EXTRATERRITORIAL USE OF FORCE AGAINST NON-STATE ACTORS BY
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In 2011, the liquidation of Osama bin Laden, the confirmation of the
President of the United States’ authority to detain non-state belligerents until the
end of the war on terror,1 and the unabated use of targeted killings by US and
Israeli forces outside US and Israeli territory demonstrated the continued
topicality of Noam Lubell’s study of the extraterritorial use of force against
non-state actors. At the same time, the continued controversy over the legality of
these anti-terrorist measures shows that an international consensus on the legal
limits of the war on terror remains elusive. Undoubtedly, in order to stand a
chance of success, legal frameworks must be pragmatic — that is, must pay
sufficient attention to states’ desire to uproot the terrorist threat, while paying
due regard to humanitarian considerations. It is exactly such a framework that is
developed by Lubell, and policy-makers and military planners may do well to
draw on it.

While Lubell’s book is very topical indeed, states’ use of force against
non-state armed groups and individuals located outside their borders is not an
entirely new phenomenon. After all, the seminal case of self-defence in
international law, the 1837 Caroline Case, involved the use of force by Canadian
troops against (non-state) rebels on US soil.2 Also, since the late 1960s Israeli
forces have not shied away from carrying out targeted killings against (non-state)
Palestinian militants.3 But it was only after the September 11 attacks, and the
start of US military action against al-Qaeda, that the permissibility of using
extraterritorial force against non-state actors rose to prominence.4

Such action raises a host of — at times interrelated — issues: the
encroachment of another state’s territorial sovereignty through a liberal
interpretation of the right to self-defence, the difficulty of characterising
terrorists as combatants or civilians, and the question whether armed activists
operating abroad fall within the jurisdiction of states for purposes of applying
human rights to them. Therefore, Lubell has approached his topic in a holistic
way, examining the challenges to three branches of international law: the legal
framework regulating the use of force (jus ad bellum), international humanitarian

§ 1034, confirming that ‘(4) the President’s authority pursuant to the Authorization for Use
of Military Force includes the authority to detain belligerents, including persons described in
paragraph (3), until the termination of hostilities’. Those persons are
persons who — (A) are part of, or are substantially supporting, al-Qaeda, the Taliban,
or associated forces that are engaged in hostilities against the United States or its
coalition partners; or (B) have engaged in hostilities or have directly supported
hostilities in aid of a nation, organization, or person described in subparagraph (A).

2 The relevant diplomatic materials concerning the Caroline Case are available on the website
of Yale Law School’s Avalon Project: The Avalon Project, British-American Diplomacy:
<http://avalon.law.yale.edu/19th_century/brit-1842d.asp>.

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4 Noam Lubell, Extraterritorial Use of Force against Non-State Actors (Oxford University
law (‘IHL’), and international human rights law. These challenges can be, and have been, addressed ut singuli in different recent monographs. But as those publications do not specifically focus on non-state armed groups, their activities and states’ responses thereto may not receive the attention due to them. On the other hand, Lubell has to introduce, in a rather slim volume, a number of general concepts, such as the contours of self-defence and the extraterritorial application of human rights treaties. His monograph thus tackles questions that are not necessarily only germane to armed non-state actors (for example, the lawfulness of anticipatory self-defence or the reach \textit{ratione loci} of international human rights treaties), and that have in fact been discussed in more detail and perhaps with more sophistication elsewhere. Conversely, when a question is germane to non-state actors, such as the notion of civilians’ direct participation in hostilities, the other focus of the book — extraterritoriality — somewhat disappears from view in Lubell’s discussion. Lubell is not entirely to blame for this, however, as extraterritoriality is part and parcel of the nature of IHL and is accordingly not controversial; indeed, IHL could hardly serve a regulatory function if it could not be applied to the armed activities of states outside their borders.

