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Purity Lost: The Paradoxical Face of the New Transnational Legal Body

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

*Oren Perez**

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*“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.”***

*“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.”****

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 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 constitutionalization is put forward in this context as a possible and appropriate reaction.¹

** 1 CHARLES SANDERS PEIRCE, COLLECTED PAPERS OF CHARLES SANDERS PEIRCE §1.174 (Charles Hartshorne & Paul Weiss eds.) (1931).

*** NICHOLAS RESCHER, NATURE AND UNDERSTANDING: THE METAPHYSICS AND METHOD OF SCIENCE 25 (Clarendon Press) (2000).

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 regarding the proliferation of international judicial bodies and the increasing fragmentation of the international legal order and suggested extending and reaffirming the powers and international status of the ICJ as a solution. See Judge Stephen M. Schwebel, President, ICJ, Address to the Plenary Session of the United Nations (Oct. 26, 1999), available at <http://www.icj-cij.org/presscom/index.php?pr=133&pt=1&p1=6&p2=1> [hereinafter Schwebel Speech 1999]; Judge Gilbert Guillaume, President, ICJ, Address to the to the United Nations General Assembly, (Oct. 26 2000), available at <http://www.icj-cij.org/presscom/files/9/3069.pdf> [hereinafter Guillaume Speech 2000].

Using the notions of *purity* and *paradox*, this Article develops an analytic framework by 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 that extends the horizon of possibilities through which the international legal system can react to social pressures. In this light, attempts to purify the international legal system by appealing to grand theories—constitutional, moral, or other—are ill-conceived for two reasons: first, because these grand theories fail to recognize the innate paradoxicality of the law; and second, because such theories constitute a threat to the legitimacy and resilience of the global legal system. This Article explores, in this context, alternative institutional models that draw upon—rather than oppose—the complexity and paradoxicality of modern international law.

This Article opens with Section I, a discussion of the Westphalian scheme of validity (what I will call “the purity thesis”). It then considers, in Section II, the invocation of the Westphalian scheme within new international regimes such as the World Trade Organization and the International Criminal Court and argues that the Westphalian scheme creates irresolvable paradoxes within these regimes. To facilitate this argument, this Article develops a model of paradoxicality in philosophy and law. Section III explores alternative forms of validation that claim to fill the normative void caused by the demise of the Westphalian model. On close inspection, these alternative forms of validation prove equally problematic, lacking both coherence and completeness. Section IV takes a step back by looking into the history of international legal theory for the foundations of the Westphalian scheme of validity. This 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 dynamic of autonomous and self-organizing systems (such as law). Given the impurity of international law historically, what then is unique about the current state of international law? This question is addressed in Section V, which argues that what is unique about the current system of international law is not the impurity of our forms of validation, but the proliferation of multiple, paradoxical validating techniques that 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 paradoxical-

ity—a process of *polymorphosis*. What are the practical consequences of this process? The remainder of this Article explores the sociological implications of this process, drawing on ideas from systems theory and ecology. It concludes, in Section IV, with a discussion of the false promise of global constitutionalism, setting it against an alternative institutional model: non-hierarchical reflexivity.

I. 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:

The Peace of Westphalia . . . marks the end of an epoch and the opening of another. It represents the majestic portal 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.³

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

2. For a historical account of the development of the theory of international law, see generally MARTTI KOSKENNIEMI, *THE GENTLE CIVILIZER OF NATIONS: THE RISE AND FALL OF INTERNATIONAL LAW 1870–1960* 353–509 (Cambridge University Press 2002); Dinah Shelton, *Normative Hierarchy in International Law*, 100 AM. J. INT'L L. 291 (2006).

3. Leo Gross, *The Peace of Westphalia, 1648–1948*, 42 AM. J. INT'L L. 20, 28–29 (1948). The Westphalian narrative was discussed in numerous articles and books. See, e.g., Amos S. Hershey, *History of International Law Since the Peace of Westphalia*, 6 AM. J. INT'L L. 30 (1912); Andreas Osiander, *Sovereignty, International Relations, and the Westphalian Myth*, 55 INT'L ORG. 251 (2001) (citations omitted).

4. This vision can be associated, of course, with the positivist school, whose most obvious representative in the early twentieth century was Hans Kelsen. See Martti Koskenniemi, *Lauterpacht: The Victorian Tradition in International Law*, 8 EUR. J. INT'L L. 215, 216–217 (1997); Jorg Kammerhofer, *Uncertainty in the Formal Sources of Inter-*

Kunz. Kunz argued that international law regulates the creation of international norms through two hierarchically ordered procedures: custom and treaty.⁵ Both are based on the notion of state consent. Custom, Kunz argued, is the hierarchically higher form of norm creation in international law. “Custom-produced, general international law is the basis; the customary principle of ‘*Pacta sunt servanda*’ is the reason for the 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 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 should be resolved primarily through the application of international conventions and international custom.⁹

national Law: Customary International Law and Some of Its Problems, 15 EUR. J. INT'L L. 523, 548 (2004).

5. Joseph L. Kunz, *The Nature of Customary International Law*, 47 AM. J. INT'L L. 662, 665 (1953) (“Treaty and custom are two different, independent procedures for creating international legal norms.”).

6. *Id.* 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 AM. J. INT'L L. 180, 180 (1945). Its status received further recognition in the text of the Vienna Convention on the Law of Treaties. See Vienna Convention on the Law of Treaties art. 2, May 23, 1969, 1155 U.N.T.S. 331 [hereinafter Vienna Convention] (the definitions of “ratification,” “acceptance,” “approval,” and “accession” all emphasize state consent). See also Paul Schiff Berman, *From International Law to Law and Globalization*, 43 COLUM. J. TRANSNAT'L L. 485, 487 (2005).

7. Kunz, *supra* note 5, at 665. On the interpretation of these two conditions, see Kammerhofer, *supra* note 4, at 548.

8. See Madeline Morris, *High Crimes and Misconceptions: The ICC and Non-party States*, 64 LAW & CONTEMP. PROBS. 13, 57 (2001) (with respect to the prohibitions against genocide, war crimes, and crimes against humanity).

9. Statute of the International Court of Justice art. 38, June 26, 1945, 59 Stat. 1055, 33 U.N.T.S. 993. 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. Vienna Convention, *supra* note 6, art. 53. Kunz, *supra* note 5, at 665.

II. 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, the increasing importance of non-state actors such as non-Governmental organizations (“NGO”) and multinational enterprises (“MNE”), the law-making powers of international tribunals, and the emergence of general principles of global humanitarian law.¹⁰ However, despite the ongoing 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 regimes: the World Trade Organization (“WTO”) and the International Criminal Court (“ICC”). I will argue that the invocation of the Westphalian validity doctrine in these regimes generates deep inconsistencies that undermine its claim to provide coherent and complete foundations for modern international law.

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 lays the groundwork for the broader thesis set forth in Sections IV and V of this Article.

A. Detour: Paradoxes and Inconsistencies in the Law

1. Paradoxes: A General Exposition

What do we mean by the concept of “paradox”? The term is sometimes used informally to designate a statement that conflicts with the common view.¹¹ Within the realm of law, this understanding can be applied to any legal claim that challenges a received legal opinion. I am interested in other forms of paradoxes—not paradoxes that reflect a transitory inter-

10. For a general discussion of the demise of the Westphalian paradigm, see Gunther Teubner, *Global Bukowina: Legal Pluralism in the World Society*, in *GLOBAL LAW WITHOUT A STATE* 3, 3–30 (Gunther Teubner ed., 1997); Berman, *supra* note 6, at 487–88.

11. Thus, the definition of paradox in the *Oxford Dictionary* opens with: “Statement contrary to received opinion.” *THE CONCISE OXFORD DICTIONARY OF CURRENT ENGLISH* 880 (5th ed. 1964).

pretative dispute but, rather, those that expose a deeper social and linguistic problematic.

Philosophical literature offers various definitions of this more challenging understanding of the concept of paradox. 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 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: “[a]n 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 while *semantical paradoxes* involve notions of truth, falsity, and reference, and challenge the way we reason with these notions.¹⁷

12. NICHOLAS RESCHER, *PARADOXES: THEIR ROOTS, RANGE, AND RESOLUTION* xxi (Open Court Publishing Co. 2001).

13. Charles S. Chihara, *The Semantic Paradoxes: A Diagnostic Investigation*, 88 *PHIL. REV.* 590 (1979). For a similar view, see R.M. SAINSBURY, *PARADOXES* 1 (2d ed. 1995).

14. W.V. QUINE, *THE WAYS OF PARADOX AND OTHER ESSAYS* 7 (Random House Publishers 1966).

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: A STUDY OF LOGIC, LAW, OMNIPOTENCE, AND CHANGE* 276 (Peter Lang Publishing) (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. 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 (e.g., the Barber Paradox). Falsidical paradox, by 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. *Id.* at 5.

To get a better sense of the notion of paradox, let us examine a specific and famous example, the paradox of the liar (“Liar Paradox”).¹⁸ Consider the following sentence:

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. Attributing a stable truth value to this sentence seems to be impossible. It is possible to structure a similar paradox that is hetero-referential, rather than self-referential. Consider the following set of sentences which, following Roy Sorensen, I will call the “Looped Liar Paradox”:¹⁹

Plato: What Socrates says is true.

Socrates: What Plato says is false.

Like the Liar Paradox, it is impossible to attribute stable and coherent truth values to this pair.²⁰

A feature common to both the Liar Paradox and the Looped Liar Paradox is their *semantic instability*: their perpetual oscillation between truth and falsity.²¹ The Liar Paradox and the Looped Liar Paradox seem to suffer from some kind of semantic pathology that is unsettling because of the way in which it challenges our conventional grammatical structures and our usage of basic notions such as truth and reference.²²

18. The discussion of semantical paradoxes involves 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 have decided not to delve into this question. Within philosophy, one can find 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 & Norman Swartz, *Truth*, in THE INTERNET ENCYCLOPEDIA OF PHILOSOPHY, <http://www.iep.utm.edu/t/truth.htm> (last visited Sept. 12, 2007). Semantical paradoxes create a problem, though, for each of these theories. One initial assumption that 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 211 (Oxford University Press 2003). This version of the liar can be traced back to the fourteenth century medieval thinker John Buridan. *Id.* at 201–15.

20. One can construct a liar-like paradox that is non-circular. See Stephen Yablo, *Paradox Without Self-Reference*, 53 ANALYSIS 251, 251 n.1 (1993).

