The 'Declared Areas' Offence: To What Extent Does Australia's Policy Response to Foreign Fighters Undermine Freedom of Movement?

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Abstract

The rise of foreign fighters is increasingly becoming an issue of global significance. Numerous figures suggest that over 20000 foreign fighters have joined the fight in Syria and Iraq in the four first years of conflict. Between 2014 and 2015, deaths in Organisation for Economic Co-operation and Development (OECD) nations escalated from 77 to 577, half of them committed by the Islamic State (IS). Australia's concern for its national security has led to substantial developments in enacting severe counter-terrorism laws, such as the *Counter-Terrorism Legislation Amendment (Foreign Fighters) Act 2014*. Given the undeniable intrusion of counter-terrorism laws into human rights, this paper will evaluate and question the necessity and proportionality of this new Act and in particular, the introduction of the 'declared areas' offence in sections 119.2 and 119.3 of the Criminal Code. This offence criminalizes entering or remaining in 'declared areas' in certain foreign locations with a very limited list of exemptions. This paper will argue that this offence is likely to impermissibly infringe upon the right to freedom of movement, which can only be restricted in very few cases. Accordingly, the main question of this paper is; 'to what extent is justified and proportionate the infringement on the freedom of movement placed by the 'declared areas' offence created by the 'Foreign Fighters Act'?' Finally, the author will advocate that to guarantee it's compliant with its international human rights obligations, the Australian Government must rely upon the independent assessment and recommendations of review bodies.

Keywords: Law; Terrorism; Human Rights; Foreign Fighters

Introduction

Literature and statistics on the foreign fighters' topic have expanded in the past decade, especially since the Syrian war broke out. Nevertheless, 'existing literature provides few answers to the question of the rise of foreign fighters, because this type of activism remains notoriously understudied' (Hegghammer,

2010: 54). Whereas there has been descriptive analysis regarding foreign fighter's participations in individual countries, almost no cross-case examination explaining their emergence has being conducted (Hegghammer, 2010). It might seem as a recent phenomenon but it has existed since ancient times. For instance, there were foreign fighters in the Spanish civil war. It has been generally accepted that foreign fighters are 'non-citizens of conflict states who join insurgencies during civil conflicts', as David Malet has defined them (Malet, 2013: 9). Although this definition has been used in literature by many academics, others, such as Thomas Hegghammer, differ and argue that the main reason for the lack of such term 'is that foreign fighters constitute an intermediate actor category lost between local rebels, on the one hand, and international terrorists, on the other'(Hegghammer, 2010, 55).

Domestic, regional and international legislation, including United Nations (UN) Resolutions, has been passed in regulating the foreign terrorist fighters (FTF) issue. The most important UN document is the Resolution 2178 (2014) which 'requires countries to take certain steps to address the FTF threat, including to prevent suspected FTFs from entering or transiting their territories and to have laws to prosecute FTFs'.

However, in relation to the 'declared areas' offence, there is still a literature gap due to the fact there have not been any cases yet. No other counter-terrorism law overseas has gone so far enacting such an offence (Williams, 2014: 2). This includes the United Kingdom (UK), on whom Australia mainly relies when drafting their counter-terrorism legislation.

For all these reasons, this research paper is of high significance. Amongst the western European countries, the UK has the most repressive terrorism-related legislation (Lister, 2015: 4). The human rights implications represent an important case of study and thus research needs to be conducted. Most of the limited literature focuses in the potential violation of the freedom of movement. Meanwhile, in the Explanatory Memoranda, the Government considered the offence proportionate and justified, and cited numerous factors demonstrating that the restriction achieves an appropriate balance between safeguarding Australia's national security and protecting individual's civil liberties (Explanatory Memorandum Bill No 1, 2015).

According to the International Covenant on Civil and Political Rights (ICCPR), freedom of movement is the right to move freely in the territory of a State, and also to another country. The freedom to leave any country, includes one's own country. Conversely, literature review on freedom of movement argues that there is a lack of 'a precise and broadly agreed-upon definition' (Connable, 2012:11).

