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KILLING QASEM SOLEIMANI: INTERNATIONAL LAWYERS DIVIDED AND CONQUERED

*Luca Ferro**

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I. INTRODUCTION

In an influential piece published by the American Journal of International Law in 1908, Oppenheim opined that the chief task for the science of international law was "the exposition of the existing recognized rules."[1] He further explained that "[w]hatever we think of the value of a recognized rule — whether we approve or condemn it, whether we want to retain, abolish, or replace it — we must first of all know whether it is really a recognized rule of law at all, and *what are its commands*."[2] Writing in that same journal 75 years later, Weil strictly distinguished between the *prelegal* and the *legal*, and noted that "on one side of the line, there is born a legal obligation that can be relied on before a court or arbitrator, the flouting of which constitutes

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1. Lassa Oppenheim, *The Science of International Law: Its Task and Method*, 2 AM. J. OF INT'L L. 313 (1908).

2. *Id.* at 314–15.

an internationally unlawful act giving rise to international responsibility; on the other side, there is nothing of the kind."[3]

Then, in 2001, the International Law Commission ("ILC") released its (Draft) Articles on the Responsibility of States for Internationally Wrongful Acts ("ARSIWA") with a truism at its core: "Every internationally wrongful act of a State entails the international responsibility of that State."[4] That wrongfulness flows from an act (or omission) that is attributable to the State and constitutes a breach of its international obligations.[5] The latter can evidently be ascertained by "comparing the conduct in fact engaged in by the State with the conduct legally prescribed by the international obligation."[6]

The point of these fundamental observations is that (one of) international lawyers' primary task(s) is to determine with precision whether contentious State conduct is or is not in accordance with the edicts of international law and, consequently, does or does not entail international responsibility.[7] This simple idea has a long and distinguished pedigree. For example, already in the 19th century, British *uomo universale* William Whewell set out to:

> contribute to the formation of a strong body of experts on International Law, distributed among the chief countries of the world", such that "every nation would be willing, if not to accept the general verdict of such experts, at least to hesitate to impute malignity to another nation whose conduct was declared by the common opinion of experts in neutral countries to be technically correct.[8]

The point of this article, however, is to argue that such an undertaking has currently and decidedly taken a back seat in the international legal academy, given what Jan Klabbers has labelled the

3. Prosper Weil, *Towards Relative Normativity in International Law?*, 77 AM. J. INT'L L. 413, 417–18 (1983).

4. Int'l Law Comm'n, Draft Art.'s on Responsibility of States for Internationally Wrongful Acts, Rep. on the Work of Its Fifty-Third Session, U.N. Doc. A/56/10, at 32 (2001) [hereinafter ARSIWA].

5. *Id.*

6. *Id.* at 55.

7. *Id.* at 31–32.

8. Anne Orford, *Scientific Reason and the Discipline of International Law*, 25 EUR. J. INT'L L. 369, 374 (2014). Whewell was indeed a polymath, writing profusely on widely diverging topics such as mechanics, mineralogy, geology, astronomy, political economy, theology, educational reform, architecture, philosophy of science, history of science and moral philosophy. Laura J. Snyder, *William Whewell*, THE STANFORD ENCYC. OF PHIL. (Edward N. Zalta ed., Spring Edition, 2019), https://plato.stanford.edu/archives/spr2019/entries/whewell/ [perma.cc/HR4F-PLBP].

"fragmentation of international *lawyers*" as opposed (or in addition) to that of international *law*.[9] While this article is certainly inspired by the appreciation that such a *status quo* is indeed a sorry one, it will limit itself to evidencing that understanding through a single yet revealing case study: the legality *vel non* of killing Iranian Major-General Qasem Soleimani by U.S. drone strikes, and the staggering lack of agreement on international law's substance and application in that case by some of the world's leading experts.

This article is structured in two main parts. First, it sets out the facts surrounding the death of Soleimani as reported by media outlets and widely relied upon by international legal experts. It then delves into the analysis by no less than 15 of them who co-authored 11 legal briefs of varying depth. All such briefs tackle, more or less, the same overarching question: Was the killing of Soleimani by U.S. drone strikes in conformity with the relevant requirements of international law, consisting of the jus ad bellum ("JAB"), jus in bello ("JIB") and international human rights law ("IHRL")?[10]

However, as noted above, there was little consensus among the experts — if any. The article hopes to better understand *why* international lawyers disagree so spectacularly by comparing and contrasting the variety of views in the Soleimani-case and stripping down the supporting argumentation to uncover the underlying (theoretical and methodological) approach. The article's second part will tackle that preliminary examination. The root of the problem indeed appears to lie in a different methodological approach to the same issue, which includes relying on different sources and/or interpreting the same sources differently. Add to that the law's supposed indeterminacy, the absence of an authoritative arbiter, and contemporary academic idiosyncrasies, and it becomes clear(er) why each interpretation of international law is seemingly allowed to stand.

The article ends with some final reflections. Generally, it hopes to spark a much-needed debate by identifying a worrying trend in international law and taking a swing at offering preliminary explanations, rather than present a definitive solution. After all, if the "invisible college of international lawyers"[11] cannot decide on the disputed legality of a State unapologetically taking out the military brass of its archenemy on the territory of a neutral country, it is difficult to see what remains of the prohibition on the use of force — the cornerstone of the Charter of the United Nations and international law more broadly.

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9. Jan Klabbers, *On Epistemic Universalism and the Melancholy of International Law*, 29 EUR. J. INT'L L. 1057, 1062 (2019).

10. *See generally* Oscar Schachter, *The Invisible College of International Lawyers*, 72 NW. U. L. REV. 217 (1977).

11. *Id.* at 217–18.

II. CASE STUDY: THE KILLING OF QASEM SOLEIMANI

A. Facts and context

On Friday, January 3, 2020 at 12:47 AM, American MQ-9 Reaper drones struck a convoy leaving Baghdad International Airport in Iraq, killing ten individuals.[12] Among the dead were Iranian Major-General Qasem Soleimani, chief of the Quds Force and one of the most powerful men in Iran, and Abu Mahdi al-Muhandis, de facto leader of the Iraqi Popular Mobilisation Forces and founder of the Kataib Hezbollah ("KH") militia.[13] Five days later, Iran responded with missile attacks on the Ain Al Asad air base, used by American forces to train Iraqi soldiers, causing traumatic brain injury to more than 100 U.S. servicemen.[14] Just hours after that, the Iranian military — on high alert for American counteractions — accidentally shot down a Ukrainian passenger plane on its way to Kyiv from Tehran, killing all 176 on board.[15]

Rising tensions between the United States and Iran over the previous two years culminated in that deadly week in early January. These tensions started with the U.S. withdrawal on May 8, 2018 from the 2015 multilateral nuclear agreement with Iran and its policy of maximum pressure ever since.[16] They included several incidents in 2019,

12. Peter Baker, Ronen Bergman, David D. Kirkpatrick, Julian E. Barnes & Alissa J. Rubin, *Seven Days in January: How Trump Pushed U.S. and Iran to the Brink of War*, N.Y. TIMES (Nov. 16, 2020), https://www.nytimes.com/2020/01/11/us/politics/iran-trump.html?auth=linked-google [https://perma.cc/A9G2-ADNN].

13. *Id.*; Matthew S. Schwartz, *Who Was the Iraqi Commander Also Killed in the Baghdad Drone Strike?*, NPR (Jan. 4, 2020, 10:16 PM), https://www.npr.org/2020/01/04/793618490/who-was-the-iraqi-commander-also-killed-in-baghdad-drone-strike [perma.cc/U7SG-CGN9].

14. *Iran Launches Missile Attacks on US Facilities in Iraq*, AL JAZEERA (Jan. 8, 2020), https://www.aljazeera.com/news/2020/01/rockets-fired-iraq-base-housing-troops-reports-200107232445101.html [https://perma.cc/FL5B-EYE4]; Bill Chappell, *109 U.S. Troops Suffered Brain Injuries in Iran Strike, Pentagon Says*, NPR (Feb. 11, 2020, 10:39 AM), https://www.npr.org/2020/02/11/804785515/109-u-s-troops-suffered-brain-injuries-in-iran-strike-pentagon-says?t=1597833845065 [https://perma.cc/VUU6-NUB3].

15. *Iran Plane Crash: Ukrainian Jet Was 'Unintentionally' Shot Down*, BBC (Jan. 11, 2020), https://www.bbc.com/news/world-middle-east-51073621 [https://perma.cc/TD79-RAY3].

16. Kenneth Katzman, Kathleen J. McInnis & Thomas Clayton, *U.S.-Iran Conflict and Implications for U.S. Policy*, CONG. RSCH. SERV. (May 8, 2020), https://fas.org/sgp/crs/mideast/R45795.pdf [https://perma.cc/5KBK-9Z2H]; *Six Charts that Show How Hard US Sanctions Have Hit Iran*, BBC (Dec. 9, 2019), https://www.bbc.com/news/world-middle-east-48119109 [https://perma.cc/252G-K2MN].

allegedly caused by one of the protagonists, such as damaging oil tankers in the Gulf of Oman, shooting down an American drone near the Strait of Hormuz, disabling Iranian tracking equipment through cyber-operations and destroying Saudi Arabian energy infrastructure sites.[17]

The temperature rose even further in December 2019. First, Iran-allied forces launched indirect fire attacks against Iraqi military facilities where U.S. troops were stationed.[18] During one of those attacks on a base near Kirkuk on December 27, 2019 , a U.S. contractor was killed and several American and Iraqi soldiers wounded.[19] The U.S. responded two days later by targeting five facilities in Iraq and Syria — used by Kataib Hezbollah, to which the attacks were attributed — killing 25 militia members and wounding 55 more.[20] Finally, at the turn of the year, enraged militia supporters stormed and entered the U.S. embassy compound in Baghdad, setting fire to some of its buildings.[21]

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17. *Saudi Arabia Calls for 'Decisive' Action over Tanker Attacks*, AL JAZEERA (June 15, 2019), https://www.aljazeera.com/news/2019/06/iran-renews-ultimatum-nuclear-deal-oil-tanker-tensions-190615090730002.html [https://perma.cc/84HA-6VGY]; Nasser Karimi & Jon Gambrell, *Iran Shoots Down US Surveillance Drone, Heightening Tensions*, AP NEWS (June 20, 2019), https://apnews.com/e4316eb989d5499c9828350de8524963 [https://perma.cc/L74K-A94U]; Tami Abdollah, *AP Sources: US Struck Iranian Military Computers This Week*, AP NEWS (June 23, 2019), https://apnews.com/f01492c3dbd14856bce41d776248921f [https://perma.cc/89MK-WZRS]; *Special Report: 'Time to Take Out Our Swords' – Inside Iran's Plot to Attack Saudi Arabia*, REUTERS (Nov. 25, 2019, 6:06 AM), https://www.reuters.com/article/us-saudi-aramco-attacks-iran-special-rep/special-reporttime-to-take-out-our-swords-inside-irans-plot-to-attack-saudi-arabia-idUSKBN1XZ16H [https://perma.cc/LYT6-B77U].

