Canada’s Foreign Fighters: The Foreign Enlistment Act and Related Terrorism Provisions in the Criminal Code.

On September 25, 2013, the Canadian Broadcasting Corporation reported that Ali Mohamad Dirie, a convicted member of the Toronto 18 terrorist plot, had been killed while fighting in the civil war in Syria.‡ Released from prison in October 2011, he defied his peace bond within less than a year, leaving the country and joining the ranks of the Syrian rebels. He was not alone.

Canada has an obligation to prevent the departure of these foreign fighters. In addition to general agreements to combat the spread of terrorism and other activities that are generally detrimental to international peace and stability, Canada is bound by UN Security Council Resolution 2178 which requires member states to have laws to prevent “Foreign Terrorist Fighters” from departing their territory and to prosecute them if they return. There are also less altruistic reasons to be concerned with this issue. CSIS has warned that these foreign fighters represent an immediate threat to Canada’s national security due to the accumulation of military and terrorist skills, and possible radicalization.§ This same concern has been raised with regards to reports of Canadians fighting with Al-Shabab in Somalia, and Al-Muwaqif-1’s Bala Dima, another affiliate of Al Qaeda, in Algeria. These are not mere hypotheticals; Al Qaeda itself rose

By late 2013, a British think tank estimated that between 9 and 100 Canadians were fighting in the conflict among up to 11,000 foreign fighters from 74 different countries.‖ In March of 2014, the Canadian Security Intelligence Service (CSIS) placed the number at approximately 30.¶ The numbers have grown dramatically since then. Foreign fighters in Syria and Iraq are reportedly engaged in a number of armed non-state actors, including Jabhat al-Nusra, an affiliate of Al Qaeda and a listed terrorist group under Canadian law; and the Islamic State in Iraq and Syria (ISIS), a listed terrorist organization§ against whom the Canadian Armed Forces as part of a broader coalition are conducting military operations. At the same time, Canadians have joined the ranks of the Peshmerga, the Kurdish militia supported by the same coalition.

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§ Ibid.
from the nucleus of foreign fighters who went to Afghanistan in the 1980s to fight the occupying Russian forces. One study found that of the 401 terrorists operating in the West between 1990 and 2010, at least 107 had previous experience as foreign fighters. However, I contend that Canada’s existing laws, specifically the Criminal Code prohibition against travelling abroad to join terrorist organizations, is inadequate, especially when viewed against its historical backdrop. Concerns of Canadians travelling abroad to fight in foreign conflicts, as members of military forces or armed non-state actors, is certainly not new.

Canadians have a long history of travelling abroad to join foreign militaries and armed non-state actors. During the Spanish Civil War, the Communist Party of Canada organized the dispatch of approximately 1600 Canadians to fight for the faltering Republican government in Spain. The maintenance of neutrality, only twenty years after the First World War, was an important policy goal at the time, and while these volunteers became folk heroes in certain circles, others feared they might draw Canada into another war in Europe. Additionally, the same arguments were made against their adventurism as are made against the Canadians fighting in Syria and Iraq; they were learning dangerous skills, becoming radicalized, and their actions were strengthening international communism, a great fear at the time. The result was the Foreign Enlistment Act (FEA), a Canadian version of the British statute by the same name, that forbids Canadians from fighting in foreign militaries during times of war, and in civil wars when so dictated by an Order in Council. The law remains in effect today.

The FEA and the terrorism provisions of the Criminal Code were both designed to combat the issue of Canadians fighting in foreign conflicts, but under very different circumstances. The FEA was written well before the Charter, in a time when neutrality was a primary policy objective and the greatest threat to Canadian, and British Imperial, security came from nation states. The terrorism provisions in the Criminal Code, however, were born in the post-Charter, post-9/11 world where the threat posed by terrorist groups weighed more heavily on the minds of legislators. It should come as little surprise that these two systems were not created with the other one in mind. They arose from their specific circumstances, and there is little coherence when the two are taken together. In fact, some startling holes appear.

In this article, I will first examine the prohibitions created by the terrorism offences in the Criminal Code and the FEA. I will indicate where the FEA requires updates, and highlight some of the gaps in the provisions. These gaps are broad, potentially undermining the policy objectives of both sets of prohibitions. Second, I will subject the two regimes to a Charter analysis. I find that some of the prohibitions under the FEA do not survive this analysis, are largely outdated, and in need of re-examination. I will then make some recommendations as to how the two approaches can be updated and harmonized, and describe how the Australian government has recently addressed these same issues. This article will not address the crime of high treason, which would be triggered when a Canadian joins or otherwise assists a state or non-state enemy against which the Canadian Armed Forces are engaged in hostilities.

The Foreign Enlistment Act

The FEA makes a series of prohibitions against activities that could be detrimental to maintaining Canadian neutrality in foreign conflicts. For example, the Act prohibits outfitting ships to take part in foreign conflicts, or launching or outfitting expeditions against foreign friendly states. The prohibitions we are concerned with here are those against enlisting in foreign militaries, leaving Canada to enlist in foreign militaries, and recruiting for foreign militaries.

