Norm Contestation for Strategic Effect: Legal Narratives as Information Advantage

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Odysseus
I too in youth was slow of tongue and forward with my hand;
But I have learnt by trial of mankind
Mightier than deeds of puissance is the tongue.
Sophocles, *Philoctetes* (transl. Francis Storr)

Abstract

Telling stories is intrinsic to legal practice. Clients, lawyers, and courts constantly tell stories about the facts and the law to make sense of the world around them. Legal narration is thus a familiar feature at the domestic as well as at the international level. In formal venues, legal storytelling is subject to a

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range of procedural and substantive requirements. For example, not everyone enjoys standing before a particular court. By contrast, in informal venues, few if any such conditions apply. Press releases, official statements and social media posts provide legal actors with considerable latitude and communicative freedom to give their version of events. Much of this has emancipatory potential, as it can lend a voice to those who lack representation in more formal circumstances. However, it also enables actors to engage in legal discourse, and to spin their stories, without the various checks and balances that apply in formal settings. Legal narratives are also a source of conflict, polemics and even misinformation.

The purpose of this article is to take a closer look at the role that legal narratives play in the contestation of, and contestation through, international norms. The article argues that legal narratives display certain distinct features that set them apart from other types of storytelling. Specifically, they are marked by normative constraints imposed by the formal nature of legal reasoning and interpretation and by the logic of rhetoric and the policy choices they are meant to serve. These two features – the formalism of the law and the demands of rhetoric and instrumentalism – pull legal narratives in different directions. Outside formal processes and venues, this tension becomes acute. In the absence of epistemic scrutiny by experts and authorities, legal narratives may stray far from the formalism of the law in pursuit of competing goals. Where these goals gain the upper hand, attaining an information advantage may become their primary purpose, a point the article illustrates with reference to the justifications Russia offered for its invasion of Ukraine in 2022. In such circumstances, legal narratives may invoke the language and authority of the law not just unpersuasively, but falsely.

Keywords

norm contestation – legal narratives – information advantage – misinformation

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I. Introduction

Narratives are a familiar feature of the law.[1] As in life more generally,[2] much about the law revolves around narration.[3] Stories, plots, events, and characters loom large everywhere. Clients tell stories to their lawyers, providing an account of their grievances, deeds, and aspirations. Lawyers retell these stories before the courts, translating them into the formal language of claims, allegations, and defences. The courts themselves develop stories as part of the judicial process. 'My Lords, the facts of this case are simple', are the opening words of Lord Buckmaster in the landmark case of *Donoghue v. Stevenson*, introducing the tale of a snail getting lost in a bottle of ginger beer and the mighty questions of principle posed by its misadventure.[4]

Legal narratives abound at the international level too.[5] International actors, from States to non-governmental organisations, rely on the language of international law to portray themselves and the world in a particular way. The United Kingdom, for example, has sought to characterise its dispute with Mauritius over the Chagos Archipelago as a bilateral affair touching on questions of sovereignty and mutual treaty relations.[6] This framing enabled the British Government to insist that any judicial treatment

1 Peter Brooks, 'Narrative Transactions – Does the Law Need a Narratology?', Yale Journal of Law & the Humanities 18 (2006), 1-28 (5) (suggesting that narrative in the law is 'inevitable and irreplaceable'). On legal storytelling generally, see Peter Brooks and Paul D. Gewirtz (eds), *Law's Stories: Narrative and Rhetoric in the Law* (New Haven: Yale University Press 1996); Gary Bellow and Martha Minow, 'Introduction' in: Gary Bellow and Martha Minow (eds), *Law Stories* (Ann Arbor: University of Michigan Press 1996), 1-29; Guyora Binder and Robert Weisberg, *Literary Criticisms of Law* (Princeton, N.J.: Princeton University Press 2000); Anthony G. Amsterdam and Jerome S. Bruner, *Minding the Law* (Cambridge, Mass.: Harvard University Press 2000); Michael Hanne and Robert Weisberg (eds), *Narrative and Metaphor in the Law* (Cambridge: Cambridge University Press 2018).

2 Jerome Bruner, 'Life as Narrative', Social Research 54 (1987), 11-32.

3 James B. White, *The Legal Imagination: Studies in the Nature of Legal Thought and Expression* (Boston, Mass.: Little, Brown and Company 1973), 859 (lawyering involves converting 'the raw material of life […] into a story that will claim to tell the truth in legal terms'). See also Flora Di Donato, *The Analysis of Legal Cases: A Narrative Approach* (Abingdon: Routledge 2019).

4 *Donoghue v. Stevenson* [1932] AC 562 (House of Lords).

5 Sofia Stolk and Renske Vos (eds), *International Law's Collected Stories* (Basingstoke: Palgrave Macmillan 2020).

6 Written Statement of the United Kingdom, 15 February 2018, in: *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, 104-116. For an assessment sympathetic to the British position, see Sienho Yee, 'The Upcoming Separation of the Chagos Archipelago Advisory Opinion: Between the Court's Participation in the UN's Work on Decolonization and the Consent Principle in International Dispute Settlement', Chinese Journal of International Law 16 (2018), 623-642. On the historical background, see Stephen Allen, *The Chagos Islanders and International Law* (Oxford: Hart 2014).

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of the matter required its prior consent. By contrast, Mauritius invoked the language of self-determination, including personal stories recounted by displaced Chagossians,[7] to present the dispute as a struggle for decolonisation of universal concern.[8] Faced with these narratives, the International Court of Justice retold both stories in its advisory opinion, but sided with Mauritius by accepting that the case was, at heart, about the broader issue of self-determination.[9] Legal instruments and institutions tell their own stories. In restating the fundamental principles of the international legal order, the Friendly Relations Declaration[10] evokes a thin version of friendship centred around co-existence and cooperation,[11] one that says as much about the limits of international law as it does about its possibilities. In a similar fashion, the title of the United Nations (UN) Security Council speaks to its preoccupation with matters of international peace and security and the underlying goal of saving 'succeeding generations from the scourge of war'.[12]

As the example of the Chagos Archipelago illustrates, international actors engage in legal storytelling not just to share their perspective, but to contest alternative accounts and framings. More often than not, legal narratives are also legal counter-narratives.[13] This adversarial streak of legal narration has not escaped the attention of commentators. However, with some notable exceptions,[14] much of the work in this field is concerned with storytelling in formal

7 Stephen Allen, 'Self-Determination, the Chagos Advisory Opinion and The Chagossians', ICLQ 69 (2020), 203-220 (214).

8 Written Comments of Mauritius, 15 May 2018, in: *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, 31-64.

9 Ksenia Polonskaya, 'International Court of Justice: The Role of Consent in the Context of Judicial Propriety Deconstructed in Light of Chagos Archipelago', The Law & Practice of International Courts and Tribunals 18 (2019), 189-218 (esp. 210-216). See also Zeno Crespi Reghizzi, 'The Chagos Advisory Opinion and the Principle of Consent to Adjudication' in: Jamie Trinidad and Thomas Burri (eds), *The International Court of Justice and Decolonisation: New Directions from the Chagos Advisory Opinion* (Cambridge: Cambridge University Press 2021), 51-70.

10 Declaration on Principles of International Law, Friendly Relations and Co-Operation among States in Accordance with the Charter of the UN, 24 October 1970, A/RES/25/2625.

11 Gerry Simpson, *The Sentimental Life of International Law: Literature, Language, and Longing in World Politics* (Oxford: Oxford University Press 2021), 161-169.

12 Preamble, UN Charter. On the narrative of collective security and its 'hidden cargo', see Julia Otten, 'Narratives in International Law', KritV 99 (2016), 187-216 (207-215).

13 Generally, see Klarissa Lueg and Marianne Wolff Lundholt (eds), *Routledge Handbook of Counter-Narratives* (London: Routledge 2020).

14 E.g. Madelaine Chiam, *International Law in Public Debate* (Cambridge: Cambridge University Press 2021); Xiaoyu Lu, *Norms, Storytelling and International Institutions in China: The Imperative to Narrate* (Basingstoke: Palgrave Macmillan 2021). See also Ian Johnstone and Steven Ratner (eds), *Talking International Law: Legal Argumentation Outside the Courtroom* (Oxford: Oxford University Press 2021).

venues, above all before international courts and tribunals.[15] Yet legal narration is not confined to these circumstances. Stories involving the law are just as often, if not more frequently, told in informal settings and formats, ranging from press releases[16] to position papers,[17] from magazine articles[18] to social media threads,[19] from television interviews[20] to parliamentary statements.[21] The sheer volume and ubiquity of informal legal narratives is intriguing.

In formal venues, legal communication is subject to a plethora of constraints. Rules of standing determine who may tell their story and who may not.[22] Rules of procedure and practice directions impose requirements as to the content, format, length, language, and publication of pleadings.[23] Legal language itself is heavily laden with technical terms and conventions, sporting its own vocabulary and syntax.[24] By contrast, observing such restrictions and expectations is not a necessary precondition for legal communication in informal settings: on Twitter, everyone with a device and an opinion can happily tweet away about the law.

This communicative freedom has significant emancipatory potential. It can provide a voice and audience to those who in formal venues lack both.[25] But

15 E.g. Andrea Bianchi, 'International Adjudication, Rhetoric and Storytelling', Journal of International Dispute Settlement 9 (2018), 28-44; Barrie Sander, 'The Method Is the Message: Law, Narrative Authority and Historical Contestation in International Criminal Courts', MJIL 19 (2018), 299-334.

16 Statement by NATO Foreign Ministers on Afghanistan, 20 August 2021 <https://www.nato.int/cps/en/natohq/official_texts_186086.htm?selectedLocale=en>.

17 The State of Israel, *The Operation in Gaza: Factual and Legal Aspects* (Jerusalem, 2009).

18 Sergei V. Lavrov, 'On Law, Rights and Rules', Russia in Global Affairs 19 (2021), 228-240.

19 Hua Chunying (@SpokespersonCHN), 1 March 2022, Twitter <https://twitter.com/SpokespersonCHN/status/1498696209766449152?s=20&t=1GDU7fyw9KUHJwiU7OWrtA>.

20 'EU Chief: "Nothing Off Table" in Response to Russia', 27 January 2022, CNN <https://edition.cnn.com/videos/tv/2022/01/27/ursula-von-der-leyen-amanpour-european-union-ukraine-russia-biden.cnn>.

21 Secretary of State for Foreign and Commonwealth Affairs, Jeremy Hunt, 'Implementation of International Humanitarian Law at Domestic Level: Voluntary Resort', HC Deb. (11 March 2019), vol. 656, col. 4WS.

22 Mariko Kawano, 'Standing of a State in the Contentious Proceedings of the International Court of Justice Recent Trends and Challenges of the ICJ Jurisprudence', Japanese Yearbook of International Law 55 (2012), 208-236.

23 E.g. Part III, Rules of the Tribunal (ITLOS/8) as adopted on 28 October 1997 (amended) and Guidelines concerning the Preparation and Presentation of Cases before the Tribunal (ITLOS/9), 14 November 2006.

24 Brenda Danet, 'Language in the Legal Process', L. & Soc. Rev. 14 (1980), 445-564 (470-487); Risto Hiltunen, 'The Grammar and Structure of Legal Texts' in: Peter Meijes Tiersma and Lawrence Solan (eds), *The Oxford Handbook of Language and Law* (Oxford: Oxford University Press 2016), 39-51.

