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IN DEFENSE OF UNCERTAINTY: VALUES BEHIND INDETERMINATE RULES OF INTERNATIONAL LAW

***Abstract:** The paper discusses uncertainty in international law from the perspective of its indeterminate rules against an often held view that such rules are bad news for international law. First, it shows that indeterminate rules are not a pathology, but inevitable in international law due to the diversity of states, their different interests, as well as complexities of some of the issues those norms attempt to regulate. Second, the paper claims that there is an upside in indeterminate rules if international law is conceptualized through its argumentative side. These values are explained through concrete examples of indeterminate provisions from the Treaty on the Non-proliferation of Nuclear Weapons and the UNSC Resolution 2249, a classical example of “constructively ambiguous” text. Relying on the works of Waldron and Hakimi, the paper explains how indeterminate rules accommodate disagreements, and consequently provide at least minimal regulation of certain contested issues, sustain international community, and, moreover, demonstrate how international law operates.*

Key words: uncertainty, indeterminate rules, compliance with international law, argumentative practice, interpretation, disagreement, non-proliferation of nuclear weapons, Resolution 2249, self-defense.

1. INTRODUCTION

This paper will discuss uncertainty in international law, from the perspective of the uncertainty of the content of some its rules. It is a contri-

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bution to the symposium on the Miodrag Jovanović's book *The Nature of International Law*.¹

The issue of uncertainty in international law has been raised throughout Jovanović's book; the concluding chapter ("In Lieu of a Conclusion – A Note on (Un)certainty") is dedicated to it. Jovanović finds international law to be uncertain in many regards: sources, determining the content of a rule, conflicts between different international law regimes, precedential weight of individual rulings, consistent application of valid rules, credible fact-finding, compliance with international rulings.² This is not an unsurprising conclusion. For any legal scholar, including the one who favors international law,³ admitting that there is uncertainty in international law is an evitable result of a minimal intellectual honesty. What one does with such a conclusion is another matter.

Jovanović argues that multifaceted uncertainty in international law does not undermine the main claim of his book that "international law possesses all typical features of the central case of law as a 'genre'."⁴ He finds uncertainty not to be confined to international law, but to also exist in national laws.⁵ To that end he gives an example from constitutional law, pointing out that "there is regularly some level of uncertainty regarding secondary rules of constitutional law and their capacity to resolve first-order uncertainties"⁶ explaining that both in constitutional systems with or without institutionalized model of judicial review, different constitutional actors, judges, and lawyers disagree on the content and interpretation of constitutional law. Moreover, even when there is a final judicial decision on a constitutional issue its execution "depends on the political will of more powerful state actors, which may be a further source of uncertainty."⁷

Further, Jovanović seems to argue that one of the tasks of international law is to mitigate uncertainty.⁸ He expressly states that eliminating all uncertainties is unattainable, but also hints that it is undesirable, as he mentions

1 Jovanović, M. A., 2019, *The Nature of International Law*, Cambridge, New York, Cambridge University Press.

2 Jovanović, M., pp. 229–231 (by quoting Kammerhofer, J., 2011, *Uncertainty in International Law – A Kelsenian Perspective*, London, Routledge).

3 It is a common place among international lawyers and scholars – as claimed by David Kennedy – "to see themselves and their work as favoring international law and institutions in a way that lawyers in many other fields do not – to work in banking is not to be in favor of banking." Kennedy, D., 1994, *A New World Order: Yesterday, Today, and Tomorrow*, *Transnational Law and Contemporary Problems*, Vol. 4, No. 2, p. 335.

4 Jovanović, M., 2019, p. 228.

5 *Ibid.*, pp. 232, 233.

6 *Ibid.*, p. 232. Footnotes omitted.

7 *Ibid.*, p. 233.

8 *Ibid.*, p. 231.

“unintended negative effects” of such scenario.⁹ Jovanović does not say what these unintended negative effects of absolute clarity would be for international law. My plan is to offer some arguments in that respect, by focusing on uncertainty flowing from indeterminate rules of international law.

Indeterminate rules, a denomination used by Thomas Franck, are those whose message is unclear;¹⁰ this pertains but is not limited to their textual clarity.¹¹ In any case, indeterminate rules¹² create uncertainty. However, it should be noted that uncertainty is not always a result of indeterminacy. It can stem from a divergent interpretation of otherwise determinate rules, inconsistent practice in application of rules, inconclusiveness of the factual data relevant for the application of a rule, identification of different rules as relevant for deciding on application of rule to the case at hand, etc.¹³ While the arguments that will be presented in this paper can also be relevant in these situations, my primary goal is to generally address uncertainty flowing directly from indeterminate rules in international law.

2. SKETCHING THE ARGUMENTS

I intend to show, relying on the work of Waldron and Hakimi, that uncertainty stemming from indeterminate rules of international law, is not all bad news, that it is not a pathology, but rather an inevitability, which moreover testifies to the nature and the way international law operates and serves its other important functions. The arguments in the paper are developed on the claim that we can find a value in indeterminate international rules. This might sound as counterintuitive, if not all wrong, as virtues of law should most certainly be its clarity and predictability.¹⁴ Namely, a

9 *Ibid.*, p. 231, resorting to Hart in support of this argument (Hart stated that “the exclusion of all uncertainty at whatever costs in other values is not a goal which I have ever envisaged for the rule of recognition”).

10 Franck, T., 1990, *The Power of Legitimacy Among Nations*, Oxford, Oxford University Press, p. 52; Franck, T., 1988, Legitimacy in the International System, *American Journal of International Law*, Vol. 82, No. 4, p. 714.

11 See the example of provision on the use of force from the UN Charter (Art. 2(4) and 51) explained in this regard in *ibid.*, p. 721.

12 Throughout the paper I use the term indeterminate rules to encompass both rules in strict sense, meaning concrete stipulations, and rules in broad sense, meaning texts (such as resolutions of the UN Security Council) which provide different stipulations, which taken together create indeterminacy.

13 I owe this point to one of the anonymous reviewers of this paper.

14 See Brunnée, J., Troope, S., 2011, Interactional International Law: An Introduction, *International Theory*, Vol. 3, No. 2, pp. 307–318, 310 (holding clarity as one of the criteria of law). See also Abbott, K. *et al.*, 2000, The Concept of Legalization, *Interna-*

precise rule sets what is expected of a subject in a particular circumstantial setting. Moreover, indeterminacy of rules is said to undermine compliance with international law. It has been forwarded that “the more determinate the standard, the more difficult it is to resist the pull of the rule to compliance and to justify noncompliance.”¹⁵ Thus, imprecise, flexible, and contextual rules are taken to work against the compliance with international law and to undermine its normativity.¹⁶ How can we then find any value in such indeterminate rules? To be able to do that an observer needs to be able to conceptualize the law beyond the body of rules. In other words, one needs to go beyond the understanding of law as a formal set of “crisp and determinate rules”,¹⁷ and to take into consideration its procedural, rational, and argumentative side, as argued by Waldron.¹⁸

Namely, law “frames, sponsors, and institutionalizes” the culture of argument.¹⁹ Indeterminate rules cultivate this culture, as they accommodate disagreements stemming from different interests of states or complexity of the issue they want to regulate. They open more space for debate, *i.e.*, conflicting arguments on the meaning of a specific rule, which in turn can provide an insight into the values laying in the core of a rule.²⁰ Moreover, arguments are valuable,²¹ as they are an integral element of law’s operation,²² what in international law, as I will explain, provides multidimensional benefits.

tional Organizations, Vol. 54, No. 3, pp. 401–419, 412–413 (claiming that the clarity is essential for the force of law).

