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## **Justice as Conflict of Recognition: The Case of SGBV in the Rome Statute and in the ICC**

Simone Wisotzki

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# Justice as Conflict of Recognition: The Case of SGBV in the Rome Statute and in the ICC

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## ABSTRACT

Recognition is a multi-faceted concept. In IR theory it also seems to be an undervalued concept as it only focuses on the relationship between states and the mutual recognition of identities as well as cultural and religious differences. Honneth's concept of recognition as leading principle of social relations dominates the debates in political theory. Besides this focus on intersubjective agency, the recognition of rights and human rights also plays a role in political theory. The working paper focuses on this approach and argues that the emergence of certain human rights can be grasped through drawing on concept of recognition of rights. The paper therefore relies on the approach of Jens Bartelson who summarizes the debate on states' recognition under the heading of "three dimensions of recognition": the moral/social, political and legal recognition. The working paper draws on this conceptual clarification and relates it to the recognition of rights. It argues that the recognition of sexual gender-based violence (SGBV) as part of international law can be explained by relying on Bartelson's concept as heuristic. The working paper traces the norm emergence process of SGBV from its social, political and its final legal recognition as part of the Rome Statute of the International Criminal Court (ICC). Nevertheless, the attempt of the NGO-network to strengthen individual women's rights during the negotiations of the Rome Statute was opposed by certain states blocking a broader definition of gender-based crimes.

## 1. INTRODUCTION<sup>1</sup>

Sexual gender-based violence (SGBV) has longtime escaped sanctions in the international realm. This finally changed with the Rome Statute and the International Criminal Court (ICC). While with the institutionalization of the ICC SGBV became legally recognized as punishable crimes, processes of social and political recognition preceded the emergence of these legal rights. Recognition is a multi-faceted and truly interdisciplinary concept. This paper draws on research undertaken in political theory, legal theory and international political sociology. The different disciplines focus on diverse aspects of recognition. While political theorists concentrate on individual or collective processes of recognition, legal theory and international political sociology concentrate on the recognition of states. Missing, among others, is the recognition of rights which at least in political theory has been reflected upon. The underlying processes of rights recognition are of interest for scholars of legal theory and international political sociology alike as the formal codification of (human) rights are preceded by processes of moral, social and political recognition.

This article was inspired by an article of Jens Bartelson (2013) who differentiates between three concepts of recognition: moral/social, political and legal recognition. I further draw on Bartelson's finding that the three concepts of recognition are mutually connected and help to describe how human rights emerge. The article reflects on existing research on recognition and argues that such research should reflect more consistently on the mechanisms and effects of recognition. For understanding the institutionalization of (human) rights, language, persuasion and argumentation are such mechanisms which illuminate how processes of recognition work in everyday politics (Bjola/Kornprobst 2011: 9). Bartelson's insights on the recognition of states can be transferred to the recognition of rights. Legal recognition does not occur in isolation of other international

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practices such as moral, social and political kinds of recognition (Bartelson 2013; Agné et al. 2013: 100). Moral/social and political recognition very often precede the formal act of legal recognition of a right. I argue that when concentrating on the emergence of rights, the concept of recognition might also serve as an analytical concept.

While Bartelson mainly concentrates on the level of the state, other literature suggests that rights also need to be socially and politically recognized in order to achieve legal status (Martin 2013). Gould (2014) points to the fact that gross injustices or crimes need to gain empathic or solidaristic recognition by the international society in order to provoke political action. In the case of the SGBV norm, the vast occurrence of sexual and gender-based violence in the Rwandan and Balkan wars enabled different norm entrepreneurs to take action. For the first time, such gross violations of human rights were punished through the installation of ad-hoc criminal courts (International Criminal Tribunal for Yugoslavia/ITCY and International Criminal Tribunal for Rwanda/ICTR). These tribunals helped the cause of feminist lawyers who sought to get sexual and gender-based violence recognized as legal crimes and as gross human rights violation seriously inhibiting individual physical integrity and security. The process of legal recognition became essentially contested among states which underlines that processes of rights recognition are to a certain extent contingent and do not follow linear pathways.

## 2. RECOGNITION: THE STATE OF THE ART

This chapter seeks to give an overview about the different strands of recognition theory. In doing so, it concentrates on identifying the mechanisms and on the effects of recognition. I would like to start with some remarks of conceptual clarification of the concept. Ricoeur (2005) differentiates recognition along three different conceptual understandings. In its first basic meaning, recognition is about the cognitive ability to identify and distinguish something as being itself and not something else (25). Secondly, recognition entails a form of acknowledgement, either as self-recognition or mutual recognition. The mechanism of mutual recognition is thirdly a path which allows conflicting and unequal parties to transform their relationship by means of mutual acknowledgement of their values and identities. As Ricoeur stresses, the practice of recognition “would for everyone be to receive the full assurance of his or her identity, thanks to the recognition by others of each person’s range of capacities” (2005: 250).

