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The Making of Global Legal Culture and International Criminal Law

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Abstract

It is commonly agreed that international criminal law (ICL) is a 'hybrid' legal culture, which mixes the legal traditions of the common law and civil law. However, the precise nature of this legal culture remains a contentious legal and theoretical issue. The paper identifies the two dominant models of ICL within these debates as either a clash of cultures or a *sui generis* system, and shows how neither satisfactorily engages with the concept of legal culture itself. To address this problem, the paper develops a new account of ICL as a global legal culture. The paper first identifies the distinctive 'cultural logic' of ICL, drawing on the example of recent developments in sexual violence offences. It then examines how ICL takes a global legal form, which 'globalizes' liberal legal culture. Finally, the paper shows how this process of making the legal culture of ICL 'global' creates its cultural contradictions, but also enables the possibility of making a new legal culture at the international level.

Key words

international criminal justice; international criminal law; legal culture; sexual violence; war crimes

> [T]he legal system that applies before this Tribunal is not common law nor civil law. It is a hybrid, and it is a system that applies and develops on its own premises and its own terms.
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> *The Prosecutor* v. *Stanišić and Zupljanin*, Case No. IT-08-91-T[1]

> [T]he drafters of the Statute . . . deliberately adopted a hybrid procedure which borrows from different legal cultures and systems.
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> *The Prosecutor* v. *Katanga and Ngudjolo Chui*, Case No. ICC-01/04-01/07[2]

In 1992, Stanišić, a senior political leader in the Serbian Ministry of Internal Affairs, led the 'ethnic cleansing' of Muslim and Croat Bosnians in Bosnia and Herzegovina. Some ten years later, Katanga, a senior military commander of the Force de résistance patriotique en Ituri, allegedly led military actions against Hema civilians in the Democratic Republic of Congo. The *Stanišić* and *Katanga* cases occur at different

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1 15 October 2009, transcript, at 1508, International Criminal Tribunal for the Former Yugoslavia (ICTY).

2 Reasons for the Oral Decision on the Motion Challenging the Admissibility of the Case, 16 June 2009, 18–19, International Criminal Court (ICC).

times, on different continents, and in different contexts. However, in 2009 the international courts hearing these cases both confronted a common question: what is the legal culture of international criminal law? They also agreed upon an answer. International criminal law (ICL) is a hybrid legal culture, which mixes the legal traditions of the common law and civil law to produce a *sui generis* system. Despite this apparent agreement, the fundamental nature of this legal culture remains a contentious legal and theoretical issue. Are there distinctive 'premises' and 'terms' that characterize ICL as a legal culture? What does ICL reveal about the making of 'legal culture' at the international level?

This paper answers these questions by first examining the ideas of 'legal culture' in the debates concerning ICL as a 'cultural hybrid'. It analyses the two key models of the 'cultural hybridity' of ICL, which characterize it as either a clash of cultures or a *sui generis* system. Neither of these approaches satisfactorily engages with the concept of legal culture itself. To address this problem, the second section of the paper identifies the distinctive 'cultural' characteristics of ICL. These consist of the international crime, the legal subject, and the criminal trial. Drawing on the concept of the legal form, the third section then shows how ICL operates as a 'global' legal culture. Finally, the paper examines the contradictions within the cultural logic of ICL, which makes a specific form of liberal legality into a global legal form. It shows how the making of the ICL as a global legal culture creates both this contradiction and the possibility of other cultural logics.

As in many contemporary ICL cases, sexual violence was an integral part of the alleged crimes in the *Stanišić* and *Katanga* proceedings. I analyse ICL as a legal culture by examining this rapidly developing area of international criminal law. Sexual violence offences represent an important and contentious area of substantive and procedural development in contemporary ICL. In particular, my analysis focuses upon ICTY jurisprudence and practice because it represents the most developed body of sexual violence cases prosecuted under international criminal law. Analysing these offences, together with their associated jurisprudence and trial practice, illuminates the nature of this emerging legal culture. Sexual violence offences also demonstrate the integral interconnection between 'legal culture' in its narrower legal sense of the aims and modes of judicial fact-finding, and the broader sense of law as a cultural system that symbolizes and structures social relations.

1. The cultural hybridity of international criminal law

Notions of 'cultural hybridity' now preoccupy debates concerning the legal culture of ICL. However, as Elies van Sliedregt describes, 'the recent discussion is dominated by the adversarial (common law) – inquisitorial (civil law) dichotomy, and centres on the hybrid nature of procedure in international criminal law'.[3] These procedural issues range from technical rules governing the conduct of proceedings and evidence, to the structure of proceedings (such as the role of the parties and judges), to the

3 E. van Sliedregt, 'Introduction: Common Civility – International Criminal Law as Cultural Hybrid', (2011) 24 LJIL 389.

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determination of guilt and appeals.[4] The conflict (or combination) of legal cultures is understood to be most profound and contentious in this area, whereas there is thought to be little difference in the substantive law of the common-law and civil-law traditions.[5] However, this focus upon procedural features, and the legal cultures they are thought to exemplify, has led to two crucial difficulties in understanding the legal culture of ICL.

The first key difficulty is the focus upon procedural issues, and the consequent neglect of the hybrid nature of substantive ICL.[6] The importance of this broader sense of hybridity can be seen in relation to sexual violence offences. First, these offences are 'hybrids' in the sense that they combine elements of offences drawn from national criminal codes (such as the definition of rape under international law). The elements of the crime also mix different bodies of law, such as international human rights law (IHRL) and international humanitarian law (IHL) (such as rape as a war crime defined as a violation of the right to sexual autonomy). Second, procedural and substantive issues are not always easily separated. For example, establishing the offence of rape differs according to whether lack of consent is an evidential requirement of the offence (that is, the prosecution must prove that the complainant did not consent), or an affirmative defence (that is, consent is raised as a defence to the charge of sexual violence).[7]

The second difficulty within the 'hybridity' debates concerns the broader 'cultural' context of these procedural issues. These range from legal issues (such as fair-trial requirements), to normative concerns (such as the aim of international criminal justice), to wider political contexts (such as the completion strategies of the ad hoc tribunals).[8] These debates focus upon the 'internal legal culture' of ICL – that is, the legal practices, values, and institutions of the field of ICL – while neglecting broader 'external' and extra-legal factors that shape this field.[9] Moreover, they routinely assume (rather than elucidate) their own idea of 'legal culture'. Mégret points out that 'each procedural tradition is far more complex than its discreet rules, or even the totality of its rules, and thus should be understood as an amalgamation of

4 See, for example, M. Fairlie, 'The Marriage of Common and Continental Law at the ICTY and Its Progeny, Due Deficit', (2004) 4 *International Criminal Law Review* 243, A. Orie, 'Accusatorial v. Inquisitorial Approach in International Criminal Proceedings Prior to the Establishment of the ICC and in the Proceedings of the ICC', in A. Cassese, P. Gaeta, and J. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary* (2002); and K. Ambos, 'The Structure of International Criminal Procedure', in M. Bohlander (ed.), *International Criminal Justice* (2007).

