

The Politics of Gender Justice

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Abstract

The clash between liberalism and realism as international relations theories and states practices is a driving force within the international criminal justice as well. Liberal peace theory embodied with set of interventionist norms on one hand and doctrine of sovereign equality plus non-intervention political pattern as a realist theory on the other hand, make up for the debate all over the years of doing and undoing politics and gender politics recently. This paper seeks to provide insights on how the international community can and have to enforce accessibility for the gender crimes in armed conflict situations. The discussion based on political and legal scholars, aim to identify challenges and efforts that international community face with regard to sexual crimes and the responsibility to hold accountable based on gender approach crimes done against humanity. The international attempts to reform international legal order will be analyzed through the Rome Statute and the International Criminal Court (ICC), Responsibility to protect norm in lenses of: sovereignty as responsibility, right or duty to intervene, gender articulation of war crimes, principle of complementarity and institutional legitimacy.

Keywords: gender politics, women's court, responsibility to protect



1. Introduction

While conflicts are an ongoing regional and international issue, there are several ways of politics that undo and/or rebuild schemes of peacebuilding or peace reconstruction. There is no single factor that might be analyzed in isolation when it comes at dealing with justice, transitional waves of state building and other democratic struggling. By saying so, we highlight the fact that no formal rule or formal designed institution operate alone in the international web of politics. This is the case even for the ICC reality, where in the Rome Statute, informal rules and the nested environment of the Court, reflect the gender justice outcomes (Chapell,2016:11). Accordingly, recognition, representation and redistributive gender justice are enhanced and reinforced through the above institutional factors.

According to Duncanson (2016:9) “we can think of gender as individual identity and as a symbolic system”. Even though the international community have reacted towards feminist critiques and movements to foster a gender approach within their institutions, it is of primary responsibility of states to advance and prioritize issues related to gender. Different actors emphasize different interests, thus the emerging international legal order is in the middle of its own legacies and of prospects of feminist and other civil society movements.

Not Chapell alone, but other scholars have noticed the influence of institutionalist analysis embodied in formal design rules and informal institutions, in interacting and complementing each other. Radnitz (2011), Campbell (2004), Lowndes and Roberts (2013) have pointed out the significance of institutionalization in terms of formal and informal action as second strategies of dealing with justice in the big picture, and gender justice in particular. Of a high importance is the analysis of goals and objectives that are put forward through different point of views, interests and agendas. Thus, there is no gender justice without well-understanding gender politics of these institutions, such as the Rome Statute, the International Criminal Court (ICC), etc.

In order to set the background of what is further required to improve accessibility to Court, we should bring into attention the temporal and spatial context where in justice and its inputs are constructed and designed. Chapell (2016) underlines the significance of legitimacy and legacies of pre-Rome Statute situation and by doing so, he shed lights on two concepts, such as revisability and institutional legitimacy. As he further elaborates “revisability is to be defined through two features; the one that is aligned with flexibility and the second to variability; which is too much related to the ability of the Court to learn and to respond accordingly” (Chapell,2016:16). This concern is evident even nowadays, for the institutions of legal order to establish a proper relationship both to responses to new procedures and policies, and legacies of gender issues in international criminal law.

In spite of revisability importance to maintain a level of legitimacy in the ICC, accountability is another factor of risk when it comes to deal with the international level of justice. There is not the same index of legitimacy in international institutions as in the national sphere, due to the lack of check and balances system of accountability. Thus, there is a difference in these parallel institutional and judicial “universes” which in fact, should meet at one point with each other; at the point of dealing with crimes against humanity. Bodansky (2012), Barnett and Finnemore (2004) provide analysis on concepts of legitimacy, accountability, democratic mechanisms as the threshold for making the ICC and every international institution the friendly environment for broader participation of social and civic actors. Schiff (2010) highlights the

difficulty to achieve a constant judgment of justice in the international level due to the inclusiveness of various actors and interests who make up different standards of accountability and legitimacy. This difficulty is more apparent in the ICC (International Criminal Court) where in actors involved show different expectations about the performance.

In the fullest terms, what is appropriate to re-consider is that there won't be gender justice without re-considering gender laws and practices within national laws system. As we are going to go through later in analysis, the international and national institutions/actors, should better operate in consent and proper compromise when dealing with human rights and human security. Two parallel systems, the one of Westphalian level and the other of interconnected web of interests and norms, reflect discontents and sometimes failure of positive outcomes.