Recognition is a multi-faceted concept and has been debated in many scientific disciplines, such as Internal Law, Sociology, Social Psychology, Political Theory and International Relations. When related to states, Kelsen (1941: 605-617) for International Law distinguishes between the formal legal recognition of a state and a more comprehensive practice of political recognition. In the latter, he refers to a government’s free decision to enter into diplomatic relationship with another state. International legal scholars mainly distinguish between two perspectives of recognition: While from the point of view of the declaratory theory the existence of states is tied to empirically evident, formal criteria such as a defined territory, a population and a government, proponents of the constitutive theory portray acts of recognition as indispensable for a political entity to obtain legal status as a sovereign state (Erman 2013: 132; Lauterpacht 1944).

Viewing it from a macro-historical perspective, the international system of “civilized” states was formed throughout the 19th century through such practices of recognition. The constitutionalization of international law and the derived practices of diplomacy allowed European states to establish a set of shared norms and values which governed relations within the European states’ system. While these states formally recognized each other as “sovereign equal”, they sharply distinguished non-Europeans as “savages” or “barbarians” and confined them to an entirely different status in international law (Ringmar 2014: 5). Savages had no sovereign rights and could rely on the benevolence of states’ as part of a virtue of shared humanity only. Early attempts of recognition among states embraced a certain “standard of civilization” which served as selecting mechanism for the international society (Gong 1984). Today’s formal mechanism of membership

to the international system of states requires certain qualities of statehood, but is also based on the mutual and formal acknowledgment of sovereign equality among states (Bartelson 2013: 109). Critical law and IR studies stress that despite mechanisms of sovereign equality among states, e.g. in multilateral negotiations, inequality and sub-ordination are characterizing mechanisms of (non)-recognition among states' and their concerted efforts to constitutionalize the international society.

In IR Theory, the effects of recognition are closely tied to the status of peace and conflict among states. According to Ringmar, situations of mutual non-recognition between states are almost always unstable. Practices of recognition, therefore, might have a stabilizing effect on the international system of states (Ringmar 2012: 6; 2002; Lebow 2012; 2008). Moreover, it is argued that the concept of recognition might help to mitigate potential problems of international anarchy through a process of mutual recognition of different collective identities. In his piece on the processes of recognition between states, Honneth (2012: 35) argues that the path for civilizing international relations lies in sustained efforts at conveying respect and esteem for the collective identities of other states. And according to Lindemann (2011), recognition could become a helpful tool to mitigate conflicts in the international system. Recognition also has positive effects on processes of reconciliation, as the process of developing peaceful and cooperative relations strongly relies on symbolic values such as esteem and respect in order to signal to a foreign citizenry that its cultural heritage are not inferior and that it can count on the other's human empathy for its suffering.

Beyond the mechanisms of statehood and sovereign equality, IR theory has been rather limited in highlighting the mechanisms of recognition. Acts of such a politics of recognition between states might include other aspects than a legal perspective of statehood. Authors stress the relevance of recognizing the "Other's" identities, status and self-esteem (Wolf 2012; Greenhill 2008). Ways of "thick recognition" are required to understand the "Other" in terms of essential components making up its identity – this also might include the respect for other's cultural, religious or local differences and even the finding of some common grounds (Allan/Keller 2012: 77). Recognition of responsibility and empathy has been identified as important soft skills in the relationship between states (Lindemann 2013: 152; 2012). Bell argues that human motives such as honor, self-esteem or justice perceptions also serve as mechanisms of recognition. "Bearing in mind that the human motive of the spirit triggers the search for esteem through honor and standing, denied status will result in a conflict of recognition, since the party that is denied recognition will inevitably believe that the situation is unjust" (Bell 2014: 523). Lebow and Honneth also stress such soft skills which serve as mechanisms of recognition between states such as honor, status and esteem (Lebow 2012: 93; 2008; Honneth 2012).

