

REVIEW ESSAY

HUMAN RIGHTS AND PERSONAL SELF-DEFENSE IN INTERNATIONAL LAW BY JAN ARNO HESSBRUEGGE (OXFORD UNIVERSITY PRESS, 2017) 400 PAGES, PRICE GBP 64.00 (HARDCOVER) ISBN 9780190655020.

I BACKGROUND

While the ‘natural right’ of state self-defence in international law, as recognised by art 51 of the *Charter of the United Nations* (‘*UN Charter*’) and as part of *jus ad/contra bellum*, has been the subject of much legal debate,¹ *personal* self-defence, ie self-defence exercised by individuals, and its regulation under international law remains to a large extent underexplored in international legal scholarship. The book by Jan Arno Hessbruegge on *Human Rights and Personal Self-Defense in International Law* published by Oxford University Press in 2017 fills this important gap in the literature.²

Personal self-defence is increasingly used and misused in order to justify the use of force — including deadly force — to ward off allegedly unlawful attacks in peacetime and wartime alike. It is invoked by various actors in diverse contexts. Law enforcement officials commonly claim self-defence in order to justify the killing of alleged criminals;³ and the state they represent may equally refer to self-defence on the international plane to justify such restrictions to the right to life under human rights law.⁴ Military personnel (and the state they represent) equally rely on self-defence (in its various dimensions, in particular personal and unit self-defence or defence of others) in order to justify the use of force in armed conflict situations, despite the applicability of international humanitarian law that has been conceived to regulate the conduct of hostilities

¹ See, eg, Yoram Dinstein, *War, Aggression and Self-Defence* (Cambridge University Press, 5th ed, 2011); Elizabeth Wilmshurst, ‘Principles of International Law on the Use of Force by States in Self-Defence’ (Working Paper, Chatham House, October 2005); David Kretzmer, ‘The Inherent Right to Self-Defence and Proportionality in *Jus ad Bellum*’ (2013) 24 *European Journal of International Law* 235; Johanna Friman, *Revisiting the Concept of Defence in the Jus Ad Bellum: The Dual Face of Defence* (Hart, 2017); Jens David Ohlin, ‘The Doctrine of Legitimate Defence’ (2015) 91 *International Law Studies* 119.

² Jan Arno Hessbruegge, *Human Rights and Personal Self-Defense in International Law* (Oxford University Press, 2017).

³ See, eg, the controversial decision of a grand jury in St Louis, Missouri, not to indict a white police officer, Darren Wilson, for having shot dead Michael Brown, an unarmed black man on the basis of a self-defence plea. See Jeremy Kohler, ‘Statement of St Louis Prosecuting Attorney Robert P McCulloch’, *St Louis Post-Dispatch* (online), 24 November 2014 <http://www.stltoday.com/news/local/crime-and-courts/statement-of-st-louis-prosecuting-attorney-robert-p-mcculloch/article_2becfef3-9b4b-5e1e-9043-f586f389ef91.html>, archived at <<https://perma.cc/DR8B-S64E>>. See also Hessbruegge, above n 2, 91.

⁴ See *Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 20 March 1952, 213 UNTS 222 (entered into force 3 September 1953), as amended by *Protocol No 14bis to the Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 27 May 2009, CETS No 204 (entered into force 1 September 2009) art 2(2)(a); Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, *Basic Principles on the Use of Force and Firearms by Law Enforcement Officials* (27 August – 7 September 1990) Principle 9.

between belligerent parties.⁵ In some instances, such self-defence claims are perfectly sound and consonant with international law. This is the case especially when service members have to justify the use of force against violent civilians whose acts did not amount to direct participation in hostilities.⁶ For instance, when threatened by an unknown individual who must be presumed to be a civilian, a soldier may justify his or her use of force based on self-defence. In other cases, reliance on fuzzy concepts of self-defence, such as ‘naked self-defence’,⁷ which would allegedly authorise *and* regulate the use of force against, for instance, lone wolf terrorists outside armed conflict situations is much more problematic and tends to conflate personal and inter-state self-defence.

Personal self-defence, which can be considered as a general principle of law,⁸ given its virtually universal recognition in domestic criminal laws, is also very much claimed by private persons at the domestic level. In certain domestic legal systems, self-defence may justify killing to defend property.⁹ Preemptive self-

⁵ See, eg, *Jaloud v Netherlands* (European Court of Human Rights, Grand Chamber, Application No 47708/08, 20 November 2014) §40. States also often invoke personal/unit self-defence in the context of armed conflicts. For instance, on 20 June 2017, the US shot down an Iranian armed drone in Syria as it approached a US outpost near the border of Syria. Pentagon spokesman Captain Jeff Davis justified this use of force by referring to the concept of ‘hostile intent’ that is related to unit/individual self-defence in US military doctrine: see Julian Borger, ‘US Shoots Down Second Iran-Made Armed Drone over Syria in 12 Days’, *The Guardian* (online), 20 June 2017 <<https://www.theguardian.com/us-news/2017/jun/20/us-iran-drone-shot-down-syria>>, archived at <<https://perma.cc/W4LB-9NVH>>. For a legal analysis, see, Erica Gaston, ‘Soldier Self-Defence and the Strikes in Syria’ on *Lawfare* (22 June 2017) <<https://www.lawfareblog.com/soldier-self-defense-and-strikes-syria>>, archived at <<https://perma.cc/AK9J-XLM8>>. On 3 October 2015, the erroneous US airstrike against the Hospital of Médecins Sans Frontières in Kabul, Afghanistan, that killed 42 civilians were called in by Special Forces based on self-defence for US and partner (ie Afghan) forces. See Matthieu Aikins, ‘Doctors With Enemies: Did Afghan Forces Target the M.S.F. Hospital?’, *New York Times Magazine* (17 May 2016) <<https://www.nytimes.com/2016/05/22/magazine/doctors-with-enemies-did-afghan-forces-target-the-msf-hospital.html>>, archived at <<https://perma.cc/2VE9-2XTN>>. See also John F Campbell, ‘Investigation Report of the Airstrike on the Médecins Sans Frontières / Doctors Without Borders Trauma Center in Kunduz, Afghanistan on 3 October 2015’ (Report, US Forces Afghanistan, 21 November 2015) 15. Israel has also often resorted to self-defence claims to justify the use of force in Gaza. See, eg, James Marc Leas, ‘Deconstructing Israel’s “Self-Defence” Claim and Its Campaign against the ICC’, *Truthout* (online), 14 December 2015 <<http://www.truth-out.org/news/item/34030-deconstructing-israel-s-self-defence-claim-and-its-campaign-against-the-icc>>, archived at <<https://perma.cc/4R3K-CQWA>>. Erica Gaston is about to publish an empirical study of how four North Atlantic Treaty Organization (‘NATO’) member countries — France, Germany, the United Kingdom and the US — applied principles of individual or unit self-defence and hostile intent in Afghanistan.

