UNIVERSIDADE CATÓLICA PORTUGUESA

Responsibility to Protect: Conflict Prevention through Mediation

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Mestrado em Direito

Faculdade de Direito | Escola do Porto

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Aos meus pais, Isabel e Júlio,

Aos meus tios, Helena e Sten,

E aos meus padrinhos, Arcelina e Gilberto.

Peace

What's peace? Now first of all it's really
Not a simple issue of no-war.
It's no-injustice, no-intolerance, no-hatred.
It's thinking good not bad of everyone.

It recognizes one humanity
In which all lives are precious
And worthy to be loved and given help
Towards fulfilment.

Peace is an inner state
Reflected outwardly in actions,
In loving care for anyone in need,
Its qualities are wisdom and compassion.

Our work for peace is work for harmony
Among all beings. Through peace
We pray that God's will may be done
On earth as it is in heaven.

- Adam Curle

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Resumo

Na presente dissertação propomo-nos a explorar a possibilidade do desenvolvimento de um regime jurídico vinculativo, que possa ser desencadeado em contextos de crises humanitárias. O objetivo será agir eficazmente para prevenir a erupção ou escalada da violência e de conflitos armados. Em termos legais, é discutido se tal parâmetro preventivo já existe e, consequentemente, se as normas jurídicas internacionais impõem um dever à comunidade internacional de reagir perante graves violações de Direitos Humanos perpetradas pelos Governos. Concluímos que tal regime normativo existe, emanando do princípio da 'Responsabilidade de Proteger' e do dever de cooperação estabelecido no Projeto de Artigos sobre a Responsabilidade dos Estados. No entanto, carece de força vinculativa. Um dos obstáculos à adoção pelos Estados de regimes de prevenção de conflitos vinculativos tem sido a sua conotação com a intervenção militar para fins humanitários. Por este motivo, pretendemos reforçar a importância da prevenção de conflitos em contextos anteriores à comissão de grandes atrocidades. Damos ênfase à Mediação como método de prevenção de conflitos com especial relevância em contextos de conflitos internos. Analisamos a crise na Venezuela e a possibilidade da emergência de um costume internacional que valide a prática da Mediação como norma legal. A nossa análise assenta numa abordagem interdisciplinar, colhendo ensinamentos das Relações Internacionais, bem como (ainda que em menor extensão) dos Estudos da Paz e da Psicologia.

Palavras-chave: Responsabilidade de Proteger; Dever de Cooperação, Mediação; Prevenção de Conflitos; Venezuela.

Abstract

This thesis explores the possibility of developing a legally binding framework for conflict prevention, that could be enacted in contexts of humanitarian crisis. The goal would be to act effectively to prevent the eruption or escalation of violence and armed conflicts. We discuss, in legal terms, whether such a preventive framework already exists. Moreover, whether general norms of International Law impose on States a duty to react to grave violations of Human Rights conducted by Governments. We conclude that such a regime exists and emanates from the principle of 'Responsibility to Protect' and from the duty of cooperation established under the ICL's Draft Articles. However, the regime lacks binding character. One obstacle to the adoption by States of legally binding mechanisms for conflict prevention is the fact that the latter has been associated with military intervention for humanitarian purposes. For this reason, we intend to reinforce the importance of conflict prevention in contexts prior to the commission of mass atrocities. Mediation is emphasised as a conflict prevention method with special relevance in contexts of internal conflict. We analyse the Venezuelan crisis and the possibility of emergence of a customary norm, which validates the practise of Mediation as a legal rule. We conduct an interdisciplinary analysis, retrieving lessons from International Relations, as well as – to a lesser extent – Peace Studies and Psychology.

Keywords: *Responsibility to Protect; Duty of Cooperation; Mediation; Conflict Prevention; Venezuela.*