15 Franck, T., 1988, p. 714.

16 *Ibid.* (arguing that “[i]ndeterminate normative standards not only make it harder to know what conformity is expected, but also make it easier to justify noncompliance”). Moreover, Franck claimed that “[t]he degree of determinacy of a rule directly affects the degree of its perceived legitimacy”. *Ibid.*, p. 716. See also Guzman, A., 2005, Saving Customary International Law, *Michigan Journal of International Law*, Vol. 27, No. 1, pp. 115–176, 124 (claiming that the lack of precision – of customary international law rules – “undermine[s] the force of the rules and generate skepticism about their importance”) and Koskeniemi, M., 2001, Solidarity Measures: State Responsibility as a New International Order?, *British Yearbook of International Law*, Vol. 72, No. 1, pp. 337–356, 341 (arguing that “vague clauses would give too much room for political abuse.”)

17 Waldron, J., 2008, The Concept and the Rule of Law, *Georgia Law Review*, Vol. 43, No. 1, p. 59.

18 *Ibid.*

19 *Ibid.*, p. 56.

20 See Çali, B., 2009, On Interpretivism and International Law, *European Journal of International Law*, Vol. 20, No. 3, pp. 808–809.

21 *Ibid.*, pp. 49–50.

22 *Ibid.*, p. 60.

To be clear, I do not think that international law should strive to enhance uncertainty to accommodate a need for debate, no matter how valuable I consider it to be. On the contrary, international law should attempt to send clear messages on the required conduct. But when such regulation is not possible, due to reasons pertaining to different interests of states and complexity of issues to be regulated, uncertainty flowing from a specific rule should not be seen as its flaw, and thus a flaw of international law, but as an opportunity for finding out what values lie at heart of such regulation, sustaining required balance and understanding how international law operates.

This paper develops as follows. Part 3 discusses inevitability of indeterminate rules that create uncertainty, which stems from diversity of states, different values they ascribe to and complexities of certain issues some rules strive to regulate. It also describes different sets of indeterminate rules, explaining them by using a provision from the Treaty on the Non-proliferation of Nuclear Weapons (NPT),²³ and the text of the UNSC Resolution 2249²⁴ as examples. Part 4, relying on the works of Waldron and Hakimi, presents general arguments in support of the claim that we can find value in indeterminate rules. It argues that they accommodate disagreements, which have a distinctive value when structured by international law's argumentative practice.²⁵ Using the above examples of indeterminate rules analyzed in Part 2, it shows how these indeterminate rules help preserve balance, protect values that lay at the core of the international law project, and reveal how it operates. Part 5 concludes the discussion.

3. INDETERMINATE RULES: INESCAPABLE UNCERTAINTY OF THE CONTENT OF SOME RULES OF INTERNATIONAL LAW

3.1. GENERAL CONSIDERATIONS

Many rules of international law seem to send a clear message, *i.e.* they are determinate.²⁶ Some of the examples include rules of diplomatic and

23 Adopted on 12 June 1968, entered into force 5 March 1970, *United Nations Treaty Series (UNTS)*, Vol. 726, p. 161. Hereinafter: NPT.

24 UNSC Resolution 2249, UN Doc. S/RES/2249 (20 November 2015).

25 Waldron, J., 2008, p. 56; Hakimi, M., 2020, Why Should We Care About International Law?, *Michigan Law Review*, Vol. 118, No. 6, p. 1301.

26 Franck, T., 1988, p. 718.

consular relations,²⁷ law of the sea²⁸ and air,²⁹ ozone layer,³⁰ copyright and trademarks,³¹ treatment of prisoners of war.³² Indeed, many international law treaties are expressly crafted in order to “increase determinacy and narrow issues of interpretation through the ‘codification’ and ‘progressive development’ of customary law.”³³ Such are the Vienna Convention on the Law of Treaties (VCLT)³⁴ and Vienna Convention on Diplomatic Relations,³⁵ as well as certain important aspects of the UN Convention on the Law of the Sea.³⁶ Franck claimed that such determinate rules elicit high level of compliance.³⁷ However, it is questionable if this can exclusively be attributed to their determinacy, as there may be other explanations why states routinely comply with these rules.

On the other hand, there are indeterminate international rules. Indeterminate rules do not only appear in international law since “some degree of indeterminacy is inevitable in any body of rules [...] and may even have its uses in promoting agreement and achieving flexibility.”³⁸ After all, rules strive to generally regulate conduct and are later applied in a specific factual setting. So, we inevitably end up with international rules with

27 See provisions on inviolability of diplomatic and consular premises in the Vienna Convention on Diplomatic Relations (adopted on 18 April 1961, entered into force on 24 April 1964, *UNTS*, Vol. 500, p. 212), Art. 22 and Vienna Convention on Consular Relations (adopted on 24 April 1963, entered into force 19 March 1967, *UNTS*, Vol. 596, p. 261), Art. 31.

28 For example, see the provisions on innocent passage (Art. 17) of the United Nations Convention on the Law of the Sea (adopted on 10 December 1982, entered into force 16 November 1994, *UNTS*, Vol. 1833, p. 397): “Subject to this Convention, ships of all States, whether coastal or land-locked, enjoy the right of innocent passage through the territorial sea.”

29 See the provision on the jurisdiction of the aircraft Art. 3(1) from the (Tokyo) Convention on Offences and Certain Other Acts Committed on Board Aircraft (adopted on 14 September 1963, entry into force 4 December 1969, *UNTS*, Vol. 704, p. 219): “The State of registration of the aircraft is competent to exercise jurisdiction over offences and acts committed on board.”

30 The Montreal Protocol on Substances that Deplete the Ozone Layer, adopted on 16 September 1987, entered into force 1 January 1989, No. 26369.

31 Universal Copyright Convention (revised version), adopted on 24 July 1971, entered into force 10 July 1974, *UNTS*, Vol. 943, p. 178.

32 Convention Relative to the Treatment of Prisoners of War, adopted on 12 August 1949, entered into force 21 October 1950, *UNTS*, Vol. 75, p. 135.

33 Abbott, K. *et al.*, 2000, p. 414.

34 Adopted on 23 May 1969, entered into force 27 January 1980, *UNTS*, Vol. 1155, p. 331. Hereinafter: VCLT.

35 See *supra* 27.

36 See *supra* 28.

37 Franck, T. 1988, p. 718.

38 Franck, T. 1990, pp. 53–54.

“different levels of inherent legal certainty”³⁹ or indeterminate rules which are vague and/or ambiguous. Moreover, “many of the ‘rules’ and ‘principles’ are general, question-begging, and contradictory”⁴⁰ opening space for disagreement on their interpretation.

