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Report of the Committee of Privy Counsellors appointed to inquire into the recruitment of mercenaries

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REPORT OF THE COMMITTEE OF PRIVY COUNSELLORS APPOINTED TO INQUIRE INTO THE RECRUITMENT OF MERCENARIES

To the Right Honourable James Callaghan, MP

On 16th February, 1976, we were appointed by your predecessor, the Rt Hon Harold Wilson, MP, as a Committee of Inquiry with the following Terms of Reference:—

> "In the light of recent events, to consider whether sufficient control exists over the recruitment of United Kingdom citizens for service as mercenaries; to consider the need for legislation, including possible amendment of the Foreign Enlistment Act; and to make recommendations."

The recent events

2. The recent events mentioned in our Terms of Reference were the recruitment in the United Kingdom of some 160 men to serve with or in support of the armed forces of the FNLA in Angola in their struggle against the MPLA.

3. The recruiting campaign had been organised by a group of four British subjects who were supplied with funds from FNLA sources. Advertisements were placed in the national press inviting ex-servicemen to apply for "interesting work abroad". These attracted the attention of journalists and were given wide publicity in the news columns of certain newspapers. As a result the purpose for which volunteers were being sought became public knowledge as did the way to get in touch with the organisers of the recruiting campaign. The first batch of recruits were well aware that they were being engaged in a combatant role, but among those recruited later there were some who subsequently claimed that they had been led to understand that their duties in Angola would be limited to training African troops and that they would not be called upon to undertake combatant service unless they volunteered to do so. The recruits were flown from London to Brussels and thence to Zaire. The rate of pay offered was £150 a week. Of this £300 was paid in advance before departure, in many cases directly to the next of kin of the recruit. Active recruiting came to an end when it became known that a number of British mercenaries had been massacred by their own side in Africa.

4. We do not regard it as part of our function to conduct a post-mortem on the Angolan affair. What we have to consider is whether the existing legal powers to control the recruitment of United Kingdom citizens as mercenaries are effective and justifiable and, if not, what steps should be taken to improve them. Any fresh legislation will apply to future attempts to recruit mercenaries: it will be too late to apply to the Angolan affair. The relevance of the recent events referred to in our Terms of Reference to our inquiry is the weakness in the existing legal powers of control which those events have exposed.

The definition of mercenaries

5. "Mercenaries" in the broad sense are persons who serve voluntarily for pay in armed forces other than the regular forces of their own country. They

have played a part in wars, international as well as civil, for many centuries from the condottiere who, in Renaissance Italy, sold the services of their companies to the highest bidder, to the Gurkha Regiments of the British Army today. They have also included within living memory those who served in the International Brigade in the Spanish Civil War, United States citizens who joined up in British Air Forces before their own country entered World War II, and British Jews who fought in the Israeli Army against the Arabs.

6. It is tempting to seek a definition of "mercenary" which would differentiate between volunteers such as these and the professional free-lance fighter; but we do not think this is practicable in a definition intended to be used in legislation for the purpose of distinguishing persons whose recruitment or enlistment is to be subject to control from other persons. The motives which influence a man to enlist in an armed force which is not that of his own country may run through the whole gamut, from sheer desire for private gain accompanied by indifference as to the cause which that force is supporting, to a conscientious conviction that the merits of that cause are so great as to justify his sacrificing his own life if need be in order to ensure that it will triumph. The soldier of conscience may be found fighting side by side with the soldier of fortune – in the same ranks and for the same rate of pay. In nearly all cases, however, the motives which induce a particular individual to serve as a mercenary will be mixed. A spirit of adventure, an ex-soldier's difficulty in adjusting to civilian life, unemployment, domestic troubles, ideals, fanaticism, greed, all may play some part in the same individual's motivation, and no single one of them may be identifiable, to the standard of proof called for in a court of law, as the effective cause of his becoming a mercenary.

7. So if enlistment as a mercenary or the recruitment of others for that purpose is to be controlled by legislation, any definition of mercenaries which required positive proof of motivation would, in our view, either be unworkable, or so haphazard in its application as between comparable individuals as to be unacceptable. Mercenaries, we think, can only be defined by reference to what they do, and not by reference to why they do it. So we feel driven to adopt as the definition of "mercenary" for the purpose of any United Kingdom legislation "Any person who serves voluntarily and for pay in some armed force other than that of Her Majesty in the right of the United Kingdom".

