Fighting Sexual-Based Violence through a Sociology of International Justice

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TABLE OF CONTENTS

INTRODUCTION

Sexual abuse appears to have been an abnormal historical constant in all combat circumstances since ancient times. Indeed, there is a 'genetic' link between this horrible kind of violence and the concept of war itself, with the purpose of affirming the 'strongest' grounds in the social fabric of the affected civilian populations, as well as in the more personal and intimate domains of civilian war victims. However, the international community did not publicly acknowledge or condemn such illegal acts until the end of the Second World War and the second part of the 20th century. Indeed, it was only through the rising acknowledgement of the inviolability of some human values as a basic tenet of international law that these actions could be framed from a regulatory and legal position, and made illegal.

Reflecting on how international justice intervenes in the battle against sexual assault against women in armed conflict entails considering the role that international criminal law can play in rebuilding victims' social dimensions.

In the latter decade of the 20th century, the international community established several types of criminal jurisdiction with the goal of promoting peace and international political transition in situations marked by widespread violations of human rights and armed conflicts within ethnic and religious groups. This trend has manifested itself not only in the establishment of two *ad hoc* tribunals in the former Yugoslavia and Rwanda for criminal law, but also in the International Court of Justice (ICC). Parallel to the establishment of these courts, there has been an increase in the number of 'mixed' judicial instances - in Cambodia, Sierra Leone, Kosovo, and East Timor - in which judicial courts are composed of both international and national judges and apply both international and domestic criminal law.

Most observers regard the rapid and vast expansion of international criminal justice as a profoundly good thing. The international legal system is fast changing to a more 'global' environment in which state sovereignty is eroding, new subjects of the legal system proliferate, and the Grotian premise of the exclusion of humans from the subjectivity of law is on its way out. Furthermore, international criminal justice appears to be a suitable

response to the post-Cold War rise of phenomena such as ethnic conflict, aggressive nationalism, and religious extremism, all of which contribute to widespread and significant abuses of human rights. Nobody will believe that conflicts culminating in genocide can be promoted without facing the consequences of a court of justice and being punished by an international police force. In this way, the criminal instrument can serve as an effective deterrent to new wars. International criminal courts can ensure the repression of war crimes and crimes against humanity far more successfully than national courts. This is because internal courts are hesitant to punish offences that have no meaningful geographical or national ties to the State to which they belong. Furthermore, international courts are significantly more technically capable than domestic courts in ascertaining and interpreting international law, evaluating crimes impartially, and establishing uniform judicial standards. Furthermore, with far greater media coverage, international trials more effectively communicate the world community's desire to punish those guilty of significant international crimes, and more explicitly ascribe to the sanctions imposed as a function of popular disapproval of the condemned. However, how does international justice affect social processes? Criminal justice surely has a limited purpose if it is considered that the function of international criminal justice can be limited to the imposition of sanctions. Otherwise, international criminal justice must be viewed as one of the factors targeted at post-conflict societal reconstruction, particularly the reconstruction of the victims' social dimensions. The ability of global, national, and local processes to promote justice after violent conflict is the subject of heated debate in the field of justice. The majority of the discussion focuses on more formal systems of justice (courts, tribunals, or truth commissions), meaning that governmental institutions and the law are primarily responsible for creating the social healing process. Without doubt, in this regard international justice has a larger impact on the global system as it involves not only a specific area but a global dimension. As a result, it is worthwhile to consider more informal, socio-cultural processes outside the purview of the state, particularly in terms of how they support social reconstruction at the micro level. Social reconstruction is defined as a concept that encourages peaceful cohabitation and unity within a people via the use of nonviolent dispute resolution methods. It tries to heal past abuses through reconciliation and enhance people's appreciation of differences in a community through cooperative communities in order to avoid people resorting to violence when disagreements arise. Developing a social dimension for gendered victims of sexual assault in armed conflicts entails creating conditions that allow

women victims to live in a peaceful society where they can enjoy economic and legal advancement.

Can we talk about a sort of sociology of international justice? This work aims at analysing the possibility of developing new concepts regarding international justice, particularly the international justice against sexual and gender-based violence in armed conflict (SGBV).

Despite being late to the party, sociological approaches to international criminal justice are not new. Sociologists have long been involved in international criminal justice and its institutions, in addition to the growing body of interdisciplinary literature on international (criminal) justice that draws on sociological insights and methodology to varying degrees and in diverse ways. According to Mikkel Jarle Christensen, the primary lines of sociological study on international criminal justice have been largely characterised by two main approaches, namely one concerned with knowledge creation and another inspired by Pierre Bourdieu's work (Christensen 2015). A first approach is based mostly on the work of Habermas (Struett 2008), Foucault (Clarke 2007), and Latour (Campbell 2013). According to this literature, international criminal justice is 'realised' by treating court 'products' such as documents, speeches, and other legal artefacts, as empirical evidence rather than legal pronouncements. These researches provide a unique look into the social dynamics that shape international criminal justice as a way of 'being' in the globe (Nouwen and Werner 2010).

The second approach, however, is dominated by sociologically trained scholars who consider international criminal justice as part of global restructurings. John Hagen considers a more explicit institutional study, in which he demonstrates the individual agency at work in the legal and political crafting of a new legal regime (Hagan 2010). Chris Tenove has also demonstrated how international criminal justice is a social field shaped by human rights advocacy, diplomacy, and criminal justice (Dixon and Tenove 2013).

The study of international criminal justice thus benefits from a starting point of the adversarial structure of its social field, as created by the ongoing competition between and among different actors and agendas. In this way, rather than providing a worldwide 'grand theory', relational sociology provides a collection of conceptual tools for experimentally investigating actual positions and practices in international criminal justice.

