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."[1] 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."[2] 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.[3]

* Robert and Marion Short Professor in Law and Research Professor of International Dispute Resolution—Kroc Institute, University of Notre Dame.

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

[2] *Id.*

[3] 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

https://doi.org/10.5305/amerjintelaw.107.2.0380 Published online by Cambridge University Press

The current rules on the use of force have developed over time in light of the very "operational realities" that Bethlehem worries are being ignored.[4] The International Court of Justice (ICJ) has already considered these rules and applied them in a number of decisions involving real states using force against NSAs. The ICJ has not indicated that the law is unclear. Most importantly, the current law on the use of force was thoroughly reviewed in 2003–05, following 9/11 and the 2003 invasion of Iraq. United Nations members committed in September 2005 at the World Summit in New York to "strictly" abide by the UN Charter and agreed that "the relevant provisions of the Charter are sufficient to address the full range of threats to international peace and security."[5] No change was found to be necessary or desired.

Bethlehem's Proposals

Bethlehem's first, succinct principle potentially states a correct proposition about the law, but so much is left out that it must be viewed as misleading. He says that "[s]tates have a right of self-defense against an imminent or actual armed attack by [NSAs]."[6]

The place to begin any analysis on the use of force in self-defense is not Article 51 of the UN Charter—where Bethlehem starts—but Article 2(4), the general prohibition on the use of force. Article 51 and the Security Council's power to authorize the use of force are exceptions to this general prohibition. As exceptions, they are to be strictly construed, which has been the approach of the ICJ.[7] Moreover, we understand, increasingly, the importance of regarding all killing by governments through the prism of human rights law. The human right to life is affirmed in all human rights treaties, including, most importantly, the International Covenant on Civil and Political Rights.[8] Its Article 6 provides: "Every human being has the inherent right

Chatham House Principles (published as Elizabeth Wilmshurst, *The Chatham House Principles of International Law on the Use of Force in Self-Defence*, 55 INT'L & COMP. L.Q. 963 (2006) [hereinafter Chatham House Principles]), or the Leiden Policy Recommendations (published as Nico Schrijver & Larissa van den Herik, *Leiden Policy Recommendations on Counter-terrorism and International Law*, 57 NETH. INT'L L. REV. 531 (2010)). S*ee also infra* text accompanying note 23 (critical comment on one of the Chatham House Principles).

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

[5] 2005 World Summit Outcome, GA Res. A/60/L.1, paras. 78–79 (Sept. 15, 2005), *available at* http://www.globalr2p.org/media/files/wsod_2005.pdf. This important document and other evidence of the current status of the law on self-defense are omitted in Theresa Reinold, *State Weakness, Irregular Warfare, and the Right to Self-Defense Post-9/11*, 105 AJIL 244 (2011). For an overview and assessment of the principal literature in English on the law of self-defense, see Mary Ellen O'Connell, *The Right of Self-Defense*, OXFORD BIBLIOGRAPHIES (Mar. 2012), *at* http://www.oxfordbibliographies.com/view/document/obo-9780199796953/obo-9780199796953-0028.xml.

[6] Bethlehem, *supra* note 1, at 775, princ. 1.

[7] *See* Mary Ellen O'Connell, *The Choice of Law Against Terrorism*, 4 J. NAT'L SEC. L. & POL'Y 343, 359 (2010) (citing Corfu Channel (UK v. Alb.), 1949 ICJ REP. 4 (Apr. 9); Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1986 ICJ REP. 14 (June 27) [hereinafter *Nicaragua*]; Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 ICJ REP. 226 (July 8) [hereinafter *Nuclear Weapons*]; Oil Platforms (Iran v. U.S.), 2003 ICJ REP. 161, paras. 61–64 (Nov. 6) [hereinafter *Oil Platforms*]; Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, Sep. Op. Higgins, J., 2004 ICJ REP. 136, 207, paras. 33–34 (July 9) [hereinafter *Wall*]; Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), 2005 ICJ REP. 168, paras. 146, 301 (Dec. 19) [hereinafter *Congo v. Uganda*]; Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Montenegro), 2007 ICJ REP. 43, para. 391 (Feb. 26)).

[8] International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 UNTS 171, *available at* http://www.ohchr.org/EN/ProfessionalInterest/Pages/CCPR.aspx. The United States is a party.

to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life."[9] The affirmative right to life also guides us toward a strict reading of the law restricting the right to use force.