18. Kenneth Katzman, Kathleen J. McInnis, & Clayton Thomas, *U.S.-Iran Conflict and Implications for U.S. Policy*, CONG. RSCH. SERV. 8 (May 8, 2020), https://fas.org/sgp/crs/mideast/R45795.pdf [https://perma.cc/5KBK-9Z2H].

19. *Id.*

20. Idrees Ali & Ahmed Rasheed, *Trump Aides Call U.S. Strikes on Iraq and Syria 'Successful,' Warn of Potential Further Action*, REUTERS (Dec. 29, 2019, 12:35 PM), https://www.reuters.com/article/us-iraq-security-usa/trump-aides-call-u-s-strikes-on-iraq-and-syria-successful-warn-of-potential-further-action-idUSKBN1YX0GR [https://perma.cc/J2KA-GFXR].

21. *US-Iran Tensions: Timeline of Events Leading to Soleimani Killing*, AL JAZEERA (Jan. 8, 2020), https://www.aljazeera.com/news/2020/01/iran-tensions-timeline-events-leading-soleimani-killing-200103152234464.html [https://perma.cc/SX3L-7HCF]; Mustafa Salim & Liz Sly, *Supporters of Iranian-backed Militia End Siege of U.S. Embassy in Baghdad*, WASH. POST (Jan. 1, 2020, 5:30

These militia members withdrew on January 1, 2020, leading U.S. President Donald Trump to tweet in his familiar bellicose style:The U.S. Embassy in Iraq is, & has been for hours, SAFE! Many of our great Warfighters, together with the most lethal military equipment in the world, was immediately rushed to the site. Thank you to the President & Prime Minister of Iraq for their rapid response upon request … Iran will be held fully responsible for lives lost, or damage incurred, at any of our facilities. They will pay a very BIG PRICE! This is not a Warning, it is a Threat. Happy New Year![22] We now know that threat was no mere bluster. In fact, the decision to opt for the most extreme military option and take out Soleimani was made in the following hours.[23]

B. A comparative overview of expert analysis

The growing antagonism between Iran and the United States provides the crucial context for a better understanding of the killing of General Soleimani — including, importantly, from a legal point of view. The following sections set out the analysis on the legality of the targeted drone strikes as carried out by 15 experts.[24] The article will carefully

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PM), https://www.washingtonpost.com/world/supporters-of-iranian-backed-militia-start-withdrawing-from-besieged-us-embassy-in-baghdad-following-militia-orders/2020/01/01/8280cb34-2c9e-11ea-9b60-817cc18cf173_story.html [https://perma.cc/SSM8-VKHA].

22. Donald J. Trump (@realDonaldTrump), TWITTER (Dec. 31, 2019, 10:19 PM), https://twitter.com/realDonaldTrump/status/1212121012151689217 [https://perma.cc/HQ3B-97EZ].

23. Helene Cooper, Eric Schmitt, Maggie Haberman & Rukmini Callimachi, *As Tensions with Iran Escalated, Trump Opted for Most Extreme Measure*, N.Y. TIMES (Jan. 7, 2020), https://www.nytimes.com/2020/01/04/us/politics/trump-suleimani.html [https://perma.cc/UQS6-4WUS]. *See also* Carol E. Lee & Courtney Kube, *Trump Authorized Soleimani's Killing 7 Months Ago, with Conditions*, NBC (Jan. 13, 2020), https://www.nbcnews.com/politics/national-security/trump-authorized-soleimani-s-killing-7-months-ago-conditions-n1113271?cid=sm_npd_ms_tw_ma&fbclid=IwAR0Dig5n8E7zkx_7uKsQYndCOoEbseWMleomJhN6ZFoJ6q3JqRfmxQqOgpo [https://perma.cc/53RN-HC9R].

24. *See generally* Mary Ellen O'Connell, *The Killing of Soleimani and International Law*, EJIL:TALK! (Jan. 6, 2020), https://www.ejiltalk.org/the-killing-of-soleimani-and-international-law/?fbclid=IwAR3zRXtyYlUr9W7VDLIDZJDK419WjADuGyQnX5CUAljri7q1YnzhoLPLerY [https://perma.cc/74CY-KN25]; Marko Milanovic, *The Soleimani Strike and Self-Defence Against an Imminent Armed Attack*, EJIL:TALK! (Jan. 7, 2020), https://www.ejiltalk.org/the-soleimani-strike-and-self-defence-against-an-imminent-armed-attack/ [https://perma.cc/FG27-GYMV] [hereinafter Milanovic I]; Marko Milanovic, *Iran Unlawfully Retaliates Against the United States, Violating Iraqi*

avoid taking a position in that legal debate, but rather will provide a helicopter view thereof.

On a preliminary note, an author's position vis-à-vis a subsection of international law will not be taken into account unless (s)he has taken an explicit position on the lex lata in the Soleimani-case — the law as it is, as opposed to the lex ferenda or the law as it ought to be — and expanded upon it in some depth.[25] In addition, the expressed

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Sovereignty in the Process, EJIL:TALK! (Jan. 8, 2020), https://www.ejiltalk.org/iran-unlawfully-retaliates-against-the-united-states-violating-iraqi-sovereignty-in-the-process/ [https://perma.cc/5ESK-NBVB] [hereinafter Milonovic II]; Adil Ahmad Haque, *U.S. Legal Defense of the Soleimani Strike at the United Nations: A Critical Assessment*, JUST SECURITY (Jan. 10, 2020), https://www.justsecurity.org/68008/u-s-legal-defense-of-the-soleimani-strike-at-the-united-nations-a-critical-assessment/ [https://perma.cc/2DD5-T46H]; Alonso Gurmendi, *The Soleimani Case and the Last Nail in the Lex Specialis Coffin*, OPINIOJURIS (Jan. 13, 2020), http://opiniojuris.org/2020/01/13/the-soleimani-case-and-the-last-nail-in-the-lex-specialis-coffin/ [https://perma.cc/5RJN-NW4F]; Patryk I. Labuda, *The Killing of Soleimani, the Use of Force against Iraq and Overlooked Ius ad Bellum Questions*, EJIL:TALK! (Jan. 13, 2020), https://www.ejiltalk.org/the-killing-of-soleimani-the-use-of-force-against-iraq-and-overlooked-ius-ad-bellum-questions/?fbclid=IwAR22CyMwDDv9zRUNJSdiN8dWMyEUJVd-H5xa3T9ddKA_r3naToVvNLICCc0 [https://perma.cc/UC77-B83Q]; Olivier Corten et al., *The Crisis Between Iran, Iraq and the United States in January 2020: What Does International Law Say?*, CENTRE DE DROIT INTERNATIONAL (Jan. 15, 2020), http://cdi.ulb.ac.be/wp-content/uploads/2020/01/Iran.US_.Iraq_.EN_.Final_-1.pdf [https://perma.cc/JD2C-L934]; Ralph Janik, *Soleimani and Targeted Killings of Enemy Combatants — Part I: Revisiting the "First Shot"–Theory*, OPINIOJURIS (Jan. 20, 2020), http://opiniojuris.org/2020/01/20/soleimani-and-targeted-killings-of-enemy-combatants-part-i-revisiting-the-first-shot-theory/ [https://perma.cc/K7ES-J5ZC]; Geoffrey S. Corn & Chris Jenks, *Soleimani and the Tactical Execution of Strategic Self-Defense*, LAWFARE (Jan. 24, 2020, 2:54 PM), https://www.lawfareblog.com/soleimani-and-tactical-execution-strategic-self-defense [https://perma.cc/7E4P-AFM6]; Stefan Talmon & Miriam Heipertz, *The U.S. Killing or Iranian General Qasem Soleimani: Of Wrong Trees and Red Herrings, and Why the Killing May Be Lawful After All*, GPIL (Feb. 2, 2020) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3530273 [https://perma.cc/DDF3-BK8P]; Agnes Callamard (Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions), *Annex: The Targeted Killing of General Soleimani*, U.N. Doc. A/HRC/44/38 (June 29, 2020).

25. For example, this excludes incidental commentary to news outlets or even the otherwise insightful debate between five renowned experts (Ashley Deeks, Jack Goldsmith, Samuel Moyn, Bobby Chesney and Scott Anderson) in a podcast-episode on the Lawfare-website. *See* Mikhalia Fogel, *The Lawfare Podcast Special Edition: Law and the Soleimani Strike*, LAWFARE PODCAST (Jan. 6, 2020), https://www.lawfareblog.com/lawfare-podcast-special-edition-law-and-

views will be treated in isolation, meaning that an author's previous scholarship will not feature in the discussion below. That discussion proceeds thematically, setting out points of (dis)agreement between the experts on issues of the jus ad bellum (section 2.2.1) and jus in bello (section 2.2.2). Generally, 7 out of 15 experts carried out a comprehensive legal review of the military action (in three separate opinions).[26] Four others focused primarily on JAB-issues, while two more zoomed in on the relationship between JIB and IHRL.[27] The final two discussed the interplay between JIB and JAB, but concentrated on the former.[28]

As for the most basic question — spoiler alert! — 11 commentators argued that the drone strikes (likely) violated one or more rules of international law, a conclusion with which only two explicitly disagreed.[29] The final two experts under review chose not to engage with *all* legal questions,[30] making it impossible to discern their position on the legality of the military action as a whole. Nevertheless, they did opine that Soleimani qualified as a legitimate military target.[31]

1. Were the drone strikes in conformity with the jus ad bellum?

A first JAB-issue concerns the *proactive* U.S. argument that it had "taken decisive defensive action . . . by killing Qasem Soleimani" because he was "plotting imminent and sinister attacks on American

soleimani-strike [https://perma.cc/LV7W-8T45]. That discussion set out the relevant legal questions but did not (attempt to) answer them nor tackle the finer points of the law in much detail. Alonso Gurmendi, *Raising Questions on Targeted Killings as First Strikes in IACs*, OPINIOJURIS (Jan. 9, 2020), http://opiniojuris.org/2020/01/09/raising-questions-on-targeted-killings-as-first-strikes-in-iacs/ [https://perma.cc/2ZJ4-VKKP] ("Yes. The American strike against Qassem Soleimani was illegal. This is the common conclusion of some of the world's best experts on international law and jus ad bellum."). Given the comment's brevity, and the fact that the three experts referred to (i.e., Milanovic (twice), Callamard and Haque) do not agree on each relevant issue, Gurmendi is not counted as one of the experts commenting on the jus ad bellum for the purposes of this article, *see generally id.*

26. *See generally* Corten et al., *supra* note 24; Talmon & Heipertz, *supra* note 24; Callamard, *supra* note 24.