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Preface/ Prefácio

Neste prefácio, vou resumir, utilizando linguagem leiga e de forma sucinta, o pensamento subjacente nesta prova científica. A paz impõe-se de dentro para fora. Isto significa que uma verdadeira paz, a paz positiva, se alcança quando se adereçam as raízes dos conflitos. Os mecanismos que desencadeiam a Paz são preferencialmente ativados antes do escalar da violência. A isso se chama a prevenção de conflitos. A empatia pode ser aprendida e desenvolvida nas diferentes esferas de atuação social - desde as relações interpessoais, às do indivíduo com as instituições de autoridade e destas entre si, até ás relações entre entidades supranacionais e internacionais. A Mediação é um mecanismo utilizado pela humanidade desde tempos imemoriais. Porém, não está devidamente regulada no Direito Internacional. Por este motivo, nem sempre se faz Mediação de uma forma adequada, atempada ou eficaz. Ainda assim, na pior das hipóteses, a mediação contribui para o início de uma relação de comunicação entre as partes. Na melhor, resolve o conflito de forma definita e duradoura, transformando uma realidade conflituosa numa paz positiva. As Nações Unidas surgem como um potencial Messias, o garante da manutenção de uma paz sustentável. No entanto, de momento observa-se que são necessárias certas transformações no seio desde organismo. Tem sido corrompido pelos balanços e contrabalanços de poderes e interesses geopolíticos. Vivemos um momento crítico de rutura das relações pacíficas com repercussões muito gravosas para a humanidade. Urge-se que as Nações se Unam em prol dos valores da vida, da segurança e da paz. Os mecanismos para o fazer já foram pensados nos Estudos da Paz, bem como no ramo das Relações Internacionais e testados na Psicologia. Adicionalmente, já existem normas jurídicas de Direito Internacional que os preveem. Falta que os diferentes ramos científicos acolham, em diálogo, as diferentes contribuições. A maior barreira ao desenvolvimento de estruturas sólidas de prevenção de conflitos tem sido a falta de vontade política para atuar preventivamente e, em paralelo, de dispor recursos financeiros a esse propósito. Ainda assim, nas últimas décadas tem-se verificado um crescente entusiasmo pela Mediação e mecanismos afins. O caso da Venezuela revela indícios de uma mudança de paradigma, sendo que a mediação do conflito pode ser determinante na operacionalização dessa tão desejada transição. O tempo para agir é muito limitado, dada a fragilidade da situação e a já lançada ameaça de guerra. Acredito que toda a produção literária e discussão pública sobre o assunto contribuam para a consciencialização social. As sementes das quais uma mudança de paradigma vai florescer já foram lançadas ao ar. Falta que cada Estado prepare o seu jardim. E esse trabalho começa na mente de cada indivíduo. Assim, lanço o mote que desencadeou o processo de aprendizagem que vivi nos últimos meses, e que desenvolvi ao longo destas páginas.

Porto, outubro de 2019

I. Introduction

According to the Upsala Conflict Data Program (UCDP) statistical data on global conflicts, in 2018, 162 conflicts[1] were happening around the world, 77 of which were state-based violence, 52 non-state violence and 33 one-sided violence conflicts. These numbers are the highest since 1975[2].

Acknowledging the urgent redefinition of the International Community's diplomatic approaches towards on-going and emerging conflicts around the Globe, this thesis aims to explore the relevance of Mediation techniques from a conflict prevention perspective, taking into account the legal scope of Responsibility to Protect and chapter VI of the United Nations Charter, entitled Pacific Settlement of Disputes.

The United Nations (UN) was historically assigned with a worldwide mandate of sustaining a durable peace. In fact, Art. 1 of the Charter of the United Nations states that the aim of the organization is to "maintain international peace and security". However, since its creation, the United Nations has been through ups and downs in the pursuit of this goal[3]. In recent years, the Secretary-Generals have been putting their efforts into creating and restoring mechanisms suitable for preventing the eruption of major humanitarian crises and the emergence of armed conflict. It is not an easy task to find the necessary balance in-between the games of geopolitical interests and forces and, perhaps for this reason, States have been very cautious and reluctant in adopting legally binding solutions for conflict prevention.

We argue that dialogue between different fields of knowledge would help the finding of legal solutions to the current global peace crisis. International Law and International Relations already have a symbiotic relationship. Additional to a more intensive exchange between International Law and International Relations, the contribution of Psychology and Peace Studies would perhaps yield success in achieving the desired and needed outcomes.

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[1] The UCDP defines conflict as the following: "An armed conflict is a contested incompatibility that concerns government and/or territory where the use of armed force between two parties, of which at least one is the government of a state, results in at least 25 battle-related deaths in one calendar year."
[2] https://ucdp.uu.se/
[3] Orakhelashvili, 2019, p. 25.

Realities such as the one lived in Venezuela cause great damage to all mankind and affect international peace, security and stability. These facts are recognized by the international community. Despite this, concise mechanisms to react in a timely manner to prevent the escalation of violence haven't yet been developed. Drawing on Conflict Transformation theory, this process could overcome the inherent barriers of Law, ultimately involving a structural reformulation of social institutions, paving the way for constructive and continuous dialogue between peoples and authorities.

Responsibility to Protect represents the first normative step in the right direction. In 2005 the General Assembly adopted the principle, which establishes an international responsibility of territorial States to protect their populations, and to cooperate in a complementary way, through the United Nations, to protect inhabitants of States incapable or unwilling to do so. Furthermore, the formulation of Responsibility to Protect emphasises the importance of preventive action.

