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Abstract: Modern international law seems to be in disarray. The classic doctrines of international law, with their focus on sovereignty, state consent, custom and treaty, do not provide a satisfactory explanation for many of the practices and institutional structures that fill the global legal universe. The contemporary legal terrain is characterized by overlapping jurisdictions, inconsistent doctrinal interpretations and competing worldviews. But what are the social implications of the deepening fragmentation and increasing complexity of the global legal system? Some observers see these phenomena as a new global risk, which requires urgent collective response. Global constitutionalisation is put forward in this context as a possible and appropriate response. Using the notions of purity and paradox the article develops an analytic framework in which the increasing complexity of the international legal system can be elucidated. The complexification of the global legal system is described in terms of a move from purity to impurity and from singular to multiple paradoxicality. The article uses examples from diverse fields of law – ranging from the WTO, the International Criminal Court, to the ICC International Court of Arbitration and the World Wide Web Consortium Platform for Privacy Preferences Project to develop this argument. Drawing on this framework the article considers the consequences of the complexification of the global legal system in terms of its stability and legitimacy. Rather than seeing the messy nature of modern international law as a risk the article postulates it as an evolutionary achievement which extends the horizon of possibilities through which the international legal system can react to social pressures. Drawing on ideas from systems theory and ecology the article argues that the attempts to purify the international legal system through appeal to grand theories - constitutional, moral or other - could have negative social consequences. The article explores in this context an

alternative institutional model – non-hierarchical reflexivity - which embraces, rather than oppose, the innate paradoxicality of modern international law.

Keywords: Transnational Law, International Economic Law, International Legal Theory, Paradox, Complexity, Global Constitutionalism

JEL classification: K10, K33

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PURITY LOST: THE PARADOXICAL FACE OF THE NEW TRANSNATIONAL LEGAL BODY

Oren Perez*

> Evolution means nothing but growth in the widest sense of that word. Reproduction, of course, is merely one of the incidents of growth. And what is growth? Not mere increase. Spencer says it is the passage from the homogeneous to the heterogeneous — or, if we prefer English to Spencerese — diversification.
>
> Charles Pierce, Collected Papers (1931) section 1.174

> "The fact is that complexity is self-potentiating. Complex systems generally engender further principles of order that produce yet greater complexities. Complex organisms create an impetus towards complex societies, complex machines towards complex industries, complex armaments towards complex armies. And the world's complexity means there is, now and always, more to reality than our science – or for that matter our speculation and our philosophy – is able to dream of".
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> Nicholas Rescher, Nature and Understanding: The Metaphysics and Method of Science (2000) 24-25.

I. INTRODUCTION

Modern international law seems to be in disarray. The classic doctrines of international law, with their focus on sovereignty, state consent, custom and treaty, do not provide a satisfactory explanation for many of the practices and institutional structures that fill the global legal universe. The

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contemporary legal terrain seems to be characterized by overlapping jurisdictions, inconsistent doctrinal interpretations and competing worldviews. But what are the social implications of the deepening fragmentation and increasing complexity of the global legal system? Some observers argue that these phenomena constitute a new global risk, which requires urgent collective response. Global constitutionalisation is put forward in this context as a possible and appropriate reaction.[1]

Using the notions of purity and paradox the article develops an analytic framework in which the increasing complexity of the international legal system can be elucidated. Drawing on this framework the article considers the consequences of the complexification of the global legal system in terms of its stability and legitimacy. Rather than seeing the messy and complex nature of modern international law as a risk this article depicts it as an evolutionary achievement which extends the horizon of possibilities through which the international legal system can react to social pressures. The attempts to purify the international legal system by appealing to grand theories - constitutional, moral or other - are ill-conceived. First, because they fail to recognize the innate paradoxicality of the law. Second, because they constitute a threat to the legitimacy and resilience of the global legal system. The article explores in this context alternative institutional models which draw upon – rather than oppose - the complexity and paradoxicality of modern international law.

The article proceeds as follows. It opens with a discussion of the Westphalian scheme of validity (what I will call 'the purity thesis') (section

[1] This was the approach of two former Presidents of the International Court of Justice ("ICJ"), Judge Stephen M. Schwebel and Judge Gilbert Guillaume. Both expressed their concern of the proliferation of international judicial bodies and the increasing fragmentation of the international legal order and suggested, as a solution, to extend and reaffirm, through various measures, the powers and international status of the ICJ. See: Address to the Plenary Session of the General Assembly of the United Nations by Judge Stephen M. Schwebel, President of the International Court of Justice, 26 October 1999, http://www.icj-cij.org/icjwww/ipresscom/SPEECHES/iSpeechPresidentGA54_19991026.htm; Address by Judge Gilbert Guillaume, President of the International Court of Justice to the United Nations General Assembly, 27 October 2000, http://www.icj-cij.org/icjwww/ipresscom/SPEECHES/iSpeechPresident_Guillaume_SixthCommittee_20001027.htm.

II). It then proceeds to consider the invocation of the Westphalian scheme within new international regimes such as the World Trade Organization and the International Criminal Court, arguing that the Westphalian scheme creates irresolvable paradoxes within these regimes (section III). To facilitate this argument the article develops a model of paradoxicality in philosophy and law. Section IV explores alternative forms of validation which are claiming to fill the normative void that was caused by the demise of the Westphalian model. On close inspection these alternative principles emerge as equally problematic in terms of their coherence or completeness. Section V takes a step back by looking into the history of international legal theory. Historical examination demonstrates that international law has never been pure. I show that this impurity closely parallels the problem of grounding in philosophy, especially as reflected in the semantic paradox entitled 'the Truth-Teller Paradox'. The last part of this section explores the role of paradoxes in the dynamics of autonomous and self-organizing systems (such as law). But what then is unique in the current state of international law? This question is addressed in section VI which argues that what is unique in the current system of international law is not the impurity of our forms of validation - but the proliferation of multiple, paradoxical, validating techniques, which are invoked, simultaneously, at the forefront of the international legal body. The contemporary universe of transnational law is characterized by a shift from (imaginary) purity to multiple paradoxicality – a process of polymorphosis. But what are the practical consequences this process? The remainder of this article explores the sociological implications of this process, drawing on ideas from systems theory and ecology. It concludes with a discussion of the false promise of global constitutionalism, setting it against an alternative institutional model: non-hierarchical reflexivity.

II. PURITY: THE WESTPHALIAN NARRATIVE

The pure conception of international law aspired to provide a complete and coherent account of the structure of international law. In particular it argued that international law regulates – in a complete and coherent

fashion - the creation of new (international) norms.[2]. A succinct description of the Westphalian narrative can be found in an article published by Leo Gross in 1948:[3]

"The Peace of Westphalia… marks the end of an epoch which leads from the old into the new world… In the political field it marked man's abandonment of the idea of a hierarchical structure of society and his option for a new system characterized by the coexistence of a multiplicity of states, each sovereign within its territory, equal to one another, and free from any external earthly authority. The idea of an authority or organization above the sovereign states is no longer... This new system rests on international law and the balance of power, a law operating between rather than above states and a power operating between rather than above states".

In the legal domain the Westphalian narrative was translated into an articulated doctrine of validity and authority. This doctrine – in the form explicated here – constitutes what I call – the pure vision of international law.[4] One of the most eloquent advocates of the purity thesis was Josef Kunz. Kunz argued that international law regulates the creation of

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[2] For an historical account of the development of the theory of international law, see, for example, Martti Koskenniemi, THE GENTLE CIVILIZER OF NATIONS: THE RISE AND FALL OF INTERNATIONAL LAW 1870-1960 (2001) chapters 5 & 6 and Dinah Shelton, *Normative Hierarchy in International Law*, 100 American Journal of International Law 291 (2006).

[3] Leo Gross, *The Peace of Westphalia, 1648-1948*, 42 American Journal of International Law 20, 28-29 (1948). The Westphalian narrative was discussed in numerous articles and books. See, for example, Amos S. Hershey, *History of International Law Since the Peace of Westphalia*, 6 American Journal of International Law 30 (1912) and Andreas Osiander, *Sovereignty, International Relations, and the Westphalian Myth*, 55 International Organization 251 (2001).

[4] This vision can be associated of course with the positivistic school whose most obvious representative in the early 20th century is Hans Kelsen. See, Martti Koskenniemi, *Lauterpacht: The Victorian Tradition in International Law*, 8 *European Journal of International Law* 215, 216-217 (1997) and Jorg Kammerhofer, *Uncertainty in the Formal Sources of International Law: Customary International Law and Some of Its Problems* 15 European Journal of International Law 523, 548 (2004).

international norms through two, hierarchically ordered, procedures: custom and treaty: "Treaty and custom are two different, independent procedures for creating international legal norms".[5] Both are based on the notion of state consent. Custom, Kunz argued, is the hierarchically higher form of creating norms of international law. "Custom-produced general international law is the basis; the customary principle of 'Pacta sunt servanda' is the reason for validity of all particular international law created by the treaty procedure".[6] International law also lays down the conditions under which the procedure of custom creates valid norms of general international law. These two conditions are usage and opinio juris.[7] Jus cogens norms, to the extent that they have not been codified in treaties, constitute another type of customary law.[8] This legal articulation of the Westphalian narrative seeks to provide a complete and seemingly coherent account of the way in which international law regulates the creation of new norms. This account, although without explicit hierarchical order, also underlies article 38 of the Statute of the International Court of Justice, which states that international disputes

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[5] Joseph. L. Kunz, *The Nature of Customary International Law*, 47 The American Journal of International Law 662, 665 (1953).

[6] Kunz, *ibid*, 665. The status of the norm *pacta sunt servanda* as a norm of general international law is probably beyond doubt. Kunz argues that it constitutes "the axiom, postulate and categorical imperative of the science of international law" and is "undoubtedly a positive norm of general international law" Joseph. L. Kunz, *The Meaning and the Range of the Norm Pacta Sunt Servanda* 39 The American Journal of International Law 180 (1945). Its status received further recognition in the text of the Vienna Convention on the Law of Treaties, signed at Vienna, 23 May 1969, entered into force on 27 January 1980, 1155 U.N.T.S. 331 [hereinafter Vienna Convention] (see in particular the definitions of “ratification,” “acceptance,” “approval,” and “accession” in Article 2 of the Convention). See also: Paul Schiff Berman, *From International Law to Law and Globalization*, 43 Columbia Journal of Transnational Law 485, 487 (2005).

[7] Kunz, *supra* note 5, at 665. On the interpretation of these two conditions see further, Kammerhofer, *supra* note 4.

[8] See, Madeline Morris, *High Crimes and Misconceptions: The ICC and Non-party States* 64 Law and Contemporary Problems 13, 57 (2001) (with respect to the prohibitions against genocide, war crimes, and crimes against humanity).

should be resolved primarily through the application of international conventions and international custom.[9]

III. PARADOXES AND INCONSISTENCIES IN THE CURRENT INVOCATIONS OF THE WESTPHALIAN NARRATIVE

In describing the demise of the Westphalian legal order writers usually refer to processes of norm-development in non-state arenas, to the increasing importance of non-state actors such as Non Governmental Organizations ('NGOs') and Multinational Enterprises ('MNEs'), to the law-making powers of international tribunals and to the emergence of general principles of global humanitarian law.[10] However, despite the continuing talk about the demise of the Westphalian order its underlying principles of state sovereignty and state consent continue to play an important role in the structure of various international legal regimes. It is interesting, therefore, to consider the way in which the Westphalian scheme of validity (as postulated by Joseph Kunz and Leo Gross) is invoked in contemporary treaty regimes. This section explores this question in the context of two key treaty instruments: the World Trade Organization ('WTO') and the International Criminal Court ('ICC'). I will argue that the invocation of the Westphalian validity doctrine in these treaties generates deep inconsistencies that undermine its claim to provide coherent and complete foundations for modern international law.

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[9] Available at the ICJ website: http://www.icj-cij.org (basic documents). It is also echoed in Article 53 of the Vienna Convention which states that "A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law", thus reflecting the hierarchical order postulated by Kunz.

[10] For a general discussion of the demise of the Westphalian paradigm see: Gunther Teubner, 'Global Bukowina': Legal Pluralism in the World Society, In G. Teubner (ed.), *Global Law Without a State*, , pp. 3-30 (1997) and Berman, *supra* note 6.

Exposing the paradoxes and inconsistencies associated with the Westphalian doctrinal apparatus requires that I first elucidate the meaning of paradox in both logic and law. This theoretical detour also sets the ground for the broader thesis of this article – which explores the dynamic of the global legal system (sections V and VI).

A. DETOUR: PARADOXES AND INCONSISTENCIES IN THE LAW

1. PARADOXES: A GENERAL EXPOSITION

What do we mean by the concept of "paradox"? The term 'paradox' is sometimes used informally to designate a statement which conflicts with the common view.[11] Within the realm of law, this understanding can be applied to any legal claim which challenges a received legal opinion. I am interested in other forms of paradoxes, which do not reflect a transitory interpretative dispute, but rather expose a deeper social and linguistic problematic.

The philosophical literature offers various definitions of this more challenging understanding of the concept of paradox. Thus one view focuses on the deep inconsistency associated with paradoxes. Nicholas Rescher, for example, defines paradox as a "set of propositions that are individually plausible but collectively inconsistent".[12] Another view emphasises the paradox's problematical conclusion, taking paradox as "an argument that begins with premises that appear to be clearly true, that

[11] Thus, the definition of paradox in the Oxford dictionary opens with: "Statement contrary to received opinion". See *The Concise Oxford Dictionary of Current English* (1964, 5h ed) at 880.

[12] See Nicholas Rescher, *Paradoxes: Their Roots, Range and Resolution* (2001) at xxi.

proceeds according to inference rules that appear to be valid, but that ends in contradiction".[13] Other thinkers, such as W.V. Quine, have highlighted the reasoning pattern that generates the paradox. 'An antinomy produces a self-contradiction by accepted ways of reasoning. It establishes that some tacit and trusted pattern of reasoning must be made explicit and henceforward be avoided or revised'.[14] In light of these general reflections it is possible to distinguish between two major types of paradoxes.[15] Paradoxes of coherence expose a deep inconsistency in some well-defined set of sentences or propositions.[16] Semantical paradoxes involve the notions of truth, falsity and reference, and challenge the way we reason with these notions.[17]

To get a better sense of the notion of paradox let us consider a specific and famous example - the paradox of the liar.[18] Consider the following sentence

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[13] Charles S. Chihara, *The Semantic Paradoxes: A Diagnostic Investigation* 88 The Philosophical Review 590 (1979). For a similar view see: RM Sainsbury, Paradoxes (1995) at 1

[14] WV Quine, The Ways of Paradox (1966) at 7.

[15] This distinction is not exhaustive, see Rescher, *supra* note 12, at 72-73. .

[16] I use the term 'deep inconsistency' to distinguish such paradoxes from mere contradictions. The difference between the two terms lies in the way in which paradoxes make the contradiction appear inescapable. See Peter Suber, *The Paradox of Self-Amendment* 7 Stanford Literature Review 53 (1990). I will sometimes use the term 'logical paradoxes' to refer to this type of paradoxes.

[17] Another useful taxonomy is Quine's distinction between 'veridical' and 'falsidical' paradoxes (see Quine, *supra* note 14, at 4-5). Veridical paradox is, in effect, a truth-telling argument or proof; it establishes that some proposition is true or false (eg, the Barber Paradox). Falsidical paradox, in contrast, 'is one whose proposition not only seems at first absurd but also is false, there being fallacy in the purported proof'. A typical example is Zeno's paradox of Achilles and the tortoise.

[18] The discussion of semantical paradoxes involves of course the question of the meaning of truth and falsity. However, because of the deep controversy that exists within philosophy with respect to the meaning of truth I decided not to delve into this question.

K_1 This sentence is false (we can also present this sentence in the following format: 'K_1 K_1 is false').

