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From Legitimacy to Legality: The Problem of the Global Legal Form

From legitimacy to legality: The problem of the global legal form

Kirsten Campbell

In 2004, the United Nations Secretary General's High-Level Panel on Threats, Challenges and Change released its key report on contemporary international collective security, *A More Secure World: A Shared Responsibility*.[1] The Report emphasised the importance of the international legal order in a new security paradigm of global insecurities, interdependence, and responsibilities. For the Panel, the authority of the international community derived from the agreement of its members to be bound by international legal rules rather than upon its coercive powers. Accordingly, *A More Secure World* characterised effective international governance as resting upon legal legitimacy rather than coercive force.

However, the Report also acknowledged that '[t]he effectiveness of the global collective security system, as with any other legal order, depends ultimately not only on the legality of decisions but also on the common perception of their legitimacy - their being made on solid evidentiary grounds, and for the right reasons, morally as well as legally'.[2] The Report identified the legitimacy of the international community as being most problematic where its decisions concern 'large-scale life and death impact'.[3] It contended that the 'question of legality' and the 'question of legitimacy' became particularly problematic in relation to the regulation of violence in the international system. Throughout the Report, the relationship between legality and legitimacy became a clearly paradoxical problem in relation to the international legal regulation of violence. On the one hand, the legitimacy of law founds the regulation of violence in the international system, since the agreement to be bound by an international legal order is the basis of international collective security. However, that violence also undermines legal legitimacy as a foundation of a rightful international order, as force uncouples the presumption that legality provides legitimation.

This problematic relationship between legality and legitimacy in *A More Secure World* suggests that older juridical models of legal legitimacy may no longer be useful for understanding the international legal regulation of conflict in new global orders. This paper explores how the undoing and remaking of law, sovereignty, and community in globalisation produces a form of juridical relations that is not reducible to the legitimation of rule. It argues that this legal form expresses the new *social* associations of globalisation as *legal* relations. Those legal relations reconstitute these new forms of social relations as global, and thus themselves

1 *United Nations*, A More Secure World: Our Shared Responsibility, Report of the Secretary-General's High-Level Panel on Threats, Challenges, and Change.
2 *United Nations*, A More Secure World, para. 204.
3 *United Nations*, A More Secure World, para. 205.

become an integral part of the process of globalisation.

Reading the laws of Violence

i. The question of legitimacy

How, then, should we analyse the contemporary international legal regulation of conflict? Uwe Ewald identifies two key approaches to understanding globalisation and the international legal regulation of conflict, which he describes as 'universal protection vs. interest-related risk management'.[4] These models are perhaps better described more broadly as cosmopolitan governance, exemplified by the work of David Held, or imperial rule, most often identified with the work of Hardt and Negri (as Ewald does). Importantly, Ewald notes that 'the common point of departure for both concepts is an awareness of a new age of global risks and a different form of war which results in a new concept of security, which is, at the outset, confronted by a lack of legitimacy in the use of international and national state violence'.[5] Both these approaches claim that there is a 'legitimation crisis' concerning the international governance of coercive power. For example, Held argues that new global insecurities require new forms of legitimate international governance, while Hardt and Negri contend that the international law no longer functions as the basis of legitimate violence in the general global state of war.[6] Yet while both paradigms insist upon the absence of legal legitimacy in the new global disorder, at the same time they also insist upon the necessity of the legal legitimation of the new global order. For example, Held characterises international law as the legitimate foundation of 'cosmopolitan social democracy'.[7] In contrast, Hardt and Negri reject '*liberal cosmopolitan* arguments' and argue instead that international law serves to legitimate imperial rule. Common to both arguments is the idea that law also operates as a legitimating form of rule, which permits the exercise of power without coercive force. These models of cosmopolitan governance and imperial rule thus reiterate the same paradoxical relationship between legality and legitimacy in the international relation of violence that can be found in the Report. On the one hand, there is a crisis of legal legitimacy concerning the regulation of violence. On the other hand, the legitimacy of law is also the basis of the international regulation of violence.

Martii Koskenniemi argues that 'the structure of international legal argumentation' constantly moves between concreteness and normativity, or between apology and utopia. For Koskenniemi, this structure of argumentation entails that international law 'remains both over- and underlegitimizing: it is overlegitimizing

[4] *Ewald*, Large-Scale Victimisation and the Jurisprudence of the ICTY, p.177.
[5] *Ewald*, Large-Scale Victimisation and the Jurisprudence of the ICTY, p.177.
[6] *Held/McGrew*, Globalization/Anti-Globalization, pp. 223-4; *Hardt/Negri*, Multitude, pp. 29-30.
[7] *Held/McGrew*, Globalization/Anti-Globalization, pp 218-219, 224; *Hardt/Negri*, Multitude, pp. 234, 277.

as it can be ultimately invoked to justify any behaviour (apologism), it is underlegitimizing because it is incapable of providing any convincing argument on the legitimacy of any practices (utopianism)'.[8] These models of the international regulation of armed conflict repeat this structure of international legal argumentation. In what we can call the 'apologist' account of imperial rule, international law reflects relations of force, and hence derives its efficacy from force. In the 'utopian' model of cosmopolitan governance, international law reflects ethical values, and so derives its power from morality. In both models, international law can affect social action only insofar as it functions as the legitimation of force or legitimating ideal. However, if law only has effect as legitimated force or normative legitimacy, then how do we explain the role of law in the international system? This formulation leaves unanswered the question of how international law has efficacy or effect *as law*. These arguments do not explain how law functions as a constitutive element of the global order as than as a form of the legitimation of rule.