5 G. Fletcher, 'The Influence of the Common Law and Civil Law Traditions on International Criminal Law', in E. Örücü and D. Nelken (eds.), *Comparative Law: A Handbook* (2007), 104.

6 M. Delmas-Marty 'Comparative Criminal Law as a Necessary Tool for the Application of International Criminal Law', in A. Cassese (ed.), *The Oxford Companion to International Criminal Justice* (2009), 97.

7 For discussion of this debate, see A. M. Brouwer, *Supranational Criminal Prosecution of Sexual Violence* (2005), 117–29.

8 See F. Mégret '"Beyond Fairness": Understanding the Determinants of International Criminal Procedure', (2009) 14 UCLA JILFA 39; and M. Damaska, 'The Competing Visions of Fairness', (2011) 36 *North Carolina Journal of International Law and Commercial Regulation* 365. This focus can be contrasted to the far broader 'convergence' debates.

9 See R. Cotterrell, 'Comparatists and Sociology', in P. Legrand and R. Munday (eds.), *Comparative Legal Studies: Traditions and Transitions* (2003), 148; and M. Damaska, 'Epistemology and the Legal Regulation of Proof', (2003) 2 *Law, Probability, and Risk* 117.

rules and the understandings, institutions, and social types that come with them'.[10] Critically, this amalgamation of rules, interpretation, institutions, and values is the 'something more' of legal culture.[11] Van Sliedregt argues that the 'compromise structure' of ICL is 'challenging since the single elements of the different legal systems do not fit together seamlessly, leading to myriad, heated disagreements over how to combine them into a single, coherent, workable legal system'.[12] It is because of this challenge of producing a unified legal system that ideas of 'legal culture' become central to the ICL debate. The 'cultural hybridity' debates assume that the rules and concepts of ICL are given meaning and shape through this 'something more' of legal culture, whether understood as the particular configuration of shared practices, institutions, and values of a legal system,[13] or in the 'thicker' sense of the epistemological foundations of a legal tradition.[14] In these debates, an underlying legal culture is seen as ensuring that ICL forms a 'single, coherent, workable legal system', such that 'individual features cannot be untied from the system in which they appear'.[15] How, then, do these accounts explain the legal culture that shapes ICL?

Two key sets of arguments run through the 'hybridity' debates. The first 'culture clash' argument analyses the legal culture of ICL according to the procedural features of the inquisitorial or adversarial systems. These in turn are commonly characterized as exemplifying the legal traditions of common law and civil law. This set of arguments ranges from the contention that inquisitorial and adversarial systems are distinct models of truth seeking, to the position that these systems reflect the distinctive traditions of the common law and civil law.[16] The 'culture clash' arguments contend that there is a clash of legal cultures at the international level. For some commentators, this confrontation creates a 'Frankenstein's monster', an incoherent mix of these legal cultures in which their principles and practices lose 'their anchorage' in a coherent and unified system of fact finding and the broader culture of customs and meanings that inform it.[17] For other commentators, it creates a legal system that is actually dominated by one legal culture rather than another, such as the American common-law tradition (at the ICTY) or the French civil-law tradition (at the ICC).[18] However, there are two key problems with the 'culture clash' arguments. First, this approach has led to repetitive debates as to whether ICL successfully unifies these

10 Mégret, *supra* note 8, at 46.

11 I would like to thank Beverley Brown for her formulation of legal culture as something more than rules and institutions, and for her very useful discussions of this issue.

12 Van Sliedregt, *supra* note 3.

13 See J. Bell, 'English and French Law – Not So Different?', (1995) 48 *Current Legal Problems* 63. For an example of this approach in the ICL literature, see M. Findlay, 'Synthesis in Trial Proceedings? The Experience of International Criminal Tribunals', (2001) 50 ICLQ 26.

14 P. Legrand, 'European Legal Systems Are Not Converging', (1996) 45 ICLQ 52. In the ICL context, see, for example, V. Tochilovsky, 'International Criminal Justice: "Strangers in the Foreign System"', (2005) 15 *Criminal Law Forum* 319.

15 See Orie, *supra* note 4.

16 See, for example, Fairlie, *supra* note 4, and Orie, *supra* note 4.

17 See R. Skilbeck, 'Frankenstein's Monster': Creating a New International Procedure', (2010) 8 JICJ 451; and Orie, *supra* note 4, at 1494.

18 Fletcher, *supra* note 5, at 105.

legal traditions, or merely reflects the more dominant parent.[19] These 'sterile debates about the triumph or defeat of adversarial or inquisitorial models'[20] explain much about the competing visions of ideal types of common and civil law. However, they reveal relatively little about the actual practices and values of ICL, and less about its 'cultural' distinctiveness. Second, the 'culture clash' arguments too often link a 'legal culture' to the culture of a particular society, most usually assumed to be the 'national culture' of a state.[21] The 'culture clash' at the international level is then understood to arise from insufficient mooring in national legal and political cultures, whether understood in terms of the particular national legal cultures of practitioners and judiciary, or in the wider sense of the fully developed and long-standing legal cultures of nation-states.[22] Like the organicist metaphor upon which it draws, ideas of genealogy, purity, and homogeneity underlie this model of 'cultural hybridity'. In effect, this approach makes the problematic assumption that legal cultures reflect the 'spirit' of the nation that forms them.[23] This approach frames ICL as an incoherent and inconsistent legal culture because it is not moored in the seemingly 'shared' values of national culture (unlike domestic criminal law). Ultimately, this approach cannot theorize ICL as a truly *international* legal culture, since it will always be an impure and improper mixture of legal traditions.