K_1 produces a paradoxical loop: if it is true, it is false; and if it is false, it is true. This sentence refuses, so it seems, to be attributed with a stable truth value. It is possible to structure a similar paradox which is hetero-referential rather than self-referential. Consider the following set of sentences which, following Roy Sorensen, I will call the 'looped liar':[19]

Plato: what Socrates says is true
Socrates: What Plato says is false

Like the liar sentence it is impossible to attribute stable and coherent truth values to this pair.[20]

A feature common to the 'self-referential liar' and the 'looped liar' is their semantic instability: their perpetual oscillation between truth and falsity. [21] The 'Liar Paradox' and the 'looped liar' seem to suffer from some kind of semantic pathology, which is unsettling because of the way in which it

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One can find within philosophy five major theories of truth: the Correspondence Theory; the Semantic Theory; the Deflationary (or Minimalist) Theory; the Coherence Theory, and the Pragmatic Theory. For a useful introduction to this debate, see Bradley Dowden, 'Truth' in Fieser and Dowden (eds), *The Internet Encyclopedia of Philosophy* (2004), available at http://www.iep.utm.edu/t/truth.htm. Semantical paradoxes create a problem, though, for each of these theories. One initial assumption which I do make is that statements can be either true or false (the law of excluded middle).

[19] Roy Sorensen, A Brief History of the Paradox: Philosophy and the Labyrinths of the Mind (2003) at 211. This version of the liar can be traced back to the medieval thinker John Buridan (1295-1356). Sorensen, *ibid* , at 201-215.

[20] One can construct a liar-like paradox which is non-circular. See, Stephen Yablo, *Paradox without Self-Reference*, 53 Analysis 251 (1993).

[21] Hans Herzberger, *Naive Semantics and the Liar Paradox*, 79 The Journal of Philosophy 479, 482 (1982).

challenges our conventional grammatical structures, and our usage of basic notions such as truth and reference.[22]

2. PARADOXES IN LAW: INCOHERENCE AND PARALYSIS

Logical and semantical paradoxes have existed for more than 2000 years. Early versions of the liar paradox can be found in the Christian scriptures and in Greek and medieval writings.[23] These paradoxes have not, however, brought human thought to a stand-still. While philosophers have continued to deliberate about the proper solution to the Liar paradox people have continued to use the notions of truth and falsity in their every-day reasoning, and scientists have continued their search for true descriptions. However the presence of paradoxes and deep inconsistencies in the law seems more threatening, calling into question the capacity of the law to fulfil its function as a reliable arbiter of social conflicts and a source of normative expectations. Paradoxes can undermine these legal functions, either by leading to paralysis and deadlocks or by generating chaos and indeterminacy, causing people to replace the law with other forms of governance.

Thus, the puzzle of legal paradoxicality deserves closer scrutiny. The first step toward the resolution of this puzzle is to identify the proper referent of legal paradoxes. I think that the most suitable candidate for that role is what I will call a legal set: a sequence of sentences which invoke, explicitly or implicitly, the legal code (the distinction between legal and illegal). A legal set may include three major types of normative sentences: norms, norm-propositions (statements about norms), or meta-propositions (statements about the entire legal system).[24] These types of normative

[22] See also Adam Reiger, 'The Liar, the Strengthened Liar, and Bivalence' (2001) 54 Erkenntnis 195.

[23] Sorensen, *supra* note 19, at 197. Other paradoxes such as the paradoxes of motion, attributed to Zeno are also ancient, see Sorensen, *ibid*, at 49. Sorensen's book provides a comprehensive discussion of the history of paradox.

[24] See also: Jose Juan Moreso, *Putting Legal Objectivity in its Place*. In *Analisi e diritto* edited by G. Giappichelli, at 243 (2004).

sentences may be: prescriptive (ought to), permissive (may) or prohibitive (may not).[25] Law includes additional types of norms, such as norms conferring public or private powers— competence norms (the competence to issue other norms) or determinative norms (norms that define certain concepts).[26] One way in which a legal set may be formed is to extract a segment from the law's printed history (understood as the entire genealogy of rules and case law pertaining to a particular legal domain).[27] A paradox arises whenever a legal set, or a portion of it, is self-contradictory, and when this self-contradiction is supported by apparently good reasons.[28]

Two primary features of legal paradoxes distinguish them from logical and semantical paradoxes. These differences influence, as I will demonstrate, the practical consequences of paradoxes in law. The first distinctive feature of legal paradoxes concerns the unique composition of the legal

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[25] Sven Ove Hansson, *Situationist Deontic Logic* 26 Journal of Philosophical Logic 423, 428 (1997). 'All Israeli citizens are obligated not to emit sewage into the sea' is an example of a prohibitive norm. 'Israeli law prohibits the emission of sewage into the sea' is an example of norm proposition; it is a proposition about the existence of a legal norm. 'The Israeli legal system is a combination of the common law and civil law traditions' is a meta-proposition. Two other normative types which are mentioned in the literature are: 'it is gratuitous that' and 'it is optional that'. Something is gratuitous if and only if it is not obligatory, and it is optional if and only neither it nor its negation is obligatory. See, McNamara, Paul, "Deontic Logic", *The Stanford Encyclopedia of Philosophy (Spring 2006 Edition)*, Edward N. Zalta (ed.), URL = http://plato.stanford.edu/archives/spr2006/entries/logic-deontic/, section 1.2.

[26] For these further types see Eugenio Bulygin, *On Norms of Competence*, 11 Law and Philosophy 201 (1992).

[27] But one can also form a legal set by using second-order observations of the law – for example, by giving an account of a certain theory of law. Theorizing in law reflects either an attempt to study 'how far principles, notions, and rules for decision-making can be generalized' (Niklas Luhmann, *Law As a Social System* (2004) 54-5) or a meta-attempt to expose the general structure of the law. For more on the role and nature of legal theories, see David E. Van Zandt, *The Relevance of Social Theory to Legal Theory* 83 Northwestern University Law Review 10 (1989).

[28] A different but related problem is indeterminacy. See, further section V(2) below and the discussion of the truth-teller paradox.

set. Because legal sets may include both norms and propositional statements, their contradictory form is not limited to conflicting attributions of truth and falsity.[29] This is because norms are usually thought to lack truth-value.[30] The second distinctive feature of legal paradoxes, to which I will return later in sections V and VI, relates to their dynamic quality. It reflects the fact that law is a social system and not a static register of norms. In other words legal paradoxes influence the world of action, and should be examined with this in mind.

But let me delay for a moment the discussion of the systemic impact of legal paradoxes and consider them in light of the peculiarities of a legal set. I do not intend to provide here a formal account of the way in which legal-oriented sentences can relate to, or contradict, each other.[31] For my purposes, it will suffice to give an intuitive account of what is unique in legal inconsistency, and provide a few paradigmatic examples. A legal set may be inconsistent, first, when it can be shown to contain contradictory norms. Norms or rules can be contradictory, for example, when one rule permits what another forbids, when two rules issue contradictory directives (which cannot be simultaneously complied with).[32] A further form of inconsistency arises when one can find within a legal set conflicting interpretations of the same legal concept. Another form of inconsistency, which is unique to law, arises when one can show that a

[29] However, norm-propositions, propositions that state that a given action is *obligatory* (required), *permitted* (allowed), or *forbidden* (prohibited) *according* to a given norm, can have truth value.

[30] As Henrik von Wright puts it: "Norms *as prescriptions* of human conduct… may be pronounced (un)reasonable, (un)just, or (in)valid when judged by some standards which are themselves normative – but not true or false"; Henrik von Wright, *Is There a Logic of Norms*, 4 Ratio Juris 265, 266 (1991).

[31] Deontic logic represents an attempt to provide such a formalistic account. However, this formalistic presentation is not really necessary for the arguments presented here. See, eg, von Wright, *ibid* and McNamara *supra* note 25.

[32] See von Wright, *ibid*, at 270-1. This form of inconsistency could give rise to conflicting normative expectations.

legal set includes contradictory assignments of validity. The notion of validity plays, as I will argue later, a unique role in the law, something akin to the notion of truth in logic. It is the validity of the law that makes its normative statements binding.[33]

Let us consider two examples of legal paradoxes. Consider first a legal version of the liar paradox. I follow the conventional Deontic notation with OBp denoting 'it is obligatory that p'.

O_1 It is obligatory not to follow this rule. (This can also be presented as: O_1 $O{\sim}O_1$)

This statement (interpreted as a norm rather than norm-proposition) is clearly self-contradictory. It generates conflicting directives. It is similar to the following prescription:

O_2 It is obligatory not to smoke in bars and it is obligatory to smoke in bars.

The self-contradictory nature of O_1 and O_2 makes it impossible to satisfy them – their satisfaction set is empty. Impossibility is the pathological symptom that accompanies normative contradiction.[34]

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[33] Note, however, that since legal sets may also include 'normal' propositions, and may invoke classical reasoning patterns (Even if this is done only implicitly and non-exclusively) they can also be contradictory in the sense in which this notion is used in propositional logic (ie, through inconsistent attributions of truth and falsity). On the role of classical deductive patterns in legal reasoning see: Arend Soeteman, Legal *logic? Or can we do without?* 11 Artificial Intelligence and Law 197 (2003).

[34] I follow Vranas here; see Peter B. M. Vranas, *New foundations for deontic logic: A preliminary sketch*" Unpublished Manuscript, available at http://www.public.iastate.edu/~vranas/Homesite/papers/deonticweb.doc (2002), at section 3. Note however, that while O_1 and O_2 are self-contradictory, a norm-proposition that describes a norm which is self-contradictory can be true and non contradictory. See Lennart Aqvist, *Interpretations of Deontic Logic* 73 Mind 246, 249 (1964). It is also possible to construct looped contradictory obligations with similar consequences:

O_3 *You ought to follow rule* O_4.

The paradoxes of law tend however to be more subtle than these examples. So let us consider another less blunt example. This example follows the Greek story of Protagoras and Euathlus. I will follow the story as it was told by Aulus Gellius.[35] Protagoras ("the keenest of all sophists")[36] taught rhetoric and argumentation. Euathlus, who wished to be instructed in the art of oratory and the pleading of causes (what is called law today) became a pupil of Protagoras. It was agreed between the two that Euathlus will pay his fee after he won his first case.[37] After having been a pupil and follower of Protagoras for some time, and having made considerable progress in the study of oratory, Euathlus nevertheless had not undertaken any cases. Protagoras decided to demand his fee according to the contract, and he brought a suit against Euathlus.

Protagoras and Euathlus presented their arguments before the court. Protagoras began as follows:[38]

O_4 *You ought not to follow rule* O_3.

[35] Aulus Gellius, *The Attic Nights of Aulus Gellius* (c. 150 C.E.), trans. John C. Rolfe, 3 vols., The Loeb Classical Library, Harvard University Press, rev. ed., vol. I, Book V, x, pp. 405-09 (1946). All the following quotes are from Gellius, *ibid.* This account was written roughly 600 years after the events (if they indeed occur) since it is assumed that Protagoras lived from 492 to 421 B.C.E. See, J. A. Davison, *Protagoras, Democritus, and Anaxagoras* 3 The Classical Quarterly 33, 38 (1953). This paradox was discussed by other ancient writers. See, for details Jordan Howard Sobel, *The Law Student and his Teacher* LIII Theoria 1 (1987).

[36] Gellius, *ibid* at 405. *Protagoras* has drafted the constitution of Thuria and taught in the Sicilian School of rhetoric. See, Davison, *ibid*, at 33.

[37] Gellius writes that *Euathlus* paid *Protagoras* half of the fee before beginning his lessons, and agreed to pay the remaining half "on the day when he first pleaded before jurors and won his case", *ibid* at 407.

[38] Gellius, *ibid* at 407.

"Let me tell you, most foolish of youths, that in either event you will have to pay what I am demanding, whether judgment be pronounced for or against you. For if the case goes against you, the money will be due me in accordance with the verdict, because I have won; but if the decision be in your favour, the money will be due me according to our contract, since you will have won a case".

To this Euathlus replied:[39]

"I might have met this sophism of yours, tricky as it is, by not pleading my own cause but employing another as my advocate. But I take greater satisfaction in a victory in which I defeat you, not only in the suit, but also in this argument of yours. So let me tell you in turn, wisest of masters, that in either event I shall not have to pay what you demand, whether judgment be pronounced for or against me. For if the jurors decide in my favour, according to their verdict nothing will be due you, because I have won; but if they give judgment against me, by the terms of our contract I shall owe you nothing, because I have not won a case".

Gellius concludes the story by noting that the court was struck by the intricacy of the arguments and refused to give a ruling:[40]

"… the jurors, thinking that the plea on both sides was uncertain and insoluble, for fear that their decision, for whichever side it was rendered, might annul itself, left the matter undecided and postponed the case to a distant day. Thus a celebrated master of oratory was refuted by his youthful pupil with his own argument, and his cleverly devised sophism failed".

The story of Protagoras and Euathlus reveals an internal paradox within the normative structure governing this case, leading – at least according to Gellius – to a decisional paralysis. To make the paradox more precise let us disentangle the story into a series of norms and norm-propositions.

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[39] Gellius, *ibid* at 407-9.

[40] Gellius, *ibid* at 409.

(1) In deciding a contractual dispute a Court should give effect to and enforce the contractual commitments made by the parties.
(2) According to the contract made between Protagoras and Euathlus, Euathlus will pay the full fee only after he won his first case. Protagoras brought a suit against Euathlus claiming his fee. This was Euathlus' first case.
(3) Hence, by (1) Protagoras' suit should be rejected since at the time the court was required to give a ruling, the contractual condition had not been fulfilled.
(4) If the court rejects Protagoras' suit (ruling for Euathlus), it will, by this very act, fulfill the contractual condition, thus completing Protagoras' cause of action.[41]
(5) Hence, by (1) Protagoras' suit should be accepted.
(6) If the court accepts Protagoras' suit, Euathlus will in fact lose; by its ruling the Court will cause the contractual condition not be fulfilled.
(7) Hence, by (1) Protagoras' suit should be rejected.

Statements (3) and (5) and (7) are clearly contradictory. Attempting to reason about the correct legal answer leads to a seemingly insoluble oscillation, in which a ruling for Euathlus, leads to a ruling for Protagoras, leading to a ruling for Euathlus ad infinitum.[42] The paradox is generated by the fact that – due to the contract's peculiar structure – the correct legal answer (which should be reflected in the ruling) depends in an unsettling way on the court's ultimate ruling.[43] This pathological oscillation is similar to the semantic instability generated by the liar paradox; in the legal context it may lead to judicial paralysis, as indeed was reported by Gellius. However, in law paralysis is not an acceptable option. Legal decisions

[41] This proposition builds on the fact that the ruling operates as a performative speech-act. Such speech-acts have the capacity of making themselves true or binding by being pronounced in adequate circumstances. See, Lennart Aqvist, *Some Remarks on Performatives in the Law* 11 Artificial Intelligence and the Law 105, 106, 110 (2003).

[42] See also on this point, Sobel, *supra* note 35, at 10.

[43] See Sobel, *ibid*.

unlike decisions in science, math or philosophy cannot be deferred to a later date.[44] That decisions must be made is, in itself, a basic norm of any legal system.

Indeed, the praxis of law seems to adhere to this basic precept showing little signs of paradoxical stoppages. This may signal that the role paradoxes are playing in law is not really pathological. But let us return to the story of Protagoras and Euathlus. Despite its seemingly insolubility there are several ways in which this paradox may be resolved. They are based on two primary techniques: introducing a distinction (reinterpretation) or appealing to external principles.

Consider, first, the option of reinterpretation. The court has several ways to reinterpret the foregoing problematic normative cluster. The first option disentangles the temporal components of the paradox. In determining the status of the parties' rights and obligations the court does not need to take a forward looking approach; that is, it does not have to consider the consequences of its ruling on the parties contractual obligations. Rather it needs only to assess their rights as they are at the moment of its decision. According to this interpretation (3) represents the correct decision, implying that Protagoras suit was premature, and (5) and (7) are simply incorrect. This interpretation lays the foundation, though, for a future suit by Protagoras.[45] Another approach seeks to resolve the paradox by focusing on its self-referential aspect. Thus the phrase ‘first case’ may be interpreted as not applicable to a case involving Protagoras and Euathlus as parties, thus barring the problematic self reference that is generated by the contract. This requires us to reformulate (2) again resolving the paradox (leading to a ruling against Protagoras).