This work intends to focus on these adversarial structures of social fields on the specific topic of sexual and gender-based violence (SGBV) crimes. SGBV crimes create victims not just on a physical basis. As previously said, women's bodies, while fragile, contain collective ideals of honour, chastity, and community reproduction. When a perpetrator sexually assaults a victim, he breaches and shames the collective the body symbolises, as well as all the rules - however patriarchal - that construct it; the conflict is writ tiny on an individual body, which is "destroyed [...] as the collective dream proceeds" (Maneuvers 2000,134).

Women's fragility is a subordinate feature, but it is precisely because of this subordination - men's authority over it - that their sexual virtue becomes a commodity, an investment, a valuable thing. Women may be considered as inferior to the males who rule them, but when war and conflict are primarily a men's game, SGBV becomes a weapon (Cohen 2013). The stigma that the community places on sexually unclean or victimised women becomes a self-inflicted weapon: SGBV transforms their women into what the community feels driven to despise, disown, and reject. Victims suffer the most direct injury. However, SGBV also shatters man's identity as guardian of 'his' women; he has failed to protect, and so failed as a man. Children are also said to have fled their homes "to avoid having to look at the face of their mother who was raped in front of them". In this way, SGBV devastates the community (Bergoffen 2010,101). A significant amount of literature has focused on highlighting the negative effects of widespread and systematic violence and on the social dimension and safety of communities, so determining, consequently, a general social collapse (Natalie et al. 2014).

As a result, sexual gender discrimination is not just a legal issue, but also a societal one. International justice can operate as a bridge between these two dimensions by allowing role implementation to have an impact on social reconstruction.

In this sense, while it is a new concept, developing a sociology of international criminal justice can help to understand the dynamics that have governed the relationship between society and international criminal justice, as well as the social issues that still require an international criminal justice response. This would allow us to comprehend how the current processes function in terms of societal expectations. The concept on which this work is based is that an international justice which does not address social needs, while also upholding the rule of law, risks becoming an arid justice. International justice is inextricably linked to the dynamics of a social

composition; hence, the conversation between social demands and international justice responses must be researched and recognised.

Sociology can be defined in a variety of ways. Sociology is the social science that investigates the causes and effects of human society phenomena in connection to the individual and the social group; another, more narrow, definition defines sociology as the scientific study of society. Other historical definitions include that of Auguste Comte who considered sociology as an instrument of social action, or that of Émile Durkheim, according to whom sociology is the study of facts and social relations, while Max Weber believed that sociology is a social science aimed at the interpretative knowledge of social action.

Social relations are founded on relationships between different social classes. The main ties, according to Marx, are those established in the economic arenas of the production and distribution of goods and services, and hence, in the social class system (Bagnasco et al. 2013). Religious, cultural, political, and philosophical beliefs are all superstructures. As a result, class conflict is identified as the historical driver. According to Weber, classes are not the only structure that creates opposing interests, and class warfare is not the only conflict that exists. The economic sphere is only one of several arenas where conflict can be found (Swedberg 1998). However, according to Weber, the conflict does not cause societal disintegration, but rather the formation of institutional frameworks, known as 'social orders', which embody interim power relations.

The question, therefore, becomes, can institutions of international justice be considered among the social orders? It depends on how the reply to the social instances.

This work aims at analysing this issue on the specific topic of sexual-based violence in armed conflict by trying to propone the continuous dialogue between society and international justice in the fighting against this crime. Society surely asks for an ideal international justice response for SGBV.

A physical act of SGBV clearly reveals complex repercussions. Based on these understandings, inferences on the most effective justice response for SGBV victims can be drawn by adopting a victim-centric and gender lens approach.

In this regard, two specific aspects should be examined alongside the general standards of effective and timely justice in all judicial cases.

First, the early provision of physical and financial help to the individual victim is a top priority. Indeed, NGOs who work with SGBV victims say that the concept of 'justice' for them is synonymous with meeting these immediate requirements, and SGBV victims have a limited interest in criminal trials because the aforementioned demands are more pressing (Sehmi 2018, Dixon 2015).

Second, in addition to addressing immediate individual injury, a justice response to SGBV logically involves a reparative scheme that tackles the sociological underpinnings of the violence which have been exposed. SGBV trauma, and the stigma that comes with it frequently necessitate long-term, even lifelong, interventions, as well as extensive, persistent engagement on numerous levels.

Has international criminal justice, as represented today primarily by the International Criminal Court, been able to adopt, over time, a victim-centered vision capable of ensuring the social demands of women and the entire community in order to transform the trauma of SGBV into an opportunity for social transformation? Has international criminal justice been able to interact with society across time by providing appropriate responses to the social instances of peace, justice, and social reconstruction *post bellum*?

In answering these concerns, a sociology of international criminal justice helps us to assess how much international criminal justice corresponds to societal demands. Certainly, regulatory and even political solutions are required. However, they must take into account the social dynamics and needs to which they must answer.

Does talk about sociology of international justice make sense?

Some may contest the validity of any separate discipline of sociology of law by considering that investigations concerning the social context of law must be considered as an extension of general sociology. Such a method appears to be somewhat dogmatic, especially in light of the clearly defined development of sociological law school during the 20th century, as represented by jurists like Roscoe Pound (1910), who saw legality as a reflection or expression of the balance of forces or sociological interests. As for international criminal justice, its central features must be considered as having a sociological context relating to relations between states, between groups, or collectives of individuals. Opposing a sociology of international criminal justice