25 See David Patrikarakos, *War in 140 Characters: How Social Media is Reshaping Conflict in the Twenty-first Century* (New York: Basic Books 2017), 1-130.

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this freedom is not an unmitigated blessing. The proliferation of informal avenues of mass communication has created new outlets, authors, and audiences for legal narratives at a time when questions of legality have become more closely intertwined with matters of legitimacy, especially at critical junctures between war and peace.[26] This has increased the volume and pace of legal debate, but diluted the level of expertise.[27] It has also enabled privileged stakeholders to engage in this discourse, often as part of their broader communication efforts, without the constraints they face in formal venues.[28] Coupled with the capacity of information technology, and connectivity more generally,[29] to deepen social divisions,[30] these developments have opened the door more widely to legal polemics and have amplified their impact. Of course, there is nothing new about States bending the rules in ways that favour their strategic interests[31] or that popular engagement with questions of international law lacks technical sophistication.[32] Nevertheless, the late Judge James Crawford has captured the *Zeitgeist* with typical precision when he pointed out that international law in the contemporary world is

26 On the latter, see David Kennedy, *Of War and Law* (Princeton: Princeton University Press 2006); Stephen J. Toope, 'Public Commitment to International Law: Canadian and British Media Perspectives on the Use of Force' in: Christopher P. M. Waters (ed.) *British and Canadian Perspectives on International Law* (Leiden: Martinus Nijhoff 2006), 13-28.

27 See Manuel Castells, *Communication Power* (Oxford: Oxford University Press 2009), 136; Thomas M. Nichols, *The Death of Expertise: The Campaign against established Knowledge and Why It Matters* (New York: Oxford University Press 2017), 108 ('the most obvious problem is that the freedom to post anything online floods the public square with bad information and half-baked thinking'). See also Michael N. Schmitt, 'Normative Architecture and Applied International Humanitarian Law', Int'l Rev. of the Red Cross 104 (2022), 2097-2110 (2108) (noting the declining influence of scholarship due to its sheer volume).

28 Stephen D. Collins, Jeff R. DeWitt and Rebecca K. LeFebvre, 'Hashtag Diplomacy: Twitter as a Tool for Engaging in Public Diplomacy and Promoting US Foreign Policy', Place Branding and Public Diplomacy 15 (2019), 78-96. The point is exemplified by the phenomenon of Chinese 'Wolf Warrior Diplomacy'; see Peter Martin, *China's Civilian Army: The Inside Story of China's Quest for Global Power* (Oxford: Oxford University Press 2021), 216-220; Mark Bryan Manantan, 'Unleash the Dragon: China's Strategic Narrative During the COVID-19 Pandemic', Cyber Defense Review 6 (2021), 71-90.

29 Mark Leonard, *The Age of Unpeace: How Connectivity Causes Conflict* (London: Transworld Digital 2021).

30 Peter W. Singer and Emerson T. Brooking, *Likewar: The Weaponization of Social Media* (Boston: Houghton Mifflin Harcourt 2018), 261 ('the internet is not a harbinger of peace and understanding').

31 Josef L. Kunz, 'The Problem of the Progressive Development of International Law', Iowa L. Rev. 31 (1945), 544-560 (549).

32 Georg Schwarzenberger, *International Law and Totalitarian Lawlessness* (London: Jonathan Cape 1943), 12 (lamenting that international law has become a 'happy hunting-ground of dilettantism and apparently everybody's business').

invoked 'in what seems an increasingly antagonistic way, amounting often to a dialogue of the deaf'.[33]

The purpose of this article is to venture into the dark side of popular legal discourse to take a closer look at the role that legal narratives play in the contestation of, and contestation through, international norms. The article proceeds in three steps. First, it explores the idea of legal narratives and identifies their distinctive features. Second, it proposes a typology of narrative norm contestation and illustrates this practice with reference to the Russian Federation's full-scale invasion of Ukraine in 2022. Finally, the article turns to legal narratives that are defective as a matter of legal argument. After highlighting the role that subject matter experts and competent authorities play in scrutinising legal storytelling, it draws on military doctrine to suggest that defective legal narratives persist because of their informational value. The conclusion identifies some of the broader implications and questions raised by these findings, charting a path for further work in this field.

II. Legal Narratives

The proposition that narratives, understood as the representation of events or a series of events,[34] are an integral part of the law and legal practice sounds plausible: clearly, law involves telling stories. But what exactly does this mean and why should we care?

1. Notions of Legal Storytelling

Employed in a weak and minimalistic sense, the idea of legal storytelling reflects the everyday experience that applying law to facts, for example during a criminal trial, requires those facts to be recounted and that this process inevitably takes on a narrative form.[35] It is certainly true that lawyers

33 James Crawford, 'The Current Political Discourse Concerning International Law', MLR 81 (2018), 1-22 (1).

34 Horace Porter Abbott, *The Cambridge Introduction to Narrative* (3rd edn, Cambridge: Cambridge University Press 2020), 12. Narratives are not simply a story, but the *telling* of a story. See also Marie-Laure Ryan, 'Toward a Definition of Narrative' in: David Herman (ed.) *The Cambridge Companion to Narrative* (Cambridge: Cambridge University Press 2007), 22-36; Mieke Bal, *Narratology: Introduction to the Theory of Narrative* (4th edn, Toronto: University of Toronto Press 2017), 3-10; Rick Altman, *A Theory of Narrative* (New York: Columbia University Press 2008), 1-27.

35 Robert Weisberg, 'Proclaiming Trials as Narratives: Premises and Pretenses' in: Peter Brooks and Paul D. Gewirtz (eds), *Law's Stories: Narrative and Rhetoric in the Law* (New Haven: Yale University Press 1996), 61-83 (66).

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and judges spin facts into a narrative yarn during legal proceedings, but this is hardly a profound revelation.

A stronger version of the idea suggests that legal actors employ narratives to relate different dimensions of the legal world to one another: persons, objects, and events to legal categories and concepts; generally applicable principles to specific circumstances; brute facts to norms; 'is' to 'ought' and vice versa. As Robert Cover put it, law may be viewed as a 'bridge linking a concept of a reality to an imagined alternative – that is, as a connective between two states of affairs, both of which can be represented in their normative significance only through the devices of narrative'.[36] In this version, legal storytelling is a means for making sense of the world from a legal perspective. By providing an account of events happening over time, it imposes order and meaning on what would otherwise be a random constellation of things, rules, and incidents. A collision between two big metal boxes on wheels thus becomes a road traffic offence caused, say, by a reckless driver now liable to provide compensation to the injured party. Narrative is glue that holds the legal world together and enables us to comprehend and imbue it with meaning.[37]

Taking these points further, an even stronger version of the notion of legal narratives might point out that rules do not speak for themselves. They need to be restated, interpreted, and applied. This not only implies that the meaning of the law is constructed on an ongoing basis from one situation to another,[38] but that this meaning does not pre-exist wholly independently of its representation in narrative form. Legal meaning does not just sit there waiting to be discovered and narrated. Rather, it is constituted and reconstituted by the narrative itself, which is to say that legal narratives create versions of legal reality.[39] The idea that law becomes real with the help of narratives should not be too controversial. However, it does conjure the spectre of hermeneutic indeterminacy: do narrative representations of the legal world create an infinite number of true versions of legal reality? Experience suggests that this is not the case.

Distinct interpretative communities see the legal world through the lens of their own normative preferences and hierarchies, leading them to prefer

36 Robert M. Cover, '*Nomos* and Narrative', Harv. L. Rev. 97 (1983), 4-68 (9).

37 See Amsterdam and Bruner (n. 1), 141.

38 Benjamin Gregg, 'Using Legal Rules in an Indeterminate World: Overcoming the Limitations of Jurisprudence', Political Theory 27 (1999), 357-378.

39 See Jerome Bruner, 'The Narrative Construction of Reality', Critical Inquiry 18 (1991), 1-21 (4). For a practical example, see Clive Baldwin, 'Who Needs Fact When You've Got Narrative? The Case of P, C & S vs. United Kingdom' in: Anne Wagner, Wouter Werner and Deborah Cao (eds), *Interpretation, Law and the Construction of Meaning: Collected Papers on Legal Interpretation in Theory, Adjudication and Political Practice* (Dordrecht: Springer 2007), 85-108.

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some narratives over others.[40] The social power that these communities wield enables them to promote their preferred narratives at the expense of alternative versions. Seen from this perspective, the function of the courts is to choose between competing representations of legal reality placed before them by embracing one and suppressing the others, for instance by re-telling the plight of the Chagossians as a story about decolonisation. In practice, certain representations of the legal world therefore prevail both within individual interpretative communities and across wider society, depending on the strength of the forces that back them.[41] In order to engage with the prevailing legal realities in a way that is meaningful to other members of a given interpretative community, whether to invoke their normative force or to contest them, an actor must submit to the interpretive rules and hierarchies established by that community. The existence of such 'rules of the legal game' renders some legal narratives more compelling than others,[42] at least in the eyes of that community. Accordingly, even if we accept that legal meaning is constituted rather than given, legal narratives do not operate divorced from their social context, but are shaped by the interplay between interpretative freedoms and constraints.[43] The power of narratives in constructing legal reality, and thus the power of the narrator, is relative and not unlimited.

While the relationship between law and narratives is plain to see, both weak and strong understandings of legal storytelling must be approached with two caveats in mind. The first is that not everything in the world of law is about narratives and that storytelling is not the only way to establish and impart legal meaning.[44] The second is that narratives are not confined to the field of law, but permeate society, some might even say the human condition,[45] in its entirety. In an age of the Narrative Turn,[46] even strong accounts

40 See Cover (n. 36), 40-44.

41 See Frédéric Mégret, 'International Criminal Justice as a Juridical Field', Champ pénal/Penal Field 13 (2016).

42 Pierre Bourdieu, 'The Force of Law: Toward a Sociology of the Juridical Field', Hastings L. J. 38 (1987), 814-853 (831).

43 Stanley Fish, 'Working on the Chain Gang: Interpretation in the Law and in Literary Criticism', Critical Inquiry 9 (1982), 201-216 (211).

44 Jane B. Baron and Julia Epstein, 'Is Law Narrative?', Buff. L. Rev. 45 (1997), 141-187. See also William Twining, *Rethinking Evidence: Exploratory Essays* (2nd edn, Cambridge: Cambridge University Press 2006), 319.

45 Hayden White, 'The Value of Narrativity in the Representation of Reality' in: William J. T. Mitchell (ed.) *On Narrative* (Chicago; London: University of Chicago Press 1981), 1-23 (1) (suggesting that narrative serves to fashion human experience into a universally relatable and translatable form).

46 Robert Scholes, James Phelan and Robert L. Kellogg, *The Nature of Narrative* (revised edn, Oxford: Oxford University Press 2006), 285. See also Monika Fludernik, 'Histories of

of legal narratives therefore run the risk of sounding self-evident and cliché, without offering much fresh insight. Sure, lawyers tell stories that carry meaning in order to make sense of the world around us but so does everybody else.