However, the ongoing undoing and remaking of law, sovereignty, and community in the processes of globalisation suggests that it is necessary to move away from this older juridical model of legal legitimacy in order to understand the current international legal regulation of conflict. The notion of legitimacy has an intimate philological relationship to the notion of legality because its connected meanings of lawful filiation and power derive from its common etymological Latin root, *legis*. If the first sense refers to lawful belonging to family and community, the second sense refers to the lawful power of the sovereign. The concept of legitimacy uses law to bind both sovereign rule and community membership. However, the etynomologically intimate relation between the legal and the legitimate points to the emergence of this notion from the older form of rule that Foucault characterises as the 'juridical monarchy', in which the political order is founded upon the lawful exercise of sovereign rule over a community.[9] If there has been an uncoupling of older forms of legality and legitimacy in current global insecurities and interdependences, then it is necessary to develop a model of law that does not reduce law to legitimacy. Instead, we require a new way to understand international legality that can address the specificity and efficacy of the legal in the new global world, and the constitutive power of legality in the making of this world.

ii. The problem of legality

Both cosmopolitan governance and imperial rule arguments understand humanitarian law as symptomatic of new global dis/orders, whether functioning to found global governance, or to 'neutralize and pacify conflict' in a state of global war.[10] In these symptomatic readings, law reproduces broader global structures. However, these approaches fail to address law 'in its specificity as a historical practice which operates through particular forms and mechanisms which are real,

[8] *Koskenniemi*, From Apology to Utopia, p. 67.
[9] *Foucault*, The History of Sexuality, Volume I, p. 89.
[10] *Held/McGrew*, Globalization/Anti-Globalization, p. 224; *Hardt/Negri*, Multitude, p. 276.

effective and differentiated, and which are related to irreducible to broader social relations'.[11] In particular, neither of these accounts explains why the regulation of international violence should necessarily take a legal form. There are clearly many forms of global ordering. However, the international community seeks to regulate armed conflict in terms of law. China Miéville describes this as the 'basic ontological question': '*why law?'*. Miéville suggests that there is 'something in the structure of the modern social relations which maintains the integrity of the peculiarly legal form of conceptualising and articulating claims'.[12] In the global context, we need to ask: why do these social relations take the form of legal relations? And what legal form do these global relations take?

iii. The laws of war

If the use of violence at the international level is legally regulated by the *jus ad bellum* (the rules governing the resort to force), and the *jus in bello* (the rules governing the conduct of conflict, or international humanitarian law ('IHL'), only certain breaches of these rules are criminalised under international law. These so-called 'core crimes' are war crimes, genocide, and crimes against humanity. With the important exception of crimes against peace, a criminal breach of the *jus ad bellum*, these crimes are violations of international humanitarian law.[13] These crimes form the subject-matter of the jurisdiction of the International Criminal Tribunal for the former Yugoslavia, the International Criminal Tribunal for Rwanda, and the International Criminal Court, the leading international criminal bodies having jurisdiction at the international level, and give rise to universal jurisdiction at the level of the state. They are typically considered to be 'the most serious crimes of concern to the international community as a whole' (Article 5, ICC Statute).

Popovski and Turner describe how 'the recourse to the use of force [the *jus ad bellum*] has an exceptional and controversial character and is the most critical domain of international relations in need of robust legality and legitimacy'.[14] The body of rules regulating the use of force, then, clearly reveals the crisis in older juridical models of legal legitimacy at the international level. However, they do not reveal the new forms of legality that are emerging in their place. By contrast, the body of rules regulating the conduct of conflict are rapidly proliferating, increasingly enforced, and increasingly significant. For these reasons, IHL is a better example of the global remaking of legality at the international level. Rather

[11] *Norrie*, Law and the Beautiful Soul, p. 30.
[12] *Miéville*, Between Equal Rights, p. 43.
13 While crimes against peace, or the crime of aggression, are international crimes under customary law, this crime has not been prosecuted since 1947. While its modern incarnation can be found in the ICC Statute, the Court only has jurisdiction once the crime has been defined and its scope agreed, an issue which was not formally considered until July 2009; see *Schabas*, An Introduction to the International Criminal Court, pp. 31-34. Moreover, even when the crime comes within the jurisdiction of the Court, it is likely to be severely restricted through regulation by the Security Council: *Zolo*, Who Is Afraid of Punishing Aggressors, p. 799.
[14] *Popoviski/Turner*, Legality and Legitimacy in the International order, p. 2.

than focusing my analysis upon the laws governing the resort to force, the most 'exceptional and controversial' area of law regulating international violence, I will focus upon the least contested area, the laws governing the conduct of conflict. In particular, I will focus upon those violations of IHL that are criminalised at the international level, namely, the international criminal law ('ICL') of the core crimes of war crimes, genocide, and crimes against humanity.[15]

I use two analytic strategies to explore this international legal regulation of violence. First, I develop the 'methodology' of the pre-eminent theorist of the legal form, Pashukanis, to analyse the legal subjects and relations of ICL, and hence to describe their juridical form. My second strategy reads this early Marxist model of law together with Hardt and Negri's injunction: 'to follow in Marx's footsteps one must really walk beyond Marx and develop on the basis of his method a new theoretical apparatus adequate to our own present situation'.[16] I read Pashukanis' theory of the legal form with the accounts of contemporary forms of association offered by Latour and Hardt and Negri to describe the emergence of this new legal form of global relations. This second strategy uses the specific example of the Yugoslavian wars of the 1990s, together with the institution and jurisprudence of the International Criminal Tribunal for the former Yugoslavia ('ICTY'), to explore the emergence of this global legal form.