The author acknowledges that the 'declared area' offence poses other concerns and rights intrusion, in particular the potential reverse of the onus of proof. These issues are not unconsidered or less significant, but the scope of this paper can only focus on the freedom of movement. Many reviewers as the Human Rights Law Centre, have considered that it reverses *de facto*, although not technically, the onus of proof. This is due to the defendant's requirement to prove the legitimate purpose of travelling to the area, rather than the prosecution having to demonstrate that the

defendant's purpose falls outside the list of exceptions. This places an unjustifiable burden on the accused that interferes in the presumption of innocence and the right to a fair trial (Rhys, 2014). In fact, it has been recognized by the Australian Government that there are a number of provisions in the Criminal Code that place a legal burden on the defendant. Under these circumstances, proving not being in an area for a sinful purpose presents arduous evidentiary difficulties.

The first chapter will present the context of the phenomenon of 'foreign fighters', to comprehend the complexity of the issue and the introduction of the Foreign Fighters Act by the Australian Government. It will also examine the right of freedom of movement from a human rights law perspective.

The second chapter will set out, through descriptive legal analysis, an explanation of the 'declared area' new offence and it will explore the difficulties and human rights implications posed by this provision. The section will conclude examining the infringement of the freedom of movement, as it has been criticised by various Australian review bodies.

The last chapter of the paper will examine the legitimacy of the restriction under the ICCPR conditions and its proportionality in relation to the threat level by using wide-ranging data. It will argue that there is not necessity and right balance as softer less-intrusive responses to foreign fighters are available, in following European standards. It will finish giving some recommendations to the Australian Government, based on reports made by Australian review bodies.

Foreign Fighters

Regulating foreign fighter's activities represents a neo-legal trend (Malet, 2013:9). This can be explained by the unprecedented rise of foreign fighters, both in countries of origin and destination, with the Iraqi and Syrian war, representing nowadays a challenging global issue. In April 2015, the UN estimated that at least 22,000 foreign fighters from 100 countries had joined the jihad in Syria and Iraq, including approximately 4,000 from Western Europe (Nichols, 2015). Citizens from all over the word have joined numerous groups and fractions on all sides of the conflict such as the self-proclaimed IS, Jabhat al Nusra or the Free Syrian Army. In 2011 there was a substantial variation explained by the outbreak of the civil war in Syria and the extension of the Salafist movement (De Guttry, 2016:9-11). The threat has become larger due to the possibilities the new technology era gives them to maintain contact with their respective homelands, to use encrypted tools, and even to call for attack by sympathizers in their countries (Zamitt, 2015). Western democracies conceive a significant threat that foreign fighters from Western countries could return and bring extremist ideas and jihadist propaganda. They can undertake activities such as coordinating terrorist plots, but they are also 'likely to suffer symptoms of post-traumatic stress disorder…that may lead them to question their moral image of the world' (Lister, 2015:13). For all these reasons and the continuing attacks in Westerns countries, Australia's counter-terrorism laws have been extended during the last years, in particular since September 11, identifying

foreign fighters in Syria has a serious national security threat. Particularly, in September 2015, under ASIO's (Australian Security Intelligence Organization) investigations, 120 Australians were considered to be fighting overseas in Islamist extremist groups (Independent National Security Legislation Monitor, 2016:2). However, more verifiable data will be given to argue the proportionality in relation to the threat level.

Freedom of Movement.

Freedom of movement is a human right recognized by the Universal Declaration of Human Rights and other treaties and customary international law norms. Human rights are;

> 'rights inherent to all human beings, whatever our nationality, place of residence, sex, national or ethnic origin, colour, religion, language, or any other status. We are all equally entitled to our human rights without discrimination. These rights are all interrelated, interdependent and indivisible'.

