Making Paradoxes Invisible: International Law as an Autopoietic System

Kenneth Kang[*]

Abstract

When a state claims its practices are lawful but at the same time another claims this unlawful, a paradox emerges. Legal indeterminacy becomes the ordinary rule, while the resolution of disputes is designated the exception. To illustrate how international law deals with paradoxes, this paper will employ the dichotomy of upstream–downstream trans-boundary interstate relations. Here the paradox arises, since upstream states traditionally advocate for the free utilisation of water within their territory, while downstream states instead advocate for the waters full continued flow. Although, from a logical perspective, such a paradox would typically be viewed as something negative, from a social perspective, paradoxes also draw attention to the frames of common sense. Indeed, by employing a Luhmannian-inspired theoretical framework, this paper proposes that, through a sociological understanding of paradoxes, one can more adequately rediscover and reconceptualise the manner in which international law institutionalises conflicting expectations into a more harmless, bounded and permitted contradiction.

I. Introduction

When the conditions of possibility are at the same time the conditions of impossibility, a paradox emerges. When a state claims its practices are lawful but at the same time another claims this unlawful, a paradox also emerges. To illustrate how paradoxes are dealt with by the international law system (ILS), this paper will employ the dichotomy of upstream–downstream trans-boundary interstate relations. Here, the paradox arises because the upstream state traditionally advocates for a position based upon 'absolute territorial sovereignty', which involves freely utilising water within its territory, while the downstream state traditionally counters with 'absolute territorial integrity', whereby the continuation of the full flow of waters is instead advocated.[1] Although, from a logical perspective, such a paradox would typically be viewed as something negative, from a social perspective, paradoxes also draw attention to the frames of common sense. Indeed, this paper proposes that, by employing a sociological understanding of paradoxes, one can more adequately rediscover and reconceptualise the manner in which international law institutionalises conflicting expectations into a more harmless, bounded and permitted contradiction.

In order to reconstruct these legal operations, this paper therefore proposes a Luhmannian-inspired process-based theoretical framework. The purpose here is not to prescribe the optimal formulations regarding how standards should be designed and operated, nor is it to reconstruct a workable model for predicting the outcome of new putative norms of customary law, as D'Amato

1 See McIntyre for a more precise definition of these differentiated sovereignty conceptions (2007, pp. 13, 17).

visualised in the ILS (2005; 2014). Rather, the ambition here is to reconceptualise how international law works in operational terms, and to explore what forms of legal communications are triggered, when one tries to make paradoxes invisible. Significantly, 'operational' here is understood not as a question of what is valid law and its passive unending final answers, but rather the more actively variant question of how the ILS proceeds in determining law's validity. Comprising four sections, this paper begins with a brief résumé of international law reconceptualised as an autopoietic system (Section II), followed by the main body, the theoretical framework (Section III), with conclusions reached in the last section.

II. International law as an autopoietic system

International law is a system; its environment is the field of political international relations. Although the term 'system' is often used to describe law as a system of norms, this paper employs a very different understanding; it refers here to a particular autopoietic self-reproducing system that constitutes itself by distinguishing what it does, from what occurs in its environment. Consider an anthill, which Bergthaller (2014) uses to describe an autopoietic system. The low probability of an individual ant to determine the shortest path between a food source and its nest becomes a higher probability if we observe the more complex system of foraging ants: we find
'ants laying trails following trails laid by other ants, who laid these trails following the trails laid by other ants . . and so forth' (Bergthaller, 2014, p. 42). In systemic terminology, the system of foraging ants is able to autopoietically reproduce because of its remarkable ability to assert itself against its environment (namely everything else surrounding the system, such as predators or physical obstacles). Indeed, this is achieved by the system developing substantial autonomy from its environment – that is, by the swarm of foraging ants laying a highly reductive chemical code that circumscribes the domain of differences in the environment that is relevant to it (e.g. food/ not-food).

This line of thinking is also similar to that of the international legal system reconceptualised as an autopoietic system. Since, just like an anthill, which self-organises itself through the recursive processing of pheromone trails, the self-organisation of the ILS occurs through the recursive processing of communicative filters. For heuristic purposes, we may conceptualise this as the employment of a contingency formula, namely a binary code of justice/non-justice that equips the ILS 'with controlled dynamics in order to keep itself apart from its environment' (Luhmann, 2004, p. 129). After all, if the ILS were unable to differentiate itself from the ongoing power games of political actors or the profit-oriented calculations of lobbyists, then the ILS would, as a system, likely fall apart. Indeed, it is precisely because the ILS is able to reduce complexity in an environment of high complexity that helps to explain how and why operators of the law, such as a jurist or practitioner, do what they do. Why is this?

The answer can be found in the analytical power of reconceptualising the ILS as an autopoietic self-distinguishing system that sets out to describe the social filters through which our perceptions of 'legal communications'[2] are constructed. This is because, contrary to Fischer's and Teubner's introduction of the concept of 'auto-constitutional regimes'[3] that tends to deny the 'unity of

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2 Meaning here all communications in society that are understood as directly relating to issues of legality or illegality. This could be, for example, government departments debating the creation of new laws to the teaching and interpretation of legal norms in law schools, or to environmental non-governmental organisations (NGOs) investigating cases of trans-boundary water pollution with a view to possible court action.

3 This being the argument that new structures of law have emerged departing from state-oriented legal management; see Fischer-Lescano and Teubner (2004).

international law',[4] an autopoietic reconceptualisation of the ILS has the advantage of rediscovering the system's inner phenomenal structures – a precondition for locating the reoccurring observable patterns of law's argumentative practices. Consider a lawyer advising a state on the development of its trans-boundary waters. For heuristic purposes, we may say that such communications form part of the periphery of the ILS because it constitutes a zone of non-compulsory decision-making open to all kinds of legal/non-legal interests. By contrast, the centre, namely the courts, we may conceptualise as the ILS's autonomous operations because it is only here whereby ruling obligations are rooted in the ILS itself. In this sense, if the lawyer were to offer meaningful legal advice to the state, then the lawyer must respect the possibility of arriving at a decision in the court – the place where law's unique prestation[5] can be found. Of course, this does not mean non-legal communications produced at the ILS's periphery are to be ignored altogether, for it is also necessary that the ILS remains a dynamic system, as exemplified when legal professionals constantly reinterpret interstate treaty norms that then generate a flow of communications back towards courts. Indeed, it is precisely this dynamic 'circular relationship of influence' (Luhmann, 2004, pp. 278, 289) between the law's periphery and centre that D'Amato had in mind when he devised the four conceptual filters – the self-preservation, equitable, reciprocity and interdependence filters – as the autopoietic operations of the ILS. This, he argued, is heuristically useful for working out how legal claims might eventually be filtered through the mind of a judge, namely the ILS's operations at the centre (D'Amato, 2005).