⁶ Hessbruegge, above n 2, 233. See also Gloria Gaggioli, ‘The Use of Force in Armed Conflicts: Conduct of Hostilities, Law Enforcement and Self-Defence’ in Michael Schmitt, Christopher Ford and Winston Williams (eds), *Complex Battlespaces: The Law of Armed Conflict and the Dynamics of Modern Warfare* (Oxford University Press, forthcoming).

⁷ Kenneth Anderson, ‘Targeted Killing and Drone Warfare: How We Came to Debate Whether There Is a “Legal Geography of War”’ (WCL Research Paper No 2011–16, American University, 2011) 7 <<http://ssrn.com/abstract=1824783>>. For a criticism of this concept, see Geoffrey S Corn, ‘Self-Defence Targeting: Blurring the Line between the *Jus Ad Bellum* and the *Ius in Bello*’, in Kenneth Watkin and Andrew J Norris (eds), *Non-International Armed Conflict in the Twenty-First Century* (Naval War College, 2012) 53.

⁸ Hessbruegge, above n 2, ch 2 and references therein. See also Nils Melzer and Gloria Gaggioli, ‘Conceptual Distinction and Overlaps Between Law Enforcement and the Conduct of Hostilities’ in Terry D Gill and Dieter Fleck (eds), *The Handbook of the International Law of Military Operations* (Oxford University Press, 2nd ed, 2015) 87.

⁹ Hessbruegge, above n 2, 255–8, 264–8 and references therein.

defence has sometimes been claimed (and accepted) in contexts of domestic violence in order to justify the killing of the abuser at a moment when he/she was not posing any threat to life or limb.¹⁰ Even so-called ‘honour crimes’ (eg killing of a spouse who commits adultery) have been justified based on self-defence.¹¹ Proponents of a general right to possess firearms and other means of self-defence base their argument on an alleged ‘human right’ of self-defence.¹² Burgeoning private military and security companies, which usually cannot exercise law enforcement power, mainly rely on self-defence to justify their use of force to defend property or persons.¹³ Self-defence, in its collective dimension, has even been invoked by armed groups to justify a right to resist, at the collective level, against states, especially when the latter violate the right to self-determination and human rights law more broadly.¹⁴ Are such issues regulated only at the domestic level or does international law have a say in regulating personal self-defence between private persons?

Hessbruegge provides an affirmative answer to the latter question. In his view, personal self-defence is not a human right *per se* but it is nevertheless an inherent, *sui generis*, right that can be invoked by anyone — state representatives and non-state actors, including private individuals — in the strict limits set forth by international human rights law.¹⁵ The book by Hessbruegge is essentially devoted to the ‘interaction’ between personal self-defence and international human rights law.¹⁶ It can thus be classified as a human rights law work. Nevertheless, issues pertaining to general international law that are relevant to personal self-defence, and resorting from *jus ad/contra bellum*, international criminal law and international humanitarian law are also taken into account and mainstreamed throughout the book. This cross-disciplinary, non-fragmented approach is laudable and probably explains the title of the book, which might at first sight seem slightly redundant. Reliance on domestic case law also beautifully complements and enlighten the author’s analysis.

The work, a doctoral dissertation turned into a book,¹⁷ is also an essentially academic work, in the most noble sense of the word. Hessbruegge does not shy away from analysing the work of classical authors on self-defence or from digging into theoretical issues such as the source of personal self-defence at the international level or its nature as a right, justification or excuse. At the same

¹⁰ Ibid 247–54.

¹¹ Ibid 245–6, 290.

¹² See, eg, Christopher Schmidt, ‘An International Human Right to Keep and Bear Arms’ (2007) 15 *William & Mary Bill of Rights Journal* 983. For a discussion of these positions, see also Hessbruegge, above n 2, 76–8, 268–79.

¹³ See, eg, Lindsey Cameron and Vincent Chetail, *Privatizing War: Private Military and Security Companies under Public International Law* (Cambridge University Press, 2013); Guido Den Dekker and Eric PJ Myjer, ‘The Right to Life and Self-Defence of Private Military and Security Contractors in Armed Conflict’ in Francesco Francioni and Natalino Ronzitti (eds), *War By Contract: Human Rights, Humanitarian Law and Private Contractors* (Oxford University Press, 2011) 171. See also Hessbruegge, above n 2, 270–4.

¹⁴ Hessbruegge, above n 2, 293–9, 316–43.

¹⁵ Ibid 3.

¹⁶ Ibid.

¹⁷ The original doctoral dissertation was entitled: Jan Hessbruegge, *The Right to Personal Self-Defence as a General Principle of Law and Its General Application in International Human Rights Law* (Doctoral Thesis, European University Viadrina, 2016). His supervisor was Wolff Heintschel von Heinegg.

time, the objective of the book is also definitely geared towards influencing law, both at the international and domestic levels, and most chapters are very much practice and policy-oriented. Practitioners will especially appreciate Chapters 4 and 6 providing clear and detailed guidance respectively on defensive force by law enforcement officials and on self-defence in domestic criminal law and the limits set forth in international human rights law in these respects. This book will thus certainly interest not only law professors, researchers and students, but also states, including law enforcement agencies, diplomats, human rights courts and bodies as well as international and non-governmental organisations more broadly.