Should we then dismiss the notion of legal narratives as true, but trivial? In my view, this would be a mistake, for the concept helps to bring into sharper focus certain distinct features and functions of legal narration that demand greater attention.

2. The Distinct Features of Legal Narration

Legal storytelling is a meeting place for formalism and rhetoric. The interaction between these two factors – the constraints imposed by the rule of law and the argumentative nature of legal practice[47] – endows legal narratives with certain traits that distinguish them, to greater or lesser degree, from narratives in other fields. Five of these features deserve our attention here.

First, law is a discursive discipline concerned with interpretation and reasoning. The search for meaning is a characteristic that law shares with literature and other text-based subjects.[48] However, law differs from these disciplines in that its methods of sensemaking are more strictly regulated and formalised.[49] Every legal system has rules about rules,[50] including rules that govern the process of interpretation, such as Articles 31 and 32 of the Vienna Convention on the Law of Treaties.[51] Rules also regulate legal reasoning, that is the making of legal arguments, more generally. Legal systems thus routinely limit who may speak, about what, when, where, and to whom. In formal settings where these constraints apply, not all legal stories can be told by anyone with an urge to tell them, as the rules of procedure, jurisdiction, and admissibility before

Narrative Theory (II): From Structuralism to the Present' in: James Phelan and Peter J. Rabinowitz (eds), *A Companion to Narrative Theory* (Oxford: Blackwell 2005), 36-59 (46-48).

47 Neil MacCormick, *Rhetoric and the Rule of Law: A Theory of Legal Reasoning* (Oxford: Oxford University Press 2005), 12-16.

48 James Boyd White, 'Law as Language: Reading Law and Reading Literature', Tex. L. Rev. 60 (1981), 415-445 (417).

49 See Stanley Fish, *Is There a Text in This Class? The Authority of Interpretive Communities* (Cambridge, Mass.: Harvard University Press 1980), 342-343.

50 These are what Hart famously called secondary rules: Herbert L. A. Hart, *The Concept of Law* (2nd edn, Oxford: Oxford University Press 1997), 79-99.

51 Richard K. Gardiner, *Treaty Interpretation* (2nd edn, Oxford: Oxford University Press 2015), 5-56.

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international courts demonstrate.[52] Reasoning in the field of law is more heavily controlled and institutionalised than reasoning in other areas.[53]

A second distinguishing feature is that many, if not most, legal narratives are intended to produce legal effects. They are able to do so because the law ascribes normative consequences to certain verbal and textual performances: to *say* something often means to *do* something.[54] Legal language is replete with speech acts, that is acts performed through verbal or written utterances.[55] Examples include the adoption of statutes[56] or the conclusion of contracts.[57] Legal narratives rely on speech acts in several ways. Speech acts may be embedded within a broader storyline. The Truman Proclamation of 1945 offers an example of a narrative designed to contextualise and justify an embedded declarative speech act proclaiming a shift in United States policy regarding the continental shelf.[58] A narrative may constitute a speech act in its entirety, as illustrated by the Greco-Turkish Joint Communiqué of 1975[59] at the centre of the *Aegean Sea Continental Shelf Case*.[60] Even describing people or events with reference to legal categories and concepts, for example labelling an incident an internationally wrongful act or a person a war criminal, may have normative implications.[61] While literary and other non-legal narratives may generate legal consequences too,[62] the production of legal effects through speech acts is a defining feature of legal narratives.

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52 Yuval Shany, *Questions of Jurisdiction and Admissibility before International Courts* (Cambridge: Cambridge University Press 2016).

53 Eveline T. Feteris, *Fundamentals of Legal Argumentation: A Survey of Theories on the Justification of Judicial Decisions* (2nd edn, Dordrecht: Springer 2017), 343.

54 John L. Austin, *How to Do Things with Words* (Oxford: Clarendon Press 1962), 13.

55 On the notion generally, see John R. Searle, *Speech Acts: An Essay in the Philosophy of Language* (Cambridge: Cambridge University Press 1969). For a taxonomy of legal speech acts, see Danet (n. 24), 458-461.

56 Dennis Kurzon, *It Is Hereby Performed: Explorations in Legal Speech Acts* (Amsterdam: John Benjamins 1986).

57 Sanford Schane, 'Contract Formation as a Speech Act' in: Peter Meijes Tiersma and Lawrence Solan (eds), *The Oxford Handbook of Language and Law* (Oxford: Oxford University Press 2016), 100-113. See also Anna Trosborg, 'An Analysis of Legal Speech Acts in English Contract Law', HERMES 4 (1991), 65-90.

58 Proclamation 2667 – Policy of the United States with Respect to the Natural Resources of the Subsoil and Sea Bed of the Continental Shelf, 28 September 1945. See Michael P. Scharf, *Customary International Law in Times of Fundamental Change: Recognizing Grotian Moments* (Cambridge: Cambridge University Press 2013), 107-122.

59 Joint Communiqué issued after the Meeting of the Prime Ministers of Greece and Turkey in Brussels, 31 May 1975, Annex I to S/16766, 27 March 1987.

60 ICJ, *Aegean Sea Continental Shelf* (Greece v. Turkey), Judgment of 19 December 1978, ICJ Reports 1978, 3.

61 See the notion of 'reference' as a speech act in Searle (n. 55), 72-96.

62 E.g. a series of posts published on social media could be defamatory: *Vardy v. Rooney* [2020] EWHC 3156 (QB) (High Court).

Third, as speech acts, legal narratives must satisfy certain conditions to achieve their intended effects. Without doing so, they would be defective. For example,[63] a promise must be capable of being understood by the intended beneficiary, which means it has to be syntactically comprehensible. On the semantic level, it must contain a sincere undertaking by the speaker to perform an act they would not otherwise carry out. In addition, it must satisfy a range of external or 'pragmatic' conditions;[64] for instance, it must respect linguistic and social conventions and not be made in jest. Collectively, these prerequisites for the successful performance of a speech act may be described as 'felicity conditions'.[65] Crucially, the success of *legal* speech acts also depends on normative considerations. Legal speech acts are institutionally bounded,[66] in the dual sense that they rely on pre-existing norms and legal institutions to achieve their intended normative effects, while these norms and institutions in turn subject their operation to a set of substantive and procedural requirements. Uttering the words 'I hereby enact the following […]' may succeed in creating new law, but only if the legal system assigns such an effect to this formula and provided it was voiced in the right way by a person or body empowered to do so.

Based on these points, we may distinguish between three dimensions of a legal speech act's validity.[67] Legal speech acts making empirical pronouncements of fact may be either *true* or *false*. Those that entertain propositions about the law, such as declaring its meaning, may be either *correct* or *incorrect*. This is not to suggest that only one among several competing propositions can be correct, but that correctness is one of the properties that propositions about the law possess. Nor does it imply that correctness cannot be a matter of degree; statements about the law may exhibit varying levels of correctness. Finally, depending on whether or not they have been properly performed by a person or body authorised to do so, they may be *authoritative* or *unauthoritative*. Legal speech acts display these three properties in different combinations. An utterance could be true and correct,

63 The following leans on the analysis in Searle (n. 55), 54-64.

64 Charles W. Morris, *Foundations of the Theory of Signs* (Chicago: University of Chicago Press 1938), 29-38.

65 Austin (n. 54), 14.

66 Deborah Cao, 'Legal Speech Acts as Intersubjective Communicative Action' in: Anne Wagner, Wouter Werner and Deborah Cao (eds), *Interpretation, Law and the Construction of Meaning: Collected Papers on Legal Interpretation in Theory, Adjudication and Political Practice* (Dordrecht: Springer 2007), 65-82 (73).

67 See also Felix E. Oppenheim, 'Outline of a Logical Analysis of Law', Philosophy of Science 11 (1944), 142-160.

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but not authoritative; or it could be false and incorrect, but still authoritative.[68]

All of this has significant implications for legal narratives. The success of legal speech acts embedded into legal narratives depends not only on meeting syntactic, semantic, and pragmatic felicity conditions, but also those imposed by the law. The illocutionary force of legal narratives – understood here in a Habermasian sense to refer to a narrative's capacity to influence or motivate an audience[69] – thus hinges on their conformity with normative felicity conditions. Accordingly, the validity of legal narratives may usefully be assessed with reference to the *true* or *false*, *correct* or *incorrect*, and *authoritative* or *unauthoritative* binaries. It is safe to presume that the illocutionary force of a legal narrative stands in direct relationship with the nature and degree of its validity. A narrative that is factually true, normatively correct, and emanates from an authoritative source should, in principle, carry greater illocutionary force than one that does not display these properties or is otherwise defective.[70]

Fourth, law is an argumentative practice.[71] Due to the relative indeterminacy of language and the open textured nature of norms,[72] rules of law must be interpreted. Even those who seek to comply with the law in good faith first need to understand what it requires them to do. Since legal texts admit a range of reasonable interpretations, this generates *bone fide* disagreements over their meaning.[73] Moreover, domestic and international actors rely on the law to advance their interests and resist rules and claims they consider detrimental to themselves.[74] They typically do so by advancing interpretations favourable to their own cause, insisting on or disputing the application of a particular rule or denying its validity altogether. In all of these scenarios, the parties deploy legal arguments to ensure that their position prevails over a competing one.

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68 See Brian H. Bix, 'Linguistic Meaning and Legal Truth' in: Michael Freeman and Fiona Smith (eds), *Law and Language: Current Legal Issues* (Oxford: Oxford University Press 2013), 34-44 (40).

69 See Jürgen Habermas, *On the Pragmatics of Communication* (Cambridge, Mass.: MIT Press 1998), 81-88.

70 Ian Johnstone and Steven Ratner, 'Toward a Theory of Legal Argumentation' in: Ian Johnstone and Steven Ratner (eds), *Talking International Law: Legal Argumentation Outside the Courtroom* (Oxford: Oxford University Press 2021), 339-356 (351) (finding that the quality of legal argument matters for its effectiveness).

71 White (n. 48), 436. See also MacCormick (n. 47), 14.

72 Frederick F. Schauer, *Playing by the Rules: A Philosophical Examination of Rule-Based Decision-Making in Law and in Life* (Oxford: Clarendon Press 1991), 34-37.

73 Martin Camper, *Arguing over Texts: The Rhetoric of Interpretation* (New York: Oxford University Press 2018), 171-172.

74 Hans J. Morgenthau, *Politics Among Nations: The Struggle for Power and Peace* (New York: Knopf 1948), 214.

Legal argumentation is thus concerned not simply with establishing the validity of legal claims and theses,[75] but with their preeminence. As Martti Koskenniemi notes, the point is 'to "win" against a polemical adversary'.[76] Law is an inherently argumentative *and* competitive practice.[77]

The same holds true for legal narratives. Legal narration enables legal arguments to take on a narrative form. Narration ties facts and legal arguments to a plot, so that the different narrative elements and their dramatic arrangement support the argumentative functions of asserting, justifying, and criticising.[78] Scattered events and norms are thereby integrated into a complete storyline to become a 'meaningful totality'.[79] The primary function of the narrative form here is to supply hermeneutic glue: it provides coherence.[80] Neil MacCormick has helpfully distinguished between two dimensions of coherence.[81] 'Normative coherence' refers to the justifiability of a set of norms under higher order principles and values, whereas what he calls 'narrative coherence' is concerned with the probable truth of propositions about facts. Adapted to the present context, the *normative coherence* of a narrative refers to its fit with pre-existing norms, including normative felicity conditions, while what we may term *factual coherence* refers to its capacity to establish the probable truth of propositions about facts. In principle, legal narratives displaying greater levels of normative and factual coherence will be more persuasive.