The second set of key arguments contends that the legal culture of ICL has unique characteristics that reflect the unique 'reality and values' of international criminal trials.[24] These '*sui generis*' arguments contend that ICL produces a new 'international' legal culture. For some commentators, this legal culture emerges in response to the unique requirements and challenges of international trials.[25] Others contend that the legal culture of ICL is developing – or should do so – *sui generis* rules and principles. This 'normative framework' ranges from the implementation of international 'fair-trial' standards,[26] to the broader aims of international criminal law, such as the implementation of the rule of law, or the expressive punishment of perpetrators.[27] For the *sui generis* arguments, 'the international' functions as the 'something more' of legal culture. These arguments presume that the unique nature of international trials, together with the distinctive nature of the conduct that international criminal law seeks to prohibit, and the specific aims of international criminal justice create this legal culture at the international level. However, this idea of an international

19 See F. Mégret, 'International Criminal Law: A New Legal Hybrid?' (2003). Available at SSRN: http://ssrn.com/abstract=1269382.

20 M. Langer, 'The Rise of Managerial Judging in International Criminal Law', (2006) 53 *American Journal of Comparative Law* 835.

21 For this reason, discussions of the characteristics of common or civil legal traditions at the international level commonly devolve to discussion of the specific municipal national systems, such as the English or German legal systems.

22 See, for example, Skilbeck, *supra* note 17; and Tochilovsky, *supra* note 14.

23 See J. Whitman, 'The Neo-Romantic Turn', in P. Legrand and R. Munday (eds.), *Comparative Legal Studies: Traditions and Transitions* (2003).

24 See Mégret, *supra* note 8, at 59.

25 Ambos, *supra* note 4.

26 S. Zappala, *Human Rights in International Criminal Proceedings* (2003).

27 See Damaska, *supra* note 8; and J. Ohlin, 'A Meta-Theory of International Criminal Procedure', (2009) 14 UCLA JILFA 77.

legal culture remains unclear at both descriptive and normative levels for the *sui generis* arguments. At a descriptive level, what are the distinctive features of this legal culture that make it *international*? And how do we explain the formation of this international culture? At a normative level, if this legal culture reflects the 'collective' values of international 'society',[28] then it is necessary to engage with the difficulty that it is 'never quite clear – indeed it is quite contentious – to what society international criminal law refers back, (or if such a phenomenon exists).[29] So how do we explain the international nature of this legal culture, as well as trace the emergence of ICL in its social and historical context?

1.1. From law as culture to law as cultural form

First, it is necessary to shift from the dominant idea of 'legal culture' as the practice and doctrine of particular systems, to the broader sense of law as a cultural system that represents and orders social subjects and relations.[30] The 'cultural hybridity' debates focus upon law as a culture; that is, the shared 'internal' values and customs of legal actors and institutions that an 'external' cultural world shapes. They understand the 'cultural' in terms of the 'particular world of beliefs and practices associated with a particular group' (whether that group is understood as the internal world of a municipal legal system or the external national culture that shapes it). Instead of this approach, it is necessary to engage with law itself as a cultural form; that is, as a system of symbolic and material practices that produces meaning. This in turn requires a broader notion of 'culture' that, in Raymond Williams's classic terms, is a 'signifying order through which necessarily . . . a social order is communicated, reproduced, experienced, and explored'.[31]

My model of legal culture therefore understands it as a cultural form that orders social relations and persons through particular *legal* values and practices. This cultural form works through very specific forms of representing and ordering social relations, such as the values and practices of law, legal institutions, and legal mechanisms for proceedings and judgment. For this reason, it is also crucial to identify the specificity of this cultural form, and to ask which values and practices characterize it.[32] This concept of ICL as a cultural system understands it as comprising legal rules that articulate certain models of subjects and social relations, and legal practices that represent particular forms of adjudicating conflicts. This is not a structuralist conception of legal culture, where law is fixed and static. Rather, it is a post-structuralist concept, which understands legal culture as a dynamic and contested 'set of values

28 R. Sloane, 'The Expressive Capacity of International Punishment: The Limits of the National Law Analogy and the Potential of International Criminal Law', (2007) 43 Stanford JIL 39.

29 F. Mégret, 'In Defense of Hybridity: Towards a Representation Theory of International Justice', (2005) 38 Cornell ILJ 742.

30 R. Cotterrell, *Law, Culture and Society* (2006), 127.

31 Here I follow Kate Nash in her assessment that this definition of culture by Raymond Williams remains the 'best analysis of the term': K. Nash, 'The Cultural Turn in Social Theory', (2001) 35 *Sociology* 77, at 90. See also S. Silbey, 'Legal Culture and Cultures of Legality', in J. Hall, L. Grindstaff, and M.-C. Lo (eds.), *Sociology of Culture* (2010).

32 Without this, the model of legal culture loses its proper engagement with law, a common weakness of socio-legal accounts of legal cultures: see Cotterrell, *supra* note 30, at 139.

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and practices'.[33] In this approach, ICL is not already given by existing legal traditions. Instead, it develops its particular organizing categories on an ongoing basis.

My approach seeks to identify the specific premises and terms of the legal culture of ICL. It does not begin with the assumption that ICL reflects inquisitorial or adversarial systems, or common-law and civil-law traditions. Instead, it follows the methodology proposed by the cultural theorist Fredric Jameson in his analysis of contemporary cultural forms.[34] This methodology seeks to understand and identify the characteristics or features of a cultural form, which expresses the 'dominant logic or hegemonic norm' of a particular social and historical moment.[35] Following this approach, my analysis first seeks to identify the distinguishing features or characteristics of this legal culture by describing its fundamental premises. It then aims to understand these features as a cultural logic in order to understand the emergence of this legal culture in the context of contemporary social changes.

2. The culture of international criminal law

The fundamental premise of contemporary ICL is that it is *legal*. There are many forms of regulating social action, typically characterized as force and interest (i.e. social power), or morality and tradition (i.e. social norms). However, the foundational premise of ICL is that it claims to regulate social action through law, rather than through coercion or custom. Of course, whether it actually does so is entirely debatable.[36] However, its foundational principle is that law should regulate the conduct of conflict. In this sense, ICL does not so much reflect common- or civil-law *mentalités*, understood as those values and practices particular to each legal tradition; rather, it evidences a particular legal *mentalité*, the legal 'mode of understanding reality' that both traditions share in their assumption that law should order the social relations between persons.[37]

The fundamental shared value that underpins ICL as a *legal* tradition is that law, rather than power or norms, should regulate armed conflict. ICL as a legal culture takes conflict as its object of regulation. It regulates conflict according to a body of legal rules, which prohibit certain categories of acts, and permit others. This prohibition takes the form of criminal law; that is, nominating certain acts as defined offences with the juridical consequence of punishment.[38] It characterizes this form of regulation as a formal and universal system of general rules, and persons as the bearers of legal obligations and rights. For example, this fundamental premise of contemporary ICL can be seen in the international criminalization of sexual violence. From wars of occupation to wars of liberation, sexual violence has been

33 S. Merry, 'Human Rights Law and the Demonization of Culture', (2003) 26 *Polar: Political and Legal Anthropology Review* 55.

