> It is not in the interest of the United States to reconstrue the law of the Charter so as to dilute and confuse its normative prohibitions. In our decentralized international political system with primitive institutions and underdeveloped law enforcement machinery, it is important that Charter norms—which go to the heart of international order and implicate war and peace in the nuclear age—be clear, sharp, and comprehensive; as independent as possible of judgments of degree and of issues of fact; as invulnerable as can be to self-serving interpretations and to temptations to conceal, distort, or mischaracterize events. Extending the meaning of "armed attack" and of "self-defense," multiplying exceptions to the prohibition on the use of force and the occasions that would permit military intervention, would undermine the law of the Charter and the international order established in the wake of world war.[29]

His words apply equally to the Bethlehem proposals.

NO THANK YOU TO A RADICAL REWRITE OF THE *JUS AD BELLUM*

*By Gabor Rona and Raha Wala**

Just as a newspaper must separate its reporting from its editorials, legal scholarship must distinguish between representations of what the law is and what the author might like it to be. Daniel Bethlehem's proposed principles and his arguments in support of them[1] are an amalgam of the two that, if actualized under international law, would reverse more than a century of humanitarian and human rights progress: they would undermine the general prohibition against the use of force in international relations as well as the right to life and the scope of a state's obligation of due process in the deprivation of life.

At the core of Bethlehem's thesis is a conflation of *jus ad bellum* and *jus in bello* and some questionable interpretations of both. As a preliminary matter, we note that justifications for use of force as a matter of *jus ad bellum* are about interstate relations, not interpersonal ones. *Jus ad bellum* serves to distinguish the circumstances in which the use of force by one state is—or is not—a justified interference with the sovereignty of another.[2] Satisfaction of the *jus ad bellum* criteria does not settle the question of who may be targeted, or when, where, or how such targeting may be done. These questions are matters of human rights law in peacetime and *jus in bello* (also known as the laws of war, international humanitarian law, or the law of armed conflict) in war. Thus, a justified use of force under the *jus ad bellum* does not necessarily trigger application of the *jus in bello*. The two forms of armed conflict, international and noninternational, do not encompass all possible uses of force by a state. Common Article 2 of the Geneva Conventions establishes the scope of the Conventions and defines *international armed conflict* as "cases of declared war or of any other armed conflict which may arise *between* two

[29] Louis Henkin, *The Use of Force: Law and U.S. Policy*, *in* RIGHT V. MIGHT: INTERNATIONAL LAW AND THE USE OF FORCE 37, 60 (Louis Henkin et al. eds., 2d ed. 1991) (responding to Jeane J. Kirkpatrick & Allan Gerson, *The Reagan Doctrine, Human Rights, and International Law*, *in id.* at 19).

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[1] Daniel Bethlehem, *Self-Defense Against an Imminent or Actual Armed Attack by Nonstate Actors*, 106 AJIL 769, 775–77 (2012) (listing and describing Bethlehem's sixteen principles).

[2] UN Charter Art. 51.

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or more of the High Contracting Parties."[3] Noninternational armed conflict, in contrast, is understood in customary international humanitarian law (IHL) as a certain minimum of hostilities attributable to identifiable organized parties.[4] The use of force by one state on the territory of another, therefore, may occur in international armed conflict, noninternational armed conflict, or below the radar of the law of armed conflict altogether.

Second, when and where the use of force does amount to armed conflict, it is *jus in bello*, not *jus ad bellum*, principles that determine when, where, how, and against whom force may be used. In a nutshell, the *jus in bello* permits only necessary and proportionate use of force and only against a member of the enemy's armed forces or against civilians directly participating in hostilities.[5]

Third, when force does not amount to, or occur within, armed conflict, human rights principles—including yet another version of the principle of necessity—come into play. This meaning of necessity is different from, and should not be confused with, the concept of necessity as applied in either the *jus ad bellum* or *jus in bello* contexts. *Jus ad bellum*, again, tells us when one state may use force against (not merely in) another state. *Jus in bello*, in the majority view, considers the targeting of members of enemy armed forces and civilians while they directly participate in hostilities to presumptively meet that body of law's "military necessity" requirement.[6] Human rights law, however, tells us when a representative of the state (whether soldier or police officer) may use lethal force against an individual outside of armed conflict. It allows for the use of force based only on conduct, not status. Necessity to use lethal force is satisfied in a non-armed conflict context where the threat to life is "imminent"[7] and cannot reasonably be ameliorated by other means, such as detention.[8] The purposes of *jus ad bellum* are different from those of *jus in bello* and human rights, and the threshold for use of force under human rights law (outside of armed conflict) is higher than the threshold for use of force in the *jus in bello*.