#### *Recognition in political theory*

While IR theories draw on findings of political theory and often point to Hegel as "father" of recognition, political theorists themselves lead a controversial debate on the meaning and implications of recognition. Ancient Greek philosophers, such as Aristoteles, perceived public recognition as a social mechanism and reward of honor. For Kant "Achtung" (esteem) became the highest principle of moral action. Hegel conceived recognition as the basic principle for his ethical thinking. From Aristotelian and Kantian versions of practical philosophy we can distinguish the lines of thought building on Fichte's and Hegel's concept of mutual recognition, in which identity formation, be it of individuals or of collectives, takes a central role (cf. Bedorf 2010: 10).

On the basis of Hegel's conception of ethical life and Mead's social psychology, Axel Honneth (1994) designed his social theory of recognition. He conceives the intersubjective concept of recognition as the precondition for an unabated relation to self (Honneth 1994: 196; cf. Bedorf 2010: 45–77): Reciprocal recognition allows both the involved "self" and the involved "other" to form their identity. It is thus the leading principle in social relations and unfolds within three spheres of interaction: love, law and solidarity. Therein, different mechanisms of recognition are at

work. In close relationships such as love relations, friendship or mother-child-relations (1), the involved subjects stand in need of one another and, at the same time, endorse each other mutually; these relations effectuate self-confidence. Relationships within the sphere of law (2) are formal and anonymous; as a legal subject, each individual stands in an equal relation to all other legal subjects, which effectuates self-respect. Within the sphere of social appreciation within a collective (3), lastly, an individual is recognized by the other individuals for her unique abilities and capacities, for her social value in the context of a shared consensus of values. Such solidarity effectuates self-esteem. Self-confidence, self-respect and self-esteem are preconditions for the very identity of human beings. Therefore, the harm which is caused by misrecognition or non-recognition is the worst form of social injustice (Kompridis 2007: 278; Zurn 2003).

Compared to the Honneth's theory of recognition, Charles Taylor's multicultural account of recognition is more limited in that it focusses on the relation among different cultural entities only, building on the exemplary case of the French speaking communities in Quebec and their struggle to preserve their culture. Taylor (1994: 25) states that misrecognition or non-recognition inflicts harm, reduces the mode of being and must be perceived as a form of oppression. Due recognition is a vital human need. In sharp critique of "'difference-blind' liberalism" and its claim "that it can offer a neutral ground on which people of all cultures can meet and coexist" (Taylor 1994: 62) he demands "that we all recognize the equal value of different cultures; that we not only let them survive, but acknowledge their worth" (ibid: 64). Taylor draws on Frantz Fanon and his *Wretched of the Earth* to underline his claim in the context of intercultural conflicts (cf. Bedorf 2010: 27): "[...] recognition forges identity, particularly in its Fanonist application: dominant groups tend to entrench their hegemony by inculcating an image of inferiority in the subjugated. The struggle for freedom and equality must therefore pass through a revision of these images" (Taylor 1994: 66). When it comes to his conclusion, Taylor however derives from Fanon in that he is optimistic that successful mutual recognition would, via the mechanism of mutual acknowledgment of identity building self-ascriptions, effectuate authentic identities (Bedorf 2010: 33). The idea that the recognition of difference could alleviate "Others" from their position of oppression henceforth became a decisive aspect for the multi-faceted debate on recognition.

Against the background of a feminist stance on critical theory, Nancy Fraser conceives of recognition not, as Honneth does, as the single main principle in social relations. She defends a "'dualistic' approach" (Lysaker/Jakobsen 2015: 6), including both economic redistribution and intersubjective recognition in a broader theory of justice (Fraser 2008). Recognition is thus a cultural phenomenon that effectuates social status: Recognition is instrumental to acquire equal status and parity as an interaction partner in social relations (Kompridis 2007: 278). This view sheds light on misrecognition: Institutional, cultural, racial or gendered forms of discrimination prevent people from becoming recognized as equal partners of society. While misrecognition surely is an infringement on the very identity of people, it is also an infringement on their human rights (Fraser 2003: 144).

#### *The recognition of (human) rights*

The recognition of rights differs from the recognition of individuals or other entities such as states. When it comes to the recognition of human rights, there are two strands of thinking within political theory. Drawing on a comparison with natural rights, the first strand positions that human rights may exist independently of societies and states (Lyons 2006: 2–4). Human rights are then understood as moral rights that exist prior to any legal or institutional rules (Feinberg 1973: 84). Some philosophers perceive human rights as if they had an existence in moral order that can be identified independently of their institutionalization in international treaties or practices. From a natural rights perspective, human rights derive their authority from deeper order values or meta-norms, such as fundamental moral rights possessed by all human beings or as part of the virtue of

humanity. Beitz (2009: 7) distances himself from such a perspective and develops a concept of human rights as lived practice. He stresses the difference between natural rights and human rights.