34 F. Jameson, *Postmodernism: The Cultural Logic of Late Capitalism* (1991), 6.

35 Ibid.

36 The classic discussion of the two dominant critiques of international law as coercive or idealist is M. Koskenniemi, *From Apology to Utopia* (1989).

37 N. Naffine, 'Can Women Be Legal Persons?', in S. James and S. Palmer (eds.), *Visible Women* (2002), 69.

38 *The Prosecutor v. Kunarac, Kovac and Vuković*, Case No. IT-96-23 and IT-96-23/1, Judgement, Trial Chamber, 2001, para. 470 ('*Kunarac*').

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a pervasive element of armed conflict,[39] which until recently was not subject to international legal regulation.[40] The prohibition and prosecution of sexual violence in conflict at the international level emerged contemporaneously with current ICL in the 1990s, with the ICTY and ICTR undertaking unprecedented prosecutions and rapidly developing jurisprudence. In this way, contemporary ICL marks a new moment in the international legal regulation of sexual violence in armed conflict.[41]

This fundamental premise of the legality of ICL in turn supports three related and fundamental concepts of this legal culture. These are the 'international crime', the 'legal subject', and the 'criminal trial'.

2.1. The international crime

The first fundamental concept of the legal culture of ICL is the 'international crime'. ICL criminalizes certain categories of conduct, namely crimes of aggression, war crimes, crimes against humanity, and genocide. However, the 'international' quality of these crimes does not derive from their source in international rules, since this would not distinguish this body of law from any other area of international law. Rather, the 'international' nature of these crimes is threefold. First, they represent categories of conduct prohibited by the international community. The 'international element' distinguishes these offences from so-called domestic crimes. For example, a key distinction between rape as a municipal criminal offence and as a crime against humanity lies in the additional 'international' contextual requirement that the offence be committed as part of an attack directed against a civilian population. This prohibited context makes sexual violence offences into '[t]he most serious crimes of concern to the international community as a whole' (Article 5, ICC Statute). Second, these offences claim to reflect 'the general principles of law recognized by civilized nations'.[42] For example, the elements of the crime of rape under ICL were developed by drawing upon 'the general concepts and legal institutions common to all the major legal systems of the world'.[43] Accordingly, the 'international' is an integral part of the substantive definition of the criminal act and intent. Third, they reflect the unique and specific functions, objects, and purposes of ICL. Where ICL draws upon general principles of criminal law recognized by the 'community of nations' to develop a definition of international crimes, it also takes into account 'the specificity of international criminal proceedings [and] the unique traits of such proceedings'.[44] So, for example, in *Kunarac*, the ICTY looked to 'the object and purpose of IHL to

39 For example, see S. Brownmiller, *Against Our Will* (1975); and J. Goldstein, *War and Gender* (2001).

40 Sexual violence in conflict had not been an international crime as such (where it was prohibited, it was punished as a breach of national military discipline or honour). See K. Askin, *War Crimes against Women* (1997), 377.

41 This is not to say that that this legal regulation is satisfactory: see K. Campbell, 'The Gender of Transitional Justice', (2007) 1 *International Journal of Transitional Justice* 411.

42 Art. 38 of the Statute of the International Court of Justice (ICJ). For further discussion, see M. Bohlander, 'Radbruch Redux: The Need for Revisiting the Conversation between Common and Civil Law at Root Level at the Example of International Criminal Justice', (2011) 24 LJIL 393.

43 *The Prosecutor v. Furundžija*, Case No. IT-95-17/1, Judgement, Trial Chamber, 1998, para. 178.

44 Ibid.

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justify the expansion of the international prohibition beyond what the operative domestic law would have provided' in its definition of rape.[45]

2.2. The legal subject of ICL

The second concept of the legal culture of ICL is the 'legal subject'. ICL attributes to persons legal rights and duties. If the traditional view is that the state is the subject of international law, then in ICL the individual (natural) person becomes the bearer of international rights and duties. This new subject of international law takes a particular form, since 'the individual human being becomes the addressee of both international (human) rights and duties'.[46] This model of the legal subject attributes particular types of rights to the individual, namely those rights attributable to them by virtue of their being human. These rights are most commonly figured as human rights. ICL constructs these individuals as rights-bearing subjects, who appear before the court in the process of judgment.

For example, sexual violence proceedings assume two key categories of rights-bearing subjects: the complainant and the accused. In ICL, the complainant is an individual with rights to sexual and bodily autonomy, which are breached by sexual violence. For example, the leading ICTY jurisprudence in this area describes the criminal act as a violation both of the right to physical integrity of the body and of the right to sexual autonomy of the person.[47] The victim is a rights-bearing subject, and the crime breaches those rights. The accused is also constructed as a rights-bearing subject. For example, the 'rights of the accused' are set out under the ICTY and ICTR Statutes.[48] These 'defendant' rights can be seen to fall into two categories: human rights (such as the right not to be subject to arbitrary arrest) and due-process rights (such as the right to a fair trial). In the case of both the complainant and the accused, the individual (natural) person becomes the bearer of international rights and duties.

2.3. The criminal trial

The third concept of the legal culture of ICL is the 'criminal trial'. The criminal trial is a particular form of epistemic practice because it undertakes fact finding and determines accountability. Whether 'inquisitorial, adversarial, or mixed', the legal culture of ICL assumes that the criminal trial is the appropriate form of finding facts and determining responsibility.[49] Moreover, it is also clear that ICL is developing a common set of epistemic norms and practices for rendering judgment. These share an 'empirical epistemology', even if their specific form remains contentious.[50] These norms and practices range from trial processes to evidential rules.

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45 B. Van Schaak, 'Crimen Sine Lege: Judicial Lawmaking at the Intersection of Law and Morals', (2008) 97 *Georgetown Law Journal* 119, at 167.