2. The International legal order and the Responsibility to Protect

The agreement of states for the Rome Statute draws the line of changes in two respects: first, to give credits to a restorative approach with the victim-centered paradigm, contrary to the previous reality with the old approach of retributive one (Schabas,2011:346); second, the novelty of gender justice with the three important factors such as representation, recognition, and redistribution (Chapell,2016:32).

It is of high interest for this paper to mention three important measures that the Rome Statute put on the top of the ICC but also to make these three elements object of analysis on their status of performance.

Representation: *Provisions for the representation of women and of gender experts across the ICC organs of the judiciary, Registry, and The Office of the Prosecutor (OTP);*

Recognition: *Recognition of women and of victims of sexual and gender-based violence through: Substantive crimes; Procedural rules; Acknowledgment of women victims; Work of the OTP and Registry;*

Redistribution: *Access to reparations as well as the Trust Fund for Victims (TFV) assistance mandate, including a gender justice focus. (Rome Statute, Article 68)*

At this stage, “legalization of gender” within the international criminal justice system, which in other words is referred to the legal recognition of gender-based crimes, record the very first package of measures to ensure fair representation of victims in a gender articulation of human rights. This is the very first step that international community achieved to enumerate sexual crimes as war crimes (Rome Statute, Article 8(2) (b) (xxii).

The Rome Statute gives us the whole new legal perspective of what international community should start to enhance improvements on this regard. Schiff (2008:3) puts it right when saying that ‘the ICC emerged as an amalgam of normative commitments, legal understandings, political interests, diplomatic bargains, and organization dynamics’.

The historical and political timeline that the ICC emerged, were based on two pillars of spatial context; the one came as a result of post-Cold War era and with all the changes and dynamics that it brought in the international political environment to mention the beginning of transitional

political and justice rounds in post-communist and post authoritarian countries. The second context is linked with the development of feminist legal scholar's movement to produce new set of practices and norms in order to break the usual operation with the legacies of international law. Within the big basket of international law, rules were perceived as gender captured and gender biased. Gender legacies of international law cannot be detached from the whole and the big picture of gender perspective around many issues through national lenses. The 'sovereignty' and 'internationalization' of gender gap is reflected even to other concepts such as Responsibility to Protect and Women Peace and Security agenda. This attempt to balance the globalization of politics and national ground of practices, has founded the principle of complementarity that even the ICC lies upon. Following this usual business to deal with the sexual violence during armed conflicts and post conflict settings, the ICC and its founding and expanding laws, are of high importance to foster a fair relationship between international community interests and norms.

Three sets of cross cutting gender legacies have prevented women and victims of sexual and gender based violence from accessing reparations processes, as follows:

1. Recognition-definitional issues: crimes committed against women have been seen as the collateral damage of warfare but not serious or grave enough to warrant repair;
2. Women have largely been unrepresented in reparations fora: women have failed to gain access to reparations adjudication bodies due to a lack of information about their rights, as well as social constraints and stigma limiting their opportunities to be involved;
3. Cases related to women's experiences of conflict have been inadequately prosecuted. In other words, misrecognition and misrepresentation have helped to reinforce maldistribution by blocking women victims 'access to reparative justice. (Chapell, 2016: 133)

Despite the improvement and novelty that the Rome Statute achieved in terms of gender politics and gender articulation in war crimes during armed conflict situations, there are pending efforts to oblige states 'parties to nationalize other provisions (Megret,2011:376). This is the case also for the Responsibility to Protect and WPS where states fail to make it to the top of agenda.

Chapell (2016) holds the fact that there is still no complete database on ICC which might show how is the implementation status of states. Given the fact, there is an ongoing vague and foggy environment where in major issues are on hold for the sake of lack of global commitments and global shares of values to altogether assess and appropriately respond to crimes against humanity and sexual crimes in particular.

Chapell (2016) acknowledges the distinction between international and national approaches both to check and balance their institutions and their legitimacy. He sticks to the fact that the shifted paradigm from a retributive to a restorative justice has not fulfilled the cycle of ICC's to moderate a gender-biased approach. This critique refers a missing opportunity to leave behind the legacies of international law and provide a political and legal compromise to advantage attention to nonsexual violations.

