Lying in the Grey Zone

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1. Introduction

This chapter examines the role and legal status of State lying in grey zone conflicts. The focus is on the problem of States lying to other States in their inter-State communications (the work does not consider the status of official policies of deception, concealment, disinformation, or propaganda campaigns). The work begins by examining the utility of State lying in gey zone conflicts, looking at the example of Russia's 2014 annexation of Crimea, where it appears that Russia 'lied' about its relationship with the 'little green men.' There is presently no international law prohibition on State lying (no *lex lata*). There is, however, a body of existing laws on insincere State utterances which hold the State to its word, even when the State does not mean what it says. The contention here is that we should extend this law on insincere State utterances to include lying by States (the *lex ferenda*). Because the existing laws are explained by the principle of good faith, the proposed prohibition on State lying would only apply when States were co-ordinating plans of action, creating problems for its application in grey zone conflicts. The work looks to resolve some of these difficulties, before concluding with a summary of the argument.

2. Lying in the Grey Zone

The notion of 'grey zone' competition between States has gained currency in writings and policy debates.[1] For scholars on defence and war studies, grey zone conflicts are those that sit between war and peace.[2] Whilst there is no agreed definition, three elements are common in

* My thanks to Allan Beever, Duncan Macintosh, and Aurel Sari for their comments on previous versions of the paper.

[1] See, for example, Lindsey R. Sheppard et al., *By Other Means Part II: Adapting to Compete in the Gray Zone* (Center for Strategic & International Studies, 2019).

[2] Donald Stoker and Craig Whiteside, 'Blurred Lines: Gray-Zone Conflict and Hybrid War – Two Failures of American Strategic Thinking' (2020) 73(1) *Naval War College Review* 1, 7.

descriptions of grey zone actions: (1) Grey zone actions pursue strategic political objectives; (2) Grey zone actions fall short of the threshold that might trigger a military response; and (3) Grey zone actions are not easily characterized as violations of international law.[3] Grey zone actions include, then, those which exploit uncertainty as to whether impugned State behaviour is wrongful as a matter of international law, or not.[4] Aurel Sari explains the point this way:

> '[T]he grey zone concept focuses on the competitive space within which [States] conduct their activities. By definition, this space is marked by ambiguity about the nature of the conflict and the legal status of the parties, which in turn generates uncertainty about the applicable law'.[5]

Russia's efforts to annex Ukrainian territory in 2014 and 2022 provide one example of the utility of the grey zone tactic of State lying to avoid the categorization of actions as clearly 'unlawful.'

In 2014, Russia appears to have pursued its strategic objective of annexing Ukrainian territory through grey zone actions.[6] The bare facts can be summarized as follows: groups of armed men whose uniforms lacked any clear identifying marks (hence they were dubbed, 'little green men') surrounded the airports and occupied the Crimean parliament and raised a Russian flag; the Crimean parliament voted to join the Russian Federation; this decision was confirmed in a controversial referendum; President Putin then signed a law formally integrating Crimea into Russia.[7] The United Kingdom government characterized Russian actions in the following way:

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[3] See Michael J. Mazarr, *Mastering the Gray Zone: Understanding a Changing Era of Conflict* (US Army War College Press, 2015), p. 58; Michael C. McCarthy, et al., *Deterring Russia In the Gray Zone* (US Army War College Press, 2019), p. 5; and Lyle J. Morris, et al., *Gaining Competitive Advantage in the Gray Zone* (RAND, 2019), pp. 8–9.

[4] Rosa Brooks, 'Rule of Law in the Gray Zone,' Modern War Institute, 2 July 2018. Available <https://mwi.usma.edu/rule-law-gray-zone/>, accessed 9 March 2023.

[5] Aurel Sari, 'Legal resilience in an era of grey zone conflicts and hybrid threats' (2020) 33 *Cambridge Review of International Affairs* 846, 855.

[6] Geraint Hughes, 'War in the Grey Zone: Historical Reflections and Contemporary Implications' (2020) 62(3) *Survival* 131, 132.

[7] See, generally, Encyclopaedia Britannica, 'The crisis in Crimea and eastern Ukraine.' Available <https://www.britannica.com/place/Ukraine/The-crisis-in-Crimea-and-eastern-Ukraine>, accessed 7 March 2023.

> ‘Russia deployed military troops to the Crimean peninsula, which the Kremlin had decided to take by force. Russia then tried to give its actions a veneer of legitimacy with a sham referendum… In Crimea, Russia violated the first principle of international law – that countries may not acquire territory or change borders by force.’[8]

The main argument supporting this illegality thesis was that the deployment of Russian special forces (*Spetsnaz*) during the annexation was a violation of the international law prohibition on the use of force.[9] Russia denied that its military forces were involved,[10] claiming that the heavily armed men who occupied the airports and parliament were local self-defence units.[11] The law here is straightforward:[12] If the ‘little green men’ were Russian special forces, Russia was responsible for a serious violation of international law;[13] If they were local self-defence units, the relevant legal issue was Crimea’s right to self-determination.[14] To avoid legal condemnation, it appears Russia ‘lied’ abouts its relationship with the little green men. When asked whether Russian special forces had been operating on Ukrainian territory, the Russian President, Vladimir Putin later explained, ‘The Russian Army was always there.’[15]

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[8] Seventh anniversary of Russia’s illegal annexation of Crimea: UK statement, 4 March 2021. Available <https://www.gov.uk/government/speeches/seven-years-of-illegal-occupation-of-crimea-by-the-russian-federation-uk-statement>, accessed 7 March 2023.

[9] Lauri Mälksoo. ‘The Annexation of Crimea and Balance of Power in International Law’ (2019) 30 *European Journal of International Law* 303, 305

[10] For Russia’s justification of the annexation (including a denial of ‘Russian intervention in Crimea, some sort of aggression’), see Address by President of the Russian Federation, March 18, 2014. Available <http://en.kremlin.ru/events/president/news/20603>, accessed 8 March 2023.

[11] See, Vitaly Shevchenko, ‘“Little green men” or “Russian invaders”?’, *BBC News*, 11 March 2014.

[12] See, generally, Shane R. Reeves and David Wallace, ‘The Combatant Status of the “Little Green Men” and Other Participants in the Ukraine Conflict’ (2015) 91 *International Law Studies* 361.

[13] States are responsible for the actions of their own military forces. See Article 4, International Law Commission, ‘Draft Articles on Responsibility of States for Internationally Wrongful Acts’ (2001) *Yearbook of the International Law Commission*, Vol II (2), 26. States are also responsible for the actions of non-State actors acting under their immediate direction and control (Article 8, ibid.).