The most striking aspect of Lubell’s book is perhaps his reluctance to plead in favour of an overhaul of the law as far as projecting extraterritorial force against non-state actors is concerned. Nowhere is this clearer than in his discussion of the applicability of IHL to such situations: ‘the existing legal categories may well be able to withstand and encompass a host of new factual circumstances without the need for new laws’. Lubell indeed argues rather convincingly that there is no need for a third category of armed conflicts, as military force used against non-state actors outside a state’s borders can normally be qualified as taking place in a non-international armed conflict — to which the pertinent IHL rules can then be applied — provided of course that the threshold of violence has been reached. By the same token, he argues that the problem of qualifying armed non-state ‘terrorist’ actors as either civilians or combatants is part of the larger discussion of how to define direct participation in hostilities, a discussion to which the International Committee of the Red Cross (‘ICRC’) has contributed greatly in its study on the subject.

While Lubell disfavours an overhaul of the law, he admits that some clarification of the law may be in order, for example, to determine in what situations non-state actors may lawfully be targeted, or may fall within the jurisdiction of the state using force. However, his proposals, while intelligent, are tentative and hardly concrete. He criticises the ICRC’s apparent creation of a third category of persons relevant to IHL — individuals losing protection as

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6 See the references ibid.

7 Lubell, above n 4, 126.


9 Lubell, above n 4, 126.
civilians as a result of a continuous combat function — but his suggestion not to depart from the classic distinction between civilians and combatants does not necessarily provide much clarification as to who exactly is a civilian or a combatant in contemporary asymmetrical armed conflicts where civilians and combatants mingle and change roles continuously. Similarly, the common sense submission that the appropriate test for the application of international human rights law (treaties) on an extraterritorial basis to non-state actors is ‘the exercise of authority or control over the individual in such a way that the individual’s rights are in the hands of the state’,\textsuperscript{10} does not clarify in what precise circumstances an individual falls within the state’s jurisdiction. That being said, one should be cautious in taking the author to task in this respect: given the great variety of situations in which civilians contribute, in one way or another, to armed conflicts, and the various points of contact between foreign states and individuals in the interventionist world in which we currently live, concrete future case scenarios cannot be predicted in detail, and only general principles will work.

On these general principles, Lubell mostly has it right. His plea for a ‘control over individuals’-based test for determining the (extraterritorial) application of human rights law, the so-called ‘personal model’,\textsuperscript{11} is logical in that any other solution (notably the ‘spatial model’ which emphasises a state’s control over territory\textsuperscript{12}) might give a license to states to carry out activities outside their borders which they would not be allowed to perform in their own territory. This position has now been vindicated, at least in part, by the 2011 decision of the European Court of Human Rights in the \textit{Al-Skeini v United Kingdom},\textsuperscript{13} a case postdating the publication of Lubell’s book:

In addition, the Court’s case-law demonstrates that, in certain circumstances, the use of force by a State’s agents operating outside its territory may bring the individual thereby brought under the control of the State’s authorities into the State’s Article 1 jurisdiction. This principle has been applied where an individual is taken into the custody of State agents abroad [citing \textit{Öcalan}, \textit{Issa}, \textit{Al-Saadoon} and \textit{Medvedyev}]. … The Court does not consider that jurisdiction in the above cases arose solely from the control exercised by the Contracting State over the buildings, aircraft or ship in which the individuals were held. What is decisive in such cases is the exercise of physical power and control over the person in question.\textsuperscript{15}

One could assume that the prima facie rather liberal \textit{Al-Skeini} principle brings the non-state actors discussed in Lubell’s study, in particular the victims of targeted killings, within the operating state’s human rights jurisdiction. At closer inspection, this need not be so. After all, in \textit{Al-Skeini}, the Court applied the personal model of jurisdiction only on an exceptional basis because the United