The final feature of legal narratives flows directly from the instrumental nature of the law.[82] Rules of law are not ends in themselves, but are adopted in pursuit of other social and political goals. Legal narratives cannot escape

75 See Harald R. Wohlrapp, *The Concept of Argument: A Philosophical Foundation* (Berlin: Springer 2014), lix.

76 Martti Koskenniemi, 'Law, Teleology and International Relations: An Essay in Counterdisciplinarity', Int'l Rel. 26 (2012), 3-34 (19).

77 All legal systems are adversarial, though in different ways and degrees. See Robert A. Kagan, *Adversarial Legalism: The American Way of Law* (Cambridge, Mass: Harvard University Press 2001), 9-14.

78 On these functions, see Wohlrapp (n. 75), 134-161.

79 Paul Ricoeur, *Hermeneutics and the Human Sciences: Essays on Language, Action, and Interpretation* (Cambridge: Cambridge University Press 2016), 240.

80 Helena Whalen-Bridge, 'Persuasive Legal Narrative: Articulating Ethical Standards', Legal Ethics 21 (2018), 136-158 (140).

81 Neil MacCormick, 'Coherence in Legal Justification' in: Aleksander Peczenik, Lars Lindahl and Bert van Roermund (eds), *Theory of Legal Science: Proceedings of the Conference on Legal Theory and Philosophy of Science, Lund, Sweden, December 11-14, 1983* (Dordrecht: Reidel 1983), 235-251. See also MacCormick (n. 47), 189-236.

82 This is not to deny that law has certain intrinsic values, above all its normativity and formalism, but to suggest that in the final analysis even these are not ends in themselves. For a critique of legal instrumentalism, see Brian Z. Tamanaha, *Law as a Means to an End: Threat to The Rule of Law* (Cambridge: Cambridge University Press 2006).

this instrumentalist logic of the law. While they may possess certain intrinsic values, such as a measure of literary appeal, at the end of the day their purpose is to serve as argumentative tools in the 'fight for persuasion'.[83] Legal narratives are told for a reason and from a specific perspective. They are someone's selective account of the world, composed for a particular audience to convey a particular meaning.[84]

These five features of legal narratives not only set them apart from other forms of narration, but also determine their character and function. The formalism of the law and the requirements of good rhetoric impose competing demands on legal storytelling, generating constant tension at the heart of legal narratives. As a medium of *legal* argumentation, they must respect the applicable normative felicity conditions, lest they remain unconvincing as a matter of legal argument and fail to achieve their intended normative effects. However, the fact that legal narratives are instruments for the pursuit of *non-legal* objectives subjects them to policy considerations that may be difficult to reconcile with these normative felicity conditions. Political imperatives do not always breed compelling legal arguments, just as legal reasoning does not always make a thrilling story or the formulaic language of the law offer much by way of literary catharsis.[85] Legal formalism and the demands of rhetoric thus pull legal narratives in opposing directions.[86]

III. Law and Narrative Contestation

In essence, legal storytelling is an exercise in presenting legal arguments in narrative form to achieve certain effects in pursuit of particular interests. This argumentative and instrumental character makes legal narratives an ideal tool of discursive contestation.[87] In fact, contestation through legal narratives is a well-established feature of international relations, ranging from short renditions of an event to more elaborate master narratives that rely on an estab-

83 Bianchi (n. 15), 38.

84 Bellow and Minow (n. 1), 18 ('All tellings are unique, incomplete, and inaccurate'); Bal (n. 34), 132 ('Whenever events are presented, it is from within a certain vision'); Iain Scobbie, 'Rhetoric, Persuasion, and Interpretation in International Law' in: Andrea Bianchi, Daniel Peat and Matthew Windsor (eds), *Interpretation in International Law* (Oxford: Oxford University Press 2015), 61-77 (73) ('Argumentation is always selective and thus dependent on choice').

85 For some musings on the subject, see William Twining, 'Good Stories and True Stories' in: Peter J. van Koppen and Nikolas H. M. Roos (eds), *Rationality, Information and Progress in Law and Psychology* (Maastricht: Metajuridica 2000), 33-42.

86 On the tension between formalism and anti-formalism more generally, see Martti Koskenniemi, *The Politics of International Law* (Oxford: Hart 2011), 258-284.

87 James Phelan, 'Narratives in Contest; Or, Another Twist in the Narrative Turn', Publications of the Modern Language Association of America 123 (2008), 166-175.

lished set of characters and tropes.[88] International actors regularly deploy legal narratives to influence the attitudes, perceptions, and behaviours of domestic and international audiences in pursuit of their strategic goals, including in their efforts to shape and maintain international order.[89] The Salisbury poisoning incident offers a convenient example to illustrate these processes.

In March 2018, two Russian intelligence officers attempted to assassinate Sergey Skripal, a former Russian spy, in the town of Salisbury with a chemical warfare agent.[90] In its response to the incident, the United Kingdom drew heavily on legal language and categories. In a statement delivered to Parliament, British Prime Minister Theresa May attributed the assassination attempt to Russia and accused Moscow of using force against the United Kingdom in violation of the UN Charter.[91] She also suggested that Russia's action formed part of a broader pattern of rule-breaking, including the annexation of Crimea. Recounting the incident in the language of international law served several aims: it enabled the British Government to condemn and stigmatise Moscow's conduct,[92] garner support among its allies,[93] demand accountability, and justify a series of retaliatory measures.[94]

The narrative chosen by the United Kingdom displays all of the distinctive features associated with legal storytelling we identified earlier. It advanced a set of legal arguments within the interpretative constraints imposed by the

88 E.g. Western narratives often draw on the master story of a rules-based international order being eroded by revisionist actors and authoritarianism. For a critique, see Alexander N. Vylegzhanin, et al., 'The Term "Rules-based International Order" in International Legal Discourses', Moscow JIL 31 (2021), 35-60.

89 On strategic narratives, see Alister Miskimmon, Ben O'Loughlin and Laura Roselle, *Strategic Narratives: Communication Power and the New World Order* (Abingdom: Routledge 2013).

90 J. Allister Vale, Timothy C. Marrs and Robert L. Maynard, 'Novichok: A Murderous Nerve Agent Attack in the UK', Clinical Toxicology 56 (2018), 1093-1097. See also Mark Urban, *The Skripal Files: Putin, Poison and the New Spy War* (London: Macmillan 2019).

91 Theresa May, 'Statement on the Salisbury Incident', HC Deb. (12 March 2018), vol. 637, col. 620-621. See also the second statement made to Parliament: Theresa May, 'Statement on the Salisbury Incident', HC Deb. (14 March 2018), vol. 637, col. 855-857.

92 Eliav Lieblich, 'The Salisbury Incident and the Threshold for "Unlawful Use of Force" under International Law: Between Stigmatization and Escalation', Stockholm Centre for the Ethics of War and Peace, 20 April 2018 <http://stockholmcentre.org/the-salisbury-incident-and-the-threshold-for-unlawful-use-of-force-under-international-law-between-stigmatization-and-escalation/>.

93 References to international law feature prominently in the relevant statements. E. g. Statement by the North Atlantic Council on the Use of a Nerve Agent in Salisbury, 14 March 2018, Press Release (2018) 033.

94 May (n. 91).

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UN Charter. The Government's claim that the incident amounted to a use of force, though not beyond debate, was a perfectly tenable interpretation of the applicable rules.[95] In this respect, it should be noted that it did not describe the poisoning as an 'armed attack'.[96] Using the language of Article 51 of the Charter would have been far less compelling and would have signalled that the United Kingdom considered itself entitled to act in self-defence.[97] While the narrative was designed to create some legal effects, including opening the door to Russian State responsibility, it evidently was meant to avoid escalation. The Prime Minister's statements were also carefully calibrated to address questions of proof, thereby observing not just semantic and normative, but also pragmatic felicity conditions. The narrative pursued broader narrative objectives, as demonstrated by the fact that it was anchored in the language of a rules-based international order under threat from Russian aggression.[98] Indeed, the figure of a threat and the need to safeguard the United Kingdom's security adhered to the classic dramatic sequence of re-establishing a disturbed equilibrium,[99] making this an eminently 'tellable' story.[100] Finally, the various counter-narratives deployed by the Russian authorities and affiliated media organisations in response to the British claims illustrate the dynamic and interactive character of narrative contestation as a clash of competing discourses and framings, as well as the manner in which such messages are disseminated across and amplified by different communication platforms.[101]

95 Stephen Lewis, 'Salisbury, Novichok and International Law on the Use of Force', The RUSI Journal 163 (2018), 10-19 (13-19).

96 See ICJ, *Case Concerning Military and Paramilitary Activities in and against Nicaragua* (Nicaragua v. USA), Merits, Judgment of 27 June 1986, ICJ Reports 1986, 14, para. 195.

97 Lewis (n. 97), 15-18.

98 See Silvie Janičatová and Petra Mlejnková, 'The Ambiguity of Hybrid Warfare: A Qualitative Content Analysis of the United Kingdom's Political-Military Discourse on Russia's Hostile Activities', Contemporary Security Policy 42 (2021), 312-344.

99 Tzvetan Todorov, 'The Two Principles of Narrative', Diacritics 1 (1971), 37-44 (39).

100 William Labov, *Language in the Inner City: Studies in the Black English Vernacular* (Philadelphia: University of Pennsylvania Press 1972), 366 et seq. See also Bruner (n. 39), 11 ('to be worth telling, a tale must be about how an implicit canonical script has been breached, violated, or deviated from').

101 Vera Tolz, Stephen Hutchings and Precious N. Chatterje-Doody, 'Mediatization and Journalistic Agency: Russian Television Coverage of the Skripal Poisonings', Journalism 22 (2020), 2971-2990; Ilya Yablokov and Precious N. Chatterje-Doody, *Russia Today and Conspiracy Theories: People, Power and Politics on RT* (London: Routledge 2021), 69-84. For the official storyline, see Embassy of the Russian Federation to the United Kingdom, 'Salisbury: Two Years of Unanswered Questions', 4 March 2020 <https://rusemb.org.uk/news/9632>.

