The devil is in the detail: the problem with the UK's legal basis for self-defence

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30 June 2017

This article was originally published on OpenDemocracy on June 30th, 2017.

With a lower threshold for the use of lethal force, the government must ensure greater clarity over how it avoids individuals paying the ultimate price for UK mistakes.

At the start of this year, the UK Attorney General, Jeremy Wright QC, outlined how the UK Government understood its legal right to self-defence against non-state groups in a speech at the International Institute for Strategic Studies. The speech garnered some initial interest but this soon petered out, leaving little discussions of its profound implications. This same pattern of interest was repeated a few months later when the Australian government adopted the same definition.

However, importantly, Wright presented a much more expansive definition of an "imminent threat" a key criterion in assessing whether or not a state can legally use force in self-defence.

Under traditional definitions, an imminent threat is one that is "instant, overwhelming, leaving no choice of means, and no moment of deliberation" (otherwise known as the Caroline test). However, Wright argues that the threat of terrorism has "irretrievably altered" the "frontline" of war and that, in light of these threats, the UK Government must adopt a broader definition to make sure the "law is keeping up".

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He argued that when the UK Government assessed whether a non-state actor presented an imminent threat they drew on the five considerations (first outlined by Sir Daniel Bethlehem in 2012):

1. "The nature and immediacy of the threat;
2. The probability of an attack;
3. Whether the anticipated attack is part of a concerted pattern of continuing armed activity;
4. The likely scale of the attack and the injury, loss or damage likely to result therefrom in the absence of mitigating action; and
5. The likelihood that there will be other opportunities to undertake effective action in self-defence that may be expected to cause less serious collateral injury, loss or damage".

This is clearly more expansive than the traditional definition and could potentially lessen the burden of proof needed before the use of force against an individual. This is especially true given the assertion made by Bethlehem, and repeated by Wright, that:

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> **“ “…the absence of specific evidence of where an attack will take place or of the precise nature of an attack does not preclude a conclusion that an armed attack is imminent for purposes of the exercise of the right of self-defence, provided that there is a reasonable and objective basis for concluding that an armed attack is imminent” ”**

This suggests that the government is accepting a wider margin for error than it has done in the past, by lowering the level of detail that must be known before conducting a strike. However, it is unclear how much this burden of proof has been lessened by. James A. Green maintains that the definition of imminence is too vague, and “tells us very little unless it is clear what is meant by imminence”. Monica Hakimi also notes that “the devil is in the detail”; she argues that without knowledge of how the factors Sir Daniel outlines “relate to one another, or how much weight any particular one carries” we cannot know how they apply.

Reducing the level of evidence may increase the risk that people followed because of mistaken identities or flawed intelligence could be killed sooner.

It has become devastatingly obvious in recent weeks how hard it is to find and prove imminent threats to the UK. The attacks on London and Manchester

were planned by a loose network of individuals whose role inspiring, enabling attacks in the UK remains unclear. However, if specific evidence of an attack is no longer needed, it is more likely that individuals who demonstrate patterns of suspicious behaviour (such as meeting with members of militant groups) but do not necessarily represent a genuine threat to the UK could end up being targeted on the basis of incomplete evidence. Reducing the level of evidence may also increase the risk that people followed because of mistaken identities or flawed intelligence could be killed sooner.

It is important to note that Wright specifically noted in his speech that the UK position "is a very long way from supporting any notion of a doctrine of pre-emptive strikes against threats that are more remote." However, without a better understanding of how the rules are applied it's hard to know where the line is drawn and how these dangers are avoided.

This is not an abstract concern; the UK has moved closer to the United States position of targeted killing – which has shown the dangers of an expansive policy. Both countries have now officially adopted the same legal definition of imminence. As Wright noted in his speech, US officials have directly quoted Sir Daniel's criteria as their own guiding principles. In the wake of this confirmation, legal charity Reprieve argued the UK legal basis "copies [the] failed US drone programme".

It has been well publicised that the US has expanded key legal definitions to pursue an expansive targeted killing policy against al-Qaeda and associated forces. While the Government claimed to be targeting only high value targets(HVT), it became clear that the US was targeting a far wider pool of individuals than just a small number of leaders directly planning attacks on the US. For example, the US has engaged in "signature strikes" against all military

aged males "on battlefields around the world" and has killed a number of individuals whose threat to the US remains unclear (such as 16-year-old Abdulrahman Anwar al-Awlaki, the son of Anwar al-Awlaki, Yemeni imam and supporter of al-Qaeda).

The US campaign has garnered widespread criticism. Many argue that the humanitarian impact has been devastating, with too many civilians killed and the communities "living under drones" experiencing social and psychological turmoil. Others argue that the policy has not worked or has actually helped terrorist organisations – for example, through increasing their local support. Certainly in Yemen, al-Qaeda in the Arabian Peninsula is "better funded and armed than at any point in its history". Beyond this the campaign has, at times, been incredibly damaging to the domestic and international reputation of the Obama administration.

Accountability for these decisions would help to offset the risk that a lower standard of proof leads to an increase in erroneous targeting.

Greater transparency would avoid the UK pursuing similar mistakes. There should be clarity over how much emphasis is placed on each of Bethlehem's criteria, what level of evidence is required before a lethal strike is carried out, and when individuals would and would not count as legitimate targets.

This needs to be linked to better oversight over how the government has applied these criteria in real life cases. This is especially true considering the Intelligence and Security Committee claimed that they did not receive sufficient information to judge important aspects the Reyaad Khan strike. Accountability for these decisions would help to offset the risk that a lower standard of proof leads to an increase in erroneous targeting. It would ensure the UK uses this

right to self-defence only when it is absolutely necessary, and when the evidence is sufficiently overwhelming to have only a very small margin for error.

There must be greater transparency over how this definition is used to ensure that we do not lower burden of proof needed before the use of lethal force too much, leaving individuals in other parts of the world to pay the ultimate price for our mistakes.

Image credit: Defence Images/Flickr.

About the Author

Abigail Watson i*s a research officer at the Remote Control Project, a UK-based policy unit analysing the rise of remote warfare in the West's counterterrorism strategy. Abigail is also a freelance writer at Future Foreign Policy, writing on issues such as the new challenges to international humanitarian law and Britain's foreign, security and defence policy. Abigail holds an MA (with Distinction) in Contemporary European Studies, with a trans-Atlantic track, from the University of Bath and a BA in Politics from the University of York.*

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