Julius Stone Address[*]

Inside and Outside Global Law

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Abstract

Protracted and bitter resistance by alter-globalisation and anti-globalisation movements around the world shows that the globalisation of law transpires as the globalisation of inclusion and exclusion. Humanity is inside and outside global law in all its possible manifestations. How is this possible? Conceptually: how must legal orders be structured such that, even if we can now speak of law beyond State borders, no emergent global legal order is possible that can include without excluding? Normatively: is an authoritative politics of boundaries possible, which neither postulates the possibility of realising an all-inclusive global legal order nor accepts resignation or paralysis in the face of the globalisation of inclusion and exclusion? In the spirit of Julius Stone's approach to jurisprudence, addressing these urgent questions demands integrating doctrinal, sociological, and philosophical perspectives and insights concerning the law.

I Introduction

Globalisations take place as the globalisation of inclusion and exclusion. This is more than an incidental empirical finding that calls for analysis and explanation. It highlights the political and ethical stakes of globalisation processes. 'They don't represent us!' and 'Another world is possible!' are the rallying cries to dogged, sometimes desperate, resistance by alter-globalisation movements. Slogans like 'Taking back control of the UK', '*Remettre la France en ordre*' or 'Make America Great Again' are exemplary for the irruption of anti-globalisation movements, populist or otherwise, into institutional politics in the United States ('US') and many European countries; countries that vigorously pushed globalisation. However different their political stances, both alter-globalisation and anti-globalisation movements contest the dynamic of global inclusion and exclusion into which all of us are drawn, in one way or another.

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This current state of affairs is the concern that animates this Julius Stone Address. My aim is to reflect on conceptual and normative issues germane to legal inclusion and exclusion, and on how these issues impinge on emergent global legal orders. After all, the notion of the global seems to hold promise of an all-inclusive order. So also global law, which, in its strongest sense, would be universal law: law that holds everywhere, at all times, and for everyone. If, then, we define emerging global law as that class of legal orders that raise or aspire to raise a claim to global validity — while also operating more or less autonomously with respect to State law — my conceptual question reads as follows: is a global or globalising legal order possible that could include without excluding? If no such legal order is possible, and such is my thesis, why is this the case? How are legal orders structured such that, even if we can now speak of law beyond State borders, no emergent global legal order can include without excluding? This conceptual question leads to a normative query: is there a robust sense of authority available to the process of drawing the boundaries that include in and exclude from legal orders, global or otherwise? In other words, is an authoritative politics of boundaries possible that neither postulates the possibility of realising an all-inclusive global legal order nor accepts resignation or paralysis in the face of the globalisation of inclusion and exclusion? Positing that this concept of authority turns on what I call 'restrained collective self-assertion', this Address concludes by arguing that a double asymmetry governing struggles for representation and recognition can lead beyond current manifestations of global inclusion and exclusion, even if not beyond global inclusion and exclusion as such.

II Disambiguating the Inside/Outside Distinction

The conceptual and normative questions I just posed seem either to trade on metaphor or to be non-starters. For how can we at all speak of inclusion and exclusion in a non-metaphorical sense if, by definition, emergent global legal orders are not structured in terms of the distinction between the domestic and the foreign?

This concern reveals the extent to which territoriality has been decisive in the conceptualisation of legal orders in the framework of the so-called 'Westphalian paradigm'.[1] Of central importance to this paradigm is the State's claim to exclusive territoriality organised in terms of the domestic/foreign distinction. In turn, all and sundry commentators take for granted that the distinction between the domestic and the foreign is synonymous with the distinction between, respectively, inside and outside. The literature invariably assumes that, in contrast with State law, globalising legal orders organise themselves in such a way that the distinction between inside and outside loses empirical and conceptual purchase. This distinction is a merely contingent feature of some legal orders, not a feature that is constitutive for legal orders in general, or so we are repeatedly told. The literature seeks to capture this spatial transformation with references to a 'global perspective', the global 'scale' of

[1] I refer to the 'so-called' Westphalian paradigm because careful historical analysis shows that 'much of the significance attributed to the Westphalia treaties [is, as suggested by Heinz Duchardt,] a *Hineininterpretierung*': Randall Lesaffer, 'The Westphalia Peace Treaties and the Development of the Tradition of Great European Peace Settlements Prior to 1648' (1997) 18 *Grotiana* 71, 94. In particular, 'the idea of sovereign equality between all European states is an unwarranted extension of the internal [German] arrangements': at 94.

law, 'supra-territoriality', 'deterritorialisation', 'delocalisation', 'spaces of flows', and some such.[2]

Whatever its merits, this story conceals an ambiguity that is of crucial importance for a proper understanding of legal globalisations. In effect, I propose to secern two forms of the inside/outside distinction. The first is the distinction between the domestic and the foreign. There need be no quarrel here: this is undoubtedly a contingent feature of legal orders. But a second form of the distinction largely escapes the attention of the literature: the distinction between the claim to a legal collective's *own* space and *strange* places — places which appear through behaviour or situations that challenge how a collective draws boundaries in the space it calls its own.

These two forms of the inside/outside distinction are not identical nor are they reducible to each other. Consider the World Trade Organization ('WTO'). Like a State, the WTO configures itself as a spatial unity — even if in a very different way — namely as a global market. Unlike a State, the WTO organises itself as a unity of legal places — a global market — in a way that supersedes the domestic/foreign distinction associated with States or with (mega-)regional orders such as the European Union ('EU') and the *Comprehensive and Progressive Agreement for Trans-Pacific Partnership*.[3] Yet this does not mean that the WTO has moved beyond the inside/outside distinction in the second sense noted above. Indeed, global activists continuously challenge it as highly exclusionary in its operation. The creation of a world market marginalises other kinds of places as unimportant, yet these are places that activists deem important, intimated by obstreperous behaviour that contests the normative criteria governing how the WTO organises itself as a global market.

Think, for example, of direct action oriented to realising food sovereignty by La Via Campesina, the International Peasants' Movement, a social movement that brings together over 200 million peasants and 182 organisations from 81 countries around the world. One of these organisations, the Karnataka State Farmers' Association ('KRRS'), has mobilised to occupy and destroy fields of genetically modified organism ('GMO') crops owned by Monsanto in India. Their direct action resists the commodification of seed in a global market with a view to preserving and revalorising Indian peasant ways of life. By going inside Monsanto's fields, the KRRS attempt to leave the WTO, adumbrating a place that is *outside* the WTO, even though not in the sense of a 'foreign' place. It is a *strange* place, a place that, from

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2 See, eg William Twining, *General Jurisprudence: Understanding Law from a Global Perspective* (Cambridge University Press, 2009); Boaventura de Sousa Santos, *Toward a New Legal Common Sense: Law, Globalization, and Emancipation*, (Butterworths, 2nd ed, 2002); Manuel Castells, *The Rise of the Network Society* (Wiley-Blackwell, 2nd ed, 2010); Günther Handl, Joachim Zekoll and Peer Zumbansen (eds), *Beyond Territoriality: Transnational Legal Authority in an Age of Globalization* (Martinus Nijhoff Publishers, 2012).

3 *Comprehensive and Progressive Agreement for Trans-Pacific Partnership*, signed 8 March 2018, [2018] ATNIF 1 (entered into force 30 December 2018; 14 January 2019; some signatories still to complete their ratification processes). This Agreement incorporates the provisions of the *Trans-Pacific Partnership Agreement*, Australia–Brunei Darussalam–Canada–Chile–Japan–Malaysia–Mexico–New Zealand–Peru–Singapore–United States–Vietnam, signed 4 February 2016, [2016] ATNIF 2 (not yet in force).

the KRRS's perspective, refuses normative integration into the differentiation and interconnection of places that the WTO calls its *own* space: a global market. By engaging in direct action, the KRRS resist their inclusion in a global market, an inclusion that excludes them from traditional forms of farming on their community lands. When struggling to achieve food sovereignty for their communities, the KRRS are both inside and outside the WTO (and India).[4]

Or consider the *Rome Statute*,[5] which established the International Criminal Court ('ICC') to investigate and prosecute 'the most serious crimes of concern to the international community', as its Preamble puts it; namely genocide, crimes against humanity, war crimes, and the crime of aggression.[6] By regulating the investigation and prosecution of these crimes, the parties to the Statute express their resolve 'to guarantee lasting respect for and the enforcement of international justice'.[7] One may grant that the WTO has an outside, in the sense of a strange place. But surely the *Rome Statute* is an example of an emergent global legal order that has an inside, but no outside. Who could oppose the punishment of these heinous crimes, regardless of where they take place on the face of the Earth, without denying their own humanity?

Well, on occasion the victims themselves. In an early case, the ICC moved to exercise its subsidiary jurisdiction with respect to the crimes committed by the Lord's Resistance Army ('LRA') against members of the Acholi community in Northern Uganda. Strangely (from the perspective of the ICC and the international criminal law movement), the Acholi community, members of whom were victims of these atrocities, vigorously opposed this move. The community argued that restorative justice, not criminal justice, should apply to those participants in the LRA who happened to be members of the Acholi community. In their depositions to the ICC, one of the Acholi Elders asserted that '[t]he court system is justice through punishment. The offender and offended are put aside. This leads to polarisation which will lead to death.'[8] In the words of a member of the Acholi community, '[i]n traditional Acholi culture, justice is done for *ber bedo*, to restore harmonious life'.[9] Yet the ICC shrugged off the Acholi's demand, holding that criminal justice must trump restorative justice because the latter is traditional and local, whereas the former is modern and universal. The ICC collapsed global justice into criminal justice, literally excluding a part of humanity from other forms of justice by including it where criminal justice holds sway. In effect, Acholi land is not simply

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4 For a detailed analysis of the interaction between the KRRS and the WTO, see Hans Lindahl, *Authority and the Globalisation of Inclusion and Exclusion* (Cambridge University Press, 2018).

5 *Rome Statute of the International Criminal Court*, opened for signature 17 July 1998, 2187 UNTS 90 (entered into force 1 July 2002) ('*Rome Statute*').

6 For a detailed analysis of this case, see Hans Lindahl, 'The *Rome Statute*: Global Justice and the Asymmetries of Recognition' (2019) 25(2) *Indiana Journal of Global Legal Studies* 671.

7 *Rome Statute* Preamble.

8 Cited in Sarah M H Nouwen and Wouter G Werner, 'Monopolizing Global Justice: International Law as Challenge to Human Diversity' (2015) 13(1) *Journal of International Criminal Justice* 157, 165–6.

9 Liu Institute for Global Issues, Gulu District NGO Forum and Ker Kwaro Acholi, *Roco Wat I Acoli: Restoring Relationships in Acholi-Land — Traditional Approaches to Justice and Reintegration* (2005) 14 (citation omitted) <https://sppga.ubc.ca/wp-content/uploads/sites/5/2016/03/15Sept2005_Roco_Wat_I_Acoli.pdf>.

one place in the unity of interconnected places that constitutes the ICC's jurisdiction. What, for the Acholi, defines their land as the place of their community — namely, where restorative justice ought to reign — does not simply coincide with what determines it as a place for the *Rome Statute* and the ICC, where criminal justice ought to carry the day. Humanity is inside and outside the *Rome Statute*.

The point I seek to make about the WTO and the *Rome Statute* would also hold, I conjecture, for *lex sportiva*, *lex digitalis,* the new *lex mercatoria,* and whatever other candidates for the status of emergent global legal orders we could imagine. In particular, I conjecture that it would also hold for a global order of human rights law, were it ever enacted. Humanity is inside and outside global law in all its possible manifestations. In fact, the spatial dynamic of inclusion and exclusion also holds for classical international law, even though it covers the whole face of the Earth, as resistance by many indigenous peoples to an 'internal' right of self-determination (that is, self-determination within and as part of Nation States) makes all too clear. The Aboriginal Tent Embassy on the lawn opposite Old Parliament House in Canberra is a case in point.[10]

In conclusion, although not all legal orders are *bordered*, hence organised in terms of the distinction between the domestic and the foreign, I surmise that all legal orders, global or otherwise, are spatially *limited*, in the sense of a bounded configuration of ought-places that excludes other possible ways of organising ought-places into a spatial unity. Borders are indeed a contingent feature of certain legal orders; limits, to the contrary, are a necessary feature thereof — or so I conjecture. Whereas only borders separate space into the domestic and the foreign, *all* spatial boundaries can appear as limits of a legal order. No global legal order can avoid closing itself by way of limits that separate and join an inside and an outside. Global law cannot be law unless it is local law.