27. *Compare* O'Connell, *supra* note 24; Milanovic I, *supra* note 24; Haque, *supra* note 24, *and* Labuda, *supra* note 24, *with* Gurmendi, *supra* note 24, *and* Janik, *supra* note 24.

28. *See generally* Corn & Jenks, *supra* note 24; Talmon & Heipertz, *supra* note 24.

29. *Compare* O'Connell, *supra* note 24, Milanovic I, *supra* note 24, Haque, *supra* note 24, Gurmendi, *supra* note 24, Labuda, *supra* note 24, Corten et al., *supra* note 24, Janik, *supra* note 24, *and* Callamard, *supra* note 24, *with* Talmon & Heipertz, *supra* note 24.

30. Corn & Jenks, *supra* note 24.

31. *Id.*

diplomats and military personnel."[32] That raises the question of legality concerning so-called preemptive self-defense against imminent armed attacks, understood as attacks that have not yet begun. This reveals a first schism between commentators.

On one side are the experts who consider that "the law does not permit the use of military force to respond to an alleged plan to attack in the future" and note that "no international court or tribunal has ever endorsed the argument."[33] On the other we find those who do not reject outright a more expansive interpretation in case the situation "necessitates immediate defensive action to successfully repel" an imminent attack, even if that attack is not (yet) "about to occur."[34] UN Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions Agnes Callamard appears to occupy the middle ground by relying on the famous Caroline-formulation, suggesting that "a State can defend itself against a current, ongoing attack *as well as* an attack that is imminent, where the attack is 'instant, overwhelming and leaving no choice of means, no moment of deliberation.'"[35]

However, all of the experts commenting on the jus ad bellum harbored doubts about whether *the facts* were sufficient to meet even

32. U.S., Dept. of Defense, *Statement by the Department of Defense* (Jan. 2, 2020), https://www.defense.gov/Newsroom/Releases/Release/Article/2049534/statement-by-the-department-of-defense/ [https://perma.cc/BHV4-WRTW]; Mark Hosenball, *Trump Says Soleimani Plotted 'Imminent' Attacks, but Critics Question Just How Soon*, REUTERS (Jan. 3, 2020, 5:56 PM), https://www.reuters.com/article/us-iraq-security-blast-intelligence/trump-says-soleimani-plotted-imminent-attacks-but-critics-question-just-how-soon-idUSKBN1Z228N [https://perma.cc/FL3Z-55KV].

33. O'Connell, *supra* note 244; Corten et al., *supra* note 244, at 11.

34. Milanovic I, *supra* note 244; Corn & Jenks, *supra* note 244. Alternatively, Talmon and Heipertz considered commentators had simply been "barking up the wrong tree," since the imminence-argument was "something of a red herring." Talmon & Heipertz, *supra* note 24, at 6–7. *See also* Masood Farivar & Ken Bredemeier, *US Attorney General Calls Imminence of Iranian Threat 'a Red Herring'*, VOA NEWS (Jan. 13, 2020, 7:35 PM), https://www.voanews.com/middle-east/voa-news-iran/us-attorney-general-calls-imminence-iranian-threat-red-herring [https://perma.cc/3FA8-PVPC].

35. Callamard, *supra* note 244, annex ¶ 54; Christopher Greenwood, *The Caroline*, MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW (Apr. 2009) (emphasis added), https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e261?rskey=aOGXHq&result=1&prd=OPIL [https://perma.cc/YV7K-GYRK]. *See also* Labuda, *supra* note 24. ("As with the killing of Soleimani, the US would need to show that Iraq – specifically *Kata'ib Hezbollah* – was planning imminent attacks against the US."). While he therefore seems to accept self-defense against an armed attack that has not yet begun, it was not the crux of his contribution. It is therefore difficult to definitively place him in either camp.

the threshold set by a broad interpretation of the right to preemptive self-defense.[36] As always, Milanovic eloquently hit that point home:

> The Soleimani strike is thus … is *imminently* unlawful. The lack of any specific details provided publicly and the disclosure of US intelligence that goes against US interests cast serious doubts on whether the various factual predicates for lawful self-defence could be met even on a generous appraisal of the facts. Similarly, the deterrence rationale for killing Soleimani, even if admissible in principle, collapses under the weight of its own failure, a failure that was easily foreseeable.[37]

A second JAB-issue relates to the *reactive* U.S. argument that it had undertaken military action not (only) to defend against future armed attacks, but rather "in response to an escalating series of armed attacks in recent months by the Islamic Republic of Iran and Iran-supported militias on United States forces and interests in the Middle East region."[38] According to U.S. officials, this included several incidents in 2019: (1) the Iranian take-down of an American MQ-4 drone in June;[39] (2) a threat to the U.S.S. Boxer posed by an Iranian drone in July;[40] (3) multiple rocket attacks by the "Qods Force-backed" Kataib Hezbollah against Iraqi bases hosting U.S. personnel in November;[41] and (4) the aforementioned[42] military exchanges on Iraqi (and Syrian) soil in December and (early) January 2020. Moreover, and still according to the U.S., this series of attacks took place in the context of other threats to international peace and security by Iran, including

36. *See* Milanovic I, *supra* note 24; O'Connell, *supra* note 24; Haque, *supra* note 24; Corten et al., *supra* note 24, at 10; Callamard, *supra* note 24, annex ¶ 64.

37. Milanovic I, *supra* note 244; *see* Permanent Rep. of the United States of America to the U.N., Letter dated Jan. 8, 2020 from the Permanent Rep. of the United States of America addressed to the President of the Security Council, U.N. Doc. S/2020/20 (Jan. 9, 2020) [hereinafter U.N. Doc. S/2020/20]; Corten et al., *supra* note 24, at 10 ("on a purely factual basis, the United States has in no way shown that an imminent attack was planned by General Soleimani"); Callamard, *supra* note 24, annex ¶ 64 ("the US should have brought this evidence, in a form that protected its sources, to the Security Council for public examination. Otherwise, Art. 51 becomes a convenient excuse for any use of force at the whims of a State against another State."); *see also* O'Connell, *supra* note 24; Haque, *supra* note 24 ("The U.S. letter . . . fails to allege imminent future armed attacks by Iran.").

38. U.N. Doc. S/2020/20, *supra* note 377, at 1.

39. *Id.*

40. *Id.*

41. *Id.*

42. *See Iran Plane Crash*, *supra* note 15; Katzman, McInnis & Clayton, *supra* note 16.

against Saudi Arabia (through its Yemeni proxies) and international commerce.[43] Since this argument did not feature in the rapid response U.S. justifications, and no one is "entitled to ascribe to States legal views which they do not themselves formulate,"[44] early commentators understandably did not address it.[45]

Those who did could again be divided in two camps. In the first we find Haque who indicated that "the last incident in this series was over when the U.S. decided to strike."[46] Accordingly, this "dooms the United States' legal case" since if "one attack is clearly over, then the legal 'clock' resets. If no further attack is imminent, then there is nothing to lawfully defend against."[47] While he leaves room for the possibility of defending against an "ongoing armed attack that was, if you will, arriving in waves," he closes that door here: "an ongoing *series* of attacks is not an *ongoing* attack."[48]

Much of that argument was endorsed (at times verbatim) by the UN Special Rapporteur, who agreed that "these attacks, to the extent that they were directed against the United States, had all concluded in the past."[49] And while she too admitted that "a series of attacks, collectively, could amount to an armed attack," the attacks referred to were, on the contrary, "separate and distinct … , not necessarily escalating, … not related in time or even targets."[50] Moreover, even in the latter case proof would be required of "further imminent attack" to avoid blurring the distinction between the jus ad bellum and jus in bello.[51] As such, while both authors cautiously accepted self-defense

43. U.N. Doc. S/2020/20, *supra* note 37, at 1; Hon. Paul C. Ney, Jr., General Counsel of the Dept. of Defense, Legal Considerations Related to the U.S. Air Strike Against Qassem Soleimani (Mar. 4, 2020); NOTICE ON THE LEGAL AND POLICY FRAMEWORKS GUIDING THE UNITED STATES' USE OF MILITARY FORCE AND RELATED NATIONAL SECURITY OPERATIONS (2020).

44. Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14, ¶ 266 (June 27).

45. *See, e.g.*, O'Connell, *supra* note 24; Milanovic, *supra* note 244.

46. Haque, *supra* note 24.

47. *Id.*

48. *Id.*; *see also* Adil Ahmad Haque, *The Trump Administration's Latest (Failed) Attempt to Justify the Soleimani Strike*, JUST SECURITY (Mar. 13, 2020), https://www.justsecurity.org/69163/the-trump-administrations-latest-failed-attempt-to-justify-the-soleimani-strike/ [https://perma.cc/NMS4-YZHP].

49. Callamard, *supra* note 244, annex ¶ 61.

50. *Id.* annex ¶ 57.

51. *Id.* annex ¶¶ 62–63. Callamard continues by stating "[t]he existence of previous attacks could be a legal argument for the legality of the use of force under international humanitarian law – if an international armed

against an ongoing attack that comes in different installments (or waves),[52] they appeared to interpret very strictly the time lapse between the last such installment and the military action in defense.

The second camp belongs to those who unapologetically endorse the "accumulation of events-doctrine" (the *Nadelstichtaktik* or needle-prick theory),[53] but applied it differently here. Indeed, one co-authored legal opinion puts forth that "[i]t is generally accepted that a series of limited attacks, taken in isolation, can amount to an armed attack when considered as a whole."[54] However, rather than relying on the fact that the last incident targeting the U.S. had definitively ended, the authors denied the doctrine's application for three (other) reasons: (1) the case facts differed substantively from the precedents upon which the doctrine is based; (2) the U.S. already responded military on December 29, thereby exhausting the possibility of again invoking the doctrine a few days later; and (3) a lack of "precise identification and evidence" with regard to a connection between the incidents.[55]

Another co-authored piece pointed out that the accumulation of events doctrine required the successive attacks to be "linked in time, cause and source."[56] In the case at hand, and in opposition to their colleagues cited earlier, they found that the multiple attacks on U.S. troops and installations in Iraq met that criterion and thus constituted an armed attack on the United States.[57] Moreover, the authors argued that in such a scenario, unlike in the case of anticipatory self-defense, "prospective armed attacks must not be imminent" as it is "more difficult to assess whether a series of attacks is continuing or whether it has come to an end with the latest attack."[58] They approvingly

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conflict between the states existed prior to the strike. However, the strike itself cannot be justified on the basis of retaliation/reprisal/degrading forces under *jus ad bellum*." *Id.* annex ¶ 63.

52. Haque, *supra* note 24; Callamard, *supra* note 24, annex ¶ 57.

53. J. Francisco Lobo, *One Piece at a Time: The 'Accumulation of Events' Doctrine and the 'Bloody Nose' Debate on North Korea*, LAWFARE (Mar. 16, 2018, 7:00 AM), https://www.lawfareblog.com/one-piece-time-accumulation-events-doctrine-and-bloody-nose-debate-north-korea [https://perma.cc/7RQS-QBWC].