21. Hans Herzberger, *Naive Semantics and the Liar Paradox*, 79 J. PHIL. 479, 482 (1982).

22. See also Adam Reiger, *The Liar, the Strengthened Liar, and Bivalence*, 54 ERKENNTNIS 195 (2001).

2. Paradoxes in Law: Incoherence and Paralysis

Logical and semantical paradoxes have existed for more than two thousand years. Early versions of the Liar Paradox can be found in Christian scriptures and Greek and medieval writings.²³ These paradoxes have not, however, brought human thought to a standstill. 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 everyday reasoning and scientists have continued their search for true descriptions. However, the presence of paradoxes and deep inconsistencies in the law seems more threatening and calls into question the capacity of the law to fulfill its function as a reliable arbiter of social conflicts and as 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 resolution of this puzzle is to identify the *proper referent* of legal paradoxes. The most suitable candidate for this role is what I will call a "legal set": a sequence of sentences that 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 sentences may be: *prescriptive* (ought to), *permissive* (may) or *prohibitive* (may not).²⁵ Law includes additional types of norms, such as norms

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

24. *See* Jose Juan Moreso, *Putting Legal Objectivity in its Place*, 6 ANALISI E DIRITTO 243, 243 (G. Giappichelli ed., 2004) ("[L]egal knowledge is obtained from statements like 'Legally, all *F* have the obligation to pay *T*' or 'Legally, *x* has the right to recover damages *D*'. These statements express *norm propositions*. Norm propositions are the meanings of norm statements. . . . Normative statements have a descriptive nature; they are statements about the existence of norms. . . . Norm propositions about the existence of legal norms can be called 'legal propositions'." (citations omitted).

25. *See* Sven Ove Hansson, *Situationist Deontic Logic*, 26 J. PHIL. LOG. 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 that 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 if neither it, nor its negation, is obligatory. *See*

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 a 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 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 IV and V, 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.

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

Paul McNamara, *Deontic Logic*, in THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY § 1.2 (Edward N. Zalta ed., Spring 2007), <http://plato.stanford.edu/archives/spr2006/entries/logic-deontic/#1.2>.

26. For these additional types, see Eugenio Bulygin, *On Norms of Competence*, 11 LAW & PHIL. 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,” or a meta-attempt to expose the general structure of the law. NIKLAS LUHMANN, LAW AS A SOCIAL SYSTEM 54–55 (Fatima Kastner, Richard Nobles, David Schiff & Rosamund Ziegert eds., Klaus A. Ziegert trans., Oxford University Press 2004) (1993). For more on the role and nature of legal theories, see David E. Van Zandt, *The Relevance of Social Theory to Legal Theory*, 83 NW. U.L. REV. 10 (1989).

28. A different but related problem is indeterminacy. See *infra* Section IV.B (discussing the Truth-Teller Paradox).

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.” Georg Henrik von Wright, *Is There a Logic of Norms*, 4 RATIO JURIS 265, 266 (1991).

set. I do not intend to provide 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 when it can be shown to contain contradictory norms. Norms or rules can be contradictory, for example, when one rule permits what another forbids, or when two rules issue contradictory directives, such that simultaneous compliance with both directives is impossible.³² A further form of inconsistency arises when one can find conflicting interpretations of the same legal concept within a legal set. Another form of inconsistency arises when one can show that a legal set contains 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, beginning with 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: $O_1 \quad O \sim O_1$.³⁴

This statement (interpreted as a norm rather than as a norm-proposition) is 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.³⁵

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, e.g., *id.*; McNamara, *supra* note 25, § 1.2.

32. See von Wright, *supra* note 30, at 270–71. This form of inconsistency could give rise to conflicting normative expectations.

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 that this notion is used in propositional logic (i.e., through inconsistent attributions of truth and falsity). On the role of classical deductive patterns in legal reasoning, see generally Arend Soeteman, *Legal Logic? Or Can We Do Without?*, 11 ARTIF. INTELL. L. 197 (2003).

34. McNamara, *supra* note 25, § 1.2.

The paradoxes of law tend, however, to be more subtle than these examples. So let us consider a 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.³⁶ Protagoras, “the keenest of all Sophists,” taught rhetoric and argumentation.³⁷ 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.³⁸ It was agreed between the two that Euathlus would pay Protagoras’s fee after Euathlus won his first case.³⁹ After having been a pupil and follower of Protagoras for some time, and having made considerable progress in the study of oratory, Euathlus had not undertaken any cases.⁴⁰ Protagoras decided to demand his fee according to the contract, and he brought a suit against Euathlus.⁴¹

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

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

35. I follow Vranas here. See Peter B.M. Vranas, *New Foundations for Deontic Logic: A Preliminary Sketch 4*, available at <http://www.public.iastate.edu/~vranas/Homesite/papers/deonticweb.doc> (2002). Note, however, that while O_1 and O_2 are self-contradictory, a norm-proposition that describes a norm that 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 .

O_4 You ought not to follow rule O_3 .

36. 1 AULUS GELLIUS, *THE ATTIC NIGHTS OF AULUS GELLIUS* 404–09 (E.H. Warmington ed., John C. Rolfe trans., Harvard University Press rev. ed. 1970) (1927). All of the following quotes are from Gellius, *id.* This account was written roughly six hundred years after the events took place (if they did 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 CLASSICAL QUART. 33, 38 (1953). This paradox was discussed by other ancient writers. See, e.g., Jordan Howard Sobel, *The Law Student and his Teacher*, LIII THEORIA 1 (1987).

37. GELLIUS, *supra* note 36, at 405.

38. *Id.* Protagoras drafted the Constitution of Thuria and likely taught in the Sicilian School of Rhetoric. Davison, *supra* note 36, at 33, 37.

39. 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.” GELLIUS, *supra* note 36, at 407.

40. *Id.*

41. *Id.*

decision be in your favour, the money will be due me according to our contract, since you will have won a case.⁴²

To this Euathlus replied:

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.⁴³

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

. . . 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.⁴⁴

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.⁴⁵ To make the paradox more precise, let us disentangle the story into a series of norms and norm-propositions.

- (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's first case.
- (3) Hence, according to (1), Protagoras's suit should be rejected since, at the time the court was re-

42. *Id.*

43. *Id.* at 407–09.

44. GELLIUS, *supra* note 36, at 409.

45. *Id.* at 405.

quired to give a ruling, the contractual condition had not been fulfilled.

- (4) If the court rejects Protagoras's suit (ruling for Euathlus), it will, by this very act, fulfill the contractual condition, thus completing Protagoras's cause of action.⁴⁶
- (5) Hence, according to (1), Protagoras's suit should be accepted.
- (6) If the court accepts Protagoras's suit, Euathlus will in fact lose; by its ruling, the court will cause the contractual condition to not be fulfilled.
- (7) Hence, according to (1), Protagoras's suit should be rejected.

Statements (3), (5), and (7) are 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, which leads to a ruling for Euathlus, *ad infinitum*.⁴⁷ 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.⁴⁸ 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 was reported by Gellius.⁴⁹ However, in law, paralysis is not an acceptable option. Legal decisions, unlike decisions in science, math, or philosophy, cannot be deferred to a later date.⁵⁰ 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 few signs of paradoxical stoppages. This may signal that the role

46. This proposition builds on the fact that the ruling operates as a performative speech-act. Such speech-acts have the capacity to make themselves true or binding by being pronounced in adequate circumstances. See Lennart Aqvist, *Some Remarks on Performatives in the Law*, 11 ARTIF. INTELL. L. 105, 106, 110 (2003).

47. See Sobel, *supra* note 36, at 10.

48. See *id.*

49. GELLIUS, *supra* note 36, at 405.

50. 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 judgment 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, *supra* note 36, at 4.

paradoxes are playing in law is not really pathological. With this in mind, let us return to the story of Protagoras and Euathlus. Despite its seeming insolubility, there are several ways in which this paradox may be resolved (or dissolved). They are based on two primary techniques: introducing a distinction (reinterpretation) or appealing to external principles.⁵¹

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's suit was premature, and (5) and (7) are simply incorrect. This interpretation lays the foundation, though, for a future suit by Protagoras.⁵²

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, barring the problematic self-reference that is generated by the contract. This requires us to reformulate (2), again resolving the paradox and leading to a ruling against Protagoras.

While the foregoing solutions are not uniquely legal, the appeal to external principles reflects an alogical approach because it does not seek to resolve the paradox through the introduction of further distinctions; rather, it dissolves the paradox through an appeal to hierarchically superior normative principles. Thus, the court may invoke the "good-faith" principle and conclude that Protagoras's 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.⁵³

51. For a broader discussion of the problem of paradox resolution, see RESCHER, *supra* note 12, at 57–58.

52. This solution was pointed to by Leibniz, who discussed this paradox in one of his papers. See Sobel, *supra* note 36, at 7–9. See also SUBER, *supra* note 16, at 242.

53. See Sobel, *supra* note 36, at 7–9.

B. Paradoxes in the Westphalian Order: The Cases of the WTO and the 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 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.”*⁵⁴

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 that were signed in 1994 after a long negotiation process during the Uruguay Round from 1986 to 1994.⁵⁵ The constitutional core of this web consists of two agreements: the Agreement Establishing the World Trade Organization (“WTO Agreement”), which is the umbrella instrument, and the Understanding on Rules and Procedures Governing the Settlement of Disputes (“DSU”), which establishes the WTO legal system.⁵⁶

The WTO Agreement includes various provisions that 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 (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.⁵⁷ The WTO does not claim to have universal jurisdiction. In the same spirit, Article XV (which deals with the issue of “Withdrawal”) states that

54. WORLD TRADE ORGANIZATION, THE WORLD TRADE ORGANIZATION IN BRIEF 1 (2007), http://www.wto.org/english/res_e/doload_e/inbr_e.pdf.

55. WORLD TRADE ORGANIZATION, UNDERSTANDING THE WTO 9 (3rd ed. 2007), http://www.wto.org/english/thewto_e/whatis_e/tif_e/understanding_e.pdf.

56. Understanding on Rules and Procedures Governing the Settlement of Disputes, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, art. III(3), Legal Instruments—Results of the Uruguay Round, 1869 U.N.T.S. 401, 33 I.L.M. 1125 (1994) [hereinafter DSU]. The DSU is annexed to the WTO Agreement and thus derives its validity from the former agreement. *Id.*

57. Marrakesh Agreement Establishing the World Trade Organization arts. XIV, XII, Apr. 15, 1994, 1867 U.N.T.S. 154, 33 I.L.M. 1144 [hereinafter WTO Agreement].