In any case, indeterminate rules make it difficult to see what they require of their addressees. Consequently, it is hard to assess the extent of compliance with them. Due to this, some authors seem to cast doubt on the legal force of such rules.⁴¹ However, it is evident that indeterminacy, is usually not a result of the poor legal drafting, but a deliberate choice driven by either domestic or international considerations.⁴² Given different needs, means, values and interests of the states involved, many rules of international law end up being not only indeterminate, but also contextual and fluid. Namely, they come in sets of variable stipulations dependent of a context, allowing states some discretion in deciding on what measures to take to meet the obligations or in limiting the application of a particular obligation in the scope or effect.⁴³

The indeterminacy of a significant number of rules of international law is unavoidable, because in the process of their creation states try to incorporate their different perspectives on the issue they want to regulate

39 Shany, Y., 2006, *Toward a General Margin of Appreciation Doctrine in International Law?*, *European Journal of International Law*, Vol. 16, No. 5, p. 913.

40 Brownlie, I., 2003, *Principles of Public International Law*, Oxford, Oxford University Press, p. 602 (Brownlie stated this in respect to treaty interpretation, but it seems that this description can stand for many other rules of international law).

41 Abbott, K. *et al.*, 2000, p. 414; Brunnée, J., Troope, S., 2011, pp. 311, 313 and 315.

42 Abbott, K. *et al.*, 2000, p. 415.

43 Hakimi, M., 2020, p. 1291 (giving examples of the Paris Agreement to the United Nations Framework Convention on Climate Change, adopted on 12 December 2015, entered into force on 4 November 2016, UN Doc. C.N.63.2016), Arts. 2(2) & 4(2); International Covenant on Economic, Social, and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976, *UNTS*, Vol. 999, p. 3), Art. 2(1); General Agreement on Tariffs and Trade (adopted on 30 October 1947, entered into force 1 January 1948, *UNTS*, Vol. 55, p. 194), Arts. XX & XXI and International Convention for the Regulation of Whaling (adopted on 2 December 1946, entered into force on 10 November 1948, *UNTS*, Vol. 161, p. 72), Arts. X(3) & VIII). The relevance of contextuality in deciding the scope and effect of obligations is also seen before international courts, for example in the application of the doctrine of the margin of appreciation. See Shany, Y., 2006; Donoho, D. L., 2011, *Autonomy, Self-Government, and the Margin of Appreciation: Developing a Jurisprudence of Diversity within Universal Human Rights*, *Emory International Law Review*, Vol. 15, No. 2, pp. 391–466; Arai-Takahashi, Y., *The Margin of Appreciation Doctrine: A Theoretical Analysis of Strasbourg’s Variable Geometry*, in: Føllesdal, A., Peters, B., Ulfstein, G., (eds.), 2013, *Constituting Europe: The European Court of Human Rights in a National, European and Global Context*, Cambridge, Cambridge University Press, pp. 62–105.

and use international law to accommodate their interests. Sometimes, reaching an agreement on the issue would only be possible by using broad language and general terms, which results in postponing the resolution of the issue.⁴⁴ Also, sometimes the very issues to be regulated are complex, and not fitting into simple binary categories of right and wrong behaviors.⁴⁵ All of this results in vague or ambiguous provisions.

3.2. EXAMPLES OF INDETERMINATE RULES

Broadly speaking, indeterminacy of rules can stem from their vagueness and/or ambiguity.⁴⁶ I will not go into a nuanced analysis of these categories of indeterminacy.⁴⁷ For the purposes of this paper, I will just plainly delineate them. A rule is vague when there is no pre-established answer to the issue it regulates.⁴⁸ On the other hand, a rule is ambiguous, if it has multiple meanings.⁴⁹ As concepts of vagueness and ambiguity are different, a rule can be both – vague and ambiguous – at the same time.⁵⁰ In each case, it is indeterminate.

For these reasons, examples that follow should not be understood as clear-cut cases of vagueness and ambiguity, but simply as examples of indeterminate rules.

3.2.1. Vagueness

Examples of a vague rule can be found in provisions providing for general duties or regulating behavior on the basis of a certain standard. This is not bad *per se*, as all rules attempt to generally regulate future behavior in a specific factual setting.⁵¹ For example, the Treaty on the Non-proliferation of Nuclear Weapons (NPT) contains *general* obligation

44 Bilder, R., 1962, The Office of the Legal Adviser: The State Department Lawyer and Foreign Affairs, *American Journal of International Law*, Vol. 56, No. 3, p. 654.

45 Franck, T., 1988, pp. 722–724.

46 See more in Poscher, R., Ambiguity and Vagueness in Legal Interpretation, in: Solan, L., Tiersma, P., (eds.), 2011, *Oxford Handbook on Language and Law*, Oxford University Press, (https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1651465), 3. 11. 2021). In philosophical literature, indeterminacy has been said to encompass three different categories – ambiguity, vagueness, and contestability. See more in Waldron, J., 1994, Vagueness in Law and Language: Some Philosophical Issues, *California Law Review*, Vol. 82, No. 3, p. 512.

47 For more on this, see Poscher, R., 2011, pp. 2–7.

48 *Ibid.*, 2011, p. 30. For origins and accounts of vagueness see more in *ibid.*, pp. 15 –20.

49 *Ibid.*, p. 2. See also Waldron, J., 1994, p. 515–516.

50 Poscher, R., 2011, p. 4; Waldron, J., 1994, pp. 513–514.

51 Franck, T. 1990, pp. 53–54.

requiring parties “to pursue negotiations in good faith on effective measures relating to cessation of the nuclear arms race [...] and to nuclear disarmament”.⁵² This obligation was interpreted by the ICJ as the one of a result – requiring states to reach *a deal* on nuclear disarmament⁵³ – not of means, which would only require them to just try to agree and, if unsuccessful, to move on.⁵⁴ In other words, the only clear thing under this provision is that states cannot agree not to disarm and proceed with their business. But beyond that, the concrete content of this duty remains unclear.⁵⁵

Many examples of vagueness stem from the fact that international rules incorporate certain standard of behavior. Bilateral investment treaties provide such standards by requiring, for example, “fair and equitable treatment of the investor”.⁵⁶ The same stands for human rights treaties – for example, the International Covenant on Civil and Political Rights (ICCPR)⁵⁷ or the European Convention on Human Rights (ECHR)⁵⁸ – which allow for restrictions of certain rights, *inter alia*, when this is “necessary in a democratic society”.⁵⁹ In fact, many international rules come as standards and not as crisp normative prescriptions.

52 Art. VI, NPT, *supra* note 23, in full: “Each of the Parties to the Treaty undertakes to pursue negotiations in good faith on effective measures relating to cessation of the nuclear arms race at an early date and to nuclear disarmament, and on a treaty on general and complete disarmament under strict and effective international control.”

53 See ICJ, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion of 8 July 1996, *ICJ Reports* 1996, p. 226, pp. 263–264, para. 99. Namely the ICJ stated duty from Art. VI “to go beyond that of a mere obligation of conduct; the obligation involved here is an obligation to achieve a precise result – nuclear disarmament in all its aspects – by adopting a particular course of conduct, namely, the pursuit of negotiations on the matter in good faith.”

54 Hakimi, M., 2017, p. 36.

55 *Ibid.*

56 See OECD, 2004, Fair and Equitable Treatment Standard in International Investment Law, OECD Working Papers on International Investment, No. 2004/03, OECD Publishing (<http://dx.doi.org/10.1787/675702255435>, 12. 5. 2021).

57 Adopted on 16 December 1966, entered into force 23 March 1976, *UNTS*, Vol. 999, p. 171. Hereinafter: ICCPR.

58 Convention on the Protection of Human Rights and Fundamental Freedoms, adopted on 4 November 1950, entered into force 3 September 1953, *European Treaty Series*, No. 5.