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[44] This is not always recognized by philosophers. Thus, Jordan Howard Sobel notes for example that "rather than reach a final disposition in the case a court might be moved to *suspend* the case, to put off or postpone judgement to a later day. This action could recommend itself as a desperate expedient to avoid self-contradiction: *deferral* could recommend itself to a court that considered, whether correctly or incorrectly, that it had no other way out of a logical trap"; Sobel, *ibid*, at 4.

[45] This solution was pointed to by Leibniz who discussed this paradox in one of his papers. See Sobel, supra note 35, at 7-9. See also Peter Suber, The Paradox of Self-Amendment: A Study of Law, Logic, Omnipotence, and Change (1990) available online at http://www.earlham.edu/~peters/writing/psa/ , section 20(A).

While the foregoing solutions are not uniquely legal the appeal to external principles reflects an a-logical approach, because it does not seek to resolve the paradox through the introduction of further distinctions but rather dissolves it through an appeal to hierarchically superior normative principles. Thus, the court may invoke the 'good-faith' principle, and conclude that Protagoras' scheme was dishonest. Alternatively, the contract could be revised in equity. Euathlus could be ordered to pay earnest money while making a reasonable effort to take on another case or to pay reasonable sum for the time Protagoras had already devoted to his instruction.[46]

B. PARADOXES IN THE WESTPHALIAN ORDER: THE CASES OF THE WORLD TRADE ORGANIZATION ('WTO') AND THE INTERNATIONAL CRIMINAL COURT ('ICC')

This section explores the deep inconsistency that is associated with the Westphalian scheme of validity as it is invoked in two key treaty-regimes: the WTO and the ICC. This deep inconsistency is generated, as we shall see, by the fact that both regimes cling to the traditional Westphalian scheme, while simultaneously introducing conflicting validation and law making techniques.

1. THE CASE OF THE WORLD TRADE ORGANIZATION ('WTO')

> *"the World Trade Organization (WTO) is the only international organization dealing with the global rules of trade between nations. Its main function is to ensure that trade flows as smoothly, predictably and freely as possible"*[47].

[46] See further, Suber, *ibid*.

[47] *See, 'The WTO... In brief', www.wto.org/english/thewto_e/whatis_e/inbrief_e/inbr00_e.htm, visited 11 March 2007.*

At first glance the WTO looks like a classic product of the Westphalian order. The WTO regime is the product of a complex web of treaties which were signed in 1994 after a long negotiation process (the Uruguay Round (1986-1994)).[48] The constitutional core of this web consists of two agreements the Agreement Establishing the World Trade Organization ('the WTO Agreement'), which is the umbrella instrument, and the Understanding on Rules and Procedures Governing the Settlement of Disputes ('the DSU'), which establishes the WTO legal system.[49]

The WTO Agreement and the DSU include various provisions which allude to the Westphalian notion of validation, with its emphasis on state consent and the associated ideal of national sovereignty. Thus, for example, Article XIV of the WTO Agreement, which deals with 'Acceptance, Entry into Force and Deposit' and Article XII, which deals with 'Accession', provide that accepting the authority of the WTO requires a formal act from the joining state. The WTO does not claim to have universal jurisdiction. In the same spirit Article XV, which deals with the issue of 'Withdrawal' states that "Any Member may withdraw from this Agreement". Finally, the DSU, which governs the settlement of disputes, includes a provision which seeks to protect the rights of the Member States, and to preclude the possibility that these rights will be altered by the WTO judicial bodies. Article 3(2) of the DSU states that (my emphasis):

The dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system. The Members recognize that it serves to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law. Recommendations and

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[48] World Trade Organization, *Understanding the WTO* (2003, 3rd edition).

[49] The DSU is annexed to the WTO Agreement (Annex 2, Article III(3)) and thus derives its validity from the former agreement.

rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements.

The Westphalian vision, reflected in the provisions quoted above, postulates the WTO as a highly controllable entity that is completely dependent on the states that have established it. Article 3(2) of the DSU gives the WTO judicial bodies a very limited role: they are expected merely to preserve the rights and obligations of Members under the covered agreements and to clarify their meaning. Article 3(2) thus portrays the WTO as a static normative space, whose contours were totally determined by the Member states.

This portrait of the WTO system fails to appreciate, however, the highly autonomous character of the WTO legal system.[50] It disregards the powers of the WTO new legal system, which - contra to the above portrait – has been actively shaping the normative field of the WTO – independently of the wishes and preferences of the Member states. This autonomy is formally codified in articles 23, 16:4 and 17:14 of the DSU, which jointly transform the WTO dispute settlement mechanism into an obligatory system, insulated from political intervention. In various rulings since 1995 the WTO judicial bodies have created new rights and obligations, which have not existed as such before these decisions, and depart substantively from the legal tradition of the GATT.[51]

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[50] This tension is highlighted also by Sol Picciotto: "The WTO's dispute settlement procedures involved a significant shift toward a more legalistic model of adjudication than in the GATT… Nevertheless, the legitimacy of WTO rules is still defended on the grounds that they have been agreed by governments". Sol Picciotto, *The WTO's Appellate Body: Legal Formalism as a Legitimation of Global Governance*, 18 Governance 477, 495 (2005).

[51] On the norm-making powers of the WTO tribunals see Andrew Guzman, *Global Governance and the WTO*, 45 Harvard International Law Journal 303, 347 (2002), Picciotto, *ibid* and Oren Perez, Ecological Sensitivity and Global Legal Pluralism: Rethinking the Trade and Environment Conflict (2004), chapter 3. Two prominent examples of law making by the WTO judicial bodies are the Appellate Body decision that both it and the panels have a wide discretion to accept *amicus curiae* briefs from non-state parties and its novel interpretation to Article XX. For a discussion of these issues see Perez, *ibid*, at 65-80, 100-105. See also paras 79-91 and 99-110 to *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R, 12 Oct 1998 (Appellate Body Report) and paras 50-57 to *European Communities - Measures Affecting*

2. THE INTERNATIONAL CRIMINAL COURT

> *"The International Criminal Court (ICC) is an independent, permanent court that tries persons accused of the most serious crimes of international concern, namely genocide, crimes against humanity and war crimes".*[52]

A similar tension also exists in the new regime of the International Criminal Court ('ICC'). The ICC was created after long and protracted negotiations, which culminated in the adoption of the Rome Statute on 17 July 1998.[53] The Statute provides that the ICC will have jurisdiction over crimes of genocide, certain crimes against humanity, and certain war crimes. On first reading the ICC seems like another prototype of the Westphalian model - a treaty produced through inter-state bargaining. This conclusion is supported by Article 126(1) of the Rome Statute which stipulates that the Statute shall enter into force after the deposit of the 60th instrument of ratification, acceptance, approval or accession with the Secretary-General of the United Nations. This provision refers to the principle of 'pacta sunt servanda' as the treaty source of validity. The Westphalian order also underlies Article 4(2) which deals with the legal status and powers of the Court and provides that "The Court may exercise its functions and powers, as provided in this Statute, on the territory of any State Party and, by special agreement, on the territory of any other State".[54]

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the Prohibition of Asbestos and Asbestos-Containing Products, WT/DS135, 18 September 2000 (Appellate Body Report) (*'EC-Asbestos'*) (on the *amicus* briefs question) and the *Shrimp decision*, paras. 153-159 in particular, on the interpretation of article XX.

[52] See: About the Court, at http://www.icc-cpi.int/about.html, visited 11 March 2007.

[53] By the United Nations Diplomatic Conference on the Establishment of an International Criminal Court.

[54] My emphasis.

However, on closer inspection the ICC treaty seems to include provisions which visibly challenge the Westphalian validity scheme.[55] This is reflected in the Statute's claim to hold jurisdiction over citizens of non-parties,[56] in the establishment of new universal criminal norms which transcend customary international law as it existed prior to the establishment of the Rome Treaty,[57] in the formal legal recognition of non-state actors (victims and NGOs),[58] and finally in the decision-making powers which are given to the Court.[59]

It is worthwhile to explore more closely the nearly universal jurisdiction which is given to the Court in Article 12. Article 12 provides the Court with a jurisdiction over persons who are not citizens of one of the signatories to the ICC. According to Article 12 the ICC has jurisdiction to prosecute a national of any state when crimes within the court's subject-matter jurisdiction are committed on the territory of a state that is a party

[55] For a more detailed discussion of the tension between the ICC regime and the Westpahlian validity scheme see Jackson N. Maogoto, *The Final Balance Sheet? The International Criminal Court's Challenges and Concessions to the Westphalian Model*, ExpressO Preprint Series. Working Paper 1402 4, 14 (2006), Leila Nadya Sadat and Richard Carden, *The New International Criminal Court: An Uneasy Revolution*, 88 Geo. L.J 381, 385, 390-391 (2000) and Morris, *supra* note 8, at 30-33.

[56] Article 12.

[57] Articles 5-8.

[58] Through Article 15 which provides that the prosecutor may initiate investigations on the basis of information received from non-governmental organizations, Maogoto *supra* note 55, at 7.

[59] See, in particular Article 19(1) ("The Court shall satisfy itself that it has jurisdiction in any case brought before it"), Article 21 (providing the court with the power to derive new international legal principles from "national laws of legal systems of the world" and Article 119(1) (endowing the Court with the authority to settle disputes "concerning the judicial functions". See further Morris, *supra* note 8, at 30-33.

to the treaty or that consents to ICC jurisdiction for that case.[60] The court is thus empowered to exercise jurisdiction even in cases in which the defendant's state of nationality is not a party to the treaty and does not consent to the exercise of jurisdiction.[61] The jurisdictional principle underlying article 12 stands in stark contrast to the constitutional principle of 'state consent'. This deviation is particularly striking when the ICC treaty is compared to the ICJ Statute and the ICJ jurisdictional jurisprudence.[62]

Some proponents of the ICC Treaty have tried to explain this internal inconsistency within the ICC treaty by arguing that the Court's jurisdiction over the nationals of non-party states is based, in effect, on existing principles of customary international law. According to this view the ICC jurisdiction is based "upon the principles of universal jurisdiction pursuant to which the courts of any state may prosecute the nationals of any state for certain serious international crimes. Since any individual state could prosecute perpetrators regardless of their nationality, they reason, a group of states may create an international court empowered to do the same".[63] In a recent article Madeline Morris demonstrated convincingly that this thesis has no basis in contemporary customary international law. First, the delegated universal jurisdiction theory does not account for a number of crimes within the subject-matter jurisdiction of the ICC that are not subject to universal jurisdiction. Second, the intricate institutional structure which was established by the Rome Treaty, with the unique enforcement and interpretative powers it provides to the Court and the Prosecutor, creates a

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[60] This is in addition to jurisdiction based on Security Council action under Chapter VII of the UN Charter and jurisdiction based on consent by the defendant's state of nationality.

61. See on this point: Jordan J. Paust, *The Reach of ICC Jurisdiction over Non-Signatory Nationals*, 33 VAND. J. TRANSNAT'L L. 1 (2000) and Morris, *supra* note 8, at 13-14.

[62] See Morris, *ibid*, at 20-21.

[63] See Morris, *ibid*, at 27-28. See also Jordan J. Paust, supra note 61 at 3.

legal environment which is radically different from the one envisioned by the decentralized model that existed prior to the establishment of the ICC. Thus consent to the exercise of universal jurisdiction by individual states is not equivalent to consent to universal jurisdiction delegated to an international court.[64]

IV. ALTERNATIVE FORMS OF NORMATIVE GROUNDING

The Westphalian doctrine of validity, with its emphasis on consensual norm creation through state negotiation, does not seem to cohere with contemporary legal practices. The normative deficit that was created by the demise of the Westphalian scheme is being populated by alternative forms of validation. Four legal ideas emerge as particularly noteworthy in this respect and I will discuss each of them briefly: global democracy, deference to non-legal rationalities, direct individual consent and the new association between law and technology. These alternative schemes challenge the classic conceptions of international law, generating a new and deeply complex legal universe.[65] However, as we consider each of these alternative schemes more closely it becomes obvious that the project of providing solid foundations to the international legal system fails not just because of the deep differences between these varied normative schemes, but also because when considered separately they yield inconsistencies that are as problematic as the ones generated by the conventional Westphalian doctrine. These horizontal and intrinsic paradoxes cast doubt upon the claim that these alternative doctrines provide a new, universal model of validity.

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[64] Some authors have tried to explain the UCC jurisdiction by appealing to universal moral principles. I will return to that issue below, section IV(b).

[65] This complexity cannot be captured by uni-dimensional concepts such as the "proliferation of international judicial bodies", Guillaume, *supra* note 1. For a discussion of this complexity in the context of UNCITRAL see Maria Panezi and Peer Zumbansen, 'The United Nations Commission on International Trade Law (UNCITRAL)', forthcoming in the Encyclopedia of Public International Law (2008).

A. GLOBAL DEMOCRACY?

Global democracy is invoked increasingly—in both theory and practice—as a new form of validation which imagines the democratic principle as a truly global idea, thus undercutting the role of the state. Unlike the idea of global democracy the Westphalian doctrine has limited aspirations regarding the regulation of the political process.[66] The consent requirement underlying the Westphalian doctrine was interpreted as a purely formalistic condition of constitutional adequacy,[67] which does not set substantive conditions to national political structures. Some authors have tried to offer a more democratic interpretation of the Westphalian narrative by arguing that the principle of consent should be read as a requirement to subject the transnational diplomatic process to a meaningful domestic political scrutiny. This interpretation seeks to portray the act of consent as a product of meaningful political deliberation.[68] However, under the Westphalian scheme the state retains the authority to structure the domestic political process. Further, the political model that emerges from this interpretation is highly fragmented – unlike the unified vision underlying the model of global democracy.

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[66] Thus, the only hint in the Vienna Convention to the possible tension between the formal consent of the state and the will of the people is indirect. Article 46 provides that: "(1) A State may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law regarding competence to conclude treaties as invalidating its consent *unless that violation was manifest and concerned a rule of its internal law of fundamental importance*; (2) A violation is manifest if it would be objectively evident to any State conducting itself in the matter in accordance with normal practice and in good faith." (my emphasis).

[67] .*Id.* art. 7.

[68] .*See, e.g.*, Ernst-Ulrich Petersmann, *Dispute Settlement in International Economic Law: Lessons for Strengthening International Dispute Settlement in Non-Economic Areas*, 2 J. INT'L ECON. L. 189, 231 (1999).

However the model global democracy is deeply problematic in terms of its underlying principles and possible applications. In terms of its theoretical underpinnings the vision of global democratization is torn between several potentially conflicting commitments. The proponents of global democratization invoke several core commitments. First a commitment to inclusiveness and open decision-making structures. Second, a commitment to decision-making based on open and rational deliberation, geared toward consensual agreement. Third, a commitment to individual freedom and fundamental human rights. Fourth, a commitment to the value of cultural pluralism. And finally, a commitment to embed these core commitments in global governance institutions.[69]

These commitments conflict in various ways. First, the establishment of strong global institutions - replacing the fragmented and relatively weak bodies that characterize the contemporary international order - is in tension with the commitment to individual freedom and cultural pluralism. As the distance between the global political center and the citizen-body grows, so does the risk that the voice of the citizen and the local community will be ignored. A strong central establishment constitutes, therefore, a risk to individual freedom and cultural pluralism. Second, it is not clear whether the commitment to open deliberation and consensual decision-making can be realized given the vast cultural and ideological differences that characterize the contemporary global society. It is not clear what kind of criteria could guide this deliberative effort, given that choosing any particular criterion could jeopardize the commitment to pluralism. The political institutions of majority voting and parliamentary representation offer a way to circumvent this normative deficit, but do not resolve it.

[69] See, David Held, Cosmopolitanism: globalization tamed? 29 *Review of International Studies* 465 (2003) and Michael Walzer International Society: What is the Best that We Can Do? *Occasional Papers, School of Social Science, Institute for Advanced Study ,June 2000, Paper Number* 8.