“[a]ny Member may withdraw from this Agreement.”⁵⁸ Similarly, the DSU includes a provision which seeks to protect the rights of 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:

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 rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements.*⁵⁹

The Westphalian vision, reflected in the provision quoted above, postulates the dispute settlement body 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.⁶⁰ 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.⁶¹ It disregards the powers of the WTO's new legal system, which—contrary to the above portrait—has been actively shaping the normative field of the WTO, independently of the wishes and preferences of the member states.⁶² This autonomy is formally codified in articles 16.4, 17.14, and 23 of the DSU, which jointly transform the WTO dispute settlement mechanism into an obligatory system, insulated from political intervention.⁶³ In various rulings since 1995, the WTO judicial bodies have created new rights and obligations that did not exist as such before these

58. *Id.* art. XV.

59. DSU, *supra* note 56, art. 3.2 (emphasis added).

60. *Id.*

61. This tension is also highlighted 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).

62. Andrew T. Guzman, *Global Governance and the WTO*, 45 HARV. INT'L L.J. 303, 347 (2004).

63. DSU, *supra* note 56, arts. 16.4, 17.14, 23.

decisions and depart substantively from the legal tradition of the GATT.⁶⁴

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.”*⁶⁵

A similar tension also exists in the new regime of the International Criminal Court. The ICC was created after long and protracted negotiations that culminated in the adoption of the Rome Statute on 17 July 1998.⁶⁶ The Rome Statute provides that the ICC will have jurisdiction over crimes of genocide, certain crimes against humanity, and certain war crimes.⁶⁷ 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 sixtieth instrument of ratification, acceptance, approval, or accession with the Secretary-General of the United Nations.⁶⁸ This provision refers to the principle of *pacta sunt servanda* as the treaty’s source of validity. The Westphalian order also underlies Article 4(2), which deals with the legal status and powers of the ICC. Article 4(2) provides that “[t]he Court may exercise its functions and powers, as provided in this Statute,

64. On the norm-making powers of the WTO tribunals, see Guzman, *supra* note 62, at 347; Picciotto, *supra* note 61, at 495; OREN PEREZ, ECOLOGICAL SENSITIVITY AND GLOBAL LEGAL PLURALISM: RETHINKING THE TRADE AND ENVIRONMENT CONFLICT 65–80 (Hart Publishing 2004). Two prominent examples of law made by the WTO judicial bodies are the Appellate Body decisions that both it and the panels have wide discretion to accept *amicus curiae* briefs from non-state parties and its novel interpretation of Article XX. For a discussion of these issues see PEREZ, *supra*, at 65–80, 100–05. See Appellate Body Report, *United States—Import Prohibition of Certain Shrimp and Shrimp Products* ¶¶ 79–91, 99–110 WT/DS58/AB/R (Oct. 12, 1998); Appellate Body Report, *European Communities—Measures Affecting the Prohibition of Asbestos and Asbestos-Containing Products* ¶¶ 50–57, 155–157 WT/DS135/AB/R (Mar. 12, 2001).

65. International Criminal Court, About the Court, <http://www.icc-cpi.int/about.html> (last visited Aug. 14, 2007).

66. United Nations, United Nations Diplomatic Conference on the Establishment of an International Criminal Court, <http://www.un.org/news/facts/iccfact.htm> (last visited Oct. 5, 2007).

67. Rome Statute of the International Court art. 5, *opened for signature* July 17, 1998, 2187 U.N.T.S. 90 (*entered into force* July 1, 2002) [hereinafter Rome Statute]. The Rome Statute is also commonly referred to as the ICC Treaty.

68. *Id.* art. 126(1).

on the territory of any State Party and, by special agreement, on the territory of any other State.”⁶⁹

However, upon closer inspection, the Rome Statute seems to include provisions that challenge the Westphalian validity scheme.⁷⁰ This is reflected in its claim to hold jurisdiction over citizens of non-parties,⁷¹ in the establishment of new universal criminal norms that transcend customary international law as it existed prior to the establishment of the Rome Statute,⁷² in the formal legal recognition of non-state actors (victims and NGOs),⁷³ and finally, in the decision-making powers that are given to the Court.⁷⁴

It is worthwhile to explore the nearly universal jurisdiction given to the Court in Article 12, which provides the Court with jurisdiction over persons who are not citizens of one of the signatories to the ICC.⁷⁵ 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 to the treaty or that consents to ICC jurisdiction for that case.⁷⁶ 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.⁷⁷ The jurisdictional principle underlying Article 12 stands in stark contrast to the constitutional principle of state consent. This de-

69. *Id.* art. 4(2) (emphasis added).

70. For a more detailed discussion of the tension between the ICC regime and the Westphalian validity scheme, see Jackson N. Maogoto, *The Final Balance Sheet? The International Criminal Court’s Challenges and Concessions to the Westphalian Model* 4, 14 (Berkeley Electronic Press, Working Paper No. 1402, 2006), available at <http://law.bpress.com/expresso/eps/1402>; Leila Nadya Sadat & Richard Carden, *The New International Criminal Court: An Uneasy Revolution*, 88 GEO. L.J. 381, 385, 390–91 (2000); Morris, *supra* note 8, at 30–33.

71. Rome Statute, *supra* note 67, art. 12.

72. *Id.* arts. 5–8.

73. *Id.* art. 15 (providing that the prosecutor may initiate investigations on the basis of information received from non-governmental organizations). See also Maogoto *supra* note 70, at 7.

74. Rome Statute, *supra* note 67, art. 19(1) (“The Court shall satisfy itself that it has jurisdiction in any case brought before it.”); *id.* art. 21 (providing the Court with the power to derive new international legal principles from “national laws of legal systems of the world.”); *id.* art. 119(1) (endowing the Court with the authority to settle disputes “concerning the judicial functions.”). See also Morris, *supra* note 8, at 30–33.

75. Rome Statute, *supra* note 67, art. 12.

76. *Id.* art. 12(2)(a). 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.

77. Jordan J. Paust, *The Reach of ICC Jurisdiction over Non-Signatory Nationals*, 33 VAND. J. TRANSNAT’L L. 1, 6 (2000); Morris, *supra* note 8, at 13–14.

viation is particularly striking when the Rome Statute is compared to the ICJ Statute and the ICJ jurisdictional jurisprudence.⁷⁸

Some proponents of the ICC regime have tried to explain this internal inconsistency by arguing that the ICC'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.⁷⁹

In a recent article, Madeline Morris demonstrated that this thesis has no basis in contemporary customary international law.⁸⁰ She argues that 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.⁸¹ Additionally, the intricate institutional structure established by the Rome Statute, with the unique enforcement and interpretative powers it provides to the court and the prosecutor, creates a legal environment that is radically different from the one envisioned by the decentralized model that existed prior to the establishment of the ICC.⁸² Thus, consent to the exercise of universal jurisdiction by individual states is not equivalent to consent to universal jurisdiction delegated to an international court.⁸³

III. 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

78. See Morris, *supra* note 8, at 20–21.

79. *Id.* at 27–28. See also Paust, *supra* note 77, at 3.

80. Morris, *supra* note 8, at 13, 56–60.

81. *Id.* at 28.

82. See *id.* at 29.

83. *Id.* Some authors have tried to explain ICC jurisdiction by appealing to universal moral principles. I will return to the issue in Section III.B.

challenge the classic conceptions of international law, generating a new and deeply complex legal universe.⁸⁴ 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.

A. Global Democracy?

Global democracy is invoked increasingly—in both theory and practice—as a new form of validation that imagines the democratic principle as a *truly global idea*, undercutting the role of the state.⁸⁵ Unlike the idea of global democracy, the Westphalian doctrine has limited aspirations regarding the regulation of the political process.⁸⁶ The consent requirement underlying the Westphalian doctrine was interpreted as a purely formalistic condition of constitutional adequacy⁸⁷ that does not set substantive requirements to national political structures. Some authors have argued that the Westphalian principle of consent should be read as a requirement to subject the transnational diplomatic process to substantial

84. This complexity cannot be captured by unidimensional concepts such as the “proliferation of international courts.” Guillaume Speech 2000, *supra* note 1. For a discussion of this complexity in the context of the United Nations Commission on International Trade Law (“UNCITRAL”), see Maria Panezi & Peer Zumbansen, *The United Nations Commission on International Trade Law (UNCITRAL)*, in *THE ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW* (forthcoming 2008) (manuscript on file with author).

85. The most prominent voice in this school of thought is that of David Held. *See, e.g.,* David Held, *Cosmopolitanism: Globalization Tamed?*, 29 *REV. INT'L STUD.* 465, 472 (2003).

86. Thus, in the Vienna Convention the only hint of 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.

Vienna Convention, *supra* note 6, art. 46 (emphasis added).

87. *Id.* art. 7.

domestic political scrutiny; this interpretation seeks to portray the act of consent as a product of meaningful political deliberation.⁸⁸ However, under the Westphalian scheme, the state retains the authority to structure the domestic political process.⁸⁹ Further, the political model that emerges from this interpretation is highly fragmented—unlike the unified vision underlying the model of global democracy.⁹⁰

However, choosing the principle of global democracy as an alternative source of validity raises various difficulties pertaining both to its theoretical underpinnings and to its global applicability. From a theoretical perspective, 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 a decision-making process that is based on the possibility of reaching agreement through rational deliberation; 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.⁹¹

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 they do not resolve it.

88. 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).

89. Held, *supra* note 85, at 466.

90. *Id.*

91. See generally Held, *supra* note 85; Michael Walzer, *International Society: What is the Best that We Can Do?* (Sch. of Soc. Sci. Inst. for Advanced Study, Occasional Papers No. 8, 2000), available at <http://www.sss.ias.edu/publications/papers/papereight.pdf>.

These dilemmas have been apparent in the few attempts to implement the vision of global democracy. 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 an electronically-mediated model of representative democracy.⁹² 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).⁹³ ICANN’s experiment was heavily criticized due to its failure to achieve true global representation and responsiveness to civic concerns, leading the organization to abandon its ambitious democratic aspirations.⁹⁴ Other institutions—such as the Global Reporting Initiative (“GRI”)—have established multi-stakeholder consultation processes, reflecting a commitment to consensual decision-making.⁹⁵ Despite the relative success of the GRI, the consultation procedures it established do not constitute a formal democratic structure; to some extent, the success of the GRI may be attributed to the limited field—sustainability reporting—in which it operated.⁹⁶ The tensions that 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.

92. See ICANN, Uniform Domain-Name Dispute Resolution Policies, <http://www.icann.org/udrp/> (last visited Oct. 13, 2007).

93. John G. Palfrey, *The End of the Experiment: How ICANN’s Foray into Global Internet Democracy Failed*, 17 HARV. J.L. & TECH. 412–414 (2004).

94. ICANN’s experiment failed in the sense that ICANN has radically changed its governance structure by adopting a much milder concept of democracy. Nonetheless, ICANN’s experiment still constitutes an important milestone in the attempt to transform the abstract idea of global democratization into a practical model. For a detailed discussion and critique of ICANN’s democratic experiment, see Palfrey, *supra* note 93, at 412.