54. Corten et al., *supra* note 244, at 7.

55. *Id.* at 7–9; *see* Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14, ¶ 231 (June 27); Oil Platforms (Iran v. U.S.), Judgment, 2003 I.C.J. 161, ¶ 64 (Nov. 6); Armed Activities on the Territory of the Congo (D.R.C. v. U.S.), 2005 I.C.J. 168, ¶ 146 (Dec. 19). The last reason does echo the views of Callamard. *See* Callamard, *supra* note 24.

56. Talmon & Heipertz, *supra* note 24, at 8. *But see* Callamard, *supra* note 24, §63; Corten et al., *supra* note 24, at 7.

57. Talmon & Heipertz, *supra* note 24, at 8.

58. *Id.* at 10.

quoted the U.S. Attorney-General's interpretation on that point, thereby fully disagreeing with authors in the first camp.[59]

A third JAB-issue deals with the question of whether the United States was entitled to engage in defensive action against an attack, or a series of attacks, carried out by Iran *through* its proxy forces in Iraq. All commentators dealing with this issue accepted that a State can be responsible for the actions of its proxy under international law.[60] Most refer to the complete and/or effective control tests as the relevant standards, although one confusingly also mentions the overall control-test.[61] The latter was once considered a more lenient (rival) test, but has been authoritatively rejected by the International Court of Justice — at least for the purpose of attributing actions by a non-State actor to its sponsor.[62]

Relying on the language of the official U.S. justification in its letter to the U.N. Security Council, Haque and Callamard both squarely state that attacks by "Iran-*supported* militias" could not be attributed to Iran on that basis alone, even if proven (*quod non*).[63] Other authors at least left open the possibility that the link between Kataib Hezbollah and Iran went beyond mere material support,[64] with some going even further than that: "Considering KH's close ties to Iran, their open pledge of loyalty to Iran and the regular meetings with General Soleimani, there may be evidence that Iran through its Quds Force planned, ordered and controlled the KH attacks on U.S. forces in Iraq."[65] While there was thus agreement on this aspect of *the law*, commentators nevertheless disagreed on its application to *the facts*.

A fourth and final JAB-issue centers on the location of the Soleimani-killing: the Iraqi capital of Baghdad.[66] Milanovic succinctly described the opposing positions on this matter:

> [Any] justification would have to work against both Iran and Iraq, because the strike took place on Iraqi territory without the

59. *See* Farivar & Bredemeier, *supra* note 34.

60. Corten et al., *supra* note 24, at 6.

61. Haque, *supra* note 24; Corten et al., *supra* note 24, at 6; Talmon & Heipertz, *supra* note 24, at 8–9. *But see* Callamard, *supra* note 244, ¶ 60.

62. Application of the Convention on the Prevention of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Montenegro), 2007 I.C.J. 43, ¶¶ 396–407 (Feb. 27); *see* ARSIWA, *supra* note 4, at 40–54; *see generally* Antonio Cassese, *The Nicaragua and Tadić Tests Revisited in Light of the ICJ Judgment on Genocide in Bosnia*, 18 EUR. J. INT'L L. 649 (2007).

63. Haque, *supra* note 244; Callamard, *supra* note 244, ¶ 60 (citing U.N. Doc. S/2020/20, *supra* note 377, at 1).

64. Corten et al., *supra* note 244, at 6.

65. Talmon & Heipertz, *supra* note 244, at 9.

66. O'Connell, *supra* note 24.

> consent of the Iraqi government. Pursuant to restrictivist theories of self-defence, such an argument would be a non-starter … Iraq was not implicated in any imminent attacks against the US. For expansionists, this situation would be analogous to self-defence against non-state actors — using force on the territory of the state in which the attacker is located would need to be justified by the necessity of stopping the attack, e.g. pursuant to an unwilling or unable theory.[67]

Restrictivist scholars indeed firmly reject military action against a State simply because the latter fails to prevent its territory from being used as a launching pad for harmful operations against the acting State.[68] Even if the U.S. was successful in arguing self-defense for action taken against *Iran*, it therefore irreparably failed to justify that defensive action on *Iraqi* soil.[69]

Expansionists, however, accept that the "unwilling or unable-test" may provide a justificatory route for the United States.[70] There appears to be two competing versions of that argument. The first, according to Labuda, is that self-defense may be invoked to justify the use of force "against non-state actors operating in the territory of non-consenting states who refuse (unwilling) or do not have the military/law enforcement capabilities (unable) to eliminate a threat originating in their territory."[71] Applied by analogy to the case at hand, according to Milanovic, "the US would need to demonstrate that it had to strike at Soleimani when and where it did, that it could not ask the Iraqi government for permission (e.g. on the basis of its collusion with Iran) and that it could not wait to strike at Soleimani elsewhere."[72] Both Labuda and Milanovic then tackle the theory on its own merits, without

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67. Milanovic I, *supra* note 244.

68. Corten et al., *supra* note 24, at 8–9; *see also* O'Connell, *supra* note 244 ("In the event the Iraqis failed to take adequate steps, the U.S. can keep its people safe by evacuating them from Iraq."); *see* Olivier Corten, *A Plea Against the Abusive Invocation of Self-Defence as a Response to Terrorism*, EJIL:TALK! (July 14, 2016), https://www.ejiltalk.org/a-plea-against-the-abusive-invocation-of-self-defence-as-a-response-to-terrorism/ [https://perma.cc/YM5H-5V4W].

69. However, this assumes that KH, as part of the Popular Mobilisation Forces, had not (yet) been fully integrated into the Iraqi army. *See* Corten et al., *supra* note 244, at 8–9. *Compare* Callamard, *supra* note 244, § 70, *with* Talmon & Heipertz, *supra* note 244, at 14 ("The situation here is . . . one of a State organ being placed at the disposal of another State. Rather than being so placed by the Iraqi Government, though, KH placed itself at the disposal of Iran. In this case, the conduct of KH can be considered only an act of Iran.").

70. Talmon & Heipertz, *supra* note 244, at 16.

71. Labuda, *supra* note 24.

72. Milanovic I, *supra* note 244.

thereby supporting it,[73] but both conclude that doing so is unsatisfactory — given the absurd legal consequences[74] and because the U.S. did not discharge its evidentiary burden.[75]

> Similarly, Special Rapporteur Callamard noted that support for the doctrine is decidedly mixed, but has nevertheless been used by States to justify the use of military force.[76] Be that as it may, she denied that the doctrine could apply in the Soleimani-case for three reasons: (1) the 'threat' to be neutralized was a high-level State official prone to international travel, which would absurdly imply he could be targeted anywhere in the world; (2) many of the alleged attacks against the U.S. did not concern Iraq, nor was it suggested that Iraq was the intended location of one that was imminent; (3) there was no evidence that Iraq was unable or unwilling to cooperate, given its continued support in the fight against Islamic State and the absence of consultation prior to the drone strike.[77]

Finally, Talmon and Heipertz put forth a different conception of unable or unwilling. They first discarded the former conception as "highly controversial and prone to abuse," thereby seemingly agreeing with the restrictivist point of view.[78] They then relied on the test's "original, so-to-speak" incarnation to preclude the wrongfulness of the use of force in trilateral, inter-State relations: "Where a neutral or non-belligerent State (Iraq) does not fulfil its duties — is unable or unwilling — a belligerent (the United States) is permitted to use force in self-defence on the territory of that State against the enemy (Iran)."[79] According to the authors, that understanding has long since been accepted — or was at least left open by the International Law Commission in its ARSIWA.[80] It was moreover repeatedly alluded to

73. *See* Labuda *supra* note 24 (noting that the better view is that this controversial doctrine is rejected by most states).

74. *Id.* (arguing that applying the doctrine in a situation where the acting State is already operating in the territorial State with the latter's permission effectively hollows out the *ius ad bellum* notion of consent).

75. Milanovic I, *supra* note 244.

76. Callamard, *supra* note 244, ¶¶ 72–3.

77. *Id.* ¶¶ 73–8. Haque, *supra* note 244 (noting that only clear evidence of an ongoing or imminent armed attack by Iran could justify the use of armed force in Iraq). However, it is unclear what justification beyond pre-emptive self-defense *against Iran* he would accept for defensive action in Iraq). *See generally id.*

78. Talmon & Heipertz, *supra* note 24, at 15.

79. *Id.* at 16.

80. *Id.* at 14.

by U.S. officials when pointing to Iraq's failure in protecting U.S. troops on its territory.[81]

In sum, commentators disagreed on whether the right to self-defense justifies military action against attacks that have not yet begun (or are not even about to), although none accepted that the U.S. met the evidentiary burden of even the most expansive interpretation. Moreover, while all of them accepted the accumulation of events theory, some authors argued that the attacks had ended and none were imminent, whereas others argued the exact opposite. The latter group then disagreed about the sufficiency of the connectivity of the past attacks to allow the doctrine to come into play. In addition, there was no consensus on the nature of the relationship between Kataib Hezbollah and Iran for the purpose of attributing acts of the former to the latter, thereby (possibly) justifying taking out Soleimani as the group's alleged *Hintermann*. To top it all off, there were varying views on the status and substance of the unwilling or unable-test as part of the right to self-defense, as well as on whether Iraq fulfilled either criteria.

Consequently, besides agreeing on the obvious fact that the Trump administration failed in convincingly supporting an already tenuous legal argument, the strikes' accordance with the jus ad bellum hopelessly divided international lawyers' evaluations.[82] As shown in the preceding paragraphs, the analysis often hinges on the application of the law to the facts. A different appreciation of the fact pattern therefore likely influences the final outcome, which is to some extent unavoidable — especially when commentators offer their views even as the story is still unfolding.

Much more worrisome, however, is the extent of disagreement on many applicable legal standards: is defensive military action against imminent armed attacks allowed under international law? Does imminence (exclusively) consist of a temporal element or rather (also) include aspects of necessity and causality? Is imminence conceptualized in the same way for self-defense against a single armed attack compared to a series of pinprick attacks, or does the legal 'clock' then tick more slowly? At what point of interconnectedness should we view such a series of attacks holistically? And as for the unwilling or unable-test as part of the right to self-defense: does it apply in a trilateral, inter-State situation and/or against non-State actors? Does it constitute the law as it is or rather as (some think) it ought to be?

None of these questions field clear answers, producing a kaleidoscope of legal analyses in the Soleimani-case with no indication of how to assess their respective authority. That picture becomes even

81. ARSIWA, *supra* note 4, at 74–5 ("Article 21 leaves open all issues of the effect of action in self-defence vis-à-vis third States."); Talmon & Heipertz, *supra* note 244, at 15.