46 G. Werle, *Principles of International Criminal Law* (2005), 40.

47 *Kunarac*, para. 553. See also *The Prosecutor v. Cesić*, Case No. IT-95-10/1-S, Judgement, 2004, para. 35.

48 For an overview of international human rights standards and international criminal proceedings, see R. Cryer et al., *An Introduction to International Criminal Law and Procedure* (2010), 430.

49 See Ambos, *supra* note 4.

50 J. Jackson and S. Doran, 'Evidence', in D. Patterson (ed.) *A Companion to Philosophy of Law and Legal Theory* (1996), 173.

The forms and purposes of international trials shape the development of these norms and practices. Specific normative requirements shape international criminal proceedings. These range from the narrower aim of determining criminal guilt for international crimes to the broader aim of establishing a historical record. For example, in contrast to many national criminal codes governing sexual offences, Rule 96 of the ICTY Rules of Procedure and Evidence ('RPE') removes corroboration requirements and disallows the defence of consent in certain circumstances. This rule was intended to recognize the particular circumstances of victims of sexual violence in war.[51] As the Trial Chamber in *Prosecutor* v. *Delalić* notes,

> [I]t is through this unique perspective that Rule 96 must be examined and interpreted; namely, within a distinctive approach on sexual assault cases by an international tribunal established to do justice, deter further crimes and to contribute to the restoration and maintenance of peace.[52]

This 'unique perspective' and 'distinctive approach' give these trials their international form.

The necessity of developing a functioning criminal-justice system also shapes trial norms and practices. This 'international' shaping of criminal trials occurs through the unique functional requirements of international proceedings. The size, complexity, and evidentiary challenges of international prosecutions require particular trial practices. The functional shaping of trials at an international level also occurs through its particular global context. For example, this can be seen in the impact of the completion strategy upon proceedings before the ad hoc tribunals, and the related rise of 'managerial judging'.[53] The increasing emphasis upon the efficiency of trial proceedings also reflects UNSC policy objectives. These objectives have driven changes to the rules of procedure and evidence (RPE) intended to shorten trial proceedings, such as greater judicial control of proceedings and a shift from oral to documentary evidence.[54]

3. International criminal law as the global legal form

3.1. The legal form of ICL

In the legal culture of ICL 'the *regulation* of social relationships assumes a *legal* character'; that is, they assume a legal form.[55] Following Pashukanis, the legal form can be defined as a particular ordering of social relations. It expresses those relations as juridical obligations or entitlements of exchange between abstract, free, and equal subjects.[56] In the *legal form* of social relations, atomistic legal subjects exist in

51 Brouwer, *supra* note 7, at 260–1.
52 Decision on the Prosecution's Motion for the Redaction of the Public Record, Case No. IT-96-21, 5 June 1997, para. 47.
53 See Langer, *supra* note 20.
54 T. Meron, Completion Strategy Report, 21 May 2004, S/2004/420; S. Kay, 'The Move from Oral to Written Evidence', (2004) 2 JICJ 495; P. Wald, 'To "Establish Incredible Events by Credible Evidence"' (2001) 42 Harv. ILJ 535.
55 E. Pashukanis, *Law and Marxism: A General Theory* (1978), 79 (original emphasis).
56 Ibid., 121.

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juridical relations of exchange. This legal culture constructs persons as legal subjects, by postulating an abstract and formal conception of the individual that attributes certain legal capacities and obligations to them. It constructs legal persons as 'isolated egoistic subjects, the bearers of autonomous private interests', whether as complainants possessing human rights (such as sexual autonomy) or as defendants subject to personal responsibility for their crimes (such as fixed terms of imprisonment).[57] These rights and duties are legal relationships, which constitute the relationship between persons in juridical terms.

This legal culture operates to transform collective responsibility into individual liability, and vengeance into lawful sanction. It transforms vengeance 'into a juridical institution by being linked with the form of equivalent exchange', in which 'the offender answers for his offence with a portion [equivalent] to the gravity of his action'.[58] The foundation of this transformation is the rule of law, understood as the 'regular and impartial administration of public rules' through a judicial process.[59] That trial process is 'underpinned by principles of justice, fair trial and the protection of the fundamental rights of the individual'.[60] As Antonio Cassese (in his capacity as the then president of the ICTY), stated, '[t]he only civilized alternative to this desire for revenge is to render justice: to conduct a fair trial by a truly independent and impartial tribunal and to punish those found guilty'.[61] The legal form of ICL thus seeks to order the collective violence of war into legally regulated relations between persons, and attempts to render justice as the enforcement of law.

3.2. The global legal form of ICL

Mégret argues that a 'constant process of becoming international' creates the *sui generis* nature of ICL.[62] This important argument recognizes the unique nature of international criminal justice. Following this argument, we could say that the legal culture of ICL develops through a process of becoming 'international'; that is, through its shaping by the distinct values and practices of ICL.[63] However, we should not assume that the category of the 'international' founds ICL as a legal culture. Instead, it is the process of becoming 'global' rather than 'international' that creates the unique features and challenges of this legal culture.

ICL seeks to provide a 'post-Westphalian' justice. It attempts to construct 'justice' in terms not simply of the legal ordering of nation-states, but also of the universal values of global humanity.[64] It claims to provide universal justice for the global community of all persons, and to protect 'humanity' as such. This legal culture shifts the interests being protected from the mutual interests of nation-states (the society

57 Ibid., 188.
58 Ibid., 170.
59 J. Rawls, *A Theory of Justice* (1999), 206. See also S. Chesterman, 'An International Rule of Law?', (2008) 56 *American Journal of Comparative Law* 331.
60 *The Prosecutor v. Erdemović*, Case No. IT-96-22, Sentencing Judgement, Trial Chamber, 1996, para. 21.
61 Annual Report of the ICTY, UN Doc. A/49/342; S/1994/1007, 12.
62 See Mégret, *supra* note 8, at 58.
63 See ibid. for an excellent analysis of these common strategies.
64 N. Fraser, 'Who Counts? Dilemmas of Justice in a Post-Westphalian World', *Antipode* 41 (2009) 281. It should be noted that Fraser rejects this 'global–cosmopolitan' approach.