Nonetheless, although the proposed theoretical framework structurally derives from D'Amato's model of the ILS, the methodological approaches differ significantly. This is because, whereas D'Amato's model aligns itself more to a normative account of law, the proposed framework offers a strictly descriptive account, the former being an attempt to 'help litigators and negotiators make their international-law arguments sounder and more persuasive' (D'Amato, 2014, p. 650), whereas the latter restricts itself to a description 'to understand legal communications as a part of society in operation' (Luhmann, 2004, p. vii). The analytical value here of the descriptive approach that aspires to reconceptualise international law as an autopoietic self-distinguishing system is that, while it cannot offer practical technical guidance, it can provide a 'semantic reorganization of knowledge' (Luhmann, 2008, p. 20) so as to reach a proper formulation of how to work with indeterminacy in law. That is more specifically the indeterminacy problem of how to steer a course between the Scylla of Sisyphean meaninglessness and the Charybdis of cynical decisionism, between Koskenniemi's Utopianism and Apologism.[6] But why adopt sociological description as the fruitful antidote?

This is because a descriptive approach employs a strictly 'scientific'[7] system–environment relational analysis that aspires to begin with certainty in its object of study. After all, whereas a normative approach has the tendency to purge itself[8] by employing the formula of 'in spite of X, we think Y', a descriptive approach surpasses personal experiences and habits by employing the

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4   As suggested by Kessler and Kratochwill; see Kessler and Kratochwill (2013, p. 170).

5   Prestation means Leistung in German, which translates as performance or contribution.

6   This being Koskenniemmi's critique that abstract normativity leads to utopian arguments irrelevant to contemporary practices, and that law via sovereignty reducible to the will of states leads to a position whereby law ends up apologising for its malfunctioning (Koskenniemi, 2005). See also Bernstorff's description of international law having to steer a course between the two evils of Scylla and Charybdis (2006, p. 1015).

7   As advocated by Luhmann, who suggests that it is the function of 'scientific' (i.e. oriented around the distinction true–false) legal theory that should constitute the legal object of study (2004, p. 57).

8   In the sense that such observations tend to proceed naively, observe what they observe and attribute their results to the world (and thus remain unaware of the forces that lie behind the constructed result).

more controlled (and thus more adequately complex) formula of 'because of X, there is Y' – or, in systemic terminology, 'because of system X, the resulting environment of Y is constructed'. Here, certainty inheres in t h e reoccurring patterns of society where one finds a set of clearly differentiated and typified communicative filters (i.e. functional systems) – a phenomenon Luhmann (1989) describes as functional differentiation. Of significance is the way in which each functional system draws its boundaries and constructs its resulting environment, which, according to Philippopoulos-Mihalopoulos, is an elaborate charade: 'an illusion by and for the system' to allow it to function (2009, p. 81). As a means for discovery rather than an end in itself, consider for example the descriptive formula, because the ILS employs the code justice/non-justice and its programme of legal norms to allocate these values (and thus draw boundaries), the system functions to take measures against conflict formations. The same can be said for other functional systems; because the political system employs the code government/opposition and its programme of ideologies to allocate values, the system functions to facilitate collectively binding decisions; or, because the economic system employs the code payment/non-payment and its programme of prices, the system functions to manage resource scarcities; or, because the science system employs the code truth/non-truth and its programme of theories, the system functions to minimise risk within society.[9]

The value of employing this functional analysis is because it offers a template for understanding how law operates in contradistinction with other social formations. That is, it captures how the processes of functional differentiation potentially feed into the law's self-description[10] and give way to a recurrent stream of paradoxes, this being namely the paradox of different functional systems employing different criteria of success and relevance, with the result that this quickly trivialises international law's aspirations of obtaining meaningful 'rational consensus', because nothing any longer can be described as necessary or problematic in any objective sense. Although employing this descriptive approach will inevitably offer an analysis that is 'more to a labyrinth than to a highway to a happy end',[11] it can guarantee 'at least' that its observations are 'correctly false' (Luhmann, 1987, p. 150). And, from here on, liberated from the motivations of worldview architectonics that make us humans extremely crooked subjects, the proposed theoretical framework aspires to work out the reoccurring patterns under which international law institutionalises paradoxes into a more harmless, bounded, permitted contradiction. This we may begin at the ILS periphery, the law's context, as will be explored next.

III. Theoretical framework

3.1 Context

At the periphery of the ILS is the field of political international relations. Here, mutual interferences between law and politics is a necessary precondition for maintaining the 'andness' of both systems (Luhmann, 2006, p. 46) – that is, the unity of components making up their systemic contextures. One particular example is treaty agreements. From law's perspective, treaties form part of the legal system's self-defined environment, its object of study and hence the focus of certain legal communications. But, from the political systems perspective, treaties form a self-reproductive

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9 See e.g. Borch for a more detailed introduction to the mechanisms of functional differentiation (2011, pp. 66–92).

10 Self-description, meaning the established difference between what the legal system is (i.e. its own communications such as legal argumentation or court decisions) and what it is not (i.e. other systemic communications).

11 This quote, according to Vandenberghe, is how Luhmann, in his dry sense of humour, more specifically characterised his theory of social systems theory; see Vandenberghe (1999, p. 54).

interaction system whereby the contractual parties define their own environments and interact with these environments accordingly. In this way, treaties are not only created following the legal system codes of legal/illegal, but are also expressions of political international relations. Thus, the ILS's peripheral autopoiesis is not completely established (Mattheis, 2012, p. 640) and this is why one speaks of the 'politics of international law'.

The paradox of upstream–downstream dichotomies as explained above helps to illustrate these operations. The demands for short-term economic growth produce the legal communications of the right to development, whereas the demands for long-term ecological preservation produce the legal communications of precaution and restraint. How, then, to manage the paradox? On the one hand, the relevant parties might decide to opt out of the formalities of the legal system. This might entail, for example, the deployment of more bounded interaction systems such as technical expert joint commissions, to more demanding synchronising systems such as consultations and diplomatic negotiations. However, what keeps the unity of these systems is not the denial or suppression of conflict communications (as in when a communication is rejected, when a no is answered with a no), but rather it is the promotion and enhancement of a specific type of organised conflict communications, the former, for example, being the amplification of specific uncertainties so that conflict communications might become more visible, more tractably bound by the regulations of science and thus more harmless, whereas, in the latter, the emphasis is placed upon employing positive incentives such as monetary compensation so that risks are instead repackaged as a more future-accommodating problem of costs.

On the other hand, if the interaction system becomes sucked into the undertow of an ever-widening arena of conflict topics, the system might mutate into a conflict system. That is, it will produce claims t h a t originate instead at the decision-making level of the 'expectation of expectations'. For example, under these dynamics, it is not so much that State A has experienced a decline in its water quality or quantity due to State B constructing a dam upstream and reacts against this infrastructure development; nor is it that State A expects the construction of the dam by State B will cause a decline in its water quality or quantity and therefore seeks to forestall State B's actions. Rather, it is because State A expects that State B expects confrontation and therefore defines State B's practices as 'appropriately' hostile. Thus, State A perpetuates the conflict structure by answering 'no with no' (Luhmann, 1995a, p. 566) to further its own logics of adversarial interests and priorities. However, such gain in momentum of contradiction does not mean the conflict system can proceed in a manner that avoids the ILS altogether. Although the ILS does not seek to attract conflict to retain its identity, it nonetheless predicates: it demands that communications must respect the possibility of arriving at a decision in the centre, namely in the courts – one that, however 'foundationless' binding decisions may turn out to be, these symbols of normativity at least have the potential to produce certain societal positive effects, namely that of legal security, stabilisation of expectations and the pacification of conflicts.