82. *See e.g.*, Talmon & Heipertz, *supra* note 24, at 6–7.

more blurry when branching out to other sections of international law, as the section below shows.

2. Were the drone strikes in conformity with the jus in bello and/or international human rights law?

As rightfully pointed out by Christof Heyns, the former UN Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions: "For a particular drone strike to be lawful under international law it must satisfy the legal requirements under all applicable international legal regimes."[83] Moving on, then, from the law on *going to* war (jus ad bellum — discussed in the previous section) to the law on *waging* war (jus in bello), many commentators wondered whether the drone strikes that killed General Soleimani triggered (or continued) an international armed conflict between the United States and Iran/Iraq and were, therefore, ruled by the jus in bello.[84] Alternatively, the strikes would have been launched during peacetime, which would then raise the question whether the U.S. violated its international human rights obligations by killing no less than 10 individuals, even if that use of deadly force occurred outside American territory.

Again, there was a wide variety of views among the experts. Perhaps the most straightforward one held that the strikes *ipso facto* initiated an international armed conflict ("IAC") and therefore fell to be examined under the rules of JIB.[85] This flows from the so-called 'first shot-rule', which prescribes that "[u]nlike in the case of non-international armed conflicts, where it must be proved that the hostilities have reached a certain threshold of intensity … , a single attack is sufficient to trigger an international armed conflict."[86] To the group of experts examining the strikes according to JIB also belong those who considered (or at least did not exclude the possibility) that the IAC had been ongoing since the attacks against U.S. troops and installations in Iraq began in November 2019.[87]

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83. Christ of Heyns (Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions), *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions*, ¶ 24, U.N. Doc. A/68/382 (Sept. 13, 2013).

84. *See, e.g.*, Corten et al., *supra* note 24, at 15–16.

85. Corn & Jenks, *supra* note 24.

86. Corten et al., *supra* note 24, at 16; *see also* Corn & Jenks, *supra* note 244 ("At a minimum, with the first 'shot fired'—the first missile the U.S. launched—an armed conflict between the U.S. and Iran existed.").

87. Talmon & Heipertz, *supra* note 244, at 11–12; Milanovic II, *supra* note 244 ("It is now also unambiguously clear that, as a matter of international humanitarian law, an international armed conflict (IAC) exists between the US and Iran. … It is also perfectly possible that the IAC preceded Soleimani's killing, for example due to fighting between the US and Iranian proxies in Iraq.").

Among these experts, some simply concluded that General Soleimani constituted a legitimate military target: "Where a military officer in command of the forces and capabilities creating the imminent threat of armed attack is lawfully and successfully subjected to attack, the killing was legally justified."[88] Talmon and Heipertz came to that same conclusion,[89] albeit after a somewhat more complex reasoning. While the strikes triggered an (or, in their view, were part of a pre-existing) IAC between the U.S. and Iran, the jus in bello was not the *only* applicable legal framework. International human rights law would have to be considered also: "both bodies of law are, in principle, applicable side by side and are complementary."[90] However, the authors denied that Soleimani was under the jurisdiction of the U.S. at the time he was targeted by American drones.[91] Without such extraterritorial jurisdiction, the U.S. was not bound to protect Soleimani's human rights.[92] And even if that were to be the case, his right not to be *arbitrarily* deprived of life was not violated.[93] Given the context of an international armed conflict, that right must be interpreted in light of relevant jus in bello standards — as a member of the Iranian armed forces, Soleimani was an enemy combatant, and thus a legitimate military target after all.[94]

A similar analytical framework was adopted by Corten, Lagerwall, Koutroulis and Dubuisson: if the strikes "are contrary to the law of armed conflict, then [they] also constitute an 'arbitrary' deprivation of life contrary to article 6 of the Covenant on Civil and Political Rights."[95] However, unlike their colleagues, they concluded that the strikes may have contravened JIB for two reasons: (1) No enemy combatant may be killed perfidiously through an 'assassination,' which, according to some domestic interpretations, prohibits singling out "a

88. Corn & Jenks, *supra* note 244. *See also* Milanovic II, *supra* note 244 ("To the extent that IHL applied, both the killing of Soleimani and the Iranian missile strike in response were lawful, since the attacks were directed at combatants and military objects, in compliance with the principle of distinction.")

89. Talmon & Heipertz, *supra* note 24, at 11.

90. *Id.* at 12.

91. *Id.* at 13.

92. *Id.*

93. *See* International Covenant on Civil and Political Rights art. 6(1), Dec. 16, 1966, 999 U.N.T.S. 171 ("Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.") [hereinafter ICCPR].

94. Talmon & Heipertz, *supra* note 24, at 11–13.

95. Corten et al, *supra* note 244, at 21.

specific person on the adversary's side and request[ing] his death;"[96] and (2) Soleimani may have been involved in negotiations between Iran and Saudi Arabia with Iraqi mediation at the time of his killing.[97] If true, he was protected from harm given his status as *parlementaire*.[98] If either scenario was applicable, the strikes violated JIB and, therefore, IHRL also.

Other commentators were not satisfied by that framework. Janik, for example, began by accepting that even isolated targeted killings could meet the definition of (ultra-short) international armed conflicts.[99] But relying on the work of Jann Kleffner, he then suggested that this would not trigger the full body of JIB-rules: "only the protective dimension of the principle of distinction — the prohibition to directly target civilians — should be applied to situations of targeted killings of a foreign state's armed forces."[100] Importantly, lethal force could not be legitimized on the basis of military necessity or proportionality — leaving such force to be determined exclusively on the basis of IHRL.[101] Janik then concluded that the U.S. indeed "seems to have violated [Soleimani's] right to life."[102]

In yet another approach, Gurmendi first adopts two premises: "(i) a strike that violated the *jus ad bellum* is arbitrary and therefor unlawful under IHRL and … (ii) IHL of IACs applies from the moment an attack begins with hostile intent, and therefore the first strike will usually occur after IHL is triggered."[103] Rather than assessing an arbitrary deprivation of life on the basis of jus in bello, Gurmendi

96. *Id.* at 19–20; *see also Rule 65: Perfidy*, ICRC, https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule65 [https://perma.cc/59X5-A2HK]; John Daniszewski, *Was the Drone Attack on Iranian General an Assassination?*, AP NEWS (Jan. 4, 2020), https://apnews.com/1f914021bc802931059746a5ce8a192e [https://perma.cc/JQL7-PSYC].

97. Corten et. al, *supra* note 24, at 20.

98. *Id. at* 20; *see also Rule 67: Inviolability of Parlementaires*, ICRC, https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule67 [https://perma.cc/9NB7-37S8].

99. Janik I, *supra* note 244.

100. Ralph Janik, *Soleimani and Targeted Killings of Enemy Combatants — Part II: "Geneva Law" versus "Hague Law"*, OPINIOJURIS (Jan. 20, 2020), http://opiniojuris.org/2020/01/20/soleimani-and-targeted-killings-of-enemy-combatants-part-ii-geneva-law-versus-hague-law/ [https://perma.cc/3D7T-TT9E].

101. *Id.*

102. *Id.*

103. Gurmendi, *supra* note 244.

connects it to, and makes it dependent on, the *jus ad bellum*.[104] As a result, the two tests apply simultaneously but lead to opposing results: under JIB the strike is lawful, under JAB (and thus IHRL) it is not. According to Gurmendi, which test and outcome prevails depends on the analyst.[105]

Finally, the UN Special Rapporteur considered that, on balance, the jus in bello did not apply at all: "The US and Iran had not been and have not been considered to be involved in an IAC before or after the strike and the strike occurred in a civilian setting in an area outside of active hostilities and in a non-belligerent State."[106] She came to that conclusion after considering numerous challenges to the first shot-rule, such as: (1) taking all incidents between Iran(-supported militias) and the U.S. into account, it was unclear whether there were dozens of IACs or a single (on-going) IAC or none at all; (2) most institutional and individual commentators stopped short of labeling the tensions between Iran and the U.S. as a fully-fledged armed conflict — as did the States themselves; (3) the geographical scope of the IAC and, therefore, its protagonists were uncertain; and (4) while there may be valid and pragmatic reasons to apply jus in bello in this case, it may not be the best "'fit,' for lack of a better word."[107] However, unlike Talmon and Heipertz, Callamard considered that using a drone to take out an individual abroad was "the ultimate exercise of physical power and control over the individual."[108] Consequently, the U.S. was bound by its human rights obligations even if the action took place on Iraq's territory.[109] Moreover, she agreed that an act of aggression involving the loss of life was necessarily arbitrary.[110] As a result, the "course of action taken by the US was unlawful."[111]

Again, the discord among commentators was astonishing. All agreed that to be lawful, the strikes must not have fallen foul of any

104. *See* Human Rights Committee, *General Comment No. 36 – Article 6: Right to Life*, ¶ 70, U.N. Doc. CCPR/C/GC/36 (Sept. 3, 2019) [hereinafter *General Comment No. 36*]. Gurmendi, *supra* note 24.

105. *See* Gurmendi, *supra* note 244. Gurmendi Takes the Inter-American Human Rights Commission as an example and argues it is likely to take the '*pro homine*'-approach, allowing IHRL to trump JIB: "As such, faced with two possible routes to decide a case, the Commission would choose the one that favors individual rights over state rights. Seen through Latin American eyes, Soleimani would have been murdered, not targeted." *Id.*

106. Callamard, *supra* note 244, § 39.

107. *See id.* §§ 15–39.

108. *Compare id.* § 40–3, *with* Talmon & Heipertz, *supra* note 24, at 13.

109. Callamard, *supra* note 24, §31.

110. *Compare id.* § 44, *with* Gurmendi, *supra* note 245.

111. Callamard, *supra* note 24, § 82.

applicable legal regime.[112] However, some thought that only pertained to (part of) the jus in bello, while others considered the answer to lie exclusively in international human rights law. Hybrid views also existed: certain experts thought both frameworks applied, but whether the deprivation of life was *arbitrary* under IHRL fell to be determined under JIB.[113] Others disagreed, tying IHRL to JAB: an act of aggression involving souls lost is arbitrary by definition.[114] Finally, there were some who claimed both frameworks applied, but led to opposing results and whoever is called upon to assess must decide between the two.[115] The disagreement by no means ended there. Sub-debates involved the extraterritorial application of human rights law for targeted drone strikes, the intensity threshold for IACs, and Soleimani as a(n i)legitimate military target.

As announced at the outset, this article does not aim to take a position in that legal debate — difficult as that may be. Rather, the following sections will launch a preliminary examination into the question *why* commentators, whose expertise is beyond reproach, evaluate a similar set of facts so differently all while claiming to apply the same set of rules.