These dilemmas have been apparent in the few attempts to implement the vision of global democracy in practice. Thus, for example, in 2000, the Internet Corporation for Assigned Names and Numbers ("ICANN") made an ambitious attempt to develop a governance structure based on electronically-mediated model of representative democracy. ICANN tried to use the Internet to create legitimacy, first by opening its decision-making process to the public (transparency), and second by conducting global, internet-based elections for its central governing body (the 'At Large Membership Program'). This attempt has failed however (leading ICANN to abandon its democratic aspirations), and was heavily criticized in terms of its failure to achieve true global representation and responsiveness to civic concerns.[70] Other institutions – such as the Global Reporting Initiative ("GRI") – have established multi-stakeholder consultation processes, reflecting a commitment to consensual decision-making.[71] But despite the relative success of the GRI, it remained confined to a limited filed - sustainability reporting – making no claim for global applicability. The tensions which underlie the theoretical articulations of the idea of global democracy were not resolved by the few practical attempts to design global democratic institutions. The idea of global democratization remains a deeply contested notion, both in theory and in practice.

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[70] ICANN's experiment failed in the sense that ICANN has radically changed its governance structure, adopting a much milder concept of democracy. Nonetheless ICANN's experiment still constitutes an important mile stone in the attempts to transform the abstract idea of global democratization into a practical model. For a detailed discussion and critiuqe of ICANN's democratic experiment see, John G. Palfrey, *The End of the Experiment: How ICANN's Foray Into Global Internet Democracy Failed*, 17 Harvard Journal of Law & Technology 410, 412 (2004).

[71] Details about the GRI can be found at http://www.globalreporting.org. The World Wide Web Consortium provides another example of an attempt to design global standards through multi-stakeholder consultation (see http://www.w3.org/ respectively). The rule-making process at the International Organization for Standardization is a good example of a consensual structure among closed communities; see: Oren Perez, Global Legal Pluralism and Electronic Democracy, In R. Gibson, A. Roemmele and S. Ward (eds.), *Electronic Democracy: Mobilisation, Organisation and Participation via New ICTs*, (2004), pp. 133, 143.

B. DEFERENCE TO NON-LEGAL RATIONALITY

The attempt to look for grounding in external, non-legal rationalities has been most visible in the field of human rights. The appeal to universal moral principles as a ground for new global legal norms is particularly noteworthy in two contexts: the problematic jurisdiction of the International Criminal Court and the question of humanitarian intervention. Thus, some authors have tried to justify the novel ICC jurisdiction by what amounts, in effect, to a direct appeal to moral principles. The ICC treaty belongs, it was argued to a new genre of treaties that are "globally binding because they foster the common interests of humanity".[72] In the context of humanitarian intervention authors have argued for the emergence of a new grund norm: a principle of "civilian inviolability".[73]

But the appeal to this new source of validity seems problematic not only because the choice of the pivotal norm seems somewhat arbitrary, but also because the meaning of the proposed norms remains deeply fuzzy. As Madeline Morris argued in a recent article (her argument is directed against the first thesis, but its logic is equally applicable to the second): "A threshold problem with the theory of global treaties is that there will

[72] Morris, *supra* note 8, at 52.

[73] See Anne-Marie Slaughter and William W. Burke-White, *An International Constitutional Moment* 43 HARV. INT'L L.J. 1 (2002). Other authors have proposed a different principle 'a responsibility to protect' See, e.g., Gareth Evans and Mohamed Sahnoun, *The Responsibility to Protect*, 81 Foreign Affairs 99 (2002)*;* Bruce, W. Jentleson, *A Responsibility to Protect* 28 Harvard International Review 18 (2007). See also Held, *supra* note 69 (arguing for a new global order based on two meta-moral principles: the metaprinciple of autonomy and the metaprinciple of impartialist reasoning, ibid, at 471, 472). For a critique of Slaughter and Burke-White view (which is applicable to the other proposals), see Andreas Fischer-Lescano, Redefining Sovereignty via International Constitutional Moments? In *Redefining Sovereignty: The Use of Force after the End of the Cold War. New Options, Lawful and Legitimate?*, edited by M. E. O'Connell, M. Bothe and N. Ronzitti (2005) and Jean L. Cohen, *Whose Sovereignty? Empire Versus International Law 18* Ethics and International Affairs 1 (2004).

inevitably be disagreement about what in fact will serve the common interests of humanity. An equally formidable problem confronting the theory of global treaties is that, even if that which would serve the common interests of humanity could be dispositively identified, that alone would not bind states who would find unacceptable a particular distribution of the burdens involved in serving those interests".[74] The deep vagueness of these new postulated norms calls for further interpretation, and sets the ground for interpretative disputes.[75] It is not clear what criteria will govern such disputes and which authority will decide them. The suggested new grund norms do not resolve such questions.

Similar appeals to non-legal rationalities can be found in other domains. Thus in the environmental domain we can find reference to new environmental ethics epitomized in the concepts of sustainable development[76] and the precautionary principle.[77] Environmental ethics provides an additional and independent mode of justification, operating alongside other forms of groundings.[78] Science has also been used

[74] Morris, *supra* note 8, at 52.

[75] Similar problems affflict the question of humanitarian intervention, see, e.g., the debate in the special issue *INTERNATIONAL LEGAL THEORY*, Vol. 7(1) Spring 2001, http://law.ubalt.edu/cicl/ilt/ILT_VII_1.pdf.

[76] On the principle of sustainable development see, Benjamin J. Richardson and Stepan Wood (eds), *Environmental Law for Sustainability* (2006) especially chapter 1 (13-17) and chapter 11 (373-75).

[77] On the precautionary principle see, Richardson and Wood (eds), *ibid*, chapter 11 (361-64).

[78] Thus two prominent examples are the WTO Agreement, which includes in its preamble a reference to the principle of Sustainable Development, and the Global Reporting Initiative 2006 Sustainability Guidelines, which open with a reference to the principle of Sustainable Development. The WTO tribunals have relied on the invocation of the principle of sustainability in justifying their new (pro-environment) interpretation of article XX; see: *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, *supra* note 51, at paras. 153 and 155. For a discussion of the WTO trade and environment jurisprudence see Perez, *supra* note 51, chapter 3.

increasingly as mode of grounding, especially and in the trade and environment domains.[79] In both of these domains, the problems of choosing between the competing external sources and the indeterminacy of the external principles remain unresolved.[80] We are confronted, again, not just by conflicting interpretations of the same a-legal rationality (e.g., environmental ethics), but also by deep uncertainty as to how these distinct rationalities relate to each other. There seem to be no agreement with respect to how these competing forms of rationality could be ranked and their domains of applicability defined. Indeed, there is no unified moral theory that could bring these different world views under a single umbrella in a way that would be globally accepted (successfully bridging between the cultural-moral disagreements that characterize the contemporary global society).

C. INDIVIDUAL CONSENT

The doctrine of individual consent forms a third pattern of validation. The idea of individual consent draws both on universal principles of contract law and on the ethos of liberal individualism, with its strong emphasis on

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[79] A good example is the deference to science in the the WTO Agreement on the Application of Sanitary and Phytosanitary Measures ('SPS Agreement') definition of risk assessment (with science rather than law provides the criteria for proper risk assessment), see Articles 2, 5 and Annex A(4). For a discussion, see Perez, ibid, chapter 4. The Climate Change Convention, provides another example, through its reliance on the work and judgement of the Intergovernmental Panel on Climate Change ('IPCC'). See, http://www.ipcc.ch/.

[80] E.g., Oren Perez, The Institutionalization of Inconsistency: from Fluid Concepts to Random Walk. In *Paradoxes and Inconsistencies in Law*, edited by O. Perez and G. Teubner (2006) 148-156 and Oren Perez *Anomalies at the Precautionary Kingdom: Reflections on the GMO Panel's Decision* 6 World Trade Review (Summer 2007) 1-16 (with respect to the vagueness of the precautionary principle), and David G. Victor, *Recovering Sustainable Development*, 85 Foreign Affairs 91, 92 (2006) with respect to the vagueness of the sustainability paradigm (noting that "UN summits that have yielded broad and incoherent documents and policies. Sustainable development, the compass that was designed to show the way to just and viable economics, now swings in all directions").

freedom of choice and self-determination.[81] This form of validation claims to free international law from its traditional reliance on the state as a necessary perquisite for the making of global norms. The concept of individual consent plays a particularly central role in two fields of international law: international arbitration and internet law. Yet, as with the other techniques this concept yields deep and unresolved puzzles.

Consider, first, the arbitration field. An increasing number of international disputes are being adjudicated today in global arbitration centers. This trend can be attributed both to the legal regime which was created by the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards and to a general expansion in the number of international business transactions.[82] The New York Convention ensures worldwide exclusive jurisdiction to arbitration proceedings based on valid arbitration agreements, provides procedures for the recognition and enforcement of foreign awards, and limits the grounds on which domestic courts can refuse requests for enforcement to a few basic procedural defects. The New York Convention is therefore not just a mechanism of enforcement; through the principle of non-interference it has facilitated the emergence of a new global law, which is insulated from the influence of inter-state politics.[83] The normative space that was created by the New York Convention has been filled by a new a-national system of

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[81] See B. Schwartz, *Self-determination. The Tyranny of Freedom*, 55 American Psychologist 79 (2000) and Wendy Larner, *Neo-liberalism: Policy, Ideology, Governmentality*, 63 Studies in Political Economy 5 (2000).

[82] See Pedro Martinez-Fraga, *The Convergence of Legal Cultures in Arbitration and Amendments to the New York Convention: If it is Not Broken, Why Fix it, but if it is Good, Make it Better*, Jean Monnet/Robert Schuman Paper Series, Vol. 6 No. 20 (October 2006) at 12 . Similar increase has taken place at the field of investment arbitration, see Luke Eric Peterson, *The Global Governance of Foreign Direct Investment: Madly Off in All Directions*, Occasional Papers, Dialogue Globalization, N° 19 (May 2005) at 12-14.

[83] As of 12 March 2007 the Convention had 142 parties. An updated data about the status of the Convention can be found at UNCITRAL web-site at http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html (visited 12 March 2007).

international commercial law, the new lex mercatoria,[84] and a new institutional apparatus, comprised of independent arbitrators and several permanent arbitral centers such as the International Chamber of Commerce International Court of Arbitration ('ICC Court'), the London Court of International Arbitration ('LCIA') and the US International Centre for Dispute Resolution.[85] But trying to unfold the normative status of this new nexus of norms and institutions reveals a deep puzzle. How can a system that is based on disaggregated and discontinuous contractual arrangements (arbitration clauses),[86] claim, simultaneously, for a continuous and permanent legal presence?

The ICC Court constitutes a particularly fascinating example of this existential paradox. The ICC Court Dispute Resolution Rules[87] draw their validity from the parties' consent.[88] What is interesting with respect to the ICC Court is that in contrast to conventional arbitration, the ICC rules

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[84] See, for the new lex mercatoria, Alec Stone Sweet, *The new Lex Mercatoria and Transnational Governance*, 13 Journal of European Public Policy 627 (2006) and Peer Zumbansen, Peer, *Sustaining Paradox Boundaries: Perspectives on Internal Affairs in Domestic and International Law*, 15 *European Journal of International Law* 197 (2004).

[85] See, respectively http://www.iccwbo.org/court/arbitration, http://www.lcia-arbitration.com/ and http://www.adr.org. For other International Arbitration Centers see: http://www.constructionweblinks.com/Organizations/International__Organizations/arbitration_centers.html#america (visited 20 March 2007).

[86] The reliance on arbitration clauses is reflected both in the language of the New York Convention, which limits its jurisdiction to valid arbitral agreements (Article II(3), and in the websites of the arbitral centres mentioned above which provide their prospective clients with recommended arbitration clauses (see the websites of the ICC Court and LCIA, *ibid*.). A typical arbitration clause (from the ICC): "All disputes arising out of or in connection with the present contract shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with the said Rules." See, http://www.iccwbo.org/court/arbitration/id4114/index.html, visited on 28 February 2007.

[87] See: http://www.iccwbo.org/court/arbitration/id4199/index.html.

[88] See Article 6 to the Rules.

provide the Court with the authority to scrutinize an award.[89] Under the ICC Rules the Arbitral Tribunal is required to submit its award in draft form to the Court. According to Article 27:[90]

"Before signing any Award, the Arbitral Tribunal shall submit it in draft form to the Court. The Court may lay down modifications as to the form of the Award and, without affecting the Arbitral Tribunal's liberty of decision, may also draw its attention to points of substance. No Award shall be rendered by the Arbitral Tribunal until it has been approved by the Court as to its form".

Commentators note that in scrutinizing the award the Court focuses on issues such as the completeness of the award, its adherence to the ICC Rules and the governing national law, internal consistency, and whether it is sufficiently reasoned, before authorizing its issuance to the parties.[91] Although the Court cannot compel the arbitrators to take account of its comments with respect to substance, arbitrators usually take notice of the Court's comments, at least to some extent.[92] The Court does not provide the parties with the reasons for its decision. It seems, then, that by giving their consent to ICC arbitration parties give their agreement not only to adjudicate before an arbitrator according to the law of their choosing, but also to the elusive and autonomous jurisprudence of the ICC Court.[93] Thus

[89] The Court's role is defined in Article 1 of the Rules, and in Appendixes I and II thereof. According to Article 1(2) "The Court does not itself settle disputes. It has the function of ensuring the application of these Rules. It draws up its own Internal Rules (Appendix II)".

[90] According to Appendix II, Article 6 "When the Court scrutinizes draft Awards in accordance with Article 27 of the Rules, it considers, to the extent practicable, the requirements of mandatory law at the place of arbitration".

[91] Ellis Baker and Anthony Lavers, *Review of Arbitrators' Exercise of Power in English Law: The House of Lords Decides*, 22 The International Construction Law 493 (2005).

[92] *Ibid*.

[93] The London Court of International Arbitration has a somewhat similar dual architecture; however the powers of the Court are more limited. See, the LCIR Rules of 1 January 1998 at http://www.lcia-arbitration.com/ (in particular articles 3 and 29).

the ICC Court's powers and the normative force of its jurisprudence rest, miraculously, on the disaggregated and prospective contractual arrangements of its current and future 'clients'.

Internet law provides another example of the invocation of individual consent as an independent grounding. Two prominent examples are ICANN's regime for the governance of disputes regarding domain names,[94] and the World Wide Web Consortium Platform for Privacy Preferences Project ('P3P).[95] Similarly to the world of arbitration the force of ICANN's dispute resolution policy and the P3P code stems from the direct consent of the concerned individuals – without the mediation of the state. In the case of ICANN's dispute settlement policy the consent is given in the contract signed between a domain-name holder and a registrar. In the case of P3P, the platform is incorporated into the architecture of the browsers and the websites, and consent is implied from the purchase or usage of the browser and its actual usage.[96] The global

[94] See, ICANN Uniform Domain-Name Dispute Resolution Policy (http://www.icann.org/udrp/). The Policy is applicable across all gTLDs (.aero, .biz, .cat, .com, .coop, .info, .jobs, .mobi, .museum, .name, .net, .org, .pro, .tel and .travel). The policy provides for obligatory international arbitration for disputes arising from alleged abusive registrations of domain names (for example, cybersquatting). The arbitration proceedings may be initiated by a holder of trademark rights. The UDRP is a policy between a registrar and its customer and is included in registration agreements for all ICANN-accredited registrars. A list of approved dispute-resolution service providers is available at: http://www.icann.org/dndr/udrp/approved-providers.htm (visited 20 March 2007).

[95] Available at http://www.w3.org/P3P/. The Platform for Privacy Preferences Project enables Websites to express their privacy practices in a standard format that can be retrieved automatically and interpreted easily by user agents. P3P user agents will allow users to be informed of site practices (in both machine- and human-readable formats) and to automate decision-making based on these practices when appropriate. Thus users need not read the privacy policies at every site they visit. *Ibid*.