Strategy one: The international legal form

i. The methodology of the legal form

> *Is it possible to understand law as a social relationship in the same sense in which Marx termed capital a social relationship?*[17]

Pashukanis aimed to understand law as a 'historical form of regulation' that emerged from the social relations of capitalism.[18] To avoid both economist and idealist theories of law, Pashukanis' 'general theory of law' develops what I shall call the 'methodology' of the legal form, namely, a set of principles for undertaking an analysis of law as specific form of social relationships.[19] In this methodology, an analysis of law should first identify 'the basic juridic abstractions' of juridical norms, subjects, and relations.[20] These legal categories are the abstract expression of the fundamental elements of the legal form. These 'basic juridic abstractions […]

[15] For clarity regarding this distinction between the core crimes and the broader body of international humanitarian rules (which include rules whose breaches are not necessarily criminalized at the international level), I will use 'IHL' to refer to the broader body of international rules regulating the conduct of conflict, and 'ICL' to refer to the narrower category of international crimes.
[16] *Hardt/Negri*, Empire, p. 43.
[17] *Pashukanis*, Selected Writings on Marxism and Law, p. 55.
[18] *Fine*, Democracy and the Rule of Law, p. 154.
[19] See *Pashukanis*, Methods of Constructing the Concrete in the Abstract Sciences.
[20] *Pashukanis*, Selected Writings on Marxism and Law, p. 43.

which are the closest definitions of the legal form, in general reflect specific and very complex social relations'.[21] The second task of this legal theory, then, is to understand the relationship between this system of legal concepts and the concrete historical social relations from which they emerge.

Pashukanis argues that in the *legal form* of social relations, atomistic legal subjects exist in juridical relations of exchange. The legal form is a particular form of social relation, in which that relation takes the form of juridical obligations or entitlements of exchange between abstract, free, and equal subjects.[22] Pashukanis argues that under certain historical conditions, namely, capitalist relations of exchange, 'the *regulation* of social relationships assumes a *legal* character'.[23] This legal form of the social relation reaches its highest level of abstraction in the commodity exchange of developed capitalism.

ii. The legal form of international law

In his earlier extended essay on international law of 1925, Pashukanis argues that the subject of international law is the state as the bearer of sovereign authority. This abstract subject is able to enter into exchange with other states, which are understood as 'individual property owners with equal rights'. In this contractual relation, bourgeois states interact 'on the basis of equivalent exchange, i.e. on a legal basis (on the basis of the mutual recognition of subjects)'. However, like contractual relations in national legal systems, 'bourgeois international law in principle recognises that states have equal rights yet in reality they are unequal in their significance and their power'. Because of the absence of an organisational force able to coerce states to observe international legal norms, the only guarantee of these international legal relationships is 'the real balance of forces'.[24] For Pashukanis, '*modern international law is the legal form of the struggle of capitalist states among themselves for domination over the rest of the world*'.[25] In this formulation, the material conditions of the international legal form are the struggle between imperialist, capitalist states. International law, then, is the legal form of the imperialist relation between capitalist states.

For Pashukanis, the laws of war exemplify the legal form at an international level, because this body of law 'assumes juridical equality and unequal violence'.[26] At first reading, this analysis of contemporary ICL seems convincing for three reasons. First, ICL does appear to assume juridical equality between sovereign states, because these norms derive from treaty or custom, that is, from the express or tacit

[21] *Pashukanis*, Selected Writings on Marxism and Law, p. 43.
[22] *Pashukanis*, Law and Marxism, p. 68.
[23] *Pashukanis*, Selected Writings on Marxism and Law, p. 58.
[24] *Pashukanis*, Selected Writings on Marxism and Law, pp. 176-179.
[25] *Pashukanis*, Selected Writings on Marxism and Law, p. 169.
[26] *Miéville*, Between Equal Rights, pp. 136-7 and 292-293.

consent of states to be bound by these rules.[27] Second, ICL also seems to reflect the principle of state sovereignty, as different rules and enforcement mechanisms apply to international or internal conflicts, and to state or non-state actors. For example, the rules governing the conduct of international conflict between states are considerably more developed and restrictive than those of internal armed conflict, which has been considered as 'an internal problem, governed by domestic law'.[28] Third, it appears that the 'unequal violence' of state interest and power shape both the norms of IHL and their enforcement. For example, the principle of proportionality (that injury to civilians must not exceed military necessity) certainly reflects the military (and political) interests of states.[29] Similarly, the international community rarely enforces these norms against its most powerful members, as exemplified by the recent antagonism of the USA towards the ICC.[30]

However, as both cosmopolitan governance and imperial rule arguments concerning new forms of legal regulation of international violence suggest, these juridical categories are also undergoing an important shift. This move is best summarised by the ICTY in the leading *Tadic* Jurisdiction Appeals Decision, which held that: '[a] State-sovereignty-oriented approach has been gradually supplanted by a human-being-oriented approach.[31] This shift can be seen in the ongoing reconstruction of the fundamental juridical categories of the legal subject and the juridical relation in contemporary ICL. These new legal concepts are not fully developed, as this shift is not yet complete.[32] Nevertheless, these changing juridical categories indicate a new global legal form, which is neither international nor national in scale.[33] To understand the emergence of this new form of juridical relations, my analysis will use the 'methodology' of the legal form. First, it will examine 'the basic juridic abstractions' of juridical norms, subjects, and relations. Second, it will analyse the relationship between this system of legal concepts and the concrete historical social relations from which they emerge.