The English word 'space', when interpreted as the Cartesian notion of an infinite, three-dimensional extension, distorts the nature of a space of action. Branch notes that

> the modern conception sees space — particularly land areas — as a surface that is homogeneous and geometrically divisible and on which different areas or places differ only quantitatively, not qualitatively. This stands in stark contrast to the medieval view of the world as a series of unique places, connected by routes of travel rather than by geometric relationships.[11]

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[10] See Gary Foley, Andrew Schaap and Edwina Howell (eds), *The Aboriginal Tent Embassy: Sovereignty, Black Power, Land Rights and the State* (Routledge, 2013).

[11] Jordan Branch, *The Cartographic State: Maps, Territory, and the Origins of Sovereignty* (Cambridge University Press, 2014) 55. The attraction that this cartographic notion of space exercises on modern political theory is highlighted by the fact that even Moore's powerful defence of territoriality interprets territory as a 'specific geographical area': Margaret Moore, *A Political Theory of Territory* (Oxford University Press, 2015) 39. Consequently, the putative unity of territory as a space of action, and the distinction between its borders and limits, remains beyond the purview of her account of jurisdictional authority. Likewise, if territoriality is no more than a geographical area, then the connection between collectivity and place is external and, as such, in need of justification. As will be shown in the Part III of this article, when discussing collective action, this justification comes too late: there is an *internal* relation between collectivity and the claim to an own place, even if this claim is defeasible.

While cartographic technologies certainly transform our understanding of space, as concerns political power they primarily open up new ways for representing and organising a *space of action*, hence a unity of ought-places with an inside and an outside in which the quantitative determination of places is always at the service of their qualitative determination. Political power cannot be exercised over extension because extension is not a space in which we can live and act. Likewise, however different the relation of power to place in a medieval community as compared to the cartographic State, a 'series' or 'list' of 'unique places' presupposes an organising principle that groups together a series of places into a whole in the form of a space of action that joins and separates an inside and an outside. The word 'room', in the sense of a legal order as making room for action, is much closer to the mark, a meaning that resonates with the German noun for space, *Raum*. For a room is a place that draws its sense from being an inside vis-à-vis an outside. Although I refer hereinafter to legal space and spatiality, it is in the sense of law's roominess or spaciousness and lack thereof — of action that is literally emplaced, misplaced, or displaced.

III Collective Action

Justifying this strong claim about the limits of legal orders requires drastically reconsidering the state-centred concept of law that has governed Western jurisprudential thinking during the last centuries. While States will certainly continue to be of central importance into the future, a more general concept of legal order is required that does justice to our current condition of global legal pluralism.[12] The key issue for this more general concept of legal order is the problem of legal boundaries, which jurisprudence typically dismisses as an issue for legal sociology. Instead of joining the traditional jurisprudential fray about the relation between law and morality, I propose to shift the debate, focusing on a particularly pressing jurisprudential question in our contemporary situation: how are legal orders structured, such that they include and exclude?

I submit that describing legal orders, global or otherwise, as a species of collective action explains why their basic function is to include and exclude. To assert that legal orders are a species of collective action is to aver that participation in a legal order involves taking up a group or first-person plural perspective. Legal orders involve an explicit or implicit reference to a 'we' in the form of a 'we together', rather than a 'we each'.[13] I pick out only those features accruing to collective action that explain why legal orders organise themselves as an inside vis-à-vis an outside.

To begin with, legal orders, like other forms of collective action, have a point: that which our joint action is/ought to be about, for example realising 'free' global

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[12] See Ralf Michaels, 'Global Legal Pluralism' (2009) 5 *Annual Review of Law and Social Science* 243; Paul Schiff Berman, *Global Legal Pluralism: A Jurisprudence of Law Beyond Borders* (Cambridge University Press, 2012).

[13] Margaret Gilbert, *On Social Facts* (Princeton University Press, 2nd ed, 1992) 168. I make no effort hereinafter to offer a full analysis of legal order as such, nor do I offer a taxonomy of legal orders that distinguishes between, say, States and other kinds of legal order.

trade (the WTO)[14] or investigating and prosecuting 'the most serious crimes of concern to the international community'[15] (the *Rome Statute*). Point functions as the cynosure for participants in joint action, even though it has a core of irreducible opaqueness, such that we never fully know what we are doing together. Point is spelled out in directed or relational obligations that, when taken together, constitute its default setting. For example, the 'most-favoured-nation clause' requires each country participating in the WTO to offer the same trading terms to all other WTO countries.[16] Collective action gives rise to what counts as justified mutual expectations about the deportment of those involved in joint action, such that participant agents expect, or are deemed to expect, of each other that they will do their part in pulling off the joint act. These reciprocal expectations (about which more in Part VI below) grant standing to participant agents to rebuke those who disappoint their expectations. As concerns legal orders, the default setting of joint action is what jurisprudence calls a legal system, that is, a unity of rules.

The articulation of the point of collective action via directed or relational obligations has its counterpart in the emergence of a four-dimensional pragmatic order. Legal positivism has accustomed us to interpret legal orders as systems of rules, largely neglecting an analysis of law as a pragmatic order. Even when jurisprudence views legal order as a specific normative practice, it pays insufficient attention to the perspective of agents whose behaviour is regulated by legal rules. From this agent-centred perspective, a legal order is a four-dimensional order of action that determines who ought to do what, where, and when.[17] A legal order distinguishes and interconnects certain places, subjects, times, and act contents. It also welds these four kinds of normative relations into the dimensions of a single order of action, such that certain acts by certain persons are commanded, allowed, or disallowed at certain times and in certain places. In fact, distinguishing between these four dimensions is the outcome of an abstractive process of what manifests itself to actors as a single, concrete order of action. For example, the WTO not only organises itself as a global market, but also as a collective with a history of its own, in which a series of trade negotiations — oriented to progressively lowering customs tariffs and other trade barriers, and to opening and keeping open services markets — connects past, present, and future into a single, and meaningful, temporal arc. The WTO is a space–time. Additionally, it creates certain subjectivities, such as Member States, various councils and committees, dispute settlement panels and an Appellate Body. The WTO also spells out what kinds of acts should take place, such as lowering customs tariffs. The WTO can only organise itself as a space–time by organising itself as a specific configuration of subjectivities and act-contents; conversely, the WTO cannot configure subjectivities and act-contents without

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14 'The [WTO] system's overriding purpose is to help trade flow as freely as possible — so long as there are no undesirable side effects — because this is important for economic development and well-being.': WTO, *Understanding the WTO: Who We Are* (2019) <https://www.wto.org/english/thewto_e/whatis_e/who_we_are_e.htm>.

15 *Rome Statute* Preamble.

16 *General Agreement on Tariffs and Trade 1947* art I, incorporated by reference into *Marrakesh Agreement Establishing the World Trade Organization*, opened for signature 15 April 1994, 1868 UNTS 186 (entered into force 1 January 1995) annex 1A.

17 The fourfold distinction between jurisdiction *ratione materiae*, *ratione temporis*, *ratione loci,* and *ratione personae*, is but one of the manifestations of the four dimensions of law as a pragmatic order.

organising itself as a space–time.[18] By setting the boundaries of who ought to do what, where, and when, the rules of legal orders determine the boundaries of (il)legality, that is, of legal (dis)order. Conversely, legal orders establish what counts as (il)legality or (dis)order by drawing the spatial, temporal, subjective, and material boundaries of behaviour.

Crucially, collective action necessarily includes and excludes. The point of joint action determines what is important to joint action and what is not, hence what kinds of places, times, subjectivities, and act-types are included therein, such that other practical possibilities — other possible combinations of these four dimensions of behaviour — are marginalised as inconsequential. For example, the *Rome Statute* only regulates the who, what, where, and when related to the four crimes that fall within its jurisdiction; everything else (including other crimes) is marginalised as unimportant thereto. Those possibilities for acting jointly that are excluded as unimportant belong to the domain of what remains, at least for the time being, as legally *unordered*. What is included in the perspective of a collective self is deemed to be our own space, our own history, and so on; what is excluded therefrom becomes the domain of what counts as a group's other. The emergence of a limited pragmatic order and the emergence of the distinction between a collective self and other-than-self are two sides of the same coin.

The unordered is a wellspring of marginalised practical possibilities that can irrupt into collective action, challenging what counts as (il)legal behaviour, hence questioning how it draws the fourfold boundaries that constitute it as a pragmatic order. Those challenges expose certain spatial, temporal, subjective, and material boundaries as marking the limit of a legal order. When, for example, the KRRS entered the fields of Monsanto to destroy GMO crops, they did more than resist their inclusion in the unity of ought-places that configures the WTO as a global market. They also opposed the temporality of global trade, forfending the temporal rhythm of traditional farming techniques. Likewise, they contested the kinds of subjectivities and ways of acting presupposed by trade in a global market, asserting the importance for their communities of being farmers who sow the seed they have themselves harvested and saved for future planting. When a collective's joint action and its fourfold boundaries are contested, its other appears as strange, that is, as resisting intelligibility on the basis of how the collective structures reality. Limits are the limits of intelligibility.

Legal orders structure the real as either legal or illegal. I dub 'strange' behaviour or situations the domain of a-legality, where the 'a' of a-legality does not refer to legal disorder, which is intelligible in the form of illegality, hence as a negative determination of legality. Instead, it refers to another legal order that organises the legal/illegal distinction differently, hence structures reality in a way that is unintelligible for the order it questions. A-legality refers to an emergent normative order that is strange by dint of challenging how a given legal order draws

[18] For a detailed analysis of legal orders as four-dimensional pragmatic orders, see Hans Lindahl, 'Boundaries and the Concept of Legal Order' (2011) 2(1) *Jurisprudence: An International Journal of Legal and Political Thought* 73.

the spatial, temporal, subjective, and material boundaries through which it configures what counts as (il)legal behaviour.[19]

We can now turn to a second constitutive element of legal orders: authority. Three features of collective action explain why it often takes on the form of authoritatively mediated collective action. First, questions are bound to arise as to the point of joint action, that is, about what it is that we are doing/ought to do together. Second, it may be contentious whether or not we are actually acting together in a way conducive to realising the point of joint action; hence whether, in a changing context of action, corrective steps are necessary to ensure that we succeed in pulling it off. Third, collectives often need to deal with disobedient participants. A variety of groups may or may not introduce authorities to deal with these problems; for instance, a group of musicians may or may not have a conductor. Regardless of how other kinds of groups solve these problems, legal orders belong to the class of collective action in which authorities, acting on behalf of the group as a whole, address these three problems in a way that is binding for participants. Indeed, authorities issue the rules that constitute the default setting of joint action; they check along the way whether collective action is on course; they uphold action in line with the default setting thereof. In short, the exercise of authority in legal orders involves articulating, monitoring, and upholding joint action. In so doing, authorities exercise normative power: they determine the normative status of the participants in joint action by establishing who ought to do what, where, and when. Importantly, the authoritative mediation of joint action is hybrid in character: it involves an assessment, both normative and factual, about a collective and the context of joint action. Authorities articulate, monitor, and uphold what our joint action is/ought to be about.

Admittedly, this is a strictly functional interpretation of authority: authority is what it does. Yet this stripped-down, functional approach has the advantage of revealing the internal connection between authority and the dynamic of inclusion and exclusion. What is most fundamentally at stake in authority as the exercise of normative power is the basic function of legal ordering, namely, to include in and exclude from joint action by setting the limit between collective self and other-than-self.