3.2 Operations

Operation refers here to the claims of conflict systems to which their distinctiveness is generated by their anticipation of a court's ruling. Located at the centre, these operations play a very prominent role in the ILS because it is only here whereby perceived ruling obligations are rooted in the system itself, and not influenced by factors outside it (Mattheis, 2012, p. 633). Moreover, it is only here whereby these operations stand in a circular relation to the ILS structures – its self-preservation, equality, reciprocity and interdependence filters – and are processed through them to selectively produce new operations. In doing so, since each filter derives from the goal of self-preservation (D'Amato, 2005, p. 364), this arguably offers a powerful heuristic tool for explaining why the ILS produces an intense sensibility to specific questions and, at the same time, a great indifference towards everything else, including the operational logics of other systems. These

conceptual tools I propose are useful for working out the manner to which the ILS proceeds in determining law's validity.

3.3 Self-preservation filter

The self-preservation filter refers here to a contingency formula of 'justice' or 'injustice' that the ILS employs for self-perpetuation (Luhmann, 2004, pp. 211–229). It is the means whereby the ILS compensates society for the loss of traditional natural law via replacement by a 'value-free' notion of justice (King and Thornhill, 2003, p. 66) delineated by texts, authorities, concepts, rhetoric and legally determined imaginations. It is in other words a formula determined not by fixed normative roots, but rather via circular references produced by law itself (Luhmann, 2004, pp. 214–216), enabling the system to maintain the presentation that it is still the risk carrier of societal evolution.[12]

We may identify two main aspects of this contingency formula. First, the formula enables the ILS to prioritise not so much how it might end disputes or achieve specific purposes, but rather it enables the law to position itself in a manner so as to establish the eternal recursive autopoiesis of law[13]: whether A or B's position is more conducive to achieving the ILS's goal of systemic survival (D'Amato, 2009, p. 908). Second, this in turn facilitates the law to package information for legal decisions in such a way that the appearance of 'theoretically systematized positive law based on rules and principles may be maintained' (Luhmann, 1995a, p. 216). As a consequence, the ILS can therefore present itself not as a fuzzy, ambiguous, devoid of content alternative, but rather as a system of standards with factual content: B's position was consonant with the standard whereas A's clearly was not (D'Amato, 2009, p. 909).

A question arising, however, is this: if communications between the ILS and other social systems occur only in a way that is understandable by law, then how might the ILS overcome the dilemma that these communications would potentially carry very little influence? It does so, as will be explored next, by restructuring basic reference points from that of the concrete interests of nation-states to that of the functional differentiation of specific legal issues.

3.4 Equitable filter

The equitable filter refers here to a contingency formula employed by the ILS as a schema to search for reasons and values made legally valid via its programmes. This formula, however, does not rely upon external notions of who or what should be treated equally, but adapts in a uniquely legal way general abstract notions of equality (King and Thornhill, 2003, p. 64). We may call this the ILS's 'operational closure' whereby the cognitive openness of the law rests upon its normative closure. These two seemingly incompatible concepts are explained next.

3.4.1 Normative closure

Normative closure refers here to the generalised legal code of legal/non-legal that the ILS employs for determining which communications are recognised as relevant for law. Though the code is utilised for determining the limits of legal regulation – and, in doing so, forces justice to take on its form – it is also paradoxically burdened with the task of presenting itself as containing all concepts of justice, this being to maintain the basic requirement that the law should be fair and be seen to be fair, even though deploying specific and universal decision-making criteria can only mean something

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12 For an alternative reading, Zumbansen (2001) argues that law and politics have actually ceased to be the 'risk carriers' of societal evolution.

13 As exemplified in the IJC's decision concerning the Gabcikovo Dam whereby Bostian argues the court avoided pronouncements on several topics, mostly environmental, and took a cautious approach so as to uphold the principles of treaty law (1998, pp. 426–427).

akin to regularity or consistency – that is, without consideration for a particular states or actors concrete interests.

Nonetheless, in employing the generalised legal/non-legal binary code, conflict realities are also inevitably falsified. This is because, though legal communications are directed at conflicts, this does not mean the ILS actually resolves conflicts. Rather, when the law observes conflicts, it simply transforms them into technical legal problems about right and wrong, because this is all the law can understand, and this is all that it can consider. Identifying causation of harm (i.e. the facts of who committed a certain act) after all is not the law's priority. It is instead the maintenance of a self-referential legal specific model for reducing complexities that is the law's primary concern: which attributable legal subjects (e.g. states or entities) should be rewarded and which attributable legal subjects should be punished for this act.

Assigning rights to legal subjects is therefore one of the most important tools of the ILS for enabling transformation of conflicts into legal problems. An internationally unlawful action or omission breaching a treaty cannot, after all, be taken to court if there can be no attribution of responsibility. And, even if a claim is taken to court, everything is likely be excluded but the relevant facts for the determination of right and wrong in considering what counts as legal, namely which facts are legal facts. The ILS thus simplifies conflicts and specifies precisely what is included in the conflict and disregards the rest, if the rest cannot be formulated in legal terms. For, in the end, it is law's conditional programmes that are employed here whereby legal argumentative redundancies remain the reference point for judicial decisions: only if fact X is given, can the decision be made Y is legal or illegal. As exemplified by the fact that jurisdictions of most international courts are limited to the rules of the treaty instruments that set them up, whereby fundamental changes to the law can only be applied only in exceptional cases.

One can see, therefore, why the ILS operations are heavily biased towards redundancy. Indeed, though this is not desirable, it is fatally necessary because only by translating conflicts into a question of law and non-law can the ILS generate a 'historical machine' for ensuring the constancy of equality of treatment. And only by doing this can the ILS maintain the symbolism of normativity. The alternative would see the ILS unable to presuppose and accept itself, never ending its 'quest for finding the final reason of law' (Luhmann, 2004, p. 426), with the consequences that the law would no longer be presumed to be able to solve any social conflict put before it, whether in legal terms or within a legal rationality. It would therefore cease to exist as a legal system.

Nevertheless, in the event that the application of legal coding fails to stabilise expectations and ends up endangering a conflict system's whole, how then might the ILS deal with this? Moreover, as will be explored next, if the ILS is to maintain its autopoiesis, then how might it simultaneously make invisible the paradoxical question of whether the 'original sin' of legal right and wrong exists rightly or wrongly?