1. A Typology of Narrative Contestation

The Salisbury incident serves as an example of a State presenting a legal narrative in a manner that, at least on its surface, observed the applicable felicity conditions. The story developed by the United Kingdom appeared to be factually true, normatively correct and, to the extent that it invoked the international responsibility of Russia as an injured party, authoritative. However, the obvious difficulty that arises in this respect, the proverbial elephant in the room some might say, is that the line between what the law is and what States and other actors may wish it to be often cannot be drawn with confidence.[102]

This is so, first, because rules of law are open textured and indeterminate to varying degrees. In some cases, a legal narrative may deviate from the dominant understanding of legal reality so blatantly that the discrepancy is blindingly obvious to the trained eye, as our analysis of Russia's justification for its invasion of Ukraine below will illustrate. In other cases, the law or its dominant understanding may be unsettled, making it impossible to determine with certainty whether a legal narrative is normatively correct or not. In the Salisbury case, the correctness of the British Government's claim that Russia resorted to force in contravention of Article 2(4) of the UN Charter depends on whether or not low intensity acts of violence qualify as force within the meaning of that provision. As the question is not conclusively settled,[103] the best that can be said is that the United Kingdom's position is correct on its face. Moreover, since States are not just subjects, but also creators of international law, every time they invoke existing rules, they act towards the future, affirming the rule as it stands or potentially driving it in new directions. Whether we are faced with an act of confirmation or a desire to change the rule may be difficult to tell apart. The difference can be subtle and States do not always openly admit to harbouring revisionist intentions.[104] Novel inter-

102 By way of an illustration of the difficulties, see Carsten Stahn, 'Between Law-Breaking and Law-Making: Syria, Humanitarian Intervention and "What the Law Ought to Be"', Journal of Conflict & Security Law 19 (2013), 25-48.

103 For competing views, see Olivier Corten, *The Law Against War: The Prohibition on the Use of Force in Contemporary International Law* (2nd edn, Oxford: Hart 2021), 66-92; Tom Ruys, 'The Meaning of "Force" and the Boundaries of the Jus Ad Bellum: Are "Minimal" Uses of Force Excluded from UN Charter 2(4)?', AJIL 108 (2014), 159-210; Mary Ellen O'Connell, 'The Prohibition of the Use of Force' in: Nigel White and Christian Henderson (eds), *Research Handbook on International Conflict and Security Law: Jus ad Bellum, Jus in Bello and Jus post Bellum* (Cheltenham: Edward Elgar 2013), 89-119 (102-107).

104 E.g. Ryder McKeown, 'Norm Regress: US Revisionism and the Slow Death of the Torture Norm', Int'l Rel. 23 (2009), 5-25 (12-15). Revisionism is understood here in a broad sense as a desire to change the existing order, including the prevailing rules.

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pretations and applications of a rule are usually portrayed as mere clarifications or as nascent possibilities always inherent in its original design, as properly understood. Thus, expansionist readings of the right of self-defence typically rely on its 'inherent' character to reject the label of expansionism.[105]

Despite these difficulties, we may want to hold on to the idea that some legal arguments are revisionist in their intent or effects and that some are not, or at least less so. Transposing this to the world of legal narratives, it is possible to identify three forms of legal contestation through narratives: narrative contestation before the law, of the law, and through the law.[106]

The notion of *contestation before the law* describes situations in which the narrator and the legal narrative submit to the authority of the law. This may take place in a formal setting as part of the ordinary legal process, for example in domestic or international judicial proceedings. It may also occur in the context of legal interactions conducted outside, but in the shadow of, a formal legal process. Examples include letters before action or cease and desist notices sent by a private party to another. In both cases, the narrative form endows legal arguments with dramatic coherence and 'tellability', but works within the confines of the established rules and procedures to rely on their authority in order to achieve outcomes that are integral to the legal process.

Contestation of the law refers to situations where legal narratives are employed to contest the meaning, application, and validity of the law, including as a means to affect legal change.[107] In extreme cases, a narrative may be designed to justify non-compliance with existing rules, for instance to make the case that forcible humanitarian intervention is legitimate, albeit not necessarily lawful.[108] However, such situations are rare.[109] Far more frequent are cases where States deny that an alleged rule exists or situations where they

105 See Christian Henderson, 'The 25 February 2021 Military Strikes and the "Armed Attack" Requirement of Self-Defence: from "*Sina qua Non*" to the Point of Vanishing?', Journal on the Use of Force and International Law 9 (2022), 55-77 (57-59).

106 These forms are loosely inspired by three types of legal consciousness described in Patricia Ewick and Susan S. Silbey, *The Common Place of Law: Stories from Everyday Life* (Chicago: University of Chicago Press 1998), 47-49.

107 See Martha Finnemore and Kathryn Sikkink, 'International Norm Dynamics and Political Change', IO 52 (1998), 887-917 (897) ('new norms never enter a normative vacuum but instead emerge in a highly contested normative space where they must compete with other norms and perceptions of interest').

108 Anthea Roberts, 'Legality vs Legitimacy: Can Uses of Force be Illegal but Justified?' in: Philip Alston and Euan Macdonald (eds), *Human Rights, Intervention and the Use of Force* (Oxford: Oxford University Press 2008), 179-213.

109 Lassa Oppenheim, *International Law: A Treatise, Vol. I (Peace)* (1st edn, London: Longmans Green and Co. 1905), 14-15 ('The fact is that States, in breaking the Law of Nations, never deny its existence, but recognise its existence through the endeavour to interpret the Law of Nations in a way favourable to their act').

contest the authority of the law indirectly.[110] These range from denying the applicability or validity of individual norms to more subtle re-interpretations of the existing rules.[111] Also included in this category are instances of norm entrepreneurship, including situations where new legal obligations are created by expanding the scope of preexisting principles.[112] What unites these different forms of narrative contestation is that they do not work simply within the rules, but seek to affect the law itself.

Finally, *contestation through the law* refers to the use of legal narratives to achieve effects in other domains.[113] Here, the use of legal language and arguments is designed primarily to obtain goals beyond the law, although it may have some incidental legal implications. For example, international actors often appeal to high-level principles to portray themselves as good international citizens and to justify their policy choices as part of their overall strategic communication.[114] Similarly, they may accuse other actors of breaching their legal obligations in an attempt to depict them and their conduct as irresponsible or otherwise question their legitimacy.[115]

These three types of narrative contestation are, of course, merely ideal types. In practice, they are not sharply delineated, but overlap and comple-

110 For an example of the former, see United States Department of Defense, *Law of War Manual* (updated edn, December 2016), § 5.4.3.2 (denying that the presumption of civilian status is a customary rule).

111 E.g. Catherine Jones, *China's Challenge to Liberal Norms: The Durability of International Order* (Basingstoke: Palgrave Macmillan 2018).

112 The evolution of weapons law offers several examples. See Margarita H. Petrova, 'Weapons Prohibitions through Immanent Critique: NGOs as Emancipatory and (de)Securitising Actors in Security Governance', Rev. Int'l Stud. 44 (2018), 619-653; Ingvild Bode and Hendrik Huelss, 'Autonomous Weapons Systems and Changing Norms in International Relations', Rev. Int'l Stud. 44 (2018), 393-413; Elvira Rosert and Frank Sauer, 'How (Not) to Stop the Killer Robots: A Comparative Analysis of Humanitarian Disarmament Campaign Strategies', Contemporary Security Policy 42 (2021), 4-29.

113 Obtaining effects outside the legal domain directly is what distinguishes *contestation through the law* from *contestation before the law*. While the latter may also seek to obtain extra-legal effects, it does so indirectly, mediated through the legal process. The notion of 'lawfare' falls into this category, though understood in a strict sense, the concept is confined to the field of armed conflict. See Charles J. Dunlap, Jr, 'Lawfare Today: A Perspective', Yale Journal of International Affairs 3 (2008), 146-154. For a looser approach, see Orde F. Kittrie, *Lawfare: Law as a Weapon of War* (Oxford: Oxford University Press 2016).

114 E.g. Lindsay Black and Yih-Jye Hwang, 'China and Japan's Quest for Great Power Status: Norm Entrepreneurship in Anti-Piracy Responses', Int'l Rel. 26 (2012), 431-451. Strategic communication involves an actor communicating purposefully to advance their mission. See Kirk Hallahan, Derina R. Holzhausen, Betteke van Ruler and Dejan Verčič, 'Defining Strategic Communication', International Journal of Strategic Communication 1 (2007), 3-35 (2).

115 E.g. Statement by the Russian Foreign Ministry on Actions of American Internet Monopolies, 27 January 2021 <https://mid.ru/en/press_service/spokesman/official_statement/1414656/>.

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ment one another. Contestation before the law is likely to involve at least some contestation of the rules themselves, just as formal legal arguments will typically entail at least a degree of contestation through the law. Although hard and fast distinctions cannot be drawn, these ideal types nevertheless do reflect three essentially distinct modes of norm contestation through legal storytelling. They also bring into view a certain legal topology, in as much as formal and informal venues of narrative contestation come with different audiences, expectations, and conventions. Narratives rich in technical legal arguments are best reserved for appearances in court and other venues that impose heavily formalised felicity conditions on storytelling, while broad generalisations and labelling may work well in public debate and other settings that do not. Some venues may combine traditions of formalism with informality, such as the Security Council, where legal claims are usually intertwined with non-legal arguments, producing highly politicised, selective and at times contradictory legal narratives.[116] The lesson, therefore, is that narrative typology and topology affect the balance between legal formalism and rhetoric and also the relative importance of different felicity conditions. These points are further illustrated by the arguments that Russia has advanced to justify its invasion of Ukraine.

2. Narrative Contestation in Practice: Russia's Invasion of Ukraine

On 24 February 2022, the Russian Federation launched a full-scale invasion of Ukraine. In what Moscow described as a 'special military operation', Russian forces penetrated deep into Ukrainian territory, inflicting significant casualties and extensive material damage. However, beset by strategic, operational, and tactical failures,[117] Russian forces have been unable to achieve a quick victory. After more than a year of fighting, the prospects of a drawn-out conflict are looming large. Given its large scale and destructive consequences, it is beyond any doubt that the Russian offensive amounts to a use of force rising to the level of an armed attack within the meaning of the UN Charter.[118] As such, it is *prima facie* unlawful and in need of justification.

116 Scott P. Sheeran, 'Argumentation in the UN Security Council: International Law as Process' in: Ian Johnstone and Steven Ratner (eds), *Talking International Law: Legal Argumentation Outside the Courtroom* (Oxford: Oxford University Press 2021), 62-96.

117 Robert Dalsjö, Michael Jonsson and Johan Norberg, 'A Brutal Examination: Russian Military Capability in Light of the Ukraine War', Survival 64 (2022), 7-28.

118 For an overall assessment, see James A. Green, Christian Henderson and Tom Ruys, 'Russia's Attack on Ukraine and the *Jus ad Bellum*', Journal on the Use Force and International Law 9 (2022), 1-27. This may be contrasted with Russia's seizure of Crimea in 2014. The

In a televised speech addressed to his compatriots, Russian President Vladimir Putin described Russia's actions as purely defensive, taken in response to what he called a fundamental threat posed by the United States and its allies to the very existence of the Russian Federation.[119] In developing these points, President Putin advanced what appear to be four main legal arguments. As his speech was subsequently circulated to the UN Security Council with reference to Article 51 of the UN Charter,[120] these arguments must be read as Russia's official justification for the use of force.[121]

First, President Putin accused Western nations of repeatedly violating international law since the end of the Cold War, above all by intervening in Kosovo, Iraq, Libya, and Syria. Second, he denounced the North Atlantic Treaty Organization for aggressively expanding eastward into territories adjacent to Russia. Describing this expansion as an existential threat, he drew a parallel to Russia's invasion by Nazi Germany in 1941, vowing that Russia would not for the second time make the mistake of failing to repel an 'inevitable attack'. Further, he claimed that the 'nationalist fringe and neo-Nazis in Ukraine' will bring war to Crimea and that confrontation between them and Russia is inevitable. Russia was therefore compelled to act in self-defence in accordance with Article 51 of the Charter. Third, he stated that Russia's military action came at the request of the authorities of the Donetsk People's Republic and Lugansk People's Republic pursuant to the friendship and mutual assistance agreements that Russia concluded with these two entities.[122]

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absence of open violence in that case has led some to argue that Russia's actions violated only the principle of non-intervention, but *not* Article 2(4) of the Charter: see Russell Buchan and Nicholas Tsagourias, 'The Crisis in Crimea and the Principle of Non-Intervention', International Community Law Review 19 (2017), 165-193 (179).