Offences committed abroad

8. Our Terms of Reference require us to consider the recruitment of United Kingdom citizens as mercenaries whether this happens within the Realm or not. Recruitment as a mercenary is a transaction which involves at least two parties, one to communicate to potential recruits an offer of engagement in the armed force in question and the other to accept the offer by enlistment as a mercenary in that force. It will be convenient to refer to the acceptance of the offer as "enlistment" and to use the word "recruitment" to cover the making of the offer and as including all such ancillary arrangements as may be involved in enabling recruits to leave the United Kingdom for the country in which they have agreed to serve.

9. There is an important juristic distinction, as well as a practical one, between a law which seeks to control what is done by people when they are within the United Kingdom and what is done by them when they are not. National sovereignty is territorial and the national law of a state is not enforceable outside that state's own boundaries. If the law purports to prohibit a particular kind of conduct by its citizens when they are abroad the state itself has no means of enforcing the prohibition. All that it can do is to provide for prosecution and punishment of the offender when he returns; and in the case of the United Kingdom this is only possible if there is available to the prosecution at his trial in this country evidence of his having committed the prohibited conduct while he was abroad that is admissible and cogent enough to satisfy the high standard of proof of guilt that is required in criminal cases.

Individual freedom and the public interest

10. Any claim by the state to exercise control over the enlistment of its citizens as mercenaries for service abroad involves a restriction upon the freedom of the individual which, in our view, requires to be justified on grounds of public interest. To serve as a mercenary is not an offence under international law. Under the Geneva Conventions to which the great majority of states are parties, a mercenary serving as a member of an organised armed force of one party to a conflict which would be recognised in international law as involving a "state of war" between the parties to it, is entitled to the same treatment as a combatant and as a prisoner of war as any other member of that force. In the case of a conflict which does not fall within this category the question whether anything the mercenary has done in furtherance of it will be treated as an offence against the law of the state in which the force of which he was a member operated may well depend upon the outcome of the conflict. "Treason doth never prosper: What's the reason? For if it prosper, none dare call it treason".

11. Despite what has happened in Angola since the date of our appointment, we do not think that the protection of the mercenary himself from the risk of death or injury that he may run, could of itself justify the state's prohibiting his enlistment. If a man chooses to embark upon an enterprise that is hazardous to himself we do not think that the State is for that reason alone entitled to stop him doing so.

12. The principal public interest which may be harmed by the presence of United Kingdom citizens serving as mercenaries abroad is the maintenance of good international relations between the United Kingdom and other states. Subsidiary public interests which it has been suggested could be involved are (*a*) the expense to the British Government of repatriating mercenaries with insufficient funds to pay for their own repatriation, and (*b*) the possible risk to other British subjects abroad who might be exposed to vicarious retaliatory action owing to local resentment at the presence of British mercenaries.

13. We do not think that the possibility that irrecoverable expense may be incurred in repatriation could justify prohibition of the enlistment of mercenaries. If this were a sufficient ground for preventing United Kingdom citizens

from going abroad, anyone who was poor could be debarred from travelling. The risk of exposing other British subjects to retaliation, at any rate in the absence of a publicised campaign in the United Kingdom for recruiting mercenaries, is we think too tenuous an excuse for the prohibition. We have received no evidence that it has ever happened yet.

14. As to the maintenance of good international relations between the United Kingdom and other states, it would be for Her Majesty's Government when occasion arose to assess the extent to which these might be worsened with some states or groups of states (or, as is not impossible, improved) either by the fact that an active campaign for the recruitment of mercenaries was being conducted in the United Kingdom itself or by the mere failure of the United Kingdom government to prevent its citizens from going abroad to enlist.

15. To prevent an individual from carrying on any particular activity involves some restriction on his freedom particularly if it affects his livelihood, but the curtailment of freedom involved in the prohibition of what can at most be an intermittent activity of recruiting mercenaries in the United Kingdom is a minor one and does not require a high degree of danger to the public interest in order to justify it. On the other hand although, as will later appear, we do not think there are any means by which it would be practicable to prevent a United Kingdom citizen from volunteering while he is abroad to serve as a mercenary and from leaving the United Kingdom to do so, we should regard any attempt to impose such a prohibition upon him by law as involving a deprivation of his freedom to do as he will which would require to be justified by a much more compelling reason of public policy than the prohibition of active recruiting of mercenaries within the United Kingdom.

