BOOK REVIEW

Revisiting the Concept of Defence in the* Jus ad Bellum*: The Dual Face of Defence by Johanna Friman, Hart Publishing, 2017, xv-241pp., ISBN: 9781509906970

Johanna Friman's *Revisiting the Concept of Defence in the* Jus ad Bellum is a challenging and ambitious work, which seeks both to interrogate the right of self-defence *lex lata* and present a novel and intellectually stimulating *de lege ferenda* proposal for *ad bellum* defence. At its core, the book concerns the debate over the lawfulness of self-defence actions taken against armed attacks that have not yet occurred (i.e. anticipatory/pre-emptive/preventative/interceptive self-defence – depending on what terminology is preferred).[1] One would be forgiven for thinking that little can be added to the exhaustingly perennial 'anticipatory self-defence debate',[2] but this book clears that hurdle by some distance: Friman certainly has something new to contribute.

The book begins, in chapter 1, with an intriguing exploration of the socio-historical development of the relationship between war and law; the chapter also then provides a helpful summary of the book's core argument. The second chapter, following a brief historical overview of the right of self-defence, assesses the current legal parameters of that right, engaging with the requirements for its operation (armed attack – considered *ratione materiae*, *ratione temporis* and *ratione personae* – necessity, immediacy and proportionality). The key conclusion that Friman reaches during this appraisal is that, as it stands, international law does not allow for self-defence actions to take place in response to the threat of an armed attack, but only in response to armed attacks *fait accompli*.

[1] Terminology is something of an issue in relation to the notion of forcible action taken in relation to an armed attack that has not yet occurred. Various terms are used inconsistently by different scholars (sometimes to mean different things) in this context (see Christine Gray, *International Law and the Use of Force* (Oxford University Press, 4th edn 2018) 250), and the choices made by scholars as to what terminology they employ are largely arbitrary. Having said this, Friman unusually opts to use the term 'interceptive defence' to refer to 'the resort to armed military force against an armed attack that has not yet occurred but the threat thereof is *either* inevitable *or* imminent' (198, emphasis added). Despite the generally inconsistent use of terminology in relation to this topic, 'interceptive self-defence' has been used pretty consistently to refer only to the first of these scenarios (i.e. where the attack is underway/inevitable but the effects of it have not yet been felt, see, e.g. Yoram Dinstein, *War, Aggression and Self-Defence* (Cambridge University Press, 6th edn 2017) 231–3). As such, Friman's decision to use this term to refer also to what most commonly is termed 'anticipatory self-defence' (i.e. forcible action in response to an imminent attack) was perhaps a little unwise, and it is not clear from the book why this choice was made.

[2] As Claus Kreß notes in his foreword to the book under review (vii), this reviewer previously has stated that the 'issue has long been an academic hot potato – indeed, one so hot that it has essentially been burnt to a crisp…', James A Green, 'The *Ratione Temporis* Elements of Self-Defence' (2015) 2 *Journal on the Use of Force and International Law* 97, 103.

Friman then argues that the realities of defence mean that at least some limited form of 'anticipatory' right to use force *should be* lawful, but that this in itself does not change the fact that, in her view, it currently is not. Therefore, the fundamental aim of the book is, in effect, to try to bridge a classic is/ought divide. In this context, that entails the presentation of a *lex ferenda* proposal for a Charter amendment (in the form of a new 'Article 51(2)' text), to introduce a separate right of what Friman terms 'necessity-defence'. This is conceived as a new and distinct right, but it is one that is shaped from aspects of *lex lata*: specifically necessity as a condition precluding wrongfulness under the law of state responsibility,[3] as well as the existing right of self-defence (see, e.g. 19).

It is fair to say that Friman's approach to, and view of, the existing right of self-defence is at least broadly what might be termed 'restrictionist',[4] albeit that her view that the law needs to be changed to allow for a (qualified) form of anticipatory self-defence perhaps goes beyond the traditional 'restrictionist' position on the matter. More restrictive interpretations of self-defence have comparatively fallen out of fashion within *ad bellum* scholarship in recent years, and, as such, at least some of Friman's conclusions as to the existing law arguably represent minority viewpoints. It is probably correct to say, for example, that a majority of scholars now argue that anticipatory self-defence can be lawful in response to an imminent attack,[5] albeit that a number of commentators[6] and states[7] still oppose any form of forcible anticipatory action.