[14] See, on this point, Roy Allison, ‘Russian “deniable” intervention in Ukraine: how and why Russia broke the rules’ (2014) 90(6) *International Affairs* 1255, 1259–1260; also, Thomas D. Grant, ‘Annexation of Crimea’ (2015) 109 *American Journal of International Law* 68.

[15] See, Carl Schreck, ‘From “Not Us” To “Why Hide It?”: How Russia Denied Its Crimea Invasion, Then Admitted It,’ *Radio Free Europe*, 26 February 2019. Available <https://www.rferl.org/a/from-not-us-to-why-hide-it-how-russia-denied-its-crimea-invasion-then-admitted-it/29791806.html>, accessed 9 March 2023.

By lying about its operations in Ukraine 2014, Russia appears to have created enough uncertainty about the facts and its legal responsibility for 'the little green men' to realize its strategic objective of annexing the Ukrainian territory of Crimea – with limited international condemnation, certainly as judged by the response of the General Assembly. GA Res. 68/262 simply affirms, in rather oblique terms, the 'territorial integrity of Ukraine', calls on 'all States' to refrain from attempts to modify Ukraine's borders through the use of force, and urges 'all parties to pursue immediately the peaceful resolution of the situation'. The resolution does not mention Russia by name.[16]

The muted reaction in 2014 can be contrasted with the General Assembly's response in 2022, when Russia pursued its objective of annexing Ukrainian territory through inter-State war and dubious referendums.[17] GA Res. ES-11/4 expressly condemns Russia, declaring:

> '[T]he unlawful actions of the Russian Federation with regard to the illegal so-called referendums [in the] Donetsk, Kherson, Luhansk and Zaporizhzhia regions of Ukraine[,] have no validity under international law and do not form the basis for any alteration of the status of these regions of Ukraine'.[18]

These differing responses by the UN General Assembly in 2014 and 2022 highlight the potential benefits of the grey zone tactic of State lying to avoid condemnation of State actions as unambiguously 'unlawful.'

3. On Lying

According to *The Stanford Encyclopedia of Philosophy*, the most widely accepted definition of a lie is by the philosopher, Arnold Isenberg:

[16] GA Res. 68/262, 'Territorial integrity of Ukraine, adopted 1 April 2012 (100-11-58), paras. 1 – 3.

[17] Pjotr Sauer and Luke Harding, 'Putin annexes four regions of Ukraine in major escalation of Russia's war,' *The Guardian*, 20 September 2022.

[18] GA Res. ES-11/4, Territorial integrity of Ukraine: defending the principles of the Charter of the United Nations, adopted 13 October 2022 (143-5-35), para. 3.

> ‘A lie is a statement made by one who does not believe it with the intention that someone else shall be led to believe it’.[19]

The same understanding can be seen in an influential definition provided by the international lawyer, Hugo Grotius.[20] In his analysis of ‘What is lawful in War’, where he considers whether lying to the enemy is permitted as an exception to the general prohibition on lying,[21] Grotius defines lying as:

> ‘[T]he propagation of a truth, which any one believes to be false, in him amounts to a lie. There must be in the use of the words therefore an intention to deceive, in order to constitute a falsehood in the proper and common acceptation.’[22]

Both these definitions share the same 3 elements: (1) There must be a statement of claimed fact; (2) The speaker does not believe that the claimed fact is true; (3) The speaker intends that the addressee does believe that the claimed fact is true.

First, there must be a written or spoken statement of claimed fact.[23] Lies take the form of assertives, i.e., statements of claimed facts about the world, which can be categorized as being true or false.[24] Thus, the act of lying must be distinguished from the act of dissembling, where the truth is hidden in a misleading statement, which is not literally untrue.[25] Hugo Grotius quotes, with approval, the Roman scholar, Cicero’s view that the skill of dissimulation ‘is absolutely necessary for statesmen to possess’.[26] A good example of the difference can be seen in the response given by US President Jimmy Carter’s chief of staff, in 1980, at the time of the

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[19] Arnold Isenberg, ‘Deontology and the Ethics of Lying,’ in *Aesthetics and Theory of Criticism: Selected Essays of Arnold Isenberg* (University of Chicago Press, 1973) 245, 248, referred to by James Edwin Mahon, ‘The Definition of Lying and Deception,’ in Edward N. Zalta (ed.), *The Stanford Encyclopedia of Philosophy* (Winter 2016 Edition), para. 1.

[20] See, generally, Mahon, ibid., especially para. 2.3.

[21] Hugo Grotius, *The Rights of War and Peace, including the Law of Nature and of Nations* [1625] (Walter Dunne, 1901), Book III, Ch I, § XVII.

[22] Ibid., Book III, Ch I, § X.

[23] See, on this point, Mahon, above note 19, para. 1.1. (‘[L]ying requires that a person make a statement.’).

[24] Allan Beever, *Law’s Reality: A Philosophy of Law* (Edward Elgar, 2021), p. 52.

[25] Grotius, above note 21, Book II, Ch I, § XI. (A lie ‘cannot be understood, but in a sense different from the real meaning of the speaker’.)

[26] Ibid., Book II, Ch I, § VII.

Tehran Hostage Rescue Mission. When asked by the Iranian Foreign Minister whether Carter would 'do anything rash, like attack Iran,' Hamilton Jordan replied 'Don't worry. He won't. President Carter is not a militaristic man.'[27] The first part of the response was a lie, a denial of military action, while military action was underway. The second is an example of dissembling, because, whilst it implies that Carter is not planning military action, Jordan does not say this is the case.

Second, the speaker does not believe that the statement of claimed fact is true. Lying is not the same as asserting something which is not in fact true. A person lies when they assert the truth of some proposition which they themselves do not believe to be true.[28]

Third, for an utterance to be categorized as a lie, the speaker must intend that the addressee believe that the claimed fact is true. There must be an intention to deceive – but the addressee does not have to be deceived. Consider the following example. The President of State A says, 'We have successfully developed our own nuclear weapons capacity,' with the aim of deterring an attack by State B. Now suppose that the President was lying. Here, the intention is, not only to deter State B, but also to deceive State B. But State A only deceives State B, if State B believes State A has developed nuclear weapons. But whether State B believes the statement, or not, the President is still lying. One either lies, or one does not. Lying, as the legal philosopher, Neil MacCormick observes, 'is not… a success-word.'[29]

4. The Law on State Lying (*Lex Lata & Lex Ferenda*)

In the absence of agreement on an international treaty on State lying, the most likely source of a regulative rule would be customary international law.[30] There are, though, only a few examples of state practice from which we might identify a regulative rule on State lying, with the major work on lying in international relations concluding that, whilst 'lying is sometimes

[27] Tung Yin, 'National Security Lies' (2018) 55 *Houston Law Review* 729, 736–737.