iii. The legal subject and the juridical relationship

In his general theory of law, Pashukanis suggests that an analysis of the legal form should begin with the legal subject, which he describes as the 'atom' of the juridical relation.[34] Moreover, the earliest and most obvious example of the changing

[27] *Simma/Paulus*, The Responsibility of Individuals for Human Rights Abuses in Internal Conflicts: A Positivist View, pp. 302, 305.
[28] *Rogers*, Law on the Battlefield, p. 215.
[29] *Normand/Jochnick*, The Legitimation of Violence: A Critical Analysis of the Gulf War, p. 387.
[30] *Krisch*, International Law in Times of Hegemony, p. 369.
[31] *Tadic* Jurisdiction Appeals Decision, para. 97.
[32] In this reading of the legal form, I am following Norrie (rather than Warrington's) reading of Pashukanis' general theory of law as offering the theoretical basis for the study of law in changing forms of capitalist society. See *Warrington* Pashukanis and the Commodity Form Theory, pp. 1-22, and *Norrie*, Pashukanis and the 'Commodity Form Theory: a Reply to Warrington', p. 419.
[33] I would like to thank Sari Wastell for this scalar point: see her Scales of Justice.
[34] *Pashukanis*, Law and Marxism, p. 109.

categories of ICL can be seen in the concept of the legal subject. From the Nuremburg Trials onwards, it is clear that international criminal liability is based upon the principle of the individual criminal responsibility of persons.[35] Pashukanis points out that modern criminal law shifts from older forms of collective guilt to current forms of individual guilt.[36] The refusal of notions of collective guilt found contemporary ICL jurisprudence and institutions, which focus upon the individual perpetrator.[37] As Pashukanis suggests in relation to national criminal law, the legal subjects of ICL are 'isolated egoistic subjects, the bearers of autonomous private interests', subject to penal punishment equivalent to his or her crime.[38] In contemporary ICL, as Pashukanis describes: 'punishment functions as a settlement of accounts [in which] the notion of responsibility is indispensable. The offender answers for his offence with his freedom, in fact with a portion of his freedom corresponding to the gravity of his action'.[39]

In terms of the forms of criminal liability in ICL, the legal subject is not the autonomous sovereign state. Instead, it is understood as the autonomous individual whose actions are abstracted from social relations and judged according to the legal norms of the 'international community'. While older models of the laws of war were based upon notions of contractual and reciprocal relationships between states, contemporary ICL is increasingly perceived as a set of universal rules applicable to all participants in conflict.[40] This shift is most obviously seen in the norms of crimes against humanity and genocide, which all persons have an obligation to observe in all circumstances. By contrast to other areas of international law, the contemporary legal subject of ICL is not the state, but the individual. ICL transforms persons into legal subjects, by constructing them as individual actors who are subject to international criminal duties and sanctions.

[35] Nuremberg IMT, pp. 172, 221. Indeed, it remains a highly contentious issue as to whether states can be legal subjects of international criminal law, see *Crawford*, The International Law Commission's Articles on State Responsibility, pp. 242-243. This issue should be distinguished from the obligations of states to punish breaches of humanitarian law, such as those arising under the Geneva Conventions, which constitute a system of enforcement rather than a system of criminal sanctions against states.

[36] *Pashukanis*, Law and Marxism, p. 167.

[37] For an important discussion of the relationship between individual and collective guilt, see *Hirsh/Fine*, Individual Responsibility and Cosmopolitan Law.

[38] *Pashukanis*, Law and Marxism, p. 188. See *Norrie*, Pashukanis and the 'Commodity Form Theory: a Reply to Warrington' for an important defense of Pashukanis on criminal law.

[39] *Pashukanis*, Law and Marxism, p. 179. Pashukanis goes on to argue that it is because of this principle that punishment must be equivalent to guilt that the principle of *nullum crimen, nulla poena sine lege* becomes an important legal norm, for the offender 'must know in advance the conditions under which payment will be demanded of him' (p. 184). Indeed, breach of this principle is a common defense argument in cases before the ICTY.

[40] See *Simpson*, Law, War, and Crime, pp. 59-60 and *Meron*, The Humanization of Humanitarian Law, pp. 239, 247-8. While the distinction between the rules of international and internal conflict remains important, nevertheless the boundary between the two is increasingly blurred: *Tadic* Jurisdiction Appeals Decision, para. 97. See also *Moir*, Towards the Unification of International Humanitarian Law.

What, then, is the form of the juridical relation between these subjects of ICL? Given that the subject of ICL is not the state but the individual, it is not possible to simply read the juridical relation as taking the form of a contract between equal sovereign states. Moreover, Pashukanis suggests that in the modern criminal law of the national state, the other party is neither the injured person nor the state, but rather 'the abstraction of the injured public interest' that stands in for the injured person.[41] At the international level, it is also true that neither the injured person nor international community function as the legal subject. How then might we understand the 'abstraction of the injured public interest' at the international level? What is the injury? And which public suffers injury?

In normative terms, ICL no longer seeks to protect state interests as such but rather to protect humanity 'as a collective'.[42] This can be seen in the three core international crimes, from the 'principles of humanity' that are foundational to war crimes,[43] to the characterisation of genocide as 'a crime against all of humankind, its harm being felt […] by all of humanity',[44] to the crime against humanity, 'a crime against the whole of mankind'.[45] In all three crimes, 'humanity' functions as the 'abstraction of the injured public interest'. Unlike international human rights law, the injury is not done to the individual person. After all, international criminal law only protects certain persons, such as prisoners of war, members of ethnic groups, or civilians, and only in particular circumstances, such as armed conflict rather than civil disturbance. It does not aim to protect all individuals at all times, and neither is it enforceable as an individual claim. Rather, the injured public interest is the *collective* community of humanity. For this reason, international criminal law prohibits this conduct as 'an attack on the legitimate interests which all states have in maintaining certain standards that are essential for the coexistence of all mankind'.[46] The abstraction of the injured public interest thus shifts from being the protection of international society (understood as the mutual interests of the society of states), to being that of the community of humanity.