[96] In some cases the browser is already installed in the computer when it is purchased; consent is then indicated through the total act of purchase.

code is reinterpreted in these cases as a contract – a true manifestation of the idea of social contract.[97]

This new form of validity finds resonance in the ideas of individual integrity and individual empowerment, which are central to contemporary Western culture. On close scrutiny, however, postulating individual consent as a validating force seems highly problematic. In the case of arbitration the gap between the disaggregated and discontinuous contractual consent and the permanent nature of the lex mercatoria and some of the new arbitral centers seems unbridgeable. In the case of the new internet codes, the invocation of consent does not seem to cohere with the traditional understanding of consent in contract law - the image of "two autonomous wills coming together to express their autonomy by binding themselves reciprocally to a bargain of exchange".[98] Can one seriously speak about consent in the context of ICANN's policy and the P3P code, if the individual in question has not taken part in the negotiation of the code/contract in question, and in effect has no choice but to accept it if he wants to register a domain name or enjoy some kind of privacy protection as he surfs the net (recall that P3P is encoded in the architecture of both websites and browsers).

If one rejects individual consent as an acceptable form of validation, perhaps there is no choice but to look for alternative groundings. Thus, in

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[97] For the idea of social contract, see: S. A. Lloyd, Hobbes's Moral and Political Philosophy, In E. N. Zalta (ed.), *Stanford Encyclopedia of Philosophy* (2002) and Williamson M. Evers, *Social Contract: A Critique* 1 Journal of Libertarian Studies 185 (1977).

[98] Margaret Jane Radin, *BOILERPLATE TODAY: THE RISE OF MODULARITY AND THE WANING OF CONSENT* 104 Michigan Law Review 1223, 1231 (2006), See further on the problematic of contract formation in standard electronic contracts and question of privacy protection Radin, *ibid*, Robert L. Oakley, *Fairness in electronic contracting: minimum standards for non-negotiated contracts* 42 Hous. L. Rev. 1041, 1045 (2005) and Lisa M. Austin, *Is Consent the Foundation of Fair Information Practices? Canada's Experience Under PIPEDA* 56 University of Toronto Law Journal 181, 191 (2006). And who says consent is a globally valid principle of contract formation? The idea of individual consent is also central to international arbitration and the New York Convention.

the case of the lex mercatoria, can one appeal to universal principles of commercial law—a natural law of contracts? And in the case of ICANN's UDDRP and the P3P standard, validity may reside not in the fictitious consent but in the process through which they were developed—their invocation of notions such as democracy and procedural justice?

The increasingly blurred normative reality that characterizes the contemporary international legal universe provides wide occasions for horizontal conflicts between different forms of validation. The field of investment disputes provides a particularly interesting example for this potential tension. There is a problematic interplay between forum selection clauses that are included in individual investment contracts and arbitration procedures set out in bilateral investment treaties ('BIT') (interpreted in light of the 1965 Convention on the Settlement of Investment Disputes between States and Nationals of Other State).[99] The question raised in these conflicts is whether the forum selection clause can be seen as a waiver of BIT jurisdiction. In other words, the question is whether the norm of the contract trumps the norm of the treaty or vice versa. There is a diversity of opinions on this question.[100]

D. THE BUNDLING OF LAW AND TECHNOLOGY

[99] For the text of ICSID treaty and details about the way in which it operates see: http://www.worldbank.org/icsid. As at April 10, 2006, 143 countries have ratified the Convention (http://www.worldbank.org/icsid/basicdoc/intro.htm, visited on 6 March 2007).

[100] See the discussion in the ICSID cases: *Aguas del Tunari et al v. Bolivia*, ICSID Case No. ARB/02/3 at pp. 21-30; *SGS Societe Generale de Surveillance S.A. v. Philippines* ICSID Case No. ARB/02/6, paras. 136-155 (both available from http://www.investmentclaims.com/oa1.html, visited 6 March 2007) and Gerold Zeiler, *Treaty v Contract : What is the Best Venue for Investment Disputes?* Austrian Arbitration Yearbook 323, 332-348 (2007) and Stephan W. Schill, *Arbitration Risk and Effective Compliance—Cost-Shifting in Investment Treaty Arbitration* 7 Journal of World Investment & Trade 653, 676-679 (2006).

Another highly novel source of global validity is the bundling of law and technology. This new technique emerged as a side effect of the development of digital technology that allows the bundling of software and norms in one digitized product.[101] Such norm-in-the-machine products have been available in various forms for some time. One example is the domain of intellectual property rights ("IPR"). Instead of protecting IPR in a certain product (e.g., software or music) through the use of contractual terms or by relying on state regulation, IPR can be protected from violations with special software offering world-wide protection using various technological means.[102] Such technology is being used increasingly in the fight against online file-sharing softwares.[103] The Platform for Privacy Preferences Project ('P3P') provides another example. The P3P standard is integrated into a software (browser) and into the structure of web-sites (another type of machine).[104] Another examples are new filtering softwares that are used to protect minors from exposure to sexually explicit materials on the web. In this case, as in the case of

[101] Machines are understood as devices for accomplishing a task as a collection of functional components. See Margaret Jane Radin, ONLINE STANDARDIZATION AND THE INTEGRATION OF TEXT AND MACHINE, 70 Fordham Law Review 1125, 1143 (2002).

[102] A good example is MediaMax. MediaMax is a copy-prevention software produced by SunnComm Technologies that is designed to prevent unauthorized copying of audio CDs using personal computers. See http://www.mediamaxtechnology.com/ and J. Alex Halderman, *Analysis of the MediaMax CD3 Copy-Prevention System*, Princeton University Computer Science Technical Report TR-679-03 (2003).

[103] The new technological weapon in this case is based on a content-recognition software, which makes it possible to identify copyrighted material and to block it (- unless it was licensed for use on the site). One of the key players in this field is Audible Magic (see, http://www.audiblemagic.com/ , visited 23 March 2007). See, Brad Stone and Miguel Helft, *New Weapon In Web War Over Piracy*, New York Times, 19 February 2007.

[104] On the structure of P3P technology see, further: Daniel J. Weitzner, Jim Hendler, Tim Berners-Lee, and Dan Connolly, Creating a Policy-Aware Web: Discretionary, Rule-based Access for the World Wide Web. In *Web and Information Security*, edited by E. Ferrari and B. Thuraisingham. Hershey, PA Idea Group Inc (2006) at 5 (reference is to the posted paper available at: http://www.w3.org/2004/09/Policy-Aware-Web-acl.pdf).

intellectual property rights, the new software proclaims to fulfill a task that was previously preserved to state regulation. What is common to all these cases is the invocation of technology as a new type of (global) Grund Norm.[105]

In Ashcroft v. ACLU[106] the U.S. Supreme Court has reached a similar conclusion when it noted that filtering software might more effectively protect minors from exposure to sexually explicit materials on the Internet than the Child Online Protection Act ('COPA').[107] This led the Court to the conclusion that COPA was unconstitutional (by violating the First Amendment) because of the availability of less restrictive alternatives.[108] The importance of the U.S. Supreme Court's decision in terms of this Article's thesis regarding the fragmentation of the idea of validity in the international domain lies not in the particulars of American free speech doctrine, but in its de facto recognition of technology as a source of private law.[109]

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[105] For further discussion of this phenomenon see Radin *supra* note 98, and Margaret Jane Radin, Regulation by Contract, Regulation by Machine, 160 J. Inst. & Theoretical Econ. 1 (2004).

[106] Ashcroft v. ACLU, No. 03-218., SUPREME COURT OF THE UNITED STATES , 540 U.S. 944, available at: http://supreme.justia.com/us/542/656/case.html.

[107] 47 U. S. C. §231.

[108] Filtering software was seen as less restrictive because filters impose selective restrictions on speech at the receiving end, not universal restrictions at the source. Under a filtering regime, childless adults may gain access to speech they have a right to see without having to identify themselves or provide their credit card information. Even adults with children may obtain access to the same speech on the same terms simply by turning off the filter on their home computers. Further, promoting filter use does not condemn as criminal any category of speech, and so the potential chilling effect is eliminated, or at least much diminished. *Ibid*.

[109] One can see a similar process taking place at the field of morality. See, Bruno Latour and Couze Venn, *Morality and Technology: The End of the Means*, 19 Theory Culture Society 247, 253-54 (2002).

But the claim that technology acts as new form of normative grounding seems to confuse between the is and the ought - leaping from efficacy to normativity.[110] This problematic has not escaped (legal) observers of modern technology. Thus, for example, the Electronic Frontier Foundation ("EFF") brought legal action against Sony BMG based on its distribution of CDs that incorporated an IPR protection software (MediaMax).[111] One of the claims raised by EFF alleged that many consumers were not aware that the CDs they bought included this software and that it was downloaded to their computers without their consent.[112] Once again, we see a conflict between two forms of validation: technology and individual consent.[113]

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[110] This leap characterizes the concept of legal validity in general. See: Csaba Varga, *Validity*, 41 Acta Juridica Hungarica 155 (2000) and the discussion in the following section.

[111] For other cases dealing with this problematic see: *Davidson & Assocs. v. Jung*, 422 F.3d 630 (2005), DVD Copy Control Assn., Inc. v. Bunner, SUPREME COURT OF CALIFORNIA , 31 Cal. 4th 864 (2004).

[112] See the complaint filed by EFF (21 November 2005), available at: http://www.eff.org/IP/DRM/Sony-BMG/sony_complaint.pdf (visited 23 March 2007). In response to the filing of the suit by EFF, SunnComm has taken a commitment to ensure that future versions of MediaMax will not install when the user declines the end user license agreement ("EULA") that appears when a CD is first inserted in a computer CD or DVD drive. SunnComm has also agreed to include uninstallers in all versions of MediaMax software, to submit all future versions to an independent security-testing firm for review, and to release to the public the results of the independent security testing. See, EFF, CD Copy Protection Firm Promises Fix for Software Problems, February 02, 2006, February 2006 News Archive, available at, http://www.eff.org/news/archives/2006_02.php#004378 (visited 20 March 2007). For the full litigation history see: http://www.eff.org/IP/DRM/Sony-BMG/#docs.

[113] Radin, *supra* note 98, at 1231.

V. TAKING A STEP BACK: HAVE WE EVER BEEN PURE?

A. PURITY REVISITED

The structure of contemporary international law is clearly incompatible with the pure Westphalian conception of international law. Deeper reflection, however, exposes the purity of the Westphalian order as a fictitious construct, whose claim for coherence and completeness does not stand up to scrutiny, even if we limit its domain of applicability to the (distant) past. The impurity of the Westphalian scheme of validity becomes apparent almost immediately when considered from the perspective of simple logic. State will cannot be considered the ultimate source of international law because it leaves unanswered the question of the normative force of the rule that says that 'will' binds. Thus, the force of the norm "pacts must be respected" must be assumed to derive – if we want to avoid circularity - from a source that is independent of the will of states.[114] This has already been noted by various scholars of international law. For example, Hersch Lauterpact, in a book published in 1927, notes:[115]

"To say that the binding force of treaties is derived from the will of contracting parties who, through an act of self-limitation, give up a part of their sovereignty, is to leave unanswered the query why the treaty continues to be binding after the will of one party has undergone a change. The will of the parties can never be the ultimate source of the binding

[114] See also Martti Koskenniemi, *The gentle civilizer of nations : the rise and fall of international law,*

1870-1960 (2001) 364.

[115] See, Hersch Lauterpacht, *Private Law Sources and Analogies of International Law: With Special Reference to International Arbitration*, (1927, 2002) 56-57. See also Hersch Lauterpacht, *The Function of Law in the International Community* (1933) 416-420. Lauterpacht refers to various scholars such as Bluntschli, Bar and Anzilotti.

force of a contract whose continued validity is necessarily grounded in a higher objective rule… it is the objective validity, independent of the will of States, of the rule pacta sunt servanda which renders legally possible the working of conventional international law".

The attempt to resolve the question of the force of pacta sunt servanda through appeal to a higher customary law faces similar difficulties. At the level of customary international law we have to cope with the parallel question of the source and status of the norms regulating the making of customary international law. If the idea of customary international law regulating itself does not seem satisfactory we have no choice but to imagine a higher level law - an imaginary constitutional global law - which will be the source of such norms.[116]

But the impurity of the Westphalian model does not lie just in its lack of grounding. It is also reflected in the way in which the idea of state consent opens up the possibility of a legal universe comprised of parallel, equal standing, legal regimes that are not subject to any superstructure of higher level law.[117] This is not mere theoretical conjecture: the presidents of the ICJ have warned on several occasions of the risks posed by fragmentation and over-lapping jurisdictions, and one of them noted that "the proliferation of international courts may jeopardize the unity of international law and, as a consequence, its role in inter-State relations".[118]

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[116] For the dual hierarchy approach see Josef L. Kunz, *The Nature of Customary International Law*, 47 American Journal of International Law 662, 665 (1953). For a critique see, Kammerhofer, *supra* note 4, at 539-40.

[117] See, Kammerhofer, *supra* note 4, at 549.

[118] See, the speeches of Judge Stephen M. Schwebel and Judge Gilbert Guillaume, supra note 1, and the speech by Judge Gilbert Guillaume, President of the International Court of Justice, to the General Assembly of the United Nations, 30 October 2001, http://www.icj-cij.org/icjwww/ipresscom/SPEECHES/iSpeechPresident_Guillaume_GA56_20011030.htm. See further on the issue of fragmentation: Martti Koskenniemi and Paivi Leino *Fragmentation of International Law? Postmodern Anxieties*, 15 Leiden Journal of International Law 553 (2001).

The search for alternative sources of validity is also not new. A prominent example is the appeal to morality as an independent source of international law. This modern phenomenon represents, so it seems, a return to the tradition of natural law dating back to Hugo Grotius (1583-1645). The natural law tradition received a renewed attention in the early 20th century, appearing in the academic writings of several legal scholars (in a counter-reaction to the rise of legal positivism). Thus Hersch Lauterpacht, in his 1927 Private Law Sources and Analogies of International Law: with Special Reference to International Arbitration writes about a renaissance of natural law. He refers to several modern reconstructions of this tradition, invoking concepts such as "the sense of right" and "social solidarity". Particularly illuminating is a quote from Frederick Pollock (1922): "We must either admit that modern international law is a law founded on cosmopolitan principles of reason, a true living offshoot of the Law of Nature, or ignore our most authoritative expositions of it".[119] Lauterpacht has further developed this thesis in his article The Grotian Tradition in International Law.[120] For Lauterpacht the force of the Grotian tradition stems from the intrinsic insufficiency of the conception of international law as derived from state will and from the constant need to judge its adequacy in the light of ethics and reason.[121] It seems, then, that international law has never been pure. Neither is the search for alternative groundings a new phenomenon.

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[119] Lauterpacht (1927, 2002), *supra* note 115 at 58-59, fn 7.

[120] Hersch Lauterpacht, *The Grotian Tradition in International Law*, 23 BRIT. Y.B. INT'L L. 1 (1946). Another important figure in the revival of the Grotian tradition was Cornelius van Vollenhoven, especially in his *Three Stages in the Evolution of International Law* (1919). See Renee Jeffery, *Hersch Lauterpacht, the Realist Challenge and the 'Grotian Tradition' in 20th-Century International Relations* 6 *European Journal of International Relations* 223, 224 (2006).

[121] Koskenniemi, supra note 2, at 408. Lauterpacht argues in that spirit that "the acceptance of the law of nature as an independent source of international law" is one of the precepts of modern international law, Lauterpacht, *ibid*, at 51. See, further C. Wilfred Jenks, *Hersch Lauterpacht: the Scholar as Prophet*, 36 British Yearbook of International Law 1, 72 (1960) and Jeffery, *ibid* at 237-241.

B. THE PROBLEM OF GROUNDING IN LAW AND THE TRUTH-TELLER PARADOX

The problem of grounding is a measure of the deep indeterminacy that is part and parcel of the concept of law in both its municipal and international realizations. The question of grounding does not afflict just the Westphalian scheme of consent – it is common to all the forms of validity which were considered above. . Whenever a new source of validity is invoked as an alternative to the Westphalian paradigm the question of its own justification remains lying in the air in a mist of arbitrary articulations. In considering this problematic it is interesting to consider a similar puzzle that arises in the filed of semantics – the truth-teller paradox. Consider the following sentence:

K_1 This sentence is true

We can use the structure of this sentence to produce a truth-telling sequence (with each sentence belonging to the domain of its predecessor):[122]

1 The next sentence is true
2 The next sentence is true
3 The next sentence is true

Initially, one may take these truth-telling sentences as unproblematic. Indeed, these sentences do not generate the kind of semantic instability that characterizes liar-like sentences. However, upon reflection, this conclusion seems hasty. In this case (as with the liar-like statements), the sentences involved can consistently be assigned conflicting true/false values. This makes them hopelessly undetermined.[123] The distinction

[122] This example is taken from Hans Herzberger, *Paradoxes of Grounding in Semantics* 67 *The Journal of Philosophy* 145, 150 (1970). See also Roy Sorensen, *Future Law: Prepunishment and the Causal Theory of Verdicts*, 40 Nous 166, 176 (2006).