59 See for *e.g.*, Art. 21 of ICCPR: “The right of peaceful assembly shall be recognized. No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law, and which are necessary in a democratic society in the interests of national security or public safety, public order (*ordre public*), the protection of public health or morals or the protection of the rights and freedoms of others.” See also Art. 8 of ECHR: “1. Everyone has the right to respect for his private and family life, his home and his correspondence. 2. There shall be no interference by

3.2.2. Ambiguity

There are international law rules that are ambiguous, mainly because states want to provide legal framework for action, but they have different views about certain aspects of the situation. They are “constructively ambiguous”,⁶⁰ and they are deliberately so. The work of the UN Security Council (UNSC) provides ample examples of this technique.⁶¹ Resolution 2249⁶² adopted after 2015 Paris terrorist attacks is one example of indeterminate text.

This resolution condemned a series of attacks by the Islamic State (IS). It was worded to suggest that the UNSC gave authority for the use of force against the IS, while in fact not providing a legal basis for the use of force against IS either in Syria or in Iraq.⁶³ It called upon states “to take all necessary measures”⁶⁴ on the territory controlled by IS, which is usually a codeword for the use of force,⁶⁵ without authorizing it or deciding that it is to be taken.⁶⁶ It was said that this resolution basically did not add or diminish what states could already do under the customary rule on *ius*

a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.”

60 This phrase is generally attributed to the US Secretary of State, Mr. Henry Kissinger. See Byers, M., 2020, Still Agreeing to Disagree: International Security and Constructive Ambiguity, *Journal on the Use of Force and International Law*, p. 2. (<https://doi.org/10.1080/20531702.2020.1761656>, 15. 5. 2020).

61 Byers, M., 2020, pp. 5–17. See also Byers, M., 2004, Agreeing to Disagree: Security Council Resolution 1441 and Intentional Ambiguity, *Global Governance*, Vol. 10, No. 2, pp. 165–186.

62 See *supra* note 24.

63 See detailed analysis in Akande D., Milanovic, M., 2015, The Constructive Ambiguity of the Security Council’s ISIS Resolution, *EJIL: Talk!* (<https://www.ejiltalk.org/the-constructive-ambiguity-of-the-security-councils-isis-resolution/>, 21. 5. 2020).

64 UNSC Resolution 2249, see para. 5 of the Resolution which “[c]alls upon Member States that have the capacity to do so *to take all necessary measures*, in compliance with international law, in particular with the United Nations Charter, as well as international human rights, refugee and humanitarian law, on the territory under the control of ISIL also known as Da’esh, in Syria and Iraq, to redouble and coordinate their efforts to prevent and suppress terrorist acts committed specifically by ISIL [...] and all other individuals, groups, undertakings, and entities associated with Al-Qaida, and other terrorist groups, as designated by the United Nations Security Council [...] and to eradicate the safe haven they have established over significant parts of Iraq and Syria.”

65 Akande, D., Milanovic, M., 2015.

66 See more in Akande, D., Milanovic, M., 2015.

ad bellum.⁶⁷ In other words, it referred to the rights of states to use force without itself giving an authorization for such use of force.⁶⁸ Here we see that ambiguity was present *ab initio*, as a result of a conscious choice and it served to incorporate different legal grounds invoked by states for their actions against IS.

3.3. INTERPRETING INDETERMINATE RULES

Any indeterminate rule allows broader discretion in its interpretation by the affected state. However, this discretion can be bound in different ways. First, one can use refined methods of interpretation embodied in the VCLT. Second, when there is a judicial body which can authoritatively decide on the interpretation – such is the case within the Council of Europe (in respect of ECHR), European Union, World Trade Organisation – imprecision of a rule does not need to be a license for state's discretion but contributes to a wider authority of such a body to determine the meaning of the standard.⁶⁹ The same applies when the International Court of Justice (ICJ) has the jurisdiction to decide on the interpretation and application of a rule.

For example, the ICJ⁷⁰ gave a specific content⁷¹ to a vague notion of an “equitable solution”, which is provided as a goal of the delimitation of the continental shelf between states with opposite or adjacent coasts in the UN Convention on the Law of the Sea.⁷² Similarly, the European Court

67 Akande, D., Milanovic, M., 2015; Byers, M., 2020, p. 16. Cf. Hakimi, M., 2018, The Jus Ad Bellum's Regulatory Form, *American Journal of International Law*, Vol. 112, No. 2, pp. 151–190, 188–189 (arguing that “[i]n adopting 2249, the Council—the institution with legal primacy on the use of force—communicated that it did not consider the Article 2(4) prohibition to be controlling in this case. The resolution is a decision on the law, even if it does not reflect or inform the general standards. Its apparent purpose and effect were to diminish the claims and concerns about the operation's illegality.”)

68 This is similar to resolutions 1368 and 1373 (2001), adopted after 9/11 attacks, which reaffirmed, in preambular paragraphs, the inherent right of individual and collective self-defense without authorizing US and its allies to use force in Afghanistan.

69 Abbott, K. *et al.*, 2000, p. 415.

70 See cases before the ICJ, *Case Concerning the North Sea Continental Shelf* (FR Germany/Denmark; FR Germany/The Netherlands), Judgement of 20 February 1969, *ICJ Reports*, p. 3; *Case Concerning the Continental Shelf* (Tunisia/Libyan Arabjamahiriya), Judgment of 24 February 1982, *ICJ Reports 1982*, p. 18 and *Case Concerning the Continental Shelf* (Libyan Arabjamahiriya/Malta), Judgement of 3 June 1985, *ICJ Reports 1985*, p. 13.

71 Franck, M., 1988, p. 724.

72 Art. 83(1) of the UN Convention on the Law of the Sea: “The delimitation of the continental shelf between States with opposite or adjacent coasts shall be effected by

of Human Rights, *inter alia*, specified the ECHR's notion "necessary in a democratic society".⁷³ This standard is provided as one of the criteria⁷⁴ for limitations of certain rights and freedoms (right to privacy (Art. 8), freedom of religion (Art. 9), expression (Art. 10), assembly and association (Art. 11)) under the ECHR.⁷⁵ Another example of authoritative bodies specifying a vague notion comes from international investment arbitration practice,⁷⁶ which provided substance to the very general "fair and equitable treatment", the standard used in international treaties for protection of investments.⁷⁷

agreement on the basis of international law, as referred to in Article 38 of the Statute of the International Court of Justice, in order to achieve an equitable solution."