Another critique to the situation of the ICC derives from Alex Bellamy (2020) who argues that unpopularity of the Court has reached to the important political actors in the UNSC such as Russia and China, by preventing the atrocity investigations in Syria. Another aspect of it, is the lack of national interest to prioritize atrocity prevention in the domestic level. The lack of

accountability as a far-reaching feature due to the impunity of governmental actors and other armed groups, has failed the ICC to keep the promises of its mandate.

Bassiouni (2009) brings attention to two concepts that would be of interest for this paper and in the context of this analysis. The first, relates to the notion of *civitas maxima*. Accordingly, the *civitas maxima*, the one existing since the Roman Law, remains as key as being part of the foundation of the Responsibility to Protect norm; which in other words mean the enforcement of individual and collective benefit for all society through legal obligations. As of today, considering the international context and the web of actions and interests, Bassiouni refers to an international rule of law that is a progression of a **civitas maxima**, ‘including both binding legal norms that transcend domestic norms or web as international legal processes that are similar to national legal processes, but which also apply to state action’ (2009:37). What he claims, makes no difference from the principle of complementarity discussed above in regard of the ICC, but this *international social contract* under the framework of legal processes should hold direct-enforcement effects based on national legal systems. Being aware of the interconnectedness of outcomes and resources, Bassiouni reflects on an international social contract that is made up by international criminal justice, protection and resource-sharing practices (2009:38).

The evolution of the Responsibility to Protect shows how the international community timely and decisively respond to changes that conflicts and armed settings display for the international security architecture. International failure to protect people from genocides happening in Rwanda, BiH and Kosovo, emerged R2P norm as a moral shift towards international responsibility for the humanity. Ever since, there have been attempts to establish mechanisms for the states to protect, react and rebuild for their own people, even though the different political interests through skepticism and the lack of a global commitment towards atrocity crimes hold still the process of accountability and justice as a transitional reality. The realm of the Western Balkan countries reflects the political challenges within regional political perspective. To mention few of initial responses to Secretary-General’s 2009 Report, a part of the North Macedonia, Croatia, Bosnia-Herzegovina, Albania, and Montenegro, Serbia considers R2P as a necessity, but this does not imply that it has yet acquired a legal nature and that for this reason there might be a potential for the abuse of the concept.

In order for the R2P to fulfil institutionalization, it has to provide not to be at risk of abuse by powerful states, to show consistency in real world application and most important, to break with the previous humanitarian intervention discourse (Zyberi, 2013:7).

One of these challenges has to do with the gender gap reflection that has to be improved and imposed as a collective goal and share of values in the new era of globalization.

As with the Rome Statute and international criminal justice, the R2P norm is challenged by many countries for their concern on losing sovereignty or influence.

Even though the UNSCR 1325 is considered as one of the first formal and legal documents that the Security Council has recognized women as actors since its foundation, it still has to do more for the implementation of National Action Plans, as a way to bring closer the mutual goal of human security that is embodied within both national and international aim.

The question arised is how to adapt and enhance efforts for the legal and political system to push an approach that will recognize and represent gender justice agenda within institutions.

Responsibility to Protect; Women, Peace and Security agenda, while not being legally binding to States, face diverse challenges that often are under the “conflict’ between state sovereignty and institutions of a supranational legal order. According to Kowalski et al (2017:26) “affirmation of any legal, supranational, regional or universal, legal order will always go through periods of conflict and rivalry that represent the time needed for national sovereignties to adapt to new scenarios”.

3. Challenges and Opportunities

Scholars of gender war crimes focus their analysis on recent developments and challenges that the norm as R2P is facing towards efforts of implementation. Among critiques on R2P conceptualization, feminist scholars highlight the fact that the context set for the design of gender politics in the post-conflict situations has always been inspired by neoliberal peacebuilding. In the attempts of bringing closer R2P and WPS Agenda to women of conflict zones, neoliberalism has put into question the success of norm implementation, weakening so the prospect of R2P to strengthen domestic responsibility and improve institutions in regards of accountability and accessibility. While evaluating the transitional justice mechanisms applied in the aftermath of a conflict or mass human rights violations settings, gender remains one of the key concerns. All these steps that the international community and its bodies have taken to improve the response and accessibility to justice, are part of the whole legal, political and moral package that governments and societies altogether have the duty to activate.

