concerns that stem from the general law of self-defense. However, it may be that a set of principles that are designed, explicitly, not just to state the existing law but rather to "formulate principles that reflect, as well as shape, the conduct of states"[26] should strive for a higher degree of precision. Bethlehem is right to lament the "paucity of considered and authoritative guidance on the parameters and application" of the right of self-defense against imminent or actual armed and to stress the need for legal principles that are "capable of objective application."[27] However, more attention needs to be paid to what necessity, imminence, and proportionality actually require.

## THE NONCONSENTING INNOCENT STATE: THE PROBLEM WITH BETHLEHEM'S PRINCIPLE 12

*By Dire Tladi**

In a recent issue of this *Journal*, Daniel Bethlehem proposed 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.[1] In response, this essay seeks to assess Bethlehem's proposition in principle 12 that a state may use force against nonstate actors on the territory of another state without the consent of the territorial state when the territorial state is not responsible for the initial attack and when the attack cannot be imputed to the territorial state. This description might be termed the *nonconsenting innocent state problem*.

The dilemma that I take on here arises when Bethlehem's principles are applied to the use of force against nonstate actors without the consent of the territorial state. Principle 1 indicates that "[s]tates have a right of self-defense against an imminent or actual armed attack by nonstate actors."[2] Principle 10 provides that, as a general rule, the consent of the territorial state is required whenever force is used against nonstate actors.[3] Yet principle 11 states that consent is not required when the territorial state colludes with or is "*unwilling to effectively* restrain the armed activities of the nonstate actor" carrying out armed attacks against another state.[4] While this proposition should be fairly uncontroversial, it is unclear what is meant by that quoted phrase. To the extent that this choice of language—in particular, the term *effectively*—is meant to suggest that consent may be dispensed with even in those instances where the territorial state takes reasonable but ineffective measures to prevent its territory from being used to launch attacks, problems arise that parallel those that I discuss in relation to principle 12. Principle 12, the second exception and the focus of this paper, provides that consent can be dispensed with

[26] Bethlehem, *supra* note 1, at 774.

[27] *Id.*

* Principal State Law Adviser (International Law), Department of International Relations and Cooperation of South Africa; Extraordinary Professor, Department of Public Law, University of Stellenbosch. The views expressed in this article are not attributable to the Government of South Africa or the Department of International Relations and Cooperation.

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

[2] *Id.* at 775, princ. 1.

[3] *Id.* at 776, princ. 10.

[4] *Id.*, princ. 11 (emphasis added) (footnote omitted).

https://doi.org/10.5305/amerjintelaw.107.3.0570 Published online by Cambridge University Press

where "there is a reasonable and objective basis for concluding that the third state [the territorial state] is *unable to effectively* restrain the armed activities of the nonstate actor" operating in or from its territory.[5] Presumably, this principle is intended to convey that the fault of the territorial state is irrelevant or at least not determinative; otherwise, principle 11 would be applicable. In essence, under principle 12, force may be used on the territory of an innocent state without its consent.

Leaving aside the policy, political, and practical implications, principle 12 raises important questions about the interaction between the law on self-defense and the law relevant to territorial integrity and sovereignty. At the heart of the issue appears to be the basic proposition that a state may lawfully use force in self-defense against nonstate actors on the territory of a nonconsenting innocent state.

### *The Use of Force Against Nonstate Actors in International Law*

The starting point for determining the law on self-defense is, of course, Article 51 of the United Nations Charter. In part, it provides: "Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security."[6] Those arguing for the right of a state to use force in self-defense on the territory of an innocent state make two points with respect to Article 51. First, nothing in the language of Article 51 limits the right of self-defense to situations of armed attacks by states.[7] Second, Article 51 expressly refers to an "inherent right" of a state to self-defense grounded in customary international law.[8] Both points are valid, but they are not answers in themselves. What is called for is a good-faith and contextual interpretation of Article 51, in accordance with the Vienna Convention on the Law of Treaties.[9]

### *The Line of Reasoning of the International Court of Justice*

The decisions of the International Court of Justice (ICJ) interpreting Article 51 provide an appropriate starting point. In the *Military and Paramilitary Activities* case, the ICJ explained that "an armed attack must be understood as including not merely action by regular armed forces across an international border, but also 'the sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force . . . .'"[10] This ruling seems to imply that, to qualify as an armed attack justifying use of force in self-defense, an act performed by a nonstate actor must be imputable to the authorities of the state where the

[5] *Id.*, princ. 12 (emphasis added) (footnote omitted).

[6] UN Charter, Art. 51.