[28] J. L. Austin, *How to Do Things with Words* (Clarendon Press, 1962). p. 41 ('insincerity… is an essential element in lying as distinct from merely saying what is in fact false').

[29] Neil MacCormick, 'What is Wrong with Deceit?' (1983) 10 *Sydney Law Review* 5, 9.

[30] Article 38(1)(b), Statute of the International Court of Justice lists as one of the sources of international law, 'international custom, as evidence of a general practice accepted as law.'

a useful instrument of statecraft[,] it is not commonplace.'[31] One instance is the 1960 U-2 incident, when the United States claimed that a downed spy plane was on a weather research mission. Soviet leader, Nikita Khrushchev later announced the capture of the pilot, Gary Powers, explaining that the USSR had kept this secret, 'because if we had given out the whole story, the Americans would have thought up still another fable.'[32] Soviet Foreign Minister, Andrei Gromyko then opened a debate in the UN Security Council by saying that, after its first 'lying version,' the United States had admitted its responsibility for violating Soviet air space.[33] Reflecting on the legal implications of the U-2 incident, Quincy Wright concluded that, 'In time of peace, there is a presumption that governments will not attempt to mislead other governments on questions of fact by express statement'.[34]

The problem for any claim that there is a prohibition on State lying under customary international law is the limited evidence of state practice and absence of evidence (which I could find) that States consider that State lying is, or should be, prohibited as a matter of international law (the *opinio juris* element). Indeed, there are instances similar to the U2 incident, when States did not complain about seemingly insincere State utterances. Take the 2023 example of the United States shooting down a Chinese balloon over US airspace. China claimed it was 'a civilian airship used for research, mainly meteorological, purposes.'[35] The US rejected this, reporting the balloon's equipment 'was clearly for intelligence surveillance'.[36] The US Senate Majority Leader said, 'I think the Chinese were caught lying',[37] but the US Government complained only that the presence of a PRC surveillance balloon in US airspace was a violation of US sovereignty and international law.[38]

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[31] John J. Mearsheimer, *Why Leaders Lie: The Truth about Lying in International Politics* (OUP, 2011), p. 13.

[32] Tung Yin, 'National Security Lies' (2018) 55 *Houston Law Review* 729, 761.

[33] Quincy Wright, 'Legal Aspects of the U-2 Incident' (1960) 54 *American Journal of International Law* 836, 840.

[34] Ibid., 852.

[35] PRC, Ministry of Foreign Affairs, 'Foreign Ministry Spokesperson's Remarks on the Unintended Entry of a Chinese Unmanned Airship into US Airspace Due to Force Majeure,' 3 February 2023. Available < https://www.fmprc.gov.cn/mfa_eng/xwfw_665399/s2510_665401/2535_665405/202302/t20230203_11019484.html>, accessed 7 March 2023.

[36] Julian Borger, 'Chinese balloon was "clearly" for spying, says US,' *The Guardian*, 9 February 2023.

[37] Ed Pilkington, 'Schumer says Chinese "humiliated" after three flying objects shot down,' *The Guardian*, 12 February 2023.

[38] US Department of State, 'Secretary Blinken's Call with People's Republic of China (PRC) CCP Central Foreign Affairs Office Director Wang Yi,' 3 February 2023. Available <https://www.state.gov/secretary-blinkens-call-with-peoples-republic-of-china-prc-ccp-central-foreign-affairs-office-director-wang-yi/>, accessed 7 March 2023.

As well as accounts of the positive law in force (the *lex lata*), international lawyers can make arguments about what the law should be (the *lex ferenda*).[39] *Lex ferenda* arguments take one of two forms: Either the proposed rule is said to be more just or equitable than the existing law; or the proposed rule would tidy up the existing law, by filling lacunae or eliminating anomalies.[40]

Lex ferenda arguments often make the case that the proposed rule would be more in line with the demands of morality than the old law. In moral theory, lying is often seen as presumptively wrong.[41] The two most common explanations for this are that lying undermines the right of the other person to make their own decisions, based on a proper understanding of the facts,[42] and that lying involves a breach of trust, because the speaker invites the other person to believe in the truth of the expressed proposition.[43] But there are conflicting moral arguments, inspired by utilitarian considerations, which require us to ask whether, on balance, a particular lie does more harm than good.[44] Following Niccolò Machiavelli, who noted that 'experience shows that in our times the rulers who have done great things are those who have set little store by keeping their word,'[45] these utilitarian considerations are often applied to lies uttered by political leaders.[46] John Mearsheimer's *Why Leaders Lie*, examines the subject of State lying from this 'Machiavellian' perspective, concluding that, whilst lying is sometimes useful, it is not commonplace, not least because of the natural scepticism that States have about the claims of other States, with Mearsheimer making the point that 'Lying is only effective when the potential victim thinks that the liar is probably telling the truth.'[47]

Lex ferenda arguments can also look to tidy up the existing law, by filling gaps or eliminating anomalies. The argument in this chapter sits within this category of *lex ferenda* writings,

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[39] 'Lex ferenda,' Aaron X. Fellmeth and Maurice Horwitz, *Guide to Latin in International Law* (OUP, 2009).

[40] Hugh Thirlway, 'Reflections on Lex Ferenda' (2001) XXXII *Netherlands Yearbook of International Law* 3, 10.

[41] J.A. Barnes, *A Pack of Lies: Towards a Sociology of Lying* (CUP, 1994), p. 136.

[42] Grotius, above note 21, Book III, Ch I, § XI.

[43] Charles Fried, *Right and Wrong* (Harvard University Press 1978), p. 67.

[44] Alasdair Macintyre, 'Truthfulness, Lies, and Moral Philosophers: What Can We Learn from Mill and Kant?' 16 *Tanner Lectures on Human Values* (Princeton University Press, 1994) 306, 325.

[45] Niccolò Machiavelli, *The Prince* [1513] (CUP, 1988), Ch. 18, p. 61.

[46] Michael Walzer, 'The Problem of Dirty Hands' (1973) 2 *Philosophy & Public Affairs* 160, 180.