As an introductory remark, it should be noted that the principle of 'Conflict Prevention' is an evolving concept. As a discipline and policy, its scope is wide and, consequently, defining it is a challenge. David Carment and Albrecht Schabel[4] define Conflict Prevention as a

> "medium and long-term proactive operational or structural strategy undertaken by a variety of actors, intended to identify and create the enabling conditions for a stable and more predictable international security environment."

Several mechanisms suit conflict prevention purposes. In this thesis, we highlight Mediation as a virtuous approach to international conflict. It is a tool which enables dialogue among individuals, civil society and other stakeholders of the international community, while serving Justice and peace-making purposes. Retrieving lessons from the fields of knowledge of International Relations and Peace Studies, we present a brief insight of how a mediation process develops and how it changes conflicts' dynamics.

Below, we argue that the International Community should strengthen and further develop a legal preventive framework to respond to humanitarian crises outside the scope of mass atrocity crimes. Furthermore, taking into account the legal and political scholarly debates in the aftermath of the wars in the Former Republic of Yugoslavia, it will be

[4] Carment, Schabel, 2003, p. 11.

analysed whether, and to what extent, the International Community has an obligation to react to grave violations of Human Rights conducted by Governments[5].

Our assessment is threefold, and it goes from a generic and theoretical discourse to a more specific and practical approach. In Chapter II, we present theories about conflict prevention and explore the path which led to its legal conceptualization. Considerations about the development of the concept of sovereignty are made. Furthermore, the question of military intervention for humanitarian purposes is discussed. In Chapter III, we address Mediation as a method for the prevention of conflicts. The role mediators play and their influence in conflict dynamics are underscored. Finally, in Chapter IV, we try to apply the theoretical framework to the current Venezuelan crisis. After this analysis, we will conclude on the possibility to use Mediation as a means of active conflict prevention in the light of the principle of Responsibility to Protect.

[5] See Nolte, 1999, p 629 ff.

II. Discourse on Conflict Prevention

This chapter intends to specify and deepen the cornerstones of Conflict Prevention. For the purpose, we analysed doctrine from International Relations in order to understand the scope of the concept of conflict prevention. We further address both its legal and institutional framework within the United Nations system. Moreover, we explore the question of the use of force in preventing conflicts. Finally, we will reflect on the different approaches taken in International Relations and International Law. From our point of view, only a cooperative dialogue between the two fields could lead to an effective preventive normative framework for the "Responsibility to Protect". The goal should be to establish a broader preventive paradigm that could replace the current regime of a subsequent possibility of (war crime) trials at various international tribunals.

1. Introducing the concept of Conflict Prevention

The fall of the Berlin Wall in November 1989, the subsequent opening of the Iron Curtain between Eastern Europe and Western Europe in the 1990's, the collapse of the Soviet Union and the end of the Cold War initiated an intensive search for and discussion about an effective tool for conflict prevention in International Relations' theory. In particular, the 1994 Rwandan massacre pushed discussions about the International Community's inertia and, consequently, failure to act proactively in the face of imminent major humanitarian catastrophes[6]. In view of Art. 1 of the Charter of the United Nations and obligations of the United Nations to prevent such deplorable events, it became clear that a change of perspective was necessary and that the traditional *a posteriori* reaction paradigm (war crimes tribunals) should move further to a proactive, early and preventive approach.

Starting by presenting one of our analysis' assumptions, it is important to distinguish the principles of 'conflict prevention' and 'atrocity prevention' as policies. Whereas the latter focuses on dissuading actors from committing atrocities, the former aims at finding a mutually agreeable settlement. They involve different strategies, which often are incompatible which each other[7]. One crucial difference is that strategies for

[6] Igrapé Institute, 2018.
[7] Bellamy, 2018, p. 142.

preventing conflicts usually aim at the elimination of violence and avoiding the use of force, whereas atrocity prevention policies might involve the recourse to military action, specially at a later stage[8]. We will return to this topic.

Earlier, we introduced David Carment and Albrecht Schabel's[9] definition of Conflict Prevention. According to this, Conflict Prevention

> "is a medium and long-term proactive operational or structural strategy undertaken by a variety of actors, intended to identify and create the enabling conditions for a stable and more predictable international security environment."

This definition assumes that Conflict Prevention (i) involves attitudinal change, (ii) is malleable as a concept and as a policy, (iii) can be multi-sectoral, (iv) can be applied at different phases of conflict, and (v) can be implemented by a range of actors acting either independently or in various groups/ constellations[10].

Moreover, the authors add the idea, which we paraphrase, that conflict prevention is a way of thinking, a state of mind or even a culture innate to policy makers engaged in implementing preventive diplomacy, be they Nongovernmental Organizations (NGOs), States, or regional and global International Organizations.