Let me briefly highlight three implications of the model of law outlined heretofore, all of which shed light on global legal pluralism. First, the model explains why the 'overlap' of legal orders is possible. Indeed, legal orders can share a physical space, while also organising it differently in terms of their respective points of joint action, that is, organising this space as different unities of ought-places. The claim to exclusive jurisdiction by Nation States is, historically speaking, but one of the many ways of organising legal spatiality, of which overlapping orders are the rule, not the exception.

Second, while I have focused on the differentiation of space into distinct legal orders, viewing these as a species of collective action entails that global legal

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[19] See Hans Lindahl, *Fault Lines of Globalization: Legal Order and the Politics of A-Legality* (Oxford University Press, 2013); Hans Lindahl, 'A-Legality: Postnationalism and the Question of Legal Boundaries' (2010) 73(1) *Modern Law Review* 30.

pluralism concerns all four dimensions of action. It would be reductive to approach the globalisation of legal orders only in terms of their spatiality. The emergence of global legal orders involves the emergence of a plurality of pragmatic orders, each of which articulates time, space, subjectivities, and act-types in a distinctive way.

Third, there are weak and strong forms of global legal pluralism. The former refers to the coexistence of a plurality of legal orders in a given physical space and calendar time, a coexistence that takes shape in the distinction between the first-person plural perspective of a given collective and the group perspectives of other groups: a collective self and its others. Strong global legal plurality manifests itself in the experience of the limits of a legal order. Resistance by the KRRS and Acholi to the WTO and the jurisdiction of the ICC, respectively, are exemplary for this strong sense of global legal pluralism: the conflictual relation between collective self and the other (in ourselves) as strange. The qualification 'in ourselves' is important because it shows that the strange is already always within and not simply outside: if the foreign need not be strange, so also the strange need not be foreign.[20]

IV Struggles for Representation

If, as my analysis of collective actions suggests, inclusion and exclusion are the key function of legal order, then struggle — struggle about inclusion in and exclusion from a collective — is coeval with legal order in general, and emergent global legal orders in particular. 'They don't/can't represent us!' 'Take back control of our country!' 'We are the 99%' '*Que se vayan todos!*' (They must all leave!). These are some of the cries of opposition to the dynamic of inclusion and exclusion accruing to once resplendent, now tarnished globalisations. Implicitly or explicitly, all these cries of resistance censure representation when challenging the terms of inclusion and exclusion. Why? How are representation and the operation of inclusion/exclusion related to each other, such that challenges to globalisation processes by alter- and anti-globalisation movements are, in effect, struggles about representation?

Addressing this question demands shifting from a structural to a genetic account of collective action, and therewith to inclusion and exclusion as a dynamic or process. For the analysis I offered heretofore of collective action took for granted

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[20] It will not work, therefore, to interpret and defend global pluralism as the cornerstone of an agonistic politics in terms of what Mouffe calls a multipolar agonistic world. 'Once it is acknowledged that there is no "beyond hegemony", the only conceivable strategy for overcoming world dependence on a single power is to find ways to "pluralize" hegemony. And this can be done only through the recognition of a multiplicity of regional powers.': Chantal Mouffe, *On the Political* (Routledge, 2005) 118. A first inconvenience of this interpretation of global pluralism is its State-centredness. Second, and more fundamentally, a multipolar agonistic world, as Mouffe describes it, is a plurality of unities, not the pluralisation of unity itself. Hers is a reductive reading of political agonism in a global setting that ends up aligning the distinction between the domestic and the foreign with the distinction between the own and the strange, thereby running the risk of hypostasising collective identities. By contrast, my strong reading of global legal pluralism makes room for the emergence of globalising normative orders that are *transversal*, as one might put it: the strange within ourselves joins forces with others elsewhere to intimate novel ways of acting and living jointly in a global setting. The La Via Campesina is an excellent example of globalisation as transversalisation. See also Chantal Mouffe, *Agonistics: Thinking the World Politically* (Verso, 2013).

that the WTO, the international community of States that ratified the *Rome Statute*, and even the KRRS or the Acholi, already exist as collectives. How does the first-person plural perspective of a 'we together' emerge in the first place? What does it mean to speak of *emergent* global legal orders?

This question allows me to introduce a fundamental feature of collective action that I have kept in reserve up to now: representation. The unity implied in the group perspective of a 'we together' is always and necessarily a represented unity, regardless of whether the group has two or two billion participants. As Waldenfels points out, we cannot say 'we'; someone has to act or speak on behalf of a group, and not simply as an aggregation of agents, but rather as a whole or unity.[21] Collective acts are acts imputed or ascribed to the collective as its acts, whether by participants or by third parties. Paradoxically, the agency of collective agency is most accurately formulated in the passive form, rather than the active form favoured by English grammar. For, strictly speaking, it is not the collective that, for instance, enacts rules, but rather rules that are deemed to be enacted by the collective (as a unity). Precisely because unity is always and necessarily a represented unity, a collective emerges as an *us* before becoming a *we*: no group gets off the ground unless someone convokes two or more agents to view themselves as a collective self. Prioritising 'us', namely the grammatical objective case of 'we', highlights a fundamental passivity governing the emergence of a group, a passivity that usually gets lost in references to the democratic *self*-constitution of a collective. A theory of collective action must begin as a theory about collective passion.

The convocation to collectivity, like all acts of representation, has two faces. Borrowing a distinction introduced by Goodman in his groundbreaking book, *Languages of Art*, representation is indissolubly representation *of* (something) and representation *as* (this or that).[22] Defined thus, representation concerns the human relation to reality in general. Its scope is vast, including language, art, religion, science, the economy, politics, law, and technology.[23] As concerns collective action, whoever claims to represent a collective asseverates *that* there is a collective (representation of) and *what* joins together its participant agents (representation as). Regarding legal orders as a species of collective action, representation is at work when, for example, someone posits a default setting of joint action and attributes it to a collective as its own act. Importantly, the dynamic of representation ensures that there is no direct access to what constitutes us as a unity; our access to ourselves is always mediate or indirect: we represent ourselves as *this* — rather than *that* — unity. More precisely: someone represents us as this — and not that — unity, even when that someone is me.

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[21] Bernhard Waldenfels, *Verfremdung der Moderne: Phänomenologische Grenzgänge* (Wallstein Verlag, 2001) 140.

[22] Nelson Goodman, *Languages of Art: An Approach to a Theory of Symbols* (Hackett Publishing, 1976). Phenomenologists will immediately recognise in this distinction the dynamic of what Husserl called 'intentionality', which Heidegger later qualified as 'understanding'. For an excellent analysis of scientific theories and models as representations, see Bas C van Fraassen, *Scientific Representation: Paradoxes of Perspective* (Clarendon Press, 2008).

[23] The cartographic technologies instrumental to the mapping of State territories are, of course, a salient example of representation in its twofold sense. As a representational form, cartographic technologies allow us to see something as this, while not seeing it as that.

The representational character of collective action ruins all attempts, whether by communitarianism or by a range of anti-globalisation movements, to postulate direct access to an original unity and identity that could conclusively dispel doubts about what is truly our own — authentic — way of being. Certainly, representation must claim to be able to articulate who and what we really are about; yet this articulation is premature and contestable, which means that collectives are always more and other than as represented in the default setting of joint action.

Here, then, is the internal connection between representation and the operation of inclusion/exclusion. To represent is to include in, and to exclude from, joint action by revealing us as this (rather than as that) collective, for example as economic actors engaged in furthering free global trade rather than as farmers who aspire to realising food sovereignty. As a result, representation ensures that collectives are doubly contingent: it is contingent that we are and what we are as a collective. In particular, contingency permeates the closure that separates a collective inside from its outside: we represent ourselves as *this* interconnected distribution of ought-places, rather than *that* one. Collectives are never simply in-place: they are ever vulnerable to a-legal behaviour that challenges their claim to a space of their own. By creating the distinction between legal emplacement and misplacement, representation elicits displacements that challenge the commonality of the space claimed by a collective. That they are never simply in-place also means that collectives are here *and* elsewhere, that no given spatial closure exhausts how they can emplace themselves.

Notice, therefore, the ambiguity of representational acts. On the one hand, no collective, no first-person plural perspective could emerge in the absence of representational acts that seize the initiative to claim that a manifold of individuals exist as a collective and as this collective. On the other hand, representation also entails that collectives are irreducibly contingent because there is no direct access to an original unity that could dispel controversy as to whether a collective really exists and what constitutes it as a unity. As a result, the representation of collective unity is always also its *mis*representation; an opening up of a domain of practical possibilities and a closing down of other ways of being together; an integrative and disintegrative act. We are never fully 'we together'; we are always also 'we each'.

This insight casts new light on the ontology of collectives, their way of being. Theories of collective action have fought a successful battle against methodological individualism, demonstrating that collectives have an existence irreducible to that of their participants, even though the existence of groups depends on the acts of the agents that compose them. Well and good. Yet the contingency of collectives points to two further features of the ontology of social collectives in general, and of legal orders in particular. Indeed, the default setting of the point of joint action at any given point in time is a response to the hybrid question, 'What is/ought our joint action to be about?' Collectives cannot but respond time and again to this question by setting the boundaries of (il)legality because questionability is a constitutive element of the mode of being of collectives. Collectives are constitutively exposed to a-legal challenges by the other (in themselves). Certainly, the hybrid question about who we are/ought to be only bursts into the open when the unity of the collective is challenged. But every collective act is a response to this question, even

when the rules that make up the default setting of the point of joint action are followed more or less as a matter of course in the warp and woof of the everyday. Accordingly, responsiveness, as much as questionability, belongs to a collective's ontology: every representational act, including the 'first' act that gets a collective going, has a responsive structure. To represent ourselves as this or as that, even if otherwise than before, is to respond to the question 'What is our/ought our joint action to be about?' The responsive structure of representation gives the lie to political Cartesianism, namely the assumption that collective self is prior to other-than-self, ensuring that collectives are ec-centric, that they begin elsewhere than in themselves.[24]

These considerations explain what I called the *dynamic* of inclusion and exclusion. Paradoxically, the first act that gets a collective going must come second if it is to be the first act. The 're' of representation presupposes an original collective, yet an original collective to which there is no direct access because it is only present through its representations. This holds for the WTO and the *Rome Statute*. It also holds for alter-globalisation movements when they claim to do no more than 'retake' the space that has been taken from them: 'taking back what is ours'.[25] Likewise, despite the promises by those who support the United Kingdom leaving the EU ('Brexiters') to 'take back control', by French politician Marine Le Pen to '*Remettre la France en ordre*', and by American President Donald Trump to 'Make America great again', the representational character of such promises ensures that there is no return to an original, pristine unity that is itself beyond question. To represent the original unity is to change it, hence to forfeit what would ground a legal order as being indisputably 'ours'.[26]

If representation entails that there is no direct access to an original collective unity, so also it entails that there is no direct access to the a-legal challenge to which representation responds. By establishing what our joint action is/ought to be about, representational acts indirectly indicate how the jointness of (presupposed) joint action is questioned. A collective self-representation is always also a representation of the other, and vice versa. Here again, contingency kicks in: why assume that we

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[24] I borrow Plessner's thesis about 'eccentric positionality', giving it a collective reading. See Helmuth Plessner, *Die Stufen des Organischen und der Mensch: Einleitung in die Philosophische Anthropologie* (de Gruyter, 1965).

[25] Marina Sitrin and Dario Azzellini, *They Can't Represent Us! Democracy from Greece to Occupy* (Verso, 2014) 11.