The ability to produce a book that is both academically and practically relevant is certainly due to the strong background and extensive experience of the author as a human rights practitioner and scholar. Jan Arno Hessbruegge is Human Rights Officer at the UN Office of the High Commissioner for Human Rights in New York. Previously, he was Legal Advisor in the Executive Office of the High Commissioner, with the UN Commissions of Inquiry on Human Rights in Syria and North Korea, the UN Special Rapporteur on Violence against Women and the Representative of the UN Secretary-General on Internally Displaced Persons. He served in UN peacekeeping missions in Sudan and Haiti. He holds a PhD in international law from the European University Viadrina in Frankfurt (Germany) and is Visiting Professor at the University for Peace in Costa Rica. He has written numerous scholarly works on international law and human rights.

II STRUCTURE AND CONTENT

The book is structured in eight chapters. In addition to the introductory and conclusive sections, Chapters 2 and 3 discuss key theoretical aspects in relation to the source and nature of the right to personal self-defence. Chapters 4 and 5 deal with personal self-defence by state agents in peacetime and wartime respectively. And Chapters 6 and 7 address personal self-defence by individuals and other non-state actors against other private persons and states/law enforcement officials respectively. The next few pages of the present book review provide a brief summary and discussion of each chapter.

The introductory chapter¹⁸ usefully presents a short summary of the key findings of the book. These are that the right to personal self-defence constitutes a general principle of law, which impacts on international human rights law at three levels: (1) *State-to-individual level* (top-down relationship) since personal self-defence justifies a state's infringement of the right to life in times of peace and armed conflicts; (2) *Individual-to-individual level* (horizontal relationship) because international human rights law establishes boundaries on how broadly or narrowly domestic laws on personal self-defence between private persons may be drawn. (3) *Individual-to-state level* (bottom-up dimension) because personal self-defence allows individuals and peoples to forcibly resist certain types of human rights violations committed by or on behalf of the state. Although personal self-defence is rooted in the instinct of self-preservation, it is limited by the human rights of others by means of the legal criteria of legality, immediacy,

¹⁸ Hessbruegge, above n 2, ch 1.

necessity and proportionality that are common to the three levels of personal self-defence just described. The introductory chapter also delineates the topic by distinguishing personal self-defence from other concepts of self-help (necessity, duress and retaliatory reprisals) as well as from interstate self-defence. It presents the methodology and sources and highlights in particular the focus on human rights case law and practice, while duly taking into account other fields of law on which personal self-defence has a bearing, namely international humanitarian law, international criminal law, *jus ad bellum* and domestic law.

In the second chapter¹⁹ Hessbruegge explores the international law source of personal self-defence and its character as a right. He holds the view that the right to personal self-defence, which is not explicitly recognised in international treaties, is not a customary rule of international law but rather a general principle of law. He ventures into an analysis of various cultural and religious traditions as well as into diverse moral theories about self-defence and concludes that it is a natural law right, which has an inherent (but limited) moral justification as a ‘forced choice’ between negative consequences. Hessbruegge also provides a general empirical analysis of domestic laws, without elaborating upon any specific legal system, and concludes that self-defence is commonly classified as a right/justification rather than as an excuse. Despite differences between various domestic notions of self-defence, Hessbruegge highlights that they entail comparable requirements of application. Self-defence must always respond to an unlawful human attack against a protected interest; and the response must be immediate, necessary and proportional. Personal self-defence is described as not only common to all domestic legal orders around the world, but as additionally transposable at the international level as demonstrated by its incorporation in various branches of international law, such as human rights law, international humanitarian law, international criminal law, the law of the sea and the law of diplomatic relations.

The third chapter²⁰ aims at demonstrating that self-defence is not a proper human right as it is neither recognised as such in human rights treaties, nor in most domestic legal orders. According to Hessbruegge, personal self-defence is nevertheless a natural and inalienable *sui generis* right, although the concrete legal implications of such a demonstration are not entirely clear.²¹ In his view,

[t]he right to self-defence is a genuinely pre-societal right that evolved in the *absence* of the state. It survived the formation of the state because no state will ever have *enough power* to perfectly protect individuals. Conversely, human rights evolved in response to the *overbearing presence* of the state and serve primarily to ensure that states do not accumulate *too much power*. Unlike human rights, self-defence does not additionally incorporate a vision to transform the state. It can accommodate any type of state, including authoritarian states that fail to respect human rights.²²

¹⁹ Ibid ch 2.

²⁰ Ibid ch 3.

²¹ Hessbruegge admits that: ‘Recognizing self-defense as a human right or another type of individual right recognized under international law may not make much of a difference in strictly legal terms’: above n 2, 76.

²² Ibid 89 (emphasis in original).

Nevertheless, personal self-defence is described as a ‘derivative of human rights’ because human rights shapes the right to personal self-defence by requiring its recognition at the domestic level while circumscribing it at the same time.²³

The fourth chapter²⁴ is certainly the most important or the ‘must-read’ chapter of the book. It could even be described as a sub-book with 124 pages on its own (ie 35 per cent of the monograph approximately). In this chapter, the author makes the case that personal self-defence is a ‘deep, but narrow justification for the use of force in law enforcement’.²⁵ He holds that

it is “deep” because the defence of life against imminent threat constitutes the sole ground on which law enforcement agents may deliberately deprive individuals of their right to life. ... [and] “narrow,” since it is subject to strict formal and substantive requirements.²⁶

More specifically, in this chapter, the author examines in every detail the conditions under which law enforcement agents may use force in self-defence, as a justified limitation of the rights to life and physical security, and allegedly, as the sole peacetime justification of ‘deliberately lethal force’, a new label proposed by the author, which involves ‘shooting to kill’,²⁷ by contradistinction with potentially lethal, less lethal and non-lethal force.

Hessbruegge unravels the formal and substantive requirements of personal self-defence under human rights law, including in particular the need for a sufficient legal basis for the use of force at the domestic level, the notion of unlawful attack as a prerequisite of the use of force in self-defence, and the principles of immediacy, necessity, precautions and proportionality (following the peculiar sequence proposed by the author). He highlights in particular that law enforcement agents may use force only to defend themselves or others in the face of ‘immediately antecedent, present, or ongoing threats’,²⁸ while reprisals or pre-emptive force cannot be justified by self-defence. In addition, it is held that defensive force must be necessary from the *ex ante* perspective of a reasonable law enforcement officer. Hessbruegge usefully differentiates between the qualitative and quantitative dimensions of necessity. Under the former dimension, law enforcement agents must minimise the need for the use of force and prefer non-forcible means to defend against the attack. Under the latter dimension, when force has to be used, there is a duty to minimise and graduate the level of force, which involves using as far as possible less lethal means. In this context, the author discusses controversial means and methods such as warning shots, tasers and knockout gases. Regarding the principle of proportionality, the author attempts to devise various elements to be factored in the proportionality assessment, namely:

²³ Ibid.