Although Bethlehem claims that he addresses only *jus ad bellum* and not *jus in bello*, the content and his explanation of his principles conflate the two in a manner that does not reflect existing law. Many of his principles appear to be designed primarily to articulate the circumstances

[3] Geneva Convention [III] Relative to the Treatment of Prisoners of War, Art. 2, Aug. 12, 1949, 6 UST 3316, 75 UNTS 135 (emphasis added).

[4] *See* Jelena Pejic, *The Protective Scope of Common Article 3: More Than Meets the Eye*, 93 INT'L REV. RED CROSS 3 (2011), *available at* http://www.icrc.org/eng/assets/files/review/2011/irrc-881-pejic.pdf (describing the state of customary and treaty law on the threshold requirements pertaining to noninternational armed conflict).

[5] *See* Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-international Armed Conflicts, Art. 13, June 8, 1977, 1125 UNTS 609; NILS MELZER, INTERPRETIVE GUIDANCE ON THE NOTION OF DIRECT PARTICIPATION IN HOSTILITIES UNDER INTERNATIONAL HUMANITARIAN LAW 27–36 (2009) (International Committee of the Red Cross study), *available at* http://www.icrc.org/eng/assets/files/other/icrc-002-0990.pdf [hereinafter ICRC STUDY] (explaining that for purposes of noninternational armed conflicts, membership in the enemy's armed forces must be determined by whether the individual in question served a continuous combat function in an organized armed group).

[6] MELZER, *supra* note 5, at 77–82.

[7] We construe the term *imminent*, in its commonly understood sense, to include a close temporal nexus between threat and harm, and not as elasticized in, for example, the recently leaked U.S. Department of Justice, Office of Legal Counsel white paper on the subject, which dispenses with any such nexus. *See* http://msnbcmedia.msn.com/i/msnbc/sections/news/020413_DOJ_White_Paper.pdf.

[8] Eighth United Nations Congress on Crime Prevention and Criminal Justice, UN Basic Principles on the Use of Force and Firearms by Law Enforcement, UN Doc. A/CONF.144/28/Rev.1, at 112 (1990) (noting that "intentional lethal use of firearms may only be made when strictly unavoidable in order to protect life").

in which persons may be subject to the use of force, as compared to the distinct and predicate *jus ad bellum* issue[9] of what threshold of armed activity is required to constitute an "armed attack" under Article 51 of the UN Charter. For example, Bethlehem's principle 7 holds:

> Armed action in self-defense *may be directed against those* actively planning, threatening, or perpetrating armed attacks. It *may also be directed against those* in respect of whom there is a strong, reasonable, and objective basis for concluding that they are taking a direct part in those attacks through the provision of material support essential to the attacks.[10]

These appear to be rather pure plays on *jus in bello*, not *jus ad bellum.*

Bethlehem arrives at this principle by maintaining that "[t]he term 'armed attack' [in Article 51 of the UN Charter] includes both discrete attacks and a series of attacks that indicate a concerted pattern of continuing armed activity."[11] For Bethlehem, a concerted pattern of continuing armed activity may exist "in circumstances in which there is a reasonable and objective basis for concluding that those threatening or perpetrating such attacks are acting in concert."[12]

What does it mean to be "acting in concert" in relation to armed activity? According to Bethlehem, "Those acting in concert include those planning, threatening, and perpetrating armed attacks and those providing material support essential to those attacks, *such that they can be said to be taking a direct part in those attacks*."[13]

Though not an established legal term of art, the concept of "taking direct part in attacks" should ring a bell to those familiar with the rules governing the conduct of hostilities in armed conflict. That familiarity exists because the phrase sounds remarkably similar to the IHL concept of "taking direct part in hostilities" (DPH). Indeed, Bethlehem acknowledges that "[t]he concept of direct participation in attacks draws on, but is distinct from, the *jus in bello* concept of direct participation in hostilities."[14] However, Bethlehem does not explain which features of "direct participation in attacks" are drawn from "direct participation in hostilities" and which are distinct.

