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# Collective Aaction and Emergent Global Legal Orders

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## Chapter 2. Collective action and emergent global legal orders

The coming pages operate a shift from the largely descriptive approach favoured in Chapter 1 to a more austere, primarily conceptual enquiry. Indeed, the aim of the present chapter is to outline a concept of law that can help us to identify key continuities and discontinuities between state law and emergent global legal orders. The first section of the chapter unveils this concept of law, which I dub ‘institutionalised authoritative collective action’ (hereinafter IACA). The remainder of the chapter fleshes out and tests the explanatory potential of the IACA-model of law in several directions. First, it revisits Chapter 1 to show why this model substantiates that chapter’s key findings, in particular the distinction between borders and limits, hence the distinction between the two spatial forms of the inside/outside distinction. Secondly, it enriches the account of the globality of global law: the IACA-model of law shows that a full description of the continuities and discontinuities between state law and emergent global legal orders must include the temporal, subjective and material dimensions of legal order, in addition to their spatial dimension. Thirdly, the IACA-model of law is assessed with respect to several features characteristic of globalisation processes: the fragmentation, privatisation and marketisation of normative orders, together with the ‘compression’ of space and time. Finally, the chapter focuses on three key categories of contemporary thinking about normative orders in a global context: governance, network and regime. I will argue that in different but related ways, each of these concepts presupposes, without really articulating, the problem of the *unity* of emergent global legal orders, a problem that is central to IACA.

The problem of unity is crucial. Against the view that articulating a concept of (global) legal order is at best of theoretical interest and at worst either sterile or futile, I submit that focusing on the concept of law from the perspective of the putative unity of legal orders has a primarily *practical* interest: to understand, first, how legal globalisations contribute to the globalisation of inclusion and exclusion; to probe, secondly, whether an emergent global legal order is possible, or perhaps even actual, which could include without excluding. Ultimately, as noted in Chapter 1, the aim of this book is to elucidate a concept of legal authority in a global context. My hunch is that the problem of the globalisation of inclusion and exclusion, hence the terms in which we should be prepared to think about the unity of legal orders, brings the fundamental features of legal authority into sharp relief.

### 2.1. Conceptualising legal order: three desiderata

To address these aims, a concept of legal order is needed that is general, flexible and discriminating. It should be general by dint of highlighting the basic features that identify emergent global legal orders as *law*, hence features it shares with other putative legal orders. It should be flexible in the sense of being able to pick out and accommodate what differentiates emergent *global* law from other legal orders. Because doing so demands reconsidering what it is that we want to call a *legal* order, our concept of law will also need to discriminate between law and other normative orders.

Yet from the very outset this endeavour faces two related difficulties. The first concerns the historicity of the endeavour itself, which is reflected in both terms of its object of enquiry. On the one hand, the move to pick out what is proper to *legal* orders, in contrast to other forms of normativity, already presupposes the differentiation of normativity into the domains of law, morality and religion, amongst others. Only against the historical background of this differentiation, which Niklas Luhmann and others have been at pains to theorise, does an enquiry into the continuities and discontinuities between state law and emer-

gent global legal orders make any sense.<sup>1</sup> On the other hand, I raise the question about legal *order* from within the horizon of the experience of contingency characteristic of Western modernity. Hans Blumenberg, the great German historian of ideas, compellingly argues that, at the end of the Middle Ages, the theological sharpening of the problem of contingency—the problem *that* there is a world and *what* it is as a world—overburdens Western humanity's interpretation of itself and its relation to the world, such that the Scholastic solution of the 'transitive' conservation of the world in being by an omnipotent and arbitrary God is no longer either plausible or acceptable, giving way to 'intransitive' conservation: self-preservation as a principle of rationality. As a result of this epochal transformation, the ordering of society comes to be interpreted as a *self-ordering*.<sup>2</sup> Crucially, the problem of the *ground* of legal orders and of their boundaries becomes urgent in light of the contingency of social orders: how can a legal order justify that it includes this, while excluding that? Both the question about inclusion and exclusion which drives this book and the question about the concept of legal order to be unveiled in this chapter presuppose this historical horizon, even though the book aims to critically interrogate certain features of this horizon and its way of conceptualising (legal) order. This historical situatedness cannot be bracketed by methodological vigilance, however refined; it is the unavoidable background condition for an enquiry into the concept of legal order that aspires to meet the aforementioned desiderata, in particular the desideratum of generality.

The historicity of an enquiry into the concept of legal order is linked to a second, related problem: there is no independent criterion by which to establish whether the model to be outlined hereinafter satisfies the three desiderata indicated above. Consider generality: there is no pre-determined range of normative orders that count as legal orders prior to their conceptualisation as such, and which it would be the task of legal theory to merely pick out and reproduce in their constitutive features. This difficulty spills over into the second and third desiderata noted above: discriminating between law and non-law is not independent of the process of establishing the scope of what is to count as law; the same holds for the process of identifying significant differences between kinds of legal orders. Most importantly, any attempt to establish the general features shared by all legal orders inevitably brings into play normative presuppositions which no amount of methodological dexterity can neutralise.<sup>3</sup> So, even though the desiderata of generality, discriminatory capacity and flexibility are not simply spurious or illusory, they can never be fully detached from a *politics of conceptualising*.

Quentin Skinner makes a similar point when dismissing the assumption that it would be possible to conceptualise the state from a neutral vantage point: '[a]s the genealogy of the state unfolds, what it reveals is the contingent and contestable character of the concept, the impossibility of showing that it has any essence or natural boundaries'.<sup>4</sup> Skin-

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<sup>1</sup> Niklas Luhmann, *Law as a Social System*, translated by Klaus A. Ziegert (Oxford: Oxford University Press, 2004), esp. 230 ff.

<sup>2</sup> Hans Blumenberg, *The Legitimacy of the Modern Age*, translated by Robert Wallace (Cambridge, MA: The MIT Press, 1985), 137-138; Hans Blumenberg, 'Ordnungschwund und Selbsterhaltung: Über Weltverstehen und Weltverhalten im Werden der technische Epoche', in H. Kuhn and F. Wiedmann (eds.), *Das Problem der Ordnung. Verhandlungen des VI deutschen Kongresses für Philosophie* (Meisenheim: Anton Hain Verlag, 1962), 37-57.

<sup>3</sup> A case in point is nominalism, as its response to this problem ends up reintroducing implicit normative presuppositions in the very attempt to bracket them, usually in the form of a liberal defence of legal pluralism. See, for example, Tamanaha's attempt to move beyond a functionalist approach to law by embracing what I take to be a nominalist approach thereto. Brian Tamanaha, *A General Jurisprudence of Law and Society* (Oxford: Oxford University Press, 2001), 194.

<sup>4</sup> Quentin Skinner, 'A Genealogy of the Modern State', in *Proceedings of the British Academy* 162 (2009), 325-370, 326.

ner's assertion reads as a muted and urbane echo of Carl Schmitt trenchant thesis that 'all political concepts, images, and terms have a polemical meaning. They are focused on a specific conflict and are bound to a concrete situation'.<sup>5</sup> I share both authors' conviction that there is no neutral position from which to conceptualise the law. What is particularly instructive for this preliminary note on method is, nonetheless, the reason for which the endeavour to conceptualise legal order cannot rise above the fray.

Indeed, the inevitability of a politics of conceptualising stems from the fact that models of law have a representational—or, if you wish, interpretative—structure: they disclose something *as* something.<sup>6</sup> Some will represent law *as* a system of rules posited by a sovereign, others *as* the commands of nature, others *as* a convention, and so forth. Like all accounts of law, the model of legal order I will sketch out opens up a domain for practical involvement and theoretical enquiry by revealing phenomena in a certain light. There is no alternative to this way of gaining conceptual access to law; it is the necessary implication of the insight that our practical and theoretical engagement with reality is mediate or indirect. But the price to be paid for this mediated relation to law is that representation cannot open up a domain for enquiry without also closing down other ways of accessing it. Representation discloses something *as this*, rather than *as that*, which entails that it is not possible to include without excluding when conceptualising a range of phenomena as law. If I speak of a politics of conceptualising with regard to models of legal order it is because the marginalisation they bring about is never merely conceptual; it is also—and even primarily—*practical* in nature, prescribing certain ways of dealing with behaviour that has been excluded from the domain of law. This is what William Twining has eloquently shown when, resisting the methodological nationalism that has informed legal positivism during the last centuries, he outlines a concept of law that renders visible a plethora of candidates to the status of legal orders which have been systematically excluded from the purview of legal theory, thereby contributing to their domestication by state-centred politics.<sup>7</sup> Yet, no less than the restrictive brand of legal positivism he resists, so also Twining's general jurisprudence is informed by normative presuppositions that govern what he is prepared to call law, and which speak to a certain politics of conceptualising.

There is no reason to expect that the concept of legal order advanced in this chapter can extricate itself from this double movement of inclusion and exclusion. I will argue hereinafter that legal order can best be represented *as* a kind of collective action; but what is elided and perhaps traduced when law is so construed? This question has a political bite. For if, as a range of scholars have argued, the emergence of global legal orders partakes of the globalisation of imperialism, can a theory of legal globalisations, one which draws predominantly on strands of 'Western' philosophical thinking about law and politics, avoid becoming part of that imperial project, even though it seeks to examine the globalisation of inclusion and exclusion? More pointedly, insofar as this book argues that collective agency remains crucial to the concept of (global) law, the question arises whether it is not a manifestation of the metaphysics of (collective) subjectivity that many take to be at the heart of imperialism. I cannot parry this objection at this stage of the argument, and I don't know whether I can parry it at all. In any case, a key to dealing with this objection lies with those who, speaking and acting from what I earlier dubbed a xenotopia, resist the globalisation of

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<sup>5</sup> Carl Schmitt, *The Concept of the Political*, translated by George Schwab (Chicago: University of Chicago Press, 2007), 30

<sup>6</sup> Phenomenologists will recognise here the structure of what Husserl calls 'intentionality' and Heidegger 'understanding'. See Edmund Husserl, *Logical Investigations*, translated by J.N. Findlay (London: Routledge and Kegan Paul, 1970), vol. 2, 578; Heidegger, *Being and Time*, 189.

<sup>7</sup> See Section 1.1.

inclusion and exclusion. In Chapter 4 we will have the opportunity to examine some of these forms of resistance, as well as their theoretical underpinnings, including the concepts of multitude and social movements, even though I cannot do so in a way that is not already coloured, in one way or another, by my conjecture that legal order should be represented as a kind of collective action.

But it would be a mistake to assume that the inevitability of inclusion and exclusion proper to the conceptualisation of law should lead us to accept that law is nothing more or nothing other than its interpretations. This purely constructivist view is untenable because there is a *difference*, both conceptual and normative, between the interpreted and the interpretation—between, respectively, something and its disclosure *as* something (else)—which is not at the disposition of the legal theorist or of whoever engages in political practice.<sup>8</sup> As concerns law, this difference manifests itself, amongst others, in the difficulties encountered by state-centred theories of law to render comprehensible certain transformations which nonetheless appear as increasingly relevant and important to the theory and practice of law. What is required is to revise the conceptual framework of legal theory in a way that brings to light what is relevant and important in disclosing something as law, in particular as global law.

These ideas sound very much like the dynamic of inclusion and exclusion we have discussed in Chapter 1 with respect to the WTO. Indeed. They suggest that the epistemology and ontology of law I endorse are isomorphic, i.e. that there is a structural similarity between the process of conceptualising the law and the mode of being of legal orders. The *trait d'union* between the two is representation. If representation, as a cognitive process, involves disclosing something as something, so also representation is at the heart of legal order as collective action: in the course of acting together, we represent ourselves as this (e.g. as a collective oriented to realising global trade) rather than as that (e.g. as a collective oriented to realising the way of life of traditional farming), in the very act by which we represent an act as illegal (e.g. the wanton destruction of seed) rather than as legal (e.g. the defence of food sovereignty).

These preliminary thoughts hark back to and subtend the key methodological tenet introduced at the outset of Chapter 1. If one rejects nominalist and essentialist approaches to the concept of law, as I do, then what is required is an approach that moves back and forth between the globality and the law of global law, such that a certain pre-comprehension of what counts as law opens up a domain of enquiry as *global* law and, conversely, emergent manifestations of the global lead to a transformed understanding of the *law* of global law. By resolutely staying within this circular relation—a circularity which need not be vicious<sup>9</sup>—it becomes possible to test the generality, discriminating capacity and flexibility of the concept of legal order to be introduced in the following section, even though this circularity cannot lead to a conclusive result. What we need to do, couching the point in a way that is less hermeneutically freighted, is to sketch out a preliminary concept of law which can then be modulated in different ways, or perhaps even revised more or less drastically, to make sense of a range of features accruing to putative global legal orders.

## 2.2. Institutionalised authoritative collective action

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<sup>8</sup> See Bernhard Waldenfels, *Spielraum des Verhaltens* (Frankfurt: Suhrkamp, 1980), 129; Bernhard Waldenfels, *Bruchlinien der Erfahrung* (Frankfurt: Suhrkamp, 2002), 28-30. See also Jacques Derrida, *Speech and Phenomena and other Essays on Husserl's Theory of Signs*, translated by David B. Allison (Evanston, IL: Northwestern University Press, 1973), whose concept of *différance* both radicalises and subverts Husserl's account of intentionality.

<sup>9</sup> Heidegger, *Being and Time*, 194.

As anticipated at the outset of this chapter, I will refer to this concept of law with the somewhat unwieldy expression *institutionalised authoritative collective action*. Legal orders, in the interpretation I will privilege, are a species of collective action. My strategy will be to build up this model of law in three steps. The first unveils the concept of collective action; the second introduces the notion of authority; the third completes this provisional account of the concept of law, arguing that the institutionalisation of the authoritative mediation of collective action is an ingredient feature of legal orders. To be sure, it remains an abstract and incomplete model of legal order which calls for further development—empirical, conceptual and normative—in the coming chapters.

### 2.2.1. We each and we together

To get started, I would like to return to the space of action as outlined in Section 1.2. The reader will remember that I sought to offer a preliminary explanation and generalisation of Sassen’s important insight that denationalisation amounts to the ‘localization of the global’, such that emergent cross-border normative orders give rise to ‘networks of places’. We need to outline a concept of law that can explain, to begin with, this crucial feature of emergent legal globalities, while also accounting for the bordered spatiality of state law. In particular, this concept of law should at least be capable of accommodating the cardinal distinction between the borders and limits of legal orders, as it appeared in our analysis of the WTO and its contestation by the KRRS.

The example in Section 1.2.3 of someone cooking in a kitchen, however removed it may seem from the domain of law, yielded an important clue for a model of legal order that explains why legal globalisations involve the emergence of a unity of legal places, however tenuous and fragile. Indeed, I showed that the different places that make up the kitchen obtain their meaning and their unity from, on the one hand, the first-person singular perspective of an ‘I’ and, on the other, the point of what the person is doing: cooking a meal. These two dimensions justified referring to the interconnected distribution of places that constitutes a space of action as a *pragmatic* unity. But to the extent that this example remained tied to the perspective of an individual, our analysis didn’t address the key issue called forth by the WTO and its contestation by the KRRS, namely, how legal orders structure space in the form of *collective* spaces of action. What I will now do is to expand the scope of this initial description of the space of action, passing from individual action to collective action, and then identifying what, in a preliminary formulation, I take to be the specific form of collective action proper to law.

A first step in this endeavour takes us from the first-person singular perspective of an ‘I’ to the first-person plural perspective of a ‘we’. But, importantly, we need to disambiguate the pronoun ‘we’ to make at least preliminary sense of legal order and of legal orders as deploying networks of places. To see why, consider a scenario in which several persons are busily preparing their evening meals in a large kitchen, say a manifold of students in a dorm kitchen. And now compare it to a second scenario in which a group of students is preparing a meal for all of their fellow students in the dorm. Suppose that in both situations someone were to ask, ‘What are you doing?’ In both cases, the answer might run, ‘We are cooking’. But the use of the word ‘we’ is quite different in these scenarios. In the first, ‘we’ functions as an *aggregative* term: each of a number of individuals happens to be cooking, independently of what the others are doing. Margaret Gilbert adroitly characterises this use of the term ‘we’ as ‘we each’. In the second, ‘we’ functions as an *integrative* term: a manifold of individuals functions as a group of friends engaged in cooking: ‘we together’.<sup>10</sup> When act-

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<sup>10</sup> Margaret Gilbert, *On Social Facts*, 2<sup>nd</sup> edition (Princeton: Princeton University Press, 1992), 168.

ing together, the members of a group take up a first-person plural perspective: we intend, believe, act, etc. as a *unit*, even though there can be no intention, belief or act by a group absent a set of interlocking intentions, beliefs or acts by its participant agents, and absent common knowledge among participant agents that they are acting together and what it is that they are doing together.