²⁴ Ibid 91–216.

²⁵ Ibid 215.

²⁶ Ibid.

²⁷ Hessbruegge includes in ‘deliberately lethal force’ three sub-categories: ‘deadly force used (i) with the intention to kill; (ii) with knowledge that the force will kill in the ordinary course of events or (iii) acceptance of a high degree of probability of that outcome’: *ibid* 92.

²⁸ *Ibid* 216.

the intensity and extent of the harm inflicted versus that defended against; the probability of harm if the defensive measure is taken or not taken; the number of victims protected versus the number of aggressors harmed; and the culpability or non-culpability of the aggressor.²⁹

He then discusses the proportionality requirement in relation to the attacking individuals and in relation to innocent bystanders, providing various examples from both international case law and domestic law, such as the famous German Federal Constitutional Court case concerning the legality of shooting down of passenger planes that have been hijacked by terrorists.³⁰ Lastly, the author highlights — in a manner consonant with the famous *McCann v United Kingdom* case before the European Court of Human Rights³¹ — that the necessity and proportionality requirements inherent in self-defence must be assessed looking at both the ‘officer’s individual defensive action’ and the ‘authorities’ wider collective response’.³² In other words, even if an individual law enforcement official might rightfully claim self-defence in order to justify its use of force, its state might still be found responsible for a violation of the right to life if the state did not appropriately plan, command, and control the incriminated operation or if it did not adequately select, train, and equip law enforcement agents. Insisting on this principle of precaution is indeed vital when discussing personal self-defence by state agents, as the sense of urgency that the notion of self-defence connotes may overshadow the need for proper preventive measures allowing to avoid or minimise the use of force by such agents in all law enforcement situations.

Quite surprisingly, the author equally discusses the seemingly unrelated issue of torture and inhuman treatment as an absolutely prohibited means of self-defence.³³ The author rejects the argument that has been made by some that the right to personal self-defence is an inherent limitation to the prohibition of torture and ill-treatment.³⁴

The notion of subjective/defensive intent, ie that the defender must act with the intent to defend or at least be aware of the existence of the self-defence situation, often found in domestic law as an additional substantive requirement for personal self-defence as a ground of justification is also briefly analysed.³⁵ The author contends that states can claim self-defence as a limitation to the right

²⁹ Ibid 171.

³⁰ Bundesverfassungsgericht [German Federal Constitutional Court], 1 BvR 357/05, 15 February 2006.

³¹ *McCann v United Kingdom* (1995) 324 Eur Court HR (ser A) 1.

³² Hessbruegge, above n 2, 216.

³³ Ibid 189–96.

³⁴ See, eg, US Torture Memos: John C Yoo, ‘Memorandum for William J Haynes II, General Counsel of the Department of Defence’ (Memorandum, US Department of Justice, Office of Legal Counsel, 14 March 2003) 58 <http://www.aclu.org/files/pdfs/safefree/yoo_army_torture_memo.pdf>, archived at <<https://perma.cc/79J6-E2CC>>; Jay S Bybee, ‘Memorandum for Alberto R Gonzales, Counsel to the President’ (Memorandum, US Department of Justice, Office of Legal Counsel, 1 August 2002) 42–6 <<http://www2.Gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/02.08.01.pdf>>, archived at <<https://perma.cc/TE7H-NQEP>>. See also Volker Erb, ‘Notwehr als Menschenrecht – Zugleich eine Kritik der Entscheidung des LG Frankfurt am Main im’ (2005) *Neue Zeitschrift für Strafrecht* 593, 599; Uwe Steinhoff, ‘Defusing the Ticking Social Bomb Argument: The Right to Self-Defensive Torture’ (2010) 12(1) *Global Dialogue* 1.

³⁵ Hessbruegge, above n 2, 197–9.

to life only if the state agents who resorted to force knew of the existence of the objective circumstances providing a justification or at least acted with a bona fide belief in the self-defence situation.³⁶ This interesting argument is novel and has not really been discussed in human rights case law and practice.

Lastly, the author goes beyond an analysis of the actual use of defensive force and discusses procedural obligations, ie investigation, accountability mechanisms and remedies, as well as other post-action duties such as medical care and psychosocial support.³⁷

More broadly, this chapter emphasises that despite the fact that the substantive requirements for personal self-defence are generally identical to those to be found in domestic criminal laws, law enforcement agents as representatives of states, which have the monopoly on the use of force, have broader powers to use defensive force than private individuals. For instance, law enforcement agents being tasked with maintaining law and order would allegedly have no duty to retreat in order to avoid lethal force in self-defence.³⁸ On the other hand, law enforcement officials, who have been trained to face situations of violence, have also more duties than private individuals when using force in self-defence. They must, for instance, take appropriate measures in order to avoid the use of force (eg negotiate surrender in hostage situations or use de-escalation measures in the handling of demonstrations).³⁹ They are allegedly prohibited from defending property with lethal force.⁴⁰ In the same vein, in front of human rights courts and bodies, states claiming self-defence as a limitation to the right to life need to adduce sufficient evidence and have the burden of proving that their agents acted in self-defence, while in domestic criminal proceedings, the presumption of innocence entails that the state has to disprove a plea of self-defence by the defendant.⁴¹

The fifth chapter⁴² is an attempt to analyse self-defence in military-led operations. It relies in part on previous work that is related to the interplay between the conduct of hostilities and law enforcement paradigms, notably by the International Committee of the Red Cross.⁴³ The author does not however make a clear distinction between the use of force in law enforcement and in self-defence and seems rather to consider the two terms as almost synonymous or at least as giving rise to the same controversies.⁴⁴ Accordingly, Hessbruegge

³⁶ Ibid 198.

³⁷ Ibid 202–15.