119 Address by the President of the Russian Federation, 24 February 2022 <http://en.kremlin.ru/events/president/news/67843>.

120 Letter dated 24 February 2022 from the Permanent Representative of the Russian Federation to the UN addressed to the Secretary-General, 24 February 2022, S/2022/154. See also ICJ, 'Document (with annexes) from the Russian Federation setting out its Position regarding the Alleged "Lack of Jurisdiction" of the Court', 7 March 2022 <https://www.icj-cij.org/public/files/case-related/182/182-20220307-OTH-01-00-EN.pdf>.

121 The fact that the text of President Putin's speech, addressed to the citizens of Russia, also doubled up as Russia's formal notification under Article 51 of the Charter is noteworthy. Although the legal argument may have been tailored primarily for domestic consumption, it simply does not follow that 'there is little sense in evaluating its success via persuasiveness to Western lawyers and diplomats', as suggested by Anastasiya Kotova and Ntina Tzouvala, 'In Defense of Comparisons: Russia and the Transmutations of Imperialism in International Law', AJIL 116 (2022), 710-719, 717. Nothing stopped Moscow from submitting a dedicated letter to the Security Council that may have been more intelligible to that audience, rather than simply recycle President Putin's speech.

122 Letter dated 3 March 2022 from the Permanent Representative of the Russian Federation to the UN addressed to the Secretary-General, 7 March 2022, A/76/740-S/2022/179.

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Finally, President Putin declared that the operation was aimed at protecting the inhabitants of eastern Ukraine from being subjected to 'abuse and genocide' by the Ukrainian Government.

Some of the legal arguments put forward by President Putin, in particular the claim of self-defence, are cast in familiar legal language and at first sight read like *contestation before the law*. Other arguments, such as the reference to genocide, are more difficult to decipher. Nevertheless, what unites them is that they are utterly unconvincing as a matter of legal argument.

Whatever violations of international law the United States and its allies may have committed since the disintegration of the Soviet Union, they do not justify Russia's military action against Ukraine, least of all an invasion on such a scale.[123] First, the position of the Russian Government is self-contradictory: it cannot condemn Western interventions as breaches of the prohibition to use force and in the same breath claim that military operations in similar circumstances are lawful if carried out by Russia. If Western interventions were unlawful, a *tu quoque* argument does not render interventions of a similar kind lawful for Russia. Second, even if Western practice has succeeded in broadening the exceptions to the prohibition against the use of force,[124] Russia's legal arguments and conduct exceed the scope of these exceptions. The right to use force in self-defence is available if an 'armed attack' has occurred.[125] Ukraine has not launched an armed attack against Russia, nor did President Putin argue otherwise. Rather, he declared that the Russian operation was designed to remove a 'threat' emanating from the territory of Ukraine. Russia thus appears to rely on the right of anticipatory self-defence.[126] Whether or not such a right exists

123 Though it is not clear whether President Putin is implicitly relying on the doctrine of countermeasures, this would not assist Russia, as forcible countermeasures and armed reprisals are prohibited. See ICJ, *Corfu Channel Case* (Albania v. UK), Merits, Judgment of 9 April 1949, ICJ Reports 1949, 4 (35) and Friendly Relations Declaration (n. 10). Even if 'reasonable' armed reprisals were permissible, Russia's military action would not qualify as such, given its excessive scale. See Derek Bowett, 'Reprisals Involving Recourse to Armed Force', AJIL 66 (1972), 1-36 (26-28).

124 See *Nicaragua* (n. 96), para. 207 ('Reliance by a State on a novel right or an unprecedented exception to the principle might, if shared in principle by other States, tend towards a modification of customary international law').

125 Generally, see Tom Ruys, '*Armed Attack' and Article 51 of the UN Charter: Customary Law and Practice* (Cambridge: Cambridge University Press 2010).

126 This is the position taken by the Russian Constitutional Court in its decisions on the constitutionality of the agreements Russia concluded with the Donetsk, Kherson, Luhansk and Zaporizhzhia regions for their incorporation into the Russian Federation: e. g. Постановление Конституционного Суда Российской Федерации от 2.10.2022 # 36-П по делу о проверке конституционности не вступившего в силу международного Договора между Российской

is subject to debate.[127] However, even its supporters accept that the right of anticipatory self-defence is limited to situations where the threat of an armed attack is real and its launch imminent.[128] Neither of these requirements is met here: there is no evidence that Ukraine was planning to attack Russia or that the only way to avert such an attack was for Russia to use force pre-emptively. The fact that Ukraine has received military assistance from third countries, one of President Putin's grievances,[129] does not meet this threshold.[130] Since the right of self-defence does not entitle a State to use force to protect its perceived security interests beyond the parameters laid down in customary international law and the UN Charter,[131] the argument fails.

The claim of collective self-defence does not fare any better. Self-defence is available only to States. The Donetsk and Lugansk People's Republics are constituent parts of Ukraine, not independent States. While Russia has recognised them as sovereign States just days ahead of its invasion,[132] it did so in disregard of the established criteria of Statehood[133] and in contravention of the commitments it gave to uphold Ukraine's territorial integrity and existing borders.[134] Accordingly, Russia's recognition contravenes its international

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Федерацией и Донецкой Народной Республикой о принятии в Российскую Федерацию Донецкой Народной Республики и образовании в составе Российской Федерации нового субъекта, 2 October 2010, 7, <http://publication.pravo.gov.ru/Document/View/00012022 10020002>. See Sergii Masol, 'Orwellian Rulings of the Russian Constitutional Court on the Donetsk, Kherson, Luhansk and Zaporizhzhia Provinces of Ukraine', EJIL:Talk, 25 October 2022 <https://www.ejiltalk.org/orwellian-rulings-of-the-russian-constitutional-court-on-the-donetsk-kherson-luhansk-and-zaporizhzhia-provinces-of-ukraine/>.

127 Sean D. Murphy, 'The Doctrine of Preemptive Self-Defense', Vill. L. Rev. 50 (2005), 699-748 (706-719).

128 Noam Lubell, 'The Problem of Imminence in an Uncertain World' in: Marc Weller (ed.) *The Oxford Handbook of the Use of Force in International Law* (Oxford: Oxford University Press 2015), 697-719 (701).

129 For an elaboration of this point, see Address by the President of the Russian Federation, 21 February 2022 <http://en.kremlin.ru/events/president/news/67828>.

130 See Independent International Fact-Finding Mission on the Conflict in Georgia, *Report: Volume II* (September 2009), 255-256.

131 ICJ, *Armed Activities on the Territory of the Congo* (Democratic Republic of the Congo v. Uganda), Judgment of 19 December 2005, ICJ Reports 2005, 168, para. 148.

132 Decree of the President of the Russian Federation of 21 February 2022 No. 71 'On the Recognition of the Donetsk People's Republic' and No. 72 'On the Recognition of the Luhansk People's Republic'.

133 The two entities lack independence, as they are substantially dependent on Russia's support.

134 Memorandum on Security Assurances in Connection with Ukraine's accession to the Treaty on the Non-Proliferation of Nuclear Weapons (Budapest Memorandum), 5 December 1994, 3007 UNTS 167; Article 2, Treaty on Friendship, Cooperation and Partnership between Ukraine and the Russian Federation, 31 May 1997, 3007 UNTS 117.

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obligations and any invitations extended by these two non-State entities cannot serve as a basis for collective self-defence.[135]

Finally, the genocide claim runs into two obstacles: the facts and the law. There is no evidence whatsoever that Ukraine has perpetrated acts of genocide against anyone, including the residents of Donbass.[136] Indeed, this unsubstantiated claim has prompted Ukraine to initiate proceedings against Russia before the International Court of Justice.[137] However, even if a genocide had been unfolding in the territory of Ukraine, using military force to put an end to it could be justified only with reference to some variant of the doctrine of humanitarian intervention. This doctrine finds no support in international law and has been opposed by Russia itself.[138] In any event, neither the stated objectives nor the scale of Russia's military invasion are confined to bringing humanitarian relief and are therefore incompatible with the preconditions attached to humanitarian intervention by proponents of the doctrine.

The legal arguments advanced by Russia to justify its invasion of Ukraine are a curious mix of non-starters, category mistakes and what are at best untenable interpretations of the law. They are not seriously arguable. As such, they have been widely discredited by experts[139] and by States,[140] including at an emergency session of the UN General Assembly.[141] The legal narrative offered by Russia to justify its invasion of Ukraine is therefore fundamentally defective: understood as *contestation before the law*, it is false and incorrect, lacking both factual and normative coherence. An alternative reading might construe these arguments not as an attempt to justify the

135 Even if it did, the conditions for lawful self-defence, including the existence of a prior armed attack, would still have to be met.

136 Nothing in the status reports prepared by the Special Monitoring Mission to Ukraine of the Organization for Security and Cooperation in Europe, for instance, even remotely points to acts of genocide. For the entire duration of 2021, the Mission corroborated 91 civilian casualties. See Status Report as of 24 January 2022, 1 February 2022.

137 ICJ, *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide* (Ukraine v. Russian Federation), Application Instituting Proceedings, 27 February 2022.

138 For a detailed analysis, see Corten (n. 105), 495-549.

139 E.g. Sofia Cavandoli and Gary Wilson, 'Distorting Fundamental Norms of International Law to Resurrect the Soviet Union: The International Law Context of Russia's Invasion of Ukraine', NILR 69 (2022), 383-410; Terry D. Gill, 'The Jus ad Bellum and Russia's "Special Military Operation" in Ukraine', JIPK 25 (2022), 121-127; Claudio Grossman, 'The Invasion of Ukraine: A Gross Violation of International Law', The Human Rights Brief 25 (2022), 74-81; Ralph Janik, 'Putin's War against Ukraine: Mocking International Law', EJIL:Talk, 28 February 2022 <https://www.ejiltalk.org/putins-war-against-ukraine-mocking-international-law/>.

140 Kristen E. Eichensehr, 'Russian Invasion of Ukraine Draws Widespread – but Not Universal – Condemnation', AJIL 116 (2022), 605-614.