The FEA does not prohibit Canadians from serving in foreign militaries in all circumstances. The laws of Canada do not create any express provisions against foreign military service, although the FEA does create a prohibition in a specific set of circumstances. Enlistment by a Canadian national in a foreign state’s military force is prohibited when that foreign state is in a state of war with a second foreign state with which Canada enjoys friendly relations. This prohibition applies to Canadian nationals, and applies whether they commit the offence in Canada or elsewhere. Travelling abroad for the purpose of enlisting in a foreign military under the same conditions is also an offence. These prohibitions under the FEA are therefore distinct from the provisions in the Criminal Code, which contain no requirement for a state of war or conflict, or any other circumstances with regards to foreign relations.

The FEA’s prohibition on recruiting is considerably broader. The prohibition is a standing one; there is no requirement
for specific circumstances in international relations. It does not matter if Canada is at war or on friendly terms with the organization for which the recruiting is taking place. Inducing someone to serve in “the armed forces of any foreign state or other armed forces operating in that state” is an offence at all times. This prohibition can be broken into two elements: who is prohibited from the act of recruiting, and what organizations cannot be recruited for.

The recruiting prohibition applies to anyone within Canada, whether or not that individual is a Canadian national, and regardless of the relationships between Canada and the foreign state in question. The only exception is recruiting conducted through consular or diplomatic officers or agents, who are nationals of the countries they represent. Such recruiting is permitted as long as the individuals conducting the recruiting are not also Canadian nationals, and the recruiting takes place in accordance with the regulations of the Governor in Council. The Act also makes it an offence to induce someone to enlist, or to leave Canada for reasons of enlistment, through misrepresentations.

As for what organizations someone cannot recruit for in Canada, there is slightly more ambiguity. The term “armed forces of any state” is clearly defined. “Armed forces” is a defined term in the FEA, and such an organization must also belong to a state in order to be caught by this part of the prohibition. However, the prohibition also applies to “other armed forces operating in that state.” This implies that the prohibition also applies to an armed non-state actor. Recruiting for organizations like the Kurdish militia, the Peshmerga, would therefore be caught by this prohibition.

Further complications begin to arise when we look at the definitions. The Act provides no definition of state of war, or friendly relations. This was not an issue at the time of drafting in 1937, as the terms were clear and well understood. The Hague Convention of 1907 articulated the processes by which states declared war on each other. Where no such declaration existed, the states were presumed to be on friendly relations. This binary was dubious at the time, and today provides an even less useful distinction. Since the implementation of the United Nations Charter in 1945, which prohibits the use of force or the threat of use of force, declarations of war have become largely obsolete. Not one of the 34 member states in the Organisation of Economic Co-operation and Development have declared war since the Second World War. There is rarely a clean binary between a “state of war” and “friendly relations,” interstate relations instead exist on a spectrum between friendliness and enmity.

This issue was litigated in the British case of Amin v Brown in 2005. The court examined a statute from the same period: the 1939 Trading with the Enemy Act. The plaintiff attempted to use this statute to avoid paying his landlady, an Iraqi national, because, he claimed, Britain was at war with Iraq. However, the court held that the intervention in Iraq was not a war and that the condition of war could not be a requirement for a law. Although this case is not binding on Canadian courts, it is a reading of international law that would almost certainly be respected in Canada. Consequently, the distinction of a “state of war” is no longer legally useful for determining when the statute applies.

An additional complication arises when looking at the statute’s use of the term foreign state. A foreign state is defined as, any foreign prince, colony, province or part of any province or people, or any persons or persons exercising or assuming to exercise the powers of government in or over any foreign country, colony, province or part of any province or people.

The statute therefore applies when the military force in question belongs to a state, or something that exercises or assumes the power of government over a terrain or people. In some circumstances, this can be problematic as invoking the FEA would be tacit recognition of an entity as a state. Applying the FEA to the act of enlisting in the Peshmerga, for example, would be akin to recognizing Kurdistan as a state, an act that would surely put considerable pressure on Canadian-Turkish relations.

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19 Ibid., s 11(1).
20 Ibid.
21 Ibid., s 11(2).
22 Ibid., s 5.
23 Ibid., s 2: “includes army, naval and air forces or services, combatant or non-combatant, but does not include surgical, medical, nursing and other services that are engaged solely in humanitarian work and under the control or supervision of the Canadian Red Cross or other recognized Canadian humanitarian Society.”
25 [1905] All ER (D) 180 (Bu).
26 FEA, s 2.
The FEA contains another mechanism by which its prohibitions can be applied outside traditional states of war, and to armed non-state actors. \(^{29}\) Under s. 19, the Governor in Council may make orders or regulations that modify the statute such that it applies "to any case in which there is a state of armed conflict, civil or otherwise, whether within a foreign country or between foreign countries." \(^{29}\) This section does not create a standing prohibition, an arrangement that Co-Operative Commonwealth Federation Member of Parliament Charles Grant MacNeil criticized during the second reading of the Bill. He commented, it is unlawful for me to enlist in the armed forces of a foreign state at war with another foreign state, yet it continues to be lawful for me to enlist in the armed forces of insurgents within a friendly foreign state. Surely the inconsistency must be apparent. It is not so much a question of legal technicalities as a matter of common sense. \(^{26}\)

The Minister of Justice countered that such decisions should be made by the government on a case by case basis. \(^{27}\) For the only time in Canadian history, it did so in July 1937, six months after it passed the FEA. Only then were Canadians prohibited from joining the ranks of the Spanish Republican Army, or the rebel forces. Notwithstanding the other problems indicated in this article, the FEA could presumably be applied by Order in Council to Syria and Iraq so as to cover those who act with ISIS.