[47] Mearsheimer, above note 31, pp. 29–30.

looking to tidy up the existing laws on insincere State utterances by recognizing that State lying should be seen as legal wrongful when States are co-ordinating their plans of actions in good faith. The argument is necessarily normative, because the International Court of Justice has made clear that, whilst the principle of good faith can explain the need for a primary, regulate rule, it cannot create that rule.[48]

The inspiration for the argument developed in this chapter lies in the disagreement between the philosophers of language, Ludwig Wittgenstein and John Searle on the status of lying. Wittgenstein argued that 'Lying is a language-game that needs to be learned like any other one.'[49] In other words, we must learn how to lie, i.e., to appear to have a good reason for saying something that we don't believe. Searle disagreed, saying:

> 'I think Wittgenstein was wrong[,] because lying consists in violating one of the regulative rules [of language use], and any regulative rule at all contains within it the notion of a violation.'[50]

Searle's point is that speaking a language is a rule-governed practice that depends on speakers complying with certain rules of language use. One of these rules is that the speaker should mean what they say – a point that applies whether they are making a promise,[51] or asserting some fact about the world.[52] Lying violates the rules of language use because the speaker is not sincere when they assert some proposition about the world.[53] This point is significant, because, whilst there is no international law on State lying, there are established laws on insincere State utterances.

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[48] *Border and Transborder Armed Actions*, ICJ Rep. 1988, para 94.

[49] Ludwig Wittgenstein, *Philosophical Investigations*, 4th edition, edited by P. M. S. Hacker and Joachim Schulte (Wiley-Blackwell, 2009), p. 96.

[50] John R. Searle, 'The Logical Status of Fictional Discourse' (1975) 6(2) *New Literary History* 319, 326.

[51] John R. Searle, *Speech Acts: An Essay in the Philosophy of Language* (Cambridge University Press, 1969), p. 63.

[52] Ibid., p. 66.

[53] JL Austin explains the point this way: 'the unhappiness here is… exactly the same as the unhappiness infecting "I promise..." when I do not intend [to carry out my promise]. [T]o say "I promise," without intending, is parallel to saying "it is the case" without believing': Austin, above note 28, p. 50.

5. The Existing Law Insincere State Utterances

The law on insincere State utterances is a collection of international law rules which holds the State to its word when the State does not mean what it says. We see this in the law on unilateral declarations, in the law of treaties, and in the doctrine of estoppel.

Under the law on unilateral declarations, an insincere promise is still a promise. We see this in the *Nuclear Tests* case. During the late 1960s and early 1970s, France conducted a series of atmospheric tests of nuclear weapons in French Polynesia. On 25 July 1974, French President, Valéry Giscard d'Estaing said, 'I had myself made it clear that this round of atmospheric [nuclear] tests would be the last'.[54] The President was speaking for France. By this utterance, he made public the country's intention to cease all atmospheric nuclear tests at the end of the 1974 series. By making a promise with the intention of being legally bound, France changed its legal position, and was 'thenceforth legally required to follow a course of conduct consistent with the declaration.'[55] The sincerity of the promise was irrelevant,[56] with the ICJ explaining the point this way:

> 'Once the Court has found that a State has entered into a commitment concerning its future conduct it is not the Court's function to contemplate that it will not comply with it.'[57]

Even if the President did not mean what he said (if, for example, France was contemplating more tests), Giscard d'Estaing would still have made a promise, one that could be kept or broken – as New Zealand claimed in the 1990s, when France recommenced underground nuclear testing in the South Pacific.[58]

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[54] *Nuclear Tests*, ICJ Rep. 1974, p. 253, para. 37.

[55] Ibid., para. 43.

[56] As Thomas Franck noted at the time: 'A spokesman for state policy – like the President [...] – must be taken to intend the natural consequences of his words': Thomas M. Franck, 'Word Made Law: The Decision of the ICJ in the *Nuclear Test* Cases' (1975) 69 *American Journal of International Law* 612, 616.

[57] *Nuclear Tests*, above note 54, para. 60.

[58] See *Request for an Examination of the Situation in Accordance with Paragraph 63 of the Court's Judgment of 20 December 1974 in the Nuclear Tests* (New Zealand v. France) *Case*, ICJ Rep. 1995, p. 288, para. 62.

In *Nuclear Tests* case, the International Court of Justice explained the existence of the law on unilateral declarations by reference to the principle of good faith:

> 'Just as the very rule of *pacta sunt servanda* in the law of treaties is based on good faith, so also is the binding character of an international obligation assumed by unilateral declaration.'[59]

In the law of treaties, an insincere agreement still binds both parties. The standard example here is the 1938 Munich Agreement, when Adolf Hitler promised to resolve future disputes in Europe by peaceful means, in return for the annexation of the Sudetenland in Czechoslovakia. A 1963 report by the International Law Commission makes the following point:

> 'It might be true that Germany had negotiated at Munich *without any intention of complying with the agreement* concluded; but the agreement had not been vitiated by fraud: the proof of that was precisely that Germany by its subsequent actions had *broken the agreement*, which was legally valid.'[60]

There is nothing legally wrongful about a State agreeing to do something which it has no intention of doing. There is only an internationally wrongful act when the State fails to perform the promised action (the State can always change its mind and keep its word). Any international agreement, even an insincere agreement, where the States parties manifest an intention to be legally bound, binds the parties, as a matter of international law, and must be performed by them in good faith (*pacta sunt servanda*).[61]

In the law on unilateral declarations and the law of treaties, the internationally wrongful act is the failure by the State to keep to its word. This failure can be the result of the (in)actions of any State official.

The doctrine of estoppel is different because, here, only certain State officials can bind the State to a stated position of fact, and only certain State officials can repudiate that stated

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[59] *Nuclear Tests*, above note 54, para. 46.

[60] *Yearbook of the International Law Commission* [1963-I], p. 31 (emphasis added).

[61] Article 26, Vienna Convention on the Law of Treaties, 1155 UNTS 331.

position of fact. The internationally wrongful act is the second, inconsistent speech action by someone speaking for the State. The point is significant for any proposed law on State lying because it shows that some internationally wrongful acts can only be committed by those high-ranking officials whose utterances count as the utterances of the State.

Under the doctrine of estoppel, the State is bound by its words, even if the State does not mean what it says. The ICJ has confirmed that the concept of estoppel follows from the principle of good faith.[62] The doctrine is neatly explained by the International Court of Justice in its 1990 *Land, Island and Maritime Frontier Dispute* judgment. Estoppel concerns:

> 'a statement or representation made by one party to another and reliance upon it by that other party to his detriment or to the advantage of the party making it'.[63]

There are 4 component elements in any claim of estoppel. First, there must be an assertion of claimed fact by someone entitled to speak for the State on the matter in question.[64] Second, there must be reliance on the asserted position of fact by the State addressed by the utterance.[65] This is evidenced by the addressee State acting differently, or not acting when it would otherwise have acted.[66] Third, there must then be an inconsistent assertion of fact – again by

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[62] *Delimitation of the Maritime Boundary in the Gulf of Maine Area*, ICJ Rep. 1984, p. 246, para. 130.