International human rights law poses duties on Governments 'to act in certain ways or to refrain from certain acts, in order to promote and protect human rights and fundamental freedoms of individuals or groups'. Australia has no Bill of Rights but it does not mean that Australia is not obliged to respect the Covenant on Civil and Political Rights (ICCPR), which has freely ratified by means of the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth). Australia has resources for the protection of these fundamental freedoms. The *Human Rights (Parliamentary Scrutiny) Act 2011* has recognized human rights as 'the rights and freedoms recognized or declared …' in a broad list of international instruments. Furthermore, the Parliamentary Joint Committee on Human Rights was created as a joint committee of members of the Parliament appointed 'to examine Bills for Acts, and legislative instruments that come before either House of the Parliament for compatibility with human rights…'

However, some of these human rights can be lawfully restricted in certain situations and this is the case of the freedom of movement. Meanwhile, article 4.2 of the ICCPR provides a range of 'non-derogable' rights which cannot be breached in any circumstances (Bianchi, 2006: 4).

Although there has been a broad debate on freedom of movement's definition, it can be understood as 'the degree to which individuals or groups have—and perceive that they have—the ability to move from place to place within a given environment as well as into and out of that environment' (Connable, 2012:23).

The fact that freedom of movement can be seen in terms of physical or 'actual' aspects is one of the debated topics. Through an example applied to our case study: an Australian citizen with Syrian roots can effectively and physically be restricted to travel out of Australia or have his/her liberty of movement constrained within the Australian territory (because of a detention order for instance); or have the ability to move and travel to a 'declared area' for a friend's wedding, but

actually the person is fearful to do so and decides to stay in Australia. This last indirect non-physical restriction effectively motivates the person not to travel to Syria because of the person's fear of being charged under the *Foreign Fighters Act* (Connable, 2012:11-13).

Counter-terrorism legislation, as an academic arena, suffers from unclear and vague definitions. All these factors complicate to objectively evaluate a potential infringement of the right of freedom of movement. Therefore, bringing laws into practice and having independent evaluation of each case circumstances is challenging.

'Declared areas' offence. Implications.

The *Counter-Terrorism Legislation Amendment (Foreign Fighters) Act 2014* (Cth) ('the Foreign Fighters Act') 'covers a multitude of areas across 162 pages of legislation, including criminal law as it relates to terrorism' (Williams, 2014:7). It is directed to the issue of Australian citizens and residents travelling to Iraq and Syria who take part in the war and then return home with radical outlook and training in terrorism.

The 'declared area' offence was introduced by this act in sections 119.2 and 119.3 of the Criminal Code. The offence criminalizes entering or remaining in 'declared areas' or 'no-go zones' in foreign countries, thus engaging freedom of movement. In November 2015, the declared areas were the Mosul district, Ninewa province in Iraq and Al-Raqqa, province in Syria.

The act controversially expands official powers and allows 'the Minister of Foreign Affairs with a power to identify certain areas of the world in which, if an Australian enters without sufficient justification, they will commit an offence'(Independent National Security Legislation Monitor). The only and debatable requirement for the Minister' identification of a declared area, by legislative instrument, is to be 'satisfied that a terrorist organization listed under the Criminal Code Act 1995 (s 119.3) is engaging in hostile activity in that area'. This measure becomes even more questionable for the fact that is punishable by up to ten years of imprisonment

The Criminal Code, allows the Parliamentary Joint Committee on Intelligence and Security to review a declaration 'before the end of the period during which the declaration may be disallowed under section 42 of the *Legislation Act 2003'*. Nonetheless, the Committee has no authority to review the Minister's decision before the declaration of a new area.

There are other Australian laws that restrict the entry to specific areas and interfere with the freedom of movement as for example the 'declared safety zones' in the *Offshore Minerals Act* 1994 (Cth) s 404, but the purpose of such laws and impact on individuals are not comparable.

Subsection 119.2(3) of the Criminal Code sets out a limited list of exceptions that justify travelling to the no-go zones. It includes providing humanitarian aid, making a genuine visit to a family member, working in a

professional capacity as a journalist, performing official government or United Nations duties and appearing before a court or tribunal.

This list of legitimate exceptions, has been criticized by many Australian review bodies such as the Human Rights Committee, for having a very narrow scope. For instance, business travellers, religious pilgrims, adventurers, ill-informed tourists, reckless people who enter inadvertently, people who attend to personal or financial affairs, people in transit or others who have gone to visit or support friends, are not included in this list. This proves the wide number of innocent reasons for a person to enter or remain in a declared area. The Gilbert and Tobin Centre for Public Law underscored that the offence is unjustifiable since 'it criminalises a range of legitimate behaviours that are not sufficiently connected to the threat of foreign fighters' (Australian Law Reform Commission: 203).