95. For details about the GRI, see Global Reporting Initiative [GRI], <http://www.globalreporting.org>. The World Wide Web Consortium provides another example of an attempt to design global standards through multi-stakeholder consultation. See World Wide Web Consortium, <http://www.w3.org/>. 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 ELECTRONIC DEMOCRACY: MOBILISATION, ORGANIZATION AND PARTICIPATION VIA NEW ICTS 133, 133, 143–44 (Rachel K. Gibson, Andrea Roemmele & Stephen J. Ward eds., Routledge 2004).

96. I discuss the institutional structure of the GRI in more detail in the last section of this Article. See *infra* notes 234–239 and accompanying text.

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 ICC and the question of humanitarian intervention. Some authors have tried to justify the novel ICC jurisdiction by what amounts, in effect, to a direct appeal to moral principles.⁹⁷ 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.”⁹⁸ In the context of humanitarian intervention, authors have argued for the emergence of a new *grund norm*: a principle of civilian inviolability.⁹⁹

However, 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 extremely fuzzy. As Madeline Morris argued in a recent article:

A threshold problem with the theory of global treaties is that there will 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.¹⁰⁰

97. Morris, *supra* note 8, at 26.

98. *Id.* at 52.

99. See Anne-Marie Slaughter & William W. Burke-White, *An International Constitutional Moment* 43 HARV. INT’L L.J. 1, 1 (2002). Other authors have proposed a different principle, “a responsibility to protect.” See, e.g., Gareth Evans & Mohamed Sahnoun, *The Responsibility to Protect*, 81 FOREIGN AFF. 99, 101 (2002); Bruce, W. Jentleson, *A Responsibility to Protect*, 28 HARV. INT’L L.J. 18, 18 (2007). See also Held, *supra* note 91, at 471–72 (arguing for a new global order based on two meta-moral principles: the metaprinciple of autonomy and the metaprinciple of impartialist reasoning). For a critique of the Slaughter and Burke-White view (which is applicable to the other proposals), see Andreas Fischer-Lescano, *Redefining Sovereignty via International Constitutional Moments? The Case of Afghanistan*, in REDEFINING SOVEREIGNTY: THE USE OF FORCE AFTER THE END OF THE COLD WAR 335 (Mary Ellen O’Connell, Michael Bothe & Natalino Ronzitti eds., Transnational Pub. 2005); Jean L. Cohen, *Whose Sovereignty? Empire Versus International Law*, 18 ETHICS AND INT’L AFF. 1 (2004).

100. Morris, *supra* note 8, at 52.

The deep vagueness of these new postulated norms calls for further interpretation and sets the ground for interpretative disputes.¹⁰¹ It is not clear what criteria will govern such disputes or which authority will decide them. The suggested new *grund norms* do not resolve these questions.

Similar appeals to non-legal rationalities can be found in other domains. In the environmental domain, we can find reference to a new environmental ethics, epitomized in the concept of sustainable development¹⁰² and in the precautionary principle.¹⁰³ Environmental ethics provides an additional and independent mode of justification, operating alongside other forms of groundings.¹⁰⁴ Science has also been used increasingly as a mode of grounding, especially in the trade and environment domains.¹⁰⁵ In both of these domains, the problems of choosing between the competing external sources and the indeterminacy of the external principles remain unresolved.¹⁰⁶ We are confronted, again, not

101. Similar problems afflict the question of humanitarian intervention. See, e.g., Jianming Shen, *The Non-Intervention Principle and Humanitarian Interventions Under International Law*, 7 INT'L LEGAL THEORY 1 (2001).

102. On the principle of sustainable development, see ENVIRONMENTAL LAW FOR SUSTAINABILITY: A READER 13–17, 373–75 (Benjamin J. Richardson & Stepan Wood eds., Hart Pub. 2006).

103. On the precautionary principle, see *id.* at 361–64.

104. Two prominent examples are the WTO Agreement, which includes in its preamble a reference to the principle of sustainable development, and the GRI 2006 sustainability guidelines, which open with a reference to the principle of sustainable development. WTO Agreement, *supra* note 57, pmb.; GRI, G3 Guidelines, http://www.globalreporting.org/NR/rdonlyres/ED9E9B36-AB54-4DE1-BFF2-5F735235CA44/0/G3_GuidelinesENU.pdf at 2 [hereinafter GRI G3]. The WTO tribunals have relied on the invocation of the principle of sustainability in justifying their new (pro-environment) interpretation of article XX. See Appellate Body Report, *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, *supra* note 64, at ¶¶ 153, 155. For a discussion of the WTO trade and environment jurisprudence, see PEREZ, *supra* note 64, at 65–80.

105. A good example is the deference to science in the WTO Agreement on the Application of Sanitary and Phytosanitary Measures (“SPS Agreement”) definition of risk assessment, in which science rather than law provides the criteria for proper risk assessment. See Agreement on the Application of Sanitary and Phytosanitary Measures, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, arts. 2, 5, Annex A(4) 1867 U.N.T.S. 493. For a discussion, see PEREZ, *supra* note 64, at 155–158. The Climate Change Convention provides another example through its reliance on the work and judgment of the Intergovernmental Panel on Climate Change (“IPCC”). See Intergovernmental Panel on Climate Change, <http://www.ipcc.ch/> (last visited Oct. 13, 2007).

106. See e.g., Oren Perez, *The Institutionalization of Inconsistency: From Fluid Concepts to Random Walk*, in PARADOXES AND INCONSISTENCIES IN LAW 119, 128–36 (Oren Perez & Gunther Teubner eds., 2006); Oren Perez, *Anomalies at the Precautionary Kingdom: Reflections on the GMO Panel’s Decision*, 6 WORLD TRADE REV. 265, 265, 267

just by conflicting interpretations of the same extra-legal authority (e.g., environmental ethics), but also by deep uncertainty as to how these divergent authorities relate to each other. There seems 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 freedom of choice and self-determination.¹⁰⁷ This form of validation claims to free international law from its traditional reliance on the state as a necessary prerequisite 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.¹⁰⁸ 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.¹⁰⁹ The New York Conven-

(2007) (with respect to the vagueness of the precautionary principle); David G. Victor, *Recovering Sustainable Development*, 85 FOREIGN AFF. 91, 92 (2006) (noting with respect to the vagueness of the sustainability paradigm that “UN summits . . . 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.”).

107. See Barry Schwartz, *Self-determination: The Tyranny of Freedom*, 55 AM. PSYCHOL. 79 (2000); Wendy Lamer, *Neo-Liberalism: Policy, Ideology, Governmentality*, 63 STUD. POL. ECON. 5 (2000).

108. See Christopher R. Drahozal, *Contracting Out of National Law: An Empirical Look at the New Law Merchant*, 80 NOTRE DAME L. REV. 523, 537 (2005) (reporting an increase in the number of arbitration requests filed with the International Court of Arbitration from 1999–2003).

109. 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*, in JEAN MONNET/ROBERT SCHUMAN PAPER SERIES, at 1, 12 (Miami-Florida European Union Center No. 20, 2006). A similar increase has taken place in

tion 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.¹¹⁰ The New York Convention is not, therefore, just a mechanism of enforcement: through the principle of non-interference, it has facilitated the emergence of a new global law that is insulated from the influence of inter-state politics.¹¹¹ The normative space that was created by the New York Convention has been filled by a new a-national system of international commercial law, the new *lex mercatoria*,¹¹² 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 (“ICA”), the London Court of International Arbitration (“LCIA”), and the US International Centre for Dispute Resolution.¹¹³ 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),¹¹⁴ also claim simultaneously a continuous and permanent legal presence?

the field of investment arbitration. See Luke Eric Peterson, *The Global Governance of Foreign Direct Investment: Madly Off in All Directions*, No. 19, at 12–14, Occasional Papers, Dialogue Globalization (May 2005).

110. United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 3 [hereinafter New York Convention].

111. As of March 12, 2007, the Convention had 142 parties. Updated data about the status of the Convention can be found on UNCITRAL’s Web site. See UNCITRAL, Status 1958–Convention on the Recognition and Enforcement of Foreign Arbitral Awards, http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html (last visited Oct. 6, 2007).

112. Alec Stone Sweet, *The New Lex Mercatoria and Transnational Governance*, 13 J. EUR. PUB. POL’Y 627, 627–30 (2006); Peer Zumbansen, *Sustaining Paradox Boundaries: Perspectives on Internal Affairs in Domestic and International Law*, 15 EUR. J. INT’L L. 197, 198 (2004).

113. See International Chamber of Commerce, International Court of Arbitration, <http://www.iccwbo.org/court/arbitration>; London Court of International Arbitration, <http://www.lcia-arbitration.com/>; American Arbitration Association, <http://www.adr.org>. For other International Arbitration Centers, see International Business—Arbitration Centers, http://www.constructionweblinks.com/Organizations/International__Organizations/arbitration_centers.html (last visited Oct. 13, 2007).

114. The reliance on arbitration clauses is reflected both in the language of the New York Convention, which limits its jurisdiction to valid arbitral agreements, see New York Convention, *supra* note 110, art. II(3), and in the Web sites of the arbitral centers mentioned above, which provide their prospective clients with recommended arbitration clauses, see the Web sites of the ICA and LCIA, *supra* note 113. A typical arbitration

The ICA constitutes a particularly fascinating example of this existential paradox. The ICA Dispute Resolution Rules¹¹⁵ draw their validity from the parties' consent.¹¹⁶ In contrast to conventional arbitration, the ICC Rules provide the ICA with the authority to scrutinize an award.¹¹⁷ Under the ICC Rules, the arbitral tribunal is required to submit its award in draft form to the ICA. According to Article 27:

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.¹¹⁸

Commentators note that in scrutinizing the award, the ICA 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.¹¹⁹ 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.¹²⁰ 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

clause states: "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." International Chamber of Commerce, International Court of Arbitration, <http://www.iccwbo.org/court/arbitration/id4114/index.html> (last visited Oct. 6, 2007).

115. International Chamber of Commerce, International Court of Arbitration Dispute Resolution Rules, http://www.iccwbo.org/uploadedFiles/Court/Arbitration/other/rules_arb_english.pdf.

116. *Id.* art. 6.

117. The ICA's role is defined in Article 1 of the Rules, and in Appendices I and II thereof. *Id.* art. 1, apps I, II. 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." *Id.* art. 1(2).

118. 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." *Id.* app. II, art. 6.

119. Ellis Baker and Anthony Lavers, *Review of Arbitrators' Exercise of Power in English Law: The House of Lords Decides*, 22 INT'L CONSTRUCTION L. REV. 493, 499-500 (2005).