³⁸ Ibid 148–50.

³⁹ Ibid 150–4.

⁴⁰ Ibid 174–80.

⁴¹ Ibid 200.

⁴² Ibid 217–34.

⁴³ Gloria Gaggioli, 'The Use of Force in Armed Conflicts: Interplay between the Conduct of Hostilities and Law Enforcement Paradigms' (Expert Meeting Report, International Committee of the Red Cross, November 2013). See also Dieter Fleck, 'Law Enforcement and the Conduct of Hostilities: Two Supplementing or Mutually Excluding Legal Paradigms?' in Andreas Fischer-Lescano et al (eds), *Frieden in Freiheit, Peace in Liberty, Paix en liberté: Festschrift für Michael Bothe zum 70. Geburtstag* (Nomos, DIKE, 2008) 391; Melzer and Gaggioli, above n 8.

⁴⁴ See, eg, Hessbruegge, above n 2, 233: 'When such persons [protected persons] use violence that remains below the threshold of direct participation in hostilities, the military may use force against them only within the confines of the law enforcement framework and the self-defence justification that it embodies.'

considers that personal self-defence remains relevant in armed conflict situations, but only for exceptional circumstances since the use of force by the military is regulated primarily by the rules of international humanitarian law. Such exceptional situations are cases of: (a) riots, violent demonstrations and opportunistic banditry, (b) use of force in order to avoid escapes and to maintain law and order in detention settings, (c) to enforce naval blockades and ceasefire lines. The author does not dig into military, operational notions of self-defence to be found notably in military rules of engagement, nor does he attempt to discuss the challenges pertaining to the multifaceted concept of self-defence in military operations (*jus ad bellum* self-defence, unit self-defence, personal self-defence, defence of others) and overlapping legal regimes (notably domestic/operational law, international humanitarian law, human rights law, *jus ad bellum*). He does not either discuss the concept of personal self-defence, its use and abuse by non-state actors such as UN Peace Forces⁴⁵ or private military and security companies ('PMSCs'); although states' obligations in relation to self-defence by PMSCs are discussed in Chapter 6.⁴⁶ Overall, this chapter is a well-done account of existing knowledge on law enforcement in military operations but it does not purport to bring fresh hindsight on the complex issue of self-defence in military operations.

It however also discusses underexplored contemporary issues such as military involvement in peacetime law enforcement and the need to ensure appropriate training and equipment of military personnel involved in such peacetime operations.⁴⁷ It also rightfully criticises the controversial notion of 'naked self-defence' — ie the argument that targeted killings notably of alleged terrorists may be 'justified under art 51 of the *UN Charter* without the need to assess the killings separately against IHL or international human rights law'.⁴⁸ Hessbruegge considers in particular that this argument wrongly conflates personal and interstate self-defence.

Chapter 6⁴⁹ deals with personal self-defence between private persons. It holds that human rights standards are applicable to private self-defence in two ways. First, the author argues that organised non-state armed groups exercising territorial control and having de facto governmental authority are directly bound by human rights law.⁵⁰ This position is said to be the majority view among states and scholars despite ongoing controversies.⁵¹ Secondly, states have a *due diligence* obligation to protect individuals from human rights abuses committed by private individuals.⁵² In the context of self-defence, this allegedly entails several obligations, such as the duty to recognise a right of self-defence between private persons. It also entails a duty to regulate and reasonably circumscribe self-defence between private individuals.

⁴⁵ On self-defence by UN Peace Forces, see, eg, Katherine E Cox, 'Beyond Self-Defence: United Nations Peacekeeping Operations & the Use of Force' (1999) 27 *Denver Journal of International Law and Policy* 239.

⁴⁶ Hessbruegge, above n 2, 270–4.

⁴⁷ *Ibid* 225–30.

⁴⁸ *Ibid* 230–3.

⁴⁹ *Ibid* ch 6.

⁵⁰ *Ibid* 236–7.

⁵¹ *Ibid*.

⁵² *Ibid* 237–9.

Thus, self-defence must be authorised only to ward off an ‘unlawful attack on a defensible interest’.⁵³ Among those interests, Hessbruegge mentions ‘core rights such as life, physical security, physical freedom, property, and privacy’,⁵⁴ while ‘defence of honor’, for instance, which is often invoked in relation to honor crimes (eg killing a spouse who has committed adultery) is not a ‘defensible interest’.⁵⁵ In exceptional cases, it is argued that the factual absence of an ‘unlawful attack’ may not necessarily negate a self-defence justification if there is a ‘reasonable belief’, or at least an ‘honest belief’, in a situation calling for self-defence (‘putative self-defence’).⁵⁶

The principles of immediacy, necessity and proportionality are also said to apply in intrapersonal self-defence. On this basis, Hessbruegge refutes arguments according to which victims of serious domestic violence may pre-emptively kill in self-defence their recurrent abusers while they pose no imminent threat (eg killing of an abusive husband in his sleep).⁵⁷ The author also considers that certain domestic laws on self-defence are contrary to human rights law requirements of necessity and proportionality. According to Hessbruegge, European countries that allow the use of deadly force in order to defend property violate the *Convention for the Protection of Human Rights and Fundamental Freedoms*.⁵⁸ Surprisingly, he does not reach a similar conclusion for extra-European countries. Based on policy arguments, Hessbruegge considers that ‘[e]xtending a general prohibition of lethal force in defense of property beyond the European level might not lead to appropriate results in light of the different social contexts’ and that, as a consequence non-European States may allow the use of lethal force in defence of property ‘of particularly high or existential value’.⁵⁹ This position is quite original but may be challenged based on the universal character of the principle of proportionality.⁶⁰ More convincingly, Hessbruegge argues that ‘stand your ground’ laws abolishing the duty to retreat in order to avoid killing in self-defence violate international human rights law, at least when applied to confrontations in the public space (by opposition to the victim’s home).⁶¹ In the same vein, he criticises the ‘Make My Day’ or ‘Castle Doctrine’ laws providing for a presumption of legality of any level of force against home intruders.⁶²

The author also analyses the duty to investigate and prosecute excessive or unwarranted self-defence by private individuals and looks at particularly intricate and sensitive issues such as laws provide for immunities from prosecution when self-defence is invoked (see ‘Castle Doctrine’) as well as various evidentiary

⁵³ Ibid 244.