[123] Bradley Armour-Garb and James A. Woodbridge, *Dialetheism, Semantic Pathology, and the Open Pair* 84 Australasian Journal of Philosophy 395, 397 (2006).

between the Liar Paradox and the Truth-Teller paradox is thus that in the former the problem is that there is no consistent assignment of truth-values, while in the latter the problem is that there are too many consistent assignments (thus any assignment must involve an arbitrary choice as to which truth-value should be assigned). [124]

The notion of validity produces in law something which is akin to the truth-teller paradox. Validity is the qualifying mark or label of legal norms.[125] It distinguishes between the law (rules) in force and that which is not law. In other words: 'Law which is not valid is not law'.[126] Determining the validity of norms is thus of critical importance; it is essential to the formation of normative expectations and is also a critical component of legal decision-making. It is the validity of the law that makes its normative statements binding. While non-legal prescriptive statements also 'purport' to be binding they invoke other reasons for their 'bindingness'.[127] But validity is not only a mark unique to law; it can only be endowed and transferred according to law. The concept of validity thus holds an inevitable circularity: Validity can only be determined recursively, that is, by reference to valid law.[128] Because norms cannot be evaluated through the logical prism of truth and falsity, the concept of validity can operate as a plausible alternative.[129] Consider, for example, the following set of rules ("the Paradox of Validity"):

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[124] See, Roy Sorensen, *Vagueness and Contradiction* (2001) at 167. See also Herzberger, *supra* note 21, at 150

[125] Csaba Varga, *Validity*, 41 *Acta Juridica Hungarica* 155, 155.

[126] See Luhmann, above n 40, at 125.

[127] See Vranas, supra note 34, at section 3, for a discussion of the notion of bindingness.

[128] See Luhmann, *ibid*, at 128 and Varga, *supra* note 110, at 155-6.

[129] See, on that also, Vladimir Svoboda, *Forms of Norms and Validity* 80 Poznan Studies in the Philosophy of the Sciences and the Humanities 223, 229 (2003). As in classical logic, I assume bivalence, ie, a binary distinction between valid/not-valid. While validity resembles in some aspects the notion of truth, it does not generate the same kind of paradoxes. Thus, for example, the notion of validity does not yield a paradox parallel to

Rule 1.1: This rule, and all the rules enumerated below, are valid.
Rule 2.1. …
Rule 2.2 …
Rule 2.3. …
…
Rule 2.n. …

This sequence of rules can have (at least) two consistent assignments of validity values. The first, in which both the Rule 1.1 ('meta rule') and all the other rules ('secondary rules') are valid, and another one, in which both the meta rule and all the secondary rules are invalid.[130] The Truth-Teller Paradox generates a similar problem of multiple (consistent) assignments of truth and falsity.

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the liar. Consider the following example: Imagine that you open the Civil Code which is in force in your country. In page 100 to the Code you find rule number 499 which states:

499. This rule is not valid.

What is the meaning of this sentence? Consider, first, the option that rule 499 is valid, that is, it represents the law in force. If it is valid, then what it says is valid as well, and since it says about itself that it is not valid, this must be valid as well. Contradiction. Assume, alternatively, that rule 499 is not valid. Then, what it says about itself is indeed the case, and no contradiction arises. (Strictly speaking, if a rule is not valid, what it says is legally irrelevant.) Unlike the Liar Paradox, there is a simple way out here, which requires us to assume that rule 499 is not valid. This leaves us with the riddle of how and why this sentence was incorporated into the Code in the first place.

[130] The qualification 'at least' is necessary, because once we assume that the Meta rule is not valid, there can be multiple assignments of validity, which attribute different values to the Secondary rules.

Note, however, that there are important differences between the paradox of validity and the truth-teller paradox. In the context of the latter it is possible to argue that the sentences included in the truth teller sequence, are vacuous or under-specified. This reflects the fact that these sentences do not supply a concrete truth-condition by which their truth or falsity may be determined. They fail to yield a statement.[131] The parallel legal sequence is not vacuous. Even if we consider it invalid its deontic content is not lost. The normative statements simply lose the colour of law. They become non-legal norms.

The foregoing paradox reflects one of the deepest dilemmas of modern law: On the one hand, we feel uncomfortable with the thought that law validates itself; on the other hand, this is exactly what is expected from the law according to the modern conception of validity – that is, that validity can only be endowed according to law. The assumption that the criteria and authority for determining the validity of norms must be instituted through valid law thus generates a vicious circularity, which seems to be logically irresolvable.

At this point, it might make sense to turn to philosophy. Perhaps we can gain some inspiration from the various strategies invoked by philosophers to resolve the puzzle of semantical paradoxes. Let me briefly sketch some of the attempts to resolve these paradoxes.[132] Alfred Tarski proposed to resolve the puzzle of the liar paradox by replacing our everyday, singular understanding of truth with a multi-level linguistic framework. According to this construction, one is able to speak meaningfully about the truth of statements in one language (the 'object-language') only in a language that

[131] Transforming K_1 into a bi-conditional thus yields the following vacuous sentence: *K_1 is true if and only if K_1 is true*. In contrast, in proper statements such transformation makes perfect sense. Consider: *K_2 Leaves are green*. The sentence *K_2 is true if and only leaves are green* is fully specified. See further Laurence Goldstein, *Fibonacci, Yablo, and the Cassationist Approach to Paradox* 115 Mind 867, 884-5 (2006).

[132] For a general discussion, see, eg, Sainsbury, above n 9 and Rescher, above n 8. An important solution strategy which I will not discuss is based on rejecting (some) of the assumptions of classical logic (eg, the law of excluded middle). For this approach, see, for example, G Priest, 'What Is So Bad about Contradictions' (1998) 95 *The Journal of Philosophy* 410.

is located higher on the linguistic hierarchy than the object language and whose expressive capacities are essentially richer (the 'meta-language').[133]

Another approach takes as given the non-hierarchical character of natural language. It proposes to resolve the riddle of the liar and truth-teller paradoxes by arguing that groundless sentences are intrinsically ill-formed, and should be excluded from the realm of statements – statement being understood as a sentence that is used to say something true or false.[134] Groundless sentences, it is argued, while grammatically correct, fail to make any statement; they are, in other words, 'truth-incompetent'. And since these sentences are truth-incompetent, it makes no sense to ask whether they are true or false.[135] Laurence Goldstein argues that the reason why liar-like sentences generate such awe and confusion is not because of any deep logical problematic, but rather, because of certain deep-seated beliefs and preconceptions that characterize human thought. Underlying the semantical paradoxes is our naïve intuition that 'the paradoxical sentences because they are not ungrammatical, vague or sortally suspect and encompass no false presuppositions, must yield statements when used'.[136] The analysis of these paradoxes thus seems to belong more to the realm of psychology than to the realm of logic.

In effect, the foregoing approaches introduce, though for different reasons, a general ban on self-reference and other forms of groundlessness. However, this ban may seem too strict for and incongruent with our intuitions regarding the use of language. An alternative approach is offered

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[133] Alfred Tarski, The Semantic Conception of Truth and the Foundations of Semantics (1944) 3 *Philosophy and Phenomenological Research* 341, at 350-1.

[134] Statement, following Goldstein, is understood as 'a truth-bearer, a *used* sentence – "used" not in the sense just of being uttered out loud (a pheme) or written down (a grapheme) but in the sense of being used to *say* something true or false' Goldstein, above n 30, at 54.

[135] Goldstein, *ibid*, at 58.

[136] *Ibid*, at 69.

by the model of naïve semantics, articulated by Hans Herzberger. The essence of this approach is the following:

In naive semantics, paradoxes are allowed to arise freely and to work their own way out. No semantic defences are to be set up against them. … No effort will be made to eliminate the paradoxes, to suppress them, or in any way to interfere and take deliberate action against them. They are to unfold according to their own inner principles. In its early stages naive semantics may appear somewhat haphazard and even chaotic. Gradually some islands of stability will emerge and grow until eventually everything has resettled into a new but orderly arrangement.[137]

Instead of trying to break or suppress the semantic instability associated with semantical paradoxes – their oscillation between true and false – naive semantics calls us to embrace it. This can be achieved by exposing the pattern through which paradoxical statements change their value at different stages of evaluation.[138] Naïve semantics thus rejects any attempt to classify liar-like sentences as neither true nor false or both true and false. Their fundamental semantic character is neither a truth value nor the absence of a truth value, but a valuational pattern that has certain regularities. By demonstrating that paradoxical sentences follow certain regularities, naïve semantics shows 'how a language could contain

[137] Herzberger, above n 22, at 482.

[138] This valuation technique consists of two phases: 'Each statement undergoes two phases of evaluation, either of which can be trivially simple or, within fixed bounds, extremely complicated. Each statement can be assigned two characteristic ordinal numbers: a s*tabilization point* and a *fundamental periodicity*. The stabilization point for a statement marks the earliest stage at which its valuations become periodic, and its periodicity marks the length of its valuational cycle', Herzberger, *ibid*, at 492. Thus, for example, the looped liar that was discussed above (the Plato-Socrates dialogue) is cyclic with periodicity 4. Starting with the assumption that Plato's statement is true leads you to conclude that Socrates' statement is true, next that Plato's statement is in fact false, Socrates' statement is false, returning to the original evaluation that Plato's statement is true. So if we attribute the values (1, 0) to (true, false) we get the following cyclical pattern: 11001100… .

paradoxical statements and nevertheless have a systematic and coherent semantic structure'.[139]

What are the implications of the philosophical struggle with semantical paradoxes to the study of the paradox of validity? Consider, first, Tarski's hierarchical conception of truth. To apply Tarski's proposal to law, one would have to assume a hierarchy of laws in which the validity of the lower-level normative layer could only be determined through the prism of a higher law. This hierarchical conceptualization of validity is inconsistent, however, with our practical experience of law as a unitary system. So maybe, following the philosophical strategy of barring groundless sentences, we should impose a ban on groundless normative structures? This solution raises many difficulties: first, because the idea that validity should only be endowed according to law has deep roots in the moral and political culture of the Western world, and second, because it is not clear what constitute a proper grounding for a global norm.

The answer to the question of legal paradoxicality lies elsewhere, and requires, as will be argued below, a conceptual switch. This alternative approach has some resonance with the dynamic vision of naïve semantics.

C. THE PRAXIS OF PARADOX: FROM PURITY TO SYSTEM DYNAMICS

Exploring the puzzle of legal paradoxes requires a departure from the philosophical and logical approach to the study of paradoxes. The philosophical inquiry has been guided by the idea that paradoxes represent a certain malady of thought that should somehow be eliminated, prevented

[139] Herzberger, *ibid*, at 497

or resolved.[140] One of the main tasks of logic is to free us from this disease.[141]

The philosophical approach is not applicable to law because the notion of paradox – in its philosophical and logical connotations – does not apply to law in its social instantiation.[142] This has to do with the fact that paradoxes are properties of sentences.[143] Because law, as a social system, is not reducible to sentences (eg, norms), it cannot be, strictly speaking, 'paradoxical' - although it can be depicted as self-referential, self-organizing or self-producing.[144] The paradoxes of law emerge as sentential

[140] Thus, Alfred Tarski has noted in one of his papers: 'The appearance of an antinomy is for me a symptom of disease'; Alfred Tarski, *Truth and Proof*, 220 Scientific American 63, 66 (1969).

[141] Nicholas Rescher observes: The 'prime directive of rationality is to restore consistency in such situations'. Rescher, *supra* note 12, at 9; see also Chihara, *supra* note 13, at 590-1.

[142] The gap between the logical and legal planes remained unnoticed by some legal scholars. Thus, for example, George Fletcher, in his article on 'Paradoxes in Legal Thought', notes: "This Article commits itself to logical consistency as the indispensable foundation for effective dialogue and coherent criticism. Only if we accept consistency as an overriding legal value will we be troubled by the paradoxes and antinomies that lie latent in our undeveloped systems of legal thought. Grappling with uncovered paradoxes and antinomies will impel us toward consistent theoretical structures". George P. Fletcher, *Paradoxes in Legal Thought*, 85 Columbia Law Review 1263, 1264-5 (1985).

[143] I use the term 'sentence' to denote a string of words satisfying the grammatical rules of a language (see the WordNet 2.0 dictionary, available at http://wordnet.princeton.edu). This broad definition includes sentences in the form of both statements and norms. Statements (or claims), unlike norms, are truth-bearers; they can be true or false, see Goldstein, above n 30, at 54.

[144] One of the key lessons of the social analysis of law is the understanding that the essence of law cannot be captured by simply enumerating its normative content. This point has been forcefully made by Gunther Teubner and Niklas Luhmann. Describing the law as a system of rules or a system of symbols, Teubner argues, provides no answer to the dynamic property of law, to its self-regulatory capacity: 'For how are norms to produce norms or symbols to generate symbols? We can only conceive of the law producing itself if we understand it no longer as a mere system of rules but as a system of actions', Gunther Teubner, *Law as an Autopoietic System* (1997) at 18. See, further, on

reflections of its unique systemic structure: of its self-organizing and self-producing features. A self-organizing system is a system that not only regulates or adapts its behaviour, but creates its own organization. Self-production (or autopoiesis) denotes the process by which a system recursively produces its own network of components (in the case of law: communication ordered by the distinction legal/illegal), thus continuously regenerating its essential organization in the face of external perturbations and internal erosion.[145] Self-organizing and self-producing systems are intrinsically circular and self-referential.[146]

Recognizing that the paradoxes of law are reflections of its unique systemic structure indicates that the notion of purity does not provide a suitable guide for the study of legal paradoxicality.[147] One cannot purify the law from its paradoxes, because they reflect vital steering and stabilizing mechanisms, without which the law would not be able to

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that point, Niklas Luhmann, *Law As a Social System* (2004), at 98-105, 177 and Neil MacCormick, *Norms, Institutions, and institutional Facts*, 17 Law and Philosophy 301, 330-1 (1998).

[145] See Francis Heylighen, 'The Science of Self-organization and Adaptivity' in *The Encyclopedia of Life Support Systems* (EOLSS Publishers, 2001), available at http://www.eolss.net, and Francis Heylighen and Cliff Joslyn, 'Cybernetics and Second Order Cybernetics', in RA Meyers (ed.), *Encyclopedia of Physical Science & Technology* vol 4 (3rd ed) (2001) 155-170.

[146] In mathematical terms these forms of circularity can be modelled by an equation representing how some phenomenon or variable $\boldsymbol{y}$ is mapped onto itself by a transformation or process $\boldsymbol{f}$: $y = f(y)$. To make sense of this equation one needs to explicate what y and f stand for. For a more detailed analysis see, Heylighen and Joslyn, *ibid*, at section III(A).

[147] The notion of purification is invoked, for example, by Nicholas Rescher, see Rescher, *supra* note 12, at 31. Rescher himself provides some support for the foregoing thesis in his distinction between the practical and theoretical contexts. In practical contexts, Rescher argues, 'there is a possibility of compromise – of affecting a division that enables us in some way and to some extent "to have it both ways", say, to proceed A-wise on even days and B-wise on odd ones. But we cannot rationally do this with beliefs. In theoretical contexts we must choose – must resolve the issue on way or another', Rescher, *ibid*, at 11.

counteract external pressures.[148] The static perspective which characterises the study of paradoxes in logic is not suited for that task because it is not sensitive to the social dynamics underlying the paradoxes of law.[149] The circular quality of the concept of validity is therefore an inevitable feature of legal communication. This circularity does not undermine the normative unity of the legal system because the mark of validity is taken for granted in the recursive operations of the law.[150] Further, in functional terms this circularity provides the law with far-reaching flexibility – by empowering it to create and destruct normative structures in response to conflicting social pressures.