virtually denies this interaction. In this context, it is worth referring to Hans Johachim Morgenthau's description of 'international actions' as "the totality of social phenomena that transcend national borders"(Morgenthau 1959,15). Elaborating a sociology of international criminal justice is not only legitimate, but it is a need. What role does society play in the application of international criminal law and justice? A necessary tool for comprehending social truths and observing specific aspects of the social environment, the law extends beyond the rule it imposes. The tools of jurisprudence and international judgments are used to measure and observe a large portion of social changes and aspirations. International criminal law and international criminal jurisprudence are called upon in this context to express societal values that are thought to be shared by humanity. Durkheim quotes "[…] social life, wherever it becomes lasting, inevitably tends to assume a definitive form and become organised. Law is nothing more than this very organisation in its most stable and precise form. Life in general within a society cannot enlarge in scope without legal activity similarly increasing in proportion" (Durkheim 1997, 25). The creation of an 'international community' is based precisely on the need to create universal standards of behavior and institutions to apply them. Durkheim emphasised the importance of criminal law in the international community and, particularly, for its 'evolution'. International criminal law is actually based on the social conscience and conviction that certain behaviours and acts pose serious risks to society. The widely held belief that the criminalization of some behaviours could legitimately be justified by a straightforward reference to their risk to society and, therefore, to its protection through crime control. This means that crime is the consequence of a social definition process rather than an inherent quality of a certain set of behaviours, or by the intrinsic seriousness of the acts. As Durkheim writes, "Crime disturbs those feelings which in any one type of society are to be found in every healthy consciousness" (1997, 38). As a result, crimes can be considered based on collective conscience as the totality of opinions and sentiments held by the general populace of a society, There are many different types of crimes, and each one affects moral sensibilities and elicits responses in people. Given this, repressive laws and punishments also serve as a reflection of the general awareness of the threats to social cohesiveness and the individual. Both criminal behaviour and punishment serve two purposes: to safeguard individuals and maintain social integration. International criminal law and international criminal justice take into account instances where people's rights have been violated. Therefore, it is clear what each individual criminal law and international criminal justice mean. Alongside this perspective, considering the social perspective cannot

be avoided. The social function of crime and punishment derives from a set of ideas first presented in *Plato's Republic and Laws*. According to the author, because the development of moral virtue is one of the aims or purposes of those cultures sophisticated enough to have a legal system, the law should be used to penalise people for doing what is morally wrong (Hart, 1967). Without doubts, moral meanings are ambiguous and subject to change, making it impossible to establish significant social norms that are broadly accepted. However, given these challenges, international criminal law should be based on what the public views as violations of social health and individual rights. International criminal law is a response to atrocities, cruel and catastrophic crimes and horrors that disturb every individual's conscience. The unique weight and gravity of violence to which the international criminal law wishes to respond involves an intuitively understood core of human life; it provides all humans with a feeling, a common belief that does not need to be relativized by any global multiculturalism. As a result, in order to reach a consensus, Chiat Lee (2010), justifies interference in the internal affairs of states on the justifiable grounds that states frequently perpetrate the most heinous international crimes against their citizens. According to Lee, certain crimes are international because the nature of the crimes must pertain to a framework other than the internal one through which states exercising lawful authority inside their territory or over their populations. However, what is required to conceive speaking from the collective consciousness of a specific culture to the collective awareness of a 'international community'? International criminal law has been regarded as the language of a global common conscience since the advent of modern international law. The international Institut de Droit, founded in 1873, referred to the "conscience juridique du monde civilise" (Koskenniemi 2002, 11). Roberto Ago (1957,14) considers legal validity of customary rules stemming from "la conscience des membres de la société sans que personne ne les ait jamais établies ou formulées". Giuseppe Sperduti (1946) considers that a universal public conscience is the foundation of an international community. A 'conscience collective of humanity', or similar terms are used in institutional policy documents and international law scholarship. Attorney Robert Jackson, in his keynote address on The Nuremberg Trials, referred to the "common sense of mankind" (Marrus, 1997). Cherif Bassiouni (1998, 80), during the drafting committee of the ICC Statute, talked about "certain fundamental values and expectations shared by all peoples of the world". The context of international criminal law, and particularly international criminal justice, brings together diverse national or regional communities that act together, united in a moral cause to combat impunity. For this reason, common

fundamental values need to be found in order to punish those who commit atrocities. Examples of uses of the terms 'humanity' or 'mankind' in international law abound, beginning with the UN Charter preamble, which states that, "the scourge of war has brought untold sorrow to mankind", or the Nuremberg Charter, Tokyo Charter, and more recent instruments establishing international criminal tribunals or courts, such as the ICC Statute, which talks about "crimes against humanity". Furthermore, they are frequently used in the context of the "common heritage of humanity" in the Convention for the Protection of Cultural Property in the Event of Armed Conflict, 1954; or in the Treaty on Principles Governing States' Activities in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies, 1967. Elaborating a specific set of morally wrong and condemnable acts in terms of international criminal law is central to the concept of humanity, which unites people regardless of ethnic origin, culture, religion, or other differences. As Durkheim quotes "crime disturbs those feelings which in any single society are to be found in every healthy conscience" (1997, 38). In this regard, the ICC Statute Preambles refer to "unimaginable atrocities that shock the conscience of humanity". The ICC Statute assumes an absoluteness and an unquestionable nature when it refers to the acts as "the most serious crimes affecting the international community as a whole". In other words, it doesn't concentrate on the legal procedure and societal choices that led to the definition of what behaviours qualify as the most serious crimes. Conflicts of interest and social differentiation are undeniable traits of international society, although it is worth recalling that authors like Charles de Visscher were doubtful about the existence of an international community due to the unavoidable sociological fact that the primary units or entities governed by the international legal order are sovereign States. Indeed, he notes "The State by its mere existence conduces to the intransigent assertion of sovereignty. It is therefore a pure illusion to expect from the mere arrangement of inter-State relations the establishment of a community order; this can find a solid foundation only in the development of the international spirit in men" (2015,15). What does spirit in men mean? International criminal law and justice can synthesize differences through principles that can find their foundation on the common sense of humanity. The idea of a common interest is a result of conflicts of interest, which, if established, could serve as the basis for international law. As Rosalyn Higgins (1965) points out, the goal of contemporary international law is to identify what the common interest is and build laws around it. However, if criminal law were only viewed from this perspective, it would merely represent the desire of the ruling class to continue holding sway. For example, empirical finding suggests that, for example, international law

prohibits some forms of violence while tolerating others, as evidenced by declarations of self-defense, collateral damage, or anti-terrorism, for example. The common values that underlie international criminal law can re-emerge precisely due to jurisprudential interpretation.