[26] The absence of an original unity does not mean, however, that anything holds with representational acts, as though it makes no difference whether a collective is represented in one way or another. Were such the case, then there would be no *re*-presentation, but rather the pure presentation or *creatio ex nihilo* of collectivity. The presupposition that there is a collective and what joins its members together must have some purchase on social and natural reality if representational acts are to succeed. Kant was well aware of this problem in the *Critique of Pure Reason* when postulating a transcendental principle of homogeneity, which 'is necessarily presupposed in the manifold of possible experience . . . for in the absence of homogeneity, no empirical concepts, and therefore no experience, would be possible': Immanuel Kant, *Critique of Pure Reason* (Norman Kemp Smith trans, Macmillan Education, 1987) A 654 [trans of: *Kritik der Reinen Vernunft* (first published 1781)]. Transposed to the social domain, this means that representation must be able to reveal a manifold that is 'intrinsically organized to a minimal degree, since it must be at least *organizable*': Cornelius Castoriadis, *Philosophy, Politics, Autonomy*, edited by David Ames Curtis (Oxford University Press, 1991) 89.

are being challenged in this way, rather than that? At stake in the representation of collective unity is never only the appropriate response among a range of possible responses to a given challenge to collective unity, for no challenge is given directly and of itself. Because every representation is an indirect response to what a challenge is about, no representation can exhaust the nature of the challenge, either normatively or factually. Representation includes and excludes *us*; it also includes and excludes the *other*. Both collective self and other are inextricably caught up in the operation of inclusion and exclusion deployed by the interplay between question and response. Collectives are always in excess of their representations; so also the a-legal challenges to which they respond.

In short, collectives cannot but incessantly represent themselves and other-than-self because no representation can be definitive for either pole of intersubjective relations. Representation entails that the 'inter' of intersubjectivity refers to an in-between beyond the definitive control of either collective self or other-than-self, such that the boundaries of legal orders are never simply ours nor theirs, hence constitutively unstable. Questions about who we are/ought to be, and about the other (in ourselves) as other than us, only admit of provisional responses.

This explains why legal order is a process, a legal order-*ing*: always an order-in-the-making, never a definitive state; always an *ordo ordinans*, never an *ordo ordinatus*, even when, in conditions of relative stability, representation primarily reproduces the extant order. The 're' of representation means that we (are deemed to) present ourselves *anew* as this or that unity, where 'anew' hovers somewhere between pure repetition and pure innovation, always introducing a difference, however minimal, into collective identity over time.[27]

Allow me to summarise these considerations on the internal relation between representation and the operation of inclusion/exclusion as follows:

Thesis 1: The unity of a collective is putative.
Thesis 2: There is, strictly speaking, no unity, only a process of unification.
Thesis 3: There is, strictly speaking, no plurality, only a process of pluralisation.
Thesis 4: Unification and pluralisation are the two faces of the single process of representation.

These four theses about representation explain the dynamic of inclusion and exclusion that drives emergent global legal orders, including the WTO and the *Rome Statute*. They explain, in particular, why global law pluralises humanity in the process of unifying it, hence why humanity is necessarily both inside and outside global law. Those who claim to represent humanity when enacting a global legal order, whatever its point, cannot but represent humanity as this or as that, differentiating it with respect to itself in the process of identifying what is to count as humanity for the purposes of that legal order. Emergent global legal orders can take up a first-person plural perspective *on* humanity, not the perspective *of* humanity.

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[27] Ferdinando Menga draws on the concept of 'expression', as elaborated in Heidegger's early work, Merleau-Ponty, and Waldenfels, to illuminate the structure and dynamic of (political) representation. See Ferdinando Menga, *Ausdruck, Mitwelt, Ordnung: Zur Ursprünglichkeit einer Dimension des Politischen im Anschluss an die Philosophie des frühen Heidegger* (Wilhelm Fink, 2018) 33–80.

V Participation is Representation

These four theses also explain why alter- and anti-globalisation movements take aim at representation when they cry out 'They don't/can't represent us!'; 'Take back control of our country!'; 'We are the 99%'; '*Que se vayan todos!*' (They must all leave!). They decry the misrepresentations that take place, whether by inclusion or by exclusion, in the course of legal globalisations, demanding that representation give way to participation. For a wide range of alter- and anti-globalisation movements, the contradiction between representation and democracy bursts into full view with the globalisation of inclusion and exclusion.

> This [historical epoch] is marked by an ever increasing global rejection of representative democracy and, simultaneously, a massive coming together of people who were not previously organized, using direct democratic form to begin to reinvent ways of being together.[28]

They fustigate representation as an act whereby individuals or groups arrogate to themselves the power to rule over others, creating a cleavage between those who rule and those who are ruled — *transitive* power, as one might call it. By contrast, democratic self-rule is power that we exercise over ourselves by participating directly in collective decision-making. Democracy consists in the exercise of *intransitive* or reflexive power, power over ourselves: collective self-rule, hence a collective self-binding. Rancière, the French political philosopher, argues in a particularly trenchant intervention that representation is 'by rights, an oligarchic form [of government], a representation of minorities who are entitled to take charge of public affairs'.[29] '"Representative democracy"', he adds, 'might appear today as a pleonasm. But it was initially an oxymoron.'[30] There is no doubt that, for him, like for many other political theorists and activists, representative democracy remains an oxymoron: democracy, if it is to mean collective self-rule, can only pass muster as participative or direct democracy.[31]

At bottom, alter- and anti-globalisation movements censure the mode of authority they associate with representation. In a minimalistic characterisation, authority is factually contextualised normative power; that is, power to change the normative status of its addressee(s). Therefore, those movements argue, representational authority is the expression of domination exercised through unilateral acts of inclusion and exclusion imposed on their addressees. Against representational authority, these movements appeal to participative authority, to participation in democratic decision-making as the condign mode of collective self-rule and self-binding.

The analysis of representation outlined above and in Part IV accounts for the worry voiced by alter- and anti-globalisation movements when they point out that

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28 Sitrin and Azzellini, above n 25, 6.

29 Jacques Rancière, *Hatred of Democracy* (Steve Corcoran trans, Verso, 2007) 53 [trans of: *La Haine de la Démocratie* (first published 2005)].

30 Ibid 53.

31 Arendt, for example, contrasts party democracy to worker council democracy, asserting that 'the issue at stake [is] representation versus action and participation': Hannah Arendt, *On Revolution* (Penguin Books, 1973) 273.

representation deploys transitive power: power by some over others. Because the unity of a collective is a represented unity, someone must *take* the initiative to speak and act on behalf of the whole, a taking that is always more or less unauthorised, always more or less forceful, when representing unity thus and not otherwise. This taking is also a *taking place*, a spatial closure that includes in and excludes from what the representational act deems to be a collective's own space. It is no coincidence that one of the emblematic movements against the globalisation of capitalism calls itself 'Occupy Wall Street'. By *occupying* Wall Street, the movement understands itself as retaking or reclaiming the space from which they have been dispossessed by capitalist place taking. The movement forces a closure, which it claims to be legitimate by dint of retaking place.

Thus, my account of representation fully acknowledges the misrepresentations wrought by emergent global legal orders, which alter- and anti-globalisation movements denounce.

Yet there is more to representation than only an act of (spatial) misrepresentation and domination of the many ('We are the 99%!') by the few. For the one, representation, as transitive power, has a positive function: there can be no intransitive power, no power over ourselves, unless someone seizes the initiative to act and speak on behalf of us. For the other, it would be reductive to equate representation with transitive power. To represent, as argued heretofore, is to represent a multeity of agents as a *whole*, that is, a group to whom the representative claims to belong. Representation has an intransitive or reflexive purport. The intransitivity of power is built into the thesis that representation is necessary because someone must say 'we' on behalf of *we* — not of *they*. The 100% of 'We are the 99%' is not simply a quantitative aggregate of individuals; it is a qualitative integrate, a putative unity of individuals. Authority is representational authority. Taken together, the transitive and intransitive dimensions of authority evince its irreducibly ambiguous status, for there can be no authoritative representation of commonality, of what joins us together, without an element of forceful, even violent, marginalisation.

By this analysis, the conceptual opposition between participative and representative democracy, between direct and indirect democracy, is specious. Consider, to this effect, the 'crisis of representation' as diagnosed by an activist from the Solidarity Health Clinic in Thessaloniki, in the midst of the social upheaval caused by the austerity measures forced upon Greece by the EU:

> We are very used to delegating responsibility to somebody else and giving them the power to make decisions over what is happening. We don't think of that as democratic. We don't want to have representatives, we want to represent ourselves.[32]

Notice how this comment inadvertently confirms that participation is representation, while also revealing the intransitivity or reflexivity of representation: 'we want to represent *ourselves*'.

Mine is not a philippic against participation, nor am I suggesting that its votaries are callous or naïve. Far from it. The point is, instead, that participation, like

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[32] Sitrin and Azzellini, above n 25, 52.

all other vehicles for representing collective unity, deploys the *forceful* dynamic of inclusion and exclusion. By playing off participation against representation, the activist's comment conceals the ambiguity that accrues to participation, and precisely because participation deploys both transitive and intransitive power. We cannot participate in representing ourselves, other than by representing ourselves as this, not as that, hence by marginalising, more or less forcefully, at least some claims as to what joins us together, even when representation takes place through participatory processes. Participation misrepresents collective unity in the process of representing it.

More radically, the call for direct democracy through participation elides the twofold alterity at work in collective self-rule. On the one hand, someone must seize the initiative to represent us, summoning us to view ourselves as a group that would rule over itself. On the other, that we are a collective and what we are as a collective has its inception elsewhere, namely, in the a-legal challenge to which the representation of collective unity is a response. At the beginning and as the beginning was a-legality.

Thus, the activist's defence of a model of authority based on the supposed immediacy of collective self-rule falls prey to political Cartesianism, as does Rancière's. For it makes no sense to claim that representative democracy is an oxymoron: representation is a conditio sine qua non of democracy, even if not its condition per quam. Democracy is the form of government in which the exercise of authority acknowledges and seeks to deal with the irreducible contingency of all representations of collective self and other-than-self. In other words, democracy seeks to deal with the fact that representations of collective self and other-than-self are always also, to a lesser or greater extent, misrepresentations thereof. The crisis of representation unleashed by globalisation is a struggle for, not against, representation, that is, a struggle about whether we are a collective and what we are/ought to be as a collective. This is nothing other than a struggle about the terms of authoritative inclusion in and exclusion from globalising legal orders.

VI Struggles for Recognition

A further step in the direction of a robust concept of authority involves reconstructing struggles for representation as struggles for recognition. In effect, the normative dimension of struggles for representation comes into view when interpreted as struggles for the collective recognition of an identity/difference violated or threatened by inclusion in and exclusion from a legal order. Moreover, as will transpire, the ambiguity we have discovered in representational processes — namely that representation is always also misrepresentation — returns unabated in struggles for recognition.[33]

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[33] Recognition is never only a normative category; it is also cognitive, which means that recognition, like representation, is a hybrid category. A systematic account of the cognitive and normative dimensions of representation, recognition, and authority falls beyond the scope of this Address. See Paul Ricœur, *The Course of Recognition* (David Pellauer trans, Harvard University Press, 2005) [trans of: *Parcours de la Reconnaissance* (first published 2004)].

By entering into and destroying the fields of GMO crops owned by Monsanto, the KRRS claim that their community is misrecognised by the WTO, holding that the recognition of their identity/difference demands that they be excluded from this emergent global legal order. So also the Acholi Elders demand that restorative justice be applied to certain members of the LRA. They claim that criminal justice under the *Rome Statute* misrecognises their community's identity/difference, pressing the ICC to recognise their community by excluding it from the Court's jurisdiction. Misrecognition need not take place through inclusion in a legal order. It can also arise through exclusion. A good example is the GMO dispute in the WTO, which turns largely on the conflict between a permissive approach favoured by the US and the precautionary principle favoured by the EU. Under the US approach, restrictions on food products are only justified when they produce scientifically proven risks; under the EU approach restrictions are called for in situations of uncertainty and potentially serious risks. By opposing the application of the permissive principle in global trade, the EU holds that the point of joint action by the WTO excludes a principle important to the EU's identity/difference.[34] Likewise, Member States may resist the ICC's move to exercise subsidiary jurisdiction, arguing that the Court's assertion of jurisdiction misrecognises their identity/difference by refusing to give legal force to how they have transposed international criminal law into domestic law.