VI. THE POLYMORPHOSIS OF INTERNATIONAL LAW AND ITS REPERCUSSIONS

The groundlessness of law is not, then, a new problem. Still I will argue that the paradoxicality of the contemporary system of international law constitutes a novel phenomenon. What is unique in the structure of the international legal system is not the impurity of our forms of validation, but the emergence of multiple validating techniques, which are invoked,

[148] It is simply wrong, therefore, to view consistency, as Fletcher does, 'as an overriding legal value' (although the appearance of consistency – concealing the paradox – could have instrumental value).

[149] A notable exception is naïve semantics, which as we saw earlier, emphasises the dynamic aspect of semantical paradoxes. See also Patrick Grim, Gary Mar, Paul St. Denis, *The Philosophical Computer: Exploratory Essays in Philosophical Computer Modeling* (1998), chapter 1. However these attempts, which are based on the idea of iterated functional sequences, do not capture the innovative feature of the law – its capacity to produce unpredictable surprises.

[150] This is why law cannot include a right to revolution. This idea was nicely captured by an old English verse dealing with the paradox of treason (quoted by Josef Kunz): "Treason cannot prosper, What's the reason? For if it does, who would dare to call it treason?"; Josef L. Kunz, *Revolutionary Creation of Norms of International Law*, 41 The American Journal of International Law 119, 121 (fn. 6) (1947).

simultaneously, at the forefront of the international legal body. The global legal system has moved from a state of (imaginary) purity to a state of multiple paradoxicalities – a process of polymorphosis – leading to a much more complex juridical universe. But what are the social implications of this process? In order to answer this question, let me first outline the key types of deep inconsistencies that afflict the contemporary universe of international law.

- Horizontal inconsistent sources of validation. There is no universally agreed concept of validity. Different international regimes use different notions of validity (compare the World Trade Organization regime to the International Chamber of Commerce International Court of Arbitration). In some cases this form of inconsistency leads to trans-regime conflicts (e.g., the clash between treaty and contractual obligations in the investment domain, and the clash between consent and technology in Internet law).
- Internal inconsistency. Within the same legal regime it is possible to find conflicting conceptions of validity, pulling in different directions (e.g., the cases of the WTO and the International Criminal Court).
- The incorporation of vague sources of validity (from morality to science). Vagueness yields conflicting interpretations both within particular regimes and across regimes (e.g., the new principle of 'civilian inviolability' and the 'precautionary principle').

Together these multiple inconsistencies bring forth a legal universe whose complexity is multidimensional. The complexity of modern international law cannot be captured through reference to the heterogeneous institutional reality of multiple legal tribunals. Its complexity runs deeper, covering many layers of legal praxis and challenging the traditional boundaries and tenets of international law (such as the distinction between public and private international law). But what are the possible repercussions of the polymorphosis process? In the following sections I want to explore this question by considering the influence of the polymorphosis process on the structure and autonomy of the global legal system, on its stability and its relationship with other systems of governance, and on its external legitimacy. Responding to these questions requires us to move from the realm of historic-analytic analysis into the realm of futuristic socio-legal analysis. This move also makes the following discussion much more explorative (even speculative).

A. FROM COLONIZATION TO INTERNAL COMPLEXIFICATION: THE EMERGENCE OF COSMOPOLITAN LAW

The polymorphosis process can be postulated as a reflection of the colonization, or instrumentalization of the global legal system by multifarious external systems.[151] There are certainly voices who argue that this colonization is wide-spread, with the finger being pointed in particular to the global economic system or the so called 'Washington consensus'. Economic rationality and economic institutions (in all their different embodiments, public and private) it is argued, are actually calling the shots; the law – from the WTO to the climate change convention – operates as a mere façade for economic calculations and corporate interests.[152] While this argument has some merit I do not find it convincing as an explanation for the diverse processes depicted above. There are two

[151] For the risk of the colonization of global law by external sources see, eg, Fischer-Lescano, *supra* note 73.

[152] See, e.g. David Held, *Globalisation: the Dangers and the Answers*, openDemocracy, 27 May 2004 http://www.opendemocracy.net/content/articles/PDF/1918.pdf; WILLIAM FINNEGAN, *The Economics of Empire: Notes on the Washington Consensus*, Harper's Magazine May 2003, http://www.mindfully.org/WTO/2003/Economics-Of-EmpireMay03.htm; Noam Chomsky, *The Passion for Free Markets Exporting American values through the new World Trade Organization*, http://www.zmag.org/zmag/articles/may97chomsky.html. Noam Chomsky provides a proto-typical formulation of the colonization argument. Referring to the WTO agreement on telecommunications he argues that "the 'new tool' allows the U.S. to intervene profoundly in the internal affairs of others, compelling them to change their laws and practices. Crucially, the WTO will make sure that other countries are 'following through on their commitments to allow foreigners to invest' without restriction in central areas of their economy. In the specific case at hand, the likely outcome is clear to all: 'The obvious corporate beneficiaries of this new era will be U.S. carriers, who are best positioned to dominate a level playing field' (*ibid*). In a similar fashion the bundling of law and technology can be viewed as an "automatic" mechanism, which is controlled by private firms - and serves their interests. Margaret Radin has argued recently that this new form of machine-implemented self-enforcement reflects the replacement of the law of the legislature by the law of the firm; Radin, *supra* note 98, at 1233.

main reasons for my skepticism. First, the diversity and complexity of the different validation techniques – reflecting both their horizontal incompatibilities and their internal fuzziness – makes this argument unconvincing. The empirical argument that served to reject Kunz's purity thesis, by questioning its coherence, likewise serves to reject this totalistic Marxist critique (by similarly questioning its coherence). Second, the search for grounding, which underlies all of the forms of validation discussed in section IV, reflects a common adherence to the concept of 'normativity'. Indeed the quest for validity can only make sense within the realm of law.[153]

The polymorphosis process represents therefore something else - an internally generated process of complexification. It is a purely internal phenomenon: an internally driven reconstruction of law's groundings with the law reacting – but not yielding - to external sources. [154] The appeal to democracy, science, morality, direct consent and technology does not signal the colonization of law but, rather, an extension of the horizon of possibilities through which international law, in its various realizations, can react to external pressures. But the polymorphosis process represents a deeper message. It brings forth a new kind of global law – a truly cosmopolitan phenomenon. The unity of this new body of global laws does not derive from the ideal of national sovereignty or from some projected global hierarchy;[155] rather, it is constituted through a common appeal to the concepts of normativity and grounding – which are postulated as universally applicable distinctions.

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[153] See, Varga, *supra* note 110, at 164.

[154] This does not mean that the question of the grounding of law is not discussed in non-legal domains, such as politics or philosophy; however, from internal perspective this external deliberation appears as noise.

[155] Hence it is no longer true to argue that "national sovereignty is the condition of global law and global law is the condition of sovereignty being possible". eg, Fischer-Lescano, *supra* note 73, at section V. Neither can such unity be found in the International Court of Justice as the apex of some postulated hierarchy. See, Koskenniemi and Leino, *supra* note 118, at 577.

B. PARADOX, DIVERSITY AND RESILIENCE

The polymorphosis process does not seem to reflect, then, the subjugation of the law by external forces. However, the impact of this process on the functional operation of the law, and on its relationship with other systems of governance, still constitutes an unresolved problematic. This problematic raises two questions: first, could the multiple forms of self-reference and inconsistencies associated with the polymorphosis process lead to irresolvable conflicts within and between regimes, bringing ultimately to the total paralysis of the global legal system?[156] Second, and in light of this possibility, could the entanglement of the law in its internal paradoxes lead to the expansion of other social systems (economics, politics, morality and religion), leading simultaneously to the contraction of global law as problems migrate to other systems?

Systems theory recognizes operational paralysis and structural disintegration as a possible trajectory in the life of ecological and social systems.[157] However, this conjecture is not the most plausible account of the future direction of the contemporary global legal system. I argue that the complexity and diversity of contemporary body of law—the proliferation of validation techniques—should be seen, at this point, as a source of strength rather than weakness. This complexity contributes to the

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[156] For this possibility see: Gunther Teubner and Andreas Fischer-Lescano, *Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law*, 25 MICHIGAN JOURNAL OF INTERNATIONAL LAW 999 (2004) and Greg C. Shaffer and Mark A. Pollack, *Regulating Risk in a Global Economy: The United States, Europe, and Agricultural Biotechnology*, (forthcoming), chapter 1.

[157] See, e.g., Folke, et al. *REGIME SHIFTS, RESILIENCE, AND BIODIVERSITY IN ECOSYSTEM MANAGEMENT*, 35 Annual Review of Ecology, Evolution, and Systematics 557, 567; Ahmet E.

Kideys, *Fall and Rise of the Black Sea Ecosystem* 297 (5586) Science 1482 (2002); Brian Walker and Jacqueline A. Meyers, *Thresholds in Ecological and Social–Ecological Systems: a Developing Database*, 9 Ecology and Society 3, 12 (2004).

resilience of the global legal system and enhances its ability to respond to external pressures. The legal anxiety associated with the possibility of regime-collisions and normative contradictions[158] confuses the micro level (the ramifications of a local dispute, e.g., between the WTO regime and the Kyoto Protocol) and the macro level – the resilience of the global legal system in its totality.

This argument draws on the study of the relation between system-resilience and diversity in ecology. The concept of resilience is used in ecology to denote the width or limit of a stability domain of an ecological system and is defined by the "magnitude of disturbance that a system can absorb before it changes stable states".[159] Bio-diversity is defined as a measure of two features of ecological system: functional-group diversity and functional-response diversity. Functional-group diversity measures the diversity of the eco-system in terms of groups of species that fulfill different functions (e.g., species may pollinate, graze, predate, fix nitrogen, etc.). The persistence of functional groups contributes to the performance of ecosystems and the services that they generate. Loss of a major functional group, such as apex predators, may cause drastic alterations in ecosystem functioning. Functional-response diversity is defined in terms of the diversity of responses to environmental change among species that contribute to the same ecosystem function. Variability in responses to environmental change within the same functional group is critical to ecosystem resilience.[160]

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[158] See, for example, in Teubner and Fischer-Lescano, *supra* note 156 and Rosalyn Higgins, *A Babel of Judicial Voices? Ruminations from the Bench, Keynote speech given by President Rosalyn Higgins at the Spring Meeting of the International Law Association on 4 March 2006*, 55 INT'L & COMP. L. Q. 791 (2006), at 792.

[159] See: Lance Gunderson, *Ecological Resilience - In Theory and Application*, 31 Annu. Rev. Ecol. Syst. 425, 427 (2000). Folke *et al* define resilience similarly as "the capacity of a system to absorb disturbance and reorganize while undergoing change so as to retain essentially the same function, structure, identity, and feedbacks"; Folke *et al*, *ibid*, at 558.

[160] Folke *et al*, ibid, at 570.

There is an increasing consensus among ecologists that bio-diversity contributes to systems resilience by increasing sources of renewal and reorganization and by providing a rich response horizon.[161] Generally biodiversity provides a cross-scale resilience. Species combine to form an overlapping set of reinforcing influences, spreading risks and benefits widely, and thus retaining overall consistency in performance, independent of wide fluctuations in the individual species.[162] Diversity is thus postulated as an evolutionary achievement.

Applying biological concepts to the study of social processes is not a trivial exercise. The following comments constitute a first step in a more wide-ranging investigation of the applicability of this biological research to the social sciences.[163] In the context of law, resilience may be understood in terms of the capacity of the legal system to withstand external colonization attempts (reflecting a shift from autonomy to allonomy)[164] or its capacity to maintain a certain level of communicative activity (with different levels representing different states). The diversity of validation techniques constitutes a form of functional-response diversity. It provides the law with multiple avenues to respond to external

[161] Folke *et al*, ibid, at 572.

[162] Gunderson, *supra* note 159, at 431. The distribution of functional diversity within and across scales allows regeneration and renewal to occur following ecological disruption over a wide range of scales (with scale defined as a range of spatial and temporal frequencies, Garry Peterson, Craig R. Allen and C. S. Holling, *Ecological Resilience, Biodiversity, and Scale*, 1 Ecosystems 6, 11, 16 (1998)).

[163] For other attempts to use biological ideas in the study of social systems, see: Niklas Luhmann, SOCIAL SYSTEMS (1995) (the idea of autopoiesis, 12-58, 34-36 in particular) and Francis Heylighen, *supra* note 145, at 24 (the concept of self-organization).

[164] *Allonomy*, literally meaning external law, refers to the situation in which a system is regulated or controlled from outside; Francisco J. Varela, F. J. *Principles of Biological Autonomy*, (1979) xi.

pressures, maintaining, nonetheless its normative unity (against competing social orders).[165]

This diversity – which in the legal domain is translated into paradoxical tensions at the meta-normative level - has advantages at both the micro-regime level and the macro-meta-system level. Let me give a few concrete examples. In the case of the WTO, the friction between the autonomy of the legal system and its apparent commitment to the Westphalian paradigm allows the law to proceed with its internally driven conceptual innovation while still relying on the legitimacy produced by the ideal of state consent.[166] The reference to external validating sources – such as science and environmental ethics – further enriches the response horizon of WTO law. In the case of the lex mercatoria, the tension between disaggregated contractual sources and a permanent institutional and doctrinal apparatus allows the law to develop deep sensitivities to the needs of the global economic system within a stable institutional infrastructure, which provides the system with memory and coherence (despite its underlying fragmented foundations). The reliance on (and development of) universal private law doctrines, operating as a common conceptual grid, constitutes a further source of validity and stability. At the meta-regime level, the interplay between the different validation sources allows the legal system to respond to multiple social needs despite political and economic constraints. Thus, for example, the Global Reporting Initiative, by invoking the principles of consensual decision making and sustainable development, has initiated successfully a new global scheme dealing with corporate reporting in a field in which the conventional treaty-making route would have faced formidable obstacles.

The lesson from the biological discussion of diversity and resilience seems to be clear: there is a value in diversity in both its institutional and normative dimensions. In terms of institutional design, this suggests, I will

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[165] Diversity contributes, therefore, to the continuance of (transnational) legal communication (see, Heylighen & Joslyn, *supra* note 145, at section IV(A)). To the extent that law is taken as a better way for resolving societal conflicts (e.g., relative to force) this result has important moral value.

[166] See, Picciotto, *supra* note 50, at 496 in particular.

argue, a shift from models of institutional hierarchy and normative unity to reflexive models, which maintain this diversity and the paradoxical frictions associated with it.[167] I will say more about that in section VII

C. THE IMPLICATIONS FOR THE LEGITIMACY OF THE GLOBAL LEGAL SYSTEM

Finally a key question is to what extent the paradoxes of validity influence the (external) legitimacy of international law. This question requires us to distinguish between moral and sociological understandings of legitimacy. Legitimacy in the moral, normative sense refers to the right to rule. Allen Buchanan and Robert Keohane argue that in the case of global institutions the right to rule should be understood to mean "both that institutional agents are morally justified in making rules and attempting to secure compliance with them and that people subject to those rules have moral, content-independent reasons to follow them and/or to not interfere with others' compliance with them".[168] Legitimacy in a sociological sense is a measure of belief. From a sociological perspective an institution is legitimate when it is widely believed to have the right to rule.[169] Legitimacy is therefore a subjective quality, defined by the perception of the institution in the eyes of the individual.[170] There is a sharp distinction between sociological and normative perspectives. From a sociological perspective making a claim about the legitimacy of certain global institutions should not be seen as a "moral claim about the universal legitimacy, or even less the moral worth, of any particular international

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[167] For a similar conclusion see Teubner and Andreas Fischer-Lescano, *supra* note 156, at 1004.

[168] My emphasis. Allen Buchanan and Robert O. Keohane, *The Legitimacy of Global Governance Institutions*, 20 Ethics & International Affairs 405, 411 (2006).

[169] Buchanan and Keohane, ibid, at 405.