International courts and tribunals can be considered as authorized interpreters of collective sentiments. The sociological values that govern the formal norms of international law can be inferred to some extent. However, formal declarations or resolutions of international organisations or conferences frequently express them. As a result, the 1948 Universal Declaration of Human Rights, which was adopted by the UN General Assembly, may be viewed as a statement of moral principles. The recommendations made at international labour conferences serve as instruments for establishing values that must be kept separate from goals, even though upholding a value can become a goal in and of itself. Many participants in the ICC negotiations, which began with the formation of the *ad hoc* committee in 1995, appeared to believe that they were advancing a common, universal cause, a just response to the prior atrocities in the former Yugoslavia and Rwanda, as well as the moral legacy of the World Wars. Although there were political differences that were debated and fought over, the exercise's motivation came from the frequently recalled and ritually revered context of violence and suffering, which occasionally made any disagreements over positions during the negotiations irrelevant. A similar ethos can be seen in the institutional practises of the various international criminal courts or tribunals. The international criminal justice system views acts of violence and suffering as both personal and collective crimes. This implies that the response to crime, or punishment, must have significance for both the individual and society. Durkheim writes "although [punishment] proceeds from an entirely mechanical reaction and from an access of passionate emotion, for the most part unthinking, it continues to play a useful role. But that role is not the one commonly perceived. It does not serve, or serves only very incidentally, to correct the guilty person or to scare off any possible imitators. From this dual viewpoint its effectiveness may rightly be questioned; in any case it is mediocre" (1997, 53).

In the preparatory materials of the various statutes of the international Tribunals or of the ICC, in the juridical instruments themselves, in the jurisprudence, and in the programmatic documents, the only preventive or deterrent effects of the sentence were taken for granted. In fact, the expectations concerned in particular the restoration or maintenance peace and order (Bass, 2000). Over time, numerous additional goals of international criminal justice have been acknowledged and developed, such as compensating

victims, documenting history, promoting social values, and enhancing individuals. For instance, the Eichmann trial was electrifying due to a number of factors, including the recognition of Israel as the owner of the Holocaust, the contentious kidnapping of Eichmann, and the impact of some of the testimony in the presence of numerous victims. The trial received unprecedented media coverage.[1]

Twenty years after the establishment of the International Criminal Court, it is necessary to reflect on these additional goals of international criminal justice. International criminal justice is, in fact, a positive tool for society, as well as for enhancing and updating its shared values. Due to this, it is essential to take an interdisciplinary approach to international justice and its significance, which cannot be reduced to purely punitive.

Structure of this book

This book examines how international criminal justice has responded to SGBV over time, specifically with regard to societal shifts that have resulted in new sorts of conflict and new considerations of social categories, particularly girls. In fact, the first chapter is devoted to new conflicts and the consequences that result from them. Changes in large-scale social relations have generated new types of warfare based on ethnic, social, and economic disparities, rather than ideological objectives or simple territorial conquest. The second chapter investigates how, over time, societal changes and transformations necessitate a new notion of age classification within the macro category of girls, which, according to the Convention on the Rights of the Child, includes people aged zero to eighteen. When we consider the various effects that SGBV can have on a girl of eight years or a girl of 16, for example, it is clear that challenges and impacts are different. This approach would lead to concrete results when international justice must consider the measures to be adopted in consideration of victims' various physical and psychological maturities.

On the basis of these considerations, the third chapter examines the answers given by international criminal justice, through *ad hoc* tribunals, and the ICC, to the needs of victims of SGBV. In considering these needs, a gender perspective and a victim-centred approach are adopted.

[1] Some 300 accreditations were granted to the trial.

CHAPTER ONE

NEW ARMED CONFLICT, NEW CHALLENGES

Armed conflicts in a multi-polarity international system

Warfare and fighting systems are constantly evolving and changing. The essence of the warring parties and their objectives, the means and methods of warfare employed, and the global contexts in which they occur, change rapidly. This is evident in light of the new wars that have erupted in the post-Cold War world, which is characterized by its multi-polarity system and multiple decision-making centers.

The Cold War era was unique in that the fear of escalation to global nuclear war was an inhibiting factor for both superpowers. Rules of the road evolved, which limited the direct use of force by two countries, not only in Europe, but also in regional conflicts anywhere, lest they create circumstances where a direct confrontation between them could arise. The competition was organized and circumscribed within the United Sates-Soviet relationship, formally in the case of arms control, and informally in the case of regional competition.

All of this changed with the end of the Cold War. The disintegration of blocs resulted in a lack of political power and a rise in decentralized decision-making, which has increased rather than decreased the risk of international crises and challenges. Nationalism has progressed to new levels, and warring groups started to be characterized more by ethnicity than by political ideology. The collapse of the Warsaw Pact and the end of Europe's separation offered an opportunity for Yugoslavs to address long-standing grievances. The former Soviet empire went through a similar process regarding cultural, political, and geographical issues.

The end of the Cold War brought a new period of increased nationalism and ethnic insurgency seeking an independent state for itself. As a result, dramatic changes occurred in the world, fuelled by ideological divisions, religious conflicts, and marginalization, exacerbated by the globalization process, and failed and impoverished states. National government collapsed,

and armed struggle broke out between ethnic militias, warlords, or criminal organizations seeking to obtain power and control of the state.

Intra-state conflicts started more often than inter-state conflicts, and they lasted longer. As Timothy Shaw quotes: "A defining feature of world politics since the late 20th century is the decline in the frequency of warfare between states in the international system" (Shaw 1994, 60).