These juridical relations reveal a shift from the legal form of the contract of exchange between states to the global relationship between persons. The juridical relationship between these legal subjects is no longer simply based upon the 'mutual recognition' of states as subjects, but rather upon a more complex process of constituting persons *in organised conflict* as juridical subjects. These juridical subjects exist in relations of legal equivalence because they are members of the collective community of humanity. These shifts from state to individual responsibility, from the protection of state interest to the protection of humanity as such, and from the society of states to the global society of humanity, can be

[41] *Pashukanis*, Law and Marxism, p. 179.
[42] *Teitel,* Humanity's Law, p. 355.
[43] *International Court of Justice*, Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons, paras. 78-79.
[44] *The Prosecutor v. Krstic*, para. 36.
[45] *The Prosecutor v. Erdedmovic,* para. 20-21.
[46] *The Prosecutor v. Tadic,* para. 40.

described as the emergence of a new global legal form. The distinctive nature of this legal form does not lie solely in its constraint of coercive power, for it is part of the coercive relations of globalisation. Nor does it simply lie in the normative recognition of our shared humanity, for this legal form does not recognise a prior and essential 'humanity'. Rather, the distinctive nature of this juridical relation lies in its constitution of 'humanity' as such.

This global legal form is not mere a 'lifeless abstraction' that has no concrete existence.[47] Rather, the emergence of this form of legal regulation of armed conflict can be seen at both national and international levels. This point should not be misunderstood as simply claiming that there is greater enforcement of these norms, which would lead to the familiar problem of the coercive power of international law. Instead, this argument follows Pashukanis in contending that coercion is not the foundation of the legal relation, but rather that it is the ordering of social relations that guarantees the existence of the legal form.[48] While the operation of these norms at the international level at first appears to remain limited to either exceptional situations (such as the establishment of the ICTY and the ICTR), or to state agreement, (exemplified by multilateral treaties such as the ICC Statute), these developments also suggest the increasing importance of this form of legal regulation of armed violence. The establishment of the ICTY, ICTR and ICC exemplify the 'post-Cold War revival of international prosecutions', after an interregnum of some fifty years.[49] The legal mandate of the establishment of the *ad hoc* tribunals was Chapter VII of the Charter of the United Nations, namely, to maintain or restore international peace and security. The power of the Security Council to establish international criminal tribunals (and to refer cases to the ICC) is now largely beyond dispute, and was used to refer the situation in Darfur, Sudan to the ICC in 2005.[50] As John Bolton, a staunch critic of the ICC and of the Bush Administration's 'tacit support' for its Darfur investigation, acknowledged that '[i]f you allow this to happen, you legitimize the ICC'.[51] The ICC has secured significant international compliance, with 108 countries having ratified the Rome Statute as of January 2008. These developments suggest that this new legal form is currently emerging at the international level.

At the national level, older implementation and compliance mechanisms, which range from the instruction of armed forces in humanitarian rules to the prosecution of its violations, are increasingly well established and widely accepted.[52] There is also an ongoing increase in the exercise of universal jurisdiction, use of international

[47] *Pashukanis*, Law and Marxism, p. 85.
[48] *Pashukanis*, Law and Marxism, p. 89.
[49] *Schabas*, The UN International Criminal Tribunals, p. 11.
[50] *Schabas*, The UN International Criminal Tribunals, p. 53.
[51] *Abramowitz/Lynch*, Darfur Killings Soften Bush's Opposition to International Court.
[52] *Fleck*, International Accountability for Violations of the Ius in Bello, p. 179. See also the International Committee of the Red Cross National Implementation Data Base, http://www.icrc.org/ihl-nat.

criminal principles, and prosecution of crimes of war in national courts.[53] Tribunals, which utilise a mixture of international and national elements to prosecute international crimes, have also been established in response to conflicts in Sierra Leone, Timor-Leste, and Cambodia.[54] Finally, the wide ratification of the ICC Statute, and the concomitant obligation to prosecute breaches in national courts, entails that new national systems of compliance and enforcement of ICL are developing.[55] What is emerging in these developments is an orientation to the 'global agendas and systems' of this new legal form within national settings.[56]

Strategy two: Towards a social theory of the global legal form

i. From coercive power to relations of force

Pashukanis suggests that the international legal form emerges from the concrete historical social relations of imperialist capitalism. This legal form derives from 'a structured process of confrontation of international legal agents thrown up by the dynamics of capitalism'.[57] Should we understand this global legal form as the legal expression of the new global imperialism? If so, the work of Hardt and Negri would most obviously seem to offer a means to update Pashukanis' analysis. However, there are two key difficulties with such an appropriation.[58]

The first difficulty is that is Hardt and Negri persuasively argue that the processes of globalisation do not simply produce a new form of imperialism. Rather, these older imperialist forms have shifted to a new 'global order, a new logic and structure of rule […] this new global form of sovereignty is what we call Empire'.[59] Given this emphasis upon a new form of rule, we cannot simply substitute their account of global exchange for Pashukanis' Leninist critique of imperialism in order to theorise ICL as the legal form of this new imperialist competition between states.[60] The second difficulty concerns Hardt and Negri's characterisation of ICL as a new mode of legal domination: 'postmodern global governance'.[61] In this account, ICL is a