There is also the issue of to whom the prohibition on enlistment applies. The FEA forbids Canadian nationals from enlisting in foreign military forces in certain circumstances, or leaving Canada in order to enlist. When the original statute was drafted in 1937, a Canadian national was defined under the Canadian Nationals Act of 1921 \(^{28}\) as a Canadian citizen, their wife, and any children. However, the term was removed from the lexicon of citizenship by the Canadian Citizenship Act of 1946. \(^{29}\) The term is not defined in the current Citizenship Act, either. \(^{30}\)

The prohibitions contained in the FEA consequently seem archaic. Canadian nationals, no longer a defined term, cannot enlist in foreign militaries under specific conditions that no longer exist. Much of this could be eliminated with simple amendments. The term Canadian national could be changed to Canadian citizen, and state of war could be changed to state of armed conflict, as was done with the Geneva Conventions in 1949. Additionally, the FEA creates no prohibition against enlisting in insurgent groups or any other form of armed non-state actor, unless a specific Order in Council is passed. Effectively, the statute is nothing more than a prohibition against recruiting, and a placeholder that allows the Governor in Council to create additional prohibitions through regulations or Orders in Council instead of passing emergency legislation. The limited scope of the prohibition makes sense in light of the political climate at the time it was passed, but does not provide much clarity or consistency in the modern, post-Charter era.

**Terrorism Provisions in the Criminal Code**

The Anti-Terrorism Act of 2001 added a series of provisions to the Criminal Code that codified Canada’s prohibitions on terrorist activity. Most relevant to the discussion at hand is how these provisions dealt with recruiting and membership in a terrorist group. A terrorist group is defined as, “an entity that has as one of its purposes or activities facilitating or carrying out any terrorist activity,” \(^{31}\) or a listed entity: an organization placed on a schedule by the Governor in Council upon the recommendation of the Minister of Public Safety and Emergency Preparedness. \(^{32}\) These organizations are designated by regulation, in the same way the FEA is applied to specific civil wars. Identifying listed entities is easy enough as the list is publicly accessible: at the time of writing, Canada had 54 entities listed as terrorist groups. \(^{32}\) However, the definition of terrorist activities and therefore terrorist groups is broad, making it difficult to determine with precision whether or not an unlisted entity is truly a terrorist group, or some other form of armed non-state actor. Belonging to a terrorist group is not, on its own, an offence under the Criminal Code. However, the

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\(^{25}\) At the beginning of the Spanish Civil War, there was considerable debate as to whether or not the British FEA of 1870 applied in the case of civil wars, at least until the insurgents took on the character of a foreign state. In spite of this legal problem, the British Foreign Office made the conscious decision of stating through a press release that the statute did apply to the Spanish Civil War and that British subjects could not enlist in foreign military forces of either the Republicans or the Nationalists. The decision was made with the understanding that difficulties in enforcement would be offset by the deterrent value of the statement. See S.P. Mackenzie, "The Foreign Enlistment Act and the Spanish Civil War, 1936-1939," Twentieth Century British History (Vol. 10, No. 1, 1999), p. 59. In Canada, it was widely held that the British FEA did not apply in Spain, a concern that was among the reasons for creating a Canadian statute and including a provision to ensure that the statute could be applied to the Spanish Civil War.

\(^{26}\) FEA, s. 19(a).

\(^{27}\) Hansard Debates Canada, March 18, 1938, p. 1950.

\(^{28}\) This concern was likely motivated by fears of a politically damaging conflict between English and French Canada in response to the Spanish Civil War. English Canada generally supported the Republicans, and French Canada generally supported the Nationalists. Lépine and Prime Minister Mackenzie King wanted to be seen to be taking sufficient action to appease Quebec, but not too much that they would alienate English Canada in the process. See Thor Erik Frohn-Nielsen, Canada’s Foreign Enlistment Act: Mackenzie King’s Expedient Response to the Spanish Civil War (University of British Columbia: MA Thesis, 1979).

\(^{29}\) S.C. 1921, c. 4.

\(^{30}\) S.C. 1946, c. 15.


\(^{32}\) CCC, s.83.01(1).

\(^{33}\) Ibid., and CCC, s. 83.05(1).

The provisions in the Criminal Code are not restricted to a specific group of people. A Canadian citizen and a foreign citizen are subject to the same prohibitions. This is different than the FEA, and this distinction is important. Under the FEA, no Canadian national can enlist in a foreign military force or travel abroad to do so. The restriction is limited to Canadian nationals, implying a duty of loyalty between Canadian nationals and the state. Recruiting within Canada for foreign military forces is prohibited by Canadian nationals at all times, and by non-Canadian nationals when they are not acting on behalf of their own state through their consular or diplomatic officers or agents. This, again, implies a duty of loyalty between Canadian nationals and the state, as well as non-Canadian nationals and their states of origin. Terrorism offences, however, have been deemed to be so heinous that country of origin is irrelevant. No Canadian may commit them at home or abroad, nor can any non-Canadian use Canada as a staging area to commit these offences.