Burundi, Liberia, Ivory Coast, Sudan, Uganda, Rwanda, and Kosovo are all examples of long-running civil wars characterised by deep severity. In Rwanda, the Hutu government engineered a genocidal massacre that resulted in the deaths of around one million people, mostly Tutsis and moderate Hutus, in just a few months. The same occurred during the conflict in the former Yugoslavia, where the population witnessed the worst death, genocide, and destruction in the country.

During those internal conflicts, only the fire of the belligerents ruled the defenseless and unfortunate civilian population, trapped in humanitarian emergencies. But at the same time, as Jimmi Adisa quotes, in the post- Cold War-era, "the international community […] is faced with a broad array of conflicts […] the intensity of those problems and the demand that they impose on the global system, threaten to overwhelm the institutional capacity of the United Nations" (Adisa 1997, 16). Furthermore, the complex challenges of intra-state conflicts have negatively impacted the stability of regional neighbours and global security. Huge refugee flows, the proliferation of light arms, local mercenaries, and economic dislocation, have a devastating impact on neighboring states. Refugees are used as a shield by armed groups and local mercenaries to conduct cross-border attacks. Internal conflicts that are ignored on a global scale, even in remote areas of the world, can have a negative effect on world peace and security. In fact, conflicts within states have been related to the rising issue of international terrorism: for example, John Kabia considers that there is a relationship between the insurgency group RUF in the Sierra-Leone conflict and Al Qaeda (Kabia 2009, 39).

The new wars became those waged within the state, involving civilian groups. Although not entirely new, civilian engagement has nonetheless become more and more asymmetrical than in the past (Kaldor 1999). The fragility of the state, where internal conflicts develop, ultimately has a negative impact on the individual and collective security of citizens, made even more precarious by the growing perception of the state's emptiness. In the absence of a strong state system, this situation allows for an increase in

private groups, such as militias, acting as service providers. Unprecedented forms of conflict have emerged, as have new social and human dimensions, and, even where traditional distinctions still stand, they take on new scopes. Current inter-state armed conflicts are determined by economic issues, such as disputes over natural resources and environmental scarcity and degradation, as well as ideological, religious, and ethnic issues (Silva and Gomes 2016).

In addition, the weapons used have also changed. The introduction of nuclear weapons during the Second World War (1939-1945) had already marked a turning point from traditional warfare. Currently, a close connection between armed conflicts and technology characterizes cyber wars, in which acts of war are committed, in whole or in part, by digital means that are not part of the strategies envisaged by conventional wars (Lobato and Kenkel 2015).

Since the early 2000s, weapons have included military drone airstrikes: the United States initially availed itself of new technologies as a response for the 9/11 attacks, but they have since been deployed in other conflicts in Syria, Pakistan, Somalia, and Yemen, to cite a few (Peron and Dias 2018). The increased circulation of small arms, which are more difficult to monitor, also causes concern. Given the changing nature of warfare, the fear is that regular armies can no longer be expected to abide by existing norms such as proportionality and distinction when their non-state armed opponents lurk among the civilian population.

Although varied in terms of duration, geographical spread, and geopolitical impact, these conflicts have in common the devastating effect inflicted on the civilian population. Civilians are either often deliberately targeted by belligerents, or suffer collateral damage: they are the main victims of anti-personnel mines, can be used as human shields, and are easily displaced from their homes and even from their country. Unfortunately, the age of the victims does not restrict this violence, and children, being the most vulnerable of victims, can pay the highest price: they can be orphaned or separated from their families, used for forced labour, sexual exploitation, or military recruitment.

Are ‘new wars’ truly a recently-developed type of military conflict, or are they merely modern manifestations of centuries-old patterns of aggression? And when it comes to new forms of warfare, does public international law - in particular international humanitarian law, human rights law, and

international criminal law - adequately address the needs of women in all these predicaments?

In the following chapter, we will address the issue of whether or not the system of international humanitarian law can respond to the dynamics of modern armed conflict, especially with regard to the negative consequences for women

First Section: Warfare forms and the international legal system

The idea of 'war' has played, and continues to play, a significant role in human civilizations all over the world. It is something that can be found in every chapter of history, in the news today, and even in forecasts for the future.

Political science, international law, and social science have raised extensive research on the idea of war, its tactics, and its role in settling disputes between nations. Studies on war are frequently regarded as belonging to the fields of political science or international law, but given that war has significant ramifications for society as a whole, it is important to understand war using sociological theories. Indeed, sociological theories or perspectives offer a variety of ideas about war and its relevance to society, albeit less so than the others. In order to have a comprehensive framework of what war represents in the social system, the findings of these various scientific disciplines should be combined, or at least read together.

Sociology has developed various theories or viewpoints to comprehend war and its relationship to society overall, while taking into account its function and impact on society as a whole. Three sociological main perspectives on war can be considered here. These three are: the conflict theory perspective; the symbolic interactionist perspective; and the structural functionalist perspective. The structural-functionalist theory sees society as a structure made up of various components, each of which was created to address the biopsychosocial needs of the society's constituents. Accordingly, any kind of change in a society's sociopolitical landscape is thought to appear as and when social unrest between two or more social units takes place. Generally speaking, institutions have their roots in some form of collective action, a common enterprise, or a social movement that required coordination and consistency of action over a long period of time (Parks 1941). One such tension that functionalists think contributes to the advancement of society is war. As Robert E. Parks (1941) points out, war serves a variety of