Passports and the legal right to leave the country

16. Before turning to an examination of the Foreign Enlistment Act, 1870, which, among other things, does make it a criminal offence for a British subject, while he is abroad, to enlist in some (ill-defined) categories of foreign military and naval forces or to leave the United Kingdom in order to do so, it is convenient to consider whether there is some administrative action open to Her Majesty's Government which could take the place of penal legislation as a means by which such acts on the part of United Kingdom citizens could be prevented. No administrative action can stop a United Kingdom citizen from volunteering for service as a mercenary once he is abroad, but his journey from this country to a foreign destination, though it cannot be prevented, can be hindered and made more difficult for him by his not possessing a valid passport.

17. At common law, apart from any prohibition that may have been imposed by statute, a citizen of the United Kingdom has the right to leave this country and to return to it unhindered and at his own free will. A similar right in every human being is recognised by Article 13(2) of the Universal Declaration of Human Rights approved by the General Assembly of the United Nations on 10th December, 1948. A passport does not confer upon its holder any greater right to leave or enter the United Kingdom than that to which he is entitled at common law. It merely makes it easier for him to exercise that right since

it provides him with a ready means of identification. But if he establishes his identity by other means, an immigration officer has no legal power to prevent his embarkation on any ship or aircraft which is going to leave this country. Once he has embarked in the United Kingdom for his destination the absence of a valid passport is unlikely in most cases to prove a serious hindrance to his getting there.

The inefficacy of withdrawal of passports as a means of preventing enlistment

18. The issue of a passport is an exercise of the Royal prerogative and the document, when issued to its holder, nevertheless remains the property of the Crown. No United Kingdom citizen has a legal right to have a passport issued to him and the Foreign Secretary, by whom the Royal prerogative is exercised, can withhold or withdraw a passport at his discretion. His exercise of that discretion is not, or at any rate has not so far been held to be, open to challenge in the courts. In practice this unfettered discretionary power to refuse a passport is very sparingly exercised and only in respect of a limited number of categories of persons. These were last defined in a written answer given by Miss Lestor, MP, as Parliamentary Under Secretary of State, Foreign and Commonwealth Office, in the House of Commons on 15th November, 1974. Two categories are relevant to our inquiry. They are:—

(1) a person whom the Secretary of State has reason to believe to have furthered or encouraged, or to be likely to further or encourage, the unlawful actions of the illegal régime in Southern Rhodesia, and

(2) a person whose past or proposed activities are so demonstrably undesirable that the grant or continued enjoyment of passport facilities would be contrary to the public interest.

19. Anyone intending to enlist in the Rhodesian army or air force would presumably fall within the first category; and, depending upon the view that Her Majesty's Government took as to the gravity of the threat to the public interest that would be involved, United Kingdom citizens who left this country to enlist as mercenaries for service elsewhere than in Southern Rhodesia might fall within the second category. In fact passports were withdrawn from eight United Kingdom citizens who served as mercenaries in the Congo in 1961, three who served in the Congo in 1967/68, four who served in Nigeria in 1968, and fifty-four who served in Angola earlier this year.

20. It is, in our view, significant that on each of these occasions the stable door was shut after the horse had gone—if such a metaphor is appropriate to the minor obstacle to departure that lack of a passport creates. In the previous cases British diplomatic representatives in the countries concerned had been able to get possession of the passports only because the mercenaries sought their help in arranging repatriation. In the case of the Angolan mercenaries, they returned in groups and in the limelight of publicity. But where an applicant for the issue or renewal of a passport is not already known to the Passport Office to have been previously engaged in mercenary service it is not practicable to refuse his application on the ground that such is in fact his purpose, for an applicant for a passport is not required to state why he wants it. Even if it were

known to the Passport Office that the applicant was a professional mercenary and a passport were refused him, there would be nothing to stop him from obtaining from any main post office a British Visitor's Passport on application and production of a birth certificate. This would be a sufficient document of identification for the purpose of leaving the United Kingdom and its validity is recognised in a number of other countries mainly in Europe.