To see the difference between the two scenarios, imagine that, in the first case, one of the students who happened to be cooking hadn't noticed that the sauce was boiling over; no one alerted her to this fact, and she only realised what had happened when it was too late. She would surely be annoyed at having to start over. But she would have no standing to rebuke her fellow students for not having warned her; they had no *obligation* to do so. She—and she alone—was to blame for what had happened. In the second scenario, the student who botched the sauce would certainly be entitled to upbraid her fellow students for not having warned her. After all, preparing a meal was something they were doing *jointly*; what was the point of cooking together unless they were prepared to help each other out along the way? See here the elementary structure of entitlements and rebukes between members which attaches to *collective action*, i.e. action by social groups—'plural subjects', to use Gilbert's favoured expression.<sup>11</sup>

### 2.2.2. Collective action

This is, admittedly, a very crude description of collective action. But it suffices, at least for the time being, to pick out several features thereof which deserve our closer attention, and which legal orders share with other kinds of collective action:

(1) Legal obligations and sanctions are a species of the obligations and rebukes which emerge between participant agents in the course of collective action. Gilbert refers to these as 'directed' obligations or, following H.L.A. Hart's vocabulary, 'relational' obligations.<sup>12</sup> When characterising obligations arising from collective action as directed or relational, Gilbert means that they arise *between* the participant agents of plural subjects and by dint *of* their participation therein. The same holds for the standing to rebuke those who breach obligations derived from collective action: participant agents are entitled to complain when other participant agents don't do their bit towards realising collective action. Collective action gives rise to mutual expectations about the behaviour of those involved in joint action, such that participant agents expect, or are deemed to expect, of each other that they ought to and will do their part in pulling off the joint act. These mutual or reciprocal expectations grant standing to participant agents to scold those who disappoint their expectations. After all, theirs is a *common* venture, or so claims who rebukes another participant agent.

(2) The nature and scope of legally relevant behaviour, as well as the rights and obligations that accrue to participant agents, are internally related to the point of joint action: that which our joint act ought to be *about*, that which functions as the *cynosure* for acting together. For instance, the website of the WTO interprets the organisation as oriented to ensuring that '[global] trade flows as smoothly, predictably and freely as possible'. While the point of group action can take on the form of a purpose, it is not limited thereto. William

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<sup>11</sup> Margaret Gilbert, *A Theory of Political Obligation* (Oxford: Oxford University Press, 2006), 189 ff. See also Margaret Gilbert, *Joint Commitment: How We Make the Social World* (Oxford: Oxford University Press, 2014).

<sup>12</sup> *Ibid*, 40; 153-161. Gilbert explicitly draws on H.L.A. Hart's notion of relational obligations in his famous essay, "Are There any Natural Rights?" in *Philosophical Review* 64 (1955) 2, 175-191. I abstract from Bratman's debate with Gilbert about whether there are forms of shared agency that do not involve mutual obligations and entitlements; it suffices for my purposes that law is one of the forms of collective agency which does involve such obligations and entitlements.

Twining puts it very well when noting that “[p]oint” is preferable to purpose as it allows for the idea of social practices emerging, developing, becoming entrenched, or changing in response to complex processes of interaction that cannot be accounted for in terms of deliberate purpose, consensus or conscious choice’.<sup>13</sup> And he adds that point refers ‘to any motive, value or reason that can be given to explain or justify the practice from the point of view of the actor’.<sup>14</sup> The refusal to collapse point into purpose is especially important for our enquiry because while states have a point, they usually don’t have a specific purpose, as is typically the case with other collectives, such as our dorm cooking team or emergent global legal orders, e.g. the WTO. More about this in a bit.

(3) Collective action can be *nested* in higher-order—hence more complex—forms of collective action. For example, the cooking activity by the dorm students can be part of the preparations for a party to which all dorm students are invited, in which eating together is only one of the events that have been organised. Or if the cooking episode took place in a restaurant, then this operation might be nested in a more complex form of collective action, e.g. a corporation which owns a chain of restaurants, and which is itself chartered in a given state. As a result, the point of joint action can go from a very limited range of activities, such as what it takes to cook a meal together, to the enormously complex and varied range of acts that fall within the scope of collective action by the members of a state.

(4) Importantly, nested collective action must be conducive to realising the collective action of which it is part. In other words, collective action must be consistent with the point of the higher-order collective action in which the former is nested. For instance, if a couple of the students are together preparing the vegetables, they should do so in a way that is conducive to being able to subsequently cook the vegetables in the way required by the recipe. Or, turning to the WTO, the joint action whereby, say, the members negotiate, enact and monitor trade-related aspects of international property rights (TRIPS) should be coherent with, more generally, joint action oriented to realising the point of the WTO. In this sense, there is an instrumental dimension to the rationality of collective action: nested collective action is a means to realising nesting collective action.<sup>15</sup>

(5) Joint action deploys a four-dimensional order: spatial, temporal, subjective and material. Depending on what we are doing together, collective action selects and interconnects places (e.g. the places that make up a kitchen), times (e.g. the proper sequence of actions to cook a meal), subjects (e.g. the different kinds of persons required to cook a meal) and act-types (e.g. the different activities involved in cooking). Notice that collective action does not simply coordinate pre-existent places, times, subjectivities and act-types; that it ‘selects’ these means that collective action brings them into existence as *elements* of an order in the very process of bringing them together into a *single* order. Legally speaking, these four dimensions of collective action correspond to what the doctrine calls the spatial, temporal, subjective and material ‘spheres of validity’ of legal norms and orders. Like other forms of collective action, the law regulates—orders—behaviour by establishing *who ought to do what, where and when*.<sup>16</sup>

(6) The point of joint action determines what is relevant and important to joint action and what is not, hence what kinds of places, times, subjectivities and act-types are relevant and important thereto, such that other possible combinations of these four dimensions

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<sup>13</sup> Twining, *General Jurisprudence*, 111.

<sup>14</sup> *Ibid*, 110.

<sup>15</sup> See Scott Shapiro, *Legality* (Cambridge, MA: Harvard University Press, 2010), 121-122, and Michael Bratman, *Intention, Plans, and Practical Reason* (Cambridge, MA: Harvard University Press, 1987), Ch. 8 and 9.

<sup>16</sup> Kelsen, *Introduction to the Problems of Legal Theory*, 12. See also Hans Lindahl, *Fault Lines of Globalization*, 13-42.



of behaviour are marginalised as irrelevant and unimportant. In other words, collective action in general, and law as a particular form of collective action, cannot *include* certain spaces, times, subjects and act-types without also *excluding* others spaces, times, etc. Collective action opens up a range of practical possibilities—possibilities as to the who, what, where and when of participant agency—while also closing down other practical possibilities. In other words, collective action cannot *empower* participant agents without also *disempowering* them. This is what direct action by the KRRS illustrates with respect to the WTO. And so also the jejune example of cooking together, which, as collective action, cannot enable a repertoire of acts, places and such without also disabling everything that is irrelevant thereto.

(7) Collective action is transformable, which means that the rules which establish who ought to do what, where and when are a *default-setting* of the point of joint action. Think of rules that might emerge among the members of the cooking team—X takes care of chopping, Y does the frying—and which can be changed when circumstances so demand: X will take over the frying from Y, who needs to answer a telephone call. The *contextual* character of collective action is crucial in this respect: new default-settings can emerge, either through design or spontaneously, in response to changes in the context of collective action. As a result, no less than posited law, so also customary law, together with its transformations over time, is part and parcel of the default setting of the point of collective action.

(8) The point of joint action never can be fully articulated: participant agents never have nor can have a full understanding of what they are doing or ought to do together. For example, it turned out that the students had not anticipated that cooking together could also involve having to mop up a large pool of olive oil when one of the pans fell to the floor. And, turning to the WTO, it became retrospectively clear, in light of Article 2.4 of its Agreement on Technical Barriers to Trade (TBT), that it was necessary to lay down procedural criteria for the enactment of international standards by private standard-setters like the ISO, if these standards were to legitimately function as the ‘basis’ for national technical standards.<sup>17</sup> As a result, the default-setting of the point of collective action is provisional and open to more or less far-reaching revision in ways that the participants often could not have anticipated, in response to novel contexts of collective action.

(9) The partial opaqueness of joint action rules out that the rationality proper to collective action is simply instrumental.<sup>18</sup> It is also always oriented towards the *ends* of collective action; more precisely, the rationality of collective action has a hybrid status, being both means- and ends-oriented. To modify the default-setting of the point of joint action is also always, to a lesser or greater extent, to articulate its point in a new way. Whether or not the student who dropped the pan is the one who should mop up the mess, or whether another of the students should do so who is less occupied with cooking chores, is not merely a question about means; it is also a question about what it means to cook together. In the same way, a decision about whether or not the enactment of international standards by the ISO and some such should meet the criteria of transparency, openness, impartiality, consensus, effectiveness and relevance, coherence, and due attention given to the concerns of developing countries, is to do more than to establish what means are required to realise the point of the WTO; it is to establish in what way trade might count as the realization of a *global good*.<sup>19</sup> The practical question confronting collectives about what to do is a contextual ques-

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<sup>17</sup> *EU– Trade Description of Sardines*, Report of the Appellate Body, DS 231/AB/R, September 26, 2002; *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WT/DS381/AB/R, of May 16, 2012.

<sup>18</sup> I differ here from Shapiro; see *Legality*, 173. This point will be developed at greater length when outlining a normatively rich concept of legal authority that, as far as I can see, is not available to Shapiro’s (and Bratman’s) interpretation of the rationality of collective action.

<sup>19</sup> I illustrate this point with reference to the hybrid means-end rationality of standard-setting by the International Standards Organization in my article ‘ISO Standards and Authoritative Collective Action

tion about means and ends which calls for a contextual response that ties together means and ends. This entails that the practical question has cognitive and normative dimensions, which can only be separated through an abstractive move: ‘what ought our joint action to be about?’ is also always the question ‘what is our joint action about?’ and vice versa.

(10) Although collectives are irreducible to the summation of their participant agents, they do not exist independently thereof, which means that they intend, believe and act through their participants. Four extremely important implications follow from this fact. First, collective acts are acts which are *imputed* or *ascribed* to the collective as its acts. Imputation has already taken place, for instance, when one of the dorm students says, ‘we are cooking a dinner together’; so also when the website of the WTO explains its activities in terms of ‘who we are’, hence what we do.<sup>20</sup> Second, the imputation of acts to a collective goes hand in hand with the latter’s representation. A collective, i.e. the unity implied in ‘we together’, is always a *represented unity*, regardless of whether the collective has two, two billion or more participants. The representation of a collective always involves a twofold *claim*, namely, *that* ‘we’ are a collective and *what* ‘we’ are as a collective, i.e. what our joint action is/ought to be about. As such, representational acts are always contestable, hence defeasible: ‘not in our name’. That a collective intends, believes or acts means that a collective is *deemed* by someone to intend, believe or act. Third, the contestability of claims to unity entails that a collective is never fully a unity, hence never fully identical to itself. In the process of including those who are to view themselves as a collective self and excluding the rest as other-than-self, representation brings other-than-self into the fold of collective selfhood. So, for example, the KRRS in the WTO. Fourth, and as a consequence of the non-identity wrought by representation, the integration of a manifold of individuals into a collective is continuously exposed to disintegration: ‘we together’ never entirely pulls clear of ‘we each’.<sup>21</sup> Or, evoking intermediate social formations that elude the simple opposition between collective and individual agency, perhaps one might say: ‘we the many’—the multitude—remains ensconced in ‘we together’. In short, the unity of a social group is always and no more than a *presupposed*—and in that sense putative—unity.

(11) Collective action is not an order in the sense of a realised order—*ordo ordinatus*; it speaks to order as an *ordering*, to an order in the making—an *ordo ordinans*. In this sense, collective action is always *emergent* collective action, of which emergent global legal orders are only a particular instance. Now, if social orders establish who ought to do what, where and when, this means that collective action is an ordering by dint of spacing, timing, subjectifying and materialising behaviour, an insight which will occupy our extended attention in the next section and beyond. Moreover, the process character of social ordering is linked to the representational structure of collective action, as concentrated in the particle ‘re’. Re-presentation means not only the indirect presentation (by way of a default-setting of the point of joint action) of a collective unity that is perforce absent, but also the indirect presentation of an absent collective unity *anew*, where ‘anew’ means both ‘again’ and ‘otherwise’. As a result, collective action is an ordering whereby collective self-identification goes hand in hand with collective self-differentiation. All of this militates against an essentialist reading of the unity implied in collective action; it also militates against a hypostasis of the existence of collectives. For these reasons there is no identity other than as a process of *identification*, no difference other than as a process of *differentiation*.

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– Conceptual and Normative Issues’, in Panagiotis Delimatsis (ed.), *The Law, Economics and Politics of International Standardisation* (Cambridge: Cambridge University Press, 2015), 42-57.

<sup>20</sup> [https://www.wto.org/english/thewto\\_e/whatis\\_e/who\\_we\\_are\\_e.htm](https://www.wto.org/english/thewto_e/whatis_e/who_we_are_e.htm)

<sup>21</sup> I am grateful to Ferdinando Menga for this formulation.

(12) It is tempting to view the ‘we’ of ‘we together’ as a ‘principle’ of action in the sense of the pole whence action originates, a meaning nicely captured by the Latin term *principium*. In turn, to be the origin of action is often taken to be the core of (collective) *subjectivity*. Closer consideration suggests a more nuanced view. That a collective is always a represented unity means that a collective is called into and kept in existence by representational acts undertaken by who says ‘we’ on behalf of the ‘we’, even though these representational acts must secure the uptake of those to whom they are addressed. Here is a first sense in which an active ‘we’ doesn’t come first—as a *principium*—but rather comes second, revealing a primordial passivity that inheres in collective action. Furthermore, the action of a ‘we’ is a *response* to something like an appeal for action, such as preparing a meal together, in response to the desire of the dorm students to get to know each other, or enacting together the conditions for a global market, in response to the inefficiencies of national markets. Here again, the ‘we’ and all acts imputed to it come second: collective action is reactive or, more accurately, responsive in one way or another to a challenge which precedes it and which is never fully understood nor fully addressed by such responses. This means that the origin of a group and of its acts lies elsewhere than in itself: to become a subject of action it must first be the *object* of a summons to action. Now ‘us’ is, grammatically speaking, the objective case of ‘we’. So, prior to a ‘we’ there is an ‘us’.<sup>22</sup> This is no play on words. The priority of ‘us’ over ‘we’ explains why a collective subject is always already oriented to its other as that on which it depends for its existence. Unless this were the case, the other—which includes other (legal) orders—would be reducible to the ‘we’. The other(s) of ‘we’ would be but its malleable prolongation. This interpretation of collective subjectivity is the root form of imperialism. By contrast, the responsiveness of group agency shows, most emphatically, that collective subjectivity is only imaginable as *intersubjectivity*.

In a sense, this entire book is an extended meditation on this one word and on the question which it calls forth: what to make of the ‘inter’—the in-between—of intersubjectivity in a global context? Does it refer to a legal order common to all of humanity, to an all-inclusive ‘we’ as the necessary condition for making normative sense of (conflictual) interaction between particular legal orders in a global context? Or does the ‘inter’ of intersubjectivity speak to a more radical understanding of plurality, to an *entwinement* in which political plurality is irreducible to the unity of a single global legal order because there can be no legal inclusion without legal exclusion? If the latter, is a robust normative sense of legal authority available to a theory of globalisation as the entwinement of legal orders?