141 Resolution ES-11/1, 2 March 2022.

invasion with reference to the law as it stands, but as an effort to develop the law in a direction that would permit Russia's actions, in other words, as *contestation of the law*. The original format of the narrative, a television broadcast addressed to Russian citizens, seems like an odd backdrop for such efforts. Nor does the language carry sufficient detail and precision to enable other States to determine with any certainty what, on Russia's account, the rules should be. A genuine attempt to engage in the development of the law would require a more tangible expression of *opinio juris*. The incoherent condemnation of alleged Western transgressions does not support a revisionist reading of the Russian position either. In sum, the Russian narrative does not fare much better when interpreted as *contestation of the law*,[142] as it does not meet elementary expectations that arise in relation to arguments *de lege ferenda*.[143]

IV. Lawyering for Information Advantage

Even a cursory analysis of the legal narrative told by President Putin suggests that much goes on below the surface. Unsurprisingly, States and other international actors tell their legal stories and present their claims in the strongest possible form, glossing over weaknesses, gaps, and contradictions in their arguments. Legal narratives are often less coherent than they may appear at first sight. What on its face may seem like *contestation before the law*, in other words a narrative that submits to the authority of the law to achieve outcomes integral to the legal process, on closer inspection may turn out to involve a heavy dose of *contestation of the law* or *contestation through the law*. A seemingly straightforward appeal to the rules may, in reality, involve their deliberate misapplication and misrepresentation.

Perhaps the most intriguing aspect of the Russian legal narrative concerning Ukraine is not the glaring discrepancy between Moscow's attempt to expand its sphere of influence through force on one side and the core principles of the international legal order on the other,[144] but that President

142 In any event, the overwhelming majority of States has re-affirmed the prohibition of using force against the territorial integrity of another State. See Tom Ginsburg, 'Article 2(4) and Authoritarian International Law', AJIL Unbound 116 (2022), 130-134.

143 To the extent that arguments *de lege ferenda* express policy aspirations, the true/false and correct/incorrect binaries are not applicable. However, the authoritative/unauthoritative binary does apply, as do felicity conditions related to the creation and modification of rules of international law, such as the need to express *opinio juris* in the context of customary international law.

144 See Trine Flockhart and Elena A. Korosteleva, 'War in Ukraine: Putin and the Multi-Order World', Contemporary Security Policy 43 (2022), 1-16.

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Putin went to considerable lengths in his television address to portray the invasion as compatible with those principles *despite* this obvious discrepancy.[145] We are thus left with two questions: what makes venues that are less formal more attractive than formal ones for telling such fundamentally defective legal narratives and why do international actors relay legal stories at all that are deeply flawed as a matter of law?

1. Legal Expertise and Fake Law

Legal experts form epistemic communities equipped with the knowledge and understanding to peer below the surface and assess the persuasive strength of legal narratives *qua* legal arguments, testing their validity against the applicable standards of interpretation and relevant professional conventions.[146] Collectively, they are able to determine with a relative degree of certainty which legal stories, claims, and positions are compelling, which at least tenable and which beyond the pale of reasonable argument, as compared against the dominant understanding of legal reality that prevails in their community.[147] In formal legal venues, decision-makers such as judges are empowered to exercise this epistemic scrutiny with potentially binding effect. Unlike mere experts, they may enforce the relevant rules of interpretation and authoritatively determine the validity of legal arguments. The prospect of epistemic scrutiny and authoritative validation compels those engaged in legal storytelling to observe the applicable normative felicity conditions: in front of experts and competent authorities, any odd legal argument will not fly.

This system of checks and balances is largely absent in informal settings. This is not to say that felicity conditions are completely irrelevant. Evidently, legal narratives must observe syntactic and semiotic requirements. To be recognisable as *legal* narratives, they must also take some notice of normative felicity conditions, including paying at least lip-service to basic patterns of

145 The fact that governments clothe their policies in such legal fig-leaves on a regular basis – see Oppenheim (n. 109) – does not make this any less intriguing.

146 Anne Peters, 'The Rise and Decline of the International Rule of Law and the Job of Scholars' in: Heike Krieger, Georg Nolte and Andreas Zimmermann (eds), *The International Rule of Law: Rise or Decline?* (Oxford: Oxford University Press 2019), 56-65 (65). See also Dennis M. Patterson, *Law and Truth* (New York: Oxford University Press 1996), 169-179.

147 E.g. Orna Ben-Naftali and Rafi Reznik, 'The Astro-*Nomos*: On International Legal Paradigms and the Legal Status of the West Bank', Washington University Global Studies Law Review 14 (2015), 399-434.

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legal interpretation and reasoning.[148] They may go further and strive for higher levels of factual and normative coherence, as this might render them more persuasive. However, lay audiences in informal venues will typically lack the expertise to exercise effective epistemic scrutiny or even just to gage the coherence of a narrative. This loosens the normative constraints and allows rhetorical and instrumentalist considerations to drive the storytelling. Accordingly, the less a legal narrative aims to persuade a community of experts, but is directed primarily or exclusively at a lay audience instead, the more it can afford to disregard normative felicity conditions and aim to be merely plausible, rather than normatively valid and compelling.

The Russian legal narrative underlines the point. Considering its past arguments and the limited number of justifications available to excuse the use of force,[149] it would appear that Moscow had little choice but to rely on self-defence and a set of complementary arguments to justify its invasion. These arguments may not be very good, but then they may have been the least bad option among a choice of worse alternatives. Presumably, Russian legal advisors were aware of their limitations.[150] In this respect, it is worth recalling a passage in the legal advice given by Lord Goldsmith, the Attorney General for England and Wales and for Northern Ireland, to the British Government concerning the invasion of Iraq in 2003, where he warned that just because a legal position is 'reasonably arguable', this does not mean that a court would necessarily agree with it.[151] Evidently, this is so because reasonable, but otherwise dubious legal arguments are likely to be debunked during judicial proceedings in ways that they may not be in other settings. Whereas a 'reasonably arguable' claim may not convince an audience of experts, a narrative that is 'just about plausible' or 'not totally ridiculous' may be all that is needed to impress a lay audience,[152] especially one that accepts official statements at face value and has neither the appetite to indulge in complex legal argumentation, nor the expertise to critically evaluate competing legal claims.

148 See Ingo Venzke, *How Interpretation Makes International Law: On Semantic Change and Normative Twists* (Oxford: Oxford University Press 2014), 48.

149 See Thomas D. Grant, 'Annexation of Crimea', AJIL 109 (2015), 68-95.

150 Whether they sought to reduce the gap between policy and legality, or were concerned merely with finding the best justification for decisions already taken, is a separate matter. See Fernando G. Nuñez-Mietz, 'Lawyering Compliance with International Law: Legal Advisers in the "War on Terror"', European Journal of International Security 1 (2016), 215-238 (223-224).

151 'Attorney General's Advice On the Iraq War Iraq: Resolution 1441', ICLQ 54 (2005), 767-778 (776).

152 See Christian Marxsen, 'The Crimea Crisis: An International Law Perspective', HJIL 74 (2014), 367-391 (389).

In an era of fake news, we thus arrive at fake law: the 'misreporting of basic facts, distorting context, establishing false premises and ignoring first principles' about the law in ways that exploits the knowledge gap of the targeted audience.[153] President Putin's televised address is not an isolated example. Responding to a question about how Russia's annexation of Crimea could be reconciled with its obligations under the Budapest Memorandum of 1994,[154] Russian Foreign Minister Sergey Lavrov remarked as follows at a press conference held in 2017:

> 'I remind you once again that the Budapest Memorandum contains just one legal obligation binding Russia, the United States and Great Britain, namely, that nuclear weapons would not be used against Ukraine, which had given up its nuclear weapons. This was the only legal obligation cemented in the Budapest Memorandum in 1994. At the same time, of course, this document also contained political obligations declaring that we all desire and would respect Ukraine's sovereignty, territorial integrity and independence. This accords completely with our position.'[155]

This statement fundamentally distorts the legal position. The distinction that Foreign Minister Lavrov draws between legal obligations and political commitments is difficult to sustain when reading the Budapest Memorandum. In fact, it is disingenuous: the Memorandum describes the assurance not to use nuclear weapons as a 'commitment', but the duty to refrain from using force against the territorial integrity or political independence of Ukraine as an 'obligation'. If anything, respecting Ukraine's sovereignty and territorial integrity is a legal obligation rather than a mere political commitment under the Budapest Memorandum. In any event and regardless of its status under the Memorandum, the duty to respect Ukraine's territorial integrity and political independence derives further binding force from the UN Charter, customary principles of international law, and other legal assurances that Russia has given to Ukraine on a bilateral level.[156] Foreign Minister Lavrov's remarks are not reasonably arguable: they are an example of fake law.

153 The Secret Barrister, *Fake Law: The Truth about Justice in an Age of Lies* (London: Picador 2020), 283.

154 Budapest Memorandum (n. 134).

155 Russian Foreign Ministry, 'Foreign Minister Sergey Lavrov's Remarks and Answers to Media Questions at a News conference on the Results of Russian Diplomacy in 2016, Moscow January 17, 2017', 17 January 2017 <https://mid.ru/en/foreign_policy/news/1540711/>.

156 Article 2, Treaty on Friendship (n. 134).

2. Legal Narratives as Information Operations

Path dependency may explain why some international actors end up with sub-optimal legal positions.[157] When life gives you lemons, your options are limited. But this leaves open the question as to why they deploy legal narratives that they know, or should know, to be defective as a matter of legal argument? The answer that emerges from the preceding section is that defective legal narratives may still generate desirable effects in informal settings, mostly because their normative deficiencies may not be visible to lay audiences and they run less of a risk of being authoritatively discredited. In other words, legally defective narratives may be worth telling because they exert some illocutionary force, notwithstanding their normative shortcomings. For example, President Putin's claim that the United States and its allies have defied the ground rules of the international order created after the Second World War conveys two core messages. It vilifies Western nations as irresponsible and deceitful, whilst casting Russia into the role of the defender of universal principles and its own legitimate interests.[158] It also feeds the notion that Russia is facing a threat and must act pre-emptively against an inevitable attack. While neither of these messages succeeds in justifying the use of force in self-defence pursuant to Article 51 of the UN Charter as a matter of legal argument, they nevertheless tell a coherent story that makes the claim of self-defence at least superficially plausible. They may fail as *contestation before the law*, but still work reasonably well as *contestation through the law*, utilising legal language and concepts to achieve effects in domains other than the law.

Military doctrine on information operations offers some useful insights for studying this dimension of legal narratives. The importance of information activities in the conduct of military operations has grown steadily over the last two decades.[159] In 2018, the United States included information among the seven functions common to all levels of warfare.[160] The 'information function' of warfare is said to encompass 'the management and application of

157 E.g. Tom De Groot and Salvador Santino Fulo Regilme Jr., 'Drone Warfare and the Obama Administration's Path-Dependent Struggles on Human Rights and Counterterrorism', Interdisciplinary Political Studies 6 (2020), 167-201.

158 This ties in with the Russian master-narrative that the universally recognised tenets of international law are under threat from Western hegemony and double standards. See Lavrov (n. 18).

159 E.g. Thomas Rid and Marc Hecker, *War 2.0: Irregular Warfare in the Information Age* (Westport, Conn.: Praeger 2009), 53-124; Arturo Munoz, *U.S. Military Information Operations in Afghanistan: Effectiveness of Psychological Operations 2001-2010* (Santa Monica, CA: RAND 2012).