of states), to the protection of the community of humanity (the global category of all humans). If, as Nijman claims, the international legal person 'forms the *cords* between the individual human being and the universal human society', then in ICL the legal duties and rights of the individual human being derive from their status as a member of the global class of human beings, 'humanity'.[65] In this way, 'humanity' functions as the 'abstraction of the injured public interest', where the prohibited harm to the individual member of 'humanity' is the violation of the universal norms of the international community.[66]

The legal culture of ICL declares its foundations to be universal norms that apply across the globe. It claims to derive from the law of 'all nations of the world', whether its sources take the form of binding agreements between nation-states or the principles of the major national legal systems. In principle, the international customary rules that criminalize the core crimes apply to all persons everywhere, since the rule of law extends its global reach through universal prescriptive jurisdiction. These rules claim to be universally binding because they are thought to represent legal norms accepted by the community of nations. These norms prohibit 'the most serious crimes of concern to the international community as a whole' (Article 5, ICC Statute), and address their breach through criminal trial and sanction. The global legal form thus represents international crimes as the breach of the collective norms of humanity, with legal justice as the reinscription of universal rules that express universal values.

This legal culture constitutes persons as global legal subjects, who have legal relationships to other legal subjects as members of 'humanity'. It constitutes all persons as legal subjects, and constructs their associations in juridical terms. This legal form constitutes these new associations as *global*. The legal subject owes global obligations, and possesses global rights. It exists in legal relations to all other persons, as part of the global category of humanity. In this way, ICL orders existing social relations through the production of new forms of global legal association. It constructs persons in global legal relations to other persons, and so takes its object of protection as the global community of all persons, 'humanity' itself. In the legal culture of ICL, the legal form becomes a 'global legal form'.[67]

4. The cultural logic of ICL

4.1. The legal form as liberal legal culture

The legal culture of ICL may take a global legal form, but it is not a universal cultural system.[68] Rather, 'law is a specific social form emerging within certain social

65 J. Nijman, *The Concept of International Legal Personality* (2004), 473 (original emphasis).

66 Pashukanis, *supra* note 55, at 177. Pashukanis goes on to argue that it is the 'real figure of the injured party, who takes part in the trial either personally or through a representative, which gives the trial its living meaning'.

67 For further discussion of the global legal form, see K. Campbell, 'From Legitimacy to Legality', in C. Thornhill and S. Ashenden (eds.), *Legality and Legitimacy: Normative and Sociological Approaches* (2010).

68 On the implications of this 'cultural specificity' of ICL, see Mohamed Elewa Badar, 'Islamic Law (*Shari'a*) and the Jurisdiction of the International Criminal Court', (2011) 24 LJIL 411. Mohamed Badar presented this

relations, and mediating them' in specific ways.[69] The '*regulation* of social relationships assumes a *legal* character' in specific social orders.[70] The cultural form of ICL reflects its origins in European liberalism. Whether inquisitorial or adversarial, the modern culture of liberal legality emerges with capitalist economic relations and bourgeois political forms in Europe.[71] Formed by European struggles against absolutism, 'the demand that the criminal law respect the principle of legality, that criminal process be subjected to rules and constraints, and that punishment be administered in measured and determinate amounts, set the terms of the compact that was established between the criminal law and modernity'.[72] The liberal legal form is homologous with the particular social forms from which it emerges.

The liberal legal culture of ICL rests upon a notion of a 'social contract' between persons (and states), in which consent claims to serve as the basis of legitimate government, rather than force. In this culture, law is seen as the foundation of social ordering, and hence of justice. It posits legal subjects as existing in relations of contractual exchange, and the criminal act as a breach of this social contract.[73] So, for example, the traditional model of sexual assault under IHL as a crime of honour is now defined under contemporary ICL as a breach of the right to sexual autonomy, understood as the right to 'consent' to the exchange of that property which is most personally held; that is, the body.[74] For this reason, the lack of consent of the victim becomes a crucial element of the definition of the crime. This can be seen in ICL's emphasis upon the coercive, forced, or abusive context of sexual acts that indicates the vitiation of the 'free will' of the victim.[75]

The liberal legal form seemingly 'creates a universe of formally equal individuals', who each possess the fundamental attribute of freedom.[76] The fundamental liberal assumption of ICL is that every person has a fundamental right to liberty, and that they should only be deprived of that freedom in accordance with the law. According to this model, only legal rules and procedures can legitimately determine whether the individual is criminally liable, and hence whether they can rightfully be deprived of their inherent freedom. This liberal legal culture defines justice as the impartial application of legal rules to all, which it articulates through notions of the fair trial.[77] The 'right to a fair trial is typically interpreted as a right of the accused to procedural safeguards to prevent an unjust conviction', and the ICTY has developed

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argument at the Common Civility conference, and this paper greatly benefited from our discussion of these issues.

69 A. Norrie, *Law and the Beautiful Soul* (2005), 29.

70 Pashukanis, *supra* note 55 (original emphasis). For an overview of the debate concerning the relationship between the legal form and capitalist economic relations, see M. Head, *Pashukanis: A Critical Reappraisal* (2007).

71 Cotterrell, *supra* note 30, at 16–17.

72 L. Farmer, *Criminal Law, Tradition and Legal Order* (1997).

73 A. Norrie, *Crime, Reason, and History* (2000), 19.

74 This reflects the shift from older models of IHL as a legal regime regulating war between states to its more contemporary form, which is increasingly understood as protecting human rights in conflict. For further discussion, see C. Sriram et al., *War, Conflict, and Human Rights* (2009).

75 *The Prosecutor v. Kvocka et al.*, IT-98-30/1-A, Appeals Judgement, 2005, paras. 395–396.

76 N. Anderson and D. Greenberg, 'From Substance to Form', (1983) 7 *Social Text* 69, at 70.

77 See Mégret, *supra* note 8, at 58.

a particularly rich jurisprudence on fair-trial norms in sexual violence cases.[78] These standards define fair judicial process in terms of typical liberal ideas of the rule of law (to prevent the arbitrary exercise of power), and of formal equality (to ensure the equal treatment of all subjects before the law).[79]

4.2. ICL as a global legal culture

In ICL, this liberal legal model becomes a global legal form. This process is '*the culmination of the universalizing and abstracting tendencies in international – legal – capitalism* . . . the universalizing of the legal form'.[80] However, the legal culture of ICL does not 'universalize' the state as the juridical subject, unlike other areas of international law. Hence, it is simply not a process of 'internationalization'. Rather, it universalizes the individual as legal subject, together with its contractual relations of exchange. ICL universalizes the liberal legal form by constructing persons as global legal subjects, which exist in legal relations to all humanity (rather than the international community of states). The legal culture of ICL thereby constitutes a new mode of relationship to the global.