The second school of thought emphasizes the need for recognition of rights. The English philosopher Thomas Hill Green (1941: 136) stresses that “rights are made by recognition” and that rights do not simply exist, but “thinking makes it so”. Other British Idealists such as R.C. Collingwood point to the relevance of the mechanism of social recognition and to the contribution of rights to the common good (Boucher 2011: 757; Collingwood 1992: 219). According to Jones (2013: 275) rights first and foremost have to be recognized by societies in order to become valid and legitimate. Moreover, the moral quality of such rights is essential for being perceived as rights. Therefore, rights are morally grounded entitlements which each member of a society ought to both equally enjoy and equally respect. In order for people to internalize these rights as morally authoritative, they must be able to understand and accept the justification of rights and their moral rightness. Human rights are being perceived as a subset of moral rights. Such rights might exist without social recognition, but from the perspective of social recognition theory, these rights are then only nominal or even defective (Lyons 2006: 2). According to recognition theorists, the existence of moral rights implies two conditions: First, the social recognition of such rights and secondly, the soundness of the moral principles that support their ascription. Recognition, therefore, becomes a constitutive act for the institutionalization of a right. Two mechanisms are so far highlighted as there are the moral soundness of a right and the social acknowledgment, e.g. of a grave injustice by people. Martin (2013: 5) takes the social recognition view of rights one step further by stressing the relevance of rights’ maintenance which also refers to the implementation of human rights beyond their mere constitution.

For the purpose of this paper, human rights as a subset of moral rights are perceived as lived, dynamic processes of institutionalization that are both discursive and practical (Beitz 2009: 8).

“The discursive community in which the practice resides is global and consists of a heterogeneous group of agents, including the governments of states, international organizations, participants in the process of international law, economic actors such as business firms, members of nongovernmental organizations, and participants in domestic and transnational political networks and social movements. [...] Human rights claims are supposed to be reason-giving for various kinds of political action which are open to a range of agents.” (Beitz 2009: 8).

#### *Recognition as analytical framework for the emergence of (human) rights*

Some authors have stressed that recognition is an act of communication or a speech act which usually takes place between two agents. Kessler/Herborth (2013: 159) argue that empirical facts such as rights are not simply given but the result of a “struggle for facticity”. By drawing on such Habermasian insights, recognition must be understood as an intersubjective concept where communicative practices become a decisive tool to institutionalize social order. Bartelson (2013) points to an additional dimension of recognition: According to him, recognition is not only a relational, dyadic concept, but requires a third – a triadic – relation as it takes place under the auspices of an audience, e.g. the public sphere. Strydom (1999: 256) identifies it as “triple contingency” and stresses that under current conditions of communication within societies, the public audience plays a crucial role. Bjola and Kornprobst argue in a similar direction by defining Habermas’ concept of arguing as too narrow. Argumentation is crafted as “the process through which its participants come to determine, by communicating with one another, whether there is a message – expressed in words – circulating among them that constitutes persuasive reasoning on how the world is like and how to act in it accordingly” (Bjola/Kornprobst 2011: 4). Persuasion then becomes possible because senders embed their ideas into existent knowledge or ideas of the recipients. Some Habermasian recipients of communicative action refer in this respect also to the necessity of a common lifeworld which can be broadly defined as shared repertoire of existing ideas that agents use to anchor their arguments. The social movement theory comes to a similar

conclusion when drawing on their ideas of framing (Benford/Snow 2000). Persuasion is being perceived as form of resonance when actors succeed to mobilize for their cause, often by drawing on humanitarian issues such as unreasonable suffering in violent conflicts.

Drawing on the different dimensions of recognition – moral, social, political and legal – in order to describe the institutionalization and legalization of a human right shows some parallels to findings of norm research and communication action as they stress the contingency and contestation of such processes. Such an understanding of human rights comes close to older concepts of norm generation and more recent concepts of norm dynamics (Wunderlich 2013: 25–27). While the first school of thought stresses, inter alia, the relevance of norm entrepreneurs for grafting ideas into new norms, the second generation of norm research emphasizes the dynamics and contestation of norms. “Norms are born anew every day as actors instantiate them through their beliefs and actions” (Hoffmann 2010: 5419). Norms are being perceived as inherently ambiguous, indeterminate in their nature and essentially contingent. Nevertheless, both schools of thought would follow Kratochwil’s (1989: 69) statement according to which norms are “problem solving devices” which result in new standards of behavior and eventually become legally codified in modes of global governance or international institutions.