120. *Id.*

also to the elusive and autonomous jurisprudence of the ICA.¹²¹ Thus, the ICA'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 Uniform Domain-Name Dispute Resolution Policy ("UDDRP")¹²² and the World Wide Web Consortium Platform for Privacy Preferences Project ("P3P").¹²³ Similar 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, consent is given in the contract signed between a domain-name holder and a registrar.¹²⁴ In the case of P3P, the platform is incorporated into the architecture of the browsers and the Web sites, and consent is implied from the purchase or usage of the browser.¹²⁵ The global code is reinterpreted in these cases as a contract—a true manifestation of the idea of social contract.¹²⁶

121. The London Court of International Arbitration has a somewhat similar dual architecture; the powers of the London Court are, however, more limited. See LCIA Arbitration Rules arts. 3, 29, http://www.lcia.org/ARB_folder/arb_english_main.htm.

122. See ICANN, Uniform Domain-Name Dispute Resolution Policy [UDDRP], <http://www.icann.org/udrp/>. The policy is applicable across all generic top level domains (.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 UDDRP is a policy between a registrar and its customer and is included in registration agreements for all ICANN-accredited registrars. For a list of approved dispute-resolution service providers, see ICANN, Approved Providers, <http://www.icann.org/dndr/udrp/approved-providers.htm> (last visited Oct. 6, 2007).

123. Platform for Privacy Preferences [P3P], <http://www.w3.org/P3P/>. The Platform for Privacy Preferences Project enables Web sites to express their privacy practices in a standard format that can be retrieved automatically and interpreted easily by user agents. P3P user agents 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. *Id.*

124. ICANN, Uniform Domain-Name Dispute Resolution Policies: Eligibility Requirements Dispute Resolution Policy, para. 1, <http://www.icann.org/udrp/erdrp-policy.html>.

125. In some cases, the browser is already installed on the computer when it is purchased; consent is then indicated through the act of purchase.

126. For a general discussion of the social contract, see S.A. Lloyd, *Hobbes's Moral and Political Philosophy*, in STANFORD ENCYCLOPEDIA OF PHILOSOPHY (E.N. Zalta, ed.,

This new form of validity finds resonance in the ideas of individual integrity and individual empowerment that 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, the permanent nature of the *lex mercatoria*, and some of the new arbitral centers seems unbridgeable. In the case of the new global 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.”¹²⁷ 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 or 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?¹²⁸

If one rejects individual consent as an acceptable form of validation, perhaps there is no choice but to look for alternative groundings. Thus, in 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 the UDDRP and the P3P standards, where 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 occasion for horizontal conflicts between different forms of validation. The field of investment disputes provides a particularly interesting example of 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 (“BITS”) interpreted in light of the 1965 Convention on the Settlement of Investment

2002), <http://plato.stanford.edu/entries/hobbes-moral/>; Williamson M. Evers, *Social Contract: A Critique* 1 J. LIBERTARIAN STUD. 185 (1977).

127. Margaret Jane Radin, *Boilerplate Today: The Rise of Modularity and the Waning of Consent*, 104 MICH. L. REV. 1223, 1231 (2006). For further information on the problematic nature of contract formation in standard electronic contracts and the question of privacy protection, see Robert L. Oakley, *Fairness in Electronic Contracting: Minimum Standards for Non-Negotiated Contracts*, 42 HOUS. L. REV. 1041, 1045 (2005); Lisa M. Austin, *Is Consent the Foundation of Fair Information Practices? Canada’s Experience Under PIPEDA*, 56 U. TORONTO L.J. 181, 191 (2006).

128. Recall that P3P is encoded in the architecture of both Web sites and browsers.

Disputes between States and Nationals of Other States (“ICSID Convention”).¹²⁹ 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 opinion on this question.¹³⁰

D. The Bundling of Law and Technology

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.¹³¹ 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.¹³² Such technology is increasingly being used in the fight against online file-sharing software.¹³³ P3P provides

129. For the text of the ICSID Convention and details about the way it operates, see The World Bank Group ICSID Convention, Regulation and Rules, <http://www.worldbank.org/icsid/basicdoc/basicdoc.htm>. As of April 10, 2006, 143 countries have ratified the Convention. The World Bank Group ICSID Convention, Regulation and Rules, Introduction, <http://www.worldbank.org/icsid/basicdoc/intro.htm> (last visited Oct. 6, 2007).

130. See *Aguas del Tunari v. Bolivia*, ICSID Case No. ARB/02/3 (W. Bank) 1, 21–30 (2005), available at <http://www.investmentclaims.com/oa1.html> (last visited Oct. 6, 2007); *SGS Societe Generale de Surveillance S.A. v. Philippines*, ICSID Case No. ARB/02/6, (W. Bank) 1, 53–60 (2004), available at <http://www.investmentclaims.com/oa1.html> (last visited Oct. 6, 2007); Gerold Zeiler, *Treaty v Contract: What is the Best Venue for Investment Disputes?*, AUSTRIAN ARB. Y.B. 323, 332–348 (2007); Stephan W. Schill, *Arbitration Risk and Effective Compliance: Cost-Shifting in Investment Treaty Arbitration*, 7 J. WORLD INV. & TRADE 653, 676–679 (2006).

131. 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 L. REV. 1125, 1143 (2002).

132. 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 MediaMax Technology, <http://www.mediamaxtechnology.com/>; John A. Halderman, *Analysis of the MediaMax CD3 Copy-Prevention System*, PRINCETON U. COMPUTER SCI. TECHNICAL REP. TR-679-03 (2003).

133. See Brad Stone & Miguel Helft, *New Weapon In Web War Over Piracy*, N.Y. TIMES, FEB. 19, 2007, at C1. The new technological weapon in this case is based on 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

another example. The P3P standard is integrated into software (browser) and into the structure of Web sites (another type of machine).¹³⁴ Another example is new filtering software that is used to protect minors from exposure to sexually explicit materials on the Web.¹³⁵ In this case, as in the case of intellectual property rights, the software proclaims to fulfill a task that was previously reserved to state regulation. What is common to all these cases is the invocation of technology as a new type of (global) *grund norm*.¹³⁶

In *Ashcroft v. ACLU*,¹³⁷ the U.S. Supreme Court 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”).¹³⁸ This led the Court to the conclusion that COPA was unconstitutional (by violating the First Amendment) because of the availability of less restrictive alternatives.¹³⁹ The importance of the U.S. Supreme Court’s decision in terms of this Article’s thesis regarding the fragmentation of the concept of validity lies

Audible Magic. See Audible Magic, <http://www.audiblemagic.com/> (last visited Oct. 6, 2007).

134. On the structure of P3P technology, see Daniel J. Weitzner et al., *Creating a Policy-Aware Web: Discretionary, Rule-based Access for the World Wide Web*, in WEB AND INFORMATION SECURITY 1, 6 (Elena Ferrari & Bhavani M. Thuraisingham eds., IRM Press 2006), available at <http://www.w3.org/2004/09/Policy-Aware-Web-acl.pdf>. See also LORRIE CRANOR ET AL., THE PLATFORM FOR PRIVACY PREFERENCES 1.1 (P3P1.1) SPECIFICATION § 1.1.2 (2006), <http://www.w3.org/TR/P3P11/>.

135. For a discussion of blocking and filtering products, see Richard W. Boss, *Meeting CIPA Requirements with Technology*, Am. Lib. Ass’n Technotes (Oct. 11, 2007), <http://www.pla.org/ala/pla/plapubs/technotes/internetfiltering.cfm> (last visited Oct. 11, 2007).

136. For further discussion of this phenomenon, see Radin, *supra* note 127; Margaret Jane Radin, *Regulation by Contract, Regulation by Machine*, 160 J. INST. & THEORETICAL ECON. 1 (2004).

137. *Ashcroft v. ACLU*, 542 U.S. 656 (2004).

138. 47 U.S.C. § 231 (1998).

139. 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.

Ashcroft, 542 U.S. at 667.

not in the particulars of American free speech doctrine, but in its de facto recognition of technology as a source of private law.¹⁴⁰

But the claim that technology acts as a new form of normative grounding seems to confuse the *is* and the *ought*—leaping from efficacy to normativity.¹⁴¹ 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.¹⁴² 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.¹⁴³ Once again, we see a conflict between two forms of validation: technology and individual consent.¹⁴⁴

IV. 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 perspec-

140. One can see a similar process taking place in the field of morality. See Bruno Latour & Couze Venn, *Morality and Technology: The End of the Means*, 19 THEOR. CULT. SOC. 247, 253–54 (2002).

141. This leap characterizes the concept of legal validity in general. See Csaba Varga, *Validity*, 41 ACTA JURIDICA HUNGARICA 155 (2000). See also *infra* Section IV.B.

142. For other cases dealing with this problem, see, e.g., *Davidson & Assocs. v. Jung*, 422 F.3d 630 (2005); *DVD Copy Control Assn., Inc. v. Bunner*, 75 P.3d 1 (Cal. 2004).

143. Complaint ¶¶ 96–97, *Hull v. Sony BMG Music Entertainment Corp.*, 2005 WL 3806321 (Nov. 21, 2005) (No. BC 343385). In response to the filing of the suit by the EFF, SunnComm has undertaken 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. Electronic Frontier Foundation, *CD Copy Protection Firm Promises Fix for Software Problems* (Feb. 2, 2006), http://www.eff.org/news/archives/2006_02.php#004378. For the full litigation history, see Electronic Frontier Foundation, *Sony BMG Litigation Info*, <http://www.eff.org/IP/DRM/Sony-BMG/#docs> (last visited Oct. 18, 2007).

144. Radin, *supra* note 127, at 1231.

tive 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 *pacta sunt servanda* must be assumed to derive—if we want to avoid circularity—from a source that is independent of the will of states.¹⁴⁵ This has already been noted by various scholars of international law. For example, Hersch Lauterpacht, in a book published in 1927, notes:

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 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.¹⁴⁶

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—that will be the source of such norms.¹⁴⁷

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.¹⁴⁸ This is not mere theoretical conjecture: presidents of

145. MARTTI KOSKENNIEMI, *THE GENTLE CIVILIZER OF NATIONS: THE RISE AND FALL OF INTERNATIONAL LAW, 1870–1960* 364 (Cambridge University Press 2002).

146. HERSCH LAUTERPACHT, *PRIVATE LAW SOURCES AND ANALOGIES OF INTERNATIONAL LAW: WITH SPECIAL REFERENCE TO INTERNATIONAL ARBITRATION (CONTRIBUTIONS TO INTERNATIONAL LAW AND DIPLOMACY)* 56–57 (The Law Book Exchange 2002) (1927) [hereinafter LAUTERPACHT 1927]. See also HERSCH LAUTERPACHT, *THE FUNCTION OF LAW IN THE INTERNATIONAL COMMUNITY* 416–20 (Oxford Clarendon Press 1933) [hereinafter LAUTERPACHT 1933].