The exception for self-defense in Article 51 permits a state to use major military force on the territory of another state in response to an armed attack. The ICJ has found that the right of self-defense may only be exercised against a significant attack.[10] Most terrorist attacks carried out by criminal groups will not meet the significance test. The United Kingdom has been adamant that terrorism should generally be treated as crime.[11] When becoming a party to the 1977 Additional Protocols to the 1949 Geneva Conventions,[12] the United Kingdom appended the following understanding to its acceptance: "It is the understanding of the United Kingdom that the term 'armed conflict' of itself and in its context denotes a situation of a kind which is not constituted by the commission of ordinary crimes including acts of terrorism whether concerted or in isolation."[13]

Moreover, the law of self-defense is fundamentally premised on the finding of a significant and actual armed attack because the response in self-defense must be necessary and proportional to the armed attack.[14] Bethlehem refers to these requirements in proposals 2–8. He fails to note, however, that the lawful response is shaped to the attack. The ICJ has explained that the reference to the "inherent right" of self-defense in Article 51 is a reference to international law principles that are part of the right of self-defense although not restated in the article. For example, the ICJ found in the *Nuclear Weapons* case that "there is a 'specific rule whereby self-defence would warrant only measures which are proportional to the armed attack and necessary to respond to it, a rule well established in customary international law.' This dual condition applies equally to Article 51 of the Charter, whatever the means of force employed."[15]

The 9/11 attacks did not alter the law of self-defense. The Security Council declared in Resolution 1368 of September 12, 2001, that the terrorist attacks perpetrated in the United States on 9/11 triggered Article 51. The Security Council said nothing more. The United States and those joining it in collective self-defense had to produce evidence that the other conditions of lawful self-defense had also been met.

[9] *Id.*, Art. 6.

[10] *See, e.g.*, *Nicaragua*, *supra* note 7, para. 195; *Wall*, *supra* note 7, paras. 139–42 (majority opinion); *Oil Platforms*, *supra* note 7, paras. 62–64.

[11] *See* Christopher Greenwood, *War, Terrorism, and International Law*, 56 CURRENT LEGAL PROBS. 505, 529 (2003).

[12] Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, 1125 UNTS 3 [hereinafter Additional Protocol I]; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-international Armed Conflicts, June 8, 1977, 1125 UNTS 609.

[13] Reservation of the United Kingdom to Arts. 1(4) & 96(3) (July 2, 2002) of Additional Protocol I, *supra* note 12, *available at* http://www.icrc.org/ihl.nsf/NORM/0A9E03F0F2EE757CC1256402003FB6D2?OpenDocument.

[14] *See Nicaragua*, *supra* note 7, para. 176 (noting the requirements under customary international law of necessity and proportionality when using self-defense); *see also* Georg Nolte, *Multipurpose Self-Defence, Proportionality Disoriented: A Response to David Kretzmer*, 24 EUR. J. INT'L L. 283 (2013).

[15] *Nuclear Weapons*, *supra* note 7, para. 41 (citing *Nicaragua*, *supra* note 7, para. 176); *see also Oil Platforms*, *supra* note 7, para. 76. Bethlehem only refers to necessity as a rule of "last resort." Bethlehem, *supra* note 1, at 775, princ. 2. That was the sense in which the United States found Israel's attack on Iraq's Osirak nuclear reactor to be unlawful. *See* SC Res. 487 (June 19, 1981).

The most important evidence concerned the state responsibility of Afghanistan. Bethlehem mentions in passing that state responsibility "may also have a bearing on these issues."[16] The ICJ has made it clear, however, in the *Nicaragua* case, the *Oil Platforms* case, and the *Congo v. Uganda* case that state responsibility is a fundamental component of the lawful use of force.[17] Attacking NSAs on the territory of another state is attacking that state as much as the NSAs. After 9/11, the United Kingdom made a case for the right to use force in self-defense against Afghanistan.[18] In a white paper, the United Kingdom presented evidence of Afghanistan's state responsibility for Al Qaeda's attacks in the United States on 9/11. Turkey has a similar case respecting its attacks into northern Iraq where the de facto Kurdish government may bear responsibility for armed action against Turkey by Kurdish armed groups aimed at uniting greater Kurdistan.

Even where state responsibility exists, the right of self-defense arises only where the initial armed attack or attacks are significant. There is no right to use force against NSAs that are only involved in planning or threatening armed attack, as Bethlehem proposes (proposals 5–7). The current law certainly negates any right to use military force because there may not be "other opportunities" to attack in future (proposal 8).