III. TENTATIVE EXPLANATIONS

A. International law as a (pseudo)science

Koskenniemi famously wrote that international law is fundamentally indeterminate and that, as a consequence, it is possible to "defend any course of action — including deviation from a clear rule — by professionally impeccable legal arguments."[116] He further argued that international law is, therefore, "singularly useless as a means for justifying or criticizing international behaviour."[117] His views can be situated within the critical legal studies ("CLS") movement that was introduced into international law by the so-called New Stream in the 1980s.[118] The latter inspired a whole range of new approaches to international law ("NAILs"), including third-world and feminist

112. *See* Stuart Casey-Maslen, *Pandora's Box? Drone Strikes Under* jus ad bellum*,* jus in bello*, and International Human Rights Law*, 866 INT'L REV. OF THE RED CROSS 597, 619 (June 2012); *see also* Gurmendi, *supra* note 24.

113. *See generally* Corten et al, *supra* note 244, at 21.

114. *See generally* Callamard, *supra* note 24, §44.

115. *See generally* Gurmendi, *supra* note 24.

116. MARRTI KOSKENNIEMI, FROM APOLOGY TO UTOPIA 591, 591 (2005).

117. *Id.* at 600.

118. *See generally* David W. Kennedy, *A New Stream of International Law Scholarship*, 7 WIS. INT'L L. J. 1 (1988).

critiques of the field.[119] Such critical approaches have since chipped away at international law's claims to determinacy, objectivity, neutrality, impartiality and expertise.[120] Importantly, the "'newstream' has become the mainstream" as "critical scholarship is usually taken far more seriously than doctrinal scholarship."[121]

Additionally, Bianchi compares interpretation in international law to a game, where the players (or interpreters) must secure adherence to their own interpretation of the law in order to triumph.[122] These players have several cards (or interpretive techniques) at their disposal, but which card to play and when is ultimately "left to the skills and strategies of the individual players."[123] Similarly, while international law accommodates a wide range of theories and methodologies, the academy now appears to agree that no approach is scientifically superior to any other — leaving international lawyers completely free to follow their preferences.[124] As a result, an author may not be criticized for a methodological choice *as such*, but criticism is certainly warranted in case that choice is not made explicitly upfront or its intrinsic requirements are consequently abandoned.[125]

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119. *See generally* JOSE MARIA BENEYTO, ET AL., NEW APPROACHES TO INTERNATIONAL LAW (2012).

120. Jason Beckett, *Critical International Legal Theory*, OXFORD BIBLIOGRAPHIES (Jan. 20, 2017), https://www.oxfordbibliographies.com/view/document/obo-9780199796953/obo-9780199796953-0007.xml [https://perma.cc/232Y-LYSH].

121. Jan Klabbers, *Whatever Happened to Gramsci? Some Reflections on New Legal Realism*, 28 LEIDEN J. INT'L L. 469, 471 (2015). *See also* Jan Klabbers, *Towards a Culture of Formalism? Martti Koskenniemi and the Virtues*, 27 TEMPLE INT'L & COMP. L. J. 417, 417 (2014).

122. *See generally* Andrea Bianchi, *The Game of Interpretation in International Law*, *in* INTERPRETATION IN INTERNATIONAL LAW 35 (Andrea Bianchi, Daniel Peat & Matthew Windsor eds., 2015).

123. Andrea Bianchi, *The Game of Interpretation in International Law, in* INTERPRETATION IN INTERNATIONAL LAW 35 (Andrea Bianchi, Daniel Peat & Matthew Windsor eds, 2015). For a different analogy, see Jean D'Aspremont, *Customary International Law as a Dance Floor (Two Parts)*, EJIL:TALK! (Apr. 14–15, 2014), https://www.ejiltalk.org/customary-international-law-as-a-dance-floor-part-i/ [https://perma.cc/69P4-FW3X].

124. *See also* JEAN D'ASPREMONT, EPISTEMIC FORCES IN INTERNATIONAL LAW — FOUNDATIONAL TECHNIQUES OF INTERNATIONAL LEGAL ARGUMENTATION 179–80 (2016) ("[T]here is no methodological package that is, a priori, endowed with more validity or force than another. There are just a multitude of methodological packages which, in practice, are endorsed by professionals without any of them having any methodological or theoretical ascendancy over the other.").

125. *Id.*

Moreover, Orford has argued that "[a] theory of scientific method is . . . a theory of knowledge . . . is a theory of language and its limits."[126] While the *general* commitment to scientific values such as rationality and objectivity may be universal, what that commitment prescribes *concretely* in forms of conduct, means of producing knowledge and relations to the State is by no means static, similar to the continuous development of language — including that of international law.[127] Finally, in a ground-breaking monograph, Roberts collected a vast body of empirical evidence showing that international law is understood differently in different States.[128] Employing the same analogy as Orford, she strikingly concluded that international law is "caught between the ideal of Esperanto and the reality of both multilingualism and English as the lingua franca" and is therefore unlikely to ever be fully "international."[129]

The understanding that international law is inherently indeterminate, characterized by a methodological free-for-all and epistemic flux, and its interpretation the result of strategic choices informed by extralegal factors seems to squarely challenge the conceptualization of international law as a science by the likes of Oppenheim with which this article started.[130] It moreover threatens the law's legitimacy and may foster noncompliance.[131] Writing in 2019, Klabbers lamented that the evolution (broadly) sketched out meant that:

> international legal method is no longer about possible ways of finding out what the law says but, rather, about possible ways of

126. Orford, *supra* note 8, at 384.

127. *Id.* at 372.

128. ANTHEA ROBERTS, IS INTERNATIONAL LAW INTERNATIONAL? 325 (2017).

129. *Id.*

130. *See generally* Lassa Oppenheim, *The Science of International Law: Its Task and Method*, 2 AM. J. OF INT'L L. 313 (1908).

131. For example, on *semantic* indeterminacy Franck commented: "But indeterminacy also has its costs, which are paid in the coin of legitimacy. Not only do indeterminate normative standards make it harder to know what is expected—perhaps because the authorities responsible for the rule text were themselves uncertain, or could not agree, or wished to preserve flexibility for the future, or just did not see the issue but indeterminacy also makes it easier to justify non-compliance. To put it conversely, the more determinate a standard, the more difficult it is to justify non-compliance. Since few persons or states wish to be perceived as acting in flagrant violation of a generally recognized rule of conduct, they may try to resolve a conflict between the demands of the rule and their desire for interest gratification by "interpreting" the rule permissively." *See* THOMAS M. FRANCK, THE POWER OF LEGITIMACY AMONG NATIONS 53–4 (1990).

> doing academic research. International law … is no longer about what states do, but … about what international lawyers do. … [It] has become transfixed by methodological debates, with each faction occupying its own corner and being reluctant to look outside.[132]

The case study under review exemplifies many of those insights. Admittedly, it may be unrealistic to expect authors to set out their foundational assumptions — for example on their theoretical and methodological approach — in detail at the outset of each piece of legal commentary, especially when destined for the fast-paced blogosphere (let alone Twittersphere). Regardless, it makes a world of difference whether, as just one example, an author is mulling the law as it *is* as opposed to how (s)he thinks it *should* be.

Take the opinion of Callamard, expressed in her official capacity as UN Specially Rapporteur, wherein she firmly derides as an "anachronism" the view that a targeted, extraterritorial killing carried out by a State does not engage its human rights obligations.[133] That interpretation ultimately harkens back to the position adopted by the U.N. Human Rights Committee ("HRC") in General Comment 36 ("GC36").[134] However, the HRC's Special Rapporteur admitted that GC36 merely *suggested* that such an interpretation would indeed be covered by the International Covenant on Civil and Political Rights ("ICCPR").[135] And while the views of the HRC on the ICCPR may have "great weight," they "in no way" represent a binding interpretation of the treaty.[136] The issue here is not with the modalities of the ICCPR's extraterritorial application, but rather with its presentation as *settled law* by a high-level UN official whose views on the Soleimani-case have been broadcast around the world.[137]

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132. Klabbers, *supra* note 9, at 1062.

133. Callamard, *supra* note 244, § 43.

134. *Id.* ¶¶ 40–3. *See also General Comment No. 36*, *supra* note 1044.

135. Ryan Goodman, Christof Heyns & Yuval Shany, *Human Rights, Deprivation of Life and National Security: Q&A with Christof Heyns and Yuval Shany on General Comment 36*, JUST SECURITY (Feb. 4, 2019), https://www.justsecurity.org/62467/human-life-national-security-qa-christof-heyns-yuval-shany-general-comment-36/ [https://perma.cc/T4LQ-XRV6] (emphasis added). *See also* ICCPR, *supra* note 933.

136. Ahmadou Sadio Diallo (Guinea v. Dem. Rep. Congo), 2010 I.C.J. 639, ¶ 66 (Nov. 30, 2010).

137. Stephanie Nebehay, *U.N. Expert Deems U.S. Drone Strike on Iran's Soleimani an 'Unlawful' Killing*, REUTERS (July 6, 2020), https://www.reuters.com/article/us-usa-iran-un-rights/un-expert-deems-us-drone-strike-on-irans-soleimani-an-unlawful-killing-idUSKBN2472TW [https://perma.cc/9TZS-ZQ8Q]; *US Killing of Iran's Qassem Soleimani*

Or take the (currently most popular) blog post on *Opinio Juris* wherein Gurmendi bolsters the IHRL-JAB connection,[138] again relying on GC36 and the work of Haque.[139] The same HRC Special Rapporteur on this point noted:

> The interpretation embraced by the General Comment is that the term arbitrary deprivation of life in the ICCPR also has to be construed in light of other relevant norms of international law. *Hence*, a loss of life directly resulting from an act or omission in violation of another relevant norm of international law, such as the norms of IHL, *jus ad bellum* or other basic human rights norms, would be regarded ipso facto as a violation of the right to life.[140]

However, that interpretive move is unsupported by a single source in GC36. It is unclear how the HRC came to its conclusion and, consequently, why Gurmendi found that view — as opposed to the more traditional one connecting IHRL to JIB — to be "the most convincing."[141] Again, the issue is not with that position *in se*, but rather with its pretense of hard law and the ease with which a fundamental shift in legal doctrine seems to blow past unopposed.

Another illuminating methodological distinction in the jus ad bellum specifically was set out by Waxman (and Corten before him) that sheds more light on the documented cacophony among experts in the Soleimani-case.[142] According to Waxman,

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'Unlawful': UN Expert, AL JAZEERA (July 7, 2020), https://www.aljazeera.com/news/2020/07/killing-iran-qasem-soleimani-unlawful-expert-200707132312296.html [https://perma.cc/7UQ5-VBEE]; Nick Cumming-Bruce, *The Killing of Qassim Suleimani Was Unlawful, Says U.N. Expert*, N.Y. TIMES (July 9, 2020), https://www.nytimes.com/2020/07/09/world/middleeast/qassim-suleimani-killing-unlawful.html [https://perma.cc/TT7H-T64E].

138. *See supra* notes 1033–11 and accompanying text.