The act of recruiting for a terrorist group is prohibited under s. 83.18 of the Criminal Code which creates an offence of participation in a terrorist group. It states that anyone who, "knowingly participates in or contributes to, directly or indirectly, any activity of a terrorist group for the purpose of enhancing the ability of any terrorist group to facilitate or carry out a terrorist activity," is guilty of an offence. The provision goes on to outline what activities constitute "participation" in terrorist activities, including "providing, receiving, or recruiting a person to receive training," and "recruiting a person in order to facilitate or commit (i) a terrorism offence or (ii) an act or omission outside Canada that, if committed in Canada, would be a terrorism offence." In short, the prohibitions against recruiting are deliberately broad and conflate the acts of recruiting, committing, and facilitating terrorism offences.

Section 83.181 of the Criminal Code makes it illegal to recruit for terrorist groups anywhere in the world. Recruiting for foreign militaries, however, is only prohibited when it occurs in Canada. This indicates, not surprisingly, that the laws of Canada treat terrorism as a morally reprehensible act that must be stifled wherever possible, whereas foreign military service and acts that facilitate it are only prohibited insofar as they implicate Canada.

The Combating Terrorism Act of 2013 also created three other new offences relating to traveling abroad in order facilitate or commit terrorism offences. As with s. 83.181, they extend existing provisions to allow law enforcement officials to act more proactively and make arrests prior to an individual departing the country to commit such offences. Section 83.19 prohibits actions that facilitate terrorist activity; s. 83.191 of 2013 makes it an offence to leave Canada with the intention of committing such acts. Section 83.2 prohibits the commission of any offence "for the benefit of, at the direction of or in association with a terrorist group." The new offences enacted in 2013 prohibit leaving Canada to commit an offence that is a terrorist activity, as well as leaving Canada to commit any offence as created in the Criminal Code or any other act of Parliament. This latter provision is especially noteworthy, as it makes any crime that if committed in Canada a crime in foreign jurisdictions if it benefits a terrorist group. The act may not be a terrorism offence on its own, and the individual committing it may not be motivated by the ideology of the terrorist group.

**Gaps in these Provisions**

When the terrorism offences of the Criminal Code and the FEA are taken together, significant gaps become apparent. Under certain circumstances, a Canadian cannot serve in a foreign military. Under no circumstances can a Canadian participate

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41 FEA, s.11(1).
42 Ibid., s.183.18(1).
43 Ibid., s.183.18(2).
44 Ibid., s.183.18(3)(a).
45 Ibid., s.183.18(3)(b).
46 Ibid., s.183.18.
47 Ibid., s.83.181.
48 Ibid., s.83.2.
49 Ibid., s.83.201.
as a member of a terrorist group. However, there is no standing prohibition against a Canadian fighting as a member of an armed non-state actor. This gap is not deliberate, but is rather the product of Canadian legislators responding to two different crises in very different times: September 11 and the Spanish Civil War. As will be shown, this gap is nonsensical and detrimental to the goals of both pieces of legislation.

Terrorist and insurgent groups are both examples of armed non-state actors. A terrorist group is defined in the Criminal Code as a group that conducts terrorist activities, including a range of offences defined in other Canadian statutes or international treaties.49 Terrorist acts require an important intentionality requirement; they must be committed “in whole or in part for political, religious, or ideological purposes...” 50 with the intention of intimidating the public.... with regard to its security.51 Notably, an activity undertaken during hostilities and in accordance with international humanitarian law cannot be a terrorist activity.52 Insurgent groups, a term not judicially defined, can be just as disruptive to international -- as well as internal -- peace and security as terrorist groups. However, they cannot meet the definition of terrorist groups if they do not meet this intentionality requirement, and joining one is not a prohibited act.

The current civil war in Syria and the conflict in Iraq provides an example. Foreign fighters are serving in ISIS and Jabhat al-Nusra, both listed terrorist groups; anti-Assad insurgent groups; pro-Assad militias; and the Peshmerga. Canadians are prohibited from joining the terrorist groups under the prohibitions of the Criminal Code, but without an Order in Council, there is no prohibition against joining other armed non-state actors, whether they are an insurgency, or an organization such as the Peshmerga currently acting in self defense. In addition, since the conflict is not between states, the Foreign Enlistment Act is not activated vis- à-vis enlistment and a Canadian could join either the Syrian or Iraqi militaries. Recruiting in Canada for the Syrian and Iraqi militaries and any armed non-state actors would be prohibited by the FEA, and recruiting for a terrorist organization would be prohibited under the Criminal Code.

These circumstances highlights the shortcomings of the existing system. This system implies that civil wars fuelled by foreign fighters are less detrimental to international peace and security than interstate conflict fuelled by foreign fighters. Canadians may join foreign militaries or armed non-state actors that are employing force against their internal population, but not foreign militaries that are employing force against external populations. As MP Grant MacNeil pointed out in 1937, a time when armed non-state actors lacked the potency they have today, this defies common sense. Furthermore, armed non-state actors vary widely in character, from well-organized militias operating in self-defence, to organizations that tear down governments and commit atrocities against civilian populations. Yet there is no legal distinction between the two in Canada law.