### 2.2.3. Authoritatively mediated collective action

This question is of later concern. For the moment, it suffices to note that each of the former features conjoins law and other forms of collective action. As I have sought to show, these features are shared by the cooking episode in the student dorm and the WTO; whatever their differences, participating in the cooking event and in world trade are instances of joint action so described. But what distinguishes the WTO from the cooking team? More generally: what is distinctive for legal orders as a species of collective action?

Significantly, what we ought to do together—the point of joint action—may itself be open to discussion and conflict. For example, the members of the cooking team may have quite divergent views about what they would like to cook together, who should do what, etc.

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<sup>22</sup> It is in this strong sense of the term ‘us’, one not contemplated by the author, that I would like to endorse the wonderful title of Raimo Tuomela’s book, *The Importance of Us: A Philosophical Study of Basic Social Notions* (Palo Alto, CA: Stanford University Press, 1995). For an introduction to a phenomenology of the responsive structure of action, see Bernhard Waldenfels, *Phenomenology of the Alien: Basic Concepts*, translated by Alexander Kozin and Tanja Stähler (Evanston, IL: Northwestern University Press, 2011).

In contrast to other social groups, which may or may not engage in authoritatively mediated joint action, it is a necessary condition of legal collectives that they have authorities which, acting on behalf of the group, *regulate* participant agency, by way of a default-setting of joint action, with a view to realising the latter's (transformable) point.

While the term 'regulate' has a very broad range of meanings, it has come to be associated with administrative, usually technocratic, rulemaking in the framework of 'regulatory governance'. Mine is a far broader sense of the term, which includes but is not limited to this narrower sense. By 'regulate' I mean that one of the necessary conditions for the existence of a legal collective concerns a specific way of dealing with questions about joint action and its default-setting. A legal collective requires that questions about the point of joint action; about the rights, obligations, entitlements and responsibilities that arise in the light of that point; about the consistency of participatory agency with regard to the point of joint action; and, finally, about the consequences that follow from inconsistency therewith, are not left over to the collective's members to decide for themselves. In a legal collective, these and related questions, especially if they are the source of conflict, are settled by authorities who act on behalf of the whole, such that dissenters or reprobates are bound by that decision.

In short, regulation (in the very broad sense of the term suggested by this enumeration of activities) involves the *articulation*, *monitoring* and *upholding* of collective action. In the course of regulating group action, legal authorities articulate general and/or individual rules which are the default-setting of the point of joint action. The concept of rules, as I use it, is broad in reach. It obviously includes legislation, administrative acts and judicial rulings, no less than international treaties. But it also includes, say, model contracts as deployed in certain sectors of *lex mercatoria*; the standards drawn up by international accounting organisations, technical organisations such as ISO and the like; best practices guidelines; codes of conduct. Notice that this definition of regulation cuts across the distinction between 'hard' law and 'soft' law. Legal authorities also monitor, along the way, the extent to which actual behaviour is in conformity with the point of joint action, and to what extent it is necessary to recalibrate the point of group action in a changing context. The regulation of joint action also typically involves authorities who uphold joint action, meaning by such that they not only rebuke miscreants for breaching their obligations under collective action, but also take steps to ensure that participant agents act in accordance with joint action and its point. I define 'upholding' broadly, which includes but is not limited to physical coercion. It encompasses, in my reading, a wide range of mechanisms that authorities can bring to bear on those who breach directed or relational obligations with a view to bringing them into line with collective action and its point. For instance, the publication and wide dissemination of a report by a private standard-setting organisation about the lack of compliance of a multinational company with global standards applicable to its activities would count, in this reading, as enforcement, especially when the report can adversely affect the company's reputation and its business results. After all, why should the threat of a fine be fundamentally different from the adverse consequences for the bottom line of a business that are attendant on loss of reputation? Taken together, these three aspects of the regulation of joint action make for a relatively robust identity over time of the legal group.

#### **2.2.4. The institutionalisation of authoritatively mediated collective action**

But the authoritatively mediated character of collective action only takes us part of the way in identifying what is distinctive to legal orders as compared to other forms of collective action. After all, our dorm cooking team could very well appoint from their midst a chef (in the double sense of the word) to run the show. The chef would regulate collective action: call out general and individualised instructions—articulation; see to it that all participants of the cooking team are doing their bit—monitoring; kick out a student who refuses to fol-

low her instructions—upholding. Many other forms of collective action are also amenable to the appointment of a ‘leader’ or authority who engages in these three facets of regulation. Accordingly, there are at least two additional features that we need to include if we are to account for legal orders. Both require a considerable revision of theories that focus on joint action, theories which focus primarily on group action in small, non-institutionalised settings, such as walking or painting a house together—‘modest sociality’, as Michael Bratman calls it.<sup>23</sup> Both features turn on the *institutional* character of legal order, meaning by such that legal collectives can enact impersonal, even anonymous, relations between the participants in collective action.

The first feature concerns the kind of commitment required for *collective* action. Indeed, a range of theories assume that collectivity requires mutual responsiveness in intentions and action, such that each of the participants is attuned to the intention and behaviour of the others, adjusting their behaviour along the way and when necessary to achieve the intended outcome of joint action. As Scott Shapiro rightly points out, this strong form of mutual commitment is lacking in what he calls ‘massively shared agency’, in which at least some participants will be alienated, marginal or virtually invisible.<sup>24</sup> Participants may engage in massively shared agency without being committed to its success because they neither share the group’s goals nor intend (or can intend) that all members engage in joint action, not least because they may not know all members.<sup>25</sup> In our dorm cooking event, it is plausible to assume that all dorm students participate because each of them wants that all of them cook together and that each of them will adjust their actions to those of the others, if something happens along the way, to ensure (within reasonable limits) that they are successful in preparing the dinner. In the case of a chain of restaurants owned by a large corporation, it is by no means obvious that all employees will share the corporation’s goal (e.g. profit for the shareholders on the basis of decent meals), nor will they necessarily be prepared to adjust their behaviour to ensure that this goal can be met. Shapiro addresses this difficulty by relaxing the requirements of what is to count as shared or collective agency. In his view, a condition for massively shared agency is that *most* participants act in accordance with the *plan* that has been set up for them to realise the goals of joint action, regardless of whether they actively endorse these goals, and that they resolve their conflicts about joint action in a peaceful and open manner. In modern conditions of massively shared agency, he argues, law structures interaction in the form of ‘pre-packaged plans’, in which participants only need to follow their part of the plan rather than be highly responsive to each others’ intentions and actions, as is required by Bratman’s strong interpretation of joint agency.<sup>26</sup> This account of collective action has the advantage of explaining why massively shared agency has an institutional character: ‘the task of institutional design . . . is to create a prac-

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<sup>23</sup>Michael Bratman, *Shared Agency: A Planning Theory of Acting Together* (Oxford: Oxford University Press, 2014), 8.

<sup>24</sup>Scott Shapiro, ‘Massive Shared Agency’, in Manuel Vargas and Gideon Yaffe (eds.), *Rational and Social Agency: The Philosophy of Michael Bratman* (Oxford: Oxford University Press, 2014), 257-292.

<sup>25</sup>As to this last restriction, Benedict Anderson similarly avers that nations are imagined political communities ‘because the members of even the smallest nation will never know most of their fellow-members, meet them, or even hear of them, yet in the minds of each lives the image of their communion’. The question is, however, whether ‘imagination’, as conceived by Anderson, will work as the distinguishing feature of a certain kind of political community—the nation. After introducing the notion, he adds that ‘[i]n fact, all communities larger than primordial villages of face-to-face contact (and perhaps even these) are imagined’. The parenthetical interpolation is crucial: face-to-face contact in ‘primordial villages’ is always a *mediated* relationship, mediated by a narratively anchored *point* of joint action, absent which a multiplicity of individuals could not appear to each other as *members* of a community. See Benedict Anderson, *Imagined Communities*, revised edition (London: Verso, 2006), 6.

<sup>26</sup>Shapiro, ‘Massively Shared Agency’, 280.

tice that is so thick with plans and mesh-creating mechanisms that alienated participants end up acting in the same way as non-alienated ones'.<sup>27</sup>

I agree with Shapiro that it is necessary to relax the requirements of joint action. But I would relax the stringent conditions of modest sociality somewhat differently, asserting that a necessary condition for collective action in law is that most participants act in accordance with the *default-setting* of joint action (rather than with a *plan*), and provided they are prepared to resolve conflicts about joint action through institutionalised mechanisms of conflict resolution. I have substituted default-setting for plan because the latter is unnecessarily reductive, as it excludes non-purposive forms of the point of the default-settings of group action. This wider sense of point and its default-setting includes, for instance, customary law, which the notion of a plan has difficulties accommodating.

The second feature concerns what Shapiro calls 'impersonal authority relations' and the emergence of 'offices', which, as he explains it, are 'relatively stable and persistent positions of power where turnover in occupancy is not only possible but expected'.<sup>28</sup> It would well be possible to imagine that the cooking team selects one of the dorm students to give instructions, settle differences about how to proceed and some such. But the appointment would be one-off and would be made in light of that person in particular. The WTO, by contrast, needs to rely on officials, e.g. representatives of the member states and the Secretary General, who occupy positions temporarily and who can be succeeded by other officials when appropriate. The institutionalisation of normativity has, as Shapiro sees it, two crucial advantages absent which massively shared agency would not be possible. First, the rules enacted by authorities, and the normative relations they generate, can remain valid beyond the term of office of the individual or individuals who exercise normative power. Second, the existence and normative content of rules enacted by authorities can be detached from their intentions.

I concur with Shapiro that these two institutional features of authority are necessary conditions for the existence of a legal order. Crucially, they suggest that it is not enough to disambiguate 'we' into 'we each' and 'we together'; also *togetherness* needs to be disambiguated in a way that contrasts strong forms thereof in 'modest sociality' to weak forms thereof in massively shared agency. In a sense different to that contemplated by Bratman, legal orders attest to a modest sociality. Would this not hold also—and perhaps especially—for emergent global legal orders?

In any case, I will postpone dealing with the question whether these two institutional features are also *sufficient* conditions for a legal order until we have had a chance to more fully deploy, test and perhaps revise the concept of law as IACA. Moreover, I am well aware that the IACA-model of law is both abstract and incomplete. Abstract, because it requires further specification if it is to tell us, for example, what is proper to state law, and how state law might differ from emergent global legal orders. Incomplete, because a number of issues remain pending. For example, I have introduced a functional concept of authority, focusing on what legal authority *is* by explaining what legal authorities *do*: to regulate in the three-fold sense of articulating, monitoring and upholding collective action. I have yet to explore the normative dimension of authority that could flow from the IACA-model of law. Likewise, it remains unclear how this model could help us to understand how a legal order opens up onto a *world*, in the phenomenological sense of the term sketched out in Chapter 1. This theme will demand our close attention in the final chapter of this book. To address the abstractness and incompleteness of the model, it will be necessary to flesh it out much more fully when testing its capacity to identify and explain distinctive features of emergent global

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<sup>27</sup>*Ibid*, 282.

<sup>28</sup> *Ibid*, 284.

legal orders. For the moment, however, and to repeat my claim, these preliminary ideas may suffice to lend at least initial plausibility to the working hypothesis which we will need to critically examine—and perhaps reformulate—in the course of this book: law can best be described as institutionalised authoritative collective action. Crucially, in light of the central topic of this book, the IACA-model of law offers a *prima facie* justification (and no more than that) for why legal orders cannot include without excluding, hence why the emergence of global legal orders would amount to the globalization of inclusion and exclusion.

### 2.2.5. Three dimensions of legal orders

To illuminate the different facets of IACA, and to avoid terminological confusion, it may be helpful to distinguish between three dimensions or facets of legal order: a legal collective, a legal system and a concrete order. In my usage of these expressions, (1) a *legal collective* denotes IACA from the first-person plural perspective of a group. This expression captures the idea that a legal order involves the presupposition of unity in the form of a manifold of participant agents that are deemed to refer to themselves as a unit in action. Importantly, individuals and/or groups can be participant agents in a legal collective. (2) A *legal system* refers to IACA in terms of the default-setting of the normative point of joint action by a collective. Here, legal order is approached as a putative unity of rules (in a very broad sense that would include any of the vehicles for regulation indicated earlier, such as model contracts, statutes, rulings, technical standards, principles and policies. Finally, (3) a *concrete order*, in my interpretation of the term, denotes IACA as a unity qua interrelated distribution of places, times, subjects and act-contents. Whereas the concept of a legal system views these dimensions of order as the ‘spheres of validity’ of legal rules, the concept of concrete order takes up the perspective of those whose behaviour is ordered by law by dint of setting up certain kinds of ought-relations between places, between subjects, between times and between act-contents. It also integrates these four kinds of relations as the dimensions of a *single* order of behaviour, such that certain acts by certain persons are allowed or disallowed at certain times and in certain places.<sup>29</sup> To repeat my main contention, (1) through (3) are so many ways of approaching legal order(ing); each of them presents one of the dimensions or facets of the putative unity of IACA. I will draw on this three-way distinction at the end of the chapter, when parsing the different ways in which the problem of unity is apposite to an enquiry into emergent global legal orders.<sup>30</sup>

While I take it to be one of the virtues of the IACA-model of law that it offers a way of distinguishing these different aspects of legal order, it also has the advantage of integrating them into an account of legal order that overcomes the one-sidedness of a range of legal theories. For instance, certain positivist theories of law, such as Kelsen’s Pure Theory of Law, tend to view law as the unity of a manifold of norms; pragmatic interpretations of law, for their part, tend to focus on the notion of a legal practice; and recent socio-legal studies favour enquiries into the spatio-temporal structure of legal orders, albeit in a way that abstracts from the presupposition of a first-person plural perspective of a plural subject. The

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<sup>29</sup> I borrow the expression ‘concrete order’ from Carl Schmitt, although I develop it in a direction that makes no concession to the reification of order that follows from his account thereof. See Hans Lindahl, ‘Law as concrete order: Schmitt and the problem of freedom’, in David Dyzenhaus and Thomas Poole (eds.), *Law, Liberty and the State: Oakeshott, Hayek and Schmitt on the Rule of Law* (Cambridge: Cambridge University Press, 2015), 38-64.

<sup>30</sup> Kaarlo Tuori refers to what he calls the two faces of law. ‘On the one hand, [law] can be approached as a set of norms, as a *legal order*; this is the aspect with which typical lawyers in their spontaneous positivism equate the law. However, there is also another aspect to the law: it can be examined as a set of specific social practices, as *legal practices*’. As should be apparent, I draw the threefold distinction between legal collectivity, legal system and concrete order differently than he does. See Kaarlo Tuori, *Critical Legal Positivism* (Farnham: Ashgate, 2002), 121.

IACA-model of law integrates each of these dimensions into a comprehensive account of legal order (which is not to say that it is syncretistic). And, as we shall see in Chapter 4, it opens up an avenue of approach to a strongly normative interpretation of legal authority which allows it to enter into a fruitful dialogue with normative theories of law. Finally, the IACA-model of law clears the way for showing how legal orders point toward a world, an issue I hold in reserve till Chapter 5.

### **2.3. Revisiting the globality of global law**

It was argued that there is a circular relation between the globality and the law of global law. How one interprets global phenomena impinges on how one approaches the concept of law; how one approaches the concept of law impinges on how one interprets global phenomena. This calls, I noted, for a method that is sensitive to this mutual dependency, moving to and fro between the two poles of global law. Having moved from the globality to the law of global law, our method dictates that we once again move in the opposite direction, returning to consider how the concept of law unveiled in Section 2.2 impinges on the globality of global law. We can speak of a properly circular relation between the two terms of the expression because introducing the IACA-model of law both substantiates and changes our understanding of the globality of global law, thereby demanding a more complex approach than that privileged by Chapter 1.