[170] Ian Hurd, *Legitimacy and Authority in International Politics*, 53 International Organization 379, 381 (1999).

rule".[171] This understanding of the sociological aspect of legitimacy provides, however, only part of the picture because it focuses exclusively on the individual perspective. One can also take a systemic-institutional view of legitimacy. This perspective conceptualizes legitimacy as a measure of the capacity of the law to maintain its autonomy and as a measure of the growth or contraction of legal communication.

In exploring the relation between legitimacy and validity I want to focus on one concrete question: what are the implications of the autological and increasingly heterogeneous character of the concept of validity for the legitimacy of global law? I will start with the moral aspect of legitimacy and will then consider the sociological aspect. Initially one can take the view that the validity of the law is irrelevant to the question of legitimacy. Legitimacy is a moral measure, which is determined by moral considerations; as such, it should not be influenced by internal legal constructions. However, as Buchanan and Keohane demonstrate, the moral legitimacy of international legal institutions is also a function of the operational dynamics of the legal system. To the extent that the various paradoxes of validity influence this dynamic they can also influence the legitimacy of the law.

Buchanan and Keohane make a two-fold argument in this context. They argue, first, that legitimacy is primarily an instrumental measure. "The basic reason for states or other addressees of institutional rules to take them as binding and for individuals generally to support or at least to not interfere with the operation of these institutions is that they provide benefits that cannot otherwise be obtained. If an institution cannot effectively perform the functions invoked to justify its existence, then this insufficiency undermines its claim to the right to rule".[172] Second, Buchanan and Keohane suggest that part of the legitimacy of global governance institutions lies in certain epistemic-deliberative qualities. In particular they argue that to be legitimate a global governance institution must create the conditions for ongoing critical contestation of its goals and

[171] Hurd, *ibid*, at 381.

[172] Buchanan and Keohane, *supra* note 168, at 422.

terms of accountability, through interaction with agents and organizations outside the institution.[173] Achieving such epistemic responsiveness requires that the institution to be both transparent and open to dialogue with external epistemic actors.[174]

The question then is in what way does the autological and increasingly heterogeneous quality of the concept of validity influence these two measures of legitimacy? If one adopts the view that the unfolding incoherence of the international legal system could lead to operational paralysis, one could conclude this will ultimately reduce the legitimacy of the international legal system. If, on the other hand, one adopts the view that this heterogeneity contributes to the resilience of the global legal system and to its capacity to cope with the range of problems facing the global society (as I have argued above), then it is reasonable to assume that this heterogeneity should contribute to the legitimacy of the international legal body.

The paradoxes of validity could also enhance the legitimacy of international institutions by contributing to their epistemic responsiveness. The autological character of the transnational legal system turns it into a highly innovative system. It is, in the words of Heinz von Foerster, a non-trivial machine. Non-trivial machines – unlike trivial machines such as cars and mobile phones – are highly disobedient and unpredictable. In non-trivial machines "a response once observed for a given stimulus may not be the same for the same stimulus given later".[175] The autological nature of the law allows it to continuously challenge its traditional

[173] Buchanan and Keohane, *ibid*, at 406, 432.

[174] Buchanan and Keohane, *ibid*, at 432.

[175] Heinz von Foerster, Principles of Self-Organization - In a Socio-Managerial Context. Self-Organization and Management of Social Systems: Insights, Promises, Doubts, and Questions. H. Ulrich and G. J. B. Probst, eds. (1984) 10. See also Hanno Kaiser "Normativity, Trivial Machines, and Punishment." Law & Society Blog - Notes from the intersection of law, society, technology, economics, and culture - Jurisprudence; June 30th, 2004; http://www.lawsocietyblog.com/archives/2 (2004).

doctrines, analogies, and conceptual constructs. The broad ensemble of validating techniques which characterize the global legal system further enriches this self-reflection process. One of the main virtues of this self-referential dynamic is that it provides some guarantee against domination and exclusion. By creating an opening for a change it provides a room and hope for critical voices. In a world that cherishes diversity of life forms, this competency constitutes an important virtue.[176] The deep heterogeneity of the global legal system seems to cohere better with the cultural diversity of the global society.

The sociological connection between legitimacy and validity constitutes a difficult question. From a systemic perspective I have argued that the paradoxes of validity may contribute to the resilience of the law, and in that sense may contribute also to its legitimacy (understood as a measure of legal autonomy and the intensity of legal communication). Decoding the influence of paradoxes of validity on individual perceptions of legitimacy provides a difficult psychological puzzle. First, because of the low visibility of the paradoxes of validity, it is uncertain to what extent they affect the perception of global law within the wide public. If people are not aware of the incoherence and auto-logical character of the current global law, this fact will not affect their normative beliefs. Second, these features may influence subjective beliefs in different ways. Incoherence, for example may cause a loss of legitimacy by portraying law as a field in which decisions are made in a chaotic and arbitrary fashion. The self-referential nature of validity may put in doubt the bindingness of law - its capacity to provide content-independent reasons for action. Law has developed, however, doctrinal mechanisms that can cope with these questions (e.g., the use of vague concepts).[177]

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[176] *See, e.g.*, CHARLES TAYLOR, MULTICULTURALISM AND "THE POLITICS OF RECOGNITION" (1992); Lawrence Blum, *Recognition, Value, And Equality: A Critique of Charles Taylor's and Nancy Fraser's Accounts of Multiculturalism*, 5 CONSTELLATIONS 51 (1998).

[177] Perez, Oren. 2006. The Institutionalization of Inconsistency: from Fluid Concepts to Random Walk. In *Paradoxes and Inconsistencies in the Law*, edited by O. Perez and G. Teubner. Oxford: Hart Publishing 119.

The cognitive reaction to legal paradoxes is still an under-explored question. So let me conclude this discussion by looking at the findings of a recent article, which explored the cognitive repercussions of the similar truth-teller paradox. Shira Elqayam explored the way reasoners evaluate Truthteller-type propositions (''I am telling the truth'') and Liar-type propositions (''I am lying''). It found, through two experiments, the existence of a ''collapse illusion'', in which reasoners evaluate Truthteller-type propositions as if they were simply true, whereas Liar-type propositions tend to be evaluated as neither true nor false. This psychological result is inconsistent with the philosophical view of Truthteller-type propositions, which considers them as hopelessly indeterminate.[178] Elqayam offers several psychological explanations for this phenomenon which we cannot consider in detail here.[179] However, it would be interesting to explore whether a similar phenomenon exists also in the case of validity.

VII. FROM GLOBAL CONSTITUTIONALISM TO CONTEXTUAL REFLEXIVITY

Modern international law is impure, messy and complex. But the attempts to purify it through appeals to grand theories - constitutional, moral or other - are ill-conceived.[180] First, because they fail to recognize the innate paradoxicality of law. Second, because they constitute a threat to the legitimacy and resilience of the global legal system. The study of diversity and resilience in the ecological domain demonstrates the systemic value of

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[178] Shira Elqayam, *The Collapse Illusion Effect: A Semantic-pragmatic Illusion of Truth and Paradox*, 12 THINKING & REASONING 144 (2006).

[179] Ibid, at 150.

[180] Echoes to this purifying mode can be found, for example, in the 'constitutional moment' hypothesis of Slaughter and Burke-White (*supra* note 73), in David Held's *Cosmopolitanism* (*supra* note 69), and in Josef Kunz dual hierarchy model (*supra* note 116).

diversity. In terms of institutional design, it suggests a shift from unifying models, based on hierarchical normative and institutional structures to reflexive models, which could enhance and support the diversity of the global legal system. Indeed, as the concepts of normativity and rule of law become entrenched in the communicative fabric of the global society, there is more room for experimenting with novel reflexive institutional structures.

I would like to conclude this article with two examples of highly reflexive legal structures. Underlying both examples is the idea of distributed authority. Such more refined authority configurations provide richer opportunities for internal dialogue, self-contestation and conceptual innovation. The price, though, is some loss of coherence. The two examples demonstrate how the use of reflexive structure can affect both the micro- dynamic of a single regime, and the inter-play between several regimes. The examples also differ in their model of distributed authority and in the construction of their reflexive dynamic.

My first example focuses on the Global Reporting Initiative ('GRI'). The GRI was founded in 1997 by the Coalition for Environmentally Responsible Economies in partnership with the United Nations Environment Programme. The GRI is based on three, and potentially conflicting pillars: first, a commitment to multi-stakeholder decision-making; second, an ideological commitment to the ethos of sustainable development; third, a formal, hierarchical institutional structure. The commitment to consensual decision-making is reflected for example in the text of the G3 Sustainability Guidelines (2006):[181]

"Transparency about the sustainability of organizational activities is of interest to a diverse range of stakeholders, including business, labor, non-

[181] It also finds resonance in the description of the GRI in its website: "The 'Global Reporting Initiative' is a large multi-stakeholder network of thousands of experts, in dozens of countries worldwide, who participate in GRI's working groups and governance bodies, use the GRI Guidelines to report, access information in GRI-based reports, or contribute to develop the Reporting Framework in other ways – both formally and informally"; GRI, *Who we are*, at http://www.globalreporting.org/AboutGRI/WhoWeAre/, visited 8 march 2007.

governmental organizations, investors, accountancy, and others. This is why GRI has relied on the collaboration of a large network of experts from all of these stakeholder groups in consensus-seeking consultations. These consultations, together with practical experience, have continuously improved the Reporting Framework since GRI's founding in 1997. This multi-stakeholder approach to learning has given the Reporting Framework the widespread credibility it enjoys with a range of stakeholder groups"

The commitment to the value of sustainable development is set out in the G3 Guidelines. Thus, the Guidelines open with the famous definition of sustainability provided in the World Commission on Environment and Development report 'Our Common Future'.[182] In addition to its the commitments to multi-stakeholder consultation and sustainable development the GRI is also based on a carefully designed hierarchical structure. The GRI is run by a Board of Directors and a Secretariat. The Board has "the ultimate fiduciary, financial and legal responsibility for the GRI, including final decision making authority on GRI Guidelines revisions, organizational strategy, and work plans".[183] The Secretariat is responsible for implementing "the technical work plan set by the Board of Directors".[184] While the Stakeholder Council[185] is supposed to provide a

[182] The goal of sustainable development is to "meet the needs of the present without compromising the ability of future generations to meet their own needs". World Commission on Environment and Development, *Our Common Future* (1987) 43.

[183] The GRI formal instruments of incorporation are not published on the website; I'm relying therefore on the information that was made public on the website. See, http://www.globalreporting.org/AboutGRI/WhoWeAre/Board/, visited 8 March 2007.

[184] It also supports "the operations of the Board of Directors, Stakeholder Council and Technical Advisory Committee"http://www.globalreporting.org/AboutGRI/WhoWeAre/Secretariat/, visited 8 March 2007.

[185] The Stakeholder Council ('SC') has 60 members. It meets annually and constitutes "the GRI's formal stakeholder policy forum, similar to a parliament, that debates and deliberates key strategic and policy issues". However its only formal powers are to approve nominations for the Board of Directors and to provide it with strategic recommendations. The SC members are chosen by the Organizational Stakeholders. See

kind of parliamentary scrutiny on with respect to the Board's decision making processes, its formal powers are very limited. The Board has the formal capacity to adopt policies that are inconsistent with the results of the deliberation process and the ideological commitment to sustainable development.

The tri-partite normative commitment of the GRI could potentially lead to a range of irresolvable conflicts. Despite this potential for internal quarrels the GRI has functioned in an admirable fashion over the last years. It has produced two Reporting Guidelines over a period of 4 years (2002, 2006).[186] These Guidelines have not only reflected a deep commitment to ecological values - setting ambitious reporting standards that depart from the conventional, economic-oriented accounting principles - but have also influenced in a substantive way the reporting practices of Multinational Corporations.[187] The GRI reflexive structure seems to have provided the organization with both innovative capacity and the legitimacy to carry out its mission. Further, it succeeded in a domain in which progress through the treaty-making route, would have been much more difficult.

My second example is based on the vision of judicial dialogue, drawing on the mechanism of preliminary ruling which was developed in the European Union. This mechanism can be used both in the context of single

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http://www.globalreporting.org/AboutGRI/WhoWeAre/StakeholderCouncil/ http://www.globalreporting.org/AboutGRI/WhoWeAre/OrganizationalStakeholders/, visited 8 March 2007.

[186] See, http://www.globalreporting.org/ReportingFramework/G3Online/ (visited 27 March 2007).

[187] A survey published in 2005 by KPMG analysed trends in corporate responsibility reporting among the world's top 250 companies of the Fortune 500 ('G250') and top 100 companies in 16 countries ('N100'); KPMG, *International Survey of Corporate Responsibility Reporting* (2005). The report found that sustainability reporting has now become mainstream among G250 companies (68 percent) and fast becoming so among N100 companies (48 percent), *ibid*, at 4. The influence of the GRI Guidelines was reflected by the fact that 40 per cent of the reporters mentioned that the Guidelines were the tool used by the corporation to decide about the content of the sustainability report; *ibid*, at 20.

regimes and in the context of cross—regimes relationships. Under Article 234 of the Treaty Establishing the European Community,[188] the European Court of Justice ("ECJ") may give preliminary rulings interpreting European law at the request of any national court. This mechanism was initially intended to address only questions relating to the validity of European law. However the ECJ successfully encouraged national courts to use the mechanism to review the compatibility of national law with European law. As a result of the preliminary reference mechanism there have been fewer occasions in which the ECJ has exercised its authority to **review national judicial decisions**. Instead, the ECJ's interaction with national courts has become something akin to judicial **dialogue**, with reciprocal learning and exchange of ideas.[189]

The European model can serve as a template for creating more extensive dialogue between international tribunals and national courts and possibly also between different international tribunals. The two regimes that were discussed in section III – the WTO and the ICC – provide only limited opportunities for such dialogue. In the ICC treaty the principle that the Court is to be 'complementary' to national criminal proceedings could be seen as a possible platform for this kind of judicial dialogue. The Rome Statute provides that the ICC will not exercise its jurisdiction if the state is genuinely willing to carry out the investigation or prosecution of crimes.[190] The Statute also outlines processes for judicial review of national court decisions.[191] Formally, the determination as to whether the domestic court proceedings were independent and impartial lies solely with the ICC itself. However, such intervention in domestic legal proceedings is likely to

[188] Consolidated Version of the Treaty Establishing the European Community, Feb. 26, 2001, O.J. (C 80) 1 (2001), art. 234. Article 234 previously was encompassed in Article 177 of the Treaty of Rome, Mar. 25, 1957, 298 U.N.T.S. 11, 109.

[189] See, Robert B. Ahdieh, Between Dialogue and Decree: International Review of National Courts, 79 N.Y.U.L. Rev. 2029, 2156-2157 (2005).

[190] See, Rome Statute, Article 17. See further Maogoto, supra note 55, at 19.

[191] Maogoto, *ibid*, at 20.

prove highly controversial and thus we can expect the Court to be careful in using this authority.[192] It seems that incorporating some form of preliminary ruling procedure into the ICC treaty could provide more room for judicial dialogue, while at the same time defusing some of the political tension associated with the judicial review procedure. The WTO does not have procedures that could facilitate a constructive dialogue between national courts and the WTO judicial tribunals (although national courts play an important role in enforcing sections of the WTO rule-book, especially in the fields of anti-dumping, intellectual property rights, and government procurement).[193] In both cases, and in particular that of the WTO, designing procedures that will facilitate an equal-footed dialogue between national and international courts could contribute to the reflexivity and legitimacy of the legal system as a whole.[194]

The conceptual shift from purity to reflexivity asks us then to embrace the paradoxicality of law. The polymorphosis process seems to mark the end of the dream of grand global constitutionalism.

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[192] Maogoto, *ibid*, at 21.

[193] See, e.g., in the case of anti-dumping: James P. Durling, *Deference, But Only When Due: WTO Review of Anti-Dumping Measures* 6 Journal of International Economic Law 125 (2003).

[194] It is beyond the scope of this article to explore the details of such procedures. It is clear however that in order to facilitate dialogue they should not be designed so as to merely crystallize the supremacy of the international tribunal. In designing such dialogical mechanisms we should take into account the fact that the WTO rule-book, unlike EU law, is not directly applicable within the jurisdictions of most WTO members.