

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.¹ 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 principles¹ 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."² 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 disparities³—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,"⁴ 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"⁵ How excluded weaker

¹ 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).

* Of the Board of Editors.

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

² *Id.* at 773.

³ "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.

⁴ *Id.* at 770.

⁵ *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.