- 73 Simply speaking, the ECtHR applied the principle of proportionality to determine the content of the notion "necessary in a democratic society": "It must now be decided whether the 'interference' complained of corresponded to a 'pressing social need', whether it was 'proportionate to the legitimate aim pursued', whether the reasons given by the national authorities to justify it are 'relevant and sufficient'". See ECtHR, *Sunday Times v. the United Kingdom*, no. 6538/74, Judgment of 29 March 1979, para. 62.
- 74 All limitation clauses contain the requirement of "necessary in a democratic society", while enumerated protected legitimate aims differ from provision to provision; also, the legality requirement is provided as "prescribed by law" in Art. 9–11, while in Art. 8 it is "in accordance with law". For the sake of brevity, I am only reproducing the limitation clause of Article 9(2): "Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others."
- 75 However, it can be argued that the way in which the ECtHR defined the notion of "necessary in a democratic society" is also unclear as it used other vague standards (such as "a pressing social need", existence of "relevant and sufficient reasons") to define it. See Gerards, J., 2013, How to Improve the Necessity Test of the European Court of Human Rights, *International Journal of Constitutional Law*, Vol. 11, No. 2, pp. 466–490. Be that as it may, the ECtHR still made the content of the notion "necessary in a democratic society" more concrete through its adjudication.
- 76 See, for example, ICSID cases, *Tecnicas Medioambientales Tecmed S. A. v. United Mexican States*, no. ARB(AF)/00/2, Award of 29 May 2003, para. 154; *Lemire v. Ukraine*, no. ARB/06/18, Decision on Jurisdiction and Liability of 14 January 2010, paras. 284–285, *Electrabel v. Hungary*, no. ARB/07/19, Award of 25 November 2015, para. 165 (citing *Saluka v. Czech Republic*, UNCITRAL, Partial Award of 17 March 2006).
- 77 Key elements of the fair and equitable treatment generally include obligations of due process, transparency, stability, predictability, reasonable expectations of the foreign investor, freedom from coercion and harassment. In addition to these criteria, tribunals also take into consideration lack of arbitrariness and non-discrimination, which may also fall under other substantive investment treaties' standards. See Yannaca-Small, K., "Fair and Equitable Treatment: Have Its Contours Fully Evolved?" in: Yannaca-Small, K., (ed.), 2018, *Arbitration Under International Investment Agreements: A Guide to the Key Issues*, 2nd ed., Oxford, Oxford University Press, p. 510. See also Dolzer, R., 2013, Fair and Equitable Treatment: Today's Contours, *Santa Clara Journal of International Law*, Vol. 12, No. 1, p. 15.

However, at times, as explained by Hakimi, the authoritative interpretation will not help much to resolve alleviate disagreement between the parties about the meaning and application of an international agreement.⁷⁸ Take the example of the case *Gabčíkovo-Nagymaros Project* between Hungary and Slovakia before the ICJ, which originated from the 1977 treaty between Hungary and Czechoslovakia concerning the construction and operation of the Gabčíkovo-Nagymaros Project (a system of dams, locks and other installations along the river Danube).⁷⁹ Due to environmental concerns, Hungary suspended the work on the Project and terminated the treaty, while Slovakia⁸⁰ unilaterally adopted and implemented an alternative plan for the Project.⁸¹ The states agreed to take their dispute over the Project to the ICJ, which found that both of them acted unlawfully. While concluded that the “literal application” of the treaty should not prevail over “the purpose of the [t]reaty, and the intentions of the parties in concluding it”,⁸² the Court did not offer its interpretation of the treaty in new circumstances. The ICJ held that it was up to the states to find integrated solution, taking into the account the objectives of the 1977 treaty, “the norms of international environmental law and the principles of the law of international watercourses”,⁸³ also suggesting they should resort to a third-party assistance and expertise in the future negotiation on the Project.⁸⁴ After the ICJ judgement, both states remained at their previous positions.⁸⁵ Obviously, while there was an international adjudicative forum available, it did not help articulate a clear message from agreed rules.

78 Hakimi, M., 2017, *The Work of International Law*, *Harvard International Law Journal*, Vol. 58, No. 1, pp. 20–21.

79 ICJ, *Gabčíkovo-Nagymaros Project* (Hungary/Slovakia), Judgment of 25 September 1977, *ICJ Reports 1997*, p. 7 (hereinafter: *Gabčíkovo-Nagymaros Case*). This project was joint investment planned the production of hydroelectricity, the improvement of navigation and the protection against flooding. It provided a single and indivisible operation arrangement by building the system of locks, one at Gabčíkovo (in Czechoslovakia) and the other at Nagymaros (in Hungary). Simultaneously, the contracting agreed to ensure that the quality of water in the Danube was not degraded as a result of the Project, and that obligations for the protection of nature regarding the construction and operation of the project would be observed. See *ibid.*, p. 17, para. 15.

80 At one point, Czechoslovakia had dissolved, and Slovakia had inherited its claim.

81 It began the work on damming the Danube in its territory.

82 *Gabčíkovo-Nagymaros Case*, pp. 78–79, para. 142.

83 *Ibid.*, p. 78, para. 141.

84 *Ibid.*, p. 79, para. 143.

85 After the ICJ judgement, both states remained to hold their previous positions. Slovakia continued to insist on the implementation of 1977 treaty, while Hungary opposed the Project as an outdated and harmful to the environment, insisting that the ICJ judgment does not put an obligation for it to build a dam. See more in Llamzon, A., 2007, *Jurisdiction and Compliance in Recent Decisions of the International Court of Justice*, *European Journal of International Law*, Vol. 18, No. 5, p. 834. While

In vast majority of instances of interpretation and application of international law rules, there is no international adjudicative body, so these processes are entirely left to states. At times, the meaning of the rule would remain unsolved between two or multiple different interpretations.⁸⁶ These are the situations where many observers would say international law is powerless to restrain states and secure compliance with its rules. However, in my mind, such conclusion oversimplifies the role of international law in inter-state relations. Namely, discretion of states in interpreting and applying an international law rule is not unlimited. They are bound by other rules of international law (such as rules of interpretation from the VCLT,⁸⁷ which enjoy the status of customary international law⁸⁸), and the principles of international law. In these situations, the argumentative side of international law comes into the spotlight, as states usually use its interpretative tools to justify their interpretations of a specific rule. In this way, while disagreeing, states remain in the realm of international law. One would rarely see a blatant disregard for international law and a lack of at least basic justification based on it, as was the case with the US recognition of Israeli sovereignty over Golan Heights in April 2019 by the Trump administration.⁸⁹ Such stepping outside the realm of international law as an argumentative process is far more threatening for the international law project⁹⁰ than different interpretations of a specific rule. These instances testify to a normative decline of international law⁹¹ or decline of its authority.⁹²

the negotiation between parties were initiated, with their ups and downs, to this day the agreed solution for the Project has not been reached. For the aftermath of the judgment, see *ibid.*, pp. 833–835. This led some commentators to claim that “it is arguable that the Court was abdicating the very responsibility that the parties had assigned to it”. Evans, M., Okowa, P., 1998, Recent Cases: Case Concerning the Gabčíkovo-Nagymaros Project (Hungary/Slovakia), *International and Comparative Law Quarterly*, Vol. 47, No. 3, p. 697. Still, the ruling of the ICJ can be perceived to be a pragmatic one, as there would be very serious financial and political implications if it decided to rule that the contractual regime was frustrated. *Ibid.*, p. 697.

86 For the argument that international law accommodates both cooperation and conflict see, Hakimi, M., 2017a.

87 See VCLT, Arts. 31 and 32.

88 See ICJ, *Arbitral Award of 31 July 1989* (Guinea-Bissau v. Senegal), Judgment of 12 November 1991, *ICJ Reports*, p. 53, pp. 69–70, para. 48; Dörr, O., Article 31. General Rule of Interpretation, in: Dörr, O., Schmalenbach, K., (eds.), 2012, *Vienna Convention on the Law of Treaties: A Commentary*, Heidelberg – Dordrecht, Springer, pp. 523–525.

89 State Diplomatic and Consular Relations, 2019, United States Recognizes Israeli Sovereignty Over the Golan Heights, *American Journal of International Law*, Vol. 113, No. 3, p. 617.