An additional problem stems from the dynamic nature of these armed non-state actors. Such groups merge, change allegiances, and change tactics. The individuals within them may move from one group to another.53 Consider three possible cases.

First, a Canadian foreign fighter may fight with one rebel group, only to transfer to a listed entity. This individual would not be in violation of Canadian law when they left Canada, but they would be upon transferring to a listed terrorist group under the Criminal Code.

Second, a Canadian foreign fighter may join a non-terrorist armed non-state actor with the honest intention of fighting a regime and not engaging in terrorist activities, only to have that group change allegiances or tactics without their knowledge. This individual, whether or not they have committed a terrorist act, has gone from being within Canadian law, to being outside of it by engaging in one of the broadly defined terrorism offences without any change in their personal conduct.

Third, a Canadian foreign fighter joins an organization within the insurgency that meets almost any definition of a terrorist group. However, in the chaos of a conflict zone, this group is not identified and listed as a terrorist group. Investigators therefore presume that this individual was simply a member of an armed non-state actor, and the individual escapes prosecution. This is a very real possibility, considering that Canada does not have a foreign intelligence service of its own, and the amount of information that would be necessary to maintain a truly complete list of terrorist organizations operating in conflict zones. Interestingly, the FEA avoids this pitfall by listing territories in which the conflict is occurring, rather than attempting to list the organizations. The Order in Council that applied the statute during the Spanish Civil War did not provide a list of organizations that Canadians could not enlist in, but rather stated that Canadians could not engage in such activities in Spain or its colonies. This is similar to the “declared area”

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49 Ibid., s 83.01(1).
50 Ibid.
51 CCC, s 83.01(b).
52 “Foreign Fighters in Syria,” (Israel Intelligence and Heritage Communications Center-Meir Amit Intelligence and Terrorism Information Center, December 2013), p. 6.
approach taken in Australia, to be discussed in the final section of this paper.

All three of these cases illustrate an absurd disconnect in the laws as currently written. It also highlights the practical obstacle of getting convictions against violators, as the investigators must show that the individual joined specific listed entities, and not that they engaged in identical conduct as part of a non-listed entity. Proving this beyond a reasonable doubt may be problematic.

**Constitutionality of the Provisions**

Ernest Lapointe, the Minister of Justice, stated during the second reading of what was to become the FEA, "Certainly to some extent the bill, from the first line to the last, is an invasion of liberty; but it is for the good of the country." The FEA, then as now, places a limitation on the rights of Canadian nationals to travel abroad and engage in otherwise permitted activities. The terrorism provisions in the Criminal Code put these same restrictions on Canadians, although the activities in question are no more permissible under the Criminal Code in Canada as they are elsewhere. In the following section I will put the FEA and the terrorism provisions in the Criminal Code through a Charter analysis, ultimately finding that they violate several Charter rights. While the terrorism provisions are saved by Section 1, the majority of the restrictions under the FEA are not. Note that in order to proceed with this analysis, I must assume that the court would find substitutes for the terms "state of war," "friendly state," and "Canadian national."

Section 2(d) of the Charter protects the freedom "to establish, belong to and maintain an association." In Canadian and international law, the freedom of association has been widely held to include political organizations, trade unions, fraternal and cultural organizations. This value is widely held, and consequently the vast majority of litigation hinges on whether or not a government action has had the effect of infringing upon the establishment or maintenance of an organization. In the case of the FEA, the restriction is an outright prohibition on membership. The terrorism provisions of the Criminal Code have an indirect effect of prohibiting meaningful membership. Recruiting, however, is another matter. The freedom of association has not been extended to activities in support of the association, such as a right to conduct fundraising or recruit. Recruiting instead falls under the freedom of expression as articulated under s. 2(b).

Although recruiting is an act of communication, the Supreme Court of Canada has held that violence and threats of violence are beyond the scope of s. 2(b) protection. In R. v. Khawaja, the Court applied this reasoning to uphold the Criminal Code provisions against terrorism offences, including recruiting, where the acts involves violence or threats of violence. Consequently, recruiting may or may not be protected by s. 2(b). Recruiting for terrorist activities necessarily involve acts of violence, otherwise the terrorism offences would not be implicated. These offences will not receive s. 2(b) protection. However, recruiting for foreign militaries, as prohibited under the FEA, will not necessarily involve violence or threats of violence. Militaries, even during conflicts, perform functions unrelated to combat. Elements of militaries, including a variety of skilled tradesmen, will normally not be called upon to engage in combat except in self defence. Consequently, general recruiting will not necessarily constitute violence or threats of violence, and would still be protected by s. 2(b). The outright prohibition on recruiting in the FEA would therefore be a violation of s. 2(b).

Mobility rights include the right to travel internationally, and the right to move between the provinces within Canada. Both rights are encapsulated in s. 6 of the Charter, which is extended only to Canadian citizens, and the right to travel internationally is codified in international law through Article 12(2) of the International Covenant on Civil and Political Rights. Section 6(1) of the Charter states that every citizen of Canada has the right to travel internationally, and the right to leave Canada to serve in a foreign military force, armed non-state actor, or terrorist group, and to subsequently return after completing this engagement.