3.4.2 Cognitive openness

Cognitive openness refers here to how the ILS adapts to disappointments. It is the means by which the ILS employs various purposive programmes that set legal objectives irrespective of constitutive or regulatory conditions (e.g. the agreed treaty texts). This allows the ILS to derive measures to be taken in the present for future goals: to decide Y for the purpose of X – in other words, to legitimise the inclusion of non-legal communications for the purposes of balancing interests. In the context of trans-boundary waters, for instance, this could be formulated as follows: to include state obligations towards individuals or non-state actors previously excluded from a treaty system, for the purposes of attaining equitable utilisation.[14]

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14 As exemplified in the 2002 Framework Agreement on the Sava River Basin, Article 21(2), in which states were asked to facilitate monitoring of treaty implementation by providing information to the general public.

In practice, these purposive programmes are employed to limit the degrees of freedom of a conflict system. They do so by breaking through rules of the type *qui suoiure utitur neminem laedit*[15] or, more specifically, the concepts of absolute territorial sovereignty/absolute territorial integrity.[16] Consequently, they make it possible for the ILS to treat in special circumstances a state (or entity) that acted lawfully (or perceives itself as doing so) as if it had acted unlawfully. In other words, the law's 'proceduralisation' (McIntyre, 2010) reintroduces uncertainty via the medium of substantive emptiness (i.e. purposive programmes) in order to attain the advantages of co-ordination and overcome paradoxes 'arising from the need to know the unknowable' (Luhmann, 1995b, p. 294). Their deployment, however, also comes at the price of developing both simultaneously progressive and regressive tendencies in the regulation of conflict systems, as will be shown.

On the one hand, purposive programmes are progressive. This is because they are a more effective way of having an aim ascribed to a rule. If the goal is for development, then the concept of equitable utilisation for instance can serve to validate the lawfulness of new (or increased) utilisations of an international watercourse. This helps to legitimise all of the side effects of development – a necessary prerequisite for stabilising motivations (Kang, 2017). But purposive programmes also function as a kind of indisputable medium for the 'reception of all possible preferences, value shifts and ideologies, which are not controlled by the legal system' (Luhmann, 1995b, p. 297). This is because their legitimacy does not derive from the official truth of validity claims, but rather it is from the co-ordination of learning processes. For example, if one state understands equity as a distributive concept[17] whereas the other focuses on its corrective aspects,[18] the ILS overcomes the paradox, by simply keeping it at bay, by replacing the freezing effect of a truth-seeking consensus with the pliability of whether the relevant subjects have cognitively grasped the normative expectations involved in the law's autopoiesis. That is, whether these expectations such as the introduction of various risk assessments permit conditions of reversibility needed for enabling a 'general readiness to accept, within certain limits of tolerance, decisions which are still without content' (Luhmann, 1969, p. 28). In this sense, purposive programmes serve as essential carriers of the law's differentiation, for they enable exceptions to be manoeuvred in order to overcome paradoxes in cases where it is too hard to follow the law's coding.

On the other hand, purposive programmes are regressive. This is because they legitimise the choice of means and thus generate injustice (Luhmann, 2004, p. 223). In other words, they nurture a legal culture of argumentation that produces a high degree of variety emphasising the individual nature of each case and its content with vague general formulae like 'equitable utilisation' or 'balancing of interests'. But the more conflict systems observe these purposive programmes – and, thus, are more receptive to changing preferences – the more conflict systems will rely for their actual functioning on organisations. This will lead to the outsourcing of the law's normative authority to the adoption of global expert regimes – indeed, the new natural law (Koskenniemi, 2009, p. 410), which gives functional priority to the forms set by technology and capital investment. As a consequence, due to the modus operandi of organisations whose preferences are to communicate with other organisations, whose tendency is to treat private

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Available at: <http://www.savacommission.org/dms/docs/dokumenti/documents_publications/basic_documents/fasrb.pdf> (accessed 24 May 2017).

15 'He who relies on his right harms no one.'

16 See note 1.

17 This being whether equitable allocation is achieved so as to maintain each riparian state's current level of economic development.

18 This being whether equity requires states that have less access to financial and technical means to be entitled to water allocation so as to allow them to 'catch up' with other states.

persons as if they were another organisation (Luhmann, 1997, p. 834) and whose functioning depends upon excluding almost every person except for the organisation one is included in – this is nothing more than the acknowledgement that society will increasingly equip itself with the capacity for discrimination through its organisations (Luhmann, 2000a, p. 393).

The question arising then is this: how might the ILS compensate conflict systems for its falsification of realities and its outsourcing of normative authority to organisational systems? This I shall turn to next, by re-filtering the equality filter through the principle of reciprocity.

3.5 Reciprocity filter

The reciprocity filter refers here to a contingency formula that is employed in order to compensate for the ILS's relatively weak instruments of governance. Indeed, this is because '(a)s long as the international order lacks a centralized enforcement machinery and thus has to live with autodetermination', reciprocity will serve as 'the principal leitmotiv, a constructive, mitigating and stabilizing force' (Simma, 1984, p. 400). Nonetheless, like the equitable filter, the reciprocity filter also functions operatively closed, in the sense that it operates within its own internal logics, but also behaves as cognitively open to the environment, when faced with events or facts that frustrate its system's normative closure.

3.5.1 Normative closure

Normative closure refers here to the generalised legal code of lawful unlawful that the ILS employs for determining the legal acceptance of social behaviour. Of relevance is how the principle of reciprocity, or more specifically a 'tit-for-a-different-tat' violation rule,[19] is deployed by treaty systems in the form of a conditional programme: if State B violates an international legal entitlement of State A, then the losses of State A should (in principle) be transmitted back to State B. Here, transmission occurs because the conditional programme grants State A the right to deploy legal countermeasures, such as the release from its own obligations of adhering to other primary provisions in the agreed treaty with State B. In doing so, this serves as a symbolic apparatus to allow State B to identify whether its expectations are in line with the law, and thus whether these are cost-effective expectations.[20]

Nonetheless, such conditional programmes only make sense in situations whereby the existence of rights and duties are reversible. That is, if the complementarity of rights and duties derived from a treaty system's substantial reciprocity result from the actual equivalence of mutual advantages. In practice, however, if this is attained (often based on concessions granted outside treaty systems), then such stability is always a hard-won achievement because what this actually enables is the justification of a considerable measure of inequality in points of time and attainments. For example, in terms of time, the typical conditional programme may employ the formula: if State B suffers from water scarcity during time period Y, then State A, according to the agreed treaty escape clauses, shall permit State B to deliver less water than it would have to under normal circumstances, and vice versa, while, in terms of attainments, the typical conditional programme may be: if State B can more efficiently utilise the watercourse, then State A shall forego actual use of the wet water in return for monetary compensation from State B. In this sense, the above conditional programmes enable greater differentiation not only because they employ schematic if/ then decisional-making models, but also because they enable the increase of bearable insecurity, and thus allow conflict systems to acquire an amount of complexity, form and certainty that they might not otherwise have had.