In short, what I earlier called a-legal behaviour consists in a demand for recognition that challenges the jointness of joint action, thereby sparking a struggle about inclusion in and exclusion from a legal order in which the collective's identity and the identity of whoever raises the demand for recognition are put to the test. When confronted with a demand for recognition, a collective must respond by setting, in one way or another, the boundaries of what is to count as (il)legality, hence the limit between collective self and other-than-self.

The question about the authoritativeness of a politics of boundaries in a global setting can be formulated thus: is there an *unconditional* criterion that could settle how collectives ought to respond to demands for recognition when articulating, monitoring, and upholding joint action?

One answer to this question, the answer that has occupied centre stage in recent normative theory, assumes that a demand for recognition is a demand for inclusion in the form of *reciprocal* recognition within the unity of a legal order. So construed, struggles for recognition involve the emergence of a relation between self and other that, if all parties act in good faith, transforms an initial condition of misrecognition into a relation of reciprocal recognition as equal and free participants in joint action. This approach assumes that each of the parties engaged in a struggle for recognition can transform its self-understanding through a new default setting of joint action to which all affected parties can commit because this setting allows each of them to view her/himself as equal yet different to the other participants in joint action. When viewed as a process of legal ordering that takes place in struggles for recognition, a politics of boundaries is authoritative if there is recognition of 'the

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[34] Mark A Pollack and Gregory C Schaffer, *When Cooperation Fails: The International Law and Politics of Genetically Modified Foods* (Oxford University Press, 2009).

other *as one of us* [by] the flexible "we" of a community that resists all substantive determinations and extends its permeable boundaries ever further'.[35] Collectives are limited, but limits can be rendered ever more inclusive in the process of articulating, monitoring, and upholding the jointness of joint action. A-legality, strangeness, is provisional.

Accordingly, the champions of the principle of reciprocal recognition acknowledge the contingency of collectives while also asserting that a normatively robust concept of authority demands overcoming contingency. An authoritative politics of boundaries is necessary because of the contingency of collectives; an authoritative politics of boundaries is possible because the 'demand (*Anspruch*) to complete inclusion' is inherent to rational struggles for recognition.[36] A legal order is unconditionally authoritative if and only if it has an inside, but no strange outside — by virtue of having integrated normative plurality into the unity of a single legal order. *E pluribus unum*. Legal globalisation can and should be a process of *universalisation*, even if progress is inchmeal and the arrival of a global legal order with an inside, but no outside, must be postponed indefinitely in historical time.

This account of recognition will not work. To begin with, theories of reciprocal recognition fail to adequately describe the dynamic of representation at work in processes of recognition. To recognise is to recognise something or someone *as* this or *as* that. Recognition, Bedorf notes, has a triadic structure: 'the two-part relation, *x recognizes y*, describes the relation only partially. Instead, it is a triadic relation in which *x recognizes y as z*'.[37] The 're' of recognition deploys the same dynamic as the 're' of representation: a collective identity is never given directly to recognition. Strictly speaking, recognition is a process of identification and differentiation: whoever recognises posits an identity between what is recognised and how it is recognised, thereby differentiating it from what becomes its other. As a result, what is identified in recognition is always more and other than how it is identified (for example, as *z* rather than as *w*).

Collective self-recognition deploys this process of identification/ differentiation. Paraphrasing Bedorf, collective self-recognition does not have the form 'we recognise ourselves'; it deploys a triadic relation: 'we recognise ourselves as *z* (rather than as *w*)'. In particular, we recognise ourselves as this spatial unity (rather than that one). The (spatial) self-identification — hence self-inclusion — that takes place in self-recognition is also always a (spatial) self-differentiation — hence a self-exclusion. Recognition differentiates a collective with respect to *itself* in the very move by which it posits its identity (in time), such that the collective is never only here and now, but also elsewhere and 'elsewhen'. For instance, the WTO recognises itself as a collective capable of ensuring food safety by relying on scientific risk analyses. But this self-recognition introduces a difference into the

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35 Jürgen Habermas, *The Inclusion of the Other: Studies in Political Theory* (Ciaran Cronin and Pablo de Greiff, Polity Press, 2005) xxxv–xxxvi (emphasis in original) [trans of: *Die Einbeziehung des Anderen: Studien zur Politischen* (first published 1996)].

36 Jürgen Habermas, *The Postnational Constellation: Political Essays* (Max Pensky trans, Polity Press, 2001) 148 [trans of: *Die Postnationale Konstellation: Politische Essays* (first published 1998)] (translation modified).

37 Thomas Bedorf, *Verkennende Anerkennung: Über Identität und Politik* (Suhrkamp, 2010) 122 (Hans Lindahl translation in text accompanying n 37).

WTO's identity — a non-identity in identity — because participants in the WTO, for example, the EU, will complain that the default setting of food safety gives insufficient weight to the precautionary principle. The same would hold for Member States which complain that the ICC has excluded their transposition of international criminal law into domestic law from the operation of the principle of complementarity under the *Rome Statute*. They cry out: 'Not in our name! We are misrecognised because what we view as important has been *excluded* from joint action.'

Analogous problems regard collective recognition of the other as other. Indeed, the 're' of recognition ensures that other-differentiation goes hand in hand with other-identification, in that the other is recognised as one of us. For instance, the KRRS's direct action challenges their identification as subject to — hence as included in — the WTO. The same holds for the Acholi, who challenge their identification as a community subject to — thus included in — the *Rome Statute*. They cry out: 'Not in our name! We are misrecognised because, having been *included* in joint action, we can no longer act in accordance with what we view as important to us.' Liberal political theory has been overwhelmingly concerned to secure a greater inclusiveness for collectives, warning against the untoward 'othering' and exclusion of individuals or groups.[38] But this is only part of the problem, even if the part that has received most, if not all, normative attention; the second part is an untoward 'selving'. For what about those cases in which 'inclusiveness and belongingness' are lived as the problem, not the solution to the problem?

This brings us to a second, related difficulty confronting theories of reciprocal recognition, namely, their reductive reading of how boundaries do their work of including and excluding. Recognition of the other through a new default setting of joint action requires that a demand for recognition confront a collective with practical possibilities of its own that it has unjustifiably excluded from joint action. For example, the WTO might interpret the KRRS's direct action as evidencing a disparity — a non-identity — between its aspiration to protect and preserve the environment, as laid out in the Preamble to the *WTO Agreement*,[39] and its default setting of free global trade. It would then move to restore its collective identity, recognising the KRRS through an environment-friendly default setting of global trade. Yet is the demand for recognition of the KRRS only or even primarily about protecting and preserving the environment? That their demand registers as such with the WTO merely shows how the WTO frames what counts for it as a *justified* demand for recognition. Yet there are facets of the demand for recognition of the way of life of Indian farmers to which the WTO remains normatively indifferent because they are in excess of the practical possibilities available to a collective oriented to furthering free global trade — they remain strange to it, recalcitrant to integration into the WTO's collective identity.

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[38] See, eg, John A Powell and Stephen Menendian, 'The Problem of Othering: Towards Inclusiveness and Belonging' (2016) 1 *Othering & Belonging: Expanding the Circle of Human Concern* 14 <http://www.otheringandbelonging.org/wp-content/uploads/2016/07/OtheringAndBelonging_Issue1.pdf>.

[39] *Marrakesh Agreement Establishing the World Trade Organization*, opened for signature 15 April 1994, 1868 UNTS 186 (entered into force 1 January 1995).

A comparable quandary confronts Acholi resistance to international criminal justice under the *Rome Statute*. The principle of complementarity is the vehicle by which the *Rome Statute* seeks to accommodate a certain measure of normative pluralism in the workings of international criminal justice. It stipulates that the ICC may only exercise its jurisdiction if Member States are unable or unwilling to investigate and prosecute the aforementioned crimes. But the recognition of otherness for which complementarity makes room is limited by the point of joint action, as stipulated in the Preamble of the *Rome Statute*: 'punishing the most serious crimes of concern to the international community as a whole'. Nouwen and Werner note that the principle of complementarity 'creates space for an alternative forum of criminal justice to that of the ICC, but not to an alternative conception of justice: for the purposes of complementarity, the domestic justice would have to be criminal justice'.[40] Like with the KRRS, so also the Acholi demand for recognition is excessive with respect to the possibilities of collective self-identification and self-recognition afforded by the *Rome Statute*.

This insight bears directly on the ontology of collectives: collectives exist in the modes of a *finite* questionability and a *finite* respons-a-bility. This means that a double asymmetry plays out in struggles for collective recognition. The other's demand for recognition is asymmetrical with respect to a collective's response because it is not merely a claim to inclusion in relations of legal reciprocity as a way of redressing the violation of its identity/difference. To a lesser or greater extent, demands for recognition are in excess of the possibilities available to the group perspective opened up by the point of joint action. In turn, the response governed by that group perspective is asymmetrical with respect to the question because it frames the demand of the other in ways that render it amenable to a response in the terms of (transformed) relations of reciprocity available to joint action. There is always at least a minimal gap between the question to which a collective responds — What is/ought *our* joint action to be about? — and the question addressed to it by a demand for recognition. Collectives frame their responses to demands for recognition in such a way that they can recognise themselves when transforming the default setting of their joint action with a view to recognising the other (in themselves). Recognition is always also *mis*recognition.

Notice that this double asymmetry is not an argument against reciprocity as such. As adverted heretofore, the directed or relational obligations of participants in joint action articulate what are represented as reciprocal expectations between them. The claim to commonality intrinsic to joint action asserts that a legal order has instituted or can institute relations of reciprocity between the members of the collective. Yet this claim has a normative blind spot that reciprocity cannot suspend because it conditions the possibility of reciprocity. Acts of recognition that institute relations of reciprocity in response to a demand for recognition are exposed to being a form of domination *because* they articulate, monitor, and enforce what are represented as relations of reciprocity.

Back to the four theses about representation listed above in Part IV. Theories of reciprocal recognition will have no difficulty in taking on board Thesis 1 about

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[40] Nouwen and Werner, above n 8, 174.

putative unity and Thesis 2 about unification, while emphatically jettisoning Thesis 3 about pluralisation. This enables those theories to endorse an interpretation of globalisation according to which boundaries do more than simply include and exclude; they already include what they exclude, for otherwise boundaries could not be extended to integrate what they had unjustifiably marginalised from joint action. So far so good. Yet the double asymmetry between question and response shows that the logic of boundaries is more complex than envisaged by those theories. Yes, boundaries include what they exclude; but they also exclude what they include. Such is the upshot of the KRRS and Acholi opposition to their inclusion in the WTO and the *Rome Statute* respectively. Against theories of reciprocal recognition, I insist on Thesis 4: there is no unification without pluralisation. The double asymmetry between question and response has its correlate in the complex logic of boundaries, which *include by excluding and exclude by including*.[41]

Thus, it is not enough to have introduced the notion of limits when making sense of how boundaries do their work of including and excluding. An additional category is required to account for the complex logic of boundaries. Demands for recognition reveal boundaries as fault lines, not only as the limits of joint action, to the extent that those demands are beyond a collective's practical possibilities. As limits, boundaries can be transformed to include in or exclude from the compass of joint action. Limits speak to the domain of the unordered which, when it irrupts into a legal order in the form of a demand for recognition, is *orderable* for that order. As fault lines, boundaries intimate ways of acting and being together that refuse integration into the joint action they challenge. Fault lines signal the domain of the unordered insofar as it is *unorderable* for a legal order. Emergent global legal orders have fault lines as well as limits. In this they are no different to other legal orders.