Another underlying assumption is that conflicts are a natural expression of heterogeneity of interests, values and beliefs, being, therefore, an intrinsically embedded aspect of societies from which social change arises. This means that conflicts are as much inevitable as they are needed and should be perceived as positive[11]. The focus of conflict management theory and practice, as a wide theoretical field is, as scholars argue, the way conflicts are dealt with. One pre-requisite is, nevertheless, that habits and choices can be changed.

It should be pointed out that there is a common tendency to focus on so-called *ad hoc* Conflict Prevention – actions directed at specific countries in the imminence of conflicts[12]. This is often related to the concept of *negative peace* – a rather limited and narrow definition of 'Conflict Prevention' in which peace is the absence of war[13].

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[8] Sharma, Welsh, 2015, p. 9.
[9] Carment, Schabel, 2003, p. 11.
[10] *Idem*.
[11] Ramsbotham et. al, 2005, p. 11. Mani, Ponzio, 2018.
[12] Lund, 2009.
[13] Diehl, 2016.

Another part of, conflict prevention, in a long-term perspective, even when no signs of conflict have emerged yet, is the adoption of global and/or region-levels conventions or other normative standards of Human Rights and Democracy by States[14].

Generically, all measures aimed at reducing poverty and increasing economic growth suit the prevention of humanitarian crisis, as does the promotion of Human Rights and the protection of Minorities' Rights[15]. Increasing cooperation in the educational, health, social, cultural and related fields is also believed to decrease conflict[16]. This set of measures can be referred to as *a priori* conflict prevention and one illustrative direct action would be the creation of international courts such as the International Criminal Court (ICC), which is believed to have a deterrent effect on populations, aside from punishing individuals for committed crimes[17].

The International Criminal Court has been the subject of criticism, namely regarding demonstrated operational and political problems, as well as limitations with institutional legitimacy[18]. We will not, however, exhaust this topic. The Statute of the ICC is a treaty, adopted at the Rome Conference in 1998 and entered into force in 2002. The Court's jurisdiction has, therefore, a voluntary nature. The Court can exercise jurisdiction over crimes against humanity, war crimes, genocide and the crime of aggression (Article 5).

From the Preamble of the Statute and from Article 1 and Article 17 emanates a rule of complementarity as to the admissibility of cases[19]. The preamble and Article 1 provide that the "International Court established under this Statute shall be complementary to national criminal jurisdictions". This means that State cooperation is vital to the effective functioning of the Court[20]. However, the Statute of the Court does not apply to a significant number of States (The United States, China, Russia and India, for example, are not parties to the Rome Statute, leaving a big part of world population outside the jurisdiction of the Court). Moreover, the ICC mechanisms to enforce the duty to cooperate

[14]Ramsbotham et. al, 2005, p. 141 ff.
[15] Monteiro, 2000.
[16] Strauss, 2015.
[17] Lund, 2009.
[18] Orakhelashvili, 2019, p. 449. See Guilfoyle, 2016, p. 95 ff.
[19] Orakhelashvili, 2019, p. 445
[20] Sluier, 2009. Guilfoyle, 2016, p. 92.

are seemingly flawed[21]. Finally, the Court is criticised for its "selectivity", both in the definition of so-called "international crimes" and in the range of situations where its jurisdiction is exercised.[22] Critical scholars point to the fact that the Court's activities have been, so far, focused on Africa, which has led to some States, such as Burundi, withdrawing their ratifications of the Rome Statute.[23].

Returning to the matter of Conflict Prevention, in its turn, so-called *a priori* conflict prevention relates itself to the concept of *positive peace*. The latter is a much broader definition, in which the absence of high levels of violence is an element, encompassing nevertheless other features that can be applied in different contexts, such as human rights, justice and conflict management. Further components of positive peace would be state-to-state relations, national societies, and group interactions. Building positive peace is, therefore, a long-term process and requires extensive and ongoing commitments by the International Community[24].

2. UN Legal and Institutional Framework for Conflict Prevention

The next step of our analysis falls under the current legal and institutional framework for Conflict Prevention, within the United Nations system. Our legal assessment follows a chronological sequence. We start from the Charter of the United Nations, adopted in 1945 and its chapter VI, entitled "Pacific Settlement of Disputes". Then, we move onto the International Law Commission (ICL)'s Draft articles on Responsibility of States for Internationally Wrongful Acts, which date from 2001. Finally, we introduce the latest normative effort, namely Responsibility to Protect (R2P), which has its legal source in the adoption of the 2005 Word Summit Outcome Document (WSOD) by the General Assembly, and its subsequent endorsement by the Security Council (in, e.g.: Resolution 1674 (2006) on Protection of civilians in armed conflict).