139. Gurmendi, *supra* note 244. *See also General Comment No. 36*, *supra* note 1044, ¶ 70.

140. Goodman et al., *supra* note 1355 (emphasis added).

141. Gurmendi, *supra* note 244.

142. *See generally* Matthew C. Waxman, *Regulating Resort to Force: Form and Substance of the UN Charter Regime*, 24 EUR. J. INT'L L. 151 (2013) [hereinafter Waxman, *Form and Substance*]; Olivier Corten, *The Controversies over the Customary Prohibition on the Use of Force: A Methodological Debate*, 16 EUR. J. INT'L L. 803 (2006). For responses, see Olivier Corten, *Regulating Resort to Force: A Response to Matthew Waxman from a 'Bright-Liner'*, 24 EUR. J. INT'L L. 191 (2013); Matthew Waxman, *Regulating Resort to Force: A Response and Thanks to Corten*, EJIL:TALK! (May 2, 2013), https://www.ejiltalk.org/regulating-resort-to-force-a-response-and-thanks-to-corten/comment-page-1/ [https://perma.cc/A5QS-ZP29].

> [t]o Bright-Liners, the legality of resort to force by individual states or groups of states should operate as an on–off switch, flipped by the manifestation of readily identifiable factual preconditions, not shaded or uncertain assessments. . . . Balancers, by contrast, view legality of resort to force as more like a dimmer knob than an on–off switch. … Balancers believe that use of force beyond that authorized by the Security Council should be regulated by flexible standards that take account of contextual factors and the various policy interests animating international law, and that this approach better reflects state practice. . . . To be clear, these two orientations — Bright-Liners and Balancers — actually represent segments along a spectrum of possible views . . . [and] each incorporates some elements of the other's preferred form.[143]

To some extent, the preference for one over another appears influenced by the authors' background and training: "US authors tend to situate themselves more within the [second] current, the others (most notably the Europeans) the [first]. The correspondence is by no means absolute."[144]

One example of that methodological clash in the Soleimani-case is the discussion about which elements go into the imminence-analysis pertaining to the right to self-defense. As we have seen, some experts argued that imminence (at most) relates to the armed attack's temporal proximity: has it already begun or is it about to?[145] Others, however, disagreed and included elements of necessity and causality, using imminence more as a "rhetorical device than a genuinely useful legal concept — an armed attack will be regarded as imminent if *responding* to the attack is *necessary now*, regardless of when and how exactly the attack will take place."[146] Both approaches appear to find themselves on opposite sides of Waxman's spectrum opposing Bright-Liners (on-off switch) and Balancers (dimmer knob).[147]

Similarly, the unwilling or unable-test operates as a workaround for conducting a targeted killing on the territory of a State absent consent

143. Waxman, *Form and Substance*, *supra* note 142, at 15–859; *see generally* Weil, *supra* note 3. The description of international law as an "on-off switch" echoes Weil's strict distinction between prelegal and legal, *id.*

144. Corten, *supra* note 142, at 822; *see also* Waxman, *Form and Substance*, *supra* note 1422, at 153–54, 158–59. *See generally* ROBERTS, *supra* note 128.

145. Unsurprisingly, Corten & others are the most restrictive. Corten et al., *supra* note 24, at 10. *See also* O'Connell, *supra* note 244.

146. Milanovic I, *supra* note 244.

147. *See* Monica Hakimi, *Making Sense of Customary International Law* 118 MICH. L. R. 1487, 1490 (2020) (taking firm issue with the so-called rulebook-conception of customary international law — arguably a concept more in tune with Bright-Liners).

and Security Council authorization. According to Callamard, the test was developed by the U.S. and other States since 9/11 and has been used to "justify targeting inter alia the Taliban in Afghanistan, and ISIL in Syria."[148] Following a balancing approach to the right to self-defense, it is reasonable to argue in favor of its admissibility if the defensive military action was necessary to counter a threat at a specific time *and in a specific location*, taking into account the territorial State's collusion with the enemy.[149] Conversely, a Bright-Liner considers that such an interpretation is "incompatible both with existing legal instruments (no text allows such a possibility) and with the consistent case-law of the International Court of Justice."[150]

Stripping down the respective lines of argumentation thus reveals a methodological assumption at their core that strategic choices and an (alleged) indeterminacy of the international legal language inspires[151] — often with diametrically opposed outcomes. From this, we may draw two inferences: first, the influential critical approaches to international law propagated moving away from the science of international law — as perhaps most famously described in Oppenheim's seminal article.[152] The logical consequence is that the search for a 'correct answer on the law' is viewed with much suspicion (if not derision). Second, even those professionals that do not travel down that road — and they are plentiful too — have become much more tolerant towards the *free choice* of theoretical and methodological approach by their peers. As a result, every interpretation of international law becomes equally *defensible*, even if not (necessarily) equally *convincing*. This much is glaringly evident from the Soleimani-case.

B. The absence of an authoritative arbiter

The absence of a universally accepted method or institution to decide between, or (broadly) rank according to authoritativeness, the multitude of diverging interpretations of international law and their application to a contentious case reinforces the foregoing. It seems as if all interpretations may stand, resulting in the ever-greater fragmentation of international law.[153] Nor is there an international

148. Callamard, *supra* note 24, ¶ 72.

149. Milanovic I, *supra* note 244; Talmon & Heipertz, *supra* note 245, at 14.

150. Corten et al., *supra* note 244, at 9.

151. In this case, the indeterminacy could involve the term "imminence," or may be found in the formulation of Article 51 of the U.N. Charter. U.N. Charter art. 51 ("Nothing . . . shall impair the inherent right of individual or collective self-defence *if an armed attack occurs.*") (emphasis added).

152. *See generally* Oppenheim, *supra* note 1.

153. *See generally* Martii Koskenniemi (Chairman of the Int'l Law Comm'n), *Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law*, U.N. Doc. A/CN.4/L.682 (Apr. 13, 2006).

arbiter capable of taking on that fateful role. Even the International Court of Justice, which comes closest,[154] is fully dependent on States' consent to decide a dispute between them and take that opportunity to clarify outstanding international legal issues (often in *obiter dicta*).[155] Moreover, relatively speaking such judgments by the ICJ (or any other international court, for that matter) are few and far between.[156]

However, the ICJ does rely on "judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law."[157] Generally, and in the abstract, it is (supposed to be) the soundness, trustworthiness and persuasiveness — or, in a word, quality — of those subsidiary sources that determines their influence on international law.[158] The U.S. Supreme Court in Paquete Habana case phrased it as follows:

> International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction . . . . For this purpose, where there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations; and, as evidence of these, to the works of jurists and commentators, *not for the speculations of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is.*[159]

In addition, the "teachings" of expert bodies with a globally diverse composition, with the International Law Commission as a prime

154. *See* Alain Pellet, *Article 38*, *in* THE STATUTE OF THE INTERNATIONAL COURT OF JUSTICE: A COMMENTARY 858 (Andreas Zimmermann et al., eds., 2nd ed. 2012) ("[T]he Court remains the most prestigious of all and the only one having a general competence for all legal disputes . . . ; its status as the principal judicial organ of the United Nations enhances its authority as does its composition, both wide . . . and diversified . . . ; its organic permanence and precedence in time has enabled the Court to elaborate an impressive case law without equal.")

155. U.N. Charter art. 36.

156. See Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14 (June 27) for one particularly powerful example of the fact that much of our contemporary understanding of the jus ad bellum still relies on the judgment of the I.C.J. in the Nicaragua case.

157. Charter of the United Nations and the Statute of the International Court of Justice art. 38(1)(d), 24 October 1945, 33 U.N.T.S. 993.

158. *See* Pellet, *supra* note 1544, at 856 (quoting Von Bogdandy, The Judge as Law-Maker: Thoughts on Bruno Simma's Declaration in the Kosovo Opinion, in Fastenrath).

159. The Paquete Habana, 175 U.S. 677, 700 (1900) (emphasis added).

example, carries a greater weight than those of individual scholars.[160] Nevertheless, the work of such a collective often takes years before wrapping up. After all, rather than provide play-by-play commentary, these institutions play the long game. Furthermore, their views are not always adopted by consensus (internal disagreement),[161] may contradict those adopted by colleagues (external disagreement),[162] and also do not always clearly distinguish between the codification of international law and its progressive development.[163]

D'Aspremont pointedly described the state of affairs as follows: "the intellectual prison of custom seems to be gradually transformed into a large dance floor where (almost) *every step and movement is allowed or, at least, tolerated.*"[164] While he was commenting specifically on international custom as a primary source of international law,[165] the same can be said to apply to (sources of) the field more broadly. Arguably, the lack of a fire-proof way to distinguish between authoritative and speculative interpretations fuels this phenomenon.

And again, the Soleimani-case supports these concerns. For example, commentators were willing to judge the official U.S. justifications on their own merits — even if the standards they invoked did not accurately reflect international law. Milanovic confronted the U.S. position on self-defense head-on by proceeding "*for the sake of the argument*, on the assumption that these expansive positions [espoused by the U.S.] are correct."[166] He concluded that "even if we took the US views of applicable international law on their own terms, . . . it would

160. *See Membership*, INT'L L. COMM'N. https://legal.un.org/ilc/ilcmembe.shtml [https://perma.cc/7CNR-AXUW].

161. *See* Georg Nolte, *The Resolution of the Institut de Droit International on Military Assistance on Request*, 45 REVUE BELGE [BELG.] DE DROIT INTERNATIONAL [INT'L] 241 (2012).

162. *Compare Final Report on the Meaning of Armed Conflict*, INT'L L. ASS'N (2010), http://www.rulac.org/assets/downloads/ILA_report_armed_conflict_2010.pdf [https://perma.cc/2HUN-D232],u *with Commentary of 2016 – Article 2: Application of the Convention*, INT'L COMM. RED CROSS (2016), https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=BE2D518CF5DE54EAC1257F7D0036B518 [https://perma.cc/SLV2-TUNC]. For the treatment of the comparable 'decisional fragmentation' among international courts and tribunals, see PHILIPPA WEBB, INTERNATIONAL JUDICIAL INTEGRATION AND FRAGMENTATION (2013).