purposes, including helping to settle international disputes over matters such as: territorial boundaries, religion, and other ideologies; strengthening social ties and camaraderie between warring societies; establishing a political institution in the state that makes collective action possible on a scale that is unimaginable in a primitive society; and helping to increase employment rates, as it spurs economic development. On the other hand, according to conflict theory, conflicts and wars arise when resources, power, and influence are unequally distributed among social groups, and these conflicts speed up social reform. Comparing conflict theory to the functionalist perspective, conflict theory has a more pessimistic outlook on the war. Violence and coercion are used in war as a political tactic, though they are not the only means of achieving specific goals (Clausewitz, in Sharma 2014): countries invest more in their armed forces, and even go to war, as a result of cooperation between politicians, arms producers, and military officials that benefits all parties involved; the corporations profit because, almost always, in a war, the victor takes possession of the materials of the losers, expanding their supplier base for their own businesses; the leadership of the armed forces benefits from a good reputation and job opportunities for the personnel who are affected by the war's events; and, as in the case of imperialism, nations use their armed forces along with other similar tactics to increase their power and dominance over other states (Worell 2011). This sociological theory perspective, as presented by Boggs (2011), also contests the idea that war benefits society in any positive way because it consumes a sizable portion of the budget that could otherwise be used for societal needs. Finally, associations between members of a society are at the heart of symbolic interactionism. People are thought to understand their social environments through communication and the exchange of meaning through signs and symbols. This viewpoint focuses on how concepts and interpretations can affect people's opinions and behaviour in war, and how these ideas evolve throughout a person's development. Symbolic interactionists concentrate on the symbols, signs, and objects associated with war and how they are used to influence the members of society, in contrast to functionalists who concentrate on the goals of war, and conflict theorists who concentrate on the differences that are associated with war. During a time of war, leaders and the media use symbols to advance nationalism and patriotism while also fostering a sense of unity and support for the war. This is very important because the actors' internal structures and their relationships to one another in terms of a social organisation determine the stakes of war (Sharma 2014). The efficient operation of the internal structures of the warring parties is aided by symbolic representations and

shared experiences. All of these approaches have components that help us understand certain aspects of the war, but they also have flaws.

Structural functionalism was the dominant sociological perspective in the middle of the 20th century, though its appeal waned as a result of the ability to fully comprehend the profound social changes brought on by the First World War and the Cold War. Conflict theorists have been accused of being more likely to focus on war and ignore current stability, just as structural functionalism has been criticised for emphasising society's stability. As opposed to the theory's prediction that different social systems are abruptly altered by war, social systems are stable or have advanced gradually after war. Last but not least, the symbolic interactionism viewpoint is disputed due to its difficulty in maintaining objectivity and extreme limitations in only considering symbolic communication as a factor in war. In any case, the definition of war and the analysis of war from various scientific angles are inextricably linked. Contrary to popular belief, conflict and war are not always synonymous. Sociologically speaking, war is merely one of the numerous conflicts that exist and take place at all levels as a result of various conflicts in human societies.

It is worth noting right away that, in addition to declared wars, the concept of armed conflict was first introduced by the 1949 Geneva Conventions in order to consider other forms of inter-state armed conflict, the existence of which is independent of the definition of the parts. Thus, emphasizing the effectiveness of the conflict rather than the formal one, the applicability of international humanitarian law would now be based on facts that could be objectively verified rather than the recognition of the state of war by governments' will. The distinction between war and armed conflict, according to international security databases, such as the Upsala Conflict Data Program, is also based on the number of casualties: war is an armed conflict that pits two armed forces, at least one of which belongs to the state, against each other for the conquest of territory or power, and causes at least 1,000 deaths. Nonetheless, the two terms 'war' and 'armed conflict' are used interchangeably in this text, which further aims to demonstrate the evolution of the phenomenon (Pettersson et al. 2020).

Other distinctions are taken into account here. Traditional armed conflicts involve both state and non-state actors, combatants and civilians; and, in terms of geographical area, we distinguish between internal wars and international conflicts, to which only international law has ever been applied. As Stephen Neff points out, this has been especially true in Western areas: "In Western thought, there was a long tradition of regarding civil

conflict as fundamentally different from true war [..] this meant that none of the rituals associated with war-making and war-waging was applicable to struggles against mere law breakers. Nor did the rules on the conduct of war apply [...] The result was a clear dichotomy between domestic enforcement and true war" (Neff 2005, 250).

These long-held distinctions are gradually eroding. The 'new wars' are internal, and no longer fought between states, but they have been heavily 'internationalized'. New wars may involve both state and non-state actors. Fighters are no longer solely motivated by territorial sovereignty, but may also be motivated by ethnic rivalry, economic gain, or gaining access to the state apparatus in order to control minerals and other resources. Furthermore, rather than being protected from attacks, civilians are increasingly vulnerable to serious human rights violations and must bear the brunt of the hostilities.

The harsh reality of armed conflict is far more complex than the model outlined in international law, and while such law seeks to limit the effects of conflict, it lacks a comprehensive definition of the situations that fall within the scope of its rules.

The principles of sovereignty and non-intervention have long been the foundations of the traditional Westphalian system, and in order to maintain order and stability in the international system, condemn foreign interference in the internal affairs of states. However, in the aftermath of the Cold War, and recent challenges, such as waves of terrorism and intra-state conflict, international law has begun to fundamentally reconsider its prohibition on military intervention. Traditional legal instruments do not appear to propose precise enough criteria to unequivocally determine the circumstances that characterize modern wars: territorial sovereignty without on-the-ground military involvement; foreign intervention in non-international armed conflicts; and non-international armed conflicts involving multiple states' territories.

1a. International, non-international and internazionalized conflict. The 'overall control'.

The 1949 Geneva Conventions refer to the conflict between states as "all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them" (Article 2. Para1). These situations may take the form of direct conflict between states or intervention in an

ongoing internal conflict, such as when a foreign power sends troops into a territory to support one of the warring parties or remotely supports and guides an insurrection. In the last instances, the conflict becomes 'internationalized'.