21. We are satisfied that neither the refusal of a passport nor its withdrawal can provide an effective administrative means of preventing or delaying the departure from the country of a would-be mercenary who has been informed about his legal rights.

22. In one of the instances that we have mentioned from the Congo and in the case of a number of those mercenaries whose passports were impounded on their return to the United Kingdom from Angola, the discretionary power to grant and withdraw a passport was used to obtain from a returning mercenary a signed statement that he would not return to his mercenary activities there. Upon signing such a statement his passport was restored to him. The usefulness of this method is however limited by three considerations. First, for the reasons we have already given it is only available after a person already known to be a mercenary either seeks assistance to return to this country or has returned on his own initiative. Secondly, if the returning mercenary refuses to surrender his passport, the only way of recovering it is by a civil action in detinue; no right of search or seizure of a passport is vested in an immigration officer or the police. One group of thirteen mercenaries returning from Angola did so refuse. Thirdly, it is doubtful whether there is any effective sanction if the signatory should act contrary to the way in which he said in his statement that he would. Even if the statement could be treated as a contractual undertaking any attempt to enforce it by injunction would be much too late to stop him leaving the country; and if it were regarded as a statement of present intention a subsequent prosecution under Section 15 of the Theft Act 1968, based on the fact that he had served again as a mercenary in the country specified in his statement, would have little prospect of success.

23. These considerations lead us to conclude that the use of the prerogative power to withhold or withdraw a passport as a means of hindering United Kingdom citizens from leaving the country to enlist as mercenaries cannot be justified pragmatically or morally. The number of intending mercenaries against whom it could be used with any effect at all would be minimal; and such effectiveness as it had upon those few in respect of whom it could be used would be based on bluff—in reliance upon the citizen's ignorance of his right at common law to leave the kingdom and to return to it.

The Foreign Enlistment Act, 1870

24. We turn, therefore, to the criminal law as a means of controlling the enlistment and recruitment of United Kingdom citizens as mercenaries, and to a consideration of the current penal law upon this subject which is to be found in Sections 4 to 7 of the Foreign Enlistment Act, 1870. This Act was an Imperial Act which extended to the overseas territories of the Crown as well as the

United Kingdom itself. It no longer applies of its own authority in Commonwealth countries except those that have remained colonies. It repealed an earlier Statute of 1819 which had proved inadequate to prevent the equipping in the United Kingdom of the Alabama for use as a cruiser by the Confederate forces in the American Civil War. The Alabama had caused much havoc among merchant shipping; and for this the British Government after an international arbitration accepted liability to pay compensation. So it is not surprising that many of the provisions of the Act of 1870 deal with the building and fitting out of ships for foreign belligerent forces and the preparation and equipment of naval and military expeditions against friendly states. As these provisions are not concerned with mercenaries we do not regard them as falling within our Terms of Reference. Accordingly we shall confine our considerations to the offences created by the Act under the heading of "Illegal Enlistment".

25. The fact that the Foreign Enlistment Act, 1870, is a penal statute has two consequences. The first is that it falls to be construed with strict regard to the statutory language used. It is not permissible for courts of law to extend the definitions of statutory offences by analogy in order to deal with new situations which they regard as equally reprehensible. The second is that the effectiveness of a penal statute depends upon the likelihood that, upon a trial in the United Kingdom of a person accused of an offence under the Act, the prosecution will be in a position to prove by admissible evidence the existence of each and every ingredient of the offence and to do so with that degree of certainty that is required for conviction of a criminal offence.

The legal defects in the Foreign Enlistment Act

26. The statutory language used in the Act to create offences under the heading of "Illegal Enlistment" is adapted to conditions as they existed in 1870 as respects relations between sovereign states, the kinds of armed conflict that had taken place in foreign territory during the previous decades and the means of transport and of waging war that were then available. The immense changes in those conditions which have taken place in the last hundred years and particularly since World War II have resulted in there being important omissions from the Act and a number of obscurities in the statutory language affecting most of the ingredients of the offences. These make the application of the Act to United Kingdom citizens who participate in a particular internal conflict in a foreign state a matter of grave legal doubt and the commission of an offence almost incapable of satisfactory proof.