[21] See Sluiter, G., 2009. Guilfoyle, 2016, p. 92.
[22] Guilfoyle, 2016, p. 90.
[23] Orakhelashvili, 2019, p. 449.
[24] Diehl, 2016.

a. The Charter

Article 2(3) and Article 33 of the UN Charter, the founding document of the organisation, establish a general obligation for States to settle legal or political disputes peacefully. Furthermore, they contain a general prohibition of the threat or use of force in international relations. In combination, these rules set a changing point in the international legal system, after the Second World War.

Article 33 is relevant in respect of States Responsibility for wrongful acts. This article encompasses a general obligation for States to resort to peaceful methods of dispute settlement, such as mediation, negotiations or arbitration, when reparation – which, being the case, must in the first place have been requested – is not made or considered unsatisfactory[25].

Following Cassese's[26] explanation, there are two categories of State accountability. The first concerns the "private" relation between States bounded by contractual obligations due to bilateral or multilateral treaties. This is the responsibility for *ordinary* breaches of International Law and protects States' interests of an economic, commercial or diplomatic nature. The second form of accountability is an *aggravated* responsibility for violations of general community rules, *erga omnes* obligations protecting fundamental rights – peace, Human Rights, the self-determination of peoples, or obligations *erga omnes contractantes*. In this case, a *public* relation arises between the infringing State and all the other States (in the case of treaty breaches, all the other contracting States). Consequently, even third States which are not affected by the illegal act of a violating State may be entitled to react if all States have a legal interest in the protection of specific rights[27].

b. ICL's Draft Articles on States Responsibility for Wrongful Acts

In view of the importance of the concept of State Responsibility, the International Law Commission's (ICL) Draft Articles on States Responsibility for Wrongful Acts, from

[25] Cassese, 2001, p. 186.
[26] *Idem.*, p.182 ff.
[27] Orakhelashvili, 2019, p. 293.

2001, in chapter III deal with "Serious breaches of obligations under peremptory norms of general International Law". This implies that the presented draft falls under the scope of the above-mentioned *aggravated* responsibility for violations of *erga omnes* obligations.

From a Conflict Prevention point of view, the relevant articles are Article 41 and article 48. The former entails a positive duty for States to cooperate in ending serious breaches of International Law, whether they are individually affected by it or not. The latter authorizes non-injured States to invoke the responsibility of the wrongdoer. As Wyler and Castellanos-Jankiewicz[28] observe, States have the right to react against crimes in the name of every member of society. The ICL stated[29] that this duty of cooperation must be pursued through lawful means and can be institutionalized - through the UN, for example - or non-institutionalized. Nevertheless, this cooperation can assume a variety of forms.

c. Responsibility to Protect (R2P)

"Responsibility to Protect" (R2P) is an international legal principle which creates legal and political obligations for States. Its legal foundations arise from the 2005 World Summit Outcome Document (WSOD), paragraphs 138 and 139[30], several United Nations Security Council (UNSC) resolutions (e.g.: Resolution 1674 (2006) on Protection of civilians in armed conflict) combined with International *Jus Cogens* norms, such has the Genocide Convention[31].

The doctrine essentially encompasses two different sets of responsibilities. The first one would be the responsibility of each State to protect its own population. This obligation follows from *Ius Cogens* norms. In the specific case of e.g. genocide prevention, the International Court of Justice (ICJ) in its judgment of the *Srebrenica Case* has explained that States have an international responsibility to take all measures available to them

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[28] Wyler, Castellanos-Jankiewicz, 2014.
[29] ILC Report on the Work of its Sixty-First Session, GAOR 64th Sess., Suppl. No. 10, Doc. A/64/10 of 4 May to 5 June and 6 July to 7 August 2009.
[30] *In:* https://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A_RES_60_1.pdf.
[31] Convention on the Prevention and Punishment of the Crime of Genocide. Adopted by the general assembly of the united nations on 9 December 1948.

which might have "a deterrent effect on those suspected of preparing genocide, or reasonably suspected of harbouring specific intent", whether it be in their territory or in the territory of another State, within the limits of International Law. [32]

The second set of responsibilities lies within the sphere of the principal category of international legal persons, States, acting through the United Nations, within the scope of its delegated powers. When a State manifestly fails to protect its population or itself commits genocide, war crimes, ethnic cleansing, crimes against humanity, there should be an international effort to assist in the reestablishment of peace and security. These efforts should preferably be conducted through peaceful means, and as a last resort, the international community could resort to the measures of chapter VII of the Charter of the United Nations.

In view of the above it can be concluded that, territorial States have the primary responsibility to protect and assist their citizens and should they manifestly fail to do so, the International Community, namely through the UN, is bound to assist in the reestablishment of peace and security. This secondary responsibility is, however, limited to the imminence of or commission of any of the four categories of crimes listed in the Rome Statute of the International Criminal Court (ICC)[33].