Proposals 9–13 involve permitting military force against NSAs because some sort of consent is claimed or because a state is "unable or unwilling" to act against NSAs. Consent is a fundamental general principle, playing a central role throughout international law. For example, consent is required for a state to become a party to a treaty. Consent is also a prominent defense to international wrongs in the law of state responsibility.[19] Bethlehem proposes carving out a special understanding of consent for the exercise of military force on another state's territory: "Consent may be strategic or operational, generic or ad hoc, express or implied."[20] Expanding the meaning of consent in this way for the particular purpose of attacking NSAs will, of course, add to international law's fragmentation. More importantly, states will likely reject Bethlehem's new version of consent, given that it seriously limits sovereign rights. States are just as unlikely to accept a proposal that consent can be provided on anything short of the express agreement of those with the authority under national law to grant it. Can Bethlehem imagine the United States, for example, recognizing the validity of consent provided by CIA personnel to Mexican intelligence agents to carry out a campaign of targeted killing in the United States with drones against NSAs involved in cross-border drug crime?

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

[17] *Nicaragua*, *supra* note 7, para. 203; *Oil Platforms*, *supra* note 7, para. 61–64; *Congo v. Uganda*, *supra* note 7, paras. 146, 300, 301; *see also* James Thuo Gathii, *Irregular Forces and Self-Defense Under the UN Charter*, *in* WHAT IS WAR? AN INVESTIGATION IN THE WAKE OF 9/11, at 97 (Mary Ellen O'Connell ed., 2012).

[18] *See* Mary Ellen O'Connell, *Lawful Self-Defense to Terrorism*, 63 U. PITT. L. REV. 889, 901–02 (2002).

[19] *See* Draft Articles on State Responsibility, Art. 20, GA Res. 56/83 (Dec. 12, 2001), *available at* http://untreaty.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf ("Consent: Valid consent by a State to the commission of a given act by another State precludes the wrongfulness of that act in relation to the former State to the extent that the act remains within the limits of that consent."). Comment 4 to Article 20 emphasizes that for consent to be valid it must be provided by an official with authority to do so. Comment 10 cautions that "[t]he rights conferred by international human rights treaties cannot be waived by their beneficiaries . . . ." If beneficiaries cannot waive their own human rights, the state may certainly not do so on their behalf. *See also* JAMES CRAWFORD, THE INTERNATIONAL LAW COMMISSION'S ARTICLES ON STATE RESPONSIBILITY, INTRODUCTION, TEXT AND COMMENTARIES (2001). As to what counts as "valid" consent, see Sean D. Murphy, *The International Legality of US Military Cross-Border Operations from Afghanistan into Pakistan*, 85 INT'L L. STUD. 109, 118–20 (2009).

[20] Bethlehem, *supra* note 1, at 777, princ. 13.

Even where appropriate authorities provide valid consent, they can only grant the authority that the state possesses. Governments must restrict the use of lethal force to peacetime policing rules when dealing with criminal groups not waging armed conflict.[21] To the extent that consent can justify the use of military force, the consent would need to be in the form of an invitation supporting a government's counterinsurgency campaign—as the French began doing in Mali in January 2013, and the United States, the United Kingdom, and other states began doing in Afghanistan in mid-2002, at which time these states began fighting a counterinsurgency war to support the government of Hamid Karzai.[22]

Bethlehem also proposes that, in situations where even his flexible consent standards are not met, states could still exercise military force if a government was "unwilling" or "unable" to control violent NSAs (proposals 11–12). The phrase "unable or unwilling" apparently first appeared in a think-tank document, *The Chatham House Principles of International Law on the Use of Force in Self-Defence*.[23] The document has no citation to authority for the assertion that states may resort to force against states "unable or unwilling" to control terrorism on their territory. Again, states have not accepted such a right and are unlikely to ever accept a rule this flexible on intervention. Bethlehem's proposal would leave it to the victim state to decide something as amorphous as another state being "unable" to control violence on its territory.

International law has a mechanism for the problem that Bethlehem addresses in his proposals. Where a state believes that military force is the right solution to a security challenge but the conditions of lawful self-defense are not present, the state may request Security Council authorization for the use of military force. The Security Council has in recent years authorized states to respond: it has allowed states to address the problem of Somali piracy with enhanced law enforcement measures, and it has authorized interventions that changed the governments of Somalia and Libya. The United States, however, has neither gone to the Security Council for authorization to use military force against NSAs suspected of terrorism in Somalia, Yemen, or other states, nor appears inclined to do so in the future as it contemplates using force in Libya, Nigeria, and Mali. Do U.S. officials believe that Bethlehem's proposals are already the law? If so, these officials should understand that his proposals are far from the current rules and would effectively eliminate the restraints of Article 51.