Perhaps inevitably, the current reviewer found that he personally agreed with some of the author's *lex lata* conclusions, while disagreeing (at times, rather strongly) with others. Friman's discussion (66–74) of the '*ratione personae* question' – i.e. the possibility of using force in self-defence against an armed attack perpetrated by a non-state actor where this is not attributable to a state (or, perhaps even where there is no state involvement even falling below the level of attribution) – is, for example, excellent. Friman shows that the matter is unclear based on a textual reading of Article 51, which does not indicate *from whom* the armed attack must originate (68), and notes that there is evidence pointing in both directions (for and against) the current lawfulness of self-defence in response to attacks by non-state actors (68–73). This

[3] See, e.g. *Text of the Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries*, Report of the International Law Commission, 53rd sess., UN Doc A/56/10 (2001), 173–7, 194, Article 25.
[4] This term is used, e.g., by Christian Henderson, *The Persistent Advocate and the Use of Force: The Impact of the United States upon the* Jus ad Bellum *in the Post-Cold War Era* (Ashgate, 2010) 173.
[5] See Noam Lubell, 'The Problem of Imminence in an Uncertain World' in Marc Weller (ed), *The Oxford Handbook of the Use of Force in International Law* (Oxford University Press, 2015) 695, 718.
[6] See, e.g. Olivier Corten, *The Law Against War*: *The Prohibition on the Use of Force in Contemporary International Law* (Hart Publishing, 2010) particularly at 407.
[7] See *ibid*, 416–41 (giving examples).

question is controversial and much debated, and so not all readers will agree with Friman's conclusion that 'it appears premature … to conclude that the alleged shift in customary practice … has crystallised into the unequivocal emergence of a new *ratione personae* threshold …' (73). Yet she also endorses Tom Ruys' assertion that, nonetheless, it now can be said that such actions against non-state actors 'are "not unambiguously unlawful"' (73).[8] Therefore, a balanced and nuanced picture is presented that accurately (in this reviewer's opinion) charts the genuine uncertainty as to the state of the law.

In relation to the book's key focus, anticipatory self-defence, much of Friman's *lex lata* analysis again is convincing. She presents a detailed and, overall, strong argument that the shoe of Article 51 cannot easily be made to fit the foot of anticipatory self-defence. The principles of treaty interpretation[9] are employed well to support the view that the ordinary meaning of 'if an armed attack occurs', taken in context, should be read as precluding anticipatory self-defence (e.g. 39–40). Friman thus persuasively dismisses the 'expansionist'[10] claim that 'if an armed attack occurs' should not be read as 'if, and only if, an armed attack occurs',[11] on the basis that such a reading would be contrary to the intention of the drafters and would, indeed, render the inclusion of the provision meaningless (34–5).

However, in contrast to the way in which she incorporates credible counterarguments concerning the *ratione personae* aspect of the armed attack criterion into her findings, when it comes to questions *ratione temporis*, the manner in which Friman asserts her ultimate conclusion – brooking no argument whatsoever (e.g. 'the *occurrence* of an armed attack *incontestably* is a *sine qua non* for lawful self-defence' (163, emphasis added))[12] – perhaps goes too far. This reviewer has long been of the (admittedly unhelpfully equivocal) view that the certainty with which many scholars present their positions on the question of anticipatory self-defence (in either direction: that the law undoubtedly allows for responses to imminent attacks/that it absolutely prohibits self-defence unless an armed attack has occurred) are

[8] Citing Tom Ruys, *'Armed Attack' and Article 51 of the UN Charter* (Cambridge University Press, 2010) 487.
[9] As found in Articles 31 and 32 of the Vienna Convention on the Law of Treaties (1969) 1155 UNTS 331.
[10] Again, this term is used by, e.g. Henderson (n 4) 173.
[11] For the most famous expression of this view, see *Military and Paramilitary Activities in and Against Nicaragua* (*Nicaragua v United States of America*) (merits) [1986] ICJ Reports 14, dissenting opinion of Judge Schwebel, para 173.
[12] See also, e.g. 'the primary elements of interpretation seem to settle the matter [of the unlawfulness of anticipatory self-defence under Article 51] *conclusively*' (48, emphasis added); the unlawfulness of anticipatory self-defence 'would seem to represent the *only* bona fide reading of the Charter…' (60, emphasis added); '[t]his [the unlawfulness of anticipatory self-defence] represents the *only* bona fide reading of Article 51 *that can credibly be claimed* to be compatible with the UN Charter as a whole…' (162, emphasis added).