\textsuperscript{10} Ibid 223.
\textsuperscript{11} Ibid.
\textsuperscript{13} \textit{Al-Skeini v United Kingdom} (2011) 53 EHRR 18.
\textsuperscript{14} \textit{Öcalan v Turkey} [2005] IV Eur Court HR 131; \textit{Issa v Turkey} (2005) 41 EHRR 567; \textit{Al-Saadoon v United Kingdom} (2009) 49 EHRR 93; \textit{Medvedyev v France} (2010) 51 EHRR 899.
\textsuperscript{15} \textit{Al-Skeini v United Kingdom} (2011) 53 EHRR 18, [136] (citations omitted).
Kingdom exercised public powers in Iraq. The Court did not further define the concept of ‘public powers’, but it is not far-fetched to argue that the capacity to kill from the air — a typical method to liquidate non-state actors in the war on terror — does not necessarily involve the exercise of public powers. Therefore, as Marko Milanovic has also pointed out, the Court’s reasoning may exclude targeted killings perpetrated by outside forces (the US in particular) in Yemen or Pakistan from the scope of human rights treaties, be it the European Convention on Human Rights or the International Covenant on Civil and Political Rights (‘ICCPR’). This is an outcome that Lubell is bound to regret, although, admittedly, the vague notion of public powers leaves room for progressive interpretations.

Let us now turn to what is possibly Lubell’s most controversial stated principle, developed in the first part of the book on the *jus ad bellum*: states should, as a general matter, be allowed to use force extraterritorially, in self-defence under the *jus ad bellum*, against non-state actors who have attacked them, provided that the attack crossed the threshold of armed attack (measured by its scale and effects), and that the territorial state proves unwilling or unable to end the attacks taking place from its soil (in the absence of which the customary law criterion of necessity would not be met). This statement

16 Ibid [149].
20 Lubell, above n 4, 81. This is assuming that the acts of the non-state actor cannot be attributed to the territorial state under the accepted rules of state responsibility as laid down in: International Law Commission, Report of the International Law Commission on the Work of Its Fifty-Third Session, UN GAOR, 56th sess, Supp No 10, UN Doc A/56/10 (2001) ch IV(E) arts 5–11 (‘Draft Articles on Responsibility of States for Internationally Wrongful Acts’). As such, the failure of the territorial state does not result in attribution of internationally wrongful acts committed by non-state actors to that state. Nevertheless, it has been submitted that acts of non-state actors could be attributed to failed States under art 9 of Draft Articles on Responsibility of States for Internationally Wrongful Acts, pursuant to which

[...] the conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact exercising elements of the governmental authority in the absence or default of the official authorities and in circumstances such as to call for the exercise of those elements of authority.
constitutes a marked departure from the case law of the International Court of Justice, which in its Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion) ruled out the use of self-defence against non-state actors.\textsuperscript{21} Lubell submits that ‘[t]here is in fact plentiful evidence to provide solid support for the contention that non-state actors can be responsible for armed attacks which give rise to self-defence’.\textsuperscript{22} However, he goes on to cite only the 1837 Caroline Case, the 2001 US action against al-Qaeda in Afghanistan, and the brief military operation by Israel against Hezbollah in Lebanon in 2006.\textsuperscript{23} True, a substantial number of other commentators also support the use of self-defence against non-state actors,\textsuperscript{24} but their opinions are not a formal source of law. One may be hard-pressed to consider the few cases of state practice mentioned to constitute ‘virtually uniform’ and ‘extensive’ practice, that is, the necessary material element for the formation of norms of customary international law.\textsuperscript{25}

Lubell is not alone, though. Michael Byers already warned as early as 2002 — that is, before the invasion of Iraq — in the context of the law on the use of force, including the lawfulness of self-defence, that physical acts of states, as compared to statements (such as statements of protest), seem to be accorded more weight than before and that the practice of the powerful may count more than the practice of the weak.\textsuperscript{26} The extended right of self-defence against non-state actors may then be seen as a vindication of the hegemony of militarily powerful states such as the US and Israel. It remains no less true, however, that the exercise of such self-defence has not met with much opposition from other states. It is not so much the case that verbal practice has lost its weight, but rather that there is hardly any verbal practice that counters powerful states’ physical practice — thereby seemingly validating the latter practice. Moreover, recent practice shows that the right of self-defence is also exercised by states that are