160 United States Department of Defense, *Joint Operations*, Joint Publication (JP) 3-0 (Washington DC, 2018), III-1.

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information and its deliberate integration with other joint functions to change or maintain perceptions, attitudes, and other elements that drive desired behaviors and to support human and automated decision making'.[161] This definition reflects the now prevalent approach in military doctrine.[162] In the past, information operations were conceived in narrow terms as activities designed to affect an adversary's information and informational capabilities whilst defending one's own.[163] By focusing on adversaries and capabilities, this approach overlooked other relevant audiences and the fact that exerting influence is a pre-eminent function of information activities.[164] Taking these points on board, United States doctrine now describes information operations as the employment of information-related capabilities to 'influence, disrupt, corrupt, or usurp the decision-making of adversaries and potential adversaries while protecting our own'.[165] In a similar fashion, the North Atlantic Treaty Organization defines information operations as a function 'to create desired effects on the will, understanding and capability of adversaries, potential adversaries and [other North Atlantic Council] approved audiences'.[166] Understood in this way, the purpose of information operations is to secure a relative advantage through information and information systems,[167] predominantly by way of cognitive outcomes.[168]

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161 United States Department of Defense, *Joint Operations*, Joint Publication (JP) 3-0 (Washington DC, 2018), III-17.

162 See Milton Mueller and Karl Grindal, 'Information as Power: Evolving US Military Information Operations and Their Implications for Global Internet Governance', Cyber Defense Review 7 (2022), 79-98.

163 United States Department of Defense, *Joint Doctrine for Information Operations*, Joint Publication (JP) 3-13 (Washington, DC, 1998), I-1. See also Martin C. Libicki, *What is Information Warfare?* (Washington, DC: National Defense University 1995), x.

164 Along these lines, see Isaac R. Porche III et al., *Redefining Information Warfare Boundaries for an Army in a Wireless World* (Santa Monica, CA: RAND 2013).

165 United States Department of Defense, *Information Operations*, Joint Publication (JP) 3-13 (Washington, DC, 2014), II-1.

166 North Atlantic Treaty Organization, *Allied Joint Doctrine for Information Operations*, AJP 3.10 (Brussels, 2015), 1-5.

167 United Kingdom Ministry of Defence, *Information Advantage*, Joint Concept Note 2/18 (London, 2018). See also Christopher Paul, 'Understanding and Pursuing Information Advantage', Cyber Defense Review 5 (2020), 109-124. For an understanding of information advantage as an aspect of soft power, see Joseph S. Nye Jr. and William A. Owens, 'America's Information Edge', Foreign Aff. 75 (1996), 20-36.

168 Robert Johnson, 'Information War: Theory to Practice' in: Timothy Clack and Robert Johnson (eds), *The World Information War: Western Resilience, Campaigning and Cognitive Effects* (London: Routledge 2021), 214-230 (226). See also Robert J. Ross, 'Information Advantage Activities: A Concept for the Application of Capabilities and Operational Art During Multi-Domain Operations', Cyber Defense Review 6 (2021), 63-74 (63) (defining information advantage as holding an initiative in terms of relevant actor behaviour, situational understanding and decision-making through the conduct of information operations).

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Legal narratives may generate information advantage by influencing the attitudes, perceptions and behaviour of target audiences with the help of legal arguments in order to produce outcomes favourable to the narrator. This holds true for all legal narratives. However, narratives that are defective as a matter of legal argument may achieve this effect by exploiting the knowledge gap of the target audience to induce deference to the law in circumstances where this would not be warranted. Their added value lies in their false appeal to legal authority. Earlier, we saw how Russia deploys legal narratives to justify its actions with reference to incorrect, or at best dubious, legal arguments and thereby seeks to legitimise its conduct. In this connection, it is important to realise that defective legal narratives may be driven principally by the logic of information advantage rather than by the logic of legal reasoning. They may pursue outcomes that are significantly less ambitious than winning a legal debate. Rather than prevail over competing legal arguments, they may simply seek to maintain the plausibility of their own position or undermine that of their opponents.[169] A wide variety of rhetorical strategies, devices and genres may serve such more limited goals, ranging from discreditation, subversion, and distraction to reframing, deflection, and satire.[170] Many of these rhetorical moves may not be compatible with legal argumentation in good faith.[171] Freed from the constraints of epistemic scrutiny and authoritative validity determinations they encounter in formal venues, legal narratives deployed in informal environments thus lend themselves to be utilised as instruments of misinformation and, as we have seen, fake law.

V. Conclusion

This paper has set itself the goal of exploring the murky side of popular legal discourse by taking a closer look at the use of legal narratives for international norm contestation. What have we found along the way?

169 Defective legal narratives thus serve instrumental purposes, rather than the cause of legal revisionism. See Roy Allison, 'Russian Revisionism, Legal Discourse and the "Rules-Based" International Order', Eur.-Asia Stud. 72 (2020), 976-995.

170 For a helpful taxonomy of rhetorical devices, see Alan Kelly and Christopher Paul, *Decoding Crimea: Pinpointing the Influence Strategies of Modern Information Warfare* (Riga: NATO Strategic Communications Centre of Excellence 2020). On distraction and satire, see Mona Elswah and Philip N. Howard, '"Anything that Causes Chaos": The Organizational Behavior of Russia Today (RT)', Journal of Communication 70 (2020), 623-645 and Dmitry Chernobrov, 'Strategic Humour: Public Diplomacy and Comic Framing of Foreign Policy Issues', British Journal of Politics & International Relations 24 (2022), 277-296.

171 On the destructive potential of legal narratives, see Richard Delgado, 'Storytelling for Oppositionists and Others: A Plea for Narrative', Mich. L. Rev. 87 (1989), 2411-2441.

Legal narratives, understood as the representation of events from a legal perspective, are a pervasive feature of international relations. As I have shown, legal narratives display several distinct features that set them apart from other types of storytelling. They are marked by normative constraints imposed by the formal nature of legal reasoning and interpretation. At the same time, they also obey the logic of rhetoric and the policy choices they are meant to serve. The formalism of the law and the demands of rhetoric and instrumentalism pull legal narratives in different directions. This tension is a persistent feature of legal narratives and, we might add, of legal argumentation more generally. However, outside formal legal processes and venues, this tension becomes more acute. In such settings, fidelity to normative felicity conditions competes with the art of influence without the moderating impact that legal procedures and authorities exert. In the absence of epistemic scrutiny by legal experts and the prospect of an authoritative determination of their validity, legal narratives may stray far from the formalism of the law in pursuit of competing goals, above all in pursuit of information advantage. Where these forces gain the upper hand, legal narratives may invoke the language and authority of the law not just unpersuasively, but falsely. What appears like *contestation before the law* may, in truth, be *contestation of* or *through the law*.

The paper has relied on a range of concepts and insights to develop this argument, drawn from fields including semiotics, military doctrine, and political theory. In doing so, it has pursued three objectives. The first was to craft a conceptual framework that helps to explain and assess the contribution that legal narratives make to norm contestation at the international level. This produced a taxonomy of distinct features of legal narratives and a tripartite typology. The second was to shift the spotlight from legal storytelling in formal venues to narrative norm contestation in more informal settings. The latter remains understudied, but merits attention due to its prevalence and the policy challenges it presents. The third was to pave the way for studying the strategic implications of narrative norm contestation, with a particular eye to their use as instruments of geopolitical competition. Russia's legal narrative concerning Ukraine was chosen as a recent and particularly striking case to study, but other examples, including Western legal narratives, are not in short supply.[172]

The findings of the paper are analytical rather than prescriptive: they are meant to improve our understanding of the subject by developing a vocabu-

172 E.g. Agata Kleczkowska, 'The Illegality of Humanitarian Intervention: The Case of the UK's Legal Position Concerning the 2018 Strikes in Syria', Utrecht Journal of International and European Law 35 (2020), 35-49.

lary and framework of analysis. However, better understanding and awareness is merely a starting point for addressing a set of broader questions raised by norm contestation through legal narratives. Let me end by flagging up some of the most pressing.

Much of what we have discussed is driven by the dynamic between law and politics. As in other areas, sharp dividing lines cannot be drawn: all legal narratives are both legal and political in character. They serve to restrain and to enable the exercise of power through an appeal to norms. However, we have seen how in informal settings, rhetorical considerations may come to the fore and normative restraints may recede into the background. At what point, then, do legal narratives cease being *legal* narratives and become, say, misinformation pure and simple? Are untenable legal arguments still *legal* arguments? Since State practice may create new rules of international law or modify existing ones, these questions are of more than doctrinal interest. Which manifestations of legal narratives, for example on social media, are material sources of State practice? Must ridiculous legal arguments be taken seriously when narrated by a State? Is misinformation *opinio juris*? These questions raise the even more vexed problem of determining what are ridiculous and hence not tenable legal arguments in the first place. Extreme cases, such as the legal justification Russia has offered for its invasion of Ukraine, are relatively easy to identify as such. However, since the validity and tenability of legal arguments is determined primarily by their degree of persuasiveness, in the vast majority of cases matters of validity and tenability will elude consensus.

Norm contestation through legal narratives poses strategic challenges too. The propagation of untenable legal arguments in ruthless pursuit of information advantage is not conducive to the rule of law, whether understood in a thin or thick sense. Barely arguable claims pollute the legal discourse and undermine trust in the law and legal process. Deploying legal arguments as instruments of misinformation undercuts law's ability to serve as a space of relative neutrality where political opponents may meet to seek compromise. Those who speak the language of law are said to submit themselves to a particular discourse ethic, marked by a commitment to rationality, giving reasons, and consistency.[173] Such a discourse ethic may prevail more readily in formal settings, but the findings of this paper suggest that actors may avoid formal venues in preference to informal settings precisely to escape such ethical strictures. The Russian Federation's initial decision not to participate

173 E.g. Hans-Joachim Cremer, 'Völkerrecht – Alles nur Rhetorik?', HJIL 67 (2007), 267-296.

in the proceedings launched against it by Ukraine before the International Court of Justice underlines the point.[174]

For societies committed to the rule of law, this raises difficult empirical and policy questions. How effective are legal narratives that are told in informal settings? What impact do they have on their target audiences? What narrative strategies work and why? Depending on the answer to these questions, how should malign legal narratives be countered? How can target audiences be shielded from fake law? What ethical limits should be observed in deploying counternarratives in public discourse? How forward leaning and innovative may governments committed to the rule of law be in their legal positions before accusations of double-standards and hypocrisy, a firm favourite of Russian and Chinese diplomats, begin to bite?[175] In a world of moral dilemmas, novel technological challenges and persistent geopolitical competition, how should they navigate the choice between rigid adherence to the letter of the law and giving effect to its spirit? And how, if need be, can they confront whataboutism and persuasively argue that not all deviations from the rules are equal?

The weight of these questions underlines that the subject of norm contestation through legal narratives deserves further study. The aim of this article was to provide an impetus and foundation for that task.

174 Russian Foreign Ministry, 'Press Release on the Filing of Russia's Written Objections to the Jurisdiction of the International Court of Justice in the Case Initiated by Kiev in February 2022 Under the 1948 Convention on the Prevention and Punishment of the Crime of Genocide', 5 October 2022 <https://www.mid.ru/en/foreign_policy/news/1832628/>. Since then, Russia has submitted preliminary objections to the Court's jurisdiction.

175 See Thomas M. Franck and Edward Weisband, *Word Politics: Verbal Strategy among the Superpowers* (New York: Oxford University Press 1971) (calling for narrative restraint motivated by principled reciprocity).