The emergence of a norm on rape as individually punishable crime is perceived as a process of increasing institutionalization which encompasses the three different dimensions of social, political and legal recognition. While strands of political theory and philosophy conceptualize rights as being in need of social recognition, legal theorists point to the relevance of legal recognition as part of the legalization process. International political sociologists add the dimension of political recognition which becomes a decisive act among states. Bartelson (2013) summarizes the debate on recognition under the heading of the “three dimensions of recognition”: the moral/social, political and legal recognition. In the following section I draw on these findings and transfer them to the norm dynamics of grafting a norm on rape as individually punishable crime as part of the Rome Statute of the ICC.

### 3. CASE STUDY: SGBV IN THE ROME STATUTE AND THE ICC

#### 3.1 *Moral and social recognition of sexually-related crimes*

Bartelson (2013: 108) refers to moral and social recognition as mainly related to states. He nevertheless argues that such forms of recognition need to include epistemic recognition. The moral and social recognition of rights refers to the social recognition of grave injustices such as the deliberate targeting of civilian population in armed conflicts or forms of sexual violence as part of a war strategy. The social recognition of rights also includes the dissemination of knowledge about moral injustice into the transnational community of non-governmental organizations, social movements and the everyday citizen.

From ancient times throughout the greater part of the Middle Ages, sexual violence against women, and in particular rape, was commonly perceived a property crime, a crime committed against the man who “owned” the woman, not against the woman herself (Brouwer 2005: 4; Douglas 2001). This partly changed during the late 18th and 19th century, when the first institutions of International Humanitarian Law (IHL) were grafted which sought to protect civilians in conflicts. However, the provisions which were partly intended to protect women from sexual violence remained vague.

In this context, the moral recognition of diverse forms of sexual violence as war crimes and crimes against humanity was finally achieved through the negotiations of the Rome Statute which brought about the International Criminal Court (ICC). The normative evolution has moved away from norms that conceive of sexual violence as violations of men’s property rights over women, to such norms which stress the human dignity and bodily integrity of victims (Koenig et al 2011: 4).

Additionally, the 1990s formed a particular “window of opportunity” for the purpose of humanitarian legal codification. The anti-personal mine ban treaty was concluded only six months earlier than the Rome Statute and similarly aimed at protecting civilians in the course of armed conflicts. The war horrors of Bosnia and the deliberate and vast targeting of women gained international attention. Women were not targeted simply because they belong to the enemies, but because they keep the civilian population functioning (Dixon 2002: 703). They became targets as part of an organized ethnic warfare which aimed at destroying the opposite population. The intense media coverage of crimes such as mass rapes mobilized the attention of the international society and paved the way for the International Criminal Tribunal for Yugoslavia (ICTY).

Diverse social movements, non-governmental organizations and their networks also served as important facilitators for the social recognition of rape as crime against humanity. Women’s activists managed to put the issue of women in armed conflict on the agenda of the World Conference on Human Rights held in Vienna in 1993 and of the Fourth World Conference on Women held in Beijing in 1995 (Bedont/Hall-Martinez 1999: 2). As an outcome of the Beijing conference, the Beijing Platform for Action committed governments to integrate a gender perspective within the resolution on armed conflicts. Under the Arria formula where NGOs are invited to address the UNSC members, women’s activists managed to gain the attention of the UN Security Council where violence against women in armed conflicts became recognized as a serious global challenge for the first UNSC Resolution 1325 of 2000.

IR research on norm generation refers to the relevance of epistemic communities serving as knowledge providers and experts on the issue (Cross 2013; Adler/Haas 1992: 367). In the case of moral and social recognition of sexual violence as a crime against humanity, a group of feminist lawyers served as experts and lobbyists during the Rome negotiations. Feminist legal experts already played a part in the efforts to put women’s human rights on the agenda of the 1993 Vienna Conference and the 1995 World Conference on Women in Beijing. Through these conferences, feminist activists called for the international community to recognize women’s rights as human rights including the recognition of sexually based crimes as flagrant violations of humanitarian law (Copelon 2000: 219). Some of these feminist legal experts, for instance Catharine MacKinnon, started out in 1994 as counsel of Bosnian victims who sued the Bosnian Serb Leader Radovan Karadzic in the United States District Court in the case *Kadic vs. Karadzic*. While the *Kadic* plaintiffs are unlikely to receive any of the millions of compensation, the decisions of the US Court had important symbolic value and added to the moral and social recognition of deliberate bodily harm in intra-state armed conflicts as crimes against humanity (Dixon 2002: 706).