Ercan (2016:2) argues that the shifted paradigm from the right to intervene to a responsibility to protect have not conceded as it meant to due to the conceptualization and systemic limitations. Following this argument, Duncanson (2016:32) identifies problems on conceptualization, problems on implementation and of ambition. When it comes at rendering gender approach in violent conflicts, Björkdahl and Selimovic (2017) identifies three gender justice gaps, such as gaps in gendering accountability, acknowledgment and reparations. Accordingly, so far, the Rome Statute under the ICC is the only legal mechanism that women may engage in legal proceedings. Furthermore, acknowledgement as an important social feature remains a concern due to the marginalization and stigmatization of women in post conflict areas. This is aligned with what feminists approach illustrate as problem of conceptualization and placing women only as victims of the conflict, rather than both victims and peacemaker. Finally, gender gap in reparations which is so common throughout the reparation schemes designed by states. Bjorkdahl and Selimovic highlight the importance of knowing dynamics of women in the society in order to provide to them the appropriate reparations.

4. Women’s Court and the Office of Prosecutor

This section will be focused on two situations: the first one is on the Women’s Court approach as a transitional justice mechanism that hinders an alternative model of justice for women of conflict settings, and the second one is on the Office of the Prosecutor at the ICC. These two parallel deliverables of justice represent the ongoing efforts of international and national actors to raise awareness on the one hand and to improve accessibility to the legal proceedings on the other.

Women's Court movement is also a key model for the civil society and grass-roots movements in the Western Balkans, in order to bring much closer focus on healing, advocacy, acknowledgment and historical record for the gender-based crimes. Besides criminal justice as the main mechanism to deal with the past and hold accountable the perpetrators, alternative justice through forms of local and regional activism is being pushed forward to strengthen women's participation in all processes of post conflict recovery. Even more, these deliberate models of engagement into transitional justice designing mechanisms, foster public recognition and demonstrate a sort of responsibility to achieve justice and seek for the truth. In addition to that, Women's Court is an example to lead on two main issues: firstly, it faced the scars of the war through a preparatory process of highly democratic and inclusive, by leading with the example of responsibility to transforming pain into another form of resistance; secondly, through widening the public audience, it reflected a public condemnation as a symbolic justice to be delivered.

The second point to demonstrate is the Office of the Prosecutor in the ICC. Through its Strategic Plan 2012-2015, the OTP (2014) recognizes the necessity to prioritize the integration of gender perspective in all areas of its work. By doing so, it demonstrates the institutional willingness to elevate this issue into a higher level of implementation and designation. This Office highlights both the complementarity and cooperation features of the Rome Statute that the States should align with. In other words, the OTP intend to take steps on "improving further the Rome Statute ratification, encouraging domestic implementation, participating in awareness-raising activities on the Court's jurisdiction, exchanging lessons learned and best practice to support domestic investigative and prosecutorial strategies, and assisting relevant stakeholders to identify pending impunity gaps" (OTP,2014:15).

These two models of delivering justice and raising accessibility of victims to the international legal order show how justice and transitional justice mechanisms are to be contextualized and enhanced by national and domestic actors, in order to better understand the legacies of war and root causes of it.

5. Conclusions

This paper sought to provide a better understanding on the linkages of the Responsibility to protect and the international legal order in regard of accessibility and empowerment of women participation in all processes on the aftermath of a conflict. Throughout the paper, it is highlighted the evidence that still the international community institutions are under constructive processes on dealing with the past in legal proceedings and that responsibility to protect does not threaten the supremacy of sovereignty over the web of actors that may be engaged onto the international response on conflicts. On the contrary, the responsibility to protect and the women, peace and security agenda are to be enforced by states in order to fulfil responses to their domestic conflictual issues. Thus, the responsibility to protect may be just another mechanism among transitional justice ones that complement the puzzle of resolving disputes, responding to mass atrocities and delivering justice after all.

To conclude to the research question of this paper, gender is only enhanced by the willingness of state actors and gross-roots movements. It is the State that promote gender representativeness in domestic and international institutions; it is on the domestic responsibility to design contextualized responses and mechanisms that would push for closing the gender gap. In order

to advance with the gender representation in the international courts and tribunals, it is of imperative to states to nominate women in those positions, thus opening the opportunities for women to participate in all processes of justice delivering.

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