#### **2.3.1. Substantiating earlier insights about global law**

The IACA-model of law substantiates, to begin with, one of the central features of globalisation processes, namely, the emergence of a plurality of global legal orders. Remember Twining's formulation of legal pluralism, which he links to the 'overlap' of legal orders: a plurality of legal orders can be valid in 'a single time-space', and in such a way that there is no hierarchical relation between them because each of these legal orders is more or less autonomous with respect to the others. An indigenous legal order, a state legal order and *lex mercatoria* may, for example, overlap in a given space and a given time. This account of overlap is, however, incomplete. It is important to see that two different forms of spatiality are at work in legal pluralism. On the one hand, there is the physical space shared by the respective legal orders, such as when it is said that several legal orders co-exist in a given geographical area delineated in a map. This is the sense of space that Twining has in mind. On the other hand, there are different spaces of collective action, as implied by the notion of an interconnected distribution of places. Both dimensions of space condition the possibility of overlapping legal orders. Unless these orders shared a physical space as their common 'substrate' there could be no overlap; nor could there be overlap unless these orders formed distinct legal spaces by dint of distinguishing and interconnecting places in different ways in the course of action oriented to realising the points of the respective IACAs. Legal boundaries articulate these two forms of space. This explains, on the one hand, why boundary-crossings are normative no less than physical events, and, on the other, why boundaries may change, allowing or disallowing the passage of persons and things, even though their physical positioning does not change a whit. Bauman's acid comment about the conditions of global capitalism illustrates this feature of legal boundaries: 'nowadays capital travels light—with cabin luggage only, which includes no more than a briefcase, a cellular phone and a portable computer'. By contrast, labour 'remains as immobilized as it was in the past—but the place which it once anticipated being fixed to once and for all has lost its past solidity'.<sup>31</sup>

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<sup>31</sup> Zygmunt Bauman, *Liquid Modernity* (Cambridge: Polity Press, 2000), 58.



In short, a legal space is never only the material support of one or more legal systems, but rather a concrete articulation of normative and physical dimensions from the first-person plural perspective of a ‘we’. In this reading, the claim to the exclusive regulation of all aspects of behaviour within a territory, which has been the traditional hallmark of state law, is but a contingent variation of legal spatiality: of territoriality. This holds for nomadic no less than for sedentary communities. And it applies to the ‘patchwork’ of communities typical of the European Middle Ages<sup>32</sup> as much as to the modern state. The IACA-model of law lends strong conceptual justification to the well-documented finding that the monism state law claims for itself is, historically speaking, the exception; legal pluralism is the rule. Notice that what is historically exceptional is the *claim* by states to exclusive dominion over all behaviour within a territory; in reality, this claim has always been challenged by legal orders located in the state’s ‘own’ territory. Indigenous legal orders are one example of stubborn resistance to inclusion within the monistic claims of state law.<sup>33</sup>

These ideas usher in yet a third point. The IACA-model of law substantiates the conjecture that whereas (state) borders and their attendant distinction between domestic and foreign places, between the territorial and the extraterritorial, are a contingent feature of legal orders, limits, hence the distinction between own and strange places, is a structural feature of a range of legal orders which claim or might come to claim global validity. Indeed, nothing in the concept of IACA requires that this spatial unity be bordered in the form of state territoriality. For IACA organises a legal space as a pragmatic unity which can span the whole surface of the earth. Returning to our earlier example, a Member State of the WTO (a participant agent in collective action) might lower an import tariff in response to a ruling by the Appellate Body (legal authority), according to which the tariff is in breach of the rules (default setting) which ensure that global trade ‘flows as smoothly, predictably and freely as possible’ (point).<sup>34</sup> Now, while the WTO has no borders, it cannot organise itself as a global market unless it includes a configuration of places that are deemed important and relevant to realising its point, while excluding all other possible configurations of places. What is excluded as irrelevant to global trade becomes the domain of what is spatially indeterminate for the WTO, the realm of ‘other’ possible legal orders, e.g. the Member States insofar as their territories are not relevant to global trade. All of this follows from what was said in Section 2.2 about the features of IACA.

But the IACA-model of law has more to offer than this. As we saw, the direct action by the KRRS exemplifies what happens when ‘another’ space becomes a ‘strange’ place by way of behaviour that, challenging the spatial boundaries which give form to what counts as important and relevant to the realisation of a global market, reveals these boundaries as a limit. The WTO is limited, even if not bordered, because it displays the basic structure of IACA: if a claim to *our* space demands an inclusion that establishes what places and interconnection of places are deemed important and relevant to *us*, so also it demands the exclusion of what ‘we’ view as unimportant and irrelevant, thereby making room not only for other places but also for strange places: for xenotopias. In brief, the commonality implied in the notion of *collective* action in IACA is a spatially *limited* commonality.

### 2.3.2. Concrete order

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<sup>32</sup> ‘The prevalent pattern in medieval times was one of crisscrossing jurisdictions, thus keeping territorial fixity from becoming exclusive territorial rule’. Sassen, *Territory, Authority, Rights*, 33.

<sup>33</sup> See James Tully, *Strange multiplicities: constitutionalism in an age of diversity* (Cambridge: Cambridge University Press, 1995) for a powerful analysis and defence of legal pluralism in light of the colonisation to which indigenous peoples have been subjected.

<sup>34</sup> WTO website, [https://www.wto.org/english/thewto\\_e/whatis\\_e/what\\_we\\_do\\_e.htm](https://www.wto.org/english/thewto_e/whatis_e/what_we_do_e.htm) (accessed on 3 May 2015).

This is as much as I want to say, for the time being, about how the IACA-model of law substantiates the approach to the globality of global law sketched out in Chapter 1. Consider now how it demands complementing the focus on spatiality favoured heretofore. The decisive point, as the reader will have noticed, is that legal orders are organised as four-dimensional orders: spatial, temporal, subjective and material. To the extent that one focuses, as Kelsen and others do, on conceptualising law as a legal *system*, i.e. as a unity of rules, these four dimensions are the ‘spheres of validity’ of rules. But from the first-person perspective of an agent, whether individual or collective, space, time, subjectivity and act-types appear as the dimensions of an order in which one orients oneself and acts. That legal rules are ‘reasons for action’, as legal theorists are fond of noting, means that they provide the markers for the practical orientation of agents; they establish who ought to do what, where and when. This means that legal orders do more than just differentiate and interconnect a range of ought-places in line with the point of IACA; they also differentiate and interconnect the temporal, subjective and material dimensions of behaviour into a *single* order, such that certain acts by certain persons are allowed or disallowed at certain times and in certain places. Law differentiates and interconnects four dimensions of behaviour—subjectivity, content, time and space—and it differentiates and interconnects each of these dimensions, splitting them up into an interrelated manifold of places, times, subjects and act-types.<sup>35</sup>

Returning to Chapter 1, when the KRRS entered the properties of Monsanto to destroy GMOs they did more than just challenge the WTO’s (and India’s) spatial unity; they also rendered conspicuous the *temporality* of trade related to a global market, and which they resist by evoking the temporal rhythm of their farming techniques. Likewise, the KRRS rendered conspicuous the kinds of *subjectivities* and *ways of acting* which are made available by the WTO, appealing to their understanding of what it is to be a farmer who works the land.

Let me render these ideas more concrete with respect to time. Remember the distinction, introduced in Section 1.2, between a position and a place: the former refers to a ‘where’ in the sense of coordinates in the three-dimensional space of geometry, the latter to a ‘where’ in which things, persons and acts are assigned their proper place in terms of a first-person perspective, e.g. the pan in the cupboard and the cook in front of the stove. While it is of course possible to depict a kitchen as a three-dimensional geometrical space, this depiction abstracts from its spatial unity in a pragmatic sense. Now, in the same way that the legal doctrine tends to think of space as extension, it also is inclined to interpret legal temporality in terms of calendar time, such as when a statute stipulates its date of entry into force and, perhaps, of derogation. Kelsen provided us with a good example of a reductive account of spatiality in Section 1.1, when referring to state territoriality as an ‘inverted cone’; his is also a good example of a reductive approach to legal temporality. Kelsen notes that time, no less than space, is an element of the state, even though the doctrine only focuses on the latter.

Just as territory is an element of the State . . . so time, the period of existence, is an element only in the sense that it is the corresponding temporal sphere of validity. Both spheres are limited. Just as the State is spatially not infinite, it is temporally not eternal . . . The point of time when a State begins to exist, that is, the moment when a national legal order begins to be valid, as well as the moment in which a national legal order ceases to be valid, is determined by positive international law . . .<sup>36</sup>

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<sup>35</sup> Lindahl, *Fault Lines of Globalization*, 16-17.

<sup>36</sup> Kelsen, *General Theory of Law and State*, 218-219.

The points of time of the ‘birth’ and ‘death’ of the State, as Kelsen also phrases it, are points of calendar time. But, strictly speaking, the temporality of birth and death, whether of an individual or a collective, is not the temporality of calendar time. Birth and death speak to *lived* time, to the time *of* an individual or a collective, organised in terms of a temporal arc spanning a past, a present and a future. What John Perry noted with respect to spatial indexicals such as ‘here’, ‘there’ and ‘yonder’ (see Section 1.5), also holds for temporal indexicals such as ‘now’, ‘tomorrow’ and ‘yesterday’: a proposition about the date and time when a meeting is to take place with someone’s attendance cannot yield, through a more detailed description of the person’s individuating characteristics and of the calendar time of the meeting, a first-person utterance that includes the indexicals ‘I’ and ‘now’.<sup>37</sup> ‘María has an appointment with the dean on Friday afternoon’; however much one further specifies this third-person utterance, indicating which María it refers to (e.g. María Velásquez, born on such and such a date...) and the precise time of the appointment (the second Friday of July, 2016, at 3PM), it will not yield the first-person utterance by someone who, looking at her watch, jumps up and exclaims, ‘The appointment with the dean is now; I must go’.

So, a fundamental distinction needs to be drawn between two modes of temporality at work in the law, in the same way that we drew a distinction between two modes of space. There is the ‘when’ of calendar time, which is organised in the form of a sequence of a before and an after, such that what differentiates seconds, minutes, hours, etc. is only their position in the corresponding flow of time-particles. Calendar time makes it possible to assign a beginning and an end to the temporal sphere of validity of a legal norm or even to a legal system as a whole. And there is the ‘when’ of the first-person temporality of agents, in which there is a proper order to do things if, for example, one wants to cook a dish: chop up the vegetables, mix them, put them into the pan, stir in the sauce, etc. If the time of individual action is organised as a past, present and future, so also the time of a plural subject. Someone asks one of dorm students, ‘What are you all doing?’ She answers, a tad too punctiliously: ‘We’ve just finished preparing the ingredients, are now heating up the oil in the pan so that we can later fry the vegetables’. The IACA-model of law suggests that legal orders configure time, like space, as a pragmatic unity, hence that legal orders engage in ‘timing’ as much as in ‘spacing’.<sup>38</sup>

While I have focused on time and space, it would not be difficult to show how the emergence of a cooking team and of the WTO also differentiates and integrates a range of subjectivities and act-contents in light of the respective points of joint action, such that in addition to ‘spacing’ and ‘timing’, legal orders engage in ‘subjectifying’ and ‘materialising’, as one might put it. In sum, while there are significant differences between these kinds of small, non-institutionalised social groups and legal collectives, between the dorm cooking team and the WTO, they both order behaviour by establishing who ought to do what, where and when from the first-person perspective of a ‘we’ in joint action.

This fourfold process of spacing, timing, subjectifying and materialising has a *narrative* structure. In other words, the representation of unity in the course of collective action always has the form of a story, even when representation takes place by way of law-making. Indeed, there is no legal order that can sustain itself only as a process of creating and applying rules: every legal order requires a narrative about its emergence and about its point, a narrative that creates/recreates the first-person plural perspective of a ‘we’ and which al-

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<sup>37</sup> Perry, *The Problem of the Essential Indexical and Other Essays*, 27-44.

<sup>38</sup> For discussions of these different forms of time and space Paul Ricœur, *Time and Narrative*, translated by Kathleen Blamey and David Pellauer (Chicago: Chicago University Press, 1990), vol. 3, 104 ff, and Paul Ricœur, *Memory, History, Forgetting*, translated by Kathleen Blamey & David Pellauer (Chicago: Chicago University Press, 2004), 147-169.

lows for time to appear to participants as *our* time; space to appear as *our* space; subjectivities as *our* subjectivities; acts as *our* acts.<sup>39</sup> In this vein, Kelsen's reference to the 'birth' and 'death' of a state not only speaks to lived time, but to a time in which the temporal arc of past, present and future appears as such through a story about the origins and vicissitudes of a collective. If one were to press the members of the dorm cooking team for an explanation or justification of what they are doing, they would provide a story, however terse, that would make sense of what they are doing; and the WTO offers the rudiments of such a story in a rubric of its website entitled—tellingly (in the twofold sense of the word)—'Understanding the WTO: Who we are':

The WTO was born out of negotiations, and everything the WTO does is the result of negotiations . . . Where countries have faced trade barriers and wanted them lowered, the negotiations have helped to open markets for trade. But the WTO is not just about opening markets, and in some circumstances its rules support maintaining trade barriers — for example, to protect consumers or prevent the spread of disease.<sup>40</sup>

In short, narrativity is common to legal and non-legal forms of collective action. It is the privileged vehicle for representation as a process of identification, that is, for the process whereby individuals come to view themselves as members of a collective. And it is a no less privileged vehicle for representation as a process of differentiation, that is, for the emergence of difference, collective and individual, in the process of telling a story about ourselves 'as' being about this or about that. Returning to and modifying Benedict Anderson's thesis, narrativity explains why *all* groups are *imagined* communities, even a group of two persons: to imagine a community is to tell a story that creates/recreates a collective by answering the question, What is/ought our joint action to be about? Narrativity is part and parcel of the ontology of social groups—their mode of being.

This general approach to legal order casts its concept in a different light than that favoured by Kelsen and other legal theorists, who argue that the problem of the unity of a manifold of legal rules—law as a *system*—is central to the theory of law. While correct as far as it goes, this account is blind to the fact that systematicity does not exhaust the problem of unity, which is also, and importantly, the question about how a legal order can at all manifest itself as the first-person plural perspective of a 'we' and as a *concrete* unity with respect to time, space, subjectivity and act-types. By the same token, it concentrates exclusively on law-creation and law-application, to the detriment of the narrative in which law-making is embedded and without which law-making would not be intelligible to its addressees. This point is of no small import because, when looking at legal globalities, doctrinal studies tend to concentrate on questions about global actors and the kinds of regulatory instruments they use; think of the extraordinary attention dedicated to the distinctions between 'hard' and 'soft' law and 'government' and 'governance' in contemporary scholarship. There are of course excellent reasons for reflecting on these distinctions, and we will do so as well, in

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<sup>39</sup> This would require widening the scope of Ricœur's insights about narrativity as laid out in his wonderful trilogy, *Time and Narrative*. While this trilogy focuses primarily on the relation between time and story-telling, fleshing out more fully the IACA-model of law requires showing how narrativity is crucial to the emergence of the *four* dimensions of what I have called a 'concrete' order. By the same token, a challenge to collective action must deploy a counter-narrative: a narrative about an elsewhere and an elsewhen. See Paul Ricœur, *Time and Narrative*, translated by Kathleen Blamely and David Pellauer (Chicago: Chicago University Press, 1983, 1984, 1985).

<sup>40</sup> Understanding the WTO: who we are: [https://www.wto.org/english/thewto\\_e/whatis\\_e/who\\_we\\_are\\_e.htm](https://www.wto.org/english/thewto_e/whatis_e/who_we_are_e.htm) (accessed on 1 December 2015). The WTO-watcher will know that this proto-narrative has changed over time, in response to massive contestation of the WTO, as part and parcel of the attempt to explain and justify what the WTO is about in a way that hopes to parry or defuse such contestation.

this chapter and later. But the IACA-model of law puts us on guard against reducing the distinctiveness of emergent global legal orders to their new actors and regulatory instruments. While accommodating the question about the systemic unity of legal rules, the IACA-model of law also demands that light be shed on legal order as a concrete order from the first-person plural perspective of a ‘we’: as a putative four-dimensional unity that appears as such to participants in a legal collective (and to others).