[7] *See, e.g.*, Sean D. Murphy, *Self-Defense and the Israeli* Wall *Advisory Opinion: An* Ipse Dixit *from the ICJ?*, 99 AJIL 62, 64 (2005); Jordan J. Paust, *Self-Defense Targetings of Non-state Actors and Permissibility of U.S. Use of Drones in Pakistan*, 19 J. TRANSNAT'L L. & POL. 237, 241 (2010); JOHN DUGARD, INTERNATIONAL LAW: A SOUTH AFRICAN PERSPECTIVE 512 (3d ed. 2005).

[8] *See, e.g.*, Paust, *supra* note 7, at 241–44; Murphy, *supra* note 7, at 64–67.

[9] Vienna Convention on the Law of Treaties, *opened for signature* May 23, 1969, 1155 UNTS 331.

[10] Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1986 ICJ REP. 14, para. 195 (June 27) [hereinafter *Military and Paramilitary Activities*].

https://doi.org/10.5305/amerjintelaw.107.3.0570 Published online by Cambridge University Press

alleged act of self-defense is exercised.[11] The ICJ was much more explicit on this issue in *Armed Activities on the Territory of the Congo*.[12] Assessing the arguments of self-defense advanced by Uganda for its actions in the Democratic Republic of Congo (DRC), the Court determined that there was "no satisfactory proof of the involvement in [the attacks by the Allied Democratic Forces], direct or indirect, of the Government of the DRC," noting that these attacks were not sent by or on behalf of the DRC.[13] As such, the ICJ concluded that the attacks were not attributable to the DRC and thus could not justify a claim of self-defense.[14]

Given the very clear line of reasoning by the Court that an attack by a nonstate actor without attribution to a state cannot justify the use of force against the territory of another state, any assertion that a state can exercise force in self-defense against nonstate actors, on the territory of an innocent state without the latter's consent, must be properly probed.

### *Customary International Law and Self-Defense Against Nonstate Actors*

Adherents of the view that an armed attack for purposes of self-defense includes an armed attack from nonstate actors often point to Article 51's reference to an "inherent right" of self-defense, which suggests that the right exists independent of Article 51.[15] In particular, they argue that Article 51 preserves a right already existing under customary international law and that, to determine the content of this right, recourse must be had to customary international law. In the *Military and Paramilitary Activities* case, the ICJ not only noted that Article 51 referred to an "inherent right" of self-defense but also declared that "nothing in the present Charter shall impair" such a right.[16] It went on to say that the "areas governed by the two sources of law thus do not overlap exactly, and the rules do not have the same content."[17]

The *Caroline* incident of 1837 is often referred to as authority for the view that customary international law permits the use of force against nonstate actors on the territory of one state by another without the consent of the former.[18] On the basis of an exchange of letters in 1842 between Lord Ashburton of the United Kingdom and Secretary of State Daniel Webster of the United States, it has been argued that the two powers viewed self-defense against nonstate actors on the territory of another state without the consent of the latter as permissible under international law.[19] Offering an explanation for the British attack in U.S. waters on the

[11] See *id.*, para. 155; *see also* Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 ICJ REP. 136, para. 139 (July 9) [hereinafter *Wall*].

[12] Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), 2005 ICJ REP. 168, para. 146 (Dec. 19) [hereinafter *Armed Activities*].

[13] *Id.*

[14] *Id.*

[15] *See* Paust, *supra* note 7, at 241–44; Murphy, *supra* note 7, at 65; *see also* Bethlehem, *supra* note 1, at 771. *See generally* Raphaël van Steenberghe, *Self-Defence in Response to Attacks by Non-state Actors in the Light of Recent Practice: A Step Forward?*, 23 LEIDEN J. INT'L L. 183,185 (2010).

[16] *Military and Paramilitary Activities*, *supra* note 10, para. 176.

[17] *Id.*

[18] For a description of the facts, see Paust, *supra* note 7, at 241–43. For a fuller discussion, see Abraham D. Sofaer, *On the Necessity of Pre-emption*, 14 EUR. J. INT'L L. 209, 214–20 (2003).

[19] See Paust, *supra* note 7, at 241–44; Murphy, *supra* note 7, at 65. The exchange of diplomatic notes between the United Kingdom and the United States is reprinted in 2 JOHN BASSETT MOORE, A DIGEST OF INTERNATIONAL LAW 409–13 (1906).