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19 See e.g. D'Amato (2014, p. 663).

20 These expectations are also magnified if one takes into consideration the possible forceful reaction of the entire community of states; see D'Amato (2014, p. 675).

Yet, beneath this veil of unquestioned reciprocal mutual advantages, the ILS conceals a paradox: that the order by which the reciprocity filter validates itself depends upon an equality that does not exist. Of course, the ILS could not conduct itself otherwise if it were to expose this paradox of presupposing norms about spheres of jurisdiction, for the ILS cannot be allowed to disintegrate just because State A's expectations for realising reciprocal mutual advantages are profound, State B's better and State C's more capable of attaining consensus. Instead, the ILS must have at its disposal a mode of disappointment relief that provides clear outcomes so that at the least the assumption of consensus can follow. This is what the principle of formal equality achieves – the demand for equal treatment, as derived from the principle of voluntary state consent. But the price that the ILS must pay for such a mode of disappointment relief is that it falsifies conflicts precisely by not taking into consideration the unequal distribution of communicative opportunities structuring conflict systems. For example, a water-sharing agreement delineated by fixed allocations cannot be challenged even if this produces more problems for one state than another (or another system),[21] but rather only if it has been brought about by illegal means. Indeed, such a paradoxical legal order may even permit states to avoid the 'strict application of the law in their mutual relations' (Paulus, 2011, p. 124) and thus gives rise to what Teubner describes as 'hitting the bottom'[22]: that only when catastrophe is imminent will it become essential for systems to limit their compulsive expansion, and to ecologise by becoming receptive for environmental interests. This could be read as a restatement of the principles of reciprocity and mutual recognition (Guski, 2013, p. 529).

Viewed in this way, the question arising from such a paradox is therefore this: if it is true that the self-correction of society appears to occur only at the last minute, then how might the ILS mitigate these self-destructive tendencies? I submit, as will be explored next, that it is via cognitive sensitivity that the ILS finds its answer.

3.5.2 Cognitive openness

Cognitive openness refers in this special circumstance to how the ILS understands subjective rights that draw new distinctions without provision for equilibrium and reciprocity in law. It is the means by which the ILS disrespects treaty agreements by imposing rights and duties upon one state, but not necessarily a counter-right with corresponding counter-duties. Indeed, this ability to hold ready the capacity to make asymmetrical relations (i.e. justifying procedural inequalities) and maintain independence from a conflict systems structural biases[23] is a necessary mechanism for making the law compatible with societal complexity. We may call this the programme of purposive reciprocity that is employed by the ILS to devise more sophisticated ways of reading the law's landscape.

Here, the deployment of logical reason is of particular relevance, its purposive programme: to transform the law of treaty norms into the law of reasonable arguments for the purposes of attaining the balancing of interests. In other words, reason is employed here to argue with equal voice both for reparations (equality) and for exceptions to reparations (inequality). The unmitigated demand to refute reparations is clearly wrong, violating the natural (and the created!) legal norms of treaty texts. And the unmitigated demand for reparations is clearly wrong,

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21 For example, the Almaty Agreement of the Aral Basin sea (1992) neglects the need for a wider, more flexible landscape of equitable utilisation by fixing instead the Soviet-time status quo of the then-established rules, that being a 50/50 split of the water. Available at: <http://www.icwc-aral.uz/statute1.htm> (accessed 24 May 2017).

22 This is what Teubner describes a drug addict does before he is willing to go into detox (2012, p. 11).

23 Structural biases such as bilateralist systems and their situations of equilibrium. As exemplified by the UN Environmental Programmes observation that 80 per cent of existing watercourse agreements are bilateral, even though other countries may also share the same river; see UNEP (2006, p. 35).

violating the law of exceptions as ascertained by customary norms.[24] The paradox (of justice existing only if injustice is attributed meaning) in other words reappears as tautology – justice is what is just, as reasonable reason (and hence 'unreasonable' is defined ambiguously). But of course tautologies too need to be de-tautologised for, otherwise, only conservative self-descriptions might be attained, even counter-intuitive ones. How then to drive the paradox back into its invisible retreat?

Restating the problem in the form of an abstract preventative consensus is one solution, its formulations in the context of trans-boundary waters: to impose the duty of no significant harm (NSH) even in the absence of treaty agreement, for the purposes of attaining equitable utilisation.[25] Here, the idea is to correspond to the nature of the task, namely that the inclusion of the natural or physical environment and its biodiversity fundamentally changes the nature of the law. No longer are reciprocal tit-for-tat strategies – scratch my back and I'll scratch yours – the 'categorical imperative' of society. Such strategies assume that the problem has its roots in society and therefore can be solved in the social dimension (Luhmann, 1989, pp. 73–74). Rather, the introduction of subjective rights precludes one from requiring reciprocity (Luhmann, 1997). It becomes instead an issue of how to fulfil the complementarity of expectations: State A expects State B to have the right to develop on the precondition of NSH, and State B expects State A to have precisely this expectation. Legal problem solutions, in other words, no longer depend upon reciprocal mutual consent, but rather rely increasingly on non-negotiable norms such as NSH that seek instead to redistribute risk. That is, they develop behavioural patterns of readiness to learn, to accept the non-fulfilment of expectations and to adapt to new circumstances instead of insisting on the agreed treaty stipulations, the point in case being, for instance, the principle of good neighbourliness, which, within its framework, invokes the idea that states must tolerate a certain level of (inevitable) interference within their territorial space, especially in the event of trans-boundary pollution.[26]

Of course, this does not mean the ILS can guarantee these expectations. It does mean, however, that the law can guarantee they are maintained as expectations, even in instances of disappointment, and that one can know this and communicate it in advance. The fact the NSH purposive programme does not allocate values on the basis of extra-legal differences (i.e. was factual harm committed?) exemplifies this, for its concern, rather, is of how to maintain a self-simplifying device that stabilises the distinction made between lawful state practices and unlawful ones.

The NSH purposive programme thus serves two important functions. First, it necessarily reduces the ILS's complexity by dually functioning internally as a conditional programme. As a consequence, this keeps the ILS safe from the 'big questions', frees it from the responsibility of consequences, enables reliance upon its own social constructions of events and thus validates the law to refuse to learn from facts. In short, this protects the law from the uncertainties of experience and projections of that experience which may threaten to destabilise the law's normative certainty (or relative certainty). In other words, it grants the ILS unique rationality with which it can select decisions and eliminate other possibilities by instead spreading illogicalities into small, localised leaps, thus in turn generating the complexity of decision-making.

Indeed, it is precisely through reduction that conditions for complexity can be built.[27] Hence, the NSH programme also simultaneously enhances the ILS's complexity. It transforms paradoxical legal

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24 See e.g. the Draft Articles on Responsibility of States for Internationally Wrongful Acts 2001, Article 35. Available at: <http://www.refworld.org/docid/3ddb8f804.html> (accessed 24 May 2017).

