permits.[44] The proposition contained in principle 12 is based on an erroneous assessment of customary international law and state practice and on an acontextual interpretation of Article 51. The use of force by a state against nonstate actors for acts not attributable at all to another state falls to be considered under the paradigm of the law enforcement (in which the consent of the territorial state would be required) and not the law of self-defense.

In assessing what is permissible and what is not permissible under the international law principle of self-defense, other principles such as territorial integrity, the prohibition on the use of force, and sovereignty must be respected. Such an assessment requires that, before force is used against nonstate actors on the territory of another state, either the consent of the territorial state is obtained or a reasonable basis exists for attributing responsibility for the initial attack to the territorial state. To hold otherwise would imply that self-defense takes priority over these foundational principles of international law, a proposition that has no basis in international law.

Are New Principles Really Needed? The Potential of the Established Distinction Between Responsibility for Attacks by Nonstate Actors and the Law of Self-Defense

*Mahmoud Hmoud**

Daniel Bethlehem's note on self-defense principles is intended to stimulate debate on one of the most contentious issues facing the international community today, namely, the legal response to imminent or actual terrorist attacks by nonstate actors. The note contains a set of principles that are sensitive to the practical realities of the circumstances that it addresses. But it is also intended to take up a legal policy matter—to create or amend principles of international law related to the use of armed force in dealing with threats from nonstate actors. To create or amend these principles, there must be clear evidence and sufficient state practice, or at least *opinio juris*, pointing toward the change of existing rules or the creation of new rules to "fill the gap." The whole balance in international law among the various rights, obligations, and interests of international actors will be compromised if the notion of self-defense is to be expanded beyond its legitimate limitations. As illustrated below by some basic examples drawn from the existing law of self-defense, there is sufficient flexibility in the current legal order to allow for the lawful exercise of self-defense in response to most situations of armed terrorist attacks.

While the conditions for attribution, such as direction and control over the conduct, must be fulfilled for an attack by a terrorist group to fall under the international responsibility of a state, that does not mean that for other purposes—namely, the law on the use of force—the attack would not trigger the right of the victim state to use self-defense if the attack is launched from the territory of the host state. The state from whose territory the attack occurs is estopped from claiming that its sovereignty and territorial integrity have been violated, and the use of

[44] Bethlehem, *supra* note 1, at 773.

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https://doi.org/10.5305/amerjintelaw.107.3.0576 Published online by Cambridge University Press

force in self-defense is lawful as long as it satisfies the conditions of necessity and proportionality. Such use of force in self-defense is still considered for purposes of the *jus ad bellum* as being applied (in self-defense) against another state, not against the nonstate actor.

Yet, where the terrorist attack is being launched either from a failed state or from part of the territory of a state under the control of armed groups and organizations, rather than the state itself, a very pertinent question arises. Would self-defense in those two situations be considered to be against the state or against the nonstate actor that launches the armed attack against the defending state? In the first situation, where there is a partial or total collapse of the (central) government of the state, the use of force may *exceptionally* be considered not to be against another state, which has arguably temporarily ceased to act or to be treated as a state for this purpose.

In the second situation, where rebels exercise control over the territory from which the attack was launched, there must be a distinction between the case of an armed group exercising governmental authority and the case where no government authority is being exercised in that part of the territory outside the host state's central government's control. In the first case, the state still seems to exist in that part of the territory; therefore, the use of force in self-defense in that part of the territory would be a use of force against another state. In the second example, no governmental authority exists, which makes the situation similar to that of the collapse of the state in that part of the territory. As such, it may be treated as an exception whereby the use of force in self-defense is *not* directed against the host state.

In summary, the use of force in self-defense can only be directed against another state, engaging the latter's sovereignty and territorial integrity, except in the situations where that state does not function as such. The only difference is that, in such exceptional situations (collapse of the state apparatus in all or part of its territory), the use of force in self-defense rests with the defending state and not against another state. Considering that significant terrorist attacks have been and are being launched in such situations, it is important to assert this statement as the correct legal analysis: self-defense is generally exercised against another state. Exceptionally, self-defense may be used in defined circumstances where the exercise is not against a state but against an armed attack *emanating from the territory of that state* where no government control is being exercised. In this case, self-defense may not be characterized for international law purposes as being against a nonstate actor but simply as being against an armed attack from the territory of another state. In those exceptional situations, the conditions for the lawful exercise of self-defense, including necessity and proportionality, must be followed. Otherwise, abuse will prevail, and the core principles of modern international law as embodied in the United Nations Charter—including the inviolability of state sovereignty, territorial integrity, and equality of states—will be compromised.

A question arises in relation to a terrorist attack launched from the territory of a host state against another state by a nonstate actor when the host state is in control of its territory as a whole or of the part from which the attack was launched. Is this situation an armed attack by that state? The answer to this question is nuanced. A state has not only rights but also obligations arising from its sovereignty, among which is the obligation to control its territory and to ensure that it is not used to conduct unlawful acts, including terrorist acts, against another state. If such acts are nevertheless committed from its territory, then that state may be held responsible for aiding, supporting, or providing safe haven for the perpetrators if these acts were committed under its instruction, direction, or control. If these acts are of a high intensity,

then such a state may be legally responsible for an armed attack. Those core issues are very pertinent for the debate on the legal responses to acts of terrorism. Yet, apart from the issue of the international responsibility of the state, if due to their intensity those terrorist acts amount to armed attacks, they trigger the defending state's right to use self-defense against the state from whose territory the attacks are carried out. The failure of the host state to prevent the launching of the attack from its territory changes the nature of the use of force by the defending state to a *defensive* rather than *aggressive* use of force. This assessment, of course, assumes that the defending state adheres to the conditions of lawful self-defense, including necessity and proportionality. Such a use of force is not considered to be against the sovereignty or territorial integrity of the host state, not because the perpetrator of the attack was a nonstate actor but because the defensive use of force was triggered by the failure of the host state to prevent the use of its territory to launch the attack against the other state.