disconcerting, because credible legal arguments can be made to support both, mutually contradictory, positions.[13]

Friman's surety – while evidencing commendable confidence and a clarity of focus – means, at times, that alternative positions are not always afforded the credence that they perhaps deserve. One of the strongest arguments presented by those who support the *lex lata* lawfulness of anticipatory self-defence, for example, is given notably short shrift. While, as Friman shows, the restrictive meaning of the phrase 'if an armed attack occurs' is difficult to dispute, the equally authoritative French-language text of Article 51 refers to situations '*dans le cas où un Membre des Nations Unies est l'objet d'une agression armée*' as triggering self-defence. The French version of Article 51 thus refers to a UN member state as being 'the object' of armed aggression, rather than to an armed attack 'occurring'.[14] Friman dismisses the possible implications of this difference in a single footnote, simply stating that if the attack is '…still "imminent", [then] no State has become the object of "armed" aggression…' (64, footnote 103). This is a credible reading, but far from a self-evident one.

Let us consider a bank heist. It would be almost impossible to conclude the heist had *occurred* before the robbers had entered the bank (presumably masked and waving firearms), but it would hardly take the same kind of contortion of language to say that the bank was the *object* of the heist well before that point, at a stage where the robbers were still gathered round a set of blueprints (presumably in a shady warehouse) miles from the bank itself. At the very least, the possibility that the French-language text could lead to a different conclusion required more meaningful consideration, even if it then was ultimately dismissed.

Another notable counterargument, presented by those who take the view that anticipatory self-defence currently is lawful, is that a review of state practice, particularly since 9/11, indicates that there is legally-relevant support for this position amongst states.[15] Friman certainly engages with this point by investigating examples of practice, and correctly notes that it is far from as certain as many would suggest that states *in genere* have now accepted the lawfulness of anticipatory self-defence (e.g. 47). However, the instances of state practice that she discusses feel somewhat selective, and (crucially) dated: it must be said that Friman considers very little practice post-9/11 (40–48). Of course, only a foolhardy scholar would

[13] Green (n 2) 106.

[14] See Rosalyn Higgins, *The Development of International Law Through the Political Organs of the United Nations* (Oxford University Press, 1963) 199; C Humphrey Waldock, 'The Regulation of the Use of Force by Individual States in International Law' (1952) 81 *Recueil des cours* 451, 497.

[15] See, e.g. Kinga Tibori Szabó, *Anticipatory Action in Self-Defence: Essence and Limits under International Law* (TMC Asser Press, 2011) in general, but particularly at 275–7.

ignore the relevance of instances such as the Cuban missile crisis, the Six Day War, or Osiraq to the interpretation of the modern law of self-defence,[16] but the present reviewer would suggest that, to gain a true picture, these examples must now be complemented by detailed consideration of more recent practice, to a greater extent than Friman undertakes.

A further concern that this reviewer had regarding Friman's *lex lata* conclusions relates to her repeated assertion that 'the scope and content of the customary right of self-defence is *identical* to the scope and content of the treaty right of self-defence, articulated in Article 51 of the UN Charter' (30, emphasis added) and that 'self-defence is conclusively and *comprehensively* defined and delimited by Article 51 of the UN Charter…' (226, emphasis added). Leaving aside the controversial question of anticipatory action, such claims are extremely hard to support, because the criteria of necessity and proportionality (and immediacy, if one sees this as distinct from necessity and proportionality, as Friman does) unquestionably govern modern self-defence actions,[17] but are included nowhere within Article 51; they are found only in customary international law.[18]

Friman views these customary criteria as being implicitly located in Article 51 (see, e.g. 74, 130, 205), but – other than to the extent that the 'until clause'[19] can be seen as representing an aspect of the necessity criterion (80) – it is difficult to see how they can be inferred from the text of that article. Friman's claim that they nonetheless appear therein, written in invisible ink, is especially unfortunate because it amounts precisely to the sort of interpretive leap beyond the text of Article 51 to which she so strongly objects. She passionately asks 'why should an "imminent" or even "inevitable" threat of an armed attack be implicitly included in the concept of an armed attack"?' (225), which is entirely reasonable, but one might just as easily ask: why should 'necessity, immediacy and proportionality' be implicitly included in Article 51 when only the most strained and creative of textual readings would allow for this?