27. For the purposes of offences under the Foreign Enlistment Act, 1870, illegal enlistment occurs when "without the license of Her Majesty . . . (a British subject) . . . accepts or agrees to accept any commission or engagement in the military or naval service of any foreign state at war with any foreign state at peace with Her Majesty".

28. Section 4 deals with both enlistment and recruitment. Illegal enlistment is an offence that can only be committed by a British subject but can be committed by him anywhere, whether within Her Majesty's dominions or abroad.

Illegal recruitment, on the other hand, (ie inducing other people to enlist) can be committed only within Her Majesty's dominions, but can be committed by persons who are not British subjects as well as those who are.

29. Section 5 makes it an offence for a British subject to embark on a ship with a view to quitting Her Majesty's dominions for the purpose of illegal enlistment; and Section 12 (which deals with accessories) would make it an offence for anyone else to take active steps in the United Kingdom to enable him to do so.

30. Section 7 makes it an offence for the master or owner of a ship knowingly to take on board a person who either has already enlisted illegally or is quitting Her Majesty's dominions to do so.

31. (Section 6 which deals with misrepresentations can, under modern conditions, be ignored.)

32. To deal first with the omissions: no country that is a member of the Commonwealth, even though it has adopted a republican constitution, is a "foreign state" within the meaning of the Act, neither is the Republic of Ireland.* Enlistment or recruitment for mercenary service on either side in an international conflict in which a Commonwealth country was a belligerent or on either side in any internal conflict which took place within the territory of a Commonwealth country would not be an offence under the Act. *A fortiori* the Act would have no application to service in the army or air force of the régime in Southern Rhodesia, since this still remains, *de jure*, a Crown colony. Again, the offence of leaving the United Kingdom in connection with illegal enlistment is restricted to leaving by ship – a means of travel unlikely to be used by a mercenary in modern times. The offence is so defined as not to cover leaving this country by air.

33. The obscurities in this part of the Act are consequences of (a) the inter-relation between the description in the enacting sections of the forces in which it is unlawful to enlist and the expanded definition of "foreign state" in the interpretation section (Section 30) and (b) the fact that it is the act of enlistment in an armed force and not service in it that constitutes the offence.

34. The expanded definition of "foreign state" prevents its being confined to a government that is recognised by HM Government as the *de jure* sovereign government over a particular area. It is, and was no doubt intended by the draftsman to be, broad enough to make it an offence to enlist in armed forces raised by rival governments in a civil war such as that which had been waged in the United States of America, or forces such as those which had been raised by insurgents in the Spanish American colonies in their recent struggles for independence. But the questions whether and, if so, when the Act becomes applicable to particular cases of internal struggles for power between rival factions within a state in the varied circumstances in which such struggles may arise today, are capable of raising so many doubts as to make this part of the Act unsuitable, in our opinion, to continue to be used as a penal statute.

See Ireland Act, 1949, Section 2.

De facto governments and guerrillas

35. The expanded definition of "foreign state" in Section 30 of the Act taken by itself is capable of including within its ambit armed forces raised by groups of persons who are *de facto* exercising governmental powers over a particular identifiable area even though their right to do so *de jure* is recognised neither by Her Majesty's Government nor by any other sovereign state. But the description of the offences requires that the persons on whose behalf the force is raised should also constitute an entity possessed of characteristics which in international law entitle it to recognition as being "at war" with another state and so enable it to exercise belligerent rights vis-à-vis neutral states. As a minimum this requires not only that the persons controlling the force should be claiming to be entitled to act as an independent sovereign government but that they should also have been actually exercising effectively and with some degree of permanence exclusive governmental powers over an identifiable part of the territory to which they lay claim; and their opponents must either be a government which is recognised *de jure* by Her Majesty's Government or must also satisfy the same criteria as a *de facto* government. In a prosecution for illegal enlistment or recruitment under the Act it would thus be necessary to prove that Her Majesty's Government had recognised the persons on whose behalf the armed force was raised and the opponents against whom they were fighting as being *de facto* or *de jure* governments at the time that the accused enlisted. So in practice no offence can be committed until HM Government acting through the Foreign Secretary is prepared to accord that recognition formally; and it would be a breach of the United Kingdom's own obligations under international law to grant this recognition to a *de facto* government before the criteria were satisfied.