Anyway, not every type of 'control' contributes to the internationalization of a conflict. As the International Criminal Tribunal for the former Yugoslavia (ICTY) points out:

> "Control by a State over subordinate armed forces or militias or paramilitary units may be of an overall character (and must comprise more than the mere provision of financial assistance or military equipment or training). This requirement, however, does not go so far as to include the issuing of specific orders by the State, or its direction of each individual operation [.....] It is indisputable that an armed conflict is international if it takes place between two or more States. In addition, in case of an internal armed conflict breaking out on the territory of a State, it may become international (or, depending upon the circumstances, be international in character alongside an internal armed conflict) if (i) another State intervenes in that conflict through its troops, or alternatively, if (ii) some of the participants in the internal armed conflict act on behalf of that other State"
> (International Criminal Tribunal for the former Yugoslavia (ICTY), Prosecutor v. Tadic, Case No. IT-94-1-A, Judgment (Appeals Chamber), 15 July 1999, Para 84).

But what does 'overall control' mean?

'Overall control' exists when the foreign state "has a role in organising, coordinating or planning the military actions of the military group, in addition to financing, training and equipping or providing operational support to that group" (ICTY, Prosecutor v. Tadic, Case No. IT-94-1-A, Judgment (Appeals Chamber), 15 July 1999, Para 137).

Specifically, there is an international armed conflict, as the ICTY recalls, "whenever there is a resort to armed force between States" (ICTY, Prosecutor v. Tadic, Case No. IT-94-1, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, Para 70). The attack must be motivated by the intention to harm the enemy, thus excluding cases in which the use of force is the result of an error, like an involuntary incursion into foreign territory, or incorrect identification of the target. Similarly, an international armed conflict does not exist when the target State has given its consent to a third State to act in its territory, for example, to fight a non-governmental armed group.

Under Article 1(4) of the Additional Protocol I of 1977, the settings targeted by Article 2(1) of the 1949 Geneva Conventions include "armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination, as enshrined in the Charter of the United Nations and the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations". With this provision, Protocol I introduced a new type of conflict; the 'wars of national liberation'.

In line with traditional international law, armed conflict also happens in the case of occupation which, according to Article 42 of the 1907 Hague Regulations, occurs when the territory "is actually placed under the authority of the hostile army". This entails that the occupying state must have effective, and unauthorized, control over territory that is not its own, and, as a result, the occupied territory's government is unable to exercise its authority, with the occupying power filling this void (Benvenisti 1993).

In some cases, territorial control is exercised indirectly, through means of a puppet government or some form of subordinate local power, rather than directly by the occupation forces. However, in reality, determining the degree of influence and interference in the internal affairs of another state that is required to constitute occupation can be difficult at times. For a case-by-case analysis of each situation, the ICTY's criterion of 'overall control' can be used; occupation exists when a State exercises 'effective control' over the territory in question (ICTY, Prosecutor v. Blaskic, Case No. IT-95-14-T, Judgment (Trial Chamber), 3 March 2000, Para 149, ICTY, Prosecutor v. Naletilic, Paras 181–188, 197–202).

Armed conflicts that do not have an international character, on the other hand, are those in which at least one of the parties involved is non-governmental: thus, such conflict typology occurs either between one or more armed groups and government forces, or only between armed groups (CTY, Prosecutor v. Tadic, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Para 70).

Common Article 3 of the Geneva Conventions states that, "in the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions [...]". Non-international armed conflicts have a different and more limited legal framework than international conflicts. Nonetheless, international armed conflict law can

still be applied, and Common Article 3 encourages the parties to the conflict to seek to bring into force, through special agreements, all or part of the other provisions of the Geneva Conventions.

Also, Article 1 of the Additional Protocol II applies to non-international armed conflicts "which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol". It is worth noting that while Common Article 3 assumes that armed groups can demonstrate some level of organization, it does not require that these groups control a portion of a territory. In practice, a conflict may thus fall within the material scope of Common Article 3 even if the Additional Protocol II conditions are not met. All armed conflicts covered by Additional Protocol II, on the other hand, are also covered by Common Article 3.

International jurisprudence, particularly that of the ICTY, has stated that those conditions referred to in Article 3 are met whenever there is 'protracted gun violence'. To this aim, two fundamental criteria need to be assessed on a case-by-case basis by weighing a plethora of quantitative and qualitative data: (a) the intensity of the violence, based on, for example, and among other elements, the specific acts of violence, the nature of the weapons used, the displacement of civilians; (b) the organization of the parties, based, for example, on the presence of an organizational chart outlining a command structure (Prosecutor v. Tadic, Judgment (Trial Chamber), Para 561–568, especially Para 562. See also ICTY, Prosecutor v. Limaj, Para 84; ICTY, Prosecutor v. Boskoski, Case No. IT 04-82, Judgment (Trial Chamber), 10 July 2008, Para 175). When either of these two conditions is not met, a violent situation may be defined as internal disturbances or internal tensions, which are types of social instability never defined. Internal disturbances can take a variety of forms, ranging from the spontaneous initiation of revolting acts to the struggle between more or less organized groups and authorities in power, which does not always escalate into open conflict (ICRC 1971). Internal tensions, on the other hand, are exacerbated by less violent events such as mass arrests and large crowds (Sandoz 1987).

Furthermore, Common Article 3 applies to armed conflicts "occurring in the territory of one of the High Contracting Parties", which clarification has been interpreted as meaning that Common Article 3 is only applicable to the territory of states that have ratified the 1949 Geneva Conventions.

Although some theories contend that non-international armed conflict would thus exclusively cover groups attempting to achieve a political goal, with 'purely criminal' organizations excluded, it is believed that this criterion does not find doctrinal confirmation even on the basis of international jurisprudence. The ICTY was reminded of this in the Limaj case, when the defense argued that the fighting did not qualify as an armed conflict because the Serbian forces were solely focused on "ethnic cleansing" in Kosovo (Bruderlein 2000, Petrasek 2000). This argument was rejected by the Court, which emphasized that in particular "the determination of the existence of an armed conflict is based solely on two criteria: the intensity of the conflict and the organization of the parties; the purpose of the armed forces to engage in acts of violence or also achieve some further objective is, therefore, irrelevant' (ICTY, Prosecutor v. Limaj, Para 170).