This insight entails that we need to revise the concept of legal pluralism. A first step would be to note that each legal order is a distinct time-space, hence that there are as many time-spaces as there are legal orders. I am happy, here, to join forces with (legal) sociology and socio-legal studies, which acknowledge the insufficiency of approaches to globalisation processes which focus exclusively on space. Santos, for example, refers to legal ‘time-spaces’.<sup>41</sup> Also Sassen, who has been concerned to describe the ‘spatialities and temporalities’ of globalisation processes.<sup>42</sup> A third leading contributor to the sociology of globalisation, Manuel Castells, has described the internal connection between the space and time of the global in terms of a ‘space of flows’ and a ‘timeless time’.<sup>43</sup> And there are the classic studies by David Harvey and Paul Virilio on the acceleration of time and the compression of space.<sup>44</sup> Finally, in a recent intervention in the field of socio-legal studies, Mariana Valverde has introduced the notion of ‘chronotopes’ as a way of theorising the relation between the time and space of law.<sup>45</sup> I will return to examine some of these contributions in the next section. But, while endorsing this more complex view, the IACA-model of law argues that we need to go still further: at issue is not simply a plurality of time-spaces but rather a plurality of concrete orders, each of which articulates time, space, subjectivities and act-types in a distinctive way. A given IACA cannot deploy a specific articulation of time and space unless these are linked to a specific configuration of subject and act-type unities. Conversely, a legal order is not merely patterned interaction between certain kinds of subjects ‘in’ space and time; space and time are integral dimensions of a legal order. This allows us to revisit what was said about *nomos* in Chapter 1. Schmitt, as we have seen, calls law a *nomos* to emphasise its emplaced character: a ‘unity of order and emplacement’, as he puts it. The IACA-model of law entails that his account needs to be pushed further. Law is a *nomos* in the form of a putative unity that is spatial, temporal, subjective and material.

### 2.3.3. The globalisation of concrete orders

Notice, in line with these initial thoughts on legal pluralism, that the IACA-model of law illuminates the concept and structure of jurisdiction, which was briefly discussed at the outset of Chapter 1. Kelsen, as noted, explains the concept of jurisdiction in terms of competence, i.e. as the legal ‘capacity’ to do (or omit) something. This capacity or empowerment draws its meaning from the structure of IACA, which opens up a range of possibilities for individuals or groups to act in certain ways and at certain times and places, namely, ways which are germane to the realisation of the point of joint action. While we only discussed jurisdiction in terms of its spatial dimension, it is clear that legal orders organise jurisdiction by establishing who ought to do what, where and when. For example, the parsing of

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<sup>41</sup> Santos, *Toward a New Legal Common Sense*, 418.

<sup>42</sup> Sassen, ‘Spatialities and Temporalities of the Global’.

<sup>43</sup> Manuel Castells, *The Rise of the Network Society*, 2<sup>nd</sup> ed. (Oxford: Wiley-Blackwell, 2010), 407-499.

<sup>44</sup> David Harvey, *The Condition of Postmodernity* (Oxford: Basil Blackwell, 1989), 201-307; Paul Virilio, *Speed and Politics: An Essay on Dromology*, translated by Mark Pollizzotti (New York: Semiotext(e), 1977).

<sup>45</sup> Mariana Valverde, *Chronotopes of Law: Jurisdiction, Scale and Governance* (Milton Park: Routledge, 2015).

court jurisdiction into personal jurisdiction (*ratione personae*), subject-matter jurisdiction (*ratione materiae*), territorial jurisdiction (*ratione loci*) and temporal jurisdiction (*ratione temporis*) is one of the ways in which this fourfold structuring of jurisdiction acquires legal form. In a nutshell, jurisdiction is the technical term used by lawyers to name the fourfold domain of practical possibilities (Kelsen’s ‘capacities’) made available to participants in joint action from the first-person plural perspective of a legal collective. The concept of jurisdiction, interpreted thus, meshes well with the concept of legal pluralism.

Crucially, moreover, jurisdiction cannot empower without also disempowering. The capacities it marginalises are not simply the domain of illegal behaviour (which a legal order renders possible and even accommodates to a certain extent) but rather of practical possibilities which are excluded as irrelevant and unimportant in light of the point of a given legal collective.<sup>46</sup> This leads us straight to the process of legal pluralisation, namely, the pluralisation which emerges when what had seemed to be one legal order is confronted with the experience of a spatial limit—a xenotopia—, thereby giving rise to pluralisation in the form of a contrast between own and strange places. The IACA-model of law enriches this preliminary account of pluralisation. For the model entails that a given legal order cannot create jurisdiction, opening up a domain of practical possibilities for collective action, without also closing down other configurations of space, time, subjects and ways of acting. As a result, the emergence of a global legal order, which amounts to the *unification* of space, time, subjectivity and act-types into a single legal order, goes hand in hand with the *pluralisation* of these four dimensions of legal order. Consequently, while Chapter 1 has drawn the distinction between borders and spatial limits, legal orders are not only limited in space; they are limited in each of the four dimensions that constitute them as concrete orders.

Likewise, I had noted that the KRRS’s direct action is, spatially speaking, inside and outside the WTO: it takes place in the space the WTO calls its own, yet also lies outside it, in the form of a place that resists emplacement in a spatially limited global market. This insight can now be extended to the three other dimensions of legal order. Indeed, their direct action registers within the temporality of global trade deployed by the WTO, namely, as a breach of the sequence of acts required to participate in global trade, and it speaks to a temporality of farming that resists inclusion in global trade. Likewise, the farmers who engaged in direct action register in the WTO as participants in global trade, yet also embody a form of subjectivity that refuses accommodation in the range of subject-positions made available by the WTO. Finally, the direct action registers in the WTO as an act that is relevant to global trade, albeit in the form of an illegal act, while also standing outside the domain of behaviour rendered possible by the WTO to the extent that it intimates an understanding of what it is to plant and nurture seeds in a way that resists their commodification. In brief, it is with respect to these four dimensions of concrete orders that we can speak of the KRRS’s direct action as being inside and outside the WTO.

The KRRS’s direct action suggests furthermore that what the legal doctrine calls the ‘conflict of laws’ is a reductive approach to the problem of conflict. The well-known report of the International Law Commission Study Group, ‘Fragmentation of International Law’, offers a good illustration of what I have in mind. In its second conclusion, the Report states that

International law is a legal system. Its rules and principles (i.e. its norms) act in relation to and should be interpreted against the background of other rules and principles. As a legal system, international law is not a random collection of such norms. There are meaningful relationships between them . . . In applying international law, it is often nec-

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<sup>46</sup> I have elsewhere referred to this as the domain of ‘a-legality’. See Lindahl, *Fault Lines of Globalization*, Ch. 5.

essary to determine the precise relationship between two or more rules and principles that are both valid and applicable in respect of a situation'.<sup>47</sup>

These relations are either of interpretation or of conflict; the latter concerns situations in which 'two norms that are both valid and applicable point to incompatible decisions so that a choice must be made between them'.<sup>48</sup> Revisiting the distinctions introduced at the end of Section 2.2, while conflict can be presented as a conflict between legal norms, we should not forget that it is never only—and in any case never primarily—a conflict between norms within a *legal system* nor between legal systems. As the KRRS's interference with the realisation of the WTO's point makes clear, conflict is conflict between (emergent) *concrete orders*, that is, conflict about different ways of ordering who ought to do what, where and when.

To sum up, the IACA-model of law transforms an enquiry into the globality of global law by suggesting that although this enquiry begins as a question about spatiality, it is also, and no less importantly, an enquiry into the three other dimensions of globalising legal orders. In other words, the question about the structure of emergent global legal orders is not only whether and how they organise the spatial unity of legal interaction in ways which might be different and perhaps irreducible to state law. It is also the question about emergent legal globalities as distinctive temporal, subjective and material unities. Are there patterns which structure the spaces, times, subjectivities and act-types of legal globalisations in ways which set them apart from state law? Could these patterns shed light on what is specific to the globalisation of legal inclusion and exclusion?

## **2.4. IACA and some defining features of emergent global law**

A first step towards answering these questions consists in examining several characteristics which a range of sociologists attribute to globalisation processes: fragmentation, privatisation, marketisation and the 'compression' of space and time. In complex ways, these features involve the relation between law and politics, law and economics, law and technology and, more generally, law and society. This attests to the fact that global law, like all law, does not and cannot exist in isolation from society at large, nor from the domains of politics/morality, the economy, and technology in particular. I will not, however, discuss these four features in the spirit of any of the 'law and . . .' disciplines. My aim in this Section is much more modest, namely, to show how the IACA-model of law can accommodate these characteristics, thereby preparing the ground for understanding the transformations of legal order which they bring about.

### **2.4.1. Fragmentation**

The first and most visible transformation ushered in by globalisation processes is surely the fragmentation of law, and not merely of international law, as the ILC report seems to assume.<sup>49</sup> At issue here is a process of what Sassen calls the 'disassembling' of the state assemblage of territory, authority and rights, that is, 'a proliferation of temporal and spatial framings and a proliferation of normative orders where once the dominant logic was toward producing unitary spatial, temporal, and normative framings'.<sup>50</sup> While sharing her diagnosis as concerns the disaggregation of normative orders, the IACA-model of law shows

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<sup>47</sup> Report of the International Law Commission, 'Fragmentation of International Law: difficulties arising from the diversification and expansion of international law', A/CN.4/L.702, 18 July 2006, 7. Available at: [http://www.un.org/ga/search/view\\_doc.asp?symbol=A/CN.4/L.702](http://www.un.org/ga/search/view_doc.asp?symbol=A/CN.4/L.702) (accessed on 17 June 2015).

<sup>48</sup> *Ibid*, 8.

<sup>49</sup> Report of the International Law Commission, 'Fragmentation of International Law: difficulties arising from the diversification and expansion of international law'.

<sup>50</sup> Sassen, *Territory, Authority, Rights*, 421.

that a pluralisation of legal orders is not distinct from a pluralisation of temporal and spatial framings: normative orders *are* temporal and spatial framings in their own right, even if not all temporal and spatial framings are legal framings. In any case, what is decisive to the process of legal fragmentation is ‘the multiplication of partial systems, each with a small set of sharply distinctive rules, amounting to a type of simple system’.<sup>51</sup> Moreover, it is important to note, in line with what has been noted earlier, that the fragmentation of law ushered in by globalisation processes does not mean that the state ever effectively monopolised normativity within its territory: while states have *claimed* exclusiveness for themselves, such claims have been continuously contested, often successfully, by other legal orders.

Now, my claim is that the IACA-model of law can account for both the continuity and discontinuity of state law and emergent global legal orders along this vector. Both the continuity and discontinuity are linked to the *point* of IACA. This means, as concerns continuity, that both states and emergent global legal orders have a point. Consider, first, the state. Like any other collective, states are confronted at every turn with the question, What ought our joint action to be about? And this amounts to the question: what is the point of our joint action? But there is a decisive difference with other legal collectives, too: *all* domains of social interaction fall, at least potentially, within the scope of state regulation. On the one hand, this entails that state legal orders are highly complex forms of collective action, to the extent that they involve many layers of nesting of collective action. On the other, the point of state collective action is not spelled out in terms of a *purpose* that determines in advance what kinds of interaction falls within the scope of collective action. Instead, the point of state action will typically be spelled out in terms of values, principles, and some such, and which the default-setting of collective action claims to realise. This does not mean, however, that any state effectively does or even could regulate the entire breadth of social behaviour, not even a totalitarian state. Moreover, human rights significantly curb the scope of what falls under legally regulated collective action in a democratic state. But this shielding function of human rights (which is by no means their only function) draws its meaning from the insight that the state could, in principle even if not in fact, regulate those spheres of social life which human rights declare off limits to state regulation.<sup>52</sup>

Emergent global legal orders, on the other hand, deploy a double movement whereby the fragmentation of law is correlative to its becoming oriented to specific issues.<sup>53</sup> This double transformation means, in terms of the IACA-model of law, that forms of collective action arise the point of which is a more or less narrowly specified purpose (issue-orientedness), progressively separating into distinct global orders domains of behaviour which had been regulated by state orders (fragmentation). Teubner summarises this transformation by noting that global legal orders ‘define the external reach of their jurisdiction along issue-specific rather than territorial lines, and which claim global validity for themselves’.<sup>54</sup> If state territoriality had its correlate in the assumption that all domains of social life could fall, in principle, within the ambit of state collective action, the point of collective

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<sup>51</sup> *Ibid*, 422.

<sup>52</sup> See Kelsen, *General Theory of Law and State*, 242-243.

<sup>53</sup> For example, Article 2.1 of the Statutes of ISO reads as follows: ‘The object of the Organization shall be to promote the development of standardization and related activities in the world with a view to facilitating international exchange of goods and services and to developing cooperation in the spheres of intellectual, scientific, technological and economic activity’. See, ISO Statutes, available at: <http://www.iso.org/iso/statutes.pdf>.

<sup>54</sup> Gunther Teubner, ‘Societal Constitutionalism: Alternatives to State-Centered Constitutional Theory’, in Christian Joerges, Inger-Johanne Sand and Gunther Teubner (eds.), *Transnational Governance and Constitutionalism* (Portland, OR: Hartford Publishing, 2004), 41.



action in the context of emergent global legal orders is ‘issue-specific’, thereby generating a spatial unity appropriate to the point of such collective action.

There is a second, no less decisive, form of legal fragmentation leading from state to global legal orders, namely, the fragmentation of regulation, as sketched out in Section 2.2.3. In a state, the articulation, monitoring and upholding of the point of joint action are concentrated in a *single* collective. Different officials of the same state engage in and coordinate these different facets of the regulation of collective action; this concentration is the presupposition of the so-called ‘separation of powers’ in a state. As Kelsen puts it, a state is that kind of legal system that ‘establishes certain organs—whose respective functions reflect a division of labour—for creating and applying the norms forming a legal system. When the legal system has achieved a certain degree of centralization, it is characterized as a state’.<sup>55</sup> A variety of emergent global legal orders attest, by contrast, to the fragmentation of these facets, of which one or more is ‘farmed out’ to another collective. In this sense, globalisations usher in a far more radical separation—or perhaps one should say ‘interrelation’—of powers, one in which a relation to other collectives is built in, institutionally speaking, to the regulatory self-relation of a given group. As Neil Walker puts it, a slew of new legal orders deploy ‘an inherently “relational” element in [their] self-understanding and self-definition . . . —a sense that [their] normative purpose and its effectiveness alike are dependent on the cultivation of a network of relations with other entities’.<sup>56</sup> The new law merchant, for instance, relies on states for the enforcement of arbitration awards. What is of importance for us, at this moment, is that the IACA-model of law can accommodate both unified and fragmented forms of the regulation of the point of joint action; it is not wedded to either. More about this in Chapter 3.

#### 2.4.2. Privatisation

Here again I am happy to take my cue from Sassen’s diagnosis of the transformations leading from the state assemblage of TAR to the global assemblages thereof. In her words, ‘the marking features of the new—mostly but not exclusively—private institutional order in formation are its capacity to privatize what was heretofore public and to denationalize what were once national authorities and policy agendas’.<sup>57</sup> This transformation, in her reading, entails, on the one hand, a new form of normative order irreducible to *raison d’état*, as the master normativity of state law, and, on the other, the representation of key elements of these normative orders as part and parcel of the *public* realm. As a result, certain ‘state institutions reorient their particular policy work or broader state agendas towards the requirements of the global economy, even as they continue to be coded as national’.<sup>58</sup>

For his part, Gunther Teubner connects the privatisation of law to the functional differentiation—hence fragmentation—of social systems in a global context. If the legal regulation of society was mediated by political power during the period in which the state could plausibly claim exclusive legal dominion over all dimensions of social life, globalisation marks the emancipation of law from state politics through the enactment of private legal orders which are autonomous with respect to the public domain of state politics.<sup>59</sup> The new *lex mercatoria* and cyber-law are, in his view, spectacular examples of the privatisation of global law. ‘Law without a state’, to cite the title of his well-known article, is both law with-

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<sup>55</sup> Kelsen, *Introduction to the Problems of Legal Theory*, 99.

<sup>56</sup> Neil Walker, ‘Beyond boundary disputes and basic grids: Mapping the global disorder of normative orders’, *International Journal of Constitutional Law* 6 (2008), 373-396, 381.

<sup>57</sup> Sassen, *Territory, Authority, Rights*, 222-3.

<sup>58</sup> *Ibid*, 223.

<sup>59</sup> See, most recently, Gunther Teubner, *Constitutional Fragments: Societal Constitutionalism and Globalization* (Oxford: Oxford University Press, 2012).

out boundaries, i.e. law without an inside and an outside, and law without politics, at least in the sense of the institutional politics of the state. Yet more forcefully, there is an internal correlation in this transformation: the absence of state boundaries marks the absence of state politics and vice-versa.