Let me conclude this section by taking a stand against two competing, but ultimately similar, approaches to the authoritativeness of an authoritative politics of boundaries in a global setting: communitarianism and universalism. They compete because the former recoils from globalisation, whereas the latter embraces it. Yet this opposition presupposes a more fundamental agreement. Both are monistic: the former by postulating a multiplicity of unities; the latter, an all-encompassing unity. Moreover, both seek to domesticate the irreducible double contingency of collectives: communitarianism would *restore* an original collective unity in the face of a-legal challenges; universalism would *create* it. Against communitarianism, I submit that there is no direct access to an original identity and unity that could conclusively settle how the boundaries of (il)legality should be posited. No collective is or can be identical to itself, nor simply different from its others. Universalism is certainly prepared to acknowledge the contingent inception of collectives, yet claims that contingency can be overcome. Against universalism, the complex logic of boundaries shows that contingency is a constitutive element of all

[41] This use of the concept 'complex' shows some affinities with the philosophical concept of complexity and its implications for identity/difference and inclusion/exclusion, although I will not attempt to explore relevant points of similarity and difference here. For a careful study of these themes, see Minka Woermann, *Bridging Complexity and Post-Structuralism. Insights and Implications* (Springer, 2016).

legal orders, global or otherwise.[42] Strangeness, in the form of a-legal challenges insofar as they refuse accommodation in a given legal order, will not disappear, not even in the indefinitely long run. A politics of boundaries that would conceptualise authority in terms of the discursive universalisability of the limits of legal orders or of their dialectical universalisation is a totalising endeavour that morphs into an imperial politics of boundaries.

Against both views, Thesis 4 suggests that the authoritativeness of an authoritative politics of boundaries turns on interpreting inter-subjectivity as the *entwinement* of collective self and other, where entwinement concerns an in-between — an *inter*action — that eludes the definitive control by either self or other-than-self because the boundaries of legal orders include what they exclude and exclude what they include. Entwinement precludes both a simple plurality of unities, as in communitarianism, and an all-encompassing unity in plurality, as in universalism. Entwinement — more precisely: entwin*ing*, understood as the ongoing process of a co-original unification and pluralisation that takes place in the encounter between collective self and other — is the primordial condition of global legal pluralism.[43]

If, then, contingency is an ineradicable feature of legal orders, if humanity is always inside and outside global law, is a normatively robust concept of authority available that does not accept resignation or paralysis in the face of the globalisation of inclusion and exclusion?

VII Restrained Collective Self-Assertion

While I have sought to reveal the difficulties encountered by the attempt to conceptualise authority in terms of reciprocal recognition, acknowledging this difficulty need not require abandoning the concept of recognition in our quest for a normatively robust concept of authority. What I have in mind is an authoritative politics of boundaries that takes shape through responses which recognise the other (in ourselves) as one of us and as other than us. I call this 'asymmetrical recognition'. Its first aspect speaks to collective self-assertion; the second, to collective self-restraint. A theory of asymmetrical recognition interprets an authoritative politics of boundaries as restrained collective self-assertion.

First, some words about collective self-assertion. I draw to this effect on Ricœur's magnificent analysis of self-recognition, whereby a person recognises 'that he or she is in truth a person "capable" of different accomplishments'.[44] To recognise oneself is to assert oneself as *capable,* as an agent to whom beliefs, intentions, and actions can be attributed and imputed, and, consequently, who can be held

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42 A view vigourously defended by Ferdinando G Menga, 'Was Sich der Globalisierung Entzieht: Die Unaufhebbare Kontingenz bei der Stiftung von Weltordnungen' in Dietmar Koch, Michael Ruppert, and Niels Weidtmann (eds), *Globalisierung – Eine Welt?* (Attempto-Verlag, 2015) 64.

43 My interpretation of entwinement is inspired by Merleau-Ponty's notion of chiasm. One of the final working notes of *The Visible and the Invisible*, with the heading 'Chiasm me — the world; me — the other', reads as follows: 'Begin with this: there is no identity, nor non-identity, nor non-coincidence, there is an inside and an outside that turn around each other.': Maurice Merleau-Ponty, *Le Visible et l'Invisible* (Gallimard, 1964) 317 (Hans Lindahl translation in this footnote).

44 Ricœur, above n 33, 69.

responsible for them. Although Ricœur discusses self-recognition with regard to individual persons, it is also, with some caveats, applicable to collectives. To the extent that they succeed, collective self-representations allow individuals to recognise themselves as *capable* of acting together with others with a view to realising the point of their joint action. To paraphrase Ricœur, collective self-recognition involves the attestation 'that [we are] in truth a [group] "capable" of different accomplishments'.

The notion of capability is of particular importance because it allows me to deepen the notion of power deployed in authority. Thus far, I have been content to sketch out a minimalistic interpretation of authority as normative power, that is, power to change the normative status of individuals or groups, exercised by officials in the course of articulating, monitoring, and upholding joint action. This is, however, the surface phenomenon of power. The elementary attestation of individual power that attaches to personal self-recognition — 'I can' (*je peux*), as Ricœur puts it, in the footsteps of Husserl and Merleau-Ponty — has its counterpart in the attestation of collective power that accrues to collective self-recognition: *we can*. The rousing 'Yes, we can' of Barack Obama's victory speech, delivered in Chicago on 4 November 2008, is exemplary for the summons to a range of individuals to recognise themselves as a group, that is, to understand themselves as capable, as empowered, to act as a unit in the face of adversity. It also is at stake in the self-recognition of the WTO and other emergent global legal orders. For instance, having acknowledged that 'all peoples are united by common bonds, their cultures pieced together in a shared heritage, and concerned that this delicate mosaic may be shattered at any time', the Preamble to the *Rome Statute* proclaims a proud 'we can': we, the international community, are capable of punishing those who commit these heinous crimes. This fundamental sense of power as collective self-assertion is also at work in the self-recognition of alter-globalisation movements, which share the following conviction when defying the globalisation of capitalism: 'we can govern ourselves'.[45] In each of these cases, participants assert themselves as a group, recognising themselves as members of a collective capable of realising the point of joint action. Collective self-assertion — the attestation that 'we can' preserve or maintain ourselves as the collective we really are in the face of challenges to what joins us together — is the core of collective self-recognition.

These considerations allow me to formulate the concept of authority germane to collective assertion. It consists in the capacity to posit, in a concrete situation, a representation — a default setting — of joint action that enables a wide range of individuals, in hindsight and for the time being, to recognise themselves as who they really are as a collective, motivating them to act jointly in a way that addresses — without exhausting — a challenge to collective unity. This is the deep structure of power in its traditional, minimalist definition as the power to change an addressee's normative status by establishing who ought to do what, where, and when.

Let me unpack this characterisation of authority as collective self-assertion. Because there is no original unity to which the members of a collective have direct access, representational acts can surprise us, leading us to understand ourselves

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[45] Sitrin and Azzellini, above n 25, 10.

otherwise than before, opening up new practical possibilities for acting jointly of which we were nescient, yet which we, its members, can recognise, in hindsight, as our own joint possibilities. In this paradoxical mode of an originating representation, an authoritative politics of boundaries can innovate on collective unity, including the other (in ourselves) *as one of us*. This entails that authority begins as an act of *transitive* power: someone must *seize* the initiative to represent us otherwise, if we are to recognise ourselves in a way that allows for including the other (in ourselves) as one of us. Yet what begins as an act of transitive power, appears ex post as the *intransitivity* of representation, to the extent that its addressees can recognise themselves therein. In a periphrasis, the intransitivity of representation only appears after the deed — *après coup* as Derrida would put it[46] — if and to the extent that its addressees recognise themselves in a default setting of joint action because it articulates who they 'really' are, even though they had never 'thought of themselves' in this way. A collective asserts itself if those over whom power is exercised recognise themselves as ruling over themselves when someone, acting on their behalf, sets the limits of inclusion in and exclusion from joint action. So conceived, an originating representation of who we are re-novates, as one might put it, all four dimensions of a pragmatic order: it retrojects into the past what is actually a collective unity that has yet to come in the form of a novel default setting of who ought to do what, where, and when.[47]

Yet representational re-novations are never innocent undertakings, even when imbued with the best of intentions. There is always an element of misrepresentation when representational acts innovate on collective unity to deal with a demand for recognition of the other (in ourselves). As a result, this representational act is more or less forceful and will appear to some or even many of its addressees as the expression of domination, of someone ruling over us rather than we ruling over ourselves. I want to characterise this ambiguous nature of the authoritativeness of an authoritative politics of boundaries as 'innovative transgression'.

Crucially, the authoritativeness of innovative transgression does not deploy a dialectic, as assumed by theories of reciprocal recognition. Innovative transgressions do not extend the limits of collectives ever further in the direction of an 'all-inclusive' legal order. They posit spatial closure *otherwise*. For, as noted earlier, representation ensures that inclusion is also always, to a lesser or greater extent, the other's exclusion because the other (in ourselves) is included as one of us. Innovative transgressions are authoritative to the extent that they offer a situationally fitting response to a demand for recognition, one that addresses the demand without being

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[46] I draw here on Derrida, who radicalises Freud's notion of *Nachträglichkeit* (the *après coup*) as a 'supplement of origin' or an 'original representation': Jacques Derrida, *L'Écriture et la Difference* (Seuil, 1967) 314.

[47] By foregrounding the transitive and intransitive dimensions of power, this approach to authority parries the central difficulty in Kantian-inspired approaches that seek to reconstruct authority in terms of the categorical imperative. For the authoritativeness of authority begins *earlier* than with a retrospective justification, through the test of universalisability, of what could be called, borrowing Kantian terminology, a 'maxim' for collective action. Authority has already begun to do its work when someone seizes the initiative to represent what we are/ought to be about as a collective in a way that both motivates us to act jointly and is attuned to the factual context in which joint action is to take place.

able to exhaust it. To put it with Waldenfels, an authoritative response has the structure of an 'open linkage' (*Anknüpfung*), which plays into the situational possibilities opened up by a demand for recognition.[48] The linkage between question and response deployed in struggles for collective recognition is open in a twofold sense: the question concerning what our joint action is/ought to be about remains open because the response to the other (in ourselves) does not exhaust it; the response to the other (in ourselves) remains open because other responses were possible.

So much for the authoritativeness of an authoritative politics of boundaries in which a collective asserts itself by setting boundaries that include the other (in ourselves) as one of us. But because boundaries cannot include without excluding what they include, the question arises whether and how recognition of the other as other than us is at all possible. This is the bailiwick of collective self-restraint. In what way is the authoritativeness of an authoritative politics of boundaries dependent on the exercise of collective self-restraint in the face of demands for recognition?

There are, as far as I can see, at least three modes of collective self-restraint, all of which consist in strategies that defer acts of setting the boundaries of (il)legality: deferral *of* collective self-assertion by deferral *to* the other (in ourselves). In each of these three modes, a collective exposes its contingent existence by exposing itself to the other (in itself), allowing the other to challenge that it is and what it is as a collective before asserting itself anew as a collective, where the 'anew' regards a response that hovers between pure repetition and pure innovation.

The first mode of collective self-restraint concerns all those mechanisms through which a collective defers a decision about the default setting of (il)legality; they are strategies for the deferral of collective self-assertion. The deferral of a decision about the default setting of joint action stages a struggle between competing representations of what is common to joint action, with a view to securing either inclusion in or exclusion from joint action. Much of democratic decision-making as we know it, as well as, say, the review of judicial and administrative decisions, falls within the compass of this strategy of deferral of collective self-assertion. So also do all those initiatives oriented to organising decision-making through participation as well as through what has been called 'democratic experimentalism'.[49] A further example is the strategy of constitutional courts, in the face of constitutional conflict, to 'play for time' by postponing the unity of their legal order to give the highest court of the other legal order the opportunity to sort out what counts as the unity of the latter's legal order.[50] While this struggle can take place within the institutional

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48 Bernhard Waldenfels, *Order in the Twilight*, (David J Parent trans, Ohio University Press, 1996) 18 [trans of *Ordnung in Zwilicht* (first published 1987)] (translation altered).