⁵⁴ Ibid.

⁵⁵ Ibid 245–6.

⁵⁶ Ibid 244–7.

⁵⁷ Ibid 247–54.

⁵⁸ Ibid 255–7.

⁵⁹ Ibid 258.

⁶⁰ For position contrary to the one espoused by Hessbruegge, see Christof Heyns, *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions on the Right to Life and the Use of Force by Private Security Providers in Law Enforcement Contexts*, UN GAOR, 32nd sess, Agenda Item 3, UN Doc A/HRC/32/39 (6 May 2016) [89]–[90].

⁶¹ Hessbruegge, above n 2, 258–64.

⁶² Ibid 264–8.

systems in relation to the burden of proof in the context of self-defence.⁶³ He argues in particular that a full reversal of the burden of proof to the disadvantage of the defendant violates the presumption of innocence.⁶⁴ Lastly, Hessbruegge offers a long analysis and rebuttal of arguments in favor of an alleged general right to possess firearms and other means of self-defence.⁶⁵ He convincingly holds that States have a duty under human rights law to regulate and restrict access to firearms and that they enjoy considerable discretion in devising firearms restrictions.⁶⁶

Chapter 7⁶⁷ deals with self-defence by non-state actors against the state. It starts by presenting a history of opposing views in classical legal doctrine and philosophy on the question of an alleged right of individuals to resist abusive governments.⁶⁸ It then explores personal self-defence against unlawful individual acts committed by law enforcement officials.⁶⁹ Hessbruegge provides a nuanced analysis and holds that — as per international human rights law — individuals may invoke personal self-defence in order to resist extrajudicial killings, torture and other police brutality. Instead, mere arbitrary arrest and detention by law enforcement officials would generally not give rise to personal self-defence, at least when judicial remedies are available. In the same vein, self-defence could not be invoked to justify escape from inhuman conditions of detention. It is also argued that general limits of the right to resist individual human rights violations can be derived from the criteria underpinning self-defence. Thus, only human rights violations threatening irreparable harm could make forcible resistance necessary and safe retreat options should be pursued first.

Then, Hessbruegge goes further and ventures into an alleged collective right of self-defence that may be exercised by civilians in armed conflict situations.⁷⁰ As long as civilians are not organised as an armed group and do not purport to proactively conduct hostilities, it is argued that they may exercise collective self-defence in order to resist humanitarian law and human rights law violations by the enemy. These acts would not amount to direct participation in hostilities and not entail loss of protection from attacks as long as their purpose is purely defensive. To that extent, Hessbruegge holds that members of civilian defence groups should be considered as civilians who are immune from attacks. Although the theoretical underpinnings of the analysis are rather convincing, the practical implications and potential challenges in the fog of war are not much elaborated upon.

The last two sections are probably the most ‘personal’ chapters of the book whereby Hessbruegge attempts to forcefully convince the reader of a need to recognise *de lege ferenda* — a controversial right to resist by force against denials of the right to self-determination as well as against mass atrocities.⁷¹ In

⁶³ Ibid 274–8.

⁶⁴ Ibid 278.

⁶⁵ Ibid 278–89.

⁶⁶ Ibid 290.

⁶⁷ Ibid 294–344.

⁶⁸ Ibid 294–301.

⁶⁹ Ibid 301–8.

⁷⁰ Ibid 312–16.

⁷¹ Ibid 312–43.

his view, such a right derives from personal self-defence at the collective level.⁷² At first blush, these two chapters do not seem to fit harmoniously with the rest of the book. It looks as if Hessbruegge decided to make a leap into *jus ad bellum* considerations from the perspective of non-state actors, such as national liberation movements and minorities. Indeed, to some extent the arguments proposed to affirm such a right to resist by force are more akin to *jus ad bellum* self-defence [(]art 51 of the *UN Charter*) than to personal self-defence. At second blush, these last chapters might be seen as an attempt to actually reconcile the various facets of self-defence at the level of abstract entities (states/non-state armed groups/actors) and at the level of individuals.

Chapter 8⁷³ is the concluding chapter. It succinctly offers final and illuminating reflections on personal self-defence as a guarantor and potential threat to the pillars underpinning the *Rechtsstaat*, ie monopoly on the use of force, the rule of law, and respect for human rights. It also reasserts the key messages of the book through well-drafted punch lines, such as:

- ‘Today, international human rights law plays a vital role in fixing the rules on personal self-defence’.⁷⁴
- ‘[P]ersonal self-defence is the sole ground recognized under international human rights law that allows police to shoot to kill or to use other types of deliberately lethal force’.⁷⁵
- ‘[I]nternational human rights law ... establishes minimum standards to keep domestic laws governing self-defence between private persons within reasonable bounds that respect the human rights of victims, perpetrators and innocent bystanders’.⁷⁶
- ‘The basic criteria of self-defence are the same whether self-defence is exercised by state authorities against private persons, by private persons against state authorities, or between private persons. Necessary and proportional force may be used to defend against an ongoing or imminent unlawful attack’.⁷⁷
- ‘However, there are also significant differences across contexts, depending on whether self-defence is exercised by state agents or by private persons. These differences are linked to the monopoly on the use of force’.⁷⁸
- ‘By not recognizing a narrowly tailored right of last resort to resist mass atrocities, international law misses an opportunity to construct a *ius ad bellum* for non-international armed conflict that gives legal recognition to legitimate uprisings and at the same time forms a *ius contra bellum* that delegitimizes rebels without a cause.’⁷⁹

⁷² Ibid 320.

⁷³ Ibid 345–8.

⁷⁴ Ibid 346.

⁷⁵ Ibid.

⁷⁶ Ibid.

⁷⁷ Ibid.

⁷⁸ Ibid 347.

⁷⁹ Ibid.