36. It is accordingly doubtful whether the Act could ever apply to enlistment in guerrilla forces or in security forces engaged in their suppression if the guerrillas were not purporting to act as the regular government of a particular part of the state's territory but were seeking to bring down the existing régime throughout the territory by force of arms. Again since the offence consists of enlistment and not a continuing offence of service as a mercenary the applicability of the Act to a particular mercenary might depend upon the stage that had been reached in an internal struggle between rival factions at the time he enlisted. A mercenary who had enlisted before the group on whose behalf the force was raised had won and exercised control over an identifiable area of the disputed territory and had been formally recognised by the Foreign Secretary as a *de facto* government would have committed no offence, while his comrade-in-arms who had enlisted in the same force after that event would be liable to conviction.

The evidential difficulties of proof of offences

37. Independently of the difficulties of determining the status of the various armed forces that may be operating in an internal struggle for power in a foreign state, in any trial of a person after his return for an offence under the Act the prosecution would be confronted by evidential difficulties in proving what the accused had in fact done in the foreign country, with sufficient particularity to justify a conviction for having enlisted in a particular armed force. This would require oral evidence from eye-witnesses of his conduct as they had observed

it in the confusion likely to be prevalent in the kind of conflict in which the services of mercenaries are sought. The only persons in this country likely to be able to give first-hand evidence of this kind after the return of the accused to the United Kingdom are his former comrades; but even if they could be identified and brought to the court they would be unlikely to be voluntary witnesses for the prosecution and if forced to give evidence could rely upon the privilege against self-incrimination. The task of assembling sufficient evidence to support a conviction from other witnesses in the foreign country where the mercenary served and persuading them to come here for the trial presents practical problems that would, in our view, be insurmountable. They were considered to be so by the Director of Public Prosecutions in 1938 in connection with the enlistment of United Kingdom citizens for service in the Spanish Civil War. Although there were no problems as to the status of the force in which they had served he did not find it possible to obtain sufficient evidence to justify prosecuting any individual volunteer on his return, although the general composition, functions and military achievements of the International Brigade were matters of public knowledge.

38. It is, we think, these difficulties of proving to the satisfaction of a criminal court what a particular individual had done while he was abroad that accounts for the fact that during the 106 years that it has been upon the statute book there has never been a prosecution, let alone a conviction, under the Foreign Enlistment Act, 1870, for an offence in connection with illegal enlistment or recruitment. A handful of prosecutions had been brought under the Act of 1819 which it replaced, but these all arose under provisions relating to the employment of ships in belligerent service or the fitting out of naval or military expeditions. So did the only two prosecutions under the Act of 1870. The better known of these was in 1896 in connection with the Jameson Raid and was in respect of an offence under Section 11 of fitting out a military expedition against the dominions of a friendly state.

39. The omissions and obscurities resulting from the inadequacy of the language of the Act to deal with the kinds of situation in which mercenary forces have been involved in the last thirty years may have added to its ineffectiveness. Many of these situations may fall outside the Act entirely or, what comes to the same thing so far as effectiveness is concerned, can be shown to have fallen within it only *ex post facto* as a result of a detailed assessment of factual information about the political and military situation in the foreign country concerned which was not, and could not have been, available to Her Majesty's Government at the time the mercenary was recruited and left this country. In our opinion such was undoubtedly the case in relation to Angola at the time of the departures of the mercenaries which led to our appointment as a committee of inquiry. Until the status in international law of each of the parties to the struggle in Angola was clear, the United Kingdom Government had no power in law to stop the enlistment or recruitment of mercenaries for service on behalf of any of those parties.

Repeal of the Foreign Enlistment Act

40. The difficulties caused by omissions and by the obscurity of the language of the Act could be mitigated or removed in a fresh Act of Parliament, but no

device of draftsmanship can overcome the practical difficulty of obtaining the evidence to justify a conviction in a criminal court for an offence which consists of acts which the accused is alleged to have done abroad. We do not think that it would be acceptable to seek to overcome the prosecution's difficulties of proof by transferring to the accused the burden of proving his innocence of the offence once the prosecution had been able to establish that he had been seen in company with persons bearing arms in an area where armed conflict between opposing forces was prevalent. Under such a reversed onus of proof it would be the accused instead of the prosecution who would be faced with the practical difficulties of obtaining evidence from abroad. So radical a departure from a basic rule of criminal justice in this country could, we think, never be acceptable.