While the women rights and human rights conferences of the 1990s furthered the political recognition of the problem of targeted sexual violence in armed conflicts, the group of feminist lawyers furthered the legal recognition of the problem. They did so by changing the discourse on sexual violence in terms of shifting it away from the old-fashioned meaning of an attack against the honor of men/women which is still found in parts of the Geneva Conventions of 1949 as well as in the Additional Protocols of 1977 towards an understanding of such crimes to be perceived and punished as egregious human rights violations. Crucial for changing this discourse was the creation of the Women’s Caucus for Gender Justice in the ICC which was a derivative of a caucus present at the Fourth World Conference on Women in Beijing. The Women’s Caucus primarily sought to educate people worldwide about crimes against women. To this end, the Caucus developed membership sections in almost all countries participating in the negotiations, from all regions of the world, and distributed valid information about the status of negotiations to them. During the negotiations in Rome, the Women’s Caucus managed to diversify the issue of sexual violence against women and girls to recognize other forms of criminal activities beyond rape. They also achieved the formal recognition of sexually-related crimes against men as crimes against humanity on equal-footing in the Statute (Benedetti et al 2014 : 69–71).

### 3.2 *The political recognition of sexually-related crimes in armed conflicts*

When Bartelson (2013: 111) points to the relevance of political recognition he also primarily refers to the statist realm where states willing to become part of the international system need to be recognized by other states. In relation to the recognition of rights, political recognition is related to the realm of diverse agents such as states and international organizations, for instance the United Nations, which recognize the issue, put it up on their agenda and initiate problem-solving action. The act of the political recognition of rights is the crucial link between their moral framing, their recognition by societal actors and their final legal codification.

Building early steps in the course up to the political recognition of sexual violence in armed conflicts, the United Nations already in the 1980s addressed the issue a few times, namely in an ECOSOC resolution in 1984 and in a first UNGA draft resolution in 1985 on sexual violence against women and children introduced by Austria and Spain. Nevertheless, it was during and in the aftermath of the armed conflict in the former Yugoslavia where the most egregious and targeted crimes against Bosnian women and girls had been committed by Serbian militia that the issue was addressed more systematically for the first time. In 1993, the UN General Assembly as well as the UN Security Council dedicated sessions to debating the rape and abuse of women in the armed conflict in the former Yugoslavia, leading to the passing of respective resolutions. While such dedicated sessions also took place after the war crimes committed in the conflict in Rwanda and more recently in the conflict in Darfur/Sudan, the UN Security Council focused in more detail on “women, peace and security” after adopting Resolution 1325 in 2000. The consecutive UNSCR 1820 of 2008 concentrated on the political recognition of sexual violence as war crime during armed conflicts. With UNSC Resolution 1888 the states of the UN Security Council in 2009 acknowledged the continuous challenge of sexual violence against women in the context of armed conflicts by establishing a Special Representative on Sexual Violence in Conflict at the Office of the UN Secretary General.

Such action followed the institutionalization of the International Criminal Court and demonstrates the continuous relevance of taking the issue to the political sphere in order to retain states’ attention. The political recognition of the issue remains decisive to adequately tackle the continuous practice of sexual violence in armed conflicts. For getting the issue of sexually-related crimes on the agenda of the negotiations of the Rome Statute, the Women’s Caucus for Gender Justice had to convince a crucial number of states to include such crimes into the treaty text. Therefore, some like-minded states who were generally sympathetic to pushing human rights issues became decisive allies (Benedetty et al 2014: 69–71).

### 3.3 *The legal recognition of sexual violence in the Rome Statute*

Legal recognition concerns the codification of rights. Rights, such as human rights, might be essentially ambiguous and contested in their negotiation process. Nevertheless, they have to be perceived as core problem solving devices which set new standards of behavior and eventually become legally codified modes of global governance. In this respect, human rights might be grasped as a subset of moral rights. While legal codification is a decisive step forward in a comprehensive practice of recognition, the codification of legal rights has to be followed by lived, dynamic processes of institutionalization and implementation that are both discursive and practical (Beitz 2009: 8).