25 See UNWC 1997, 'United Nations Convention on the Law of Non-Navigational Uses of International Watercourses', Article 7(2). Available at: <http://legal.un.org/ilc/texts/instruments/english/conventions/8_3_1997.pdf> (accessed 24 May 2017).

26 For example, this case was made for acid rain; see Lier (1980, p. 104).

27 Or, more specifically, 'Reduction is a necessary condition for the ability to resonate; reduction of complexity is a necessary condition for building complexity'; see Luhmann (2004, pp. 382–383).

coding and its search for specific results into a device for creative social learning within the legal system, thus enhancing its cognitive capacity, but at the expense of creating the conditions for deviance and the disturbance of order. This is exemplified, for instance, when the law ordains 'planned measures'[28] granting conflict systems the capacity for conflict communications: in the absence of trust, 'regular exchange of data and information'[29] would unlikely resolve risk-endangered conflicts, but merely succeed as a delaying strategy; in a globalised '3.0' world (Friedman, 2006), 'the notification of natural emergencies or those caused by human activity' would likely only reinforce an existing disposition, because 'quantitative analysis always becomes irrelevant where disasters are to be feared' (Luhmann, 1993, p. 149); in 'the notification of planned measures', if understood, this would always provide plenty of opportunities for accepting or rejecting the content offered; in the presentation of a quantitative environmental impact assessment of risky situations, this would 'hardly likely to impress anyone', 'because quantitative calculations are widely known to be capable of manipulation' (Luhmann, 1993, p. 149). And there the eruption of social situation reproduces an indeterminacy-producing paradox whereby informational difficulties gain such a dominant position in the enforcement of ordained rules that all other questions move into the background in comparison, and the success of enforcing 'planned measures' practically becomes a problem of information.

How, then, is legal order possible at all? And how might the ILS answer responsively with rational arguments to the extreme demands of law's ecologies, whilst simultaneously fulfilling the internal requirements of normative consistency? This I shall turn to next.

3.6 Interdependence filter

The interdependence filter refers here to a contingency formula that the ILS employs for paradoxically maintaining its autonomy. This is because the more conflict systems recruit conflict topics from other systems, the stronger are the forces towards autonomy of the ILS. And the stronger the juridification of conflict systems, the stronger in turn is the autonomy of the law, but at the price of an increased interdependence of the ILS. By employing the methodological tools of social, spatial and conceptual dimensions, what follows is therefore an investigation to work out under what conditions might the ILS afford structural changes, without simultaneously endangering its own continued existence.

3.6.1 Social dimension

The social dimension refers here to the way identities are created and maintained. Of particular relevance is how the ILS employs the concept of human rights to enable conflict systems to catch up with their environments. The idea here is to offer them legal counter-mechanisms for equalising disparate access to functional systems such as health, as exemplified when political impulses for the reversal of exclusions constitutionalised the human right to water.[30] However, within the context of trans-boundary waters, these impulses have tended to play out elsewhere. This is because, when disparate access occurs, the rule that sovereign states should (as opposed to ought to) facilitate assistance[31] only takes on the task of mediating the experiences of political interests: it does not suggest actions for determining what ought to be added beyond law's

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28 See e.g. UNWC 1997, Article 11–19, above note 25.

29 This is, however, also subject to national security concerns; see e.g. UNWC 1997, Article 31, above note 25.

30 See e.g. United Nations Resolution 64/292 on the human right to water and sanitation. Available at: <http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/64/292> (accessed 24 May 2017).

31 See e.g. Committee on Economic, Social and Cultural Rights, 2002, The Right to Water, Article 11–12. Available at: <http://www2.ohchr.org/english/issues/water/docs/CESCR_GC_15.pdf> (accessed 24 May 2017).

tautological should. Indeed, it hardly offers any ethical solutions, but rather it merely throws the problem back to the political system in such a way that makes it clear that there are no purely ethical answers. How then to overcome the paradox?

Significantly, it is the 'contemporary paradox' of human rights (Luhmann, 2004, p. 487) that deprives political systems of their dominance. This is because it is no longer exclusively the world of states and their reciprocal treaty agreements where norms of law are subsequently breached. Rather, human right claims are validated increasingly by their very violation and the subsequent outcry,[32] as exemplified in the Rogun hydropower project in Tajikistan: Uzbekistan-based protest movements oppose dam construction; a scandal develops; the media decry violations; the world bank commissions feasibility studies.[33] Nonetheless, if it is true that such a sequence of scandalisation shows a high degree of affinity with communication channelled via the mass media, then these communications must also satisfy the media's rigorous selection filters for whether the event will surprise and 'liven up the scene', generate feelings 'of common concern and outrage' or create 'self-induced uncertainty' so as to guarantee good prospects for sustaining autopoietic self-reproduction (what will happen in tomorrow's news?) (Luhmann, 2000b, pp. 28–29). Yet, as a consequence of these filters operating on the basis of forgetting,[34] the political system can neither rely u p o n , nor be expected to depend upon, the quantitative 'nonconsensual and nonpersonal' (Moeller, 2005, p. 137) data calculations of public opinion frequently presented by the mass media. Instead, it is left to operate on the basis of guessing the responses to its own world-political projects, strategies and interventions, and adjusting these decisions accordingly, so as to maintain the production of collectively binding decisions.

Viewed in this way, one can see therefore why 'human right movements are not antagonistic to society', but are rather 'more or less in perfect accord with functional differentiation'. It is no wonder, as Moeller writes, 'that their semantics are shared by most politicians, by the mass media, and even by the economy' (2005, p. 108). Yet, underneath this systemically conformist development in society lies the more painful factual (lived) experience of rights – the observation that the inclusion[35] of everyone within fu n ctio n al differentiation has not being completely successful. Indeed, it is precisely this embarrassment as to why society responds with the rhetorical exuberance of universal rights that aspires to exclude no one (Verschraegen, 2002, p. 268). But such exuberance is also paradoxical. This is because, though functional systems must treat and present their associated environments as equals, they must, however, function unequally. For instance, one can speak of equal opportunities for access to clean water, but this cannot designate equality in result, because systems have to function unequally: one must have money at their disposal in order to pay for recreational uses of water; one must pass exams in order to become a practitioner; and one must keep to conventions of litigation in order to prevent violent outbreaks; and so on.

Thus, to deny the principles of equality as well as inequality that are basic to function systems is to deny the impossibility of avoiding differences in life conditions. Dreaming of an inclusive universal society is therefore not revolutionary; it is conservative (Moeller, 2005, p. 107). In fact, however well-intentioned aspirations may be, such activism, as a by-product, creates unconsciously the conditions for what Luhmann describes as a 'totalitarian logic' that is readily converted into a logic of time (1997, p. 628). This is because efforts to assert for instance the

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32 More specifically, this is what Fischer-Lescano (2007) terms lex humana and the rise of 'world society's customary law' (and not 'international customary law'!).