It may remain an open question, for the time being, whether Teubner's system-theoretical interpretation of privatisation does justice to the concept of politics, statal or otherwise; *quod non*. Notice, moreover, that both Sassen's and Teubner's use of the public/private distinction remains thoroughly state-centred; the conceptual framework that has governed thinking about law continues to govern how sociologists of globalisation seek to understand the transformations leading beyond the state. I will revisit this problem later on. For the moment, I would draw the reader's attention to the continuities and discontinuities between state law and emergent global legal orders which the IACA-model of law illuminates in at least two ways. First, the model accommodates both 'private' and 'public' actors as regulators, in the broad sense of regulation indicated in Section 2.2.3. Indeed, the functional concept of authority sketched out heretofore easily accommodates both public and private authorities as well as combinations of the two—so-called 'hybrid' regulators. The Forest Stewardship Council, for example, understands itself as an organisation with the participant agency of regulators and regulated companies, the point of which is to 'promote environmentally sound, socially beneficial and economically prosperous management of the world's forests'.<sup>60</sup> To this effect, the FSC enacts forest management standards (articulation) which are obligatory for those wood and paper companies which seek to obtain certification by the FSC, and whose activities are verified by independent, FSC-accredited certification bodies (monitoring). Failure by a company to meet the standards to which it has signed up entails that it forfeits the right to use the FSC trademarks (e.g. the distinctive 'checkmark and tree logo design'), which can have significant negative implications for the sale of its paper or wood products, hence for its profitability (upholding). The FSC institutionalises its authoritative mediation of collective action through bylaws that include a General Assembly and a Board of Directors.

This is, of course, a purely functional interpretation of privatisation, one which does not address the concerns, shared by many, about the privatisation of law in a global context. According to this view, the emergence of private legal orders effectively collapses the public good into a private good, hence what is good for all to what is good for only a part of society, usually capital holders. Claire Cutler, for instance, has relentlessly exposed the extent to which the privatisation of global law, as epitomised by the new law merchant, involves the capture of the public good by particular agents and interests. In her words, '[w]e are experiencing the development and application of novel legal forms and new sources of law that contribute markedly to pluralistic and privatized governance arrangements and which are tailored specifically to meet the demands of business under conditions of late capitalism'.<sup>61</sup> Sassen echoes this concern when noting that private agents engage in norm-making oriented to putting into place legal orders for governing global trade, capital, services and information in a way that 'veil[s] the fact that it is often the utility functions of private actors in the global political economy that are shaping public policy'.<sup>62</sup> Also Teubner, while defending the functional differentiation of the global economy and its eman-

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<sup>60</sup> Forest Stewardship Council homepage, <https://us.fsc.org/mission-and-vision.187.htm> (accessed on 5 October 2015).

<sup>61</sup> A. Claire Cutler, *Private Power and Global Authority: Transnational Merchant Law in the Global Political Economy* (Cambridge: Cambridge University Press, 2003), 2. See also Santos, *Towards a New Common Legal Sense*, 208-214.

<sup>62</sup> Sassen, *Territory, Authority, Rights*, 184 ff;

cipation from state politics, has pointed to its vulnerability to capture—‘corruption’, systems-theoretically speaking—by particular interests.<sup>63</sup>

This is a concern that goes to the heart of the theme of this book, the globalisation of inclusion and exclusion. As such, it deserves careful discussion in the coming chapters. Suffice it to say, for the moment, that the IACA-model of law already prefigures this problem. If, as I argued in Section 2.2.2, the unity of a collective is always a represented unity, also unity involves a claim to the *commonality*—hence publicness in this minimal sense, at least—of the point of collective action, as represented by its default-setting. But who gets to represent the collective, and who is an interested party to the new law merchant or, for that matter, any of the other emergent global legal orders? Obviously, these are not questions that are or can be answered directly by the IACA-model of law. But what I want to say is that the IACA-model of law offers us an interpretation of legal order which renders intelligible *why* these questions arise in the first place as questions about state law and, ever more urgently, about emergent global legal orders. More generally, the IACA-model of law offers an alternative account of publicness which is not tied to the state-centred conceptual framework marshalled by a range of contemporary sociologies of globalisation. More about this in Chapter 3.

### 2.4.3. Marketisation

In a very broad sense, the marketisation which takes place in the course of globalisation processes concerns the shift from regulation to prices as the key ordering factor of a wide range of domains of societal action. To that extent, marketisation takes us beyond the realm of law proper and into the realm of the economic ordering of society. This shift translates, legally speaking, into the deregulation of markets, usually in the name of efficiency. As such, this trend falls beyond the scope of what interests me here, namely, ascertaining how marketisation might transform the structure of legal orders in a global context, and whether the IACA-model of law can accommodate these transformations.

There are at least two ways in which this shift is of interest to our enquiry. The first concerns the marketisation of what have traditionally been public functions and services. To a certain extent, this has led to the deregulation of national markets, in light of the costs associated to the state regulation of markets, in particular as regards the costs derived from ‘political’ decisions about its operation. But as there is no such thing as a ‘free’ market without its regulation, the marketisation of public functions and services has above all led to a *reregulation* that secures the legal conditions required for a global market economy. This has resulted in a concerted effort to bring about the global harmonisation of the core domains required for the functioning of a market economy, namely ‘the protection of property and enforcement of contract rights, augmented by corporations and bankruptcy law, banking and security regulations, intellectual property protection, and competition laws’.<sup>64</sup>

So construed, the marketisation of public functions and services leads back to the fragmentation and privatisation of law in a global context. On the one hand, the harmonisation of different domains of private law from the perspective of a global market economy takes place on a sectorial basis and is, therefore, a manifestation of the fragmentation of law discussed heretofore. As such, the IACA-model of law can easily accommodate this transformation, insofar as it turns on the *point* of collective action. On the other hand, and despite all claims about the neutrality of the market, not much legal imagination is required to understand why the globalisation of these core domains of private law involves the globalisa-

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<sup>63</sup> Gunther Teubner, *Constitutional Fragments*.

<sup>64</sup> Kerry Rittlich, ‘Who’s Afraid of the *Critique of Adjudication*? Tracing the Discourse of Law in Development’, in *Cardozo Law Review*, 22 (2001), 929-945. See also Sassen, *Territory, Authority, Rights*, 197-2013.

tion of inclusion and exclusion. At issue here is the politics of who gets to take the initiative on the default-setting of the point of a global community, that is to say, who gets to represent the putative unity of the global community on whose behalf rules are enacted, monitored and upheld. Obviously, at issue is not only *who* belongs to that collective but also *what* gets to count as the commonality of collective action, as embodied in its default-setting. Here again, the IACA-model of law does not causally ‘explain’ the harmonisation of private law attendant on the emergence of global market economy; but then again, this is not its task. What it does do is to offer a conceptual framework to understand why this transformation raises fundamental questions about the politics of legal inclusion and exclusion that arise with marketisation in a global context.

There is a second way in which marketisation signals a transformation in the structure of legal orders, one which revisits one of the forms of fragmentation discussed hitherto, namely the fragmentation of the regulatory dimensions of the articulation, monitoring and enforcement of collective action. In effect, marketisation enters the picture by way of the third of these dimensions. Callies and Zumbansen offer a useful classification of non-state sanctions in which they distinguish between the reputation mechanism, the exclusion mechanism and the use of private force or coercion.<sup>65</sup> While the IACA-model of law accommodates each of these mechanisms, the reputation mechanism, as it plays out via the market, is particularly relevant to our present discussion as one of the mechanisms of the *legal* enforcement of collective action. The loss of the right to use the FSC-trademarks by paper and wood companies that don’t meet the apposite standards is a case in point of how marketisation transforms the structure of legal enforcement, against the background of the continuity provided by the IACA-model of law.

#### **2.4.4. The ‘compression’ of space and time**

There is widespread agreement that, first, technological developments, in particular in the field of information technology, are key drivers of globalisation processes and, secondly, that these developments profoundly transform the experience of space and time in a global context. In this vein, several scholars characterise this transformation in terms of the ‘compression’ of space and time. Here again, a full exploration of this fascinating topic exceeds the scope of this book: I content myself with some general remarks about how the IACA-model of law accommodates this changed spatio-temporal experience.

Turning to space, it has often been noted that globalisation interconnects places which are physically distant from each other, whereas places which are physically contiguous to this network of places have little or no significance for that emergent order. For example, Sassen notes that new technologies bring about a dis-location, such that individuals and organisations connect with other individuals and organisations ‘located far away, thereby destabilizing the notion of context, which is often associated with that of the local and with the notion that physical proximity is one of the attributes of the local’.<sup>66</sup> Her paradigmatic example is the emergence of a network of global cities, which not only detach themselves from the hinterlands of the countries in which they are situated but also from the impoverished areas in those very cities, linking together the zones of global cities which concentrate the services and business sectors involved in the global economy.<sup>67</sup> Castells, for

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<sup>65</sup> Graf-Peter Callies and Peer Zumbansen, *Rough Consensus and Running Code* (Oxford: Hart, 2012), 120. See also Stephan Panther, ‘Non-Legal Sanctions’, in Boudewijn Bouckaert and Gerrit de Geest (eds.), *Encyclopedia of Law and Economics* (Cheltenham: Edward Elgar, 2001), Vol. 1, 999-1028.

<sup>66</sup> Sassen, *A Sociology of Globalization*, 21. See also David Harvey, *The Condition of Postmodernity* (Oxford: Blackwell, 1989), 260 ff.

<sup>67</sup> Saskia Sassen, *The Global City: New York, London, Tokyo* (Princeton: Princeton University Press, 2001).

another, speaks of a new spatial logic, the space of flows, which he defines as ‘the material organization of time-sharing social practices that work through flows’. In turn, flows are ‘purposeful, repetitive, programmable sequences of exchange and interaction between physically disjointed positions held by social actors in the economic, political, and symbolic structures of society’.<sup>68</sup> He opposes this new spatial logic to the older spatial logic of a space of places, where ‘a place is a locale whose form, function, and meaning are self-contained within the boundaries of physical contiguity’.<sup>69</sup>

While the compression of space which gives rise to global networks of places depends to a significant degree on technological achievements, it is first and foremost an implication of a process of *approximating*, as one might put it: a bringing close of what is far by including it in a world of practical involvement with others and with things.<sup>70</sup> This dynamic is no less effectual in the emergence of networks of global legal places than in the emergence of networks of global cities. Indeed, the technological approximation of places which are physically distant from each other in a global legal order presupposes and is but one of the modalities of the approximation whereby a collective gathers together and brings near the places which are relevant and important with regard to the point of joint action, while also pushing into the distance of an empty outside places which are irrelevant and unimportant thereto, whatever their physical propinquity. Contra Castells, there is nothing in the concept of place, not even prior to the emergence of the information society, which demands that it be physically contiguous to another place. For the same reason, when he defines the space of flows in terms of the ‘exchange and interaction between physically disjointed *positions*’ (emphasis added), it would have been more accurate to speak of physically disjointed *places*. Doing so would, of course, have exposed his distinction between spaces of flow and spaces of place as specious. This is not to say that globalisation does not introduce new modes of articulating places within the space of action; but it is to say that insofar as globalisation emplaces new spaces of action, these cannot but be part and parcel of a space of places.<sup>71</sup> Castells’ space of flows, whatever this might mean, is a species of the space of places.

Consequently, the flipside of approximating places (through the globalisation of legal orders) is a *distancing*; together, approximating and distancing constitute the achievement of legal spacing deployed by IACA, of which the globalisation of legal spaces is but one

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<sup>68</sup> Castells, *The Rise of the Network Society*, 442.

<sup>69</sup> *Ibid*, 453.

<sup>70</sup> ‘Approximating [*Entfernen*] amounts to making the farness vanish—that is, making the remoteness of something disappear, bringing it close’. Heidegger, *Being and Time*, §23 (translation altered).

<sup>71</sup> A separate question, one I cannot address in this book, is to what extent Castells’ use of the metaphor of ‘flow’ masks the very real boundaries which channel and contain information as well as social movement, hence the no less real processes of global inclusion and exclusion to which a variety of legal orders contribute. Sassen’s insistence, by contrast, on the importance of place to a sociology of globalisation renders her recent work, centred on the notion of expulsions, keenly sensitive to the problem of inclusion and exclusion. It is significant, finally, that while systems theory is certainly aware of the problem of inclusion and exclusion, it has great difficulties in accommodating this problem as a spatial problem within its interpretation of globalisation processes. The reasons for this quandary lead back to the inaugural decision of Luhmann’s systems theory to take communication, rather than action, as the basic unity of sociological analysis, a decision that is reflected in the conspicuous absence of spatiality from Luhmann’s three-way distinction between the ‘factual’, ‘social’ and ‘temporal’ dimensions of meaning. What gets lost with this inaugural decision is human embodiment and the lived spatiality of human embodiment, of which the space of action is one facet. See Niklas Luhmann, *Social Systems*, translated by John Bednarz, Jr. with Dirk Baecker (Palo Alto, CA: Stanford University Press, 1996), 80-86. For a sympathetic critique of this aspect of Teubner’s systems-theoretical sociology of globalisation, see Hans Lindahl, ‘We and Cyberlaw: The Spatial Unity of Legal Orders’, in *Indiana Journal of Global Legal Studies* 20 (2013) 2, 697-730.

manifestation. And this is another way of saying that (emergent global) legal orders cannot include a network of places without excluding other possible places and networks of places. Distancing, in this primordial sense, is the spatial condition of possibility of estrangement; the strange is, spatially speaking, what manifests itself as *distant in its proximity*: the KRRS' destruction of Monsanto's fields of genetically modified seeds takes place in the global market *and elsewhere*.<sup>72</sup>

As noted earlier, sociologists posit a correlation between the space and time of globalisation processes. This should not surprise us, in line with the IACA-model of law, which indicates that legal orders, global or otherwise, are structured as concrete orders which, from an actor perspective, appear as a putative unity of space, time, subjectivity and act-types. David Harvey, in his classic study of the postmodern condition, argues that time, no less than space, gets compressed in late capitalism. Resisting the naturalisation of both space and time, he argues that we are witness to the 'annihilation of space through time' in the course of capital accumulation. 'I use the word "compression" because a strong case can be made that the history of capitalism has been characterized by a speed-up in the pace of life, while so overcoming spatial barriers that the world sometimes seem to collapse inwards upon us'.<sup>73</sup> Drawing on Harvey, Castells notes that whereas clock time continues to dominate contemporary societies, the global network society witnesses the emergence of a 'timeless time', facilitated by new information technologies, such that 'for the first time in history, a unified global capital market, *working in real time*, has emerged'.<sup>74</sup> By this he means that the compression of space has its correlate in the simultaneity of time across space: 'simultaneous spatial dispersion and concentration via information technologies'.<sup>75</sup>

As indicated at the outset of this section, the IACA-model of law does not 'explain' the specific features of the temporal experience proper to globalisation processes, in particular the acceleration of time made possible by the tandem of global capitalism and the new information technologies. But such is not its task. More modestly, but importantly nonetheless, it is receptive to the specific form of temporality which is at stake in the notion of a 'compression' of time. For at issue is not the 'simultaneity' of clock time but rather simultaneity in the form of a *now*, that is, of time organised in the form of an arc that links together past, present and future. The approximation of what is physically distant, in the course of collective action, goes hand in hand with a shared present in the form of what we are *now* doing jointly in light of a shared past and with a view to the future, even though participant agents are located in physically remote places from each other and therefore also perhaps in disparate clock times. The further question, of course, is how globalisation processes articulate the relation between past, present and future in the course of collective action; but this, as noted, is a question that the IACA-model of law is not meant to answer; its task is to provide a format that would allow us to *raise* the question and to address it when looking into the specificities of globalising legal orders, something I aim to do in Chapter 3.

## 2.5. Governance, networks, regimes

Thus far I have sought to show how the IACA-model of law is consistent with and can accommodate very general features attendant on globalisation processes such as the fragmentation, privatisation and marketisation of normative orders, as well as the 'compression' of

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<sup>72</sup> In his famous essay, 'The Stranger', Georg Simmel, the great German sociologist, characterised the stranger as the person who arrives into a community and who, in contrast to a wanderer, stays on while remaining distant. Georg Simmel, 'The Stranger', in *On Individuality and Social Forms* (Chicago: University of Chicago Press, 1971) 143–50.