41. We think the provisions of the Foreign Enlistment Act, 1870, which relate to illegal enlistment have become thoroughly unsatisfactory in modern conditions. They should be repealed and a fresh start made. If this were done the occasion could be taken to update the language and content of the other sections of the Act with which we ourselves have not been directly concerned for the purposes of this inquiry.

Exclusion of enlistment from offences under fresh legislation

42. In considering whether or not to recommend the retention of a statutory offence of illegal enlistment which can be committed by United Kingdom citizens when they are abroad we have been influenced by three considerations which have been mentioned previously. First, for reasons we have given, we do not think it practicable or just to try to define an offence of enlisting as a mercenary in such a way that guilt would depend upon proof by the prosecution of a particular motive as actuating the accused to do so. Secondly, a penal prohibition sought to be imposed by the State upon what an individual does abroad involves a restriction on the liberty of the individual which we think can only be justified on compelling grounds of public interest. Thirdly, the practical difficulties of proving such an offence would mean that there could be very few successful prosecutions; and the chances of convicting the accused would depend not so much on his actual guilt as on his exceptional bad luck in there being available to the prosecution in his case sufficient evidence to convict him on his trial in this country.

43. The mere presence on the statute book of an Act of Parliament creating an offence for which it was hardly ever practicable to bring a successful prosecution would not, we think, be likely to mollify any foreign state or group of states that had resented the activities of British mercenaries in a particular country and observed that no prosecutions were in fact brought against returning mercenaries. Nor do we think that it can be justified in principle to enact a penal statute *in terrorem* only, knowing full well that it can only result in the punishment of a small minority of offenders distinguishable from the others for an arbitrary reason not connected with their actual guilt. This only serves to bring the criminal law into disrepute.

44. Accordingly we would recommend the abolition of any statutory offence by a United Kingdom citizen of enlisting as a mercenary while abroad or of leaving the United Kingdom in order to do so.

45. If this were done, we see no advantage in retaining a statutory offence of enlisting in the United Kingdom for service as a mercenary abroad. If the actual enlistment took place in the United Kingdom there would not be the same difficulties of proof as when it took place abroad. But it could always be arranged, as has probably generally been the case, that the agreement to serve was not actually concluded in this country but postponed until the prospective recruit had arrived at his destination.

46. We have considered whether it would be appropriate to make service as a mercenary a statutory offence in place of enlistment. This might reduce the difficulties of proof of the offence in some cases, though they would still remain formidable; but we have rejected the idea for another reason also – which was probably that which induced the draftsman of the Foreign Enlistment Act, 1870, to confine the offences to enlistment and recruitment. We do not think that it can be justified on grounds of public interest to impose a general prohibition on United Kingdom citizens from serving in some capacity or another (eg as instructor or technician) in the armed forces of a friendly state at a time when there are no hostilities in which that force is engaged. To make it a criminal offence under United Kingdom law for him not to desert that force as soon as it became involved in external or internal conflict, to which the United Kingdom was not itself a party, would, we think, be an impermissible affront to the sovereignty of the foreign state concerned.

Offences in connection with recruitment

47. This leads us to the conclusion that any fresh penal legislation should be directed against the activities in the United Kingdom of those who take steps calculated to induce persons to take up service as mercenaries abroad. The prohibited acts should be widely defined so as to cover not only offers of employment as a mercenary but also publishing information as to how or where to apply for such employment or to reach the place where it is available, or making any payment or taking part in any arrangement to enable or assist a person to do so.

48. Experience of the difficulties created under the Foreign Enlistment Act, 1870, by an attempt to produce a comprehensive definition of the armed forces in which it was forbidden to enlist has convinced us that any new legislation must not perpetuate this error. The Foreign Enlistment Act did contain a power on the part of the Government to exempt individuals from its provisions in respect of any particular naval or military service; but apart from this it was of general application. Whether or not because of the difficulty which in the absence of official guidance an ordinary citizen would have in knowing whether a particular armed force which he contemplated joining fell within the statutory definition or not, it has been the consistent practice of Governments, whenever the occasion has arisen, to give public official notice, by proclamation or otherwise, drawing attention to the application of the Act to the current hostilities and giving an empty warning that prosecutions for illegal enlistment may be brought under it. So in practice, although not in law, the Act has been treated by successive Governments as if it applied only to enlistment in such armed forces as had been publicly specified by them.