[53] See *Human Rights Watch*, Universal Jurisdiction in Europe; *Sriram*, Globalizing Justice for Mass Atrocities; and *Ferdinandusse*, Direct Application of International Criminal Law in National Courts.
[54] *Schabas*, The UN International Criminal Tribunals.
[55] *Werle*, Principles of International Criminal Law, p. 89.
[56] *Sassen*, Territory, Authority, Rights, p. 3.
[57] *Miéville*, Between Equal Rights, p. 280.
[58] Leaving aside the question of the accuracy of their descriptions of the 'juridical concept of Empire', which is raised by claims such as the ICTY does not apply either international or national law: *Hardt/Negri*, Multitude, pp. 28-29.
[59] *Hardt/Negri*, Empire, pp. xi-xii.
[60] Hardt and Negri explicitly argue that while important, nevertheless Lenin's analysis of imperialism does not explain this new global order, *Hardt/Negri*, Empire, p. 234.
[61] *Negri*, Postmodern Global Governance and the Critical Legal Project, p. 27.

'mechanism legitimating imperial authority'.[62] In many respects, this analysis rearticulates the traditional *realpolitik* analysis of ICL in terms of the contemporary global moment.[63] This older critical tradition argues that the international regulation of armed conflict legitimates the existing unequal relations of the international order by masking those inequalities through doctrines of state equality, and further makes conflict itself legitimate by giving it the mask of legality. Hence this account returns us to the earlier theoretical problems of how to understand the contemporary forms of the international legal ordering of violence.

If we return to Pashukanis' account of the international legal form, then it is possible to find a more productive appropriation of Hardt and Negri for a theory of the global legal form. Pashukanis argues that 'in critical periods, when the balance of forces has fluctuated seriously […] the fate of the norms of the laws of war becomes extremely problematic'.[64] Pashukanis understands the notion of 'force' here in terms of the coercive power of states at the international level. However, I suggest that this claim becomes analytically very useful if it is re-read using a different paradigm of force. Foucault argues that 'war can be regarded as the point of maximum tension, or force-relations laid bare'.[65] In Foucault, the notion of 'force' refers to the 'ability to affect and be affected', so that force is always relational. Violence is a '*concomitant or consequence of force, but not a constituent element*'.[66] This approach enables us to understand the contemporary fluctuation of the 'balance of forces' not in terms of the coercive power of states, but in terms of the emergence of new relations of force in the processes of globalisation.

To paraphrase Miéville, the global legal form can be understood as a structured process of the confrontation of legal agents thrown up by the dynamics of globalising capitalism. Following Hardt and Negri, contemporary capitalism intensifies and amplifies the economic, political, and social exchanges of global exchange.[67] While the very concept of 'globalisation' is highly contentious, nevertheless it captures the multiple processes involving dynamic and differential intensifications of transplanetary relations.[68] In this sense, 'globalisation' does not indicate the emergence of a singular 'global society', in the sense of a bounded and homogenous structure. Rather, it highlights the dynamic processes that make 'globalizing societies', in the sense of the production of diffuse and differentiated interdependencies and interconnections. This description of globalisation draws on Latour's notion of the social as 'association'.[69] It emphasises the making of the 'social', the constitution of relations, and the production of connections, and interactions. In Latour's terms, 'the social […] is the name of a type of momentary

[62] *Hardt/Negri*, Empire, p. 38.
[63] *Lippens*, Tracing the Legal Boundary between Empire and Multitude, p. 389.
[64] *Pashukanis*, Selected Writings on Marxism and Law, p. 179.
[65] *Foucault*, Society Must be Defended, p. 46.
[66] *Deleuze*, Foucault, p. 70.
[67] *Hardt/Negri*, Multitude, p. xiiii.
[68] *Scholte Aart*, Globalization: A Critical Introduction.
[69] *Latour*, Gabriel Tarde and the End of the Social.

association, which is characterised by the way it gathers together in new shapes'.[70] Framed through this understanding of the social as association, the forces of globalisation produce different forms of association, that is, new forms of relation. Globalisation is then understood as a set of processes that makes novel networks of associations, and hence constitutes new social relations. The dynamic processes of these intensified and differentiated exchanges produce new associations that are both connective and conflictual.

To understand the relation between these global associations and the global legal form, I focus upon the contemporary forms of association that sustain armed violence. If we follow Foucault in understanding violence as a consequence of force rather than its constituent element, and war as 'force-relations laid bare', then armed violence becomes the ideal field to trace the new force-relations that emerge in the processes of globalisation. My analysis of this field focuses upon conflict and connection as the two key forms of association that sustain war. Globalisation produces new shapes of interaction and new forms of networks, of which some are antagonistic, coercive, and conflictual, and others are coalitional, affiliative, and connective. I explore the operation of these conflictual and connective force-relations through the example of the Yugoslavian wars of the 1990s and their legal regulation.