[63] *Land, Island and Maritime Frontier Dispute*, ICJ Rep. 1990, p. 92, para. 63. See, also, *North Sea Continental Shelf*, ICJ Rep. 1969, p. 3, para. 30.

[64] See Kaijun Pan, 'A Re-Examination of Estoppel in International Jurisprudence' (2017) 16 *Chinese Journal of International Law* 751, para. 30. (Those people authorized to bind the State to a position 'include heads of State, heads of Government and ministers for foreign affairs and other persons representing the State in specified areas'.) Other officials can speak for the State, but only when it appears clear to the other party that they are speaking for the State. See, Hugh Thirlway, 'Law and Procedure of the International Court of Justice 1960–1989: Part One' (1990) 61 *British Year Book of International Law* 1, 37. ('[T]he constitutional niceties of the position of a given official are less important than the impression produced *ab extra* as to his competence to speak for the State.') Other officials do not ordinarily speak for the State, even when speaking in an official capacity. Thus, in *Delimitation of the Maritime Boundary in the Gulf of Maine Area*, the ICJ confirmed that Canada could not 'rely on the contents of a letter from an official of the Bureau of Land Management of the Department of the Interior… as though it were an official declaration of the United States Government on that country's international maritime boundaries': *Delimitation of the Maritime Boundary in the Gulf of Maine Area*, ICJ Rep. 1984, p. 246, para. 139.

[65] D W Bowett, 'Estoppel before International Tribunals and Its Relation to Acquiescence' (1957) 33 *British Year Book of International Law* 176, 185 – 186.

[66] *Sovereignty over Pedra Branca/Pulau Batu Puteh*, ICJ Rep. 2008, p. 12, para. 228.

someone entitled to speak for the State on the matter in question.[67] Finally, the change in position must have resulted in a detriment to the Addressee State,[68] including by way of a relative detriment through an advantage gained by the first State.[69]

Under the doctrine of estoppel, the internationally wrongful act is the second, inconsistent speech act by someone speaking for the State.[70] It does not matter that both assertions might be true; Nor does it matter if the first utterance is mistaken, and the second utterance is true;[71] Nor does it matter if the first utterance was a lie, and the second utterance was the truth, with Derek Bowett explaining that 'the principle of good faith requires that the party adhere to its statement whether it be true or not.'[72] Hugh Thirlway explains the point by quoting the Red Queen, in Lewis Carroll's *Through the Looking Glass*:

> 'When you've once said a thing, that fixes it, and you must take the consequences.'[73]

6. Good faith in the Co-Ordination of Plans of Action

The requirement for international law rules on unilateral declarations, treaties, and estoppel is explained by the principle of good faith.[74] In *Nuclear Tests*, the International Court of Justice explained the point in the following way:

> 'One of the basic principles governing the creation and performance of legal obligations, whatever their source, is the principle of good faith. Trust and confidence

[67] Bowett, above note 65, 201.

[68] *Land and Maritime Boundary between Cameroon and Nigeria*, Preliminary Objections, ICJ Rep. 1998, p. 275, para. 57.

[69] Dissenting Opinion of Sir Percy Spender, *Temple of Preah Vihear*, ICJ Rep. 1962, p. 6, p. 101, at pp. 143–144.

[70] See, Thomas Cottier and Jörg Paul Müller, 'Estoppel' (2007) *Max Planck Encyclopedia of Public International Law*, paras. 1 and 5.

[71] Separate Opinion of Sir Gerald Fitzmaurice, *Temple of Preah Vihear*, ICJ Rep. 1962, p. 6, p. 52, at p. 63.

[72] Bowett, above note 65, 184.

[73] Quoted, Hugh Thirlway, 'The Law and Procedure of the International Court of Justice 1960 – 1989: Supplement, 2005: Parts One and Two', 76 *British Year Book of International Law* (2005) 1, 19.

[74] The principle of good faith can be found in Article 2(2), Charter of the United Nations and General Assembly resolution 2625 (XXV), 'Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations', adopted 24 October 1970, without vote.

are inherent in international co-operation, in particular in an age when this co-operation in many fields is becoming increasingly essential.'[75]

The principle of good faith holds the State to its words, when States move from strategic interactions to good faith co-operation. States act strategically when they act in their own interests, for their own reasons, making it difficult for other States to predict likely actions and reactions. The situation can be characterized as a type of inter-State 'Prisoner's Dilemma,' whereby States make calculated decisions without knowing how other States will respond.[76] These uncertainties can, though, be mitigated using the speech actions of promising (the doctrine of unilateral declarations), agreeing (law of treaties), or asserting (doctrine of estoppel).[77] Indeed, one of the basic functions of international law is to reduce uncertainty and unpredictability by holding States to the voluntarily commitments represented by their speech actions.[78] By promising or agreeing or asserting, States manifest a commitment to move from strategic interactions to good faith co-operation. But to actually reduce uncertainty and unpredictability, the State must mean what it says when it makes a promise or an agreement or asserts some claimed fact about the world. This then allows States 'to avoid anticipating each time all the possible avenues of conduct and result, and to concentrate on the expectable and legitimate behaviour'.[79]

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[75] *Nuclear Tests*, ICJ Rep. 1974, p. 253, para. 46.

[76] See, for example, S. Plous, 'The Nuclear Arms Race: Prisoner's Dilemma or Perceptual Dilemma?' (1993) 30 *Journal of Peace Research* 163. The classic Prisoner's Dilemma can be explained as follows: Asa and Bea commit a crime. The police suspect them but have no evidence. Both are brought to the police station and kept in separate interrogation rooms. Asa and Bea are then offered a 'deal.' If they confess, they will be sentenced to 2 years in prison; If they do not confess, they will be sentenced to 5 years, if convicted. The only evidence will be the confessions. If both stay silent, both walk free; but if Asa stays silent and Bea confesses, then Bea gets 2 years, whilst Asa gets 5 years in jail. So, what is Asa to do? Here, Asa and Bea are interacting strategically, each trying to figure what the other will do – based on their understanding of human nature, and the character of the other person. See, generally, Steven Kuhn, 'Prisoner's Dilemma,' in Edward N. Zalta (ed.), The *Stanford Encyclopedia of Philosophy* (Winter 2019 Edition). Available <https://plato.stanford.edu/archives/win2019/entries/prisoner-dilemma/>, accessed 9 March 2023.