As a legal culture, ICL is a *juridical* representation and ordering of social relations in terms of the universal legal subject and its legal relations to humanity. This legal culture 'creates a universe of formally equal individuals whose concrete social and economic positions do not determine their legal status and capacities'.[81] Rather, it is the 'abstract universality' of humanity that determines their legal status and capacities. The global legal form creates this abstract universality by extracting persons from the material conditions of unequal global exchange. The global legal form thereby implements a specific form of global association. It functions as a form of association between persons by figuring their social relations as legal relationships of rights and obligations. This form of association is global because those legal relations connect persons as members of the human collectivity, humanity. In his reading of Pashukanis, Alan Norrie argues that 'the juridical moment is not antecedent to a prior economic moment, but is a *constitutive part* of it' (original emphasis). The legal form is an integral element of commodity exchange in capitalism, without which that exchange is not possible.[82] Following this, we can characterize the global legal form of ICL as a constitutive part of globalization because it functions as a new *legal* form of global association. The juridical relation makes that exchange possible, and is thereby an integral element of a 'globalization of economic and cultural exchanges' (as Hardt and Negri put it).[83] It makes that exchange possible by creating global legal relations between universal legal subjects. In this 'universalization' of

78 See Brouwer, *supra* note 7, at 235–8; and H. Charlesworth and C. Chinkin, *The Boundaries of International Law: A Feminist Analysis* (2000), 326–9.

79 See A. Fitchelberg, 'Democratic Legitimacy and the International Criminal Court: A Liberal Defence', (2006) 4 JICJ 765.

80 C. Miéville, *Between Equal Rights* (2005), 267–8 (original emphasis). Miéville's work is crucial to this idea of the global legal form.

81 Anderson and Greenberg, *supra* note 76, at 70.

82 A. Norrie, 'Pashukanis and the Commodity Form Theory', (1982) 10 *International Journal of the Sociology of Law* 419, at 423.

83 M. Hardt and A. Negri, *Empire* (2000), xi.

the legal form, the global legal form thus operates as the juridical element of global social relations.

So 'in what specific historical conditions . . . does abstract universality become a "fact of (social) life"? In what conditions do individuals experience themselves as subjects of universal human rights?'[84] The legal culture of ICL can be seen as homologous to the processes of globalizing capitalist exchange, in that the structure of its legal rules and concepts corresponds to the forms of exchange in global capital. ICL can be described as a legal expression of this global exchange, in which the earlier legal form of capitalist exchange is now taking a global legal form in the transition to global capitalist exchange. These new forms of global association are the material conditions that produce the emergent global legal form of ICL. This legal culture is an emergent cultural form that is best understood in Raymond Williams's sense of a set of newly evolving cultural practices, which mark a new form of cultural production.[85] This new form expresses the cultural logic of globalization. This is not to say that the 'totalizing dynamic' of globalization produces the global legal form. Rather, this approach recognizes the processes of globalization as the conditions under which the global legal form emerges, and in which it becomes a cultural dominant or hegemonic form.[86]

This idea of the global legal form should be distinguished from increasingly common claims of the international convergence or global diffusion of civil and common legal traditions.[87] While these arguments were first elaborated in relation to *lex mercatoria*, they are also appearing in relation to ICL as a global legal culture. These arguments claim that a global legal culture is now diffusing or transplanting across the globe, whether due to the legacies of colonialism, the forces of globalization, or American international hegemony.[88] This may be an accurate description of the globalization of ICL. However, it is not the reason that ICL can be described as a global legal form. Rather, ICL is 'global' in three ways that are integral to its cultural form. First, it represents persons and their relations as global, so that persons exist as legal persons in global juridical relations. Second, it expresses the relations of globalizing exchange in juridical form. Third, it is an integral element of the processes of globalization. However, it is precisely this cultural logic of ICL as a global legal form that produces its structuring contradictions.

4.3. The cultural contradictions of ICL

When global exchange assumes the form of law, it rearticulates liberal legal culture (and its fundamental terms) as a new and emergent global legal form. However, this process also changes the legal culture itself, because it structures this particular

84 S. Žižek, 'Against Human Rights' (2005) 34 *New Left Review* 115, at 129.

85 Williams characterizes emergent cultural practices as counterhegemonic (*Problems in Materialism and Culture* (1980), 42–3). However, I would argue that instead of asking whether ICL is an oppositional or conservative cultural form, a more productive (post-structuralist and post-Marxist) approach is to use the contingency and indeterminacy of this legal culture to produce new cultural forms.

86 Jameson, *supra* note 34, at 6.

87 C. Koch, 'Envisioning a Global Legal Culture', (2003–4) 25 Mich. JIL 2.

88 Ibid.

representation of persons and their social relations through a universal logic. This 'universalization' of liberal legal culture creates the 'structural hybridity' of ICL by rearticulating its 'internal' legal culture as the universal and the global, and its external and non-legal cultures as the particular and the local.[89] This rearticulation of a particular legal culture as the universal form of law produces a key contradiction within the cultural logic of ICL. On the one hand, ICL must be universal: it must apply to the category of 'humanity'; that is, to all persons and societies. However, instantiating that universality also entails that ICL must be particular: it must apply to each person and society as members of that category. Without this particularity, it cannot apply to all persons in all societies.[90] The universalizing logic of the global legal form creates the concrete particular. This in turn remains in the global legal form, like the grit of the pearl in an oyster shell. This is the continuing cultural contradiction of ICL, which runs through its fundamental terms of law, international crime, legal subject, and criminal trial. For this reason, it is necessary to examine next the cultural contradictions of each of these terms in turn.[91]

The 'liberal narrative' of ICL figures its particular form of law as the universal form of justice.[92] However, this narrative of law as justice also has a necessary relation to other particular forms, ideas, and models of the just. As abstract ideal or just objective, justice will always be given particular content with a specific post-conflict society, which in itself may be divided in its perceptions of justice. For example, the ICTY continues to struggle to address 'the gap between the international community's aspirations for justice and how its application was perceived by those most affected by the violence in the former Yugoslavia'.[93] This cultural contradiction of ICL does not simply arise from the problem of whether criminal proceedings provide justice in post-conflict societies (a long-standing transitional-justice debate). Rather, it arises from the promise of ICL to provide universal justice, which it then seeks to render as the particular form of law.