33 See the Economist, 'Water Wars in Central Asia: Dammed If They Do', 29 September 2012. Available at: <http://www.economist.com/node/21563764> (accessed 24 May 2017).

34 According to Luhmann, this is because the mass media construct systemic memory not through recollection, but mainly by forgetting (2000b, p. 101).

35 Inclusion refers here to the way humans are indicated, i.e. made relevant in communication.

human right to water, which are at least in part responses to a trade-law perspective that tends to treat water simply as a commodity (Ellis, 2009), potentially endanger the principles of precaution and prevention put forth by the rationalities of integrated water resource management,[36] the result being, then, that, in the absence of a global 'constitutional conflict of laws' (Teubner, 2012, pp. 15–174), the future becomes the grand excuse for the projection of dialectical developments. State B claims that the construction of a hydropower dam will increase economic growth, supposing that a quantitative surplus allows a better redistribution of resources; or State A enhances the effort in matters of water security in order to allow a recovery operation for the 'backward' (namely very small tribal societies that are mainly isolated from the functional systems of politics, law and the economy). Yet, in doing so, this leads to a phenomenon whereby 'all exclusions are systematically understood as residual problems, and are interpreted in such a way that they become incapable of questioning the totalitarian logic itself' (Luhmann, 1997, pp. 625–626).

This leads to another p r o b l e m a t i q u e , as will be explored next: if it is true that fundamental exclusions entail a dramatic increase in both individual freedoms and risks (Verschraegen, 2002, p. 269), then how ought the law to accommodate such a paradox?

3.6.2 Spatial dimension

The spatial dimension refers here to various materialities (e.g. the topologies of a river or the data spread about these topologies) that the law recruits as the locus for paradox management. In making productive use of materialities that are afforded by, elicited from or ascribed by functional systems, the idea here is to simultaneously enable and limit a conflict system's possibilities – that is, in other words, to invent new distinctions that do not deny the paradox, but temporarily displace it and thus relieve it of its paralysing power (Teubner, 2001b, p. 32). For example, the task of the science system might be to fix the threshold of acceptable collateral effects incurred on the river basin from hydropower development. The task of the political system might be to fix the final amount of environmental pollution acceptable to the public. And the task of the law might be then t o refine, regulate and continue these operations in one direction (and not the other) towards the desired goals. But, whilst t h e s e distinctions serve as an expedient to meet the particular demands of critical observers, the paradox, nevertheless, just like the sun, passes underground and reappears in the future. For, as Halsey puts it, to delimit the more 'majestic' aspects of nature is to admit to the basically intrusive character of such operations dividing 'filth from cleanliness, pollution from purity, violence from non-violence' (2011, p. 219). Arguably, the demarcation of boundaries is therefore what states cede not only to maintain illusions of minimal dimensions of the habitat needed for survival, but also to justify ongoing generalised ecological violence. Law's co-implications with violence thus demand alternative avenues for shifting the paradox out of sight. How can this be done?

One solution is for the law to bypass the political system by basing its norm production instead upon an economic systems formula for managing scarcity. Key here is the language of prices. For instance, though concepts such as eco-services, eco-compensation or benefit sharing cannot halt the physical processes of ecological destruction, they can at least improve a conflict system's sensitivity towards ecological degradation via the economic valuation of ecological resilience and biodiversity. They can in other words make the future become more accessible. They can react to ecological destruction in numerous self-referential ways, such as by attributing responsibility for it or by creating new cost categories and market opportunities for businessmen (Luhmann, 1997, p. 133). And they can store possibilities by granting conflict systems the capacity to lay claims on services or goods and the subsequent trading of futures via the mediums of money, as exemplified,

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36   See e.g. Tremblay (2011).

for instance, when the downstream state establishes a system of incentives, such as side-payments that change the behaviour of upstream polluters. Is the solution simply, then, for law to facilitate the flow of repayments and allow for debt to be nominally settled through an economic system's cyclical processes? The answer is a definite no if one takes into consideration that what the economy really seeks is not equilibrium, but the continuing self-reproduction of itself through the medium of money.

Here, the paradox reappears in the form of developing the complexity of the economy at the cost of ignoring ecological sensitivity. The danger of this is that the high degree of selectivity of the economy, the subduing of nature's wildness by ascribing it ecological value and the selling of nature in order to save it (McAfee, 1999) bring too little resonance into play for the economy to react to ecological dangers (Luhmann, 1989, p. 116). Moreover, all this invokes are not actions with direct ecological effects (Luhmann, 1989, p. 119), but rather it produces a socially internally felt 'deep disparity' (Deleuze, 1990, p. 261). One cannot afford to look too closely, for that would expose the unremarked violence of representation; or one should stop imagining the catastrophe, for that would produce 'catastrophic' strains and breaks in public and private finance. And there the tunnel vision of incentivising environmental protection through the promise of development simply reproduces the paradox of functional differentiation, whereby it seems that enabling the dramatic advance of human civilisation comes at the cost of making it less secure. How then to suppress the paradox?

3.6.3 Conceptual dimension

The conceptual dimension refers here to how the ILS recruits the communitarianism of an 'international community' so as to alleviate the negative consequences of functional differentiation.[37] But, since communitarianism cannot be reduced to any central authority or privileged position, its interpretation therefore demands a more procedural understanding. We may call this legitimation through procedure whereby the 'psycho-juridical requirements' (Teubner, 2006, p. 511) of reciprocal state consent are silently replaced with hidden technical legal exceptions of good faith, or else the socialisation of treaties. But then how does one present the tautologies of the international community in such a way that it provides meaningful normative aspirations, and not just reflect quasi-imperial power arrangements?

One possibility is the re-entry of external references (namely non-legal communications), which is diagnosed as the 'best known way out' (Luhmann, 1992, p. 79). By including the excluded – that is, by including all that is not communicated through communications – the ILS transcends positive law via its secondary closure, via legal self-observation. The ILS in other words subverts its own requirements of (Eurocentric-rooted) logic, such as its complexity-reduction mechanisms of excluding the 'others of international law' (Orford, 2006) or its complexity-building mechanisms of institutionalising the 'universal' so as to maintain the structural biases of the 'Civilised, Advanced, Developed or Rich' (Eslava and Pahuja, 2012, p. 211). And it does this all for the purpose, as Philippopoulos-Mihalopoulos put it, to see society in its multiplicity: to internalise 'communications battling against systemic walls, observations that never manage to be anything more than self-observations, boundaries that shift according to differentiated temporalities' (Philippopoulos-Mihalopoulos, 2013b, p. 68): all for the sake of legitimising the law – and nothing else.

Nonetheless, including the excluded can never be done arbitrarily. That would lead to epistemic confusion (Teubner, 2001a). The making of exemptions and the non-application of law would, after

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37 This being not so much the calamity of exploitation and suppression predominating hierarchical stratified societies, but rather it is neglect: 'The order without which no order would be possible at all'; see Luhmann (1997, p. 772).

all, in the absence of high structuration, dilute certainty and derange orderly legal processes. Instead, inconsistencies must be repressed by deploying the logic of systemic integration: to present the law's inconsistency as consistency so as to make the proof of errors possible and avoid giving impressions that general principles of international law have been jettisoned in favour of the concrete interests of states and actors. Indeed, norm advancement can be imposed, but only within the framework of sovereign constitutions; treaties can be terminated, but only for particular reasons of illegality; subjective rights can be taken away, but only in the public interest and against compensation.