[77] For individuals, the uncertainties involved in the Prisoner's Dilemma can be mitigated using the prior speech actions of promising ("I will never talk to the police"), agreeing ("We both agree to stay silent"), or asserting ("I will never speak to the police, I am not a grass"). See, generally, on the way speech actions allow for the co-ordination of individual plans of action, Jürgen Habermas, *The Theory of Communicative Action*, Volume 1: The Reason and the Rationalization of Society, translated by Thomas McCarthy (Beacon Press, 1984), pp. 307 – 308.

[78] See, Henner Gött, *The Law of Interactions Between International Organizations* (Springer, 2020), p. 157 (and references cited).

[79] Robert Kolb, *Good Faith in International Law* (Bloomsbury, 2017), p. 24.

The principle of good faith holds the State to its words, even when the State does not mean what it says. We saw this in the law on unilateral declarations, where an insincere promise is still a promise; in the law of treaties, where an insincere agreement still binds both parties; and in the doctrine of estoppel, where the State is bound by its words, even if the State does not mean what it says.

The reason for this is straightforward. The principle of good faith allows States to co-ordinate their plans of actions by voluntarily moving from strategic interactions to good faith co-operation through the speech actions of promising or agreeing or asserting. Good faith means that the addressee State is entitled to rely on the promise, agreement, or assertion when deciding for itself what to do next. The sincerity of the utterance cannot be a relevant factor because only the State making the utterance knows whether the utterance is sincere, or not. The addressee State cannot know, because (to the hearer) an insincere promise takes the form of a sincere promise, an insincere agreement takes the form of a sincere agreement, and an insincere statement of fact takes the form of a sincere statement of believed fact. This is why the principle of good faith holds the State to its words, even when the utterance is not sincere. Kolb explains the point this way:

> '[G]ood faith protects the legitimate expectations of another subject generated through a deliberate conduct, *whatever the true intentions* or will of the acting subject'.[80]

A State moves from a position of strategic interaction to good faith co-operation through voluntary speech actions – by making a unilateral declaration, concluding a treaty, or asserting the truth of some proposition. This then entitles the addressee State to place confidence in the ordinary meaning of the words used, to trust that the State was sincere in making the promise or agreement, or to trust that it believed in the veracity of the asserted fact. Simply put, the addressee State is entitled to rely on the ordinary implications of the words used when deciding what to do next, on the understanding that the State making the utterance meant what it said.

[80] Ibid., p. 23 (emphasis added).

7. State Lying

The argument here is that we should extend the established laws on insincere State utterances, explained by the principle of good faith, to cover State lying. This point was made already by Emer de Vattel, in his 1797 work, *The Law of Nations*, when he argued that,

> 'Good-faith consists not only in the observance of our promises, but also in not deceiving on such occasions as lay us under any sort of obligation to speak the truth.'[81]

Under the proposed law on State lying, there would be an internationally wrongful act when (1) someone speaking for the State claimed that some fact is true; (2) the State did not believe in the truth of the expressed proposition; and (3) the State intended to deceive the audience targeted by the utterance.[82]

The first element in State lying is that someone speaking for the State asserts the truth of some proposition. The problem is that States cannot speak, meaning that some flesh-and-blood person must speak for the State and assert the truth of some proposition. The question is: Who can speak for the State? Under international law, we can differentiate between the utterances of persons speaking for the State; and utterances which can be attributed to the State.[83] Take the example of lies told by a low-ranking public official to incite genocide. These lies are attributable to the State, which would be responsible for a violation of international law.[84] But low-ranking public officials cannot make promises or agreements that bind the State; nor can they commit the State to an asserted position of fact under the doctrine of estoppel – a point confirmed by the ICJ in *Gulf of Maine*, when it concluded that an official of the US Bureau of

[81] Emer de Vattel, *The Law of Nations* (Liberty Fund, 2008), para. 177.

[82] This is a straightforward application of the generally accepted definition of lying to the concept of 'State lying.' See, above notes 19 and 22 (and accompanying text).

[83] See Article 4(1), ILC, Draft Articles on State Responsibility, above note 13 ('The conduct of any State organ shall be considered an act of that State').

[84] See Antonio Cassese, 'On the Use of Criminal Law Notions in Determining State Responsibility for Genocide' 5 (2007) *Journal of International Criminal Justice* 875, 878.

Land Management did not speak for the United States.[85] So, who speaks for the State for the purposes of asserting the truth of some proposition under the proposed rule on State lying?

Under the established rules on insincere State utterances, explained by the principle of good faith, only the utterances of certain high-ranking government officials, speaking for the State, can move the State from a position of strategic interaction to a position of good faith co-operation. We see this, for example, in the doctrine of estoppel, where only the utterances by high-ranking government officials count as assertions of claimed fact by the State (thereby binding the State to that position).[86] The objective of the principle of good faith is to reduce uncertainty and unpredictability by holding States to their voluntarily commitments. But to actually reduce uncertainty and unpredictability, the State must be taken to mean what it says. This is why the principle of good faith holds the State to its words, even when the utterance is not sincere – more specifically, the principle holds those entitled to speak for the State to their words when States move from strategic interactions to good faith co-operation, so that the addressee State can rely on those words when deciding what to do next.

Because only certain people can speak for the State when States are co-ordinating plans of action, only certain people can lie for the State for the purposes of the proposed law on State lying. The proposed law would be an extension of the existing body of laws on insincere State utterances, explained by the principle of good faith. When States move from strategic interactions to good faith co-operation, those speaking for the State, e.g., Heads of State, Heads of Government, and Foreign Ministers, etc., would be expected to mean what they say when asserting some claimed fact about the world. Other States would be entitled to rely on these utterances when deciding what to do next. The same point does not apply in relation to low-ranking government officials. Consider, for example, a situation in which the President of State A wrongly claims that 'State B has nuclear weapons' – similar to the claim the President Putin made to justify the invasion of Ukraine.[87] States can legitimately complain if it transpires the

[85] Above note 64. As previously noted, this point is significant because it demonstrates the possibility that only the utterances of certain officials can result in the finding of an internationally wrongful act (recall, it is the second, inconsistent speech action which is the internationally wrongful act).

[86] Id.