Because Bethlehem's use of "direct part in attacks" encompasses *jus in bello* purposes, it threatens confusion with, and mischief to, the limitations on killing imposed by the concept of DPH. To the extent that Bethlehem is drawing on the concept of direct participation in hostilities to give content to his concept of direct participation in attacks, he does not appear to be reflecting an established understanding of international law. To the contrary, Bethlehem's definition of direct participation in attacks is not only broader, but also less easily cabined, than accepted *jus in bello* principles and rules.

For example, Bethlehem does not define the term *material support*, and we are aware of no authority that holds that providing material support essential to attacks is sufficient to render individuals subject to the use of lethal force. Bethlehem's failure to define this term is especially problematic given that his principles appear to be motivated by United States precedent, which

[9] We recognize that the inquiries are not completely analytically distinct. For example, whether attacks emanate from groups versus individuals, or state versus nonstate actors, may have some bearing on an Article 51 analysis.

[10] Bethlehem, *supra* note 1, at 775, princ. 7 (emphasis added).

[11] *Id.*, princ. 4.

[12] *Id.*, princ. 5 (footnotes omitted).

[13] *Id.*, princ. 6 (footnote omitted) (emphasis added).

[14] *Id.*, n.c.

has a troubling history with "material support" prosecutions in the criminal context.[15] We are concerned that policymakers and others seeking to give content to "material support" in Bethlehem's principles may inappropriately draw from the expansive definition in American criminal law or otherwise define the term in a manner inconsistent with applicable *jus ad bellum* and *jus in bello* principles.

Similarly, to the extent that Bethlehem intends to reflect aspects of IHL's direct participation in hostilities in claiming that those "planning" or "threatening" armed attack are subject to an armed response under IHL, such a claim does not appear to be in accord with leading authorities and commentary on the law. The International Committee of the Red Cross, for example, holds that "direct participation" requires, among other elements, direct causation of harm and excludes activities that are only indirectly tethered to an attack.[16] While "planning" an armed attack may in some circumstances constitute direct participation, merely "threatening" an armed attack would rarely—if ever—qualify.[17]

Bethlehem could have avoided these problems by disclaiming that his *jus ad bellum* principles reflect established *jus in bello* and limiting himself to the *jus ad bellum* question of justifications for attacks that would otherwise violate another state's sovereignty. However, by claiming to draw from the *jus in bello* to inform his concept of "direct participation in attacks," Bethlehem's principles may be construed as endorsement of an overly liberal formulation of IHL that does not reflect the current state of the law. Although Bethlehem in his introductory note explicitly maintains that any use of force must conform to both *jus ad bellum* and *jus in bello* requirements, the content of his principles does not reflect his disclaimer, raising the possibility that his principles could be misconstrued as an endorsement of the notion that compliance with Article 51 of the UN Charter in and of itself constitutes sufficient justification to kill persons thought to be posing a threat.

Moreover, where Bethlehem does put forth principles to preserve the application of other sources of international law, he does not mention the continued applicability of either the *jus in bello*/IHL or international human rights law.[18] This silence is particularly problematic given that it remains unclear whether the United States considers itself legally bound by the *jus in bello* rules in operating the CIA's targeted killing program or whether instead—as some commentators have emphasized—the type of "self-defense" rationale that Bethlehem has put forth can constitute a sufficient basis for conducting lethal targeting operations against individuals.[19]

Perhaps the most troubling aspect of Bethlehem's proposal is the impact that it could have on protections otherwise provided by international human rights law. As others in this issue

[15] *See, e.g.*, Holder v. Humanitarian Law Project, 130 S.Ct. 2705, 2717–31 (2010) (holding that individuals who provide human rights and international law advocacy in coordination with designated terrorist organizations can be said to be providing unlawful "material support" to such organizations).