Staying, briefly, with the customary requirements for self-defence, while Friman's readings of *lex lata* necessity (78–81) and immediacy (81–84) are strong (if, again, notably on the restrictive side of things – which is not intended as a criticism), this reviewer was entirely

[16] For substantial engagement with the implications for the *jus ad bellum* of these, and numerous other, instances of state practice, see Tom Ruys and Oliver Corten (eds), *The Use of Force in International Law: A Case Based Approach* (Oxford University Press, 2018).
[17] See, e.g. Stanimir A Alexandrov, *Self-Defence Against the Use of Force in International Law* (Kluwer Law International, 1996) 20.
[18] Gray (n 1) 159 ('these requirements are not express in the UN Charter, but are *part of customary international law*', emphasis added).
[19] That is, the requirement in Article 51 that measures in self-defence are only valid 'until the Security Council has taken measures necessary to maintain international peace and security'.

unconvinced by her understanding of the proportionality criterion (84–93), and her conclusion that 'proportionality must essentially be a "tit-for-tat" test' (92). Her reading of the criterion amounts to a requirement for an exact (or, at least, near-exact: see the author's qualification at 92) correlation between the force used in defence and the armed attack suffered. Again, this is a notably minority view, going against the common understanding that the proportionality criterion is not merely a requirement for a numerical equivalence of scale or means, but rather that the force employed must not be excessive with regard to the goal of abating or repelling the attack being responded to.[20] In this reviewer's opinion, Friman's approach seems to prioritise the intellectual clarity of 'proportionality' as a concept (and a desire starkly to distinguish it from the necessity criterion) over the reality of the way in which the states have in fact interpreted and applied this (customary international law) requirement in practice.[21]

Moving to the *de lege ferenda* aspect of *Revisiting the Concept of Defence in the* Jus ad Bellum, which represents its core contribution, Friman sets out a proposal that draws on the concept of necessity as a condition precluding wrongfulness and the exiting right of self-defence (as she interprets it). As noted, this amounts to a limited recognition of a separate right of anticipatory self-defence (what Friman terms 'necessity-defence') 'if a grave and urgent threat of an armed attack occurs against a member of the United Nations' (197), to be sanctified, by way of Charter amendment, in a new 'Article 51(2)'.

Chapter 3 adds significant meat to the bones of this proposal, showing how the requirements of the exiting defence of necessity could provide certainty and suitable restrictions to reduce the possibility of abuse if aspects of it formed the basis of the new 'necessity-defence' concept (limiting this to situations where the attack either was inevitable or 'nevertheless manifestly imminent' (173)). Friman also argues that 'necessity-defence' should be governed by requirements that broadly would reflect the existing self-defence requirements of necessity, immediacy and proportionality (as suitably tweaked to be more appropriate to anticipatory actions). She thus delimitates, with notable thoughtfulness, proposed criteria of 'exigency', 'immediacy' and 'functionality' (181–193, 205–207).

Friman's *de lege ferenda* framework would impose an undeniable element of conceptual clarity on the law of self-defence. It is worth noting that, at the outset, Friman frames her project as an interrogation of 'whether the legal concept of self-defence

[20] See, e.g. Judith Gardam, *Necessity, Proportionality and the Use of Force by States* (Cambridge University Press, 2004) 142.