As a practical matter, international travel can only occur if the individual in question has been issued a passport. In Kamel v. Canada (Attorney General), the Federal Court of Appeal held that Canadian citizens had the right to be issued a passport.

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42 Charter, s.2(b)
43 Neither the FEA nor the terrorism provisions within the Criminal Code define recruiting. However, taken at its plain meaning, recruiting can be perceived as a function of communication – providing “advertising” as well as practical instructions regarding how to join – and logistics, the actual provision of the necessary paperwork and transportation to get an individual from their current location and into the ranks of the foreign military force. The latter function is less public but is no less an act of communication.
45 [2012] 3 SCR 555 , p.84.
46 [2009] 4 FCR 449 (F.C.A.)
In that case, an individual who had previously been convicted of terrorism-related offences in France returned to Canada and subsequently applied for a passport in order to travel to Thailand. The Minister of Foreign Affairs exercised his right to refuse to issue a passport for a reason of national security. Nonetheless, the court held that refusing to issue a passport required for international travel was a violation of s. 6(1). The right to a passport applied to Canadian citizens entering and leaving Canada. The prohibitions on international travel to join a foreign military force or a terrorist group would therefore be a violation of an individual’s s. 6(1) rights, as would any state efforts to prevent that individual from returning afterwards.

Another issue to consider in light of s. 6 is the increasing commonness of dual citizenship. Canadian citizens have been able to hold citizenship in another country since 1979. Where these countries have obligatory military service, a Canadian citizen may find themselves in circumstances where they are pressed into service while living in or visiting the other country where they hold citizenship. The individuals may also feel a moral responsibility to serve in the military forces of the other country where they hold citizenship, whether or not it is mandatory, in peacetime or in times of conflict. Should this be prevented? Is this distinct from an individual joining a foreign military force because they identify with its cause or because they seek employment or adventure? There is no legal answer to this question, but it is an important consideration in crafting future legislation.

**Justification Under Section 1**

Both the terrorism provisions under the Criminal Code and the FEA violate certain Charter rights. Both violate Canadian citizens’ right to leave the country, to associate, and, in the case of recruiting, to free expression. The next step in this analysis is to determine if these prohibitions can be justified and therefore saved by s. 1 of the Charter. Section 1 states that the freedoms and rights within the Charter are guaranteed subject only to reasonable limits prescribed by law that can be “demonstrably justified in a free and democratic society.”

The Supreme Court determined the necessary test in *R. v. Oakes.* First, the restriction must be prescribed by law. In this case, we are examining a direct restriction imposed by a statute so this requirement is met unequivocally. Second, we must determine if the limit’s objective is sufficiently important to justify overriding a Charter right. Third, a rational connection must exist between the limit on the right and the objective of the restriction. Fourth, the limit should infringe upon the Charter right as little as possible. Finally, there should be proportionality between the benefits of the limit and its negative effects. I will first conduct a s. 1 analysis for the FEA, and then the terrorism provisions in the Criminal Code.

**The Foreign Enlistment Act**

The FEA does not contain a preamble that states the goal of the statute. Instead, we must look to the circumstances that existed at the time of its enactment. In 1937, the Communist Party of Canada recruited and organized Canadian nationals to serve as volunteers for the International Brigades fighting for the Republican government during the Spanish Civil War. What was the objective of passing the FEA? The primary purpose was to prevent the departure of Canadian nationals who in serving in this conflict would endanger Canada’s neutrality in the conflict. More accurately, it put in place a statutory tool that in this particular set of circumstances could subsequently be activated by an Order in Council (recall that the statute did not apply to civil wars, but could be, and was, applied by Order in Council). This would almost certainly meet the threshold of a pressing and substantial objective.

Is there a rational connection between the objective of the statute and limitation on the Charter rights? Although the courts have rarely found a rational connection to be lacking, it is a somewhat difficult leap to make in the case of the offence of enlistment or leaving Canada for purposes of enlistment. Would Canadian nationals serving in a foreign military force stand to draw Canada into a conflict?

In defiance of the FEA, more than 1,600 Canadians served in the Spanish Civil War, and there is no indication that Canada was at any risk of being drawn into the conflict as a result. Canadians have similarly served in large numbers in the Union Army during the American Civil War, the Papal Zouaves during the defence of the Papal States, and in the American Army during the Vietnam War. None of these cases appeared to have threatened Canadian neutrality in these conflicts. At international law, the acts of individuals are only attributable to a state where there is a complete dependence of the individual on that state. These circumstances fall well short of that high threshold. There are also no international legal norms requiring
a neutral state to prevent the departure of persons across their borders to participate in wars.\textsuperscript{[56]} It is possible that but for the legislation, more individuals might have volunteered, resulting in very different effects on Canadian neutrality. However, this is merely a hypothesis for which there is no evidence.

Recruiting may be a different matter. Under Article 4 of Treaty V of the Hague Convention of 1907, neutral countries may not allow recruiting to occur on their territory. The article states, “Corps of combatants cannot be formed nor recruiting agencies opened on the territory of a neutral Power to assist the belligerents.”\textsuperscript{[57]} Although the nature of neutrality has evolved since then, this demonstrates a treaty obligation as well as a norm in international law connecting the status of neutrality in a conflict to the prevention of recruiting in Canada.