Yet, despite the necessity for maintaining symbolisms of normativity, the ILS must also paradoxically replace this tradition with a difference that, when observed, always regenerates the unobservable. For the law cannot only be identified from texts alone; it must be discussed and argued over; it must be tilted ahead and ever searching for adequate connections to operate. Consequently, to prevent the circular regression of legal argumentation, the demands for objective responsibility require the re-engineering of the law's procedural and conceptual apparatus – hence its self-simplifying devices, the legal lie of fictional legal persons. The inclusion of ecological rights in political constitutions; the gradual juridification of animal rights; the change in legal language from the semantics of protection of nature via ecological interests to rights of living processes; the slow process of granting standing to ecological associations; and the expanding conceptualisation of ecological damages are just a few indicators of such trends (Teubner, 2001a, p. 32). But this new criterion of decision-making and its bias towards 'presumptive consequences', rather than time-binding decisions (Tarlock, 2004, p. 220), inevitably increases the variety of the ILS, whilst the maintenance of redundancy becomes its problem. Indeed, the law's inadequate sensors of agency, causality and proof of harm requires a focus that paradoxically disengages from such 'juridically potentially problematic assemblages' (Philippopoulos-Mihalopoulos, 2013a, p. 414) so as to acknowledge the difficulty of phronesis (Whiteside, 2006, p. 30), that being the problem of a normalising environmental crisis (Barry, 2004), the inadequacy of internal reconstruction processes and the interconnectedness of an open ecology whereby 'everything is connected to everything else' (Commoner, 1971, p. 33).

This opening of the law to the uncharacterised sphere of the excluded, however, does not mean sabotaging the routinised recursivity of legal operations. Rather, it is the very indeterminacy of law that becomes the precondition for law's ability to justify and criticise existing practice (Koskenniemi, 1989, p. 614). In t r a n s f o r m i n g infinite into finite information loads, in the translation of indeterminate complexity into determinate complexity, abstract formal legal argumentation sets bounds on acuity. It propagates a culture of formalism that resists power, holds social practice accountable and compels claims to be made in a universal way (Koskenniemi, 2001, p. 502). In short, it imposes structural constraints upon what is possible, limiting the scale of complexity upon which conflict systems might unfold, thereby lowering the overall extent of the ungovernability within society. But, in the event that conflict systems exploit the constitutive paradoxes of international law (Koskenniemi, 1989) to pursue their parochial interests, the ILS finds its last resort by resigning itself to externalisation: it recruits the vocabularies of risk as its new manager of contingency.

Here, it is the formation of institutionalised production regimes (Teubner, 2001a, p. 34) that takes on this task. In functioning as structural links between autonomous functional systems – between law, economy, politics, education, research and so forth – production regimes increasingly cushion the law from its fears of abstraction. They produce informal standards that propose aspirations, objectives and norms that do not necessarily derive from functional possibilities (e.g. the end of poverty or environmental sustainability). They facilitate political 'loose talk' by expanding communication and irritations[38] among systems, enhancing in turn societal awareness for a

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38 Understood here not as annoyance, but rather as an itching calling for action.

growing variety of concerns (Peña, 2015, p. 65). And they enable the ILS formal production modes (i.e. international customary law) to do something unthinkable for a mere treaty order: to establish binding norms even against the express will of the parties to the treaty, legitimated not via the state treaties, but via the orientation of law towards the public interest (Teubner, 2012, p. 50).

We may call this space of public interests one of fleeting, fragile, almost imaginary consistency (Luhmann, 1997) – one that the ILS will have to productively misread, perhaps creatively,[39] as a hard-core reality if it is to transcend particular preferences in the name of maintaining open political discourse. But the fact remains: if one really insists upon exposing inherent tensions and contradictions, then this new drive for public accountability, ethical 'hydrosolidarity' and ecological modernisation that the ILS finds itself along a practical continuum with may not be the ideal structure for addressing risks. Yet, in a particular way, it serves the purpose of precisely hiding tensions and contradictions so as to immunise society from terminal indecision.

IV. Conclusion

International law is an evolutionary achievement. It makes no prognosis about when conflicts will happen, what the particular situation will be, which actors will be involved and how strong their involvement will be, and yet it provides ways of handling such future conflicts. How is this possible? This paper, in employing the field of trans-boundary waters as a special case within international law, proposes a theoretical framework for more adequately conceptualising the above phenomenon. It reveals that, despite law's shift towards equity, whereby justice is now fundamentally referred away from itself,[40] law's achievements can be found elsewhere. They lie not so much in its content, but rather in its ability to organise society in such a way that decisions may be underpinned by a reliance upon a normative order – an order that this framework proposes to rediscover and reconceptualise as summarised here. Where the law's periphery occurs, the space where law encounters all kinds of legal/non-legal interests, the law's autonomous operations, the self-preservation filter compensates for this. Where the self-preservation filter selects order, always prioritising the establishment of the ILS's eternal recursive autopoiesis, the equitable filter creates order by determining the limits of legal regulation. Where order is created, the reciprocity filter maintains order by determining the legal acceptance of social behaviour. And, where order is maintained, the interdependence filter continues order precisely by accommodating for simultaneous competition and coexistence of different justifications.

Of course, what I describe here is simply one type of specific prejudice among other possible types of prejudices. In fact, it might even be more accurate to describe the ILS as a purely anarchic system – one with tangled hierarchies and 'strange loops' where the highest level of a hierarchy 'loops into' the lowest one (Hofstadter, 1979). All these criticisms, however, miss one key point, for the framework does not assert a claim to any objective technical truths: it should be viewed rather as a conceptual tool for bringing about a shift in attention and sensitivity to issues of concern. It is, in summary, a question generating theoretical endeavour that recruits the paradox because: it offers a counter-narrative to descriptions of law that seek to present the ILS as one driven by coherent consistent normative propositions; it offers various methodological recipes for cutting through the rhetoric of 'best practices' and the notion that all problems can be solved by more information and expertise; and it serves as a reminder that, if the law simply carries on feeding upon its own sense of superiority, of 'its importance, history, and its disciplinary identity' (Blomley, 1994, p. 21),

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39 See e.g. Lee (2013), who creatively illustrates the potential of integrative rules.

40 See Koskenniemi (2005, p. 552).

it will no longer be able to steer a course between the Scylla of Sisyphean meaninglessness and the Charybdis of cynical decisionism. Indeed, this is the agenda: only by successfully describing the ILS as an autopoietic self-distinguishing system that strives to make paradoxes invisible is it possible to work out the nature to which law develops responsiveness to social interests.

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