III CONTRIBUTION AND CRITICAL ANALYSIS

To our knowledge, this is the first book on *personal* self-defence from an international law perspective. Obviously, numerous scholarly works can be found on personal self-defence as such, but most of the time, the approach adopted is entrenched in domestic criminal law or comparative law.⁸⁰ At the international level, writings on self-defence deal mostly with *jus ad bellum*/state self-defence.⁸¹ Personal self-defence as a (doubtful) justification under international criminal law has also been discussed, especially in the wake of the adoption of the *Rome Statute of the International Criminal Court* and of its art 31(1)(c), in particular.⁸² Specific articles on self-defence in military operations can also be found, but mostly from an operational (military) law perspective rather than a human rights law perspective.⁸³ Only a few authors have discussed — and often as an aside — personal self-defence as a restriction in international human rights law, specifically as a limitation on the right to life.⁸⁴ Human rights practice on self-defence is scarce and, in any case, not very well-known. Hessbruegge's book is therefore a welcome addition to scholarly writing and thinking on the concept of self-defence from an international law perspective.

⁸⁰ See, eg, Joseph H Beale, 'Retreat from a Murderous Assault' (1903) 16 *Harvard Law Review* 567; Jason W Bobo, 'Following the Trend: Alabama Abandons the Duty to Retreat and Encourages Citizens to Stand Their Ground' (2007 – 2008) 38 *Cumberland Law Review* 339; Christine Catalfamo, 'Stand Your Ground: Florida's Castle Doctrine for the Twenty-First Century' (2007) 4 *Rutgers Journal of Law & Public Policy* 504; Fiona Leverick, *Killing in Self-Defence* (Oxford University Press, 2006); Jean Pradel, *Droit Pénal Comparé* (Dalloz, 3rd ed, 2008); Boaz Sangero, *Self-Defence in Criminal Law* (Hart, 2006); Stanley Yeo, 'Anglo-African Perspectives on Self-Defense' (2009) 17 *African Journal of International and Comparative Law* 118.

⁸¹ See above n 1.

⁸² See, eg, Kai Ambos, 'Defences in International Criminal Law' in Bretram S Brown (ed), *Research Handbook on International Criminal Law* (Edward Elgar, 2011) 299; 'Small Arms Survey 2004: Rights at Risk' (Report, Graduate Institute of International Studies, 2004) 181; Eric David, 'Self-Defence and State of Necessity in the Statute of the ICC' in José Doria, Hans-Peter Gasser & M Cherif Bassiouni (eds), *The Legal Regime of the International Criminal Court* (Martinus Nijhoff, 2009) 757; Albin Eser, 'Article 31: Grounds for Excluding Criminal Responsibility' in Otto Triffterer (ed), *Commentary on the Rome Statute of the International Criminal Court* (CH Beck-Hart-Nomos, 2nd ed, 2008) 863; Hannah Tonkin, 'Defensive Force under the *Rome Statute*' (2005) 6 *Melbourne Journal of International Law* 86.

⁸³ See, eg, Christopher D Amore, 'Rules of Engagement: Balancing the (Inherent) Right and Obligation of Self-Defence with the Prevention of Civilian Casualties' (2013) 1 *National Security Law Journal* 39; JFR Boddens Hosang, 'Self-Defence in Military Operations: the Interaction between the Legal Bases for Military Self-Defence and Rules of Engagement' (2008) 47 *Military Law and the Law of War Review* 25; Blaise Cathcart, 'Application of Force and Rules of Engagement in Self-Defence Operations' in Terry D Gill and Dieter Fleck (eds), *Handbook of International Law of Military Operations* (Oxford University Press, 2010) 201; Mark David Maxwell, 'Individual Self-Defence and the Rules of Engagement: Are the Two Mutually Exclusive?' (2002) 41 *Military Law and the Law of War Review* 39; Dale Stephens, 'Rules of Engagement and the Concept of Unit Self-Defence' (1998) 45 *Naval Law Review* 126; Charles P Trumbull IV, 'The Basis of Unit Self-Defence and Implications for the Use of Force' (2012) 23 *Duke Journal of Comparative and International Law* 121.

⁸⁴ See, eg, A S Ashworth, 'Self-Defence and the Human Right to Life' (1975) 34 *Cambridge Law Journal* 282; John Cerone, 'Is There a Human Right of Self-Defense?' (2006) 21 *Journal of Law, Economics and Policy* 319; David B Kopel, Paul Gallant and Joanne D Eisen, 'The Human Right of Self-Defence' (2008) 22 *BYU Journal of Public Law* 43; John C Smith, 'The Use of Force in Public or Private Defence and Article 2' (2002) *Criminal Law Review* 958.

Not only does this book fill a lacuna but it does so effectively. This book is an excellent and entertaining read. It is well-written, informative and insightful. It is not a monolithic piece. Some chapters adopt a narrative, pedagogical approach and present in a clear and concise manner the existing knowledge on the topic. Others are more argumentative and attempt to convince the reader of the rightfulness of the author's position on contemporary controversies in relation to personal self-defence using not only legal but also policy arguments. References to illustrative real-life topical cases on self-defence situations in order to introduce most chapters also contribute to give an original and up-to-date touch to the work.

Another strength of the work is that it is extremely well-documented. Hessbruegge has conducted an extensive and comprehensive review of human rights case law and practice on personal self-defence at the universal and regional level, in the Americas, Europe and Africa. References to some important domestic case law on personal self-defence can also be found throughout the book although not in a systematic manner. As evidenced by the references and bibliography, classical as well as modern publications on personal self-defence have been studied and taken on board by the author who is always careful to present diverging opinions and who systematically takes position in doctrinal debates.

As regards substance, Hessbruegge demonstrates a very solid knowledge of international human rights law and an ability to provide subtle analysis, taking into account various bodies of international law and domestic law. Irrespective of whether the reader agrees or not with the arguments made by the author, the logic and plausibility of these positions and internal coherence within the book is undeniable. The author usually adopts what can be described as the mainstream opinion among the human rights community. Despite the individual human rights focus, he always tries to take into account legitimate interests of states and usually prefers middle-ground, well-balanced, opinions to extreme views (with the exception maybe of the last 20 pages of the book where he advocates for a collective right of self-defence which would permit to forcefully resist against states committing mass atrocities).