147. For the dual hierarchy approach, see Josef L. Kunz, *The Nature of Customary International Law*, 47 *AM. J. INT'L L.* 662, 665 (1953). For a critique, see Kammerhofer, *supra* note 4, at 539–40.

148. See Kammerhofer, *supra* note 4, at 549.

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.”¹⁴⁹

The search for alternative sources of validity is 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 that dates back to Hugo Grotius (1583–1645). The natural law tradition received 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, in 1927 Hersch Lauterpacht, in *Private Law Sources and Analogies of International Law: with Special Reference to International Arbitration*, wrote about a renaissance of natural law.¹⁵⁰ 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: “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.”¹⁵¹ Lauterpacht further developed this thesis in his article, *The Grotian Tradition in International Law*.¹⁵² For Lauterpacht, the force of the Grotian tradition stemmed from the intrinsic insufficiency of the “conception of international law as derived from state will” and from the “constant need . . . [to] judg[e] its adequacy in the light of ethics and reason.”¹⁵³ It

149. Judge Gilbert Guillaume, President, ICJ, Address to the U.N.G.A. (Oct. 30, 2001), available at <http://www.icj-cij.org/presscom/index.php?pr=82&p1=6&p2=1&search=%22%2230+October+2001%22%22>. See also Guillaume Speech 2000, *supra* note 1; Schwebel Speech 1999, *supra* note 1. On the issue of fragmentation, see Martti Koskenniemi & Paivi Leino, *Fragmentation of International Law? Postmodern Anxieties*, 15 LEIDEN J. INT'L L. 553, 553–56 (2002).

150. LAUTERPACHT 1927, *supra* note 146, at 58.

151. *Id.* at 58–59, n.7 (quoting Frederick Pollack).

152. Hersch Lauterpacht, *The Grotian Tradition in International Law*, 23 BRIT. Y.B. INT'L L. 1, 21–24 (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*, 12 EUR. J. INT'L REL. 223, 224 (2006).

153. KOSKENNIEMI, *supra* note 2, at 408. Lauterpacht argues 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, *supra* note 152, at 51. For further information, see C. Wilfred Jenks, *Hersch Lauterpacht: the Scholar as Prophet*, 36 BRIT. Y.B. INT'L L. 1, 72 (1960); Jeffery, *supra* note 152, at 237–41.

seems, then, that international law has never been pure. Nor is the search for alternative groundings a new phenomenon.

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 only the *Westphalian* scheme of consent—it is common to all the forms of validity considered above. Whenever a new source of validity is invoked as an alternative to the *Westphalian* paradigm, the question of its own justification remains in a mist of arbitrary articulations. In considering this problematic, it is interesting to consider a similar puzzle that arises in the field of semantics—the Truth-Teller Paradox. Consider the following sentence:

K₁ 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):

The next sentence is true.

The next sentence is true.

The next sentence is true.

... (*ad infinitum*).¹⁵⁴

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.¹⁵⁵ The distinction between the Liar Paradox and the Truth-Teller Paradox is 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.”¹⁵⁶

154. This example is taken from Hans G. Herzberger, *Paradoxes of Grounding in Semantics*, 67 J. PHIL. 145, 150 (1970). See also Roy Sorensen, *Future Law: Prepunishment and the Causal Theory of Verdicts*, 40 NOUS 166, 176 (2006).

155. Bradley Armour-Garb & James A. Woodbridge, *Dialetheism, Semantic Pathology, and the Open Pair*, 84 AUSTRALASIAN J. PHIL. 395, 397–399 (2006).

156. ROY SORENSEN, VAGUENESS AND CONTRADICTION 167 (Oxford University Press 2002). See also Herzberger, *supra* note 21, at 150.

The notion of validity in law produces something akin to the Truth-Teller Paradox. Validity is the qualifying mark or label of legal norms.¹⁵⁷ 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.”¹⁵⁸ Thus, determining the validity of norms is 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.¹⁵⁹ 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.¹⁶⁰ Because norms cannot be evaluated through the logical prism of truth and falsity, the concept of validity operates as a plausible alternative.¹⁶¹ Consider, for example, the following set of rules (“the Paradox of Validity”):

Rule 1.1: This rule, and all the rules enumerated below, are valid.

Rule 2.1: . . .

Rule 2.2: . . .

Rule 2.3: . . .

. . .

157. Varga, *supra* note 141, at 155.

158. LUHMANN, *supra* note 27, at 125.

159. See Vranas, *supra* note 35, § 3 (discussing the notion of bindingness).

160. LUHMANN, *supra* note 27, at 128; Varga, *supra* note 141, at 155–56.

161. Vladimír Svoboda, *Forms of Norms and Validity*, 80 PONZAN STUD. PHIL. SCI. AND HUMAN. 223, 229 (2003). As in classical logic, I assume bivalence, i.e., 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 the Liar Paradox. As an example, imagine that you open the Civil Code that is in force in your country. On page 100 of 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. This is a 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: we 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.

Rule 2.n: . . . (*ad infinitum*).

This sequence of rules can have two consistent assignments (at least) of validity values. The first, in which both the Rule 1.1 (“meta rule”) and all the other rules (“secondary rules”) are valid, and the second, in which both the meta rule and all the secondary rules are invalid.¹⁶² The Truth-Teller Paradox generates a similar problem of multiple (consistent) assignments of truth and falsity.

Note, however, that there are important differences between the Paradox of Validity and the Truth-Teller Paradox. In 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 concrete conditions by which their truth or falsity may be determined. They fail to yield a statement.¹⁶³ 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 color of law; they become non-legal norms.

The foregoing paradox reflects one of the deepest dilemmas of modern law: on 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.¹⁶⁴

Alfred Tarski proposed to resolve the puzzle of the Liar Paradox by replacing our everyday, singular understanding of truth with a multi-level

162. The qualification “at least” is necessary because once we assume that the meta rule is not valid, there can be multiple assignments of validity that attribute different values to the secondary rules.

163. Transforming K_1 into a bi-conditional yields the following vacuous sentence: *K1 is true if and only if K1 is true*. In contrast, in proper statements such transformation makes perfect sense. Consider: *K2 Leaves are green*. The sentence “*K2 is true if and only leaves are green*” is fully specified. See Laurence Goldstein, *Fibonacci, Yablo, and the Cassationist Approach to Paradox*, 115 MIND 867, 884–85 (2006).

164. See generally, SAINSBURY, *supra* note 13; RESCHER, *supra* note 12. An important solution strategy that I will not discuss is based on rejecting (some) of the assumptions of classical logic (e.g., the law of excluded middle). See, e.g., Graham Priest, *What Is So Bad About Contradictions*, 95 J. PHIL. 410 (1998).

linguistic framework.¹⁶⁵ 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 is located higher on the linguistic hierarchy than the object language and whose expressive capacities are essentially richer (the meta language).¹⁶⁶

Another approach views the non-hierarchical character of natural language as a given. 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.”¹⁶⁷ It is argued that groundless sentences, while grammatically correct, fail to make any statement; they are, in other words, truth incompetent. Furthermore, since these sentences are truth incompetent, it makes no sense to ask whether they are true or false.¹⁶⁸

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 naive intuition that “the paradoxical sentences, because they are not ungrammatical, vague or sortally suspect and encompass no false presuppositions, must yield statements when used.”¹⁶⁹ 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 by the model of naive 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

165. Alfred Tarski, *The Semantic Conception of Truth and the Foundations of Semantics*, 3 PHIL. PHENOMENOLOGICAL RES. 341, 350–51 (1944).

166. *Id.* at 349–52.

167. 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.” Laurence Goldstein, *A Unified Solution to Some Paradoxes*, 100 PROC. ARISTOTELIAN SOC. 53, 54 (1999) (emphasis in original).

168. *Id.* at 58.

169. *Id.* at 69.

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.¹⁷⁰

Instead of trying to break or suppress the semantic instability associated with semantical paradoxes—their oscillation between truth and falsity—naive semantics calls us to embrace it. This can be achieved by exposing the pattern through which paradoxical statements change their values at different stages of evaluation.¹⁷¹ Naive 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.¹⁷² By demonstrating that paradoxical sentences follow certain regularities, naive semantics shows “how a language could contain paradoxical statements and nevertheless have a systematic and coherent semantic structure.”¹⁷³

What are the implications of the philosophical struggle with semantical paradoxes for the study of the paradox of validity? Consider Tarski’s hierarchical conception of truth.¹⁷⁴ 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

170. Herzberger, *supra* note 21, at 482.

171. 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 *stabilization 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 valational cycle.

Id. at 492 (emphasis in original). Thus, for example, the Looped Liar discussed above, *supra* note 19 and accompanying text, is cyclic with periodicity 4. Starting with the assumption that Plato’s statement is true leads to the conclusion that Socrates’ statement is true, so that Plato’s statement is in fact false. Thus, Socrates’ statement is false, coming full circle to the original conclusion that Plato’s statement is true. If we attribute the values (1, 0) to (true, false) we get the following cyclical pattern: 11001100

172. *Id.* at 497 (emphasis added).

173. *Id.*

174. Tarski, *supra* note 165, at 349–52.

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 constitutes 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 naive 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, or resolved.¹⁷⁵ One of the main tasks of logic is to free us from this disease.¹⁷⁶

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.¹⁷⁷ This has to do with the fact that paradoxes are properties of sentences.¹⁷⁸ Because law, as a social system, is not reducible to sentences (e.g., norms), it cannot be, strictly speaking, paradoxical—although it can be depicted as self-referential, self-

175. 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 SCI. AM. 63, 66 (1969).

176. 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 590–91.

177. The gap between the logical and legal planes has remained unnoticed by some legal scholars. For example George Fletcher, in his article *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 COLUM. L. REV. 1263, 1264–65 (1985).

178. Goldstein, *supra* note 167, at 54. I use the term “sentence” to denote a string of words satisfying the grammatical rules of a language. See WordNet 2.0 dictionary, <http://wordnet.princeton.edu> (follow “search” hyperlink and search for “sentence”). 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.

organizing, or self-producing.¹⁷⁹ The paradoxes of law emerge as sentential 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.¹⁸⁰ Self-organizing and self-producing systems are intrinsically circular and self-referential.¹⁸¹

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.¹⁸² One cannot purify the

179. 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* 18 (Zenon Bankowski ed., Anne Bankowska & Ruther Adler trans., Blackwell Publishers 1993). See also NIKLAS LUHMANN, *LAW AS A SOCIAL SYSTEM* 98–105, 177 (Fatima Katner et al. eds., Klaus A. Ziegert trans., Oxford University Press 2004); Neil MacCormick, *Norms, Institutions, and Institutional Facts*, 17 *LAW AND PHILOSOPHY* (SPECIAL ISSUE) 301, 330–31 (1998).