163. This is a reference to the ILC's twofold task. *See* G.A. Res 174(II), at art. 15 (Nov. 21, 1947).

164. D'Aspremont, *supra* note 1233 (emphasis added).

165. *Id.*

166. Milanovic I, *supra* note 244 (emphasis added).

be difficult to argue that the killing of Soleimani was lawful."[167] Therefore, while he thought it unlikely that the U.S. could discharge its evidentiary burden, it was "not inconceivable that it could do so" and the "Soleimani strike [was] thus not *clearly* unlawful in the way some previous military actions of the Trump administration have been."[168] Taken together, it remains unclear what legal standard of self-defense Milanovic himself espouses given his refusal to take a firm stance in the debate.[169] On the contrary, Labuda noted upfront that his analysis took "for granted the expansionist *ius ad bellum* doctrine known as 'unable or unwilling' (U/U)" even if "[t]he better view is that this controversial doctrine is rejected by most states."[170] Nevertheless, he then considered that "since the US is one of its proponents, I examine the doctrine's potential applicability in this post."[171]

But do these thought experiments, reasoning along with a justification that the commentator considers problematic under international law (to say the least), not inadvertently bolster its authoritativeness? After all, the influential report by the UN Special Rapporteur did not dismiss the unwilling or unable-test outright and merely admitted that "the support for this doctrine is mixed, but it has been used to justify the use of military force," and then continued her analysis with "[e]ven if valid, the 'unwilling and unable' doctrine does not justify the strike within Iraq."[172]

Perhaps, that *laissez-faire* attitude and refusal to disregard a clearly outlandish reading of the law may reinforce the questionable or even pernicious view that in the interpretation and application of international law "everything goes," indeed.[173]

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167. *Id.*

168. *Id.*

169. *Id.*

170. Labuda, *supra* note 244.

171. *Id.*

172. *See* Callamard, *supra* note 24, §§ 72–3 (reasoning with expansive interpretations of the controversial unwilling or unable-test, put forth by wayward States and taken seriously by authors) with Corten, *supra* note 24, at 9 and Talmon, *supra* note 24, at 15. A comparable, but equally problematic, analytical move takes the official State justification *too* literally. For example, both Haque and Callamard (*supra* note 24) first note that the U.S. justification refers to "Iran-supported militias" and then use that formulation to deny possible attribution of militia actions to Iran as "'assistance … in the form … of weapons or logistical or other support' does not constitute an armed attack." But by taking the official justification at face value, commentators may miss the chance to address the legal issue at the crux of the case. Haque, *supra* note 24; Callamard, *supra* note 24.

173. *See generally* D'Aspremont, *supra* note 123.

C. Academic idiosyncrasies

Finally, it is worth considering a more general and pragmatic explanation for the fundamental discord among expert commentators in case studies such as the one under review. Indeed, perhaps the requirements imposed by modern-day academia, to zoom in on just one type of commentator, unavoidably lead to a dizzying variety of views including on the (substance and application of some of the) law's most foundational norms. For example, Klabbers insightfully noted that:

> The system of incentives that has been put into place over the last couple of decades, with its emphasis on quick fixes, on quantity and on impact, not only stimulates particular ways of doing academic work but also stimulates a particular ethos. That ethos is one of drama — high drama. In order to be successful, grand claims and big promises must be made. … Research projects cannot be proposed merely because one is interested in figuring things out; the least that is expected is the promise of a 'paradigm shift'.[174]

In addition, Sassòli assessed that the importance of scholarly writings has diminished.[175] His appreciation of its causes is remarkably similar to that of Klabbers and, as they support many of the arguments made above, it deserves to be reproduced in some detail:

> [A]n academic career cannot be pursued by honestly describing the existing law, but only by suggesting 'new interpretations', 'thinking outside the box' or 'deconstructing' everything written previously. This leads to the impression that a reference may be found in favour of any position. The increasing number of publications on every imaginable IHL problem, the race in the academic world towards a quantitative evaluation of research output useful for a career and the need to raise funds for research by imagining innovative projects that claim a 'paradigm shift' is needed all reinforce this tendency. . . . [S]cholars following some contemporary schools of international law often proudly refuse to state whether their positions reflect *lex lata* or *lex ferenda* as they consider this distinction to be outdated and irrelevant.[176]

Consequently, the intense incentive to produce as much scholarship as possible may actually cause the decline of its respective impact. This is what D'Aspremont — always great in coming up with a fitting moniker — describes as leading to a "wasteland of academic

174. Klabbers, *supra* note 9, at 1066.

175. MARCO SASSÒLI, INTERNATIONAL HUMANITARIAN LAW: RULES, CONTROVERSIES, AND SOLUTIONS TO PROBLEMS ARISING IN WARFARE §§ 4.79–80 (2019).

176. *See id.*

overproduction."[177] Weiler concurs and laments that "everybody is so busy writing these days, publishing, self-publishing and then self-promoting … that hardly any time is left for . . . serious, reflective reading."[178] Even more dramatically, he believes that this imposes an "immense, self-defeating pressure" on young scholars.[179]

Perhaps these are nothing more than loosely connected observations — albeit made by giants in the field of international law. Nevertheless, the combination of sustained pressure on early-career academics to be *quantitatively* productive above all else and *overthrow*, rather than build upon, established doctrines in international law for professional advancement[180] indeed helps to better understand the explosion of views on some of its most cardinal principles. Perversely, in the long-term this may lead to the diminished impact of legal scholars. However, none of that should be interpreted as a defense of engrained notions of international law on *moral* or otherwise *principled* grounds. Quite the contrary, convincingly arguing for the progressive development of international law *first* necessitates a clear-eyed understanding of the law as it stands today. After all, as insightfully put by Hart, "[a] concept of law which allows the invalidity of law to be distinguished from its immorality, enables us to see the complexity and variety of these separate issues; whereas a narrow concept of law which denies legal validity to iniquitous rules may blind us to them."[181] Conflating those roles would be putting the cart before the horse and undermines the persuasiveness of any suggested reform from the get-go.

IV. CONCLUSION

The issues identified in this article will likely not come as a shock to members of the international legal community and, perhaps, the international legal community will not think they are problematic at all. Doctoral students are warned *against* gearing research towards

177. Jean D'Aspremont, *Destination: The Wasteland of Academic Overproduction*, EJIL:TALK! (Feb. 3, 2020); https://www.ejiltalk.org/destination-the-wasteland-of-academic-overproduction-part-1/ [https://perma.cc/29D9-HKH9].

178. Joseph Weiler, *On My Way Out – Advice to Young Scholars II: Career Strategy and the Publication Trap*, EJIL: TALK! (Feb. 18, 2016), https://www.ejiltalk.org/on-my-way-out-advice-to-young-scholars-ii-career-strategy-and-the-publication-trap/ [https://perma.cc/4PEZ-E94G].

179. Joseph Weiler, *Publish and Perish: A Plea to Deans, Faculty Chairpersons, University Authorities*, BLOG EJIL:TALK! (Nov. 8, 2018), https://www.ejiltalk.org/publish-and-perish-a-plea-to-deans-faculty-chairpersons-university-authorities/ [https://perma.cc/JZG2-DS4D].

180. *Id.*; *see also* SASSÒLI, *supra* note 175; *see* D'Aspremont, *supra* note 177.

181. HLA HART, THE CONCEPT OF LAW 211 (3rd ed. 2012).

clarifying the substance of a primary rule of international law, as such research would run the risk of being undercut by equally convincing argumentation — the law is indeterminate after all.[182] That message is ubiquitous and research that plainly describes, elucidates or specifies the law is often considered outmoded, erroneous, and, frankly, just not that interesting.[183]

Be that as it may, this article takes the position that the current state of affairs is no cause for celebration either. Indeed, with the spectacular divide on the legal appraisal of such visible and controversial State action as the killing of Qasem Soleimani by the United States,[184] the authority of international lawyers is fundamentally conquered. When international lawyers as a professional class fail in their primary task to determine with precision whether contentious State conduct is or is not in accordance with the edicts of international law and, consequently, does or does not entail international responsibility, States have their choice of expert to cover their actions under a veneer of legality. This reduces international law to a fig leaf for power politics, making it impossible to meaningfully impact State behavior.[185]

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182. Koskenniemi, *supra* note 116, at 591. *See generally* Martti Koskenniemi, *What is Critical Research in International Law? Celebrating Structuralism*, 29 LEIDEN J. INT'L L. 727 (2016).

183. Jörg Kammerhofer, *International Legal Positivism*, OXFORD HANDBOOK THEORY INT'L L. 407 (Anne Orford & Florian Hoffman eds., 2016) ("No fashion-conscious international lawyer would be caught dead espousing positivism.").

184. *See, e.g.*, Merrit Kennedy & Jackie Northam, *Was It Legal for the U.S. to Kill a Top Iranian Military Leader?*, NPR, Jan. 4, 2020, https://www.npr.org/2020/01/04/793412105/was-it-legal-for-the-u-s-to-kill-a-top-iranian-military-leader [https://perma.cc/JTA4-5JRA].

185. *See,* e.g., Tom Ruys, Luca Ferro & Tim Haesebrouck, *Parliamentary War Powers and the Role of International Law in Foreign Troop Deployment Decisions: The US-led Coalition Against "Islamic States" in Iraq and Syria*, 17 INT'L J. CONST. L. 118, 138–9 (2019) (discussing the debate in the Belgian Parliament on the decision to expand military operations against the so-called Islamic State from Iraq to Syria, with opposing parties relying on contradicting legal scholarship on the unwilling or unable-test). *See also* Lisa O'Carroll, *Government Admits New Brexit Bill "Will Break International Law"*, THE GUARDIAN (Sept. 8, 2020), https://www.theguardian.com/politics/2020/sep/08/government-admits-new-brexit-bill-will-break-international-law [https://perma.cc/GLB9-CH7K] (discussing the bald-faced admission by the government of the United Kingdom that it would break international law "in a very specific and limited way" through a reinterpretation of the special Brexit arrangements for Northern Ireland. Prime Minister Boris Johnson noted such action was necessary to guard against the EU's "'proven willingness' to interpret aspects of the agreement in 'absurd' ways, 'simply to exert leverage' in the trade

It may go without saying that the reasons underlying the discord among international lawyers require more in-depth examination and research than was possible in a single conference contribution. Hopefully, however, touching upon some of them here — i.e., methodological and theoretical libertarianism, epistemic egalitarianism, and academic industrialism — can help to ignite a much-needed debate on the issue. In the end, Koskenniemi is also famous for his statement that international law is "what international lawyers do and how they think about what they are doing."[186] But perhaps it is time to consider the opposite point of view and let the *law* again take precedence over the *lawyer*.

talks." That position would be bad enough in itself but was justified by the understanding of top legal officers that "an established principle of international law is subordinate to the much more fundamental principle of parliamentary sovereignty."). Paul Lewis & Owen Bowcott, *Government's Top Legal Advisers Divided over Move to Override Brexit Deal*, THE GUARDIAN (Sept. 10, 2020), https://www.theguardian.com/politics/2020/sep/10/governments-top-legal-advisers-divided-over-move-to-override-brexit-deal [https://perma.cc/Z2LJ-SJM9]. *Brexit: Boris Johnson Says Powers Will Ensure UK Cannot Be "Broken Up"*, BBC NEWS (Sept. 14, 2020), https://www.bbc.com/news/uk-politics-54153302 [https://perma.cc/F54U-MED3].

186. Martti Koskenniemi, *International Law in a Post-Realist Era*, 16 AUST. Y.B. INT'L L. 1, 17 (1995).