Do the prohibitions under the FEA constitute a minimal impairment on the affected Charter freedoms? An updated FEA might pursue very different goals, but when the statute was enacted, the primary goal was to maintain Canadian neutrality. In the case of recruiting and the freedom of expression, international law tells us that maintaining neutrality requires preventing recruiting for belligerent military forces on Canadian territory. However, the prohibition against recruiting in the FEA does not apply just in circumstances where Canada seeks to maintain neutrality; it is a standing prohibition. The court may therefore determine that this is not a minimal impairment of the Charter right.

The final step of the s. 1 analysis is determining if the impugned law achieves a balance between the objective of the law and its limits on Charter rights. The only remaining provision left standing, the prohibition on recruiting, meets this requirement under certain circumstances. When a state of war exists and Canada seeks to remain neutral, the prohibition on recruiting has a salutary effect of maintaining Canadian neutrality in accordance with international treaty obligations. When such circumstances do not exist, the law fails to meet the requirements of balance. Nonetheless, I think it is likely that the Crown would find this violation to be a justifiable exercise of the Crown prerogative in that Parliament is in the best position to determine when Canadian neutrality is really at stake, and that is not unreasonable to require that recruiting on Canadian soil be attributable to the foreign state in question.

**The Terrorism Offences in the Criminal Code**

The goal of the terrorism provisions in the Criminal Code is much easier to discern. The bulk of the existing provisions were part of Bill C-36, the Anti-Terrorism Act, that was introduced less than a month after the events of September 11, 2001. In introducing the bill, Anne McLellan, the Minister of Justice, stated that,

Bill C-36 is one element of the Government of Canada’s comprehensive action plan on Canadian security, a plan whose objectives are to stop terrorists from getting into Canada and protect Canadian citizens from terrorist acts, to bring forward tools to identify, prosecute, convict and punish terrorists, to keep our borders secure and to work with the international community to bring terrorists to justice and address the root causes of hatred.\textsuperscript{[58]}

She continued, “The three main objectives of the new measures are as follows: first, to suppress the very existence of terrorist groups; second, to provide new investigative tools; and, third, to provide a tougher sentencing regime to incapacitate terrorists and terrorist groups.”

The prohibition against travelling abroad to commit terrorism offences was not added to the Criminal Code until nearly a decade later. Certain provisions in the original Anti-Terrorism Act lapsed after five years and were not renewed. These provisions included preventative detention, where individuals can be held for three days on suspicion of involvement in terrorist offences; and investigative hearings, which compel individuals with knowledge of terrorism offences or face twelve months detention. Bill S-7, the Combating Terrorism Act, was introduced to re-establish these provisions, and to introduce new restrictions preventing travel abroad to commit terrorism offences. Like the other provisions, the prohibition on travel was meant to undermine terrorist groups and ensure greater security for Canadians and the international community at large. The purpose of these new provisions were stated by Senator Linda Frum during the second reading:

[T]he horrific nature of terrorism requires a proactive and preventive approach. These new offences will allow law enforcement to continue to intervene at an early stage in the planning process to prevent terrorist acts from being carried out. The new offences would send a strong deterrent message, would potentially assist with threat mitigation and would make available a higher maximum penalty than would otherwise apply.\textsuperscript{[59]}

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\textsuperscript{[56]} Hague Convention, Treaty 5: Opening of Hostilities (1907), Article 5.

\textsuperscript{[57]} Hague Convention, Treaty 5: Opening of Hostilities (1907), Article 4.

\textsuperscript{[58]} Hansard Debates- Canada, (October 16, 2001).

\textsuperscript{[59]} Hansard Debates- Canada, Senate (February 29, 2012), p. 1500.
Additionally, the Special Senate Committee on Anti-Terrorism stated in their second report regarding the Bill that they were convinced that the Bill would have the effect of allowing Canadian security officials to “stop the activities of prospective terrorists at an earlier stage of their preparations.” This effect, they stated, was an important goal but urged that new policies and systems respect the rights guaranteed under s. 6(1) of the Charter.

The terrorism provisions in the Criminal Code violate the same freedoms as the FEA: association, mobility, and, in the case of recruiting, expression. In all cases, s. 1 will likely save these limits. The leading case on this issue is the aforementioned Kamel which specifically dealt with mobility rights. In that situation, the Minister of Foreign Affairs refused to issue a passport to Kamel, infringing upon his mobility rights, due to his previous conviction for terrorism offences in France. The court held that although s. 6 was violated, it was saved by s. 1. The court determined the objective of the Minister’s decision was to “contribute to the international fight against terrorism and to comply with Canada’s commitments in this area, and a particular objective to maintain the good reputation of the Canadian passport.” This objective was held to be rationally connected to the decision, and that there was no other way of reasonably meeting this objective besides refusing to issue the passport. The objective sought was also deemed to be proportional to the objectives as described. The objective in Kamel, and the objective of the terrorism provisions in the Criminal Code are effectively the same. However, the infringement on the Charter right was considerably more severe in Kamel. Kamel was prevented from travelling because he had previously been convicted of terrorism offenses by another court, not because he was known to be travelling to Thailand with the intention of conducting a terrorism offence. The provisions in the Criminal Code only limit international travel of individuals who intend on participating in, facilitating, or committing offences in support of terrorist activities. Consequently, the restrictions on mobility would almost certainly be saved by s. 1. The restrictions on association and expression would similarly be saved by s. 1.