49 Michael C Dorf and Charles F Sabel, 'A Constitution of Democratic Experimentalism' (1998) 98(2) *Columbia Law Review* 267.

50 This strategy is at the heart of how the European Court of Justice and the Supreme Court of Ireland dealt with the constitutional conflict that arose between the EU and the Irish Republic on the occasion of the status of abortion in the well-known *Grogan* case: *Society for the Protection of Unborn Children Ireland Ltd* v Grogan [1990] 1 CMLR 689; *Society for the Protection of Unborn Children Ireland Ltd v Grogan* (C-159/90) [1991] ECR I-4685. See Hans Lindahl, 'Discretion and Public Policy: Timing the Unity and Divergence of Legal Orders' in Sacha Prechal and Bert van Roermund

structures of authority, the deferral of collective self-assertion can also segue into, and accommodate to a certain extent, para-institutional forms of representing collective unity.

A second mode of collective self-restraint is deferral *to* the other (in ourselves) as a mode of deferral of collective self-assertion. I have in mind a range of mechanisms for negotiating conflicts between legal orders. Each of these mechanisms abstains from regulating a certain class of behaviour — abandoning it, as it were, to regulation by another legal order as a form of recognition of the other as other. Examples include: the doctrines of standard of review and the margin of appreciation developed by, the WTO and the European Court of Human Rights respectively; limited autonomy regimes; mutual recognition in global trade law; subsidiarity and complementarity; safe harbour agreements; the recognition of foreign judgments; treaties between a State and indigenous peoples; and, more generally, the mechanisms for dealing with conflict of laws developed by international private law. An extreme mode of deferral to, within this second mode of collective self-restraint, is, of course, secession.

The third mode of collective self-restraint is also a mode of deferral *to* the other as the deferral *of* collective self-assertion. Whereas the second mode concerns techniques for resolving conflict between legal orders, this one involves suspending the application of legal norms that are not only applicable, but ought to be applied to an individual case. I have in mind acts of collective self-restraint that endure contingency by suspending the application of a general rule with a view to preserving the strange as strange when such application would destroy or threatens to destroy the other's identity/difference.[51]

In each of these three modes of collective self-restraint, deferral must operate within the cincture of collective self-assertion. *Restrained* collective self-assertion, yes; but collective *self-assertion* nonetheless. To assert that authority is representational authority is to aver that, ultimately, authority turns on the representation of collective *unity*, even when such unity is deferred. This means that, even in asymmetrical recognition, there will be an excess in demands for recognition that falls beyond the compass of collective recognition of the other (in ourselves) as other than us if a collective is to be able to recognise and assert itself in its responses. The 'and' of asymmetrical recognition — recognising the other (in ourselves) as one of us *and* as other than us — is conjunctive, which is why I refer to restraint as a qualification of collective self-assertion. Restrained collective self-assertion can temper, but not revoke, the finite questionability and finite responsiveness of collectives, nor, consequently, can it revoke the irreducibility of normative plurality to the unity of a legal order. In other words, a-legality is not reducible to (il)legality. Even if it affords a robust concept of authority, restrained collective self-assertion

(eds), *The Coherence of EU Law: The Search for Unity in Divergent Concepts* (Oxford University Press, 2008) 291, 303–8.

51 The Supreme Court of Canada's famous *Reference on the Secession of Quebec* [1998] 2 SCR 217 ably illustrates, I believe, this mode of collective self-restraint. For an extended analysis of the Reference along these lines, see Hans Lindahl, 'Recognition as Domination: Constitutionalism, Reciprocity and the Problem of Singularity' in Neil Walker, Jo Shaw and Stephen Tierney (eds), *Europe's Constitutional Mosaic* (Hart Publishing, 2011) 205.

cannot fully control nor neutralise the in-between that joins and separates collective self and other-than-self. The double asymmetry between question and response cannot be overcome.

This finding suggests an answer to our earlier question about an unconditional criterion by which to assess the authoritativeness of an authoritative politics of boundaries. The question is all the more urgent if, as argued heretofore, the demand to 'complete inclusion' ultimately plays into the hands of imperialism and domination. The alternative I have in mind is the demand to posit the boundaries that establish who ought to do what, where, and when in a way that acknowledges that, even when exercising self-restraint, even when transforming itself in response to demands for recognition, a (global) collective continues to have an outside — the domain of the strange — that eludes its normative control. The unconditional imperative that governs an authoritative politics of boundaries is this: set collective boundaries in such a way that they do not eliminate the strange (in ourselves). This is how collectives can assume responsibility for their finite questionability and responsiveness, and hence for their irreducible contingency.[52]

VIII Asymmetrical Responses

Have we reached an impasse that entrenches emergent global legal orders, in particular those orders associated with the globalisation of capitalism? Not at all. I have argued insistently — perhaps obsessively — that there is no unification without pluralisation because I want to hold open a politics of boundaries against all attempts to close it down by monistic strategies, whether communitarian or universalist. Instead of domesticating or overcoming the double asymmetry of question and response, the task for a theory of authority in a global setting is to explore how the dynamic sparked by this asymmetry might lead beyond the current patterns of global inclusion and exclusion, even if not beyond global inclusion and exclusion as such. I can do no more, in this Address, than paint the broad strokes of how this double asymmetry might propitiate change.

I begin with the asymmetrical response of emergent global legal orders to challenges to their unity, focusing on the Acholi and the KRRS. In what way might restrained collective self-assertion provide normative guidance to how the ICC and the WTO should respond to the challenges raised by the Acholi and the KRRS?

The third form of collective self-restraint, outlined in Part VII above, best captures, I think, what is at issue in an asymmetrical response to resistance by the Acholi community to the ICC's investigation and prosecution of crimes committed

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[52] I am inclined to view this imperative as a politically defensible interpretation of what, according to Levinas, is the ethical injunction with which the other confronts me, and for whom I am responsible: 'you shall not kill'. 'Defensible', I say, because I am sceptical of the move to simply play off responsibility for the other against (collective) self-assertion. But I will leave it at that in this Address, for reasons of space. For a succinct presentation of Levinas' ideas on this topic, see Emmanuel Levinas and Richard Kearney, 'Dialogue with Emmanuel Levinas' in Richard A Cohen (ed), *Face to Face with Levinas* (State University of New York Press, 1986) 13. See also Derrida's critique of Levinas in 'Violence et Métaphysique: Essai sur la Pensée de Emmanuel Levinas' in Jacques Derrida, *L'Écriture et la Difference* (Seuil, 1967) 117.

by members of the LRA who belonged to the community. Instead of defenestrating the demand for recognition as 'local' and 'traditional', the ICC could and should have considered the possibility of suspending its criminal jurisdiction to make room, literally, for the application of restorative justice. By doing so, the ICC would indirectly recognise the Acholi as other than the international community, which is itself no less local and traditional than the Acholi community. Had the ICC held back the application of the complementarity principle to the benefit of restorative justice, it would have engaged in a form of restrained collective self-assertion that recognises the other as other than the international community, which governs itself through the *Rome Statute*. But prior to the decision to suspend its jurisdiction, holding back to hold out, the ICC would have needed to engage in a careful assessment of the situation to ascertain whether restorative justice would be capable, in Drumbl's words, of dealing with the 'complexities of reintegration in situations of mass atrocity'.[53] Were the ICC to determine, after consultation with the Acholi Elders and others, that restorative justice would not be able to adequately address those complexities, it would have to assert its criminal jurisdiction. For otherwise, it would traduce its mandate, as per the Preamble to the *Rome Statute*, to 'guarantee lasting respect for and the enforcement of international justice'. Its restraint would cease to be a form of collective self-assertion. But, from the Acholi's perspective, what could ultimately justify the ICC's decision to impose criminal justice on them if not a *petitio principii*?

Now I turn to the KRRS, which confronts procedural and substantive problems in its attempt to have its demands for recognition acknowledged by the WTO. Procedurally, the WTO reserves standing to participate in struggles for the representation of collective unity to its Member States, largely excluding subnational social movements like the KRRS, or transnational and even global social movements like the La Via Campesina from that struggle. Substantively, as we have seen, the WTO can transform itself when responding to demands for recognition by the KRRS and like-minded social movements, but it can only do so by framing their demands for recognition, if at all, in a way that allows it to recognise and assert itself as what it is/ought to be about: a collective oriented to promoting 'free' global trade. In short, the first mode of collective self-restraint by the WTO is quite limited in its scope.

As concerns the second mode of collective self-restraint, a potential candidate for responding to the KRRS's demand for recognition is the Special Safety Measure ('SSM') advocated by developing countries during the Doha round of WTO negotiations regarding the global agricultural trading system. This SSM would allow these countries to cap agricultural imports to protect their rural populations in the event of abnormal surges of imports or abnormally cheap imports. But even if it were adopted, this mechanism would not be a fitting response to the demand for recognition by the KRRS and other movements that compose the La Via Campesina. On the one hand, collective self-restraint by the WTO would remain within the logic of a global 'market-oriented agricultural trading system', which is precisely what these movements seek to thwart.[54] On the other hand, the beneficiaries of such an SSM would be developing countries, whereas the La Via Campesina includes a fair

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53 Mark A Drumbl, *Atrocity, Punishment, and International Law* (Cambridge University Press, 2007) 148.

54 WTO, *Agreement on Agriculture*, Preamble <https://www.wto.org/english/docs_e/legal_e/14-ag.pdf>.

share of movements in developed countries. While the WTO may be prepared to address demands for recognition between groups of Member States, as reflected in the distinction between least-developed, developing, and developed States, the way in which it articulates, monitors, and upholds the point of joint action hinders recognising demands for recognition by transnational social movements that cut across that distinction.

It seems to me that the KRRS's struggle is exemplary for the difficulties encountered by a wide range of emergent global legal orders to respond fittingly to demands of recognition by many alter- and anti-globalisation movements. Ultimately, these difficulties turn on the institutional possibilities and limitations of representation made available by global governance regimes. Indeed, while I have concentrated on the fundamental structures and dynamic of representation, I have had very little to say about its institutionalisation, other than some words about participation. To borrow a distinction most famously exploited by Claude Lefort, I have approached representation as the core concept of 'the political' (*le politique*), putting aside how 'politics' (*la politique*) stages struggles for representation and recognition.[55] But it would be a mistake to focus only on the former, a mistake easily made by political philosophers who reserve for themselves the 'fundamental' domain of the political, dismissing politics as the 'derivative' domain they assign to political scientists, lawyers, and the like. Delving into the representational dynamic of inclusion and exclusion at the core of the political demands completion in an analysis of the politics of emergent global legal orders, that is, an enquiry into whether and how such orders might provide an institutional framework that could spark robust struggles for representation and recognition in a global setting. Surely, this also is part of the crisis of representation unleashed by globalisation processes.

I can do no more here than briefly comment on two such institutional initiatives, which, I believe, are presented in their most favourable light if reconstructed as institutional variations on restrained collective self-assertion. The first is global administrative law ('GAL'). It emerges in response to the lacuna created by global regulatory governance, in which decision-making is recalcitrant to ordering by either international treaties or national administrative law. As formulated by Kingsbury, Krisch and Stewart in a seminal article, GAL consists in

> the rules and procedures that help ensure the accountability of global administration … focus[ing] in particular on administrative structures, on transparency, on participatory elements in the administrative procedure, on principles of reasoned decisionmaking, and on mechanisms of review.[56]

I take GAL to be an initiative that seeks to compensate for the initial closure of global governance regimes by reforming their decision-making procedures with a view to more inclusive struggles for representation and recognition. More precisely, GAL aims to put into place administrative procedures and principles that can contribute to strengthening the sense of ownership of joint action by the addressees of those regimes. While some legal scholars have sought to frame GAL as an initiative to secure greater accountability, Stewart perceptively argues that

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[55] Claude Lefort, *Essais sur le politique (XIX^e–XX^e siècles)* (Éditions du Seuil, 1986) 19–20.