Globalisation did not 'create' the Yugoslavian wars, or the legal regulation of its violences. As Sassen points out, we should not understand globalisation in terms of a single causal model since to do so wrongly uses effect to explain cause.[71] Rather, this analysis suggests that the dynamics of these forces of globalisation produced new forms of conflict and connection, which shaped the Yugoslavian conflict. Moreover, 'the Yugoslavian wars' were not a single moment of armed violence, but instead named a complex and prolonged state of conflicts and connections sustaining armed violence in the region of the former Yugoslavia. As Clausewitz reminds us, war is a fundamentally social activity, and one that requires particular forms of associations to sustain it. The processes of globalization traverse and shape these social relations of armed violence, just as they traverse and shape the formation of their international legal regulation.

ii. The conflictual and connective associations of globalisation

The new force-relations of globalisation produce new forms of conflictual association. These conflicts are not the 'new wars' described by Kaldor and other writers, because they do not necessarily indicate new *forms* of war.[72] Rather, they represent the emergence of new antagonisms, coercions, and violence in the uneven and differential processes of globalisation. To illustrate the making of these new forms of conflictual association and their legal regulation, I focus upon two key force-relations of globalisation: the political and the economic.

[70] *Latour*, Reassembling the Social, p. 65.
[71] *Sassen*, Territory, Authority, Rights.
[72] *Newman*, The 'New Wars' Debate: A Historical Perspective is Needed, pp. 173, 189.

A key new force-relation is the emergence of new political forms in the making of the post-Cold War world. For example, the declining legitimacy of communist rule and the impact of democratisation exposed 'the conflicting political forces in Yugoslav society' that subsequently erupted into armed violence.[73] The collapse of the Cold War system at the international level also facilitated the legal regulation of the Yugoslavian wars. United Nations consensus regarding the international prosecutions of war crimes in the Yugoslavian conflict would not have been possible without the collapse of older Cold War power blocs.[74] A second key force-relation of globalisation in the production of conflictual associations is economic. Sometimes called 'negative globalisation', the economic forces of global exchange have particular and differential impacts upon existing social and political orders.[75] For example, economic globalisation had crucial political effects in the emergence of war in the former Yugoslavia, since the declining legitimacy of the communist state was combined with a severe economic crisis due to the 'structural adjustment' programme of the International Monetary Fund.[76] Equally, economic globalisation has also shaped the model and implementation of international post-conflict justice, such as the linking international criminal trials to state reconstruction, and state reconstruction to functional free-market states.[77]

The global restructuring of older political and economic orders also produces new conflicts. These processes include the rearticulation of older territories of empire through new global relations.[78] For example, Zolo reminds us that the history of earlier Ottoman and European empires shaped the modern Yugoslavia, from the great powers carving up the collapsed Ottoman Empire to the German and Italian occupations of World War Two.[79] New global relations rearticulate these older orders, from the mobilisation of regional ethno-nationalist identity in the conflict to Western European myths of archaic 'Balkan' hatreds to justify non-intervention. However, new global orders also reshape these older patterns of association. In the Yugoslavian case, this is most evident in American and European Union intervention in the conflict.[80] This reshaping includes the remaking of existing legal orders.[81] For example, the European and American engagement with the region framed the making of 'Balkan' transitional justice, ranging from crucial American support for the establishment of the ICTY to subsequent European Union support for national war crimes prosecutions (most notably in Bosnia).

These global processes not only produce new conflicts, but also new connections.

[73] *Hirst*, War and Power in the 21st Century, p. 83.
[74] *Cassese*, International Criminal Law, pp. 726-727.
[75] *Conteh-Morgan*, Globalization, State Failure, and Collective Violence, p. 88.
[76] *Woodward*, Violence-Prone Area or International Transition? Adding the Role of Outsiders in Balkan Violence.
[77] *Sriram*, Liberal Peacebuilding and Transitional Justice, p. 579. This link is most evident in EU and US policies in this area in Bosnia.
[78] *Ahluwalia*, Empire or Imperialism, p. 629.
[79] *Zolo*, Invoking Humanity.
[80] *Glenny*, The Fall of Yugoslavia.
[81] *Randeria*, De-Politicization of Democracy and Judicialization of Politics, p. 38.

They produce different transnational networks, which move through both national and international orders. These global processes form new forms of affiliation. For example, political and military actors in the Bosnian conflict sought to produce new forms of ethnic association, which were in turn instantiated by the Dayton settlement brokered by the international community.[82] Global networks also traverse contemporary conflicts. In the case of the Yugoslavian conflict, these networks included coverage by the international media, alliances between international and national NGOs, and the international flows of fighters, arms, and funds that sustained the conflict itself.[83] The legal field of international criminal justice also emerges from these intensified global connections. In the case of the ICTY, these associations ranged from transnational political networks, such as the non-governmental organisations that campaigned for war crimes prosecutions,[84] to religious affiliations, such as the pressure from the Islamic Conference Organisation for protection of Bosnian Muslims and the subsequent significant funding for the ICTY by leading Muslim countries, such as Malaysia and Pakistan.[85] They also included communication networks, such as the importance of global information circuits such as CNN and the internet in building European and American public pressure for action.[86]

The global legal form

i. Law as association

These new forms of global association, these new conflicts and connections that emerge in the processes of globalisation, are the material conditions that produce the emergent global legal form of ICL. It is not that the case that the 'concrete totality' of globalisation produces the global legal form. Rather, it is the '"rich totality of many determinations and relations'" (pace Marx) that produces this juridical relation.[87] ICL expresses these dynamic and differential intensifications of globalisation in legal form. ICL can thus be understood as the legal form of these emergent force-relations, in that it expresses these global relations as juridical relations.

