

## NOTES AND COMMENTS

### EDITORS' NOTE

The October 2012 issue of the *Journal* carried a Note by Daniel Bethlehem with the author's proposal for a set of principles on the scope of a state's right of self-defense against an imminent or actual armed attack by nonstate actors.<sup>1</sup> The Editors' Note to that item indicated that critiques of the proposal and other responses would be published in a subsequent issue of the *Journal*. Four such responses are presented here; the July 2013 issue will carry a continuation of the debate.

### LAW, POWER, AND PRINCIPLES

*By Michael J. Glennon\**

Daniel Bethlehem's proposed principles<sup>1</sup> grapple bravely with the familiar tension between law and power, between the aspirational and the real, between states' words and irreconcilable acts. His principles "are proposed with the intention of stimulating a wider debate on these issues."<sup>2</sup> With that invitation in mind, I offer this thought: while Bethlehem posits a need for objectivity—by which he appears to mean neutral principles indifferent to power disparities<sup>3</sup>—his proposed principles nonetheless substitute the *opinio juris* of the powerful for the practice of all, and they aim to bridge a division among states that he supposes merely to be a division among publicists.

Because what states actually do is, given the sensitivities, "opaque,"<sup>4</sup> Bethlehem extracts principles from what particular states say—from what powerful states say publicly, that is, in speeches in the United States and the United Kingdom, and what they apparently say privately to him, or within his hearing, in "intra- and intergovernmental discussions," "largely away from the public gaze, within governments and between them . . . ."<sup>5</sup> How excluded weaker

<sup>1</sup> Daniel Bethlehem, *Principles Relevant to the Scope of a State's Right of Self-Defense Against an Imminent or Actual Armed Attack by Nonstate Actors*, 106 AJIL 769 (2012).

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<sup>1</sup> Daniel Bethlehem, *Self-Defense Against an Imminent or Actual Armed Attack by Nonstate Actors*, 106 AJIL 769, 775–77 (2012).

<sup>2</sup> *Id.* at 773.

<sup>3</sup> "An essential element of any legal principle," he writes, "is that it must be capable of objective application and must not be seen as self-serving—that is, in the interests of one state, or small group of states, alone." *Id.* at 774.

<sup>4</sup> *Id.* at 770.

<sup>5</sup> *Id.* His principles appear to derive from discussions among powerful states that use force frequently, not from discussions with those that do not, let alone states that are targets. "They have . . . 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." *Id.* at 773.

states' consent can be inferred, or why their failure to consent is unimportant, he does not explain. "[T]here has been no similar flurry of speeches elsewhere," he asserts<sup>6</sup> (though in fact other states have had rather a lot to say about whether they prefer being attacked<sup>7</sup>).

In pursuing this approach, Bethlehem seeks support from the writings of publicists.<sup>8</sup> This course is perplexing because he earlier warned us that "[t]here is little intersection between the academic debate and the operational realities."<sup>9</sup> He attributes the absence of a "clear set of principles" to "the doctrinal divide that continues to beset the debate"<sup>10</sup> rather than to conflicting state practice, even though the International Court of Justice has insisted that custom be grounded not upon the writings of publicists or bare *opinio juris* but upon state practice,<sup>11</sup> and even though that practice often is at odds with the pertinent *opinio juris*.

The resulting principles therefore derive not *from* practice but from other earlier principles that have been hollowed out *by* practice.<sup>12</sup> Left unanswered are whether his principles are the law as Bethlehem believes it to be or the law as he would wish it to be;<sup>13</sup> whether they are proposed as general international law, or a kind of *lex specialis*, or regional or hegemonic law; and what new or different outcomes his principles would actually require.

Whatever the answers, Bethlehem deserves thanks for raising key issues and sparking a long-overdue debate. Functioning law may be impossible to achieve in the shadowy realm that his principles address (and I have expressed my own skepticism often enough), but the world surprises. It is useful to test the waters occasionally to assess whether both the powerful and the weak might be ready to try new rules. Rather than starting with principles, doctrines, and other historically controversial abstractions and then seeking consensus, however, the way to do that,

<sup>6</sup> *Id.* at 771.