Additionally, it is not a requirement to know that an area has been declared under section 119.3. As it was explained before, the defendant must prove that its travelling purpose falls within one of the lawful exceptions, potentially reversing the onus of proof, and also, that the excepted purpose is the 'sole purpose'.

Australian Lawyers for Human Rights, expressed the concern that the 'humanitarian aid exception' is exclusively applicable when providing humanitarian aid is the sole reason for being in the declared area (Australian Law Reform Commission: 205). In fact, the UN working group on Mercenaries has previously highlighted that foreign terrorist fighter measures could possibly impede humanitarian aid in war zones 'by failing to exempt travel for doctors and other life-saving aid workers' (Human Rights Watch, 2015).

It has been claimed that the offence 'will operate in practice to deter and prevent Australians from travelling abroad for legitimate purposes due to fear that they may be prosecuted for an offence' (Parliamentary Joint Committee on Human Rights). Additionally, the Parliamentary Joint Committee has observed that there are numerous Australians with connections to countries that may be subject to be 'declared areas' and could have legitimate reasons to travel. Consequently, the offence might prevent Australians travelling not only to the already confirmed 'declared areas', but also to other countries where terrorist organisations operate 'and which might plausibly be designated as declared areas, such as in Israel and Indonesia'(Australian Law Reform Commission: 205).

The Centre for Civil and Political Rights has specified that 'freedom to leave the territory of a State may not be made dependent on any specific purpose or on the period of time the individual chooses to stay outside the country'. Therefore, the offence goes against this, since travelling to those areas has to be under a specific purpose enumerated in the list of exceptions. Moreover, it has stated that the liberty of movement 'is an indispensable condition for the free development of a person'(Centre for Civil and Political Rights, 1999: 2).

It is not only reproachable the narrow list but the fact that the Government has made clear in their information pamphlets that 'visit friends or business or religious purposes are not legitimate' and that they are 'unable to provide consular

assistance to any Australian who chooses to travel to Syria' (Australian Government).

Despite its limitations, the Government has considered the list as a safeguard that ensures that the prosecution procedures are rigorous and that the impact in the freedom of movement is 'reasonable, necessary and proportionate in order to achieve the legitimate objective of protecting Australia and its national security interests' (Australian Law Reform Commission: 203).

Legitimacy and Proportionality of The Offence. Alternatives and 'Soft' Measures.

Whether this offence restriction to freedom of movement is proportionate and necessary is disputed. Paragraphs I and II of article 12 of the ICCPR provides the only exceptions in which the right of freedom of movement can be restricted. Paragraph I authorizes a State to restrict a right 'only to protect national security, public order, public health or morals and the rights and freedoms of others' (Centre for Civil and Political Rights, 1999: 3).

Therefore, national security interests are covered, but the determination of this 'legitimate objective' suffers from political discretionary decisions. This can also be seen in the broad ministerial discretion of introducing liability to prosecute for crossing an artificial geographical line. Whilst terrorism is undeniable a matter of national security, there has to be a right balance between the level of the threat and the scope of the right's restriction and impact on individuals.

Although the Australian Government has described foreign fighters as its number one national security priority and it has invested $630 million extra funding in counter-terrorism over four years, it is a fact that Australia has rarely had terrorist attacks (Zammit, 2015). Following the annual Global Terrorism Index, formulated by the Institute for Economics and Peace, Australia is the 59th most impacted country by terrorism (Brook, 2016).

In 2015, Australia has had two deaths resulting from terrorism, as compared to France, which had 161 (Brook, 2016). Furthermore, over 80 per cent of all deaths in 2015 occurred only in eight countries (Institute for Economics and Peace, 2016: 19). According to statistics from the International Centre for the Study of Radicalization of the UN in 2015, Australia represents the fifth source of foreign fighters in Syria and Iraq among western countries. France represents the first source, with 1550 foreign fighters, and the fifth worldwide (Lister, 2015:3). In February 2015, ASIO calculated that around 90 Australians were fighting for jihadists groups in Syria and Iraq. Around 500 British nationals are estimated to be fighting in Iraq and Syria on behalf of militant groups, including IS and more than 3000 Westerners are considered to have joined (Zammit, 2015:3).