Effective Counterterrorism

The recent U.S. practice of killing terrorism suspects through the use of military force outside armed conflict zones would uniquely benefit from Bethlehem's proposed principles. Indeed, Bethlehem's purpose in making his proposals appears to be aimed at legitimizing this practice. He mentions in his introduction five high-ranking Obama administration legal and security advisers and the speeches that they have given since 2010 in which they attempt to

[21] *See, e.g.*, Philip Alston, Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Addendum: Study on Targeted Killings, UN Doc. A/HRC/14/24/Add.6 (May 28, 2010); LOUISE DOSWALD-BECK, HUMAN RIGHTS IN TIMES OF CONFLICT AND TERRORISM (2011); Draft Articles on State Responsibility, *supra* note 19, Art. 20, cmt. 10.

[22] Invitation as a basis for the lawful use of force on the territory of another state has its critics. *See, e.g.*, Louise Doswald-Beck, *The Legal Validity of Military Intervention by Invitation of the Government*, 1989 BRIT. Y.B. INT'L L. 189, 251.

[23] Chatham House Principles, *supra* note 3, at 969, 970.

show that this U.S. practice of targeted killing is lawful.[24] For many, the current U.S. practice is regrettable and should end. The law should not be changed to accommodate it. Weakening the law on the use of force and effectively inviting states around the world to engage in the same conduct would be a retrograde step of monumental proportions. It is certainly not in the interest of the international community. It also clashes with the growing scope of human rights law. Moreover, allowing greater use of force against terrorists is in conflict with empirical data indicating that military force is of limited value in repressing terrorism compared with law enforcement techniques.

In 2001, just weeks before 9/11, the U.S. ambassador to Israel, Martin Indyk, stated on Israeli television in connection with the Israeli targeted killing of suspected terrorists: "The United States government is very clearly on the record as against targeted assassinations. They are extrajudicial killings, and we do not support that."[25] Instead, the U.S. position with respect to terrorists has been to treat them as criminals. After the Al Qaeda attacks on American targets in 1993, 1998, and 2000, the United States successfully used criminal law and law enforcement measures to investigate, extradite, and try persons linked to the attacks.

Our allies who for years dealt with determined problems of terrorism have taken the same approach. The British, Germans, Indians, Italians, and others have all faced terrorist challenges that they confronted using law enforcement methods.[26] In a recent public television discussion, Robert Pape, a professor of political science at the University of Chicago and director of the Chicago Project on Security and Terrorism, said in late 2012 that the Obama administration's "experiment" involving killing with drones had not succeeded.[27] The public around the world is increasingly critical of the U.S. campaign, accounting in part for the conclusion that it has not succeeded. To introduce drastic changes now to the law of self-defense to legitimize an unsuccessful policy would be a major setback for international law.[28]

Conclusion

In another discussion of expanding the right to use military force in self-defense, Louis Henkin wrote these words in response to arguments of former Reagan administration officials who supported a doctrine of pro-democratic intervention:

[24] Bethlehem, *supra* note 1, at 770.

[25] Joel Greenberg, *Israel Affirms Policy of Assassinating Militants,* N.Y. TIMES, July 5, 2001, at A5.

[26] For a detailed account of the British struggle against the IRA and other counterterrorism efforts, see LOUISE RICHARDSON, WHAT TERRORISTS WANT: UNDERSTANDING THE ENEMY, CONTAINING THE THREAT (2006).

[27] Robert Pape, Remarks on Chicago Tonight: Unmanned Drones (WTTW television broadcast Oct. 30, 2012), *available at* http://chicagotonight.wttw.com/2012/10/30/unmanned-drones. Apparently, President Barack Obama has also concluded that drone attacks will have little long-term impact on suppressing terrorism. BOB WOODWARD, OBAMA'S WARS 284 (2010).

[28] The revelation that the Obama administration believed it needed to draft rules governing its targeted killing campaign in case Governor Mitt Romney won the presidential election has increased the opposition to the policy within the United States. Many commentators have observed that the administration should know that international law rules already govern this practice. *See* Scott Shane, *Election Spurred a Move to Codify U.S. Drone Policy*, N.Y. TIMES, Nov. 24, 2012, at A1. More dramatically, Senator Rand Paul increased opposition within the United States to drone policy during a thirteen-hour filibuster of John O. Brennan's nomination to head the CIA. *See* Brett LoGiurato, *Since Rand Paul's Historic Filibuster, There Has Been a Dramatic Shift in Public Opinion on Drone Strikes*, BUS. INSIDER, Apr. 11, 2013, *at* http://www.businessinsider.com/rand-paul-filibuster-drone-polling-polls-2013-4.

> 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).

* Gabor Rona is the International Legal Director of Human Rights First. Raha Wala is a Senior Counsel of Human Rights First.

[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.

https://doi.org/10.5305/amerjintelaw.107.2.0380 Published online by Cambridge University Press