180. Francis Heylighen, 2001, *The Science of Self-organization and Adaptivity, in Technology, Information, and Systems Management Resources*, in *THE ENCYCLOPEDIA OF LIFE SUPPORT SYSTEMS (EOLSS)*, Developed Under the Auspices of United Nations Educational, Scientific, and Cultural Organization [UNESCO], EOLSS Publishers, Oxford, UK, <http://www.eolss.net>; Francis Heylighen & Cliff Joslyn, *Cybernetics and Second Order Cybernetics*, in 4 *ENCYCLOPEDIA OF PHYSICAL SCIENCE & TECHNOLOGY* 155, 155–170 (Robert A. Meyers ed., 2002) [hereinafter Heylighen & Joslyn]. On the definition of self-organization, see *id.* at 160–61.

181. In mathematical terms, these forms of circularity can be modeled by an equation representing how some phenomenon or variable y is mapped onto itself by a transformation or process 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 & Joslyn, *supra* note 180, at 160.

182. The notion of purification is invoked, for example, by Nicholas Rescher. 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 one way or another.” *Id.* at 11.

law from its paradoxes because they reflect vital steering and stabilizing mechanisms without which the law would not be able to counteract external pressures.¹⁸³ 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 dynamic underlying the paradoxes of law.¹⁸⁴ 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.¹⁸⁵ 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.

V. 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 *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.¹⁸⁶ But what are the social implications of this process? In order to answer this question, let me first

183. 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). See Fletcher, *supra* note 177, at 1265.

184. A notable exception is naive semantics, which, as we saw earlier, emphasizes the dynamic aspect of semantical paradoxes. See generally PATRICK GRIM ET AL., *THE PHILOSOPHICAL COMPUTER: EXPLORATORY ESSAYS IN PHILOSOPHICAL COMPUTER MODELING* 13–57 (MIT Press 1998). 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 surprises.

185. 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 AM. J. INT’L L. 119, 121 n.6 (1947).

186. See also Gunther Teubner & Andreas Fischer-Lescano, *Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law*, 25 MICH. J. INT’L L. 999, 1000–01 (2004).

outline the key types of deep inconsistencies that afflict the contemporary universe of international law.

- 1) *Horizontal inconsistent sources of validation.* There is no universally agreed upon concept of validity. Different international regimes use different notions of validity (compare the WTO regime to the ICA).¹⁸⁷ In some cases, this form of inconsistency leads to transregime conflicts (e.g., the clash between treaty and contractual obligations in the investment domain and the clash between consent and technology in Internet law).¹⁸⁸
- 2) *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 ICC).¹⁸⁹
- 3) *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).¹⁹⁰

Together, these 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 explore this question by considering the influence of the polymorphosis process on the structure and autonomy of the global legal system, on its stability, 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).

187. Compare *supra* Section II.B.1, with *supra* Section III.C.

188. See *supra* Section III.B.

189. See *supra* Section II.B.

190. See *supra* Section III.B.

A. From Colonization to Internal Complexification: The Emergence of Cosmopolitan Law

The polymorphosis process can be postulated to be a consequence of the colonization or instrumentalization of the global legal system by multifarious external systems.¹⁹¹ There are certainly voices that argue that this colonization is widespread, with a finger pointed, in particular, to the global economic system or the so-called “Washington Consensus.”¹⁹² 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.¹⁹³ While this argument has some merit, I do not find it convincing as an explanation for the diverse processes depicted above.

There are two 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 III, reflects a common adherence to the

191. On the risk of the colonization of global law by external sources see, for example, Fischer-Lescano, *supra* note 99.

192. See William Finnegan, *The Economics of Empire: Notes on the Washington Consensus*, HARPER’S, May 2003.

193. See, e.g., David Held, *Globalisation: the Dangers and the Answers*, OPEN DEMOCRACY, May 27, 2004, available at http://www.opendemocracy.net/globalization-reflections/article_1918.jsp; Finnegan, *supra* note 192, at 41; Noam Chomsky, *The Passion for Free Markets Exporting American Values Through the New World Trade Organization*, Z MAGAZINE, May 1997, available at <http://www.zmag.org/zmag/articles/may97chomsky.html>. Noam Chomsky provides a prototypical formulation of the colonization argument. Referring to the WTO Agreement on Basic 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’” *Id.* In a similar fashion, the bundling of law and technology can be viewed as an “automatic” mechanism that is controlled by private firms—and serves their interests. Margaret Radin has recently argued 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 127, at 1233.

concept of normativity. Indeed, the quest for validity can only make sense within the realm of law.¹⁹⁴

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.¹⁹⁵ 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,¹⁹⁶ rather, it is constituted through a common appeal to the concepts of normativity and grounding, which are postulated as universally applicable distinctions.

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 social systems 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, leading ultimately to the total paralysis of the global legal system?¹⁹⁷ 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), simultaneously causing global law to contract as problems migrate to other systems?

194. See Varga, *supra* note 141, at 164.

195. 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 an internal perspective, this external deliberation appears as noise.

196. Hence, one can no longer argue that “national sovereignty is the condition of global law and global law is the condition of sovereignty being possible.” Fischer-Lescano, *supra* note 99, at 347. Nor can such unity be found in the International Court of Justice as the apex of some postulated hierarchy. See Koskenniemi & Leino, *supra* note 149, at 577.

197. For this possibility, see Teubner & Fischer-Lescano, *supra* note 186, at 1004; GREG C. SHAFFER & MARK A. POLLACK, REGULATING RISK IN A GLOBAL ECONOMY: THE UNITED STATES, EUROPE, AND AGRICULTURAL BIOTECHNOLOGY 1–47 (Oxford University Press forthcoming 2007) (manuscript on file with author).

Systems theory recognizes operational paralysis and structural disintegration as a possible trajectory in the life of ecological and social systems.¹⁹⁸ 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 the contemporary body of law, with its proliferation of validation techniques, should be seen, at this point, as a source of strength rather than weakness. This complexity contributes to the 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 contradictions¹⁹⁹ 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 in an ecological system and is defined by the “magnitude of disturbance that a system can absorb before it changes stable states.”²⁰⁰ Biodiversity is defined as a measure of two features of an ecological system: functional-group diversity and functional-response diversity.²⁰¹ Functional-group diversity measures the diversity of the ecosystem in terms of groups of species that fulfill different functions (e.g., species may pollinate, graze, predate, fix nitrogen, etc.).²⁰² The persistence of functional groups contributes to the performance of ecosystems and the services that they generate, while the loss of a major functional group, such as apex predators, may cause drastic alterations in ecosystem functioning.²⁰³ Functional-response diversity

198. See, e.g., Carl Folke et al., *Regime Shifts, Resilience and Biodiversity in Ecosystem Management*, 35 ANNUAL REV. ECOL. EVOL. SYST. 557, 558 (2004); Ahmet E. Kideys, *Fall and Rise of the Black Sea Ecosystem*, 297 SCIENCE 1482 (2002); Brian Walker & Jacqueline A. Meyers, *Thresholds in Ecological and Social-Ecological Systems: A Developing Database*, 9 ECOLOGY & SOC'Y 3, 12 (2004).

199. See, e.g., Teubner & Fischer-Lescano, *supra* note 186, at 1002; 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, 792 (2006).

200. Lance Gunderson, *Ecological Resilience—In Theory and Application*, 31 ANN. REV. ECOLOGY & SYSTEMATICS 425, 427 (2000). Likewise, Folke et al. define resilience 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., *supra* note 198, at 558.

201. Folke et al., *supra* note 198, at 569.

202. *Id.* at 570.

203. *Id.*

is defined in terms of the diversity of responses to environmental change among species that contribute to the same ecosystem function.²⁰⁴ Variability in response to environmental change within the same functional group is critical to ecosystem resilience.²⁰⁵

There is an increasing consensus among ecologists that biodiversity contributes to system resilience by increasing sources of renewal and reorganization, and by providing a rich response horizon.²⁰⁶ Generally, biodiversity provides 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.²⁰⁷

Using biological concepts in the study of social processes is not a trivial exercise. The following comments constitute a first step in an exploration of the applicability of the idea of ecosystem resilience to the study of social systems.²⁰⁸ 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)²⁰⁹ 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 pressures, maintaining, nonetheless, its normative unity (against competing social orders).²¹⁰

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

204. *Id.*

205. *Id.*

206. *Id.* at 572.

207. Gunderson, *supra* note 200, 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 & C.S. Holling, *Ecological Resilience, Biodiversity, and Scale*, 1 ECOSYSTEMS 6, 11, 16 (1998).

208. For other attempts to use biological ideas in the study of social systems, see NIKLAS LUHMANN, SOCIAL SYSTEMS 12–58 (John Bednarz, Jr. & Dirk Baecker trans., Stanford University Press 1995); Heylighen, *supra* note 180, at 24 (the concept of self-organization).

209. “Allonomy,” literally meaning external law, refers to the situation in which a system is regulated or controlled from the outside. FRANCISCO J. VARELA, PRINCIPLES OF BIOLOGICAL AUTONOMY xi (George Klir ed., Elsevier North Holland, Inc. 1979).

210. Diversity contributes therefore to the continuance of (transnational) legal communication. See Heylighen & Joslyn, *supra* note 180, at 162–63. To the extent that law is taken as a better way to resolve societal conflicts (e.g., relative to force), this result has important moral value.

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.²¹¹ 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, providing the system with memory and coherence (despite its fragmented foundations). The reliance on (and development of) universal private law doctrines that operate as a common conceptual grid constitutes an additional 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 GRI, drawing upon an innovative institutional structure based on a tripartite commitment to consensus-building, inclusive decision-making process, and the vision of sustainable development, has successfully initiated a new global scheme dealing with corporate sustainable reporting in a field in which the conventional treaty-making route would have faced formidable obstacles.²¹²

The lesson from the biological discussion of diversity and resilience seems to be clear: there is value in diversity in both its institutional and normative dimensions. In terms of institutional design, this suggests, I will argue, a shift from models of institutional hierarchy and normative unity to reflexive models that maintain this diversity and the paradoxical frictions associated with it.²¹³ I will say more about that in Section VI.

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.²¹⁴ Allen Buchanan and Robert Keohane argue that in the

211. Picciotto, *supra* note 61, at 496. *See also supra* Section II.B.1.

212. *See* GRI G3, *supra* note 104.