[21] For this reviewer's understanding of proportionality, including supporting discussion of state practice examples, see James A Green, *The International Court of Justice and Self-Defence in International Law* (Hart Publishing, 2009) 86–96.

incontestably covers legitimate interceptive self-defence, or whether there exists sufficient ambiguity and controversy so as to warrant a clarifying revision to the concept of defence' (23). Therefore, while this reviewer has already noted his concerns with the way in which Friman then goes on to conclude that the existing law *incontestably prohibits* anticipatory self-defence, one also would be hard pressed to reach the diametrically opposed conclusion: that, as things stand, anticipatory self-defence is *incontestably lawful*. The very fact that scholars and states continue to disagree on this matter shows that this cannot be the case; there is no question that 'ambiguity and controversy' persists.

Seen in that light, the value of Friman's proposal becomes clear irrespective of one's view of her *lex lata* conclusions, because the clarification provided by the explicit introduction of a separate right of 'necessity-defence' (i.e. anticipatory self-defence) – with appropriate safeguards – would put the perennial anticipatory self-defence debate to bed, and would do so by facing the realities of modern defensive imperatives head on rather than through the legal fudging of the language of Article 51.

Nonetheless, one still can envisage critique of the value of Friman's proposal from both sides of the *ad bellum* aisle. 'Expansionist' readers, who will dispute Friman's *lex lata* conclusions in the first instance (taking the view that that anticipatory self-defence is *already* lawful), may wonder – beyond legal neatening – what all this would accomplish in real terms. Or, indeed, given that Friman's notion of 'necessity-defence' is more restrictive than is the notion of 'anticipatory self-defence' as it is commonly is presented by those who support its current existence, 'expansionists' may even object to the proposal as advocating a backwards step towards unrealistic restraint. Conversely, 'restrictionist' readers, supportive of an interpretation of self-defence that prohibits anticipatory action because of the uncertainty and risk of abuse that it entails, may see Friman as giving with one hand (making a strong case that the law does not allow for such action), while simultaneously proposing to take away with the other (presenting a proposal for how the law should be changed so to allow it in future). In the end, though, only the most anodyne of proposed *ad bellum* improvements will appeal to everyone who reads it, and this book is anything but anodyne.

Perhaps more notable, therefore, is the fact that practical concerns also can be raised about the implementation and application of Friman's proposal. In terms of application, Friman is very clear that 'self-defence' and 'necessity-defence' must be separated (e.g. 19), and that the circumstances of a given situation will dictate which 'right' is applicable, and thus which set of (similar, but different) requirements will need to be met for the defensive action taken to be considered lawful (196). This distinction imposes conceptual clarity, and also is intended to

ensure that nothing proposed will interfere with the 'fully functional' right of self-defence, which is seen as already being equipped to govern defensive actions in response to armed attacks that are occurring or already have occurred (200).

A potential issue with this approach, though, is the resort to what this reviewer elsewhere[22] has termed 'dual' self-defence claims: a number of states have asserted that they are exercising the right of self-defence in a manner that combines 'continuing' responses to an armed attack that has ended with the need to respond to future attacks.[23] Friman provides little indication as to what the sharp division that she proposes between 'self-defence' and 'necessity-defence' would mean, in terms of application, for situations where a state deliberately blurred or mixed a claim of 'traditional' self-defence with an anticipatory one.

This issue admittedly is not necessarily fatal for the workability of the proposal. For example, Friman's discussion of Operation Enduring Freedom (166) suggests that she would take the view that, as an armed attack had occurred (irrespective of the fact that it was now over), 'self-defence' would be the appropriate framework in such cases. One could just as easily argue for the alternative approach, however: given that the attack that had occurred was over, 'self-defence' could be viewed as inapplicable, meaning any such claims would need to be assessed solely under the proposed requirements for 'necessity-defence'. In any event, there is at least the potential for 'dual' self-defence claims to cause problems for the application of Friman's proposal in practice, something that is not meaningfully considered in the book.[24]

Another concern relates to the restrictive requirements that Friman proposes to safeguard her new right – 'exigency', 'immediacy' and 'functionality' – and, particularly, the fact that they are not set out in her proposed text for 'Article 51(2)'. This omission comes from the desire, in the interests of certainty and minimalizing the risks of unnecessary tinkering, 1) not to alter the existing text of Article 51; and 2) to have the new 'Article 51(2)' mirror the current text of Article 51 so far as possible. It will be recalled that this reviewer took issue with the fact that Friman's *lex lata* reading of the law dismissed the customary status of the requirements of necessity, immediacy and proportionality, instead viewing these as being somehow silently present in Article 51 itself. In the same vein, having credibly developed the 'exigency', 'immediacy' and 'functionality' *de lege ferenda* criteria for 'necessity-defence',