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*Caroline*, Ashburton wrote that there are "possible cases in the relations of nations, as of individuals, where necessity . . . may be pleaded."[20] In response, Webster noted that such necessity is "confined to cases in which the 'necessity of that self-defence is instant, overwhelming, and leaving no choice of means, and no moment for deliberation.'"[21] Neither questioned that the initial attack to which the United Kingdom had responded was committed by nonstate actors. For this reason, some commentators have concluded that customary international law accepts a state's use of force against nonstate actors on the territory of another state for acts not attributable to the territorial state.[22]

At the time of the *Caroline* incident, international law did not prohibit the use of force.[23] Even those who suggest that there were *legal* constraints on the resort to force at the time of the incident concede that, until the twentieth century, "war itself remained legal and appropriate when undertaken to defend rights in international law."[24] But the usefulness of the *Caroline* incident as a standard should be assessed in the context of the developments of international law in the twentieth and twenty-first centuries. That international law did not prohibit the use of force at the time of the *Caroline* incident means that justification for the use of force, in particular on the grounds of self-defense, was often advanced for "political expediency" and "to secure the moral high ground," rather than to provide a shield against legal wrongfulness.[25] This perspective seems to be borne out by Ashburton's statement that it should not be lightly assumed that the United Kingdom would "provoke a great and powerful neighbor."[26] Ian Brownlie makes the following important observation: "The formula used by Webster has proved valuable as a careful formulation of anticipatory self-defence but the correspondence made *no difference to the legal doctrine, such as it was, of the time.*"[27]

Brownlie also notes that "[t]he reference to the period of 1838 to 1842 [following the *Caroline* incident] as the critical date for the customary international law said to lie behind the United Nations Charter, drafted in 1945, is anachronistic and indefensible."[28] Moreover, even if the Ashburton-Webster exchange did reflect customary international law in 1842, customary international law continually evolves. It is better to look to post-Charter state practice when interpreting Article 51, rather than attempting to fashion a competing vision of the right of self-defense, whether based on events in 1837 or more recent events.

### *Interpreting Article 51*

Whether self-defense against nonstate actors on the territory of an innocent state without the latter's consent is permissible in international law ultimately depends on a good-faith interpretation of the words in Article 51, in their context and in light of the object and purpose of

[20] 2 MOORE, *supra* note 19, at 411.

[21] *Id.* at 412.

[22] *See, e.g.*, Paust, *supra* note 7, at 241–44; Murphy, *supra* note 7, at 65.

[23] *See generally* IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 697 (6th ed. 2003); DUGARD, *supra* note 7, at 501; PHILIPPE SANDS, LAWLESS WORLD: AMERICA AND THE MAKING AND BREAKING OF GLOBAL RULES—FROM FDR'S ATLANTIC CHARTER TO GEORGE W. BUSH'S ILLEGAL WAR 176 (2005).

[24] MARK W. JANIS, AN INTRODUCTION TO INTERNATIONAL LAW 172 (3d ed. 1999).

[25] DUGARD, *supra* note 7, at 501.

[26] 2 MOORE, *supra* note 19, at 412.

[27] BROWNLIE, *supra* note 23, at 701 (emphasis added).

[28] *Id.*

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the Charter.[29] Any interpretation of Article 51 must take into account that self-defense is an *exception* to a general rule, namely the prohibition on the use of force against the territorial integrity of another state. Its parameters should be strictly construed and should not have the effect of overwhelming the general rule, namely the prohibition on the use of force.[30] Also, the right of self-defense must be construed in the context of other principles of international law, namely territorial integrity, sovereign equality of states, and the prohibition of the use of force. The use of self-defense against nonstate actors on the territory of an *innocent* state without the latter's consent would violate each and every one of these foundational principles of international law. Primarily for this reason, an "armed attack" considered under Article 51 should be seen as an armed attack by a state or at least attributable to the state in the manner suggested by the ICJ.[31] Real-world practice is only an aid to interpretation and should not be regarded as determinative of the content of Article 51.[32] Nonetheless, practice is important for interpretation and, of course, for the analysis of customary international law.

Some argue that recent state practice supports the view that the use of force against nonstate actors on the territory of an innocent state without the consent of such a state is permissible under international law on self-defense.[33] Space does not permit an assessment of all the examples of state practice since 1945 that have been adduced to support this proposition. I therefore limit myself to two distinct, but related, examples of practice that have been presented most frequently in support of this argument. The first is the U.S. invasion of Afghanistan following the September 2001 attacks that were carried out not by Afghanistan but, rather, by Al Qaeda, a nonstate entity.[34] It is claimed that the decision of the United States to use force in self-defense in Afghanistan after an attack by Al Qaeda and the lack of any significant objection from other states suggest the permissibility under international law of the use of force in self-defense against nonstate actors on the territory of another state. The second example, directly linked to the first, relates to UN Security Council Resolutions 1368 and 1373[35] adopted in response to the 2001 attacks and, it is argued, recognizes the right of a state to take measures in self-defense against nonstate actors on the territory of another state.[36]

An important consideration is that the U.S. invasion of Afghanistan in the aftermath of 9/11 was not widely questioned.[37] Given the horrific nature of the attacks on 9/11 and the solidarity that many pledged to the United States, few were willing to openly criticize any U.S. action

[29] Vienna Convention, *supra* note 9, Art. 31(1).