90 Hakimi, M., 2020, p. 1294ff.

91 Scott, S., 2018, The Decline of International Law as a Normative Ideal, *Victoria University of Wellington Law Review*, Vol. 49, No. 4, pp. 627–643.

92 Hakimi, M., 2020, p. 1300.

So, while different interpretations of rules can indeed threaten the compliance and undermine legitimacy and effectiveness of international law rules, it seems that it is far more important that states remain within the framework of international law when applying and interpreting them.⁹³ This is essential for two reasons. First, it is constructive of international community,⁹⁴ as by using the tools and ground rules of international law states remain participants in a joint enterprise. Second, argumentative practice which is built on disagreements about interpretation and application of a specific rule may contribute to finding out which values lay at its core and secure the balance among different states and their distinctive interests. I will proceed to explain how.

4. FINDING VALUE IN INDETERMINATE RULES: ACCOMMODATING DISAGREEMENT

In the preceding section, I have argued that the existence of indeterminate rules in international law is inevitable due to diversity of states, their largely different values, and complexities of issues that rules attempt to regulate. Here, I will offer arguments why we should not look at the uncertainty stemming from indeterminate rules only as a danger undermining legitimacy and efficacy of international law, but also as an opportunity. I will base my arguments on the work of Waldron and Hakimi.

My primary claim is that indeterminate rules accommodate disagreement, which holds an independent and distinctive value in law, as argued by Waldron.⁹⁵ I will extensively quote him here:

*The fallacy of modern positivism is its exclusive emphasis on the command-and-control aspect of law, without any reference to the culture of argument that it frames, sponsors, and institutionalizes. The institutionalized recognition of a distinctive set of norms may be an important feature, but at least as important is what we do in law with the norms that we identify. We do not just obey them or apply the sanctions that they ordain; we argue over them adversarially, we use our sense of what is at stake in their application to license a continual process of argument, and we engage in elaborate interpretive exercises about what it means to apply them faithfully as a system to the cases that come before us.*⁹⁶

93 *Ibid.*

94 For more arguments on this see Hakimi, M., 2017, Constructing an International Community, *American Journal of International Law*, Vol. 111, No. 2, pp. 317–356; Hakimi, M., 2018.

95 Waldron, J., 2008, p. 56.

96 Waldron, J., 2008, p. 56. Emphasis added. I am aware there are other takes on law but discussing them is beyond the scope of this paper. For different approaches to

Relying on Dworkin⁹⁷ and MacCormick,⁹⁸ Waldron explained that disagreements about the law on a specific matter are an integral element of the legal order, so that any attempt to conceptualize the law must accommodate these disagreements. “Moreover, [law] must be able to explain this disagreement not just as a jurisprudential puzzlement or pathology, but as a distinctive aspect of legal practice.”⁹⁹ Law’s procedural, rational, and argumentative aspects provide such explanation.¹⁰⁰ Waldron has persuasively shown that these important aspects of law¹⁰¹ would be neglected if not denigrated, if we emphasize “only the clarity that crisp and determinate rules provide and the settlement and predictability that follow from their straightforward application”.¹⁰² Thus, if we are not to neglect international law’s procedural, rational, and argumentative side, we should be careful not to view indeterminate international law rule as its flaw.¹⁰³

Undoubtedly, indeterminate rules are likely to enhance opportunity for states’ self-interested interpretation and application of such rules.¹⁰⁴ This, in turn, opens the door to disagreement, *i.e.*, to conflicting arguments on the meaning of a specific rule. However, these arguments are valuable,¹⁰⁵ as they are “integral part of how law works”.¹⁰⁶ In other words, while indeterminate rules accommodate and reinvigorate arguments regarding their content, “arguing in law is desirable [...] even when it does not appear to settle an issue in dispute or to have an operational effect”.¹⁰⁷ However, in order to be productive disagreements about the content of a rule cannot be detached from other relevant rules and principles of

and conceptualizations of international law, see Ratner, S., Slaughter, A-M., 1999, *The Method Is the Message*, *American Journal of International Law*, Vol. 93, No. 2, pp. 410–423. For differences in international law scholarship between Europe and the United States see Verdirame, G., 2007, *The Divided West: International Lawyers in Europe and America*, *European Journal of International Law*, Vol. 18, No. 3, pp. 553–580.

97 Dworkin, R., 2004, *Hart’s Postscript and the Character of Political Philosophy*, *Oxford Journal of Legal Studies*, Vol. 24, No. 1, pp. 1–37.

98 MacCormick, N., 2005, *Rhetoric and The Rule of Law: A Theory of Legal Reasoning*, Oxford, Oxford University Press.

99 Waldron, J., 2008, p. 50.

100 *Ibid.*, p. 59.

101 As well as the notion of the rule of law.

102 Waldron, J., 2008, p. 59.

103 Waldron, J., 1994, pp. 539–540 (on general claim that indeterminate terms “should not necessarily be regarded as a flaw in a legal provision”).

104 Abbott, K. *et al.*, 2002, p. 413, fn. 26.

105 Waldron, J., 2008, pp. 49–50.

106 *Ibid.*, p. 60.

107 Hakimi, M., 2020, p. 1301.

international law. Disagreements need to be framed within international law,¹⁰⁸ which provides ground rules¹⁰⁹ and language¹¹⁰ to justify relevant yet diverging positions on the interpretation of a specific rule. Here the argumentative¹¹¹ side of international law comes into play, and it provides various benefits.

Namely, argumentative practice has independent value in international law.¹¹² It can help secure the balance required for the functioning of the international law and reveal the values at heart of international law arrangements.¹¹³ Additionally, international argumentative practice is about other things as well. As Hakimi has shown, it helps in (a) building and showing respect,¹¹⁴ (b) constituting transnational or international community¹¹⁵ and (3) holding decision-maker accountable.¹¹⁶ So, even when a rule of international law does not settle a disputed issue nor has an operational effect,¹¹⁷ it still does these important things. Finally, international argumentative practice provides evidence of how international law works.¹¹⁸ So, while indeterminate rules do not provide clear message to

108 See more in *ibid.* For the example of international law channeling disputes, including those politically charged, see Papić, T., The Political Aftermath of ICJ's Kosovo Opinion, in: Milanović, M., Wood, M., (eds.), 2015, *The Law and Politics of Kosovo Advisory Opinion*, Oxford, Oxford University Press, pp. 240–267. See also Papić, T., 2021, De-recognition of States: The Case of Kosovo, *Cornell Journal of International Law*, Vol. 53, No. 4, p. 691.

109 Hakimi, M., 2017b, p. 328 (“International law establishes a set of ground rules—texts, processes, methods, sources of authority, and so on—that structure cross-border interactions”).

110 Cohen, H., 2012, Finding International Law, Part II: Our Fragmenting Legal Community, *New York University Journal of International Law and Politics*, Vol. 44, pp. 1049–1107 (“Law provides a medium for debate and agreement, requiring actors to engage with each other in very specific fora using very specific language and procedures.” *Ibid.*, p. 1067). See also Yasuaki, O., 2003, International Law in and with International Politics: The Functions of International Law in International Society, *European Journal of International Law*, Vol. 14, No. 1, pp. 105–139, 130–134.