Recent Developments in Australian Law

The Australian government has recently updated their laws to address the risks of foreign fighters. The Counter Terrorism Legislation Amendment (Foreign Fighters) Bill 2014 amended more than 20 different statutes, so a comprehensive analysis is well beyond the scope of an article of this length. However, I will briefly highlight some of the key elements of the legislation in order to show how they have addressed some of the issues in the Canadian legislative scheme.

First, the Australian law provides a general update. The “old” law, the Crimes (Foreign Incursions and Recruitment Act) of 1978, was repealed, and its prohibitions were updated and incorporated into the Australian Criminal Code. Its definitions are now in line with current terminology, and its prohibitions work in concert with the Australian terrorism offences.

Second, the Australian law prohibits travelling abroad or attempting to travel abroad to commit certain acts, whether as a member of a terrorist organization or otherwise. In addition to the Australian terrorism offences, it is an offence to travel abroad or attempt to travel abroad in order to engage in a hostile activity. “Hostile activity” is defined very broadly. It includes participating in armed hostilities, overthrowing the government by force, destroying government property, or causing death or bodily injury to a government official. In short, it prohibits activities conducted by armed non-state actors that are detrimental to international peace and security, it creates a lesser offence when specific membership cannot be proven, and arguably it permits joining armed non-state actors that are engaged in self-defence.

Third, the Australians have created a new offence for entering or remaining in a “declared area.” A declared area is designated by the Minister of Foreign Affairs. Once declared, it is an offence to enter without a legitimate purpose, such as acting in an official capacity for the state, conducting humanitarian work, or performing any other activity permitted by regulation. This approach is similar to, but even broader than, the order-in-council that applied the FEA to the Spanish Civil War which did not provide a list of organizations, but a

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61 Ibid., p. 50.
64 Ibid., s. 119.1
65 Ibid., s. 119.2
66 Ibid., s. 119.2 (3).
67 Ibid., s. 117.1.
geographic range within which a Canadian could not join an armed force.

Fourth, it is an offence to recruit for foreign militaries or armed non-state actors. In addition to the offences of recruiting for terrorist organizations, the law also covers the recruiting for groups engaged in hostile activities as defined above, and, with exceptions similar to Canada's, for the armed forces of a foreign country.

Fifth, it is not an offence to join a foreign military.

The Australian laws are not without room for criticism. The “declared area” has fallen under particular criticism for overbreadth and its restriction on mobility rights. However, there are certainly elements of the Australian approach that appeal to common sense, particularly the emphasis on conduct versus membership. If nothing else, Canada should consider following the Australian example in ensuring that our existing laws are in line with our modern rights and values, as well as their proactive approach to a complex problem.

Conclusion

The current schema for preventing the recruiting of Canadians and their travel abroad to join foreign militaries and terrorist groups is rife with problems. With the proposed re-examination of 2015’s Bill C-51, there is ample opportunity to address these issues, two issues are especially pressing.

First, the “gap” between enlisting in terrorist organizations and other armed non-state actors committing hostiles acts must be closed. A Canadian cannot join a foreign military force under certain circumstances, and they cannot participate in a terrorist organization under any circumstances. But they can join an armed non-state actor, unless it is characterized as a terrorist group, even if the threats to Canadian neutrality or international peace and stability are exactly the same. This is an especially unusual distinction to make considering how easily the same armed group can move from one category to the other, and the fact that it puts the Crown in a difficult position of assigning politically troublesome terms on different groups in order to prohibit what is essentially the same activity. This gap could easily be filled, as the Australian law makers have shown.

Second, the FEA must be updated; it contains outdated circumstances and terminology. The application to “Canadian nationals” during “states of war” is no longer a legally useful description of circumstances in which the statute applies. Furthermore, the prohibitions within the FEA do not hold up well against a Charter analysis. Only the prohibition on recruiting, and even then only in specific circumstances, passes the s. 1 test. This law also requires examination in light of the competing priorities of Canada’s multinational population that contains increasingly large numbers of dual citizens. Would the law apply to a dual citizen engaged in military service in their other country of citizenship? It would, but should it? Should these dual citizens receive a special carve-out, permitting them to serve in the military forces of their other home? If such exceptions can be entertained, we might ask ourselves how dire is the requirement for such a prohibition in the first place.

Do the prohibitions on enlistment in foreign military forces remain relevant in the modern era, especially in light of its conflict with the Charter? If citizens are permitted to serve in foreign militaries under normal circumstances, and there is no evidence to suggest that doing so during times of conflict endangers the state, then the prohibition is no longer relevant. If unique and sufficiently dire circumstances arise, an armed conflict where individual Canadian participation could potentially implicate the state as a whole, the Government of Canada retains the ability to enact emergency legislation. Such emergency circumstances would likely provide sufficient justification for the infringement of Charter rights that the violation would be saved by s. 1.

68 Ibid., s. 102.4.
69 Ibid., s. 119.6.
70 Ibid., s. 119.7.
Further information
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