The Rwanda Tribunal (ICTR) and the Yugoslavia Tribunal (ICTY) have been crucial in driving the evolution of jurisprudence. In particular, the tribunals have included sexual violence as constituent violation under the crimes of genocide, war crimes and crimes against humanity – adding a momentum of further strength to the process of norm evolution. In the decision against Akayesu in the Rwanda Tribunal, the Trial Chamber pointed to the relationship between sexual violence and genocide. Moreover, the Trial Chamber managed to clearly differentiate between rape and

other forms of sexual violence encompassing forms of dignitary harms. In the case of rape the Court decided that coercive circumstances need not be evidenced by showing physical force. Threats, intimidation, extortion and other forms of duress that prey on fear or desperation may constitute coercion, and coercion may be inherent in certain circumstances, such as armed conflict. In cases of the ICTY, perpetrators were also prosecuted and convicted for rape as crimes against humanity which differ from war crimes in that they do not require a nexus to armed conflict. The Trial Chamber moreover defined rape as a violation of sexual autonomy. In the aftermath of the work of the two tribunals, the issue of sexual violence reached critical attention in international law. The normative evolution had moved away from norms that conceive of sexual violence as violation of men's property rights over women to recognizing women's human rights through norms which stress the human dignity and the bodily integrity of victims (Koenig et al 2011: 14; Oosterveld 2012). In early 1993, an International Human Rights Law Group called Women in the Law Project (WILP) traveled to Rwanda to gather evidence through interviewing victims of sexual violence. They pursued a multitrack strategy by spreading the message globally to women's groups but also directly targeting the ICTR. They managed to convince the Prosecutor Judge Goldstone to add sexual offences to the crime list prosecuted by the Tribunal (Halley 2008–2009: 15).

The main norms within IHL still portray sexual violence as an infringement on women's honor. The ICTY statute and also the ICTR statute both recognized rape as "crimes against humanity". These new rules relieved rape of its "retro dignity and honor baggage" and allowed it to become recognized as a freestanding crime of the same gravity as murder, extermination or enslavement (Halley 2009: 68). Nevertheless, feminist lawyers were not satisfied with the ways rape was being defined and treated in the statutes of the two war tribunals. Rape as a crime against humanity was only recognized if committed in the course of "armed attack". In reality, such crimes often occur sporadically, which would not allow prosecuting such crimes under a narrow interpretation of this norm. Therefore, feminist lawyers in Rome sought to minimize the level of armed conflict needed to recognize rape as a crime against humanity. Moreover, as feminists strived to place rape as a crime at the highest level of IHL hierarchy, they also sought to avoid categorizing rape as a crime against humanity because such a definition implied that raping an individual human being would harm humanity. Instead, feminists sought to define rape as a "grave breach" that would individualize the wrong and allow its gendered focus to appear. This was reached through the intense lobbying of the Women's Caucus on Gender Justice. Article 8.2 of the Rome Statute holds that the ICC includes jurisdiction to try individuals for grave breaches of the Geneva Conventions, including a subsection on sexual offences (Chappell 2014: 579).

The Rome Statute of 1998 of the International Criminal Court (ICC) also added sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization and other forms of sexual violence of equivalent gravity to the list of war crimes and of crimes against humanity (Ellis 2006–2007: 235). In comparison to the ICTY and the ICTR, the ICC thus codifies several other crimes against women besides rape. It also adds a gender component as it acknowledges that sexual violence could be committed against both sexes – men and women.

Nevertheless, the attempt of the Women's Caucus on Gender Justice to stretch definitions on sexual violence as legal crimes to the utmost possible triggered opposition of a number of states who stressed cultural or religious points of concern. A major point of contention arose from the question whether the term "gender" was adequate for the recognition of rights of both sexes. The Vatican and a number of Arab states sought to prevent the inclusion of such term as they feared that the such a definition would be read to encompass sexual orientation (Halley 2008–2009: 45–46; Spees 2003: 1244). The opponents finally managed to restrict the definition of gender to biological sex differences and refused the recognition of the social construction of gender. Article 7 (3) finally read as the following:

“For the purpose of this Statute, it is understood that the term ‘gender’ refers to the two sexes, male and female, within the context of society. The term ‘gender’ does not indicate any meaning different from the above.”

The reference to the two sexes reflected the positions of the Arab states and the Vatican. The phrase “in the context of society” was intended to incorporate the social construction of gender and contained therefore a compromise in language. The last sentence was again sought by the small group of anti-gender diplomats hoping to exclude other sexual orientations (Copelon 2000: 237). Similarly, the recognition of other sexually-related crimes such as the recognition of policies of sexual apartheid as pursued by the Afghan Taliban vis-a-vis women also became a contested issue. Due to the opposition of the US delegation, the NGO-network failed to get such crimes included into the definition of SGBV. Also, a potential norm on enforced pregnancy stirred the opposition of the Vatican and the Arab states. The Vatican sought to delete enforced pregnancy from the draft statute on the ground that it threatened to criminalize enforcement of national laws discouraging or criminalizing abortion.