<sup>73</sup> Harvey, *The Condition of Postmodernity*, 240. See also Virilio, *Speed and Politics*.

<sup>74</sup> Castells, *The Rise of the Network Society*, 465.

<sup>75</sup> *Ibid*, 428.

space and time. I would like to conclude this Chapter by showing how this model can orient our further enquiry into specific examples of emergent global legal orders. Indeed, the scholarship on globalisation has developed detailed analyses and classifications of the extraordinary proliferation of putative emergent global legal orders, the structure of which is not captured either by state law or international law. We could look, for instance, at international organisations other than the WTO; hybrid public-private governance arrangements such as the International Labour Organization; transgovernmental networks such as the Basel Committee on Banking Supervision, the Financial Crimes Enforcement Network or the International Organization of Securities Commissions; and entirely private global regulatory regimes, such as those enacted by the Clean Clothes Campaign, the Forest Stewardship Council and the new *lex mercatoria*. And it has been suggested that this vast domain of global governance points to the emergence of global administrative law, to borrow the title of an influential article,<sup>76</sup> and of global human rights regimes.

Even this drastically abridged survey of the vast field of enquiry that lies before us suggests that we should resist the temptation of immediately shifting from the WTO to an *ad hoc* analysis of a narrower or broader array of examples. It is certainly necessary to engage with a range of instances of putative emergent global legal orders; this is the task of Chapter 3. But first we need to identify the *question* that can lead the way, opening up these highly disparate legal orders for systematic analysis. For it is not my intention to offer yet a new contribution to the sociology of legal globalisations nor to international relations or international law. The welter of analyses spawned by these disciplines is only of interest here to the extent that they contribute to elucidating the concept of legal order in the passage from what Sassen calls the national to the global TAR. If the state captures ‘all major components of social, economic, political, and subjective life’ within a single order, the fragmentation of territory, authority and rights wrought by globalisation processes amounts to the disaggregation of ‘that master normativity into multiple partial normative orders’.<sup>77</sup> To be sure, the concept of normative order in general, and of legal order in particular, which underpins Sassen’s analysis of the passage from the national to the global TAR remains more or less implicit and taken for granted in her sociology of globalisation.

To begin to get a handle on this problem, I take my initial cue from three ubiquitous terms that are the conceptual lenses through which scholars have sought to grasp the transformations wrought by globalisation processes: *governance*, *network* and *regime*. It is perhaps not exaggerated to say that these three terms are the red thread that runs through most, if not all, contemporary enquiries into globalisation processes. The reader will have noticed that I already appealed to these terms when introducing some examples of the field of enquiry we must examine. It is not my intention to take over these terms uncritically, using them in the ways prescribed by scholars of globalisation processes. Instead, I want to hold a certain distance with respect to how the literature uses these terms. For my aim is to reveal how each of them evokes, implicitly or explicitly, the question about *unity*, a question which goes to the heart of the concept of legal order. In somewhat different but nonetheless related ways, it seems to me that the concepts of governance, network and regime point to, without really clarifying, the problem of the unity of normative orders in general, and legal orders in particular. I hasten to add that this section deploys a *conceptual* analysis; whether the concrete phenomena which these concepts are supposed to express actually involve claims to unity, even if perhaps different to those of state legal orders, is an issue that must

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<sup>76</sup> Benedict Kingsbury, Nico Krisch & Richard B. Stewart, ‘The Emergence of Global Administrative Law’, in *Law and Contemporary Problems* 68 (2005), 15-61.

<sup>77</sup> Sassen, *Territory, Authority, Rights*, 10.

be postponed till Chapter 3, when we turn to consider a raft of putative emergent global legal orders.

My insistence on addressing the question about unity that lies latent in these three concepts is motivated by two interests. First, this problem offers a good vantage point to consider whether the passage from the state to the global TAR implies structural changes in legal order as modelled in terms of IACA. Second, the question about unity leads straight to the key conjecture of Chapter 1 and Section 2.3: the emergence of global legal orders means, first and foremost, the globalisation of processes of unification and pluralisation, hence the globalisation of inclusion and exclusion. By approaching governance, network and regime in a way that grants pride of place to the question about the unity of emergent global legal orders, the ground is cleared to educe how these orders might be vehicles of new forms of global inclusion and exclusion. Let me emphasise, once again, that by seeking to understand how the unity of globalising legal orders might be configured, I have no interest in defending *à outrance* the ‘monism’ of state law that the champions of legal pluralism have stridently opposed. My worry is, rather, that by disqualifying as state-centred the endeavour to view legal orders as emergent claims to unity, legal pluralists deprive themselves of the conceptual tools that could help them to understand how and why legal globalisations might be globalisations of inclusion and exclusion. Taking this concern a step further, the question about unity prepares the way for addressing the most fundamental issue raised by the notion of global law, namely, whether a legal order is possible or even actual that has an inside but no outside, hence that could realise a unity that includes without excluding.

### 2.5.1. Governance

Here are some very general comments about the distinction between government and governance, comments which are far more abridged than any of the numerous screeds devoted to the topic.<sup>78</sup> Most generally, if governance is about governing or ruling, and in this broad sense about the regulation of behaviour, its compass includes but is by no means limited to government, which is the regulation of behaviour through the traditional channels of state authority. More precisely, governance has been described as ‘a process of coordination of actors, of social groups, not all of which are states or even public [entities], to attain own goals that are discussed and defined collectively in fragmented and uncertain environments’.<sup>79</sup> Several aspects of this definition point in the direction of the problem of unity, even though the definition does not explicitly pose this problem as such. First and foremost, there is the telling reference to goals as ‘own goals’ (*buts propres*). Indeed, the adjective evokes a collective that owns goals, goals its members can call their own because they have been the object of collective discussion and definition.

Look, furthermore, at the concept of *regulation*, which is closely associated to what scholars dub ‘regulatory governance’. As noted in Section 2.2, the term ‘regulation’ has acquired a distinctively administrative and technocratic flavour. For example, Levi-Faur de-

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<sup>78</sup> A selection of salient contributions to the topic of global governance would include: Friedrich Kratochwil, ‘Global Governance and the Emergence of a World Society’, in Nathalie Karagiannis and Peter Wagner (eds.), *Varieties of World-Making: Beyond Globalization* (Liverpool: Liverpool University Press, 2007), 266-283; Craig N. Murphy, ‘Global Governance: Poorly done and poorly understood’, in *International Affairs* 76 (2000) 4, 789-803; James N. Rosenau, ‘Governance in a New Global Order’, in Martin Hewson and Timothy Sinclair (eds.), *Approaches to Global Governance Theory* (Albany, NY: State University of New York Press, 1999), 70-86; Ole Jacob Sending, Iver Neuman, ‘Governance to Governmentality: NGOs, States and Power’, in *International Studies Quarterly*, 50 (2006), 651-72. I am grateful to Nikolas Rajkovic for alerting me to these publications.

<sup>79</sup> Jacques Commaille and Bruno Jobert, *Les métamorphoses de la régulation politique* (Paris: L.G.D.J., 1998), 29, cited by François Ost and Michel van de Kerchove, *De la pyramide au réseau? Pour une théorie dialectique du droit* (Brussels: Publications des Facultés de Saint Louis, 2002), 29.



finer regulation as ‘the *ex ante* bureaucratic legalization of prescriptive rules and the monitoring and enforcement of these rules by social, business, and political actors on other social, business, and political actors’.<sup>80</sup> There is no need, however, to restrict regulation to administrative, primarily technocratic forms of governance. Yet there are also forms of regulation which go beyond the scope of a concept of regulation appropriate to legal order. In this context, Julia Black helpfully identifies three definitions of regulation which circulate in the literature. According to the third and broadest of these definitions, regulation includes ‘all mechanisms of social control or influence affecting behaviour from whatever source, whether intentional or not’.<sup>81</sup> This is surely too broad a definition to help us to understand what is specific to law. ‘The second definition keeps to the government as the “regulator” but broadens the techniques that may be described as “regulation” to include any form of direct state intervention in the economy’.<sup>82</sup> This definition is both too broad and too narrow: too broad by dint of encompassing all forms of state intervention; too narrow because it only refers to the government as regulator and to the economy as the object of regulation.<sup>83</sup> Colin Scott gets at what is essential to regulation in the first of Black’s definitions when he has regulation encompass ‘any process or set of processes by which norms are established, the behavior of those subject to the norms monitored or fed back into the regime, and for which there are mechanisms for holding the behavior of regulated actors within the acceptable limits of the regime’.<sup>84</sup>

So defined, the ambit of regulation is co-extensive with the concept of regulation as I envisaged it, when introducing the IACA-model of law: the articulation, monitoring and upholding of the point of joint action. Notice that this definition does not take for granted that the government is the sole or even the main regulator, making room for public, hybrid and purely private regulators. Certainly, Scott refers to regimes, rather than to collective agency, an issue I will return to in a moment. But Scott’s definition dovetails neatly with the notion of governance, according to which the action of a manifold of agents is coordinated with a view to realising the collective’s ‘own goals’. Indeed, it is in light of the point of collective action that it makes sense to view regulation as encompassing the three dimensions noted by Scott: enacting, monitoring and enforcing norms. But this means nothing other than that regulation, in the sense of regulatory governance, is about the unification or integration of the behaviour of actors from the first-person plural perspective of a ‘we’. ‘Post-regulation’, that is, the indirect steering of behaviour through e.g. procedural rather than substantive rules, and ‘meta-regulation’, i.e. the regulation of regulatory processes, are no exception to the structure of collective action.

Not surprisingly, then, and in contrast with what is taken to be the autocratic and centralised form of rule proper to government, one of the forms of regulatory governance which has attracted scholarly attention is *self*-regulation, often in the form of private forms of self-regulation. Here, once again, unity comes into the picture: the notion of a collective self that rules over itself implies that a manifold of actors can view themselves as a group or unit that acts by dint of enacting and abiding by rules in their shared interest. If, as Pettit puts it, the use of the word ‘self’ is reserved for agents who can refer to themselves ‘under the aspect of first-person indexicals such as “I” and “me”, “my” and “mine”’, so also collective

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<sup>80</sup> David Levi-Faur, ‘Regulation and regulatory governance’, in David Levi-Faur, *Handbook on the Politics of Regulation* (Cheltenham: Edward Elgar, 2011), 3-21, 6.

<sup>81</sup> Julia Black, ‘Decentring regulation: understanding the role of regulation and self-regulation in a “post-regulatory” world’, in *Current Legal Problems* 54 (2001), 103-146, 129.

<sup>82</sup> *Ibid.*

<sup>83</sup> *Ibid.*

<sup>84</sup> Colin Scott, ‘Analyzing regulatory space: fragmented resources and institutional design’, in *Public Law* 1 (2001), 283-305, 283.

self-regulation, as a form of governance, entails the form of unity in which a number of actors refer to themselves as a ‘we’ who, through our joint action, seek to realise our ‘own goals’.<sup>85</sup>

These reflections about the relation between governance and unity are confirmed if we look at the four features that, according to Dingwerth and Pattberg, identify the concept of global governance as a theoretical lens by which to approach a set of contemporary social phenomena. First, the notion introduces non-state actors such as nongovernmental organisations (NGOs), transnational corporations (TNCs) and scientific actors as part and parcel of a study of rule: ‘global governance implies a multiactor perspective on world politics’.<sup>86</sup> This amounts to enlarging the range of actors that intervene in regulatory governance, all the while leaving intact the presupposition that regulation is an *integrative* process, i.e. a process oriented to unifying behaviour under a shared point of collective action. Second, the term stands for an approach which views world politics as a ‘multilevel system’ that interconnects a congeries of political processes at the local, national, regional and global levels. A multilevel system, as we have learnt from Twining, speaks to overlapping orders, rather than to a hierarchically structured order. But how would it be possible to identify orders as overlapping unless each of them raises a claim to unity that renders it more or less distinctive and autonomous from the others? Third, global governance is the place holder for a theoretical approach that acknowledges the existence of a plurality of forms of governance which are not hierarchically related to each other. In particular, anything like a central authority is lacking at the international and transnational policy level, which makes for more or less informal processes of coordination between public and private actors. Here again, more or less informal processes of coordination imply a claim to and demand for collective unity, even though not necessarily with the kind of unity apposite to state government. Finally, global governance theory acknowledges and studies ‘the emergence of new spheres of authority in world politics independently of sovereign nation-states’.<sup>87</sup> If, as noted in Section 2.2, authority is exercised by way of the articulation, monitoring and upholding of the point of collective action, then nothing in the concept of authority demands that it be restricted to states; authority is about the representation of the unity of collectives, which include but by no means are limited to states.

### 2.5.2. Network

Let us now examine our second key category, *network*, following the inclination of many scholars to parse global governance into three distinct ordering principles: hierarchy, network and market. Each of these principles is a way of ordering—and in that sense of ruling—social behaviour and relations. Walter Powell’s pioneering article on network governance summarises the core features of this three-way typology. To the extent that ‘prices alone determine production and exchange’, markets are ‘a form of noncoercive organization, they have coordinating but not integrative effects . . .’<sup>88</sup> By contrast, both hierarchy and networks have an integrative function; both integrate social behaviour by means of regulation in the broad sense I indicated when outlining the IACA-model of action: articulating,

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<sup>85</sup> Philip Pettit, *A Theory of Freedom: From the Psychology to the Politics of Agency* (Cambridge: Polity Press, 2001), 116. It should be clear that I am using the notion of selfhood here in a way quite different to the *autos* of autopoiesis in systems theories of law. The reasons for this are outlined in Lindahl, ‘The Political Fragmentation of Constitutionalism’.

<sup>86</sup> Klaus Dingwerth and Philipp Pattberg, ‘Global Governance as a Perspective on World Politics’, in *Global Governance* 12 (2006), 185-203, 191.

<sup>87</sup> *Ibid*, 193.

<sup>88</sup> Walter W. Powell, ‘Neither Market nor Hierarchy: Network Forms of Organization’, in *Research in Organizational Behavior* 12 (1990), 295-336, 302.

monitoring and upholding rules. But there is an important difference between the two. Hierarchy, which Powell explores with respect to business organisations (but is also typical of state regulation), involves an authoritative system of order that ‘divides up tasks and positions’. Networks, for their part, cannot rely on the authoritative allocation of positions and roles. Suitably extrapolated, what Powell has to say about networks as a form of economic ordering holds for regulatory networks in general: ‘in network modes of resource allocation, transactions occur neither through discrete exchanges nor by administrative fiat, but through networks of individuals engaged in reciprocal, preferential, mutually supportive actions’.<sup>89</sup>

Focusing specifically on law, Ost and Van de Kerchove argue that hierarchy and network, (state) government and (global) governance, point to two different paradigms of legal order, even though the latter never entirely crowds out the former. Positively speaking, a network consists ‘of a “web” or a “structure” composed of “elements” or “points”, often qualified as “nodes” or “summits”, related to each other by “links” or “ties” which assure their “interconnection” or “interaction”, and the variations of which respond to certain “operational rules”’.<sup>90</sup> Negatively, they aver, and in contrast with ‘the structure of a system, and certainly of a pyramidal . . . or hierarchical structure, in a network “no point is privileged with respect to another, none is univocally subordinated to one or the other”’.<sup>91</sup> This is what the reference to the horizontality of governance networks is supposed to bring out, in contrast to the vertical relations of authority implied by hierarchy in general, and state government in particular. Not surprisingly, this feature of legal networks was met with great excitement in the early stages of network research, even though hindsight has considerably tempered initial jubilation in light of the disadvantages which accrue to network governance.<sup>92</sup>

Now, what renders networks particularly interesting for our endeavour is that they hold promise, it seems, of openness in contradistinction to the closure of hierarchical forms of governance, quintessentially state government. In effect, it has been argued that ‘in contrast to the notion of a system, that of a network doesn’t seem to imply any “closure”, as networks are “open structures capable of extending infinitely”’.<sup>93</sup> It would seem, therefore, that it makes little or no sense to approach network regulation in terms of unity; or if there is a kind of unity involved in network regulation, then a unity that is recalcitrant to closure; a unity that includes without excluding. But this objection will not work. For even if regulatory networks are *open* structures, they are nonetheless *structures*, which suggests a form of prior closure which governs their openness. This is confirmed by the crucial proviso that Ost and Van de Kerchove attach to the aforementioned passage. Immediately after noting that networks are open structures capable of extending infinitely, they add that networks can ‘integrate new nodes to the extent that they are capable of communicating within the network; in other words, that [they] share the same codes of communication’.<sup>94</sup> Doesn’t the proviso about the need for a common code effectively introduce a principle of communicative closure as much as of communicative openness that is constitutive for the possibility of

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<sup>89</sup> *Ibid*, 303. Ost and Van der Kerchove offer a positive and a negative characterization of networks.