'Responsibility to Protect' is also commonly summarized in "three pillars". The first one being the primary responsibility of each State towards its citizens; secondly the pledge to assist other States in fulfilling their responsibility; and the third one, as members of the International Community, readiness to act collectively in cases of "manifest" failure of a State in protecting its population from genocide, war crimes, ethnic cleansing or crimes against humanity[34].

One final consideration about the concept of 'Responsibility to Protect' is that its current formulation is consistent with the model of "sovereignty as responsibility", as developed by Francis Deng. In Deng's view[35], sovereignty is a two-dimensional concept. It encompasses the above-mentioned responsibility for the welfare of each State's population and entails an implicit assumption of accountability. The International

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[32] Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment, I.C.J. Reports 2007, p. 43, paragraphs 428-438.
[33] Bellamy, Reike, 2010.
[34] *Idem.*
[35] Deng, 2010.

Community renders complementary protection and assistance to those in need and holds Governments accountable of the discharge of their national responsibility towards their population. As Francis Deng further explains, international normative parameters of Humanitarian and Human Rights Law compel the international community to react to humanitarian crises. The only way to balance this idea with the concept of sovereignty is by establishing minimum standards of responsibility, having the international community take a complementary role in protecting populations.

Below, we will return to the concept of sovereignty. We will address some questions which arose in scholarly debates concerning the acceptance of Francis Deng's 'sovereignty as responsibility' concept.

d. Institutional Framework

Turning our attention to the current institutional UN framework, in 2008 the Secretary-General appointed the first Special Adviser for the Responsibility to Protect and later in 2011, a joint office with the Special Adviser on the Prevention of Genocide was established, the Office on Genocide Prevention and the Responsibility to Protect. The two Special Advisers report directly to the Secretary-General and share a common methodology for early warning, assessment, convening, learning, and advocacy in order to protect populations from the four categories of atrocity crimes, as well as their incitement. They have a preventive focused mandate to act as catalysts in raising awareness of the causes and dynamics of atrocity crimes, having none of the Special Advisers judicial or *quasi*-judicial powers[36].

Ekkehard Strauss[37] points to the fact, that despite the Office's needed and pertinent mandate to fulfil a gap within the UN institutional structure for early warning and early action towards mass atrocities, the reality is that in practice it falls short on achieving its objective. One of the reasons emphasised by Strauss is the lack of consistency of the concept of Responsibility to Protect, since the content of this concept is still being discussed. In order to correctly implement Responsibility to Protect it is

[36] Information retrieved from the United Nations Office on Genocide Prevention and Responsibility to Protect website page (https://www.un.org/en/genocideprevention/2011.shtml#), last consulted in 03/09/2019, 19:32h.
[37] Strauss, 2015.

necessary that the member states of the United Nations agree on its legal, operational, and methodological framework.

e. The Secretary-General pledges

António Gueterres has consistently pledged for a switch of the International Community response paradigm to a preventive one. In his 2017 Report entitled "Implementing the responsibility to protect: accountability for prevention"[38], highlighted in paragraph 13 are the legal obligations of States to address the root causes of atrocity crimes, which entail the "creation of State structures and institutions that are functioning and legitimate, respect human rights and the rule of law, deliver services equitably and can address or defuse sources of tension before they escalate".

In his 2018 Report "Responsibility to protect: from early warning to early action"[39], he refers to the need to strengthen international cooperation and multilateral institutions to respond to conflicts, namely through mechanisms of early warning and early action. Moreover, he stresses that inclusive and sustainable development are the best form of prevention against all kinds of humanitarian risks, including the risk of atrocity crimes. The Secretary-General further states that the most effective preventive approaches are inclusive, integrated, adaptive, flexible and sustained, and require the active participation of civil society, the business sector, religious and traditional leaders and individuals. Emphasis is given to ending gender-based discrimination and empowering the role of women as agents of atrocity prevention.

f. A normative gap?

As much as a normative development of the concept of 'Responsibility to Protect' is needed, so it appears that legal scholars and practitioners have mainly focused their attention on the reaction to mass atrocities under Responsibility to Protect. We have asked ourselves whether there is a legal gap for conflict prevention or if the current legal norms

[38] *In:* https://undocs.org/A/71/1016, last consulted in 13/09/2019, 20:15h.
[39] *In:* https://www.un.org/en/genocideprevention/documents/1808811E.pdf, last consulted in 13/09/2019, 21:34h.

need to be further developed, in order to reach contexts outside the committing of mass atrocities.

In view of the above, we suggest that the duty of cooperation established under the Draft Articles and its assumed open format, in combination with the first two pillars of Responsibility to Protect may be key in legitimizing the referred normative development.