[56] Benedict Kingsbury, Nico Krisch and Richard B Stewart, 'The Emergence of Global Administrative Law' (2005) 68(3&4) *Law and Contemporary Problems* 15, 28.

'[t]he root problem is not the absence of accountability mechanisms as such, but disregard.'[57] Stewart explores a range of mechanisms that can be put into place to this effect, in particular rules concerning transparency, non-decisional participation, and reason giving, showing that GAL makes room for interventions by the disregarded — the misrecognised — both anterior and posterior to the enactment of rules by global governance regimes. When depicted in this way, GAL is a significant contribution to what I called the first mode of collective self-restraint. Yet as evidenced above with respect to the WTO, the specialised character of emergent global legal orders strongly limits who counts as disregarded or misrecognised, thereby limiting the scope for transformation of the jointness or commonality of joint action — hence for what might count as the authoritative self-assertion of a collective.

Not surprisingly, therefore, GAL elicits the following critical question: 'could global administrative law help open spaces for global *politics*?'.[58] Initiatives regarding transnational and global constitutionalism claim these spaces for themselves. In my view, these initiatives can best be reconstructed as strategies for institutionalising and restraining collective self-assertion by emergent global legal orders. Indeed, one of the implications of the model of law outlined heretofore is that constitutions are not the exclusive prerogative of States, even though State constitutions are charged with a symbolic significance and can marshal allegiance among the citizens of States in ways that are not available to transnational and globalising legal orders. Building on my earlier considerations on representation and recognition, I submit that constitutions have three core functions, each of which is operative in transnational and globalising legal orders. In effect, constitutions lay down: (1) who should get to represent a collective; (2) the conditions, both positive and negative, under which the ongoing process of representing collective unity may be imputed to a collective; and (3) what, at least minimally, is the point represented in the default settings of collective action.[59] If constitutionalism, to borrow Walker's apt formulation, is 'the special type of practical reason . . . concerned with the deepest and most collectively implicated question of "how to decide how to decide" how to act',[60] then the institutionalisation and deferral of collective self-assertion by staging struggles for representation and recognition are central to its agenda.

When read in this way, a constitution is the master rule governing processes of inclusion in and exclusion from a legal order. In other words, constitutions are the master rule that govern the process of authoritatively mediated boundary setting whereby the limit between a collective self and its other(s) is posited in response to challenges to collective unity. Returning to Harlow's question, the main issue confronting transnational and global constitutionalism is whether, in the absence of electoral politics, constitutional venues can be devised that would intensify struggles for representation and recognition beyond the constraints imposed on global politics

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57 Richard B Stewart, 'Remedying Disregard in Global Regulatory Governance: Accountability, Participation, and Responsiveness' (2014) 108(2) *American Journal of International Law* 211, 235.

58 Carol Harlow, 'Global Administrative Law: The Quest for Principles and Values' (2006) 17(1) *European Journal of International Law* 187, 213 (emphasis added).

59 See Lindahl, above n 4, 391–5.

60 Neil Walker, 'Taking Constitutionalism beyond the State' (2008) 56(3) *Political Studies* 519, 524.

by the administrative procedures of GAL and the current judicial oversight of global governance.

Characterised thus, transnational and global constitutionalism could significantly bolster the authoritativeness of an authoritative politics of boundaries in a global setting, opening up novel institutional venues for the asymmetrical recognition of the other (in ourselves) as one of us and as other than us. Yet, were it to succeed, the constitutionalisation of restrained collective self-assertion by emergent global legal orders would not be able to fully contain global struggles for representation and recognition. For a constitution is itself a representation of collective unity, such that, by representing collective unity as this, rather than as that, a constitution pluralises the collective it seeks to unify, opening up an outside that eludes the normative control of the constitutional order to which it gives rise. Transnational and global constitutionalism, however sensitive to normative pluralism, cannot neutralise the strange outside that accompanies every emergent global legal order like its shadow.

IX Asymmetrical Challenges

This outside bespeaks the powerlessness of emergent global legal orders. 'We can', the elemental attestation of power in restrained collective self-assertion, goes hand in hand with a no less primordial 'we cannot': we cannot recognise the other (in ourselves) as one of us *and* as other than us. Collective powerlessness manifests itself in demands for recognition that elude restrained collective self-assertion to the extent that they are themselves forms of collective self-assertion that endeavour to actualise what cannot be said or done in the order they challenge. This outside, the domain of a-legality, is the domain of *constituent power* available to alter- and anti-globalisation movements. For if constituent power lies behind a collective, at its inception, so also it lies ahead of it, in the form of a-legal behaviour that, catching an extant collective by surprise, is capable of convoking another way of being and acting together. Constituent power, one could say, is the primordial manifestation of collective self-assertion. Marginalisation is commonly associated with powerlessness, which is certainly the case as concerns the order from which individuals or groups have been marginalised. But they are constituently powerful by dint of being able to see and to act jointly in ways that are not available to the collective that disempowers them. It is from this domain that contestation of the current configurations of emergent global legal orders cries out, 'They *can't* represent us!'[61]

Such constituent resistance is not, despite its self-understanding, resistance to representation. It is the endeavour to represent humanity otherwise. 'Otherwise' does not mean a 'clean break', to use the language of some Brexiters, nor a *creatio ex nihilo*. Instead, it refers to the kind of rupture made possible by the entwinement between collective self and other-than-self proper to global normative (and not merely legal) pluralism. If, as I argued heretofore, no collective is either identical to itself or simply different from its other, then constituent resistance can exploit that

[61] Hans Lindahl, 'Possibility, Actuality, Rupture: Constituent Power and the Ontology of Change' in (2015) 22(2) *Constellations* 163.

it is both inside and outside extant global legal orders. It does so by showing how elements of what had been identified as our own, from the first-person plural perspective of an emergent global legal order, can be interpreted and connected differently, allowing 'us' to recognise ourselves as capable of speaking and acting jointly in ways that had eluded the practical possibilities available to us.[62] As Hughes has perceptively pointed out, one of the forms of constituent resistance consists in an exercise of legal powers that gives these a different and unexpected use, effectively turning these powers against the order. This form of collective resistance acts from within the order to evince the order's outside: a novel representation of commonality in conflict with its putative unity. She shows that peoples' tribunals, unofficial referenda, citizens' debt audits and, in the Australian context, the Aboriginal Tent Embassy, are exemplary for a-legality as a 'political–legal strategy'.[63] I see in this form of constituent resistance a subversive variation on the doctrinal figure that French administrative law calls '*détournement de pouvoir*', namely, the use by a public authority of one of its powers for another purpose than that for which it had been conferred. By rendering strange what had been the familiar exercise of powers, the representation of what we are as a unity and the referent of the representation — the 'us' to which the act is imputed or attributed — can change, giving rise to a collective that branches off in a new direction. Constituent resistance, which disorganises to reorganise what counts as the common, is precisely what it means that alter- and anti-globalisation movements can pose asymmetrical challenges to legal globalisations.

If it succeeds, constituent power exercised by alter- and anti-globalisation movements deploys temporal ruptures in the form of a retrojective projection. Borrowing a phrase coined by my colleague, van Roermund, constituent power opens up 'a past that we can look forward to'.[64] It also dislocates and then relocates a configuration of ought-places, structuring the inside/outside distinction otherwise. For constituent power must begin by (re-)taking place *somewhere*, a place both inside and outside the distribution of ought-places made available by contemporary legal globalisations.

Schmitt famously argued that legal orders get started with a taking, a taking place: a *nomos*, as he called it, playing on the German verb *nehmen*. He later developed this thesis more fully, asserting that the history of international law

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62 Somewhat analogously, Laclau and Mouffe refer to the construction of new 'hegemonies' through the articulation and expansion of 'chains of equivalence': Ernesto Laclau and Chantal Mouffe, *Hegemony and Socialist Strategy: Towards a Radical Democratic Politics* (Verso, 2nd ed, 1985) 93–145; Mouffe, *On the Political*, above n 20, 53. I withstand the temptation to tease out the similarities and differences between my approach and theirs, other than to say that the locus of both — the similarities and differences — is the concept and dynamic of representation.

63 Carys Hughes, 'Action between the Legal and the Illegal: A-Legality as a Political–Legal Strategy' (2018) 27 *Social & Legal Studies* (forthcoming) <https://doi-org.ezproxy1.library.usyd.edu.au/10.1177/0964663918791009>. This form of a-legality demands, Hughes argues, expanding the notion of a-legality to include the figure of empowerment as distinctive with respect to commands, permissions, and prohibitions, a figure that obtained ever greater prominence in Kelsen's conceptualisation of *Sollen* (ought): Hans Kelsen, *Pure Theory of Law* (Max Knight trans, University of California Press, 1967) 56 [trans of: *Reine Rechtslehre* (2nd ed published 1960)].

64 Verbal communication between Hans Lindahl and Bert van Roermund.

unfolds as a succession of *nomoi* of the Earth.[65] I venture to say that constituent resistance, in response to the globalisation of capitalism, is a-nomic, a (re-)taking place that is here and elsewhere. It intimates *a-nomoi* of the Earth, as suggested by the following description of how alter-globalisation movements endeavour to (re-)take place:

> As the unemployed in Argentina, the landless in Brazil, and indigenous peoples in Bolivia, Colombia, and Ecuador alike occupied and shut something down, they simultaneously opened something else up, organizing horizontal assemblies and creating prefigurative survival structures for necessities such as food, medicine, child support, and training. These new spaces of autonomous construction are often called *territorios* ('territories') — invoking a new landscape that is conceptual as well as physical.[66]

It remains to be seen whether these and other initiatives can (re-)take place in a way that gives rise to durable communities capable of sustaining themselves in response to the challenges posed by the globalisation of capitalism. Yet, no less than the emergent global legal orders they resist, the politics of boundaries through which alter- and anti-globalisation movements endeavour to assert themselves is authoritative if it exercises self-restraint. By seizing the initiative to represent us otherwise, the dynamic of inclusion and exclusion is already at work in alter- and anti-globalisation movements. They claim that commonality and recognition are on their side, in contrast to the partiality and misrecognition of the global legal orders they resist. Yet they cannot but marginalise in the process of unifying, even if differently. Although they claim to be the spokespersons for humanity, especially when acting in a participatory mode, they too take up a first-person plural perspective *on* humanity, not the perspective *of* humanity. This is no argument against resistance to and the transformation of contemporary patterns of global inclusion and exclusion, patterns that Sassen characterises as driven by a relentless 'logic of expulsion'.[67] But the dynamic of representation does entail that there are human emancipations in the plural, not the emancipation of humanity in the singular. Emancipatory resistance, like all representational processes, pluralises in the process of unifying. Thesis 4 posited heretofore holds sway in Marx's Thesis 11 on Feuerbach.[68] If other worlds are possible, as alter-globalisation movements insist, it is because humanity is, and will remain, inside and outside global law.

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65 Carl Schmitt, 'Appropriation/Distribution/Production: Toward a Proper Formulation of Basic Questions of Any Social and Economic Order (1953)' (1993) 95 *Telos* 52; Carl Schmitt, *The Nomos of the Earth in the International Law of the Jus Publicum Europaeum* (G L Ulmen trans, Telos Press, 2003) [trans of: *Der Nomos der Erde im Volkerrecht des Jus Publicum Europaeum* (first published 1950)].

66 Sitrin and Azzellini, above n 25, 11.

67 Saskia Sassen, *Expulsions: Brutality and Complexity in the Global Economy* (Belknap Press, 2014).

68 'Philosophers have hitherto only *interpreted* the world in various ways; the point is to *change* it.': Karl Marx, *Theses On Feuerbach* (1845) (Cyril Smith trans, 2002) [trans of: 1) ad Feuerbach (first published 1924)] <https://www.marxists.org/archive/marx/works/1845/theses/index.htm> (emphasis in translation).