Between 1993 and 2013, no attacks succeeded in Australia and only four plots were disrupted. During the INSLM Reporting Period between July 1st 2015 and June 30th 2016, the Australian security agencies reported that the nature of the threat faced was growing, but the Independent Monitor claimed that the threat level

remained unchanged. While, 25 attacks were against West and only of them took place in Australia during the reporting period. (Independent National Security Legislation Monitor, 2016: 9).

Although the figures suggest the threat is not significant, the fact that Australia is not used to the level of radicalisation as the UK and Europe are, makes it easier to be attacked. This is supported by Professors Felix Patrikeeff and David Olney, who are in agreement with the Government on the existence of a real threat, but not entirely on the measures to suppress terrorists. They view that Australian 'hard' responses 'could end up surrendering political and social freedoms' (Adelaidean, 2015). US, Australia and Canada's political response to radicalisation, violent extremism and terrorism, have generally focused more on protection and punishment rather than dissuasion and reintegration.

In the case of Western Europe, the response has been more balanced and there has been voices in society and political parties highlighting the importance of 'soft' non-coercive and 'the need for societal inclusion through disengagement, education and employment programs' (Bakker, 2016:22). Paradoxically, the potential threat level appears greater than in the US, Canada, and Australia. However, there has also been criticism that western European governments have introduced repressive terrorism legislation to counter-extremism and foreign fighters. These measures include facilitating extradition and revocation of passports, enhancing border control, expanding surveillance powers of intelligence agencies and increasing prosecutorial powers. However, Resolution 2178, called upon all UN member states to improve their counter violence extremist and 'soft' approaches.

It is required that the restrictions are provided by law, with clear conditions for its limitation. It must be necessary in a democratic society, proportional and consistent with all rights recognized in the Covenant. The main principle for the restriction of is that 'the relation between right and restriction must not be reversed' (Centre for Civil and Political Rights, 1999: 3-4). The restriction of the 'declared areas' offence complies with the requirement of being covered by the Criminal Code, addressing the conditions for the limitation of the right. Paragraph III of article 12 of ICCPR, clearly points out that 'it is not sufficient that the restrictions serve the permissible purposes; they must also be necessary to protect them' (Centre for Civil and Political Rights, 1999: 7). The necessity of the measure for achieving the purpose of national security is uncertain regarding the threat level.

In order to examine the right balance and justification, the necessity and proportionality must be scrutinize. The 'declared areas' offence might achieve the purpose of national security protection, since it is a fact that it could prevent potential foreign fighters to travel. On the other hand, it has been proven that Western attacks are 'mostly by sympathisers who operate in relative isolation from established cells' (Independent National Security Legislation Monitor, 2016 :3). For instance, since 2006 about 98 per cent of US terrorist attacks were carried 'by 'lone wolves', who are American citizens inspired by, but not directly linked to, IS'

(Brook, 2016). Hegghammer stated that only about 11 percent of foreign fighters pose a terrorist threat once they return home (Lister, 2015:2).

There are already other restrictive measures in place to constraint the freedom of travelling abroad, which proportionality is doubtful. For instance, retaining the right to revoke the citizenship of convicted dual-national terrorists in the Netherlands and retaining the capacity to confiscate travel documents to individual suspected of posing a national security threat in Germany. The UK and Australia's Governments undertake temporary passport seizures complicating the provision of the necessary documents to travel to citizens and nationals. Norway restricts travelling to certain conflict zones areas and it has been under consideration a new law that would criminalize Norwegians traveling abroad as foreign fighters. The Foreign Fighters Act, expands the operation of control orders, preventative detention regimes and the ASIO's questioning and detention warrant powers.