As Hitoshi Nasu[40] observes, the International Community's responsibility under pillars II and III of 'Responsibility to Protect' doctrine is different in nature from the State's responsibility towards its population. Article 1(3) of the Charter of the United Nations provides that one of the purposes of the United Nations is "to achieve international co-operation in solving international problems of an economic, social, cultural or humanitarian character (…)". However, the system of the United Nations lacks law enforcement mechanisms that would enable assuming a positive obligation to ensure the protection of Human Rights and respect for Humanitarian Law[41].

Following Nasu's explanation, the positive duty of cooperation established under Article 40 and Article 41 of the ICL's Articles on State Responsibility could provide the legal basis for the International Community's responsibility to protect. Quoting the ILC's commentary, "such cooperation, especially in the framework of international organizations, is carried out already in response to the gravest breaches of international law."[42]

The term "Responsibility" in the concept of Responsibility to Protect is limited to the occurrence or imminence of mass atrocity crimes, directing its scope away from a preventive context where mass atrocity is nowhere to be seen, thus making it difficult to invoke its rhetoric in such a situation. As a result, we denote that the current legal definition of the principle results in a contradiction with its enunciation, regarding preventive action in a context far from the occurrence of mass atrocities.

Moreover, Francis Deng's above mentioned "sovereignty as responsibility" norm, besides opening the doors for legitimate *reaction* from third States, is especially relevant for prevention concerns. Jentleson[43] defends the need to strengthen this norm in order to

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[40] Nasu, 2011.
[41] *Idem*.
[42] See note 29.
[43] Jentleson, 2003.

legitimize early action to prevent deadly conflicts, arguing its coherence with articles 2 (7) and chapter VII of the Charter of the United Nations. The author also emphasises that the Charter of the United Nations protects the "sovereignty of the peoples", in Kofi Annan's words and accordingly, allows an intervention in the name of Human Rights and the protection of human dignity, as well as in compliance with the Security Council's mandate of maintaining international peace and security. Thus, it can prevail over national territorial sovereignty. Nolte[44] explains that the concept of 'sovereignty as responsibility', besides being relevant in case of military intervention, is important in the context of terrorism, human rights, and other areas. Conceiving sovereignty not only as a set of rights, but also with obligations, makes the point that States are effectively obligated to control their territory, to respect human rights, and, to a certain degree, to exercise good governance[45]. The normative framework, however, remains weaker in what concerns preventive action.

3. The Use of Force to prevent conflict escalation

The general prohibition of the use of force in international relations is a principle of International Law. The prohibition results from the obligation to respect the territorial integrity and political independence of States[46]. The framework of this principle emanates from Article 2(4), Article 42 and Article 51 of the Charter of the United Nations. This rule is also a rule of international consuetudinary law[47] and the International Court of Justice (ICJ) recognized it as a *Jus Cogens* rule in the case *Nicaragua vs. United States*[48].

Article 2(4) of the Charter of the United Nations provides that "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with

[44] Nolte, 2005.
[45] *Idem.*
[46] Tavares, 2015, p. 122.
[47] Orakhelashvili , 2019, p. 452.
[48] *Idem.,* p. 452.

the Purposes of the United Nations".[49]. Article 42[50] and Article 51 of the Charter of the United Nations encompass two exceptions to the prohibitive principle.

The norm of the Article 51 is considered the main exception to the principle[51]. It recognizes the "inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations (…)". This means that the right of self-defence exists when a State suffers a previous armed attack[52]. Additionally, the ICJ recognized the consuetudinary nature of this right in the *Nicaragua* case[53]. Furthermore, the Court stated that not all aspects of this right are directly regulated by the Charter of the United Nations. Nevertheless, the right of self-defence is limited by the legal parameters of the Charter[54].

As Maria Isabel Tavares[55] observes, the principle prohibiting the use of force is related to the principle of the peaceful settlement of disputes. Tavares explains that if States shall refrain from the use of force in their international relations, then, naturally, alternative options must be conceived. This interpretation is reinforced by an examination of other provisions of the Charter[56]. Article 2(3) provides that "All Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered. Finally, this view was also supported in the *Corfu Channel* case[57].

The doctrine of Humanitarian Intervention professes the intention to protect citizens from the oppression of their own Government, typically consisting of invasion and bombardment of State territory.[58] However, this is not permitted by the Charter of the United Nations[59]. Moreover, under Article 3 and Article 5 of the General Assembly

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[49] Orakhelashvili, 2019, p. 452. Tavares, 2015, p. 128.
[50] "Article 42: Should the Security Council consider that measures provided for in Article 41 would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations."
[51] Tavares, 2015, p. 132 ff.
[52] Tavares, 2015, p. 133. Orakhelashvili, 2019, p. 456.
[53] Tavares, 2015, p. 131.
[54] *Idem*, p. 132.
[55] *Idem,* p. 126-127.
[56] Orakhelashvili, 2019, p. 452.
[57] *Idem,* pp. 452 and 453: The Court stated that "only regard the alleged right of intervention as the manifestation of a policy of force, such as has, in the past, given rise to most serious abuses and such as cannot, whatever be the present defects in international organization, find a place in international law."
[58] *Idem*, p. 468.
[59] *Idem*.