While ICL posits the international crime as a universal harm contrary to universal values, it does so by universalizing the liberal model of the criminal harm. For example, the 'right to sexual autonomy' that underlies international sexual offences is only one specific cultural representation of the harm of sexual violence. There are clearly many other ways of understanding the harms of sexual violence, and what counts as sexual violence is also specific to a given social context. For example, the *Kunarac* definition of the 'sexual penetration' of rape identifies parts of the body that are seen to carry sexual meaning, such as the penis, vagina, anus, or mouth. However, as is also evident from discussions of the definition of the offence in this case, there is no 'universal' agreement as to whether forced oral sex is classified as

89 I would like to thank Phil Clark for the very useful idea of 'structural hybridity', which he discussed at the Common Civility conference.

90 See J. Butler, S. Žižek, and E. Laclau, *Contingency, Hegenomy, Universality* (2000), for an extended discussion of this old philosophical problem.

91 For further discussion of 'legal antinomy', see Norrie, *supra* note 69.

92 R. Teitel, *Transitional Justice* (2000).

93 L. Fletcher and H. Weinstein, 'A World unto Itself? The Application of International Justice in the Former Yugoslavia', in E. Stover and H. Weinstein (eds.), *My Neighbour, My Enemy* (2004), 29 at 30.

rape. The concept of 'sexual violence' is given content in relation to specific social contexts, and the representation of these acts is itself contested in conflict.[94]

ICL 'universalizes' the liberal legal subject and its duties and rights by constructing legal subjects as free and equal, and its proceedings as impartial and fair. However, existing social categories and inequalities, such as gender, shape the making of this global legal culture. For example, while the liberal legal culture of ICL is ostensibly gender-neutral, nevertheless particular cultural assumptions about masculinity and femininity (as well as social structures differentiating between men and women) shape its principles and practices in sexual violence cases.[95] The specific social contexts and material realities of gender give particular content to the universal categories of the legal subject, and to its abstract rights. This legal culture is not sexually neutral. Rather, the particular social category of gender shapes procedural and evidential practices in ICL. This influence can be seen from initial investigative practices that ignore sexual violence offences in trial hearings in which the defence is permitted to raise issues of the prior sexual conduct of the victim.

ICL 'universalizes' culturally specific regulatory standards and practices for the determination of 'truth'. If the 'criminal trial is first and foremost an *epistemic* engine' for determining facts,[96] nevertheless epistemic judgements about what and how we know always involve normative judgements. So, for example, the ICTY Statute and RPE set out the rights of the accused to a fair trial. Fair-trial elements include the right to a public hearing, to an independent and impartial tribunal, and to test the evidence in the case presented against them. However, the ICTY jurisprudence also characterizes the rights of the accused as having precedence over the need to protect the victim–witness (who is not understood as having rights), and special and protective measures for sexual violence witnesses as being exceptions to these rights.[97] Equally importantly, the ICTY Statute excludes evidence of the prior sexual history of victim–witnesses and does not require corroboration, in contrast to many national jurisdictions. These epistemic practices of ICL are also axiological practices. For this reason, they will always involve particular, local, and non-legal values, which will shape the determination of 'truth' at trial.[98]

5. ICL AS GLOBAL LEGAL CULTURE: FROM ABSTRACT PARTICULAR TO CONCRETE UNIVERSAL

How, then, to address the foundational contradictions of this new legal culture? The strategy of appealing to the legal traditions of common law or civil law is unsatisfactory, since it returns to the problem of founding legal culture upon national culture. Equally unsatisfactory is the attempt to 'universalize' liberal legal culture,

94 D. Rejali, 'After Feminist Analyses of Bosnian Violence', in L. Lorenzen and J. Turpin (eds.), *The Women and War Reader* (1998).

95 See, for example, Medica Mondiale, *It Wouldn't Just Happen Anywhere in the World* (2010).

96 L. Laudan, *Truth, Error, and Criminal Law: An Essay in Legal Epistemology* (2006), 2.

97 See C. Chinkin, 'Due Process and Witness Anonymity', (1997) 91 AJIL 75.

98 For extensive discussion of the impact of 'local' culture upon fact finding, see N. Combs, *Fact-Finding without Facts* (2010). Combs also presented on this issue at the Common Civility conference.

such as using human rights norms as foundations for the legal culture of ICL. This simply reproduces the problem of the 'universal' and 'particular' without unsettling either cultural category. A third strategy suggests that we need to recognize the *sui generis* nature of ICL as a legal culture. This strategy argues that this legal culture develops through a process of becoming 'international'; that is, of recognizing the distinct values and practices of ICL.[99] However, my analysis of ICL shows that it is the process of becoming 'global' (rather than 'international') that creates the unique features of this legal culture.

ICL can be seen as a *sui generis* legal culture, with distinctive 'premises' and 'terms' of global legality, subjects, and trials. The culture of ICL is that of liberal legality, but it is the process of becoming 'global' that creates its unique features and problems. The process of 'globalization' makes and remakes the practices and values of this legal culture, and creates the contradictions within its cultural logic. However, this process of making the global legal culture of ICL also indicates that it does not operate as a fixed and pre-given 'legal tradition'. Instead, it develops its own particular organizing categories that express the dominant logic or hegemonic norm of a particular social and historical moment. This characteristic is what also makes ICL open to change, and to producing new representations of subjects and sociality and original practices of adjudicating international crimes. This possibility of rearticulation is arguably the greatest strength of ICL. It is evident in the rapid development of the substantive and procedural rules governing sexual offences. These developments do not simply reflect existing legal traditions or cultures, but articulate new crimes and adjudicative mechanisms at the international level.

To reconstruct this legal culture requires reinventing the global juridical relations that found ICL, so that it uses new forms of crimes, subjects, and justice to serve as global legal ties. The prosecution of sexual violence offences before the ICTY might provide clues as to how to undertake this difficult and complex task of constructing a different form of global legal culture. These cases develop new definitions of sexual violence as an international crime, new legal subjects of victims and perpetrators of sexual violence, and new trial procedures for judging these offences. These developments can be seen as indicating the emergence of a new cultural logic. Ultimately, however, they also challenge us to consider how to fully move beyond the constraints of legal liberalism in the making of a global legal culture.

99 Mégret, *supra* note 8.

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