Even if the purpose of the 'declared areas' offence was achieved, the principle of proportionality requires to adopt the least intrusive instrument 'amongst those which might achieve the desired result' (Centre for Civil and Political Rights, 1999: 3). The tendency has been focused on short-term and hard-end actions addressing symptoms rather than root causes. Counter-terrorism laws have been generally measured as disproportionate, which it relies on the issue that no government will face being blamed for a terrorist attack if it occurs and thus, there is not political incentive for such legislation to be repealed.

To reduce IS's actions, academics favoured measures such as cutting off their supplies and more long-term solutions focused on education and awareness. Thomas Hegghammer advised that 'Syria will prolong the problem of jihadi terrorism in Europe by 20 years' making the return of foreign fighters 'almost inevitable' (Lister, 2015:2). The possibility of these fighters to return home while the conflict in Syria is ongoing is very rare.

Several non-coercive and 'softer' preventative measures would be proportionate and avoid foreign fighters to travel, such as normative barriers through positive messaging, community engagement, a halting of recruitment via transmission of counter narratives. Counter Violent Extremist (CVE) preventative approaches were introduced for the first time in Australia by the Howard Government. After the 2005 London bombings, the National Action Plan to Build on Social Cohesion, Harmony and Security was established, funding 83 community projects, primarily directed to Muslim communities. During the Rudd Government, the first national CVE framework was created by means of a permanent committee under the name of Countering Violent Extremist Sub-Committee. Criticisms of these measures emphasized that they were broadly-targeted to entire communities, as Kuranda Seyit, Director of the Forum on Australia's Islamic Relations said, rather than engaging directly to potential risky individuals. For this reason the Abbot Government introduced a new approach in 2014, called Living Safe Together intervention program, to asses risky individuals.

Further improvements in CVE measures are necessary as they are less restrictive, more proportionate and do not limit innocent people with legitimate

purposes to travel. The Australian Government must follow CVE European initiatives, such as the National Support Hotline in France or the Syria Awareness Campaign in the UK. Also, it is essential the existence of programs directed to families and friends, as for instance the 'Hayat' program in Germany. Another positive aspect of this program is that it is run by non-governmental agencies, despite their close links with security agencies and authorities. The Danish 'Aarhus model' has also gained international reputation. It attempts to motivate and support individuals to leave violent extremist networks and provides 'medical treatment, psychological support, employment and housing assistance, and the re-establishment of community networks' (Zamitt, 2015: 10). There has to be an emphasis on working with the communities, having more cooperation and consultation, rather than criminalising them and their religion. In fact, it has been suggested that 'hard' responses result on more radicalisation.

To conclude, in regards to the 'declared areas' provision, the author recommends the Australian Government to; either excised it from the legislation or alternatively, introduce modifications. Subsequently, it should include a general defence for an individual who has travelled to the area for an innocent purpose not included in the list. In addition, the conduct of a war has unprecedented events, which means that a person could end up trespassing one of the 'declared areas' while it was not their intention, but a matter of their life's protection. The reverse of the onus of proof must be reconsidered. Finally, the Government should give more revising powers to the Parliament's Joint Committee on Intelligence and Security on issues arising from the implementation of counter-terrorism laws, as well as attention to the concerns of the review bodies.

Conclusion

The foreign fighters issue presents a reasonable threat to the Australian national security. However, level of the threat does not justify the severity of Australian the 'Foreign Fighters' Act and its 'declared areas' offence, which are significantly affecting human rights. This new provision infringes the freedom of movement, as it is unproportioned and unjustified regarding the circumstances and legitimate restriction ICCPR conditions. There are 'softer' non-coercive responses to foreign fighter's that despite their experimental nature, would effectively deal with the issue. Nonetheless, the author recognises the importance of certain 'hard' measures and the role of the police and intelligence services. Finally, implementation of international human rights law has no central authority, but Australia, in following the Independent reviews bodies' recommendations and its international obligations, must conform to the compliance of these rights when enacting counter-terrorism legislation.

As observed by William Godwin of the French Revolution, using violence to achieve utopia means violence will always follow. The same holds true today. If we allow the violence of terrorism to provoke harsh policy responses leading to

radicalisation and the erosion of human rights protections, it will be violence, and not national security that will follow.

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