1b. Non-international armed conflict in the Rome Statute

Non-international armed conflict has also been taken into consideration at the international jurisprudence level.

Article 8(2)(c) and (e) of the Rome Statute of the International Criminal Court (ICC), respectively distinguish between two categories of crimes that occur during 'armed conflicts not of an international character': (a) serious violations of the Common Article 3, and (b) other serious violations of laws and customs of war that are applicable in those situations. Article 8(2)(d) and (f), respectively specify that these provisions do not apply to "situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature''. While no definition is given to the 'serious violations of Common Article 3' (Article 8(2)(d)), the Statute clarifies the notion of non-international armed conflict in the case of 'other serious violations'. Article 8(2)(f) stipulates in that case that the rules must apply 'to armed conflicts that take place in the territory of a State when there is a protracted armed conflict between governmental authorities and organized armed groups or between such groups'. As a result, the issue, yet to be resolved, becomes whether the criterion of duration, 'protracted armed conflict' provided by paragraph (2)(f), merely clarifies the terms of paragraph (2)(d) without introducing a new category of conflict, or whether it proposes a new type of non-international armed conflict. However, some observers believe that the intention of those who negotiated the Statute was not to create a separate category of non-international armed conflict, but rather to prevent the restrictive notion in Additional Protocol II from being incorporated into the Statute (Meron 2000, Bothe 2002, Cullen 2007).

Conversely, other authors believe that the concept in paragraph (2) (f) adds a temporal criterion with respect to the Common Article 3. A non-international armed conflict within the meaning of paragraph (2)(f) exists when such a conflict is 'protracted'. This notion, therefore, does not appear to constitute an extension of the scope of paragraph (2)(d) but creates a separate category of non-international armed conflict in order to criminalize, in the context of the ICC Statute, further violations of international humanitarian law (Bouvier 2006, Provost 2002, Schabas 2007).

In the Lubanga Dyilo case, the ICC Pre-Trial Chamber referred to Additional Protocol II to interpret paragraph (2)(f) of the Statute. The Chamber clarified that the applicability threshold is defined by two conditions: (a) the violence must be of a certain intensity and duration; and (b) an armed group with some degree of organization, particularly the ability to plan and carry out military operations for an extended period of time "must be involved". This definition would appear to identify a more limited field of application than Common Article 3, as it requires that the violence occurs for a specific period of time. It is, however, more expansive than Additional Protocol II in that it does not demand that the armed groups exercise territorial control. Therefore, the Rome Statute seems to differentiate between two types of non-international armed conflicts: (a) conflicts within the meaning of Common Article 3 (paras (2)(c)–(d)) and (b) 'protracted' non-international armed conflicts (paras (2)(e)–(f)).

It is worth noting, however, that this amendment to the Statute does not introduce a new concept of non-international armed conflict into international humanitarian law, but rather seeks to determine the ICC's jurisdiction.

1c. Ambiguous categories of conflict

Along with those already mentioned, some categories remain ambiguous: the main question is whether such settings should be integrated or adapted to avoid a legal vacuum. Control of a territory without a military presence on the ground; foreign intervention in non-international armed conflicts; and non-international armed conflicts on the territory of several states are three types of situations that remain contentious in international humanitarian law.

Despite the clarifications made by the 1907 Hague Regulations and 1949 Geneva Conventions, determining the concept of control of territory in the absence of a military presence on the ground is not always easy in practice.

An example of occupied territories is given in the case of the Gaza strip.

During the 1967 Six-Day War, Israel captured the Gaza Strip from Egypt. The Palestinian Authority became the administrative body that governed Palestinian population centres under the Oslo Accords signed in 1993, while Israel retained control of airspace, territorial waters, and border crossing points with the exception of the land border with Egypt, which is controlled by Egypt. The 'Disengagement Plan' adopted by the Israeli government on 6 June 2004 and endorsed by parliament on 25 October of that same year, provides that the authorities' intention was to put an end to their responsibilities *vis-a`-vis* the people living in that territory (Israeli Prime Minister's Office, Cabinet Resolution Regarding the Disengagement Plan: Addendum A – Revised Disengagement Plan – Main Principles, 6 June 2004). According to the Plan, Israel must retain control of the territory's boundaries, airspace, and coastal region. Furthermore, Israel benefits from the ability to invade Palestinian territory at any time to maintain public order (Israeli Prime Minister's Office, Cabinet Resolution Regarding the Disengagement Plan: Addendum A – Revised Disengagement Plan – Main Principles, 6 June 2004).

According to Article 42(2) of the 1907 Hague Regulations, occupation exists when the authority of the hostile army has been established and can be exerted. The United Nations Secretary-General thus considered that 'the actions of Israel in respect of Gaza have clearly demonstrated that modern technology allows an occupying power to effectively control a territory even without a military presence' (Situation of human rights in the Palestinian territories occupied since 1967, UN Doc. A/61/470,27 September 2006, Para 7). Consequently, Israel is deemed as continuing to exercise from a distance a power equivalent to the 'effective control' required under the law of occupation.

The United Nations has repeatedly stated in various forums that the Gaza Strip is still under Israeli occupation. The UN Security Council Resolution 1860/2009 emphasized that "the Gaza Strip constitutes an integral part of the territory occupied in 1967 and will be a part of the Palestinian state". In 2011, the UN General Assembly Resolution 65/179 stressed "the need for respect and preservation of the territorial unity, continuity, and integrity of all of the Occupied Palestinian Territory", i.e. including Gaza. In 2012, the