111 International law structures an argumentative practice. Most prominent proponent of this view is Koskenniemi, see Koskenniemi, M., 2006, *From Apology to Utopia: The Structure of International Legal Argument*, Cambridge, Cambridge University Press.

112 Hakimi, M., 2020. For different positions, claiming argumentative practice to be a cheap talk see Goldsmith, J., Posner, E., 2005, *The Limits of International Law*, New York, Oxford University Press, pp. 170–184.

113 For interpretative take on international law, see Çali, B., 2009.

114 Hakimi, M., 2020, pp. 1302–1303.

115 *Ibid.*, pp. 1303–1304.

116 *Ibid.*, p. 1305.

117 *Ibid.*, p. 1301.

118 Hakimi, M., 2017a.

fulfil “command-and-control” aspect of law, they nevertheless serve these important functions.

Most disagreements on the content of the rule are indeed framed within international law arguments. States do not tend to dismiss a rule, but instead conceal facts, offer alternative interpretations on its application, or strive to provide justification based in international law for the conduct they have chosen to pursue.¹¹⁹ In all these instances the legitimacy of a rule can be said to be upheld.¹²⁰ Moreover, disagreements framed within international law do not undermine the normativity of international law but show the importance of its argumentative side, which helps preserve required balance in a complex reality of international encounters which different interests and values states ascribe to, which result in different policies, approaches and legal interpretations.¹²¹ I will use the examples of indeterminate rules already described in previous part – the vague provision on the general duty to negotiate from Article VI of the NPT and the ambiguous text of the UNSC Resolution 2249 – to demonstrate this point.

While being indeterminate, *i.e.* vague, the duty of good faith negotiation on measures leading to cessation of nuclear race and to nuclear disarmament stabilizes the NPT, as explained by Hakimi.¹²² As disarmament is not a feasible option, a duty to disarm would make the key nuclear weapons states likely to withdraw from the treaty or disregard its mandate.¹²³ The duty to negotiate disarmament keeps them in. At the same time, it provides a platform for dissatisfied developing non-nuclear weapons states to continue to express their discontent with unequal treatment of nuclear and non-nuclear weapon states by the NPT.¹²⁴ This enables them to refrain from more destabilizing steps, such as withdrawing from the NPT altogether.¹²⁵ The failure to disarm on the part of nuclear weapons states is used by non-nuclear weapons states “to justify resisting new

119 Franck, T., 2006, p. 96.

120 *Ibid.*, p. 95 (relying on Hart, Franck claimed this to be “another important, but hidden, indicator of a law’s legitimacy: that those who violate its strictures invariably claim not to be doing so.”) See examples regarding UN Charter rules on the use of force in *ibid.*, pp. 95–98.

121 See Hakimi, M., 2017a.

122 *Ibid.*, pp. 36–37.

123 *Ibid.*, p. 37.

124 For the analysis of different position toward non-compliance with the NPT, with the special emphasis on the position of the members of the Non-Aligned Movement to Iran’s violation of the NPT of 2002, see Ogilvie-White, T., 2007, International Responses to Iranian Nuclear Defiance: The Non-Aligned Movement and the Issue of Non-Compliance, *European Journal of International Law*, Vol. 18, No. 3, p. 458.

125 Hakimi, M., 2017a, p. 37.

non-proliferation obligations, which in their view fall disproportionately on them.”¹²⁶ In another words, they propose to do more on non-proliferation when nuclear weapon states do more on disarmament.¹²⁷ In this way, the duty to negotiate, while indeterminate, provides a platform for disagreement on disarmament, which keeps the NPT “in check and help preserve the current, uneasy but longstanding balance”¹²⁸

Indeterminacy, stemming from the ambiguity of the text of UNSC Resolution 2249 – which did not legally authorize the military action against IS in Syria and Iraq but pretended to do so – accommodated disagreements among states on the legal basis for the actions against IS and provided a legitimate platform for action endorsed by the prime institutional authority on the use of force, the UNSC. First, the ambiguity allowed the Resolution 2249 to be unanimously adopted. Second, it provided states with an opportunity to incorporate different legal grounds for taking military actions against IS.¹²⁹ Russia was relying on the consent by the Syrian government, as was the US-led coalition regarding action taken within Iraq.¹³⁰ Regarding actions taken in Syria, US was relying on the collective self-defense argument, but also made individual self-defense argument, as did the UK¹³¹ and France.¹³² Syria, of course, regarded military actions of Western states in Syria as unlawful because they were conducted without its consent.¹³³

By incorporating all legal grounds raised to justify actions already taking place, the Resolution 2249 allowed all parties involved in Syria to get closer politically,¹³⁴ without changing their existing legal narratives on their operations in Syria. In other words, it accommodated their disagreements on the legal ground for action. This is not a small thing. As Akande and Milanovic have explained, this resolution was designed to “provide political support for military action, without actually endorsing any particular legal theory on which such action can be based or providing legal

126 *Ibid.*

127 *Ibid.*

128 *Ibid.*

129 For references on different usages of Resolution 2249, see Hakimi, M., 2018, p. 189, fn. 195.

130 Akande, D., Milanovic, M., 2015.

131 See the transcripts of the debate of 26 November 2015 in the House of Commons, oral answers of the Attorney General “Syria: Legality of Airstrikes”, pp. 1468–1469 (<https://publications.parliament.uk/pa/cm201516/cmhansrd/cm151126/debtext/151126-0001.htm>, 21. 5. 2021).

132 Akande, D., Milanovic, M., 2015.

133 *Ibid.*

134 *Ibid.*

authority from the Council itself”.¹³⁵ Moreover, the Resolution gave the imprimatur of international law, and hence provided a multilateral legitimacy to actions taken against IS and to the actions states were about to take.¹³⁶ At the same time, it worked to undermine the claims and concerns about the illegality of action against IS in Syria.¹³⁷ In any case, a legitimate front against terrorist attacks by IS was created. It was not a united or joint front, as states disagree on the legal grounds for action, but an amalgamated one, which was still able to provide a response to the threat of terrorism.

While indeterminacy of some rules can be healed by interpretation using the customary rules of interpretation embodied in the VCLT or by the work of adjudicative bodies, at times the indeterminacy of rules cannot be removed by the legal analysis, no matter how competent and meticulous. In these instances, the reading of the rule is in fact solely based on policy grounds. This has been demonstrated by Milanovic to be the case with rules on the use of force (*jus ad bellum*) against non-state actors, specifically the exercise of the right to self-defense (Article 51 of the UN Charter) against them.¹³⁸ This right is an exception to the prohibition on the use of force (Article 2(4) of the UN Charter), which operates exclusively among states.¹³⁹ After 9/11 non-state actor (Al-Qaida) attacks against the US, there was a broad consensus that the US lawfully exercised its right to self-defense in Afghanistan, where Al-Qaida was operating from. Milanovic has shown that the practice and *opinion juris* of states on the issue is so ambiguous that it is impossible to discern between two possible readings of Article 51: the one that requires attribution of Al-Qaida’s attacks to Afghanistan¹⁴⁰ or the one that does not (in which case the

135 *Ibid.*

136 *Ibid.* This is the usual consequence of ambiguous resolutions unanimously adopted, for example UNSC Resolution 1441, UN Doc. S/RES/1441 (8 December 2002), see Byers, M., 2004, p. 173.