[16] *See* ICRC STUDY, *supra* note 5, at 46–64.

[17] Note that here we do not speak of status-based targeting, and Bethlehem does not claim to draw from such sources of *jus in bello*.

[18] Bethlehem, *supra* note 1, at 777, princs. 14–16.

[19] *See* Geoffrey S. Corn, *Self-Defense Targeting: Blurring the Line Between the* Jus ad Bellum *and the* Jus in Bello, 88 U.S. NAVAL WAR COLLEGE INTERNATIONAL LAW STUDIES SERIES 57 (Kenneth Watkin & Andrew J. Norris eds., 2012), *available at* http://www.usnwc.edu/getattachment/49819df1-6a3f-41f3-b3cd-5dabee41fffa/Self-defense-Targeting--Blurring-the-Line-between-.aspx; Deborah Pearlstein, *CIA General Counsel Speech on Hypothetical Uses of Force*, OPINIO JURIS, Apr. 11, 2012, *at* http://opiniojuris.org/2012/04/11/cia-general-counsel-speech-on-hypothetical-uses-of-force.

have noted,[20] Bethlehem's principles appear to go quite far in relaxing the traditional requirements governing when a state may pursue an armed response under Article 51 of the UN Charter. The natural consequence of Bethlehem's proposal, should governments decide to follow it, is additional armed responses against nonstate actors in circumstances that do not constitute armed conflict. In these circumstances, the applicable provisions of international human rights law—not IHL—must govern any use of force. Bethlehem, unfortunately, does not even mention international human rights law, let alone insist on its applicability, in his proposal.

We recall then White House Counsel Alberto Gonzales's notorious dismissal of provisions of the Geneva Conventions as "quaint."[21] While Bethlehem's proposal is couched in terms much more respectful of the international legal lexicon, it threatens to undermine settled principles of *jus ad bellum*, *jus in bello*, and human rights law. It is a radical rewrite that, if implemented, would tilt a necessarily imperfect but finely tuned balance from peace to war and from life to death.

SELF-DEFENSE AGAINST NONSTATE ACTORS: REFLECTIONS ON THE "BETHLEHEM PRINCIPLES"

*By Elizabeth Wilmshurst and Michael Wood**

Daniel Bethlehem has set down sixteen principles relevant to the scope of a state's right of self-defense against an imminent or actual armed attack by nonstate actors "with the intention of stimulating a wider debate."[1] While these principles "are published under [the author's] responsibility alone," they have "nonetheless been informed by detailed discussions over recent years with foreign ministry, defense ministry, and military legal advisers from a number of states who have operational experience in these matters."[2]

Exercises such as this one are welcome if they seek to achieve as broad a consensus as possible on the interpretation of the rules of international law on the use of force and on their application. What is needed, if the rules are to be more readily obeyed, is a far greater degree of common understanding among governments (and others) as to what the rules are, as well as greater support for the United Nations, and particularly for a Security Council that is effective and seen to be legitimate.

[20] *E.g.*, Mary Ellen O'Connell, *Dangerous Departures*, 107 AJIL 380, 380, 383–84 (2013); Elizabeth Wilmshurst & Michael Wood, *Self-Defense Against Nonstate Actors: Reflections on the "Bethlehem Principles,"* 107 AJIL 390, 393–95 (2013).

[21] Memorandum from Alberto Gonzales, White House Counsel, to President George W. Bush, Decision re Application of the Geneva Convention on Prisoners of War to the Conflict with Al Qaeda and the Taliban, at 2 (Jan. 25, 2002), a*vailable at* http://www.gwu.edu/nsarchiv/NSAEBB/NSAEBB127/02.01.25.pdf.

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[1] Daniel Bethlehem, *Self-Defense Against an Imminent or Actual Armed Attack by Nonstate Actors*, 106 AJIL 769, 773 (2012).

[2] *Id.*

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