[87] See Putin's Declaration of War on Ukraine, 24 February 2022 (English translation) ('Now they also claim to possess nuclear weapons.'). Available <https://www.spectator.co.uk/article/full-text-putin-s-declaration-of-war-on-ukraine>,

President was lying, because they should be able to rely on the sincerity of the assertions of Heads of State when deciding what to do next. But the same considerations do not apply in relation to the utterances of low-ranking officials, who do not speak for the State. So, if the same lie was uttered by an low-ranking government official, this would not count as an utterance of the State.[88] The utterance would be attributable to the State, but low-ranking government officials do not speak for the State, and they cannot lie for the State for the purposes of the proposed law on State lying. The necessary consequence is that only claimed statements of fact made by high-ranking government officials – Heads of State, Heads of Government, Foreign Ministers (and their spokespersons), etc. – count as utterances of the State for the purposes of the proposed law on State lying.

The second element in State lying is that 'the State' does not 'believe' in the truth of the expressed proposition.[89] There are 2 ways we can understand this requirement: Either the relevant belief must be attributable to those high-ranking government officials authorized to voluntarily limit the State's freedoms of action; or the relevant belief can be the belief of any State official. Consider the following: Russell is a spy employed by State A. He reports to his superiors that he has seen evidence that State B is developing nuclear weapons. State A's Foreign Minister then tells a meeting of the UN Security Council that they have evidence State B is developing nuclear weapons. Now suppose Russell was lying. Lying involves saying something that you do not believe to be true. State A's Foreign Minister believes that State B is developing nuclear weapons, so they are not lying.[90] But, 'What does State A *believe* to be

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accessed 9 March 2023. Cf. Laurence Norman, 'Ukraine Isn't Working on Nuclear Weapons, U.N. Official Says, in Rebuke to Russia,' *Wall Street Journal*, 2 March 2022.

[88] See, for example, 'Russia, without evidence, says Ukraine making nuclear 'dirty bomb',' *Reuters*, 6 March 2022. ('[A]n unnamed source [in the Russian government said] that Ukraine was close to building a plutonium-based 'dirty bomb' nuclear weapon, although the source cited no evidence.')

[89] International law has no problem talking about the 'beliefs' of States, We see this, for example, in the identification of customary international law, which requires 'evidence of a belief' by States that a practice is accepted as law: *North Sea Continental Shelf*, ICJ Rep. 1969, p. 3, para. 77.

[90] We see the problem in US Secretary of State, Colin Powell's assertion to the other States on the UN Security Council, in 2003, that, 'Saddam Hussein and his regime are concealing their efforts to produce more weapons of mass destruction'. Powell claimed that 'every statement I make today is backed up by sources, solid sources …. What we're giving you are facts and conclusions based on solid intelligence': U.S. Secretary of State Colin Powell Addresses the U.N. Security Council <https://georgewbush-whitehouse.archives.gov/news/releases/2003/02/20030205-1.html> (last accessed 1 October 2021). The evidence is that Powell believed what he was saying, claiming to have been misled by 'some people in the intelligence community who knew at that time that [the intelligence] sources were not good, and shouldn't be relied upon':

true?' Either State A is deemed to 'believe' everything that every State official (including Russell) believes (or does not believe), or State A's beliefs can only be established by those high-ranking government officials, like the Foreign Minister, with the authority to co-ordinate plans of action with other States.

Again, the logic of the international law principle of good faith shows that the relevant beliefs must be the beliefs of those high-ranking government officials with the authority to voluntarily limit the State's freedom of action. The principle of good faith holds the State to its words, when States move from strategic interactions to good faith co-operation. Specifically, the principle holds those entitled to speak for the State to their words, so that the addressee State can rely on those words when deciding what to do next. Lying involves the speaker saying something which they do not believe to be true. State beliefs are manifested in any utterance which can be framed in terms that, 'We believe that X is true' – e.g., 'We believe that State B is developing nuclear weapons.' The addressee State is entitled to proceed on the understanding that those speaking for the State believed in the truth of the expressed proposition – whilst recognizing that those speaking for the State might, in fact, be mistaken. The addressee State is not entitled to proceed on the understanding that every State official believed that the proposition was true. So, when State A's Foreign Minister informs the UN Security Council that 'State B is developing nuclear weapons,' State A does not lie because the Foreign Minister believes the statement to be true – even though Russell, a low-ranking State agent, does not believe that the statement is true.

The final element in State lying is the intention to deceive. State lying occurs when someone speaking for the State asserts the truth of some proposition which the State does not believe - and the assertion is made with the intention of deceiving another State into believing that the expressed proposition is true. There are only 2 reasons why a State would assert the truth of some proposition: Either the State is looking to inform the other State, or it is trying to deceive the other State. We cannot know whether the State had the intention of informing or deceiving, but there are things we do know: We do know the available evidence in the public domain;[91] We know what reasonable conclusions (i.e., beliefs) can be drawn from that evidence; We

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David Zarefsky, 'Making the Case for War: Colin Powell at the United Nations' (2007) 10(2) *Rhetoric & Public Affairs* 275, 298.

[91] See *United States Diplomatic and Consular Staff in Tehran*, Judgment, ICJ Rep. 1980, p. 3, para. 12.

know what the State said; and We know the affect (or the likely affect) on addressee, if the utterance is believed. Based on what we know we can construct a narrative to explain,[92] 'What motive (i.e., intention) might the State have for asserting the truth of the proposition?' There are only two possibilities: Either the State had the intention of informing (even if it turns out to have been mistaken), or the State had the intention of deceiving the other State by lying. Where there is a clear disconnect between what the State knew (or is deemed to have known) and what the State said, we can conclude that the State was intending to deceive the addressee State. This is particularly the case when it appears that the State was trying to influence the addressee State, to gain some relative advantage.

8. Between Competition and Co-Ordination: Fifty Shades of Grey

One of the basic functions of international law is to allow States to move from strategic interaction to good faith co-operation and the co-ordination of plans of action using speech actions. States interact strategically when they act, and react, for their own reasons, in their own interests. States move from strategic interactions to good faith co-operation through the speech actions of promising (law on unilateral declarations), agreeing (law of treaties), or asserting (doctrine of estoppel). The principle of good faith holds the State to its words, even if the State did not mean what it said when promising or agreeing or asserting. This is reflected in the established laws on insincere State utterances, which allows the addressee State to treat the utterance as if it was sincere when deciding what to do next.