The Women’s Caucus on Gender Justice introduced new language with the term forced pregnancy as that term would clarify that the crime under definition is a crime committed with violent intent (Bedont/Hall-Martinez 1999: 74).

Further, the recognition of women’s rights and of norms of gender equality played a crucial role in the institutionalization of the International Criminal Court. The ICC grants victims, and particularly women, a participatory role in the Court’s proceedings – it adopted the broadest participatory scheme of any previous tribunal. The ICC stressed that its intention is the empowerment of victims to seek retributive justice. Nevertheless, the ICC only has a mandate to address the highest level perpetrators of the most serious international crimes. Moreover, the culprit must be a nation that has accepted the Court’s jurisdiction, or the crime must have taken place within the borders of such country, or the UN Security Council must have decided to refer the situation to the ICC (Koenig et al 2011: 18). Secondly, the criterion of complementarity must be fulfilled, that is, the Court only complements and does not replace national jurisdiction. Thirdly, the crimes must be of sufficient gravity to justify the Court’s involvement. This brief overview of norms against sexual violence in IHL shows that sexual violence should be outlawed during all phases of armed conflict. Some lawyers argue that at least rape should be recognized as *jus cogens* or as a peremptory norm (Mitchell 2005: 225; Sellers 2002: 289), which would imply that such a norm belongs to the top of the international legal hierarchy and takes precedence over national law and over other sources of international law at the international level.

#### 4. CONCLUSION

Recognition is indeed a multi-faceted and interdisciplinary concept as it draws on political theory, legal thinking as well as on IR theory. Scholars of recognition have so far mainly concentrated on studying the recognition of states, social groups or individuals. The research on the recognition of rights, and more particular of human rights, remains underdeveloped. The paper draws on the three elements of recognition which Bartelson identifies, although he relates the concept of recognition to the statist realm. Nevertheless, the case of recognizing sexual violence in armed conflicts as war crimes and crimes against humanity comprises of three elements of rights’ recognition: Before the legal codification of several norms prosecuting SGBV as part of the Rome Statute was achieved, multi-layered processes of social and political recognition were decisive prerequisites for this success. The recognition of rights often starts with the moral and social recognition of a grave injustice which causes human suffering or indiscriminately affects civilians in armed conflicts. Such has been the case in the global governance efforts on landmines, child soldiers or small arms. In all of these cases, mainly humanitarian NGOs working in the field pointed to the unprecedented suffering of human beings and framed the issue as a case of moral humanitarian concern or as a human rights issue. Efforts of legalization were often motivated by

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liberal-cosmopolitan concerns of ensuring the responsibility of states to protect their citizens. As many of them failed to do so, such cases were taken up to the international realm and became ideal cases for such concerted global governance efforts. Transnational actors such as NGOs and their networks aimed at strengthening individual human rights beyond states' borders.

In the case of SGBV in armed conflicts, the process of social recognition was mainly pursued by women's activists and feminist networks. While these transnational actors achieved the horizontal knowledge dissemination of the issue, the group of feminist lawyers took over the vertical framing of the problem. In order to gain political recognition, both processes of social recognition (vertical framing of a problem; horizontal dissemination of knowledge) have to be pursued. Moreover, when looking at the diverse acts of political recognition, multiple venues mainly at UN level were pursued by women's activists to gain the attention of states. The political recognition of a human rights problem seems to be the prerequisite for the main effort of legal recognition of rights.

The process of rights' recognition can be essentially contested. Such has been the case in the processes of legal recognition of SGBV as war crimes and crimes against humanity. The effort of certain states to strengthen individual women's rights was frequently countered by other states stressing cultural or national prerogatives such as the rights of the family. Moreover, the term "gender" remains a contested concept among states in multilateral negotiations. In summary, the practice of recognizing human rights rarely appears as a linear process. Quite the contrary, efforts of including SGBV in its diverse forms during the negotiations of the Rome Statute were met by some states' resistance pointing to their cultural, national or sovereign prerogatives. Despite several normative concessions the human rights supporting states had to make, the legal recognition of SGBV as war crimes and crimes against humanity has been at least a nominal success. Martin (2013: 5) emphasized the maintenance of rights and stresses the relevance of the implementation process. As a next step, the implementation of the Rome Statute and the ICC practice regarding the prosecution of SGBV crimes should be examined in more detail in order to find out whether and how the recognition of rights matter in the implementation process.

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