Despite these important strengths and overall excellent quality of the book, there are as well a few weaknesses or at least potential criticisms of both form and substance. While the sequence adopted in the book is meaningful, the relative importance of each chapter is quite uneven. While some chapters are less than 20 pages, others contain more than 100 pages! This gives a sense of imbalance and of a structure that has not been carefully calibrated or thought through. It is also quite disappointing that the bibliography is limited to legal doctrine — it does not include human rights practice and jurisprudence — and adopts a mere alphabetical order, without distinguishing between books and articles. An index is provided at the end, but it is not very comprehensive. For instance, human rights case law cannot be found in the index and information is therefore difficult to retrieve in the book. The internal structure and style adopted within chapters does not permit avoiding redundancies: the same human rights jurisprudence is presented and summarized several times in the book. The principles pertaining to the use of force in law enforcement are also presented in an unusual order with notably the principle of precaution being inserted after

necessity and before proportionality, which may indicate — or at least give the impression — of a lack of proper conceptualisation of these principles and of their interplay.

Regarding substance, the main issue is in my view that the author does not properly differentiate between the use of force to maintain law and order, generally, from the use of force by law-enforcement officials in self-defence specifically. While several sentences give the impression that self-defence is indeed simply part and parcel of the use of force in law enforcement, Hessbruegge never attempts to differentiate between the two. It is therefore unclear whether the author considers that law enforcement officials can actually use force — including deadly force — to maintain law and order outside proper self-defence situations. Hessbruegge also repeatedly contends that self-defence is the only possible justification for deliberately lethal force by law enforcement officials. Such an insistence on deliberately lethal force is, however, surprising because most use of force in law enforcement do not result from shoot to kill policies.

The blurring between self-defence and the use of force in law enforcement is not without consequence. In my view, this is one of the reasons why the concept of ‘imminence’ gets increasingly stretched out. Imminence is inherent to the use of force in self-defence but not in law enforcement more generally as evidenced by a careful reading of Principle 9 of the UN *Basic Principles on the Use of Force and Firearms*.⁸⁵ It must be interpreted very narrowly as ‘a matter of seconds not hours’ as indicated by former Special Rapporteur on Extrajudicial, Summary or Arbitrary Execution, Christof Heyns.⁸⁶ But unlike private individuals, law enforcement officials may also use of force outside self-defence situations in order, for instance, to effect the arrest of dangerous criminals; within obviously the limits of the principles of necessity, proportionality and precautions.⁸⁷ The confusion or erroneous equation between the law enforcement paradigm and self-defence explains also the relative weakness of Chapter 5 on personal self-defence in military-led operations. In particular, Hessbruegge does not really discuss challenges in relation to the ever-increasing reliance on self-defence as an alleged third paradigm for the use of force in armed conflicts, and one which conflates various dimensions of self-defence (at the level of states/military unit/personal and defence of others).⁸⁸

⁸⁵ Principle 9 of the UN *Basic Principles on the Use of Force and Firearms* reads as follows: ‘Law enforcement officials shall not use firearms against persons except in self-defence or defence of others against the imminent threat of death or serious injury, to prevent the perpetration of a particularly serious crime involving grave threat to life, to arrest a person presenting such a danger and resisting their authority, or to prevent his or her escape, and only when less extreme means are insufficient to achieve these objectives. In any event, intentional lethal use of firearms may only be made when strictly unavoidable in order to protect life.’ On this, see Gloria Gaggioli, ‘Lethal Force and Drones: The Human Rights Question’ in Steven James Barela (ed), *Legitimacy and Drones: Investigating the Legality, Morality and Efficacy of UCAVs* (Ashgate Publishing, 2015) 101.

⁸⁶ *Report of Special Rapporteur Christof Heyns on Extrajudicial, Summary or Arbitrary Execution*, UN Doc A/HRC/26/36 (1 April 2014) 10 [59].

⁸⁷ Gloria Gaggioli, ‘The Use of Force in Armed Conflicts: Conduct of Hostilities, Law Enforcement and Self-Defence’ in Michael Schmitt, Christopher Ford and Winston Williams (eds), *Complex Battlespaces: The Law of Armed Conflict and the Dynamics of Modern Warfare* (Oxford University Press, forthcoming).

⁸⁸ *Ibid.*

Another substantive potential criticism is that Hessbruegge does not always clearly distinguish between legal and policy arguments.⁸⁹ Based on few existing human rights practice and jurisprudence — moreover often regional, European, practice — and common sense reflections, he derives alleged rights and duties flowing from international human rights law which should shape domestic laws and practice. Potential detractors could easily overturn such allegations by contending that the human rights practice is simply insufficient to derive limits to the liberty of States to frame the concept of personal self-defence as they see fit.

Lastly, the relevance of certain sections is also questionable. The author may have been tempted to deal with *all* possible contexts in which the right to personal self-defence has been invoked to the detriment of considerations of usefulness/necessity with respect to the overall objective of the book. For instance, it remains quite unclear why Hessbruegge considered it necessary to dedicate two sections in two different chapters on the relatively marginal argument of personal self-defence to justify torture and inhuman treatment. Most of the book deals with self-defence in relation to the use of force and seems rather focused on the right to life. A clarification of which human rights are concerned by self-defence and of which ones will be analysed in the book would have been useful in the introductory chapter. In the same vein, the advocacy in favor of the recognition of a ‘*jus ad bellum*’ right of self-defence belonging to collectivities (eg minorities) in order to resist against states denying the right to self-determination or committing mass atrocities does not sit well with the remaining of the book as highlighted above.⁹⁰ Lastly the actual ‘thesis’/main argument within the book is rather simple—albeit no less true—to the extent that it seems to be limited to an affirmation of the relevance of international human rights law to set limits to personal self-defence.

Nevertheless, this book remains a must-read for anyone who wants to know more about personal self-defence in international human rights law. It will surely quickly become the reference in this field.

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⁸⁹ See, eg, Hessbruegge, above n 2, 154 (on the steps to be adopted in a graduated use of force); 158 (on the requirement that police officers should shoot at the legs or lower torso to avoid killing the alleged criminal); 159 (on the allegation that automatic discharge firearms and autonomous weapons are per se irreconcilable with HRL). See also *ibid* 204: (‘officers must be provided with post-incident stress counselling and other psychosocial support’. No real legal basis is provided).

⁹⁰ Hessbruegge, above n 2, 247–54.

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