213. For a similar conclusion, *see* Teubner & Fischer-Lescano, *supra* note 186, at 1004.

214. Daniel Bodansky, *The Legitimacy of International Governance: A Coming Challenge for International Environmental Law?*, 93 AM. J. INT'L L. 596, 603 (1999) (arguing

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.”²¹⁵ 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.²¹⁶ Legitimacy is therefore a subjective quality, defined by the perception of the institution in the eyes of the individual.²¹⁷

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 rule.”²¹⁸ This understanding of the sociological aspect of legitimacy provides, however, only part of the picture because it focuses exclusively on the individual perspective.²¹⁹ 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 dynamic of the legal system.²²⁰ To the extent that the

that legitimacy “concerns the justification of authority; it provides grounds for deferring to another’s decision, even in the absence of coercion or rational persuasion”).

215. Allen Buchanan & Robert O. Keohane, *The Legitimacy of Global Governance Institutions*, 20 ETHICS & INT’L AFF. 405, 411 (2006) (emphasis added). For a definition of legitimacy, see *id.* at 405.

216. *Id.* at 405.

217. Ian Hurd, *Legitimacy and Authority in International Politics*, 53 INT’L ORG. 379, 411 (1999).

218. *Id.* at 381.

219. *Id.*

220. See generally Buchanan & Keohane, *supra* note 215.

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.²²¹

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 terms of accountability through interaction with agents and organizations outside the institution.²²² Achieving such epistemic responsiveness requires that the institution be both transparent and open to dialogue with external epistemic actors.²²³

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.²²⁴ Non-trivial machines—unlike trivial machines such as cars and mobile phones—are highly disobedient and unpredict-

221. *Id.* at 422.

222. *Id.* at 405–06, 432.

223. *Id.* at 432.

224. Heinz von Foerster, *Principles of Self-Organization—In a Socio-Managerial Context*, in *SELF-ORGANIZATION AND MANAGEMENT OF SOCIAL SYSTEMS* 2, 10 (Hans Ulrich & Gilbert J.B. Probst eds., Springer-Verlag 1984).

able.²²⁵ In non-trivial machines, “a response once observed for a given stimulus may not be the same for the same stimulus given later.”²²⁶ The autological nature of the law allows it to continuously challenge its traditional doctrines, analogies, and conceptual constructs. The broad ensemble of validating techniques that characterize the global legal system further enrich 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 room and hope for critical voices. In a world that cherishes diversity of life forms, this competency constitutes an important virtue.²²⁷ The deep heterogeneity of the global legal system seems to cohere better with the cultural diversity of 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 also contribute 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 wider public. If people are not aware of the incoherence and autological character of the 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).²²⁸

The cognitive reaction to legal paradoxes is still an under-explored question. So let me conclude this discussion by looking at the findings of

225. *Id.*

226. *Id.* See also Posting of Hanno Kaiser to Normativity, Trivial Machines, and Punishment Blog, <http://www.lawsocietyblog.com/archives/2> (June 30, 2004).

227. See, e.g., CHARLES TAYLOR, MULTICULTURALISM AND “THE POLITICS OF RECOGNITION” (Amy Gutmann ed., Princeton University Press 1992) (1931); Lawrence Blum, *Recognition, Value, and Equality: A Critique of Charles Taylor’s and Nancy Fraser’s Accounts of Multiculturalism*, 5 CONSTELLATIONS 51 (1998).

228. Oren Perez, *The Institutionalisation of Inconsistency: From Fluid Concepts to Random Walk*, in PARADOXES AND INCONSISTENCIES IN THE LAW 119, 123 (Oren Perez & Gunther Teubner eds., Hart Publishing 2006).

a recent article, which explored the cognitive repercussions of the similar Truth-Teller Paradox. Shira Elqayam explored the way reasoners evaluate Truth-Teller-type propositions (“I am telling the truth”) and Liar-type propositions (“I am lying”).²²⁹ She found, through two experiments, the existence of a “collapse illusion” by which reasoners evaluate Truth-Teller-type propositions as if they were simply true, whereas Liar-type propositions tended to be evaluated as neither true nor false.²³⁰ This psychological result is inconsistent with the philosophical view of Truth-Teller-type propositions, which considers them hopelessly indeterminate.²³¹ Elqayam offers several psychological explanations for this phenomenon, which I cannot consider in detail here.²³² However, it would be interesting to explore whether a similar phenomenon exists also in the case of validity.

VI. 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.²³³ First, they fail to recognize the innate paradoxicality of law, and second, 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 diversity. In terms of institutional design, it suggests a shift from unifying models based on hierarchical normative and institutional structures to reflexive models that 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 global society, there is more room for experimenting with novel and 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 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 a reflexive structure can affect both the mi-

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

230. *Id.*

231. *Id.* at 145, 170.

232. *Id.* at 150.

233. Echoes of this purifying mode can be found, for example, in the “constitutional moment” hypothesis of Slaughter and Burke-White, *supra* note 99. See also Held, *supra* note 85; Kunz, *supra* note 147.

cro-dynamic of a single regime, and the interplay between several regimes. These examples also differ in their model of distributed authority and in the construction of their reflexive dynamic.

My first example focuses on the GRI. The GRI was founded in 1997 by the Coalition for Environmentally Responsible Economies in partnership with the United Nations Environment Programme.²³⁴ The GRI is based on three potentially conflicting pillars: first, a commitment to multi-stakeholder decision making; second, an ideological commitment to the ethos of sustainable development; and third, a formal, hierarchical institutional structure.²³⁵ The commitment to consensual decision-making is reflected, for example, in the text of the G3 Sustainability Guidelines (2006):

Transparency about the sustainability of organizational activities is of interest to a diverse range of stakeholders, including business, labor, non-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.²³⁶

The commitment to the value of sustainable development is set out in the G3 Guidelines. The Guidelines open with the famous definition of sustainability provided in the World Commission on Environment and Development report, *Our Common Future*.²³⁷ In addition to its 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.²³⁸ The Board has “the

234. GRI, Who We Are, <http://www.globalreporting.org/AboutGRI/WhoWeAre/> (last visited Oct. 6, 2007).

235. *Id.*

236. It also finds resonance in the description of the GRI on its Web site: “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.” *Id.*

237. 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.” THE WORLD COMMISSION ON ENVIRONMENT AND DEVELOPMENT, *OUR COMMON FUTURE* 43 (Oxford University Press 1987).

238. GRI, *supra* note 234.

ultimate fiduciary, financial, and legal responsibility for the GRI, including final decision making authority on GRI Guidelines revisions, organizational strategy, and work plans.”²³⁹ The Secretariat is responsible for implementing “the technical work plan set by the Board of Directors.”²⁴⁰ While the Stakeholder Council is supposed to provide a kind of parliamentary scrutiny with respect to the Board’s decision-making process, its formal powers are very limited.²⁴¹ 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.²⁴²

The tripartite 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 four years.²⁴³ 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 MNEs.²⁴⁴

239. The GRI formal instruments of incorporation are not published on the Web site; I rely, therefore, on the information that was made public on the GRI Web site. GRI, Board of Directors, <http://www.globalreporting.org/AboutGRI/WhoWeAre/Board/> (last visited Oct. 6, 2007).

240. It also supports “the operations of the Board of Directors, Stakeholder Council and Technical Advisory Committee.” GRI, Secretariat, <http://www.globalreporting.org/AboutGRI/WhoWeAre/Secretariat/> (last visited Oct. 6, 2007).

241. 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. GRI, Stakeholder Council, <http://www.globalreporting.org/AboutGRI/WhoWeAre/StakeholderCouncil/> (last visited Oct. 6, 2007); GRI, Organizational Stakeholders, <http://www.globalreporting.org/AboutGRI/WhoWeAre/OrganizationalStakeholders/> (last visited Oct. 6, 2007).

242. See GRI, Board of Directors, *supra* note 239.

243. Released in 2002 and 2006. GRI, G3 Online, <http://www.globalreporting.org/ReportingFramework/G3Online/> (last visited Oct. 6, 2007).

244. See KPMG, INTERNATIONAL SURVEY OF CORPORATE RESPONSIBILITY REPORTING 4, 20 (2005). A survey published in 2005 by KPMG analyzed trends in corporate responsibility among the world’s top 250 companies of the Fortune 500 (“G250”) and the top 100 companies in sixteen countries (“N100”). The report found that sustainability reporting has “now become mainstream among G250 companies (sixty-eight percent) and fast becoming so among N100 companies (forty-eight percent).” *Id.* at 4. The influence of the GRI Guidelines was reflected in the fact that forty percent of the reporters mentioned that the Guidelines were the tool used by the corporation to decide the content of the sustainability report. *Id.* at 20.

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 regimes and in the context of cross-regime relationships. Under Article 234 of the Treaty Establishing the European Community,²⁴⁵ the European Court of Justice (“ECJ”) “may give preliminary rulings interpreting European law at the request of any national court.”²⁴⁶ This mechanism was initially intended to address only questions relating to the validity of European law.²⁴⁷ However, “the ECJ successfully encouraged national courts to use the mechanism to review the compatibility of national law with European law.”²⁴⁸ As a result of the preliminary reference mechanism, there have been fewer occasions on 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.²⁴⁹

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 II—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.²⁵⁰ The Statute also outlines processes for judicial review of national court decisions.²⁵¹ 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

245. Consolidated Version of the Treaty Establishing the European Community, art. 234, 2001 O.J. (C 80) (EC). Previously, Article 234 was encompassed in Article 177 of the Treaty of Rome. Treaty Establishing the European Economic Community art. 177, Mar. 25, 1957, 298 U.N.T.S. 11.

246. Robert B. Ahdieh, *Between Dialogue and Decree: International Review of National Courts*, 79 N.Y.U. L. REV. 2029, 2156 (2004).

247. *Id.* at 2157.

248. *Id.*

249. *Id.* at 2156–57.

250. Rome Statute, *supra* note 67, art. 17. See also Maogoto, *supra* note 70, at 19.

251. Maogoto, *supra* note 70, at 20.

proceedings is likely to prove highly controversial, and we can thus expect the Court to be careful in using this authority.²⁵² 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. Likewise, the WTO does not have procedures to 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).²⁵³ In both cases, and in particular that of the WTO, designing procedures that facilitate an *equal-footed dialogue* between national and international courts could contribute to the reflexivity and legitimacy of the legal system as a whole.²⁵⁴

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.

252. *Id.* at 21.

253. In the case of anti-dumping, see, for example, James P. Durling, *Deference, But Only When Due: WTO Review of Anti-Dumping Measures* 6 J. INT'L ECON. L. 125, 125–27 (2003).

254. 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.