The global legal form is a specific form of association. It works to 'associate entities *in a legal way*', that is, through particular material and symbolic legal practices that organise relations and connections.[88] It is this shaping of social relations that gives the global legal form its constitutive power. The global legal

[82] *Abazovic*, Bosnia and Herzegovina: Ten Years After Dayton, p. 195.
[83] *Kaldor*, New and Old Wars.
[84] *Hagan/Levi*, Crimes of War and the Force of Law, p. 1499.
[85] *Glenny*, The Fall of Yugoslavia.
[86] *Bass*, Stay the Hand of Vengeance.
[87] *Pashukanis*, Law and Marxism, p. 66.
[88] *Latour*, Reassembling the Social, p. 239. See also *Levi/Valverde*, Studying Law by Association, pp. 805, 807.

form is neither antecedent nor posterior to the globalisations of social exchange. Rather, 'the juridical moment […] is a *constitutive part* of it'.[89] The new global legal form of ICL is a constitutive part of globalisation because it functions as a new *legal* form of association. This legal association constitutes persons as global legal subjects, who have legal relationships to other legal subjects as members of 'humanity'. ICL constitutes all persons as legal subjects, and constructs their associations in juridical terms.

This legal form constitutes these new associations as *global*. Douzinas argues that '[h]uman rights construct humans. I am human because the other recognises me as human which, in institutional terms, means as a bearer of human rights'.[90] Similarly, the legal form of ICL constructs persons as existing within global legal relations to other persons, and its object of protection as the global community of all persons, 'humanity' itself. This representation of global social relations is performative in the Austinian sense. This legal form creates the object it names, 'humanity', and its juridical field instantiates this global signifier. Following Pashukanis, this performativity is not simply in the realm of ideas or at the level of ideology. Rather, the global legal form orders existing social relations through the production of new forms of global legal association. This juridical relation constructs these emergent relations of social exchange not as particular, but as global. For this reason, the global legal form is a constituent part of the processes of globalisation.

ii. The problem of the global legal form

Hardt and Negri suggest that Pashukanis saw the possibility of 'transforming public law into an institutional system based on the common'.[91] They contend that the global common is 'the only basis upon which law can construct social relationships in line with the networks organised by the many singularities that create our new global reality'.[92] However, Hardt and Negri ignore the theoretical problem for which Stalin ostensibly 'liquidated' Pashukanis: namely, that capitalist social relations produce the legal form, and hence the revolutionary transformation of those social relations will entail the withering away of law. Their call for new global rights as an institutional system based on the common ignores this problem of revolutionary law. Moreover, the global legal form reflects the many singularities that create our new global reality, which are both conflictual and connective. International criminal law seeks to protect 'humanity' in *war*, rather than the utopian peace of the common. For this reason, the production of 'humanity' by the global legal form should not be misunderstood as the recognition of the commonality of humans, as that which unites all person in a global community. Nor can it be understood as capturing the essence of humanity or the quality of being human.

[89] *Norrie*, Pashukanis and the Commodity Form Theory, pp. 419, 423.
[90] *Douzinas*, The End of Human Rights, p. 317.
[91] *Hardt/Negri*, Multitude, p. 253.
[92] *Hardt/Negri*, Multitude, p. 208.

Rather, the global legal form emerges from *both* the destructive and productive associations of global social exchange.

The juridical relation of the global legal form produces 'humanity'. For this reason, it functions as a constituent element of the making of persons as members of the global community of humanity. ICL does not simply reflect an already existing humanist category of our common humanity, but rather forms a juridical relation between all persons as members of humanity. ICL therefore needs to be understood as those legal regulations without which 'global humanity' cannot be constituted. ICL constitutes 'humanity' by determining the legality of the new associations emerging from globalisation. The global legal form sustains 'global humanity', for those legal relations 'are essential for the coexistence of all mankind […] humanity at large cannot hold together without adherence to the standards in question'.[93] The norms and practices of ICL determine the conduct that destroys or sustains the category of 'humanity' by judging the legality or illegality of certain forms of association in armed conflict. ICL protects certain categories of person, such as civilians, the wounded, and non-combatants, from armed violence. It prohibits certain aims of warfare, such as genocide. It bars certain forms of armed violence, such as those causing 'unnecessary suffering'. ICL does not prohibit war as such, but only particular objects, aims, and forms of war. These rules prohibit those forms of associations that would make the juridical category of 'global humanity' impossible. They sustain 'global humanity' by prohibiting those associations that prevent the construction of the legal relation as global, that is, the formation of 'humanity' itself.

The global legal form of ICL actively shapes the transnational extension of the social by symbolising relations between persons as *global*. Koskenniemi reminds us that '[i]nternational law may act precisely as the instrument through which particular grievances may be heard as universal ones and in this way, like myth, construct a sense of universal humanity through the act of invoking it'.[94] The global legal form acts as the instrument through which particular grievances are heard as global claims. The legal relationship that constitutes persons as legal subjects existing in juridical relationship founds this order. It constructs the possibility of global humanity, extracting persons from their particular social relations and remaking them as global legal subjects with juridical relations to humanity as such.

The problem of the global legal form is not therefore, not legitimacy, but legality. Legitimacy does not sustain the global legal form, since this legal form is a constitutive part of the making of the global world. It is not legitimacy that constructs social associations as global, but rather the legal form that constructs the global as a juridical relation. The global legal form constitutes force relations as legal relations, humanity as a legal subject, and the associations between its members as a legal relation. For this reason, the political challenge of the global legal form is not reducible to the creation of a more legitimate order of legal rules. Rather, the challenge is to create a new concept of legality itself, a task that requires

[93] *Tadic* Judgement in Sentencing Appeals, para. 40.
[94] *Koskenniemi*, What Should International Lawyers Learn from Karl Marx?, pp. 229, 246.

that requires the production of new legal forms that can symbolize just juridical relationships and global humanities.

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