137 Hakimi, M., 2018, p. 189. Similar arguments have been made in respect to resolution 1441. *Ibid.*, p. 174.

138 Milanovic, M., 2010, Self-Defense and Non-State Actors: Indeterminacy and the Jus Ad Bellum, *EJIL: Talk!* (<https://www.ejiltalk.org/self-defense-and-non-state-actors-indeterminacy-and-the-jus-ad-bellum/>, 25. 5. 2021).

139 Milanovic, M., 2010; Hakimi, M., 2017a, pp. 21–22.

140 However, the general rules of attribution of non-state actors to state cannot accommodate the practice of states and *opinion juris* in respect to the US invasion in Afghanistan it can be that “the general rules of attribution have either changed, or *lex specialis* rules of attribution have emerged, whether confined to ‘terrorist’ armed attacks or to the *jus ad bellum* more broadly, to allow for looser standard of attribution, such as harboring terrorists or complicity in their actions.” Milanovic, M., 2010. See also Ratner, S., 2002, Jus Ad Bellum and Jus in Bello after September 11, *American Journal of International*

conduct against the state where a non-state actor operates justifies violations of its sovereignty).¹⁴¹ These two readings are not only conceptually different but also have broader implications.¹⁴² The rule on self-defense against non-state actors remains “utterly indeterminate”,¹⁴³ which is caused by the indeterminacy of state practice and *opinio juris*. This boils down to choosing a reading of Article 51 based solely on policy grounds.¹⁴⁴

I agree with Milanovic that there is nothing wrong in admitting the law’s indeterminacy and acknowledging that the decision needs to be made purely on policy grounds. Still, each policy option needs to be shaped within the framework of international law, which contributes to the understanding of values behind the rule on self-defense, the practice of states and the way international law operates to constrain them.

5. CONCLUSION

Undoubtedly, the way one views uncertainty in international law will depend on the assumption one adopts on the nature of international law. If one conceptualizes the law exclusively as a body of rules, one will be less inclined to find any value in indeterminate rules which bring uncertainty. On the other hand, if one sees the law also as a “dynamic set of processes”,¹⁴⁵ there would be ample space to find the value of such rules. I clearly belong to this second camp.

International law has both regulatory and constitutive effects. It influences state’s behavior, not just by providing the criteria for legal actions (regulatory), but also by requiring them to justify their policy choices in terms of international law (constitutive).¹⁴⁶ Thus, international law is not only about

Law, Vol. 96, No. 4, pp. 905–921; Tams, C., 2009, The Use of Force against Terrorists, *European Journal of International Law*, Vol. 20, No. 2, pp. 359–397.

141 Different arguments have been advanced in this respect from the territorial state being complicit or actively supporting the non-state actor in its armed attack; it failed to exercise due diligence, or it did exercise it, but nonetheless it was unable to prevent the attack. See more in Trapp, K., 2007, Back to Basics: Necessity, Proportionality, and the Right of Self-Defence Against Non-State Terrorist Actors, *International and Comparative Law Quarterly*, Vol. 56, No. 1, pp. 141–156; Milanovic, M., 2010; Milanovic, M., 2009, State Responsibility for Acts of Non-State Actors: A Comment on Griebel and Plücken, *Leiden Journal of International Law*, Vol. 22, No. 2, pp. 307–324.

142 Milanovic, M., 2010.

143 *Ibid.*

144 *Ibid.*

145 Ratner, S., Slaughter, A-M., 1999, The Method Is the Message, *American Journal of International Law*, Vol. 93, No. 2, p. 410.

146 For more on the constitutive side of international law see Hurd, I., 2017, *How to Do Things with International Law*, Princeton, Princeton University Press.

the rules which regulate a conduct of states in international realm (again, regulatory), but also about “how we explain, justify, argue about, bolster, and undermine particular governance decisions, which must be made in concrete settings in which different policy objectives invariably intersect and only some people’s priorities take precedence” (again, constitutive).¹⁴⁷

Indeterminate international rules accommodate disagreements among states, which stem both from the divergence of their interests and the complexity of issues they try to regulate. This, in turn, enables at least minimal regulation of certain contested issues but, as Hakimi has shown, also builds international community, helps in discerning the values laying at the heart of the rule and, moreover, explains how international law operates. As Besson claimed, “[k]nowing precisely where we stand is not always the point of a provision: instead, the point may be to ensure that certain reasonable debates take place in our society rather than to settle them entirely.”¹⁴⁸

Without any space for debate, we can hardly claim that the international law project would be worth pursuing.¹⁴⁹ For these reasons, I agree with and expound on what Jovanović is hinting at: that absolute clarity in international law is not desirable. Striving for absolute certainty (even if such a thing were possible) would not only impoverish international law of its argumentative, procedural, and rational side, but would also work against regulatory pull of international law in contested areas and would ultimately undermine functioning of international legal community.

This is not to say that international law should strive to enhance uncertainty; on the contrary, it should strive to mitigate it. But in cases when indeterminacy of rules is inevitable due to complexities of issues they try to regulate, or to the diversity of states, who subscribe to different values and have diverse interests, we should be careful not to view uncertainty as a shortcoming undermining the international law project itself. Indeterminate rules provide an opportunity for debate, which has been demonstrated to have an independent value in law.¹⁵⁰ However, this claim is contingent upon a debate on the interpretation of an indeterminate rule being contained within other rules and principles of international law, and mindful of the history, object, and purpose of the given practice. From this perspective, uncertainty brought by indeterminate international rules is not bad news. We should accept it, embrace it and make use of it for preserving other important aspects of international law which go beyond mere compliance with its rules.

147 Hakimi, M., 2020, p. 1306.

148 Besson, S., 2005, *The Morality of Conflict: Reasonable Disagreement and the Law*, Oxford and Portland, Oregon, Hart Publishing, p. 117.

149 Hakimi, M., 2020, p. 1286.

150 Waldron, J., 2008, p. 56.

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U ODBRANU NEIZVESNOSTI: DOBRE STRANE NEODREĐENIH PRAVILA MEĐUNARODNOG PRAVA

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APSTRAKT

U članku se obrađuje pitanje neizvesnosti u međunarodnom pravu, i to neizvesnosti koja proističe iz neodređenih pravila međunarodnog prava. Pokazujući da su ovakva pravila neminovnost, koja proističe iz različitih interesa država ili složenosti pitanja koja regulišu, članak tvrdi da neodređena pravila nisu nikakva patologija niti mana međunarodnog prava, već da ona sa sobom nose određene vrednosti. Uočavanje ovih vrednosti podrazumeva sagledavanje prava mimo pukog korpusa različitih formalnih pravila i uzimanje u obzir njegovih proceduralnih, racionalnih i argumentativnih odlika. Tako, oslanjajući se na radove Valdrona i Hakimi i fokusirajući se na argumentativnu stranu međunarodnog prava, autorka ukazuje na te vrednosti kroz primere neodređenih pravila: opšte obaveze iz Ugovora o neširenju nuklearnog oružja (1968) i Rezolucije Saveta bezbednosti 2249, usvojene posle terorističkih napada u Parizu 2015, čiji je tekst školski primer „konstruktivne višeznačnosti”.

Ključne reči: neizvesnost, neodređena pravila, usaglašenost s međunarodnim pravom, argumentativna praksa, tumačenje, neslaganje, sukob, Ugovor o neširenju nuklearnog oružja, Rezolucija 2249, samoodbrana.

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