, the purposes behind that relationship, and the interests it is designed to protect, thereby oversimplifying the analysis.

To contextualize this situation, we analyze the impact of mercenaries on the struggles for independence in the Congo and Angola, two conflicts at the root cause of our contemporary objection to mercenaries.

Congo
The presence of mercenaries in the Congo from 1961 to 1968 cover three distinct periods, during which time they were accused of destabilizing the country, helping to save it from the Simba revolt, and finally rebelling against Mobutu’s government. The literature, however, largely focuses on their role in helping the attempted Katangese secession from 1961 to 1963. This period ignited the international community’s condemnation toward the modern mercenary, who was seen to support Tshombe and his ambition for an independent Katanga. This ambition probably received the support of the mining company Union Minière, which some alleged was a financier of the mercenaries (Mockler 1985, 80–81). Such ambition was contrary to US policy, which tied US support to the Adoula government and to Katangan reintegration (Foreign Relations of the United State, 1964–1968, Volume XXIII, Document 119, p. 168). In particular, the US government considered assigning troops to UN Operation Congo (UNOC) unless Katanga agreed to terms with the Congolese government and submitted to UN decisions as a means of averting communist alignment. As the following telegram from US Secretary of State Dean Rusk to the US Embassy in Belgium notes, “not only is Congo key to central Africa, but also chronic instability provides fertile grounds for communist infiltration, prevention of which has been cornerstone our Congo policy last four years” (Foreign Relations of the United State, 1964–1968, Volume XXIII, Document 197, p. 283). It is not surprising, therefore, that mercenaries became entangled with US interests given the role they played in the Katangese secessionist movement for independence. While it was also seen as an expression of the right of peoples to self-determination, the United States feared that the Congo would become communist-aligned and might trigger a cascade effect. An independent Congo subsequently became the primary interest of the United States within the region.

After Tshombe was appointed prime minister of the Congo in June 1964, mercenaries were immediately invited to return and help put down a Simba revolt ongoing in the eastern part of the country. As

68 For a sustained challenge to even these objections, see Lynch and Walsh (2000).

69 Indeed, the Commentaries to API note that “the problem of mercenaries was first raised at the United Nations in 1961 in connection with the Katangese secession” (ICRC 1987, 572).

70 The Union Minière du Haut Katanga (UMHK) was a Belgian mining company established on October 28, 1906, that operated in Katanga.

71 The Simba revolt began in the Congolese Eastern province of Kwilu and lasted from December 1963 to November 1965. It was organized and led by Pierre Mulele, Gaston Soumialot, and Christophe Gbenye. The Simba threat to Tshombe’s government gained the support of the Soviet Union, China, and Cuba, thus fueling the perception in Washington that a Vietnam-style domino effect was likely to succeed in the region if the revolt continued (see Michaels 2012, 134).
Michaels (2012) points out, it was “at the instigation of Washington and Brussels, [that] Tshombe began hiring a mercenary force to bolster the ANC’s counterinsurgency efforts” (134). In public, the US government sought to distance itself from the mercenaries due to concerns surrounding press reports that the United States was helping mercenaries kill Africans in order to protect European interests (Michaels 2012, 138–39). Meanwhile, privately, the relationship that eventually emerged was covert and effective with CIA analysts lavishing praise upon British mercenary leader Mike Hoare in particular (138–39). Ultimately, the mercenary operation was a success that helped to ensure the Congo remained within the Western sphere of influence. Even so, Tshombe remained unpopular among other African leaders because of his use of white mercenaries (Michaels 2012, 149), many of whom came from South Africa and Rhodesia and were considered to have very conservative, even colonialist political sympathies (Foreign Relations of the United States, 1964–1968, Volume XXIII, Document 511). Tshombe was eventually replaced as prime minister, making it easier for Congo’s neighbors to drop their support for the rebels.

Then, on July 4, 1967, the international community saw approximately 160 white mercenaries, along with Katangese troops, mutinied thereby causing a political headache for Mobutu’s government and the governments involved in their evacuation. Despite this, some departments of the UK government remained reluctant to consider mercenaries a serious long-term threat to the country’s interests. As Dales from the FCO’s South East Asia Department noted, “[o]ur interest in the subject is marginal; the problem of mercenaries in South East Asia is not itself serious enough to warrant legislation” (FCO 53/29 [13]). These sentiments were echoed in other departments that thought the problem should be dealt with on a geographical basis (FCO 53/29 [11], [12], [13]). In another FCO communication from the Central African Department, the legal advisers made it clear that, in order to show a need for legislation, it was necessary to show the mercenary problem was not simply a Congolese problem (FCO 53/68).

The question of whether to legislate against mercenaries climaxed with the release by the Cabinet Working Party on Powers to Control the Recruitment of Mercenaries and the Export of Goods and Services on May 18, 1970, at which time the opening statement acknowledged the committee’s general endorsement of the paper’s conclusion and reinforced the argument that new legislation to control the recruitment of mercenaries was unlikely to be advantageous (CAB 130/458). The government’s reluctance to contemplate new legislation banning mercenarism was therefore based on the idea that such legislation would be ineffective and, at the same time, act to limit the rights of the individual (FCO 25/111 [14]). Moral opprobrium concerning mercenary motivation or conduct was not considered.