<sup>90</sup> Ost and Van de Kerchove, *De la pyramide au réseau?*, 24.

<sup>91</sup> *Ibid*.

<sup>92</sup> Gunther Teubner, hardly a benighted foe of networks, points to the riskiness of trust, power and information asymmetries and network externalities as some of their disadvantages in his excellent book, *Netzwerk als Vertragsverbund: Virtuelle Unternehmen, Franchising, Just-in-Time in sozialwissenschaftlicher und juristischer Sicht* (Baden-Baden: Nomos, 2004), 41-57.

<sup>93</sup> Ost and Van de Kerchove, *De la pyramide au réseau?*, 25. (italics added)

<sup>94</sup> *Ibid*.

networks, thereby evoking a form of legal unity that remains implicit and taken for granted? Insofar as networks take on the form of *regulatory* networks, it would seem that at issue is the first-person plural unity both presupposed and propitiated by the articulation, monitoring and upholding of the point of collective agency.

Indeed, the IACA-model of law suggests that both hierarchy and network involve unity in the form of the first-person plural perspective of collective action. In both, social integration comes about through the emergence of a distinctive group perspective irreducible to a simple aggregation of individual actor perspectives. As in hierarchically structured collectives, so also in network governance participant actors refer to themselves as the members of a group that acts as a *unit*. To see why, consider a fairly straightforward description of a governance network:

[i] a relatively stable horizontal articulation of *interdependent*, but operationally *autonomous* actors [ii] who interact through *negotiations* that involve bargaining, deliberation and intense power struggles [iii] which take place within a *relatively institutionalized framework* of contingently articulated rules, norms, knowledge and social imaginaries [iv] that is *self-regulating* within limits set by external agencies [v] and which contributes to the production of *public purpose* in the broad sense of visions, ideas, plans and regulations.<sup>95</sup>

This description of governance networks includes key aspects of the concept of collective action as outlined in Section 2.2. To begin with, I have no problem in dropping the assumption, as formulated in [iv], that a regulatory network must needs involve limits set by external agencies; I am happy with relaxing [iv] to include purely private regulatory networks. Notice, moreover, that feature [iii] spells out the institutional dimension of legal orders as per the IACA-model of law. If, then, we concentrate on features [i], [ii] and [v], these show that a governance network is composed of a manifold of participant actors (the network's 'nodes') who jointly enact rules (in a very broad sense of the term 'rules') with a view to realising the point of collective action. It is perfectly proper, accordingly, to say that the governance network's 'nodes' take up the first-person plural perspective of a 'we, together'—a 'networked we', as one might put it. Revisiting Ost and Van de Kerchove's important proviso with respect to the openness of networks, the integration of 'new nodes' (actors) into a regulatory network is premised on their sharing the same 'code of communication' (point of joint action). No network openness without a concomitant closure, no inclusion in a regulatory network without exclusion from participation therein.

### 2.5.3. Regime

To conclude our conspectus, consider the notion of *regime*, in particular global regime, which is the third key category by which scholars have sought to conceptualise the transformations leading from the state to the global TAR. The notion evokes the idea of normative order, albeit in a diffuse manner that suggests something other than the kind of legal order associated with state law, while also leaving conveniently in the dark what is specific to it. Despite—or perhaps because of—its diffuseness, the notion has enjoyed an extraordinary career, as attested by some of the different domains to which it has been applied: international regimes, in particular special and (in some renderings) self-contained regimes; regulatory regimes; global regimes; private regimes. It has also been a privileged locus of the acrimonious and protracted trench war between international law and international

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<sup>95</sup> Eva Sørensen and Jacob Torfing, 'The Democratic Anchorage of Governance Networks', in *Scandinavian Political Studies*, 28 (2005) 3, 195-218, 197. See also R.A.W. Rhodes, *Understanding Governance: Policy Networks, Governance, Reflexivity and Accountability* (Buckingham: Open University Press, 1997), 53.

relations theory. Whereas international lawyers consistently argue that special regimes are embedded in general international law, international relations theorists appeal to the notion as a way of introducing normativity into their analyses without having to take on board the internal perspective of international lawyers.<sup>96</sup> Moreover, if early theorising concentrated on the concept of regime as such, the debate has now moved on towards issues such as regime conflict and regime constitutionalisation.<sup>97</sup>

I am not interested in expatiating on this wide-ranging debate nor in revivifying regime theory to provide yet a new definition or classification of regimes that could settle the matter once and for all. Likewise, I bracket for the moment deep concerns about the technocratic and managerial—even hegemonic—form of power linked to global regulatory regimes, postponing a fuller discussion of these concerns until we can develop a normative concept of legal authority in a global context.<sup>98</sup> What interests me, for the moment, is to identify and discuss the more or less inarticulate presupposition of these different definitions and debates.

Consider, to this effect, a handful of definitions of the term. Stephen Krasner's is the *locus classicus* of international relations accounts of the regime, namely, the 'principles, norms, rules, and decision-making procedures around which actor expectations converge in a given issue-area'.<sup>99</sup> The Report of the ILC Study Group on the Fragmentation of International Law offers, amongst others, an expansive definition of the concept of special regime: 'Sometimes whole fields of functional specialization . . . are described as self-contained (whether or not that word is used) in the sense that special rules and techniques of interpretation and administration are thought to apply'. In this vein, 'fields such as "human rights law", "WTO law", "European law/EU law", "humanitarian law", "space law", among others, are often identified as "special" in the sense that rules of general international law are assumed to be modified or even excluded in their administration'.<sup>100</sup> Margaret Young puts forward a hybrid definition of regimes that combines aspects of international law, transnational law and international relations: 'regimes are sets of norms, decision-making procedures and organisations coalescing around functional issue areas and dominated by particular modes of behaviour, assumptions and biases'.<sup>101</sup> Colin Scott has defined regimes as 'the range of policies, institutions and actors which shape outcomes in a policy domain'.<sup>102</sup> Whatever the differences between these definitions, they are all attempts to give a name to normative orders which claim at least a measure of autonomy for themselves vis-à-

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<sup>96</sup> James Crawford and Penelope Nevill, 'Relations between International Courts and Tribunals: The "Regime Problem"', in Margaret A. Young (ed.), *Regime Interaction in International Law* (Cambridge: Cambridge University Press, 2012), 258; Bruno Simma and Dirk Pulkowski, 'Of Planets and the Universe: Self-contained Regimes in International Law', in *European Journal of International Law* 17 (2006) 3, 483-529.

<sup>97</sup> For opposing views on regime conflict see Dirk Pulkowski, *The Law and Politics of International Regime Conflict* (Oxford: Oxford University Press, 2014), and Andreas Fischer-Lescano and Gunther Teubner, 'Regime Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law', in *Michigan Journal of International Law*, 25 (2004), 999-1046. For the constitutionalisation of regimes see Teubner, *Constitutional Fragments*.

<sup>98</sup> See e.g. Martti Koskenniemi, 'Miserable Comforters: International Relations as New Natural Law', in *European Journal of International Relations*, 15 (2003) 3, 395-422; Martti Koskenniemi, 'Hegemonic Regimes', in Young (ed.), *Regime Interaction in International Law*, 305-324.

<sup>99</sup> Stephen D. Krasner, 'Structural causes and regime consequences: regimes as intervening variables', in *International Organization*, 36 (1982) 2, 185-205, 185.

<sup>100</sup> ILC Study Group, 'Fragmentation of International Law', paragraph 129.

<sup>101</sup> Margaret Young, 'Introduction: The Productive Friction between Regimes', in Young (ed.), *Regime Interaction in International Law*, 1-19, 11.

<sup>102</sup> Colin Scott, 'Regulating Global Regimes', in Levi-Faur, *Handbook on the Politics of Regulation*, 563-575, 563.

vis state and international law, and which are taken to diverge significantly from the latter's structure as legal orders. And, finally, Fischer-Lescano and Teubner view a regime as 'a union of rules laying down particular rights, duties and powers and rules to do with the administration of such rules, including in particular rules for reacting to breaches'.<sup>103</sup>

Careful consideration of these definitions makes clear that, directly or indirectly, each of them evokes the problem of the *unity* of regimes. Some of these definitions point quite explicitly to this problem, as is the case with Krasner, when referring to the 'convergence' of expectations; with Young, when she refers to regimes as 'sets' of norms and some such; with Scott, when noting that regimes involve a 'range' of policies, institutions, etc; with Fischer-Lescano and Teubner, when pointing to the 'union' of rules and related procedures. Other definitions indirectly evoke the problem of unity, as in the notion of a 'special' regime. Notice, moreover, that the problem of unity is no less present when scholars refer to regimes as 'arrangements', or to 'normative arrangements' instead of regimes.<sup>104</sup>

#### **2.5.4. The threefold question about the unity of emergent global legal orders**

Enough about governance, network and regime. The thrust of my argument should be clear: each of these notions presupposes, without clarifying, the putative unity of normative orders as the constant leading across the epochal threshold from the state to the global TAR. This is not to say that the kind of putative unity relevant to state law is identical to that of emergent global legal orders. But there are good reasons to believe that it would be premature to write off an enquiry into the claims to unity raised on behalf of the latter as a desperate rear guard attempt to persevere, come what may, in state-centred thinking about law. Here, as in so many other domains, the alleged boldness of the move to jettison a key concept as anachronistic ends up entrenching the conceptual framework it claimed to have left behind. Governance, network and regime, the concepts which are supposed to take us beyond state-centred thinking about law, suggest that an enquiry into emergent global legal orders should allow itself to be guided by the question about unity. For in tracing how emergent global legal orders configure themselves as putative unities, the ground is cleared for understanding how such orders contribute to the globalisation of inclusion and exclusion.

If we accept this invitation, then the IACA-model of law suggests three different but structurally interconnected ways of bringing this general question to bear on an array of examples of emergent global legal orders.

The first concerns what I called *legal collectivity* at the end of Section 2.2: the first-person plural perspective of a 'we' in joint action. As noted in that Section, collective action is not simply the aggregation of acts by individual agents—'we each'; the participants in a group are deemed to act as a *unit*, such that it can be said of each of the participants' interventions that it is the group as a whole which acts, and regardless of whether these participants are themselves groups or individuals. Is there a mutation in this form of putative unity in the passage from state government to global governance? The question is apposite on at least three counts. First, there is widespread agreement that a variety of global regimes rely heavily on governance networks as a novel form of ordering social relations. But networks hold promise, we are told incessantly, of reticulating behaviour in ways which are inimical to the hierarchical ordering which seems to be a necessary feature of the IACA-model of law. Secondly, and moving beyond governance networks, one may wonder wheth-

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<sup>103</sup> Andreas Fischer-Lescano & Gunther Teubner, 'Regime Collisions? The Vain Search for Legal Unity in the Fragmentation of Global Law', in *Michigan Journal of International Law* 25 (2004), 999-1046, 1013.

<sup>104</sup> 'International regimes [are] institutionalized arrangements in different issue areas possessing their own norms and procedures'. Pulkowski, *The Law and Politics of International Regime Conflict*, ix.

er the new *lex mercatoria* is at all amenable to analysis in terms of collective agency. The new law merchant is particularly important because it is viewed by many a scholar as paradigmatic for emergent global law. Thirdly, to what extent is it possible to still speak of the joint ownership of action when participation by the addressees of the process of articulating the point of joint action cannot rely on the institutional venues, electoral and otherwise, of political representation available to (democratic) states? It is here where Shapiro's insight that law deploys 'pre-packaged plans' of action (See Section 2.2.) acquires its full force and urgency. For if modern conditions of massively shared agency are characterised by the possibility of widespread alienation among participant agents, then a theory of legal globalisations must be able to account for conditions of exacerbated alienation of those who are deemed to be participant agents in globalising IACAs. Would the price of 'massively shared agency' under conditions of globalisation be, at least for the time being, the emergence of 'massively estranged agency'? In short, is it still possible to speak of a 'we *together*' in institutionalised and authoritatively mediated joint action in a global context?

The second sense in which global regimes raise questions about legal unity concerns *legal systems*. The reader will remember that I reserve this expression for law as the putative unity of a manifold of legal rules. Kelsen's characterisation of a legal system is exemplary in this respect: "The law *qua* system—the legal system—is a system of legal norms. The first questions to answer here have been put by the Pure Theory of Law in the following way: what accounts for the unity of a plurality of legal norms, and why does a certain legal norm belong to a certain legal order?"<sup>105</sup> Regardless of whether one accepts Kelsen's solution to this question, namely, the presupposition of a basic norm, the question which arises is whether the institutional conditions which made it possible for Kelsen, Hart and their epigones to postulate that a legal system is a unity of legal rules still hold in light of the central role played by networks and the new law merchant in the emergence of global regimes. Do, amongst others, *lex mercatoria* and networked-based forms of global regimes raise a claim to the unity of a manifold of legal rules? If so, is the IACA-model of law up to the task of explaining why and how this is the case?

Yet a third sense in which the problem of unity is at stake in global regimes concerns what I called law as a *concrete order* which establishes who ought to do what, where and when. At issue is whether the new law merchant and network-based forms of global governance regimes countenance the assumption that a legal order appears to participant agents in IACA as a four-dimensional (albeit putative) unity of space, time, subjectivity and act-types. To what extent are forms of global governance compatible with the fourfold unity of a legal order? In particular, the question arises whether global regimes allow for boundaries which are sufficiently resilient to be the object of contestation. One may wonder, in this respect, whether the boundaries of states and the WTO, as described in Chapter 1 and Section 2.3, are at all appropriate to make sense of whatever boundaries may arise with respect to emergent global legal orders as evinced by the new law merchant and networked-based forms of governance, hence to what extent we can actually speak of legal globalisations as *concrete* orders. In particular, if limits presuppose robust legal boundaries, to what extent are emergent global legal orders *limited* in space, time, subjectivity and act-contents? In brief, does it at all make sense to refer to emergent global legal orders as contributing to the globalisation of inclusion and exclusion? If so, what changes when inclusion and exclusion become the affair of legal globalisations?

These three questions about the putative unity of emergent global legal orders are the subject matter of Chapter 3. When addressing these questions, we need to be on guard against too quickly assuming that there is a linear development taking us from the alleged

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<sup>105</sup> Kelsen, *Introduction to the Problems of Legal Theory*, 55.

senescence of state government to the efflorescence of global governance, hence from state law to global regimes. Indeed, Sassen’s thesis that states are deeply involved in processes of globalisation, and in some ways are even its principal actors, opens up a more radical possibility.<sup>106</sup> If, on the one hand, the putative unity of global regimes draws on, and in this sense remains parasitic on, the putative unity of state law, so also the novel structure of global regimes significantly transforms what has been the traditional unity of state law. I will suggest, in the closing pages of Chapter 3, that it is the *entwinement* of state law and global regimes—a relation to the other as an *institutional* condition for the self-relation of a collective: a heteronomous autonomy—which is ultimately novel to legal globalisations, and which poses an interesting challenge to the IACA-model of law.

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<sup>106</sup> ‘Is the role of the state simply one of reducing its authority (for example, as suggested with terms such as deregulation and privatization, and generally “less government”), or does it also require the production of new types of work by states—notably regulations, legislative items, court decision, and executive orders, all amounting to the production of a whole series of new “legalities”?’ Sassen’s answer to this question points in both directions, but preponderantly in the second. My aim, when tracing this process, will be quite limited, namely, to pinpoint the transformation in the concept of normative and legal order it brings about. See Sassen, *Authority, Territory, Rights*, 231.