The proposed law on State lying (the *lex ferenda*) would, necessarily, only apply when States moved from strategic interactions to good faith co-operation. The requirement for the proposed law is explained by the principle of good faith, which holds those speaking for the State to their words when States voluntarily move to good faith co-operation. When States are interacting strategically, for their own reasons, in their own interests, there would, consequently, be no legal prohibition on State lying under the proposed law. Lying about the activities of spy planes or spy balloons would not, for example, be an internationally wrongful act. On the other hand, lying when States were looking to co-ordinate their plans of action would be an internationally

[92] On this point, see *Corfu Channel case*, ICJ Rep. 1949, p. 4., p. 18.

wrongful act. A global pandemic is one situation when States properly look to co-ordinate their plans of action.[93] Lying about the scale of an outbreak would, then, be an internationally wrongful act – e.g., when US President Donald Trump accused China of under-reporting its number of Covid cases.[94]

The grey zone sits between strategic competition and good faith co-operation. A report by the US State Department's International Security Advisory Board explained:

> '[Grey zone actions] occupy a space between normal diplomacy … and open military conflict [making] deliberate use of instruments of violence, terrorism, and dissembling.'[95]

The problem is that this dividing line, between strategic competition and good faith co-operation, is not always clear. Indeed, we might say there are fifty shades of grey between co-operation and competition, from allies falling out, e.g., when the US was accused of spying on German Chancellor, Angela Merkel,[96] to talk of a 'special chemistry' between strategic enemies looking to collaborate, e.g., the 2018 summit between US President Donald Trump and North Korea's Kim Jong Un.[97]

Under the law proposed here, State lying would be internationally wrongful when States moved from strategic interactions to good faith co-operation. States manifest an intention to move to good faith co-operation through the speech actions of promising (unilateral declarations), agreeing (law of treaties), or asserting (doctrine of estoppel and proposed law on State lying). There is no obligation for States to move from strategic interactions to good faith co-operation. Each State enjoys sovereign freedom of action – the so-called, 'Lotus' principle, which

[93] See Paragraph 1, World Health Assembly Resolution WHA73.1, 'COVID-19 response', adopted 19 May 2020, which calls for 'the intensification of cooperation and collaboration'.

[94] 'Trump says China's coronavirus numbers seem "on the light side",' Reuters, 2 April 2020.

[95] See, for example, International Security Advisory Board, Report on Gray Zone Conflict (2017), p. 2. Available <https://2009-2017.state.gov/t/avc/isab/266650.htm>, accessed 03 May 2022.

[96] 'NSA spying row: Denmark accused of helping US spy on European officials,' *BBC News*, 31 May 2021.

[97] Jeong-Ho Lee, 'North Korea Says Trump's "Empty Promise" Dashes Hopes for Deal,' *Bloomberg*, 12 June 2020.

provides that anything not explicitly prohibited by international law is impliedly permitted.[98] The State voluntarily puts itself in a position of good faith co-operation by intimating that it means what it says by holding itself out as being sincere when promising or agreeing or asserting some claimed fact about the world. In these circumstances, it is reasonable for the addressee State to rely on the sincerity of the utterance.

State lying in the grey zone would be legally wrongful where the State intimated that it was telling the truth and the other State could reasonably rely on the veracity of the expressed proposition. A State puts itself in a position of good faith co-operation by intimating that it means what it says by holding itself out as being sincere – including when asserting some claimed fact about the world. There is no middle ground – no shades of grey. States can try and hide in the grey zone, but international lawyers live in a black and white world in which behaviour is either lawful or unlawful.

State lying occurs when someone speaking for the State asserts the truth of some proposition that the State does not believe, with the intention of deceiving the addressee State, in circumstances where the State intimates that it means what it says – and that other States can reasonably rely on the utterance when deciding what to do next. The prohibition would not apply in times of war; it would apply in circumstances of normal diplomacy; its application in the grey zone would depend on the circumstances: If the State clearly intimated that it meant what it said (i.e., that it should be believed, and that the addressee State should rely on the utterance when deciding what to do), and it was reasonable, in the circumstances, for the addressee State to rely on the utterance, this would be an internationally wrongful act if it transpired the State was lying.

9. Conclusion

This chapter has made the case that States should recognize a new regulative rule prohibiting State lying when States move from strategic interactions to the good faith co-ordination of their future plans of action. The proposed rule would tidy up the existing law on insincere State

[98] See, An Hertogen, 'Letting *Lotus* Bloom' (2015) 26 *European Journal of International Law* 901, 902 (and references cited). The 'Lotus' principle is named after the *Case of the SS 'Lotus'*, PCIJ, Ser. A, No. 10, p. 18.

utterances, following the logic of the established legal principle that States are taken to mean what they say when co-ordinating plans of action in good faith, i.e., when deciding how to act and react. State lying would be legally wrongful when States were co-ordinating plans of actions – but not in cases of strategic competition (paradigmatically, not in times of war). Where a State asserted the truth of some proposition, in circumstances where it is clear it expected to be believed, the addressee States would be entitled to act on the presumption that the State meant what it said.

State lying presents an existential threat to the international law system.[99] The authority of the international law system – its capacity to regulate effectively States behaviours – depends on its ability to translate the speech actions of States into legally binding norms of behaviour. Insincere utterances undermine the very possibility of State co-operation using speech actions – hence the existence of the body of laws on insincere State utterances. Hugo Grotius recognized these dangers in the 17th century when he observed that successful communication depends on the speaker meaning what they say because the very purpose of communication is the development of mutual understanding. Lying undermines this possibility of mutual understanding, violating the right of the addressee to make their own decisions, based on a proper understanding of the facts. He explains the point this way:

> 'The rights here spoken of are peculiarly connected with this subject. They imply that liberty of judgment, which men are understood, by a kind of tacit agreement, to owe to each other in their mutual intercourse.'[100]

This work has made the case for a new regulative rule in the form that 'Those speaking for the State must not lie to other States when States are co-ordinating plans of action.' The rule would apply in conditions of normal diplomacy but not in times of war. The rule would apply in grey zone conflicts where the State clearly intimated that it should be believed, and that other States should rely on the utterance. In these circumstances, the State moves itself from a position of strategic interaction to good faith obligation (there is no obligation to do this, States can always

[99] The dangers of lying by domestic politicians are well recognized in democratic States, as it destroys the basis of trust which make political deliberations possible. See, for example, Sissela Bok, *Lying: Moral Choice in Public and Private Life* (Vintage, 1999).

[100] Grotius, above note 21, Book III, Ch I, § XI.

dissemble or stay silent). If it turns out that the State did not believe in the truth of the expressed proposition, and that it intended to deceive the addressee State, this would be an internationally wrongful act and the addressee State would have legitimate grounds for complaint if it transpired the State was lying in the grey zone.