Angola

Angola, by contrast, cemented the notion of the mercenary as someone who could not be trusted to safeguard the interests and values of their home state. Many in the United Kingdom expected that the government would restrict or ban the profession after the evacuation of the Congo mercenaries. Yet there was a “marked lack of interest about the subject in Whitehall except on the part of the then Prime Minister Harold Wilson and Cabinet Secretary Sir Burke Trend” (FCO 46/556 [19A]). In the government’s view, the “balance of advantage was against further legislation at the present time” (FCO 46/556 [19A]). After the Angola debacle, however, it might have been expected that the government would change tack and restrict or ban mercenaries. But even after numerous discussions between the same government departments that were involved with resolving the Congo mercenaries debacle, the government still chose to do nothing. This should not be surprising given that little had changed legally and contextually regarding the mercenary question since the evacuation of the Congo mercenaries in 1968. Furthermore, the arguments against banning mercenaries put forward then were still considered relevant by the government a decade on.

The main report on the issue was the Diplock Report (Committee of Privy Counsellors 1976). The report was discussed on July 20, 1976, by the Group on the Diplomatic Report on Mercenaries, who agreed “that the main recommendations of the report (points 6 and 7 of the summary of the conclusions) should be recommended to [m]inisters” (CAB 164/1373[8]). It was further noted that both recommendations should be read in conjunction with sections 13 and 14 of the report, but in particular the first paragraph of section 13, which records the three propositions to which the committee attach most weight: “that it is not practicable or just to try and define
an [offense] of enlistment as a mercenary by reference to motive; that a penal prohibition on what an individual does abroad involves a restriction of liberty, which could be justified only on compelling grounds of national interests; and that the practical difficulty of providing such an [offense] would mean that there could be very few successful prosecutions” (CAB 164/1373 [13]). In the case of withdrawing a passport as an administrative means of controlling the movement of mercenaries, it was considered unjustifiable and “needed to be considered in a wider context than that of the enlistment of mercenaries” (CAB 164/1373 [10, Annex 3]). It was also noted that “[removing a passport] was something [that] they would not wish to rely on in the future” (CAB 164/1373 [8]).

Finally, the UK government’s attitude toward the Angolan mercenaries needs to be contextualized in relation to its Southern African foreign policy because this accounts for why, geostrategically, the government strongly opposed the mercenary intervention. Unlike the Yemen operation, which had unofficial support from members of the government, this group of mercenaries was recruited largely as a result of a private initiative financed by the CIA and without Whitehall knowledge or acquiescence (Hughes 2014, 8–10). Whitehall officials themselves felt that “any embroilment alongside Washington DC and Pretoria would be counterproductive for Western interests” (Hughes 2014, 10). This was particularly so for the United Kingdom, which at the time was trying to negotiate an end to the Rhodesian Civil War. Furthermore, Whitehall recognized that support for a CIA-backed mercenary operation might provoke the Soviets to support the three liberation movements fighting the Smith regime in Rhodesia. Such a move would not only undermine Whitehall’s political initiatives to end the war peacefully, but might lead to the Soviets competing with the United Kingdom over geostrategic interests and influence in the region. From the perspective of the UK government, it was disadvantageous to support the mercenaries based upon a geostrategic reasoning, rather than moral opprobrium.

Conclusion

Despite the observable decline of mercenarism coinciding with an apparent repugnance expressed by the international community, we have interwoven theoretical explanations with empirical evidence that demonstrate inconsistencies with the notion that a strong international norm exists against mercenaries. In challenging Percy’s argument, we have deliberately focused upon the historical periods and events that she and other proponents of the antimercenarism norm have based their claim, in order to illustrate other catalytic factors that do not turn upon a mercenary-specific norm. We have then supplemented these accounts with largely overlooked historical episodes from the literature that have generally failed to fit the image of mercenary activity, but which further erode support for an international norm against mercenarism.

While we do not discount moral objections to mercenaries completely, the revised picture becomes one that is dominated by tones of neutrality in the international arena, focusing instead on the right of peoples to self-determination and the narrow interests of states during periods of international instability. We have sought to demonstrate that the expression of these factors can account for much of the observations put forward by the proponents of the antimercenarism norm. We therefore suggest that the antimercenary norm is not as strong as its supporters suggest and, moreover, is often marginalized when national interests diverge from its tenets.

Given the widely accepted difficulties of defining a mercenary, the lack of international support for the instruments that curtail mercenarism, and the persistence of private military services proffered for profit in contemporary conflicts, we present this body of evidence to ground a broad reappraisal of the purported antimercenary norm. In doing so, we hope to reopen the question of mercenary decline for investigation and to foster different perspectives that account for the observed trends. Finally, there is the question of continued relevance for the purported mercenary-specific norm when considered in the context of new developments such as the emerging foreign fighters debate. By advancing a broader framework that accounts for international reaction to privately organized armed actors more generally, we hope to sketch the contours for further research beyond the mercenarism phenomenon. As such, we hope that this article has reopened this area for a broader and more comprehensive debate that takes into account contemporary developments.

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