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  \item See Tom Ruys, ‘Crossing the Thin Blue Line: An Inquiry into Israel’s Recourse to Self-Defence against Hezbollah’ (2007) \textit{43 Stanford Journal of International Law} 265, 285–90, making the case that art 9 could be applied in the context of the Israeli operation against Hezbollah on Lebanese soil in 2006, on the ground that Hezbollah exercised a range of functions traditionally exercised by the government in southern Lebanon. Ruys did so with a view to attributing a presumed armed attack by Hezbollah against Israel on 12 July 2006 to Lebanon — which would in turn have authorised Israel to exercise its inherent right to self-defence against Lebanon (rather than to Hezbollah). There is, however, a dearth of international case law applying the ground of attribution enunciated in art 9. The International Law Commission failed to come up with any relevant examples in its commentaries, and no other commentators seem to have relied on the article to justify the exercise of self-defence against non-state actors. Moreover, it is arguable that the exercise of self-defence against non-state actors should be governed by primary rules of international law rather than the secondary rules of responsibility as laid down in the \textit{Draft Articles on Responsibility of States for Internationally Wrongful Acts}.\textsuperscript{21}
  \item \textsuperscript{21} [2004] ICJ Rep 136, 194 [139], 195 [142].
  \item Lubell, above n 4, 31.
  \item \textsuperscript{22} Ibid 29–30, 36.
  \item \textsuperscript{23} Ibid 35, n 49.
\end{itemize}
not a major global power, such as Colombia (in Ecuador), Kenya (in Somalia), or Turkey (in Iraqi Kurdistan).

While there are good reasons to support a right of self-defence against non-state actors in certain circumstances, such a right, or at least its modalities of application, will remain controversial. Even if one accepts that states can, in principle, use extraterritorial force against non-state actors, the actual exercise of such force will depend on a determination that those actors really perpetrated an ‘armed attack’ and that the territorial state was unable or unwilling to tackle the security threat. In light of these criteria, the lawfulness of Kenya’s military action against al-Shabaab militants in southern Somalia (late 2011) may be in serious doubt. While Somalia may be the failed state par excellence, and Kenya’s action may thus satisfy the ‘able and willing’ test, it is questionable whether the militants’ kidnappings of a relatively limited number of people inside Kenya rise to the level of an armed attack triggering the right to self-defence, and whether the strong Kenyan presence in southern Somalia meets the requirement of proportionality. Nonetheless, there was little, if any, criticism of Kenya’s action. This leaves one to wonder whether the criteria have now been somewhat modified and relaxed: is it arguable that the criteria of ‘armed attack’ and ‘ability and willingness’ need not be independent of each other? Could one criterion compensate for the other — for example, can a strong showing of the failed character of a state (clear lack of ability and willingness to act against armed militants, such as in Somalia) lower the threshold for an armed attack? All in all, Lubell shows himself to be a pragmatist who wants to do justice to the interests of states under terrorist threat, to (weaker) states on whose territory armed non-state actors are active, as well as to the non-state actors’ rights under human rights and humanitarian law. It goes to his credit that he does so while keeping within the confines of positive international law, thus not confusing law and policy, and clearly separating the lex lata from a desirable or more appropriate lex ferenda. When he advocates that in some situations, even of armed conflict, an attempt to detain should be made before lethal force can be

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28 Kenya and Somalia even issued a Joint Communiqué on 18 October 2011, in the context of Kenya’s invoking its right of self-defence, which came close to recognising that Somalia was a failed State while at the same time emphasising joint and coordinated action and reaffirming the territorial sovereignty of both countries: Moses M Wetang’ula and H E Hussein Arab Iisse, ‘Joint Communiqué Issued at the Conclusion of a Meeting between the Government of Kenya and the Transitional Federal Government of Somalia’ (Joint Communiqué, 18 October 2011) <http://graphics8.nytimes.com/packages/pdf/world/joint-communique-kenya-somalia.pdf>.