49. We are left in no doubt that any fresh legislation creating the new offences in relation to recruitment which we have recommended should take the form of an enabling Act empowering Her Majesty's Government from time to time by Order in Council (or other appropriate statutory instrument) requiring affirmative resolution by both Houses of Parliament to apply the provisions of the Act to the armed forces specified in the Order in Council. The terms in which the specified forces were described would depend upon the particular circumstances in which the need to prohibit recruitment arose. The description of proscribed forces need not necessarily be by reference to the name that they bore; it could be by reference to the area in which they were operating – as, for instance, any armed force by whatever name it is known operating in a named territory such as Angola or Southern Rhodesia.

50. If this method of legislation were adopted the application of the Act would not depend upon whether the operations in which the proscribed force was engaged were taking place in a foreign as distinct from a Commonwealth country or a colony, or upon whether Her Majesty's Government had formally recognised one or other faction involved in an internal struggle for power as a *de facto* or *de jure* government. The power could be exercised in the light of the effect upon good international relations with other states of preventing (or permitting) steps being taken in the United Kingdom to recruit mercenaries for service in a particular armed force at a particular time.

51. The prohibition upon the publication in the United Kingdom of information as to how and where to apply for employment as a mercenary in a particular force is, we think, unlikely to be effective unless it applies also to publication in the media as a news item and not merely in advertisements. It was through information in the news columns of certain newspapers that many of the mercenaries who went to Angola were put in touch with the recruiting agents of FNLA. The minor restriction on freedom of speech which this would involve would be a factor to be taken into consideration by the Government in deciding whether or not to make an Order in Council applying the Act in a particular situation.

Summary of conclusions

52. (1) For the purposes of control by law it is fair and feasible to define mercenaries only by reference to what they do and without reference to their motives in doing it. (Paragraphs 6-7).

(2) An appropriate definition of mercenary is "any person who serves voluntarily and for pay in some armed force other than that of Her Majesty in the right of the United Kingdom". (Paragraph 7).

(3) To prevent a United Kingdom citizen from accepting service as a mercenary abroad is a restriction upon his personal freedom which could only be justified on grounds of public interest. (Paragraph 10).

(4) The use of the prerogative power to withhold or withdraw passports in order to prevent citizens from leaving the United Kingdom to take up service as mercenaries is both ineffective and unjustifiable. (Paragraphs 20-23).

(5) The provisions of the Foreign Enlistment Act, 1870, which create offence. in relation to illegal enlistment and recruitment are out of date and obscures They are unworkable in practice, and should be repealed. The absence of reference to the other provisions of the Act is because they are not relevant to this report, and consequently it does not carry any implication that they are satisfactory. (Paragraphs 24-26, 32-41).

(6) Under any new legislation enlistment as a mercenary by a United Kingdom citizen should cease to be a criminal offence and service as a mercenary abroad should not be made one. (Paragraphs 44-46).

(7) Any new legislation should be directed to empowering Her Majesty's Government to prohibit recruitment in the United Kingdom of mercenaries for service in specified armed forces abroad. The activities prohibited under this head should be widely defined so as to include publishing information as to how or where to apply for employment as a mercenary or how to get to the place where such employment is available, and making any payment or taking part in any arrangement to facilitate or promote such employment. (Paragraph 47).

(8) The provisions of the Act should be brought into effect in relation to particular armed forces by Order in Council (or other appropriate statutory instrument) requiring affirmative resolution by both Houses of Parliament specifying the forces to which it is to apply. (Paragraph 49).

(9) There should be no statutory limitation upon the kind of armed force to which the prohibition may be applied provided that it is operating outside the United Kingdom. It may be specified in the Order in Council by reference to the name by which it is known or by reference to the area in which it operates or both. (Paragraph 49).

53. We desire to express our indebtedness in the preparation of this report to our Secretary Mr J L Bantock. His help throughout has been invaluable.

DIPLOCK

DEREK WALKER-SMITH

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