[22] Green (n 2) 114–6.
[23] See Tibori Szabó (n 15) 155–62 (examining a number of such examples).
[24] Friman does argue that self-defence not only cannot be 'exclusively future orientated' (i.e., not entirely anticipatory) but also cannot be 'exclusively past orientated' (i.e., taken in response only to an armed attack that is entirely over, as this would amount to an armed reprisal) (80). However, it is unclear exactly how she envisages her proposal working in relation to a justification based on a mixture of the two claims.

Friman opts not to include them in the proposed text of 'Article 51(2)', instead assuming that they inevitably will be read into that text (between the lines of what it actually says) (205).

This places significant faith in the development in customary international law of these criteria, alongside 'Article 51(2)' (or, less plausibly, but as Friman seemingly would have it, in them being read into that text based on subsequent practice informing its interpretation). Whereas necessity, immediacy and proportionality developed in customary international law organically over centuries, the new proposed criteria would need to be developed from a standing start, with no means of controlling whether and how states would adopt them. For there to be a realistic chance of these criteria forming an aspect of the new right of 'necessity-defence' as intended (as they *must* for it to function as planned), they surely would need to be set out explicitly in 'Article 51(2)' – an imperative that should outweigh the desire for a neat mirroring of the current text of Article 51.

An even bigger issue when it comes to the proposal's implementation is the challenges that inevitably face any attempt to alter the UN Charter: procedural and, especially, political.[25] Friman fully acknowledges these challenges (e.g. 209, 216–220), and, as Claus Kreß notes in his foreword, she is 'of the view that political calculations of that kind should not discourage a scholar from articulating an idea she believes in' (viii). While this has to be correct – it must be preferable to dream an improbable dream than not to dream at all – it does not alter the fact that significant difficulties would be encountered in attempting to turn this proposal into legal reality.

However, it would be unfair to require Friman to be able fully to navigate every potential impediment to the realisation of her proposal, especially given that she is forthright in her preface that the 'ambition of the present study is … merely to present a novel line of reasoning in order to revive and widen the legal and policy debate…' (ix). The first aspect of that ambition – to present a novel line of reasoning – undoubtedly is fulfilled by this book; the second aspect – to revive and widen the debate – should be, and there is every reason to think that it will be. Friman's work has the clear potential to reinvigorate the stagnant debate over anticipatory self-defence.

It also is worth noting that *Revisiting the Concept of Defence in the* Jus ad Bellum is written with real style. For example, evocative metaphors – the development of the laws of war as a tension between the goddesses Minerva and Bellona (1–4, 16, 22, 220–221, 227), self-

[25] See, generally W Michael Reisman, 'Amending the UN Charter: The Art of the Feasible' (1994) 88 *American Society of International Law Proceedings* 108.

defence as a 'mummified Pharaoh' (50–51), self-defence as the Cinderella story (51–52) – add depth and texture to the arguments made. More generally, the book is full of beautifully written prose, which at times borders on the poetic (see, e.g. '…international law must govern present and future worlds, not worlds long gone or worlds that will never be' (18), or '[a]mbiguity generates an aura of solace, for within its mists the law becomes blurred and easier to fit into different moulds. However, this aura of solace is a treacherous delusion…' (55)). Such stylistic flourishes perhaps will not be to the taste of every reader of an academic text, but for this reviewer they meant that the book was a pleasure to read in ways that went beyond its substance.

Ultimately, *Revisiting the Concept of Defence in the* Jus ad Bellum has its problems, at least in this reviewer's opinion, and it is a book that likely will divide opinion. Yet Friman must be applauded for asking hard questions, which most in the field dodge, concerning the reconciliation of legal clarity with modern realities, and for taking the additional step of providing a credible, detailed and – crucially – *original* proposal for improvement. This is a work that adds something new to a debate that has raged since the inception of the UN era. No mean feat. Some readers likely will disagree strongly with at least certain aspects of the book, but any reader interested in the *jus ad bellum* will gain much from engaging with it.

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