<sup>7</sup> See, e.g., Farhan Bokhari, *Pakistan Protests After US Drone Strike*, FIN. TIMES, May 5, 2012, at <http://www.ft.com/intl/cms/s/0/b4a8cc3c-96c0-11e1-847c-00144feabdc0.html#axzz2Aiw3gIHE> ("Pakistan has consistently maintained that these illegal attacks are a violation of its sovereignty and territorial integrity, and are in contravention of international law," said Pakistan's foreign ministry in a statement . . ."); *Ethiopia Attacks Rebel Targets in Eritrea*, REUTERS, Mar. 17, 2012, at <http://www.reuters.com/article/2012/03/17/ethiopia-eritrea-attack-idUSL5E8EH07N20120317> ("Ethiopian troops have carried out more attacks on Ethiopian rebels inside Eritrea on Saturday, a day after Eritrea urged United Nations action against Ethiopia for a previous attack inside its territory."); Jane Perlez & David Rohde, *Pakistan Pushes Back Against U.S. Criticism on Bin Laden*, N.Y. TIMES, May 3, 2011, at <http://www.nytimes.com/2011/05/04/world/asia/04pakistan.html?pagewanted=all> ("[T]he Pakistani government lashed out at the United States . . . for the raid that killed Osama bin Laden, saying that the United States had made 'an unauthorized unilateral action' that would be not tolerated in the future."); Simon Romero, *Troops Mass at Colombian Borders in Crisis over Killing of Rebel*, N.Y. TIMES, Mar. 3, 2008, at A9 (noting how "Colombian forces killed a senior guerilla leader at a jungle camp in Ecuador," causing "President Rafael Correa of Ecuador [to] call[] Colombia's action a violation of Ecuador's sovereignty").

<sup>8</sup> See, e.g., Bethlehem, *supra* note 1, at 773 ("There is little scholarly consensus on what is properly meant by 'imminence' in the context of contemporary threats.").

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> It is an "indispensable requirement" for custom that state practice be "both extensive and virtually uniform." North Sea Continental Shelf (FRG/Den.; FRG/Neth.), 1969 ICJ REP. 3, para. 74 (Feb. 20).

<sup>12</sup> See MICHAEL J. GLENNON, *THE FOG OF LAW: PRAGMATISM, SECURITY, AND INTERNATIONAL LAW* 77–97 (2010) (describing how international legal norms can fall into desuetude in the face of contrary state practice).

<sup>13</sup> Bethlehem indicates that he undertakes to formulate principles "that apply, or ought to apply," Bethlehem, *supra* note 1, at 773, seemingly acknowledging that his principles mix the *lex ferenda* with the *lex lata*, but he then proceeds to suggest that they represent "the contours of the law," *id.*, only to imply later, in the savings clauses of principles 14 and 15, that his principles might be in conflict with the United Nations Charter and customary international law. See *id.* at 777, princs. 14–15.

in my view, is to look first to empirical data to see what consensus actually exists—by, for example, giving states a list of concrete, specific incidents in which force was used against nonstate actors and then asking in which cases they believe the use of force to have been justified. In other words, find the common ground first, then describe it, and only afterward seek states' assent to the formulation.

In the short term, an empirical approach will produce less grandiose norms than those set out in the League of Nations Covenant, the Kellogg-Briand Pact, or the United Nations Charter. It could necessitate choosing more explicitly between a coercion-based system run by the powerful or a consent-based system run by the weak. Yet it could also produce law that works. And in the long term, it could provide a foundation on which broader law can be built to manage the use of force generally—not merely force used by powerful states against nonstate actors located in less powerful states.

## DANGEROUS DEPARTURES

*By Mary Ellen O'Connell\**

Daniel Bethlehem has proposed a series of principles relating to a state's use of military force against nonstate actors (NSAs). He believes that his proposals will lead to the formulation of a "clear set of principles that effectively address the specific operational circumstances faced by states."<sup>1</sup> While Bethlehem's intentions may be laudable, his effort is founded on the misconception that the international legal system lacks sufficiently clear principles to govern the use of military force against NSAs. The system already has such principles, as this comment will show.

Where the debate is needed is with respect to another point that he makes: Bethlehem believes that our scholarship in this area of international law is not "shaping the operational thinking of those within governments and the military who are required to make decisions in the face of significant terrorist threats emanating from abroad."<sup>2</sup> Judging by actual practice, however, scholarship respecting the current law *is* shaping government thinking. Few states use military force against nonstate actors on the territory of other states to counter terrorist threats. Nevertheless, the international legal community could profit from a debate on why the current rules are being ignored by some military and government officials in these few states. Instead of addressing noncompliance by a few, Bethlehem offers to rewrite the rules, legalizing practices that today are violations of international law. Rewriting the rules will certainly get these states into compliance, but so would rewriting the rules on torture. Seeking law compliance by all is, again, a laudable intention, but doing so by changing the rules is addressing the problem from the wrong end.<sup>3</sup>

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

<sup>2</sup> *Id.*

<sup>3</sup> Other efforts of this kind should also be challenged for undermining the law, but as Elizabeth Wilmshurst and Michael Wood point out in their commentary, *Self-Defense Against Nonstate Actors: Reflections on the "Bethlehem Principles"*, 107 AJIL 390, 393–95 (2013), Bethlehem's proposals depart even more radically from the law than the