[30] PETER MALANCZUK, AKEHURST'S MODERN INTRODUCTION TO INTERNATIONAL LAW 312 (7th rev. ed. 1997).

[31] See *Military and Paramilitary Activities*, *supra* note 10, para. 195; *Wall*, *supra* note 11, para. 139; *Armed Activities*, *supra* note 12, para. 146; *cf.* Murphy, *supra* note 7, at 64; Paust, *supra* note 7, at 241; DUGARD, *supra* note 7, at 512.

[32] Vienna Convention, *supra* note 9, Art. 31(3)(b) (noting that, for treaty interpretation, subsequent practice "shall be taken into account"); *see also* International Law Commission, Provisional Summary Record of the 3172nd Meeting: Subsequent Agreements and Subsequent Practice in Relation to the Interpretation of Treaties, at 3, Draft Conclusion 1, para. 3, UN Doc. A/CN.4/SR.3172 ( June 25, 2013) (report of the drafting committee stating that for treaty interpretation "there shall be taken into account, together with the context, . . . any subsequent practice").

[33] Paust, *supra* note 7, at 238; Murphy, *supra* note 7, at 67; van Steenberghe, *supra* note 15, at 194.

[34] *See* Paust, *supra* note 7, at 248–49; Murphy, *supra* note 7, at 67.

[35] SC Res.1368 (Sept. 12, 2001); SC Res. 1373 (Sept. 28, 2001).

[36] Paust, *supra* note 7, at 248–49; Murphy, *supra* note 7, at 67.

[37] See Paust, *supra* note 7, at 249; Murphy, *supra* note 7, at 67.

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in response, and many were content to give the United States some leeway.[38] In other words, 9/11 and the responses thereto *may be* exceptional. It is, moreover, inaccurate to present the U.S. attack on Afghanistan, irrespective of its legality, as an illustration of the use of force in self-defense against nonstate actors. The U.S. attacks on Afghanistan were not attacks on Al Qaeda, but attacks on Afghanistan. That the United States was attacking Afghanistan and not differentiating between the Taliban government and Al Qaeda is clear from President George W. Bush's speeches immediately following the attacks and announcing the war in Afghanistan. He said that the United States "will make no distinction between the terrorists who committed these acts and those who harbor them,"[39] that by "aiding and abetting murder, the Taliban regime is committing murder,"[40] and that the "Taliban must act and act immediately [and] . . . hand over the terrorists, or they will share in their fate."[41]

Thus, the war in Afghanistan cannot be advanced for the proposition that a state can use force *against nonstate actors* on the territory of another state without the latter's consent. The basis for U.S. action in Afghanistan seems to be some kind of attribution of blameworthiness on the government of the state on which the use of force was to be carried out. Whether or not the international law standard for attribution is met is a different question and not at issue here, but that the rationale advanced was some kind of attribution is a fact not to be taken lightly.

Nothing in Security Council Resolutions 1368 and 1373 supports the proposition that a state may use force in self-defense against nonstate actors on the territory of an otherwise blameless state without that state's consent. Yet, admittedly, both resolutions include a preambular paragraph recognizing the "inherent right of individual or collective self-defence,"[42] and Sean Murphy correctly states that "[n]o language in these resolutions indicates that the Security Council believes that terrorist acts must first be imputed to a state so as to trigger the right of self-defense under Article 51."[43] However, no language in either resolution suggests that the use of force on the territory of an innocent state is permissible under Article 51 without the consent of that state. The resolutions condemn the terrorist attacks and reaffirm the right of self-defense but say nothing more relevant to an innocent state.

### *Conclusion*

While Bethlehem asserts that his principles, including principle 12, are "not intended to be enabling of the use of force" and are meant to "work with the grain of the UN Charter," the effect of principle 12 is precisely to be "enabling of the use of force" beyond what the Charter

[38] David Ray Griffin, *Did 9/11 Justify the War in Afghanistan? Using the McChrystal Moment to Raise a Forbidden Question*, FOREIGN POL'Y J., June 25, 2010, *at* www.foreignpolicyjournal.com/2010/06/25/did-911-justify-the-war-in-afghanistan (noting that the question of the legality of the war in Afghanistan "has . . . been considered off-limits, not to be raised in polite company").

[39] George W. Bush, Address After Terrorist Attacks (Sept. 11, 2001), *available at* http://archives.cnn.com/2001/US/09/11/bush.speech.text/index.html.

[40] George W. Bush, Speech to Joint Session of Congress: War on Terror (Sept. 20, 2001), *available at* http://middleeast.about.com/od/usmideastpolicy/a/bush-war-on-terror-speech.htm.

[41] *Id.*

[42] SC Res. 1368, *supra* note 35; SC Res. 1373, *supra* note 35.

[43] Murphy, *supra* note 7, at 67.

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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.

* Member, International Law Commission.

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