this particular case might serve as an example that the gravity of cross-border non-state violence is only one among many factors that need to be addressed when assessing the necessity of the use of force in self-defence. In this particular case the inability of the TFG [Transitional Federal Government] to prevent Al-Shabaab from crossing into the Kenyan territory certainly played a big role in Kenyan decision to invade Somalia.
used — thereby following the argument made by the ICRC as regards direct participation in hostilities — he points out clearly that he does so as a matter of policy. Indeed, targeted killings of non-state fighters are presumptively lawful under IHL, even if those fighters are travelling on a lone road in a desert. From a protective and humane point of view, however, states may be well-advised to at least make an attempt to detain these fighters — who are in fact civilians who lost their civilian status by directly taking part in hostilities — if the circumstances allow them to do so. Such a solution reinforces the role of human rights and the criminal, law enforcement approach to the fight against terrorism; indeed, under human rights law, ‘shoot to kill’ is only allowed under very exceptional circumstances.

Whether US forces were well-advised to detain rather than liquidate Osama bin Laden in the Abbottabad raid of 1 May 2011 is another question. Admittedly, there is little doubt that Osama bin Laden was the leader of al-Qaeda, so that — unlike in many other situations — the target was clearly associated with a terrorist group. But, as Lubell held, ‘it is hard to conclude that [al-Qaeda] currently possesses the characteristics of a party to a conflict’. If there are no identifiable parties to a conflict, it cannot normally constitute an armed conflict in the meaning of Common Article 3 of the 1949 Geneva Conventions or Additional Protocol II to the Geneva Conventions. If there is no armed conflict, IHL does not apply and force cannot normally be used against bin Laden, unless such force complies with the requirements of international human rights law. Under the personal model of human rights jurisdiction, as favored by Lubell (but not necessarily by the European Court of Human Rights, as argued above), bin Laden may well have fallen within US jurisdiction for the purpose of the application of the ICCPR. From a substantive point of view then, the lethal force used may well have been justified as an exceptional but necessary and proportionate response, assuming that bin Laden resisted his arrest — although caution is warranted given the opaque circumstances of the liquidation. As far as the possible violation of the territorial state (Pakistan’s) sovereignty, and the jus ad bellum, which the US operation against bin Laden could give rise to, it remains unclear whether or not Pakistan had actually consented to the operation (assuming that Pakistan may have been able and willing to act against bin Laden).

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30 Lubell, above n 4, 245.
31 Ibid.
32 See, eg, McCann v United Kingdom (1996) 21 EHRR 97, [199]–[200].
33 Lubell, above n 4, 118.
35 Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, opened for signature 8 June 1977, 1125 UNTS 609 (entered into force 7 December 1978) (‘Additional Protocol II’).
Laden). Such a scenario was already contemplated by Lubell, who pointed to ‘a difference between public condemnation of the attacks, which may be necessary for internal political reasons, and the simultaneous approval given behind closed doors’.\textsuperscript{37} One can only concur with his conclusion that ‘[i]dentifying the consent presents a primarily factual difficulty rather than a legal one’.\textsuperscript{38}

Concluding, Noam Lubell’s Extraterritorial Use of Force against Non-State Actors is a fine and timely book that tackles one of the main contemporary challenges facing international security law: the rise of, and threat posed by, non-state actors. Given its cross-cutting perspective, this book is highly recommended reading for students of the regulation of the use of force, IHL, and international human rights law alike. Military planners and human rights activists might perhaps be surprised to find out that international law makes allowance for extraterritorial targeted killings of armed non-state actors, albeit only in carefully defined circumstances. However, at a deeper level, one can hardly be surprised, as international law is largely the emanation of states’ regulatory preferences. Non-state actors are typically at the receiving end of international regulation, and sometimes with lethal consequences.

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\textsuperscript{37} Lubell, above n 4, 257.
\textsuperscript{38} Ibid.

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