Needless to say, if the terrorist act does not reach the gravity of an armed attack, then the defending state has no right to use self-defense. Separate rules, such as those contained in the relevant counterterrorism conventions, apply in this case.

I turn now to the issue of a series of attacks that reach the threshold of an armed attack, particularly where a state is complicit in such attacks launched by a nonstate actor in that state. This matter is considered in Bethlehem's principles 4–6. A series of attacks that are coordinated and part of a general campaign of a nonstate actor with the state's complicity would constitute an "actual" armed attack, thus triggering self-defense even if part of the attack is not yet carried out. A state from whose territory the campaign is being launched and that has effective control over the territory must be considered, for the purpose of implementing a right to self-defense, as complicit in the campaign. Thus, the host state may not claim that the use of force against its territory is an aggressive act that violates its sovereignty, territorial integrity, or political independence, even when the defensive use of force against it is to prevent the part of the campaign that is yet to be carried out by the nonstate actor. However, in situations where the campaign is being carried out from a territory where the apparatus of the state has collapsed or where no government authority exists in that part of the state, self-defense against the campaign is considered to be *not* against another state and is deemed lawful to the extent that the defending state's measures are necessary and proportionate.

Finally, I draw attention to an element in the principles that, from my perspective, risks overextending the law on the key issue of *imminence* of the attack in relation to anticipatory self-defense. As is well known, anticipatory self-defense remains controversial, with the prevailing view that it falls outside the confines of Article 51 of the UN Charter for two reasons. First, the wording of Article 51 requires an armed attack to have occurred. Second, the object and purpose of the article is to limit the unilateral use of force in international relations. Nevertheless, an opposing argument suggests that Article 51 preserves the customary right to self-defense, including anticipatory self-defense. The proponents of this argument contend that this form of self-defense never ceased in practice following the adoption of the Charter, with no customary rule emerging to limit such a right. I do not further address this issue here. I focus, instead, on a core problem in the application of any doctrine of anticipatory self-defense, namely the "objective" assessment of the imminence of the threat. When the preemptive attack occurs before the "aggressive" attack itself, there is no way to make an objective assessment of the threat, leaving the matter to the "subjective" discretion of the defending state. This result is particularly troubling in dealing with terrorist threats, considering that imminence depends

on the circumstances of each case and not necessarily on the timing of the terrorist attack. Principle 8 endeavors to respond to this matter by setting "objective" criteria for assessment but clearly does not make the immediacy of the terrorist attack a requisite element for triggering anticipatory self-defense. Immediacy is only one element for assessment in a non-exhaustive list contained in the principle. Principle 8 does not rule out imminence even if the immediacy is lacking, provided that other considerations on the list play a more pertinent role in that particular situation. This outcome is worrisome as it has the effect of making anticipatory self-defense more about *preemption* than about *being preemptive*. The principle also allows for the defending state to assess such imminence even with the absence of specific evidence of the nature and plan of the attack (i.e., the "generality" of the threat being sufficient, and this allowance, by itself, going beyond the objective limits of assessing imminence).

In conclusion, it may be tempting to change the rules of international law on self-defense in light of the developing threats to states from nonstate actors. Yet, the existing international legal system provides the necessary means to face such challenges, inter alia, through the proper application of the rules on the use of force in self-defense and in conjunction with the concerted efforts of the international community to combat terrorism. Sovereignty, territorial integrity, and nonintervention remain the cornerstone of international relations and play an important role in inducing interstate cooperation in combating terrorism. Rewriting the doctrine of self-defense, and the ensuing expansion of the parameters for the use of force, will undermine those core principles that empower states to take part in the efforts to combat international terrorism.

PRINCIPLES OF SELF-DEFENSE—A BRIEF RESPONSE

*By Daniel Bethlehem**

I am pleased to provide a brief response to the comments in the pages of this *Journal* on my note on self-defense principles[1] and to welcome those comments, as well as others,[2] as contributing to the kind of debate that publication of the principles hoped to achieve. I do not agree with much that has been said but am pleased that the public debate has been joined.

One of the comments questions whether the principles are intended to reflect existing law or, instead, to state what, in the view of some, operational requirements demand. The answer to *this* question at least should have been clear from the note that preceded the principles and from the first footnote to the principles themselves[3]—and should be taken at face value. As that footnote indicates, the principles were "proposed with the intention of stimulating debate on the issues" and "do not purport to reflect a settled view of the law or the practice of any state."[4] This formulation was chosen with care, and the identity of those whose views informed the

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[1] Daniel Bethlehem, *Self-Defense Against an Imminent or Actual Armed Attack by Nonstate Actors*, 106 AJIL 769 (2012).

[2] *See, e.g.*, Ashley Deeks, *Readings: Daniel Bethlehem on Principles Governing Self-Defense Against Non-state Actors*, LAWFARE (Jan. 10, 2013), *at* http://www.lawfareblog.com/2013/01/readings-daniel-bethlehem-on-principles-governing-self-defense-against-non-state-actors.

[3] Bethlehem, *supra* note 1, at 775 n.*.

[4] *Id.*

https://doi.org/10.5305/amerjintelaw.107.3.0576 Published online by Cambridge University Press