Resolution 3314 (1974)[60], humanitarian intervention is a crime of aggression. Article 3 provides that invasion and bombardment of State territory are example of aggression. Article 5 states that "no consideration of whatever nature, whether political, economic, military or otherwise, may serve as a justification for aggression."

Finally, in the aftermaths of 1999 NATO's intervention in Former Republic of Yugoslavia, 132 States adopted the Havana Declaration[61], in 2000, stating that "We reject the so-called 'right' of humanitarian intervention, which has no legal basis in the UN Charter or in the general principles of international law"[62].

Under Responsibility to Protect principle, when national authorities are unable or unwilling to protect their citizens, the duty shifts to the international community. When diplomatic, humanitarian and other methods of protecting populations at risk are insufficient, it may be necessary for the Security Council to act under chapter VII of the Charter. It must be borne in mind that those would be situations of the utmost exceptionality.

One of the strongest criticisms towards Responsibility to Protect concerns the possible political derogation of the prohibition of use of force. In fact, this aspect has received the greatest attention by scholars and politicians, who cautiously doubt Responsibility to Protect rhetoric.

Understanding of this criticism takes us back to the fact that the concept of 'Responsibility to Protect' was first announced by the International Commission on State Intervention and Sovereignty (ICCS), in its 2001 Report entitled "Responsibility to Protect". The ICCS emerged in 2000, in response to Kofi Annan's pledge for consensus regarding the parameters for authorization of external military intervention for human protection purposes. At the time, pursuing the event of the NATO's lead intervention in Kosovo in 1999, the topic of humanitarian intervention was highly controversial. Some authors[63] point to the fact that the report left several aspects unclear, such as the meaning

[60] United Nations General Assembly Resolution 3314 (XXIX), adopted by the United Nations General Assembly on December 14, 1974 as a non-binding recommendation to the United Nations Security Council on the definition it should use for the crime of aggression.
[61] *In*: http://www.g77.org/summit/Declaration_G77Summit.htm.
[62] Havana, 10–14 April 2000, para. 54. Orakhelashvili, 2019, p. 470.
[63] Nolte, 2005.

of the term "International Community", since, as critical scholars pointed out, it remained unclear whether an authorization by the Security Council was always necessary[64].

However, with the adoption of the principle in 2005 by the General Assembly, it became very clear that military intervention, being a last resort mechanism, could only occur with authorization of the Security Council. [65]. Following this fact, we assert the idea that a historical and systematic interpretation of this norm within the United Nations legal framework is consistent with the organization's goal of maintaining international peace and security[66]. Being, therefore, inconsistent with a doctrine of unilateral intervention for humanitarian purposes.

In view of the above, it can be concluded that military intervention, within the scope of 'Responsibility to Protect' is legitimized through a collective decision-making process, resulting in the adoption of a Security Council resolution. The doctrine of Humanitarian Intervention, which professes a right of unilateral military intervention, is incompatible with the principles of International Law. Distinguishing these two doctrines is of paramount importance when it comes to developing a legal framework for conflict prevention.

Furthermore, in his report *In larger freedom* from 2005, Kofi Annan emphasised the need for the Security Council to set the guiding principles for the authorization of the use of force. The former Secretary-General recommended that the Council, when considering whether to authorize or endorse the use of military force, arrive at a common view on (i) how to weight the seriousness of the threat; (ii) the proper purpose of the proposed military action; (iii) whether means short of the use of force might plausibly succeed in stopping the threat; (iv) whether the military option is proportional to the threat at hand; and (v) whether there is a reasonable chance of success[67].

In this report, Kofi Annan also made important considerations regarding the concept of sovereignty. The former Secretary-General stated that "no legal principle – not even the sovereignty – should ever be allowed to shield genocide, crimes against humanity and mass human suffering"[68]. Referring to the 'sovereignty as responsibility'

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[64] *Idem.*
[65] Bellamy, Reike 2010.
[66] Article 1 UN Charter.
[67] SG Report "In larger freedom", paragraph 126, *in*: https://undocs.org/A/59/2005.
[68] Paragraph 129.

norm, emphasis was given to the "collective"[69] aspect of it. As Georg Nolte[70] notes, caution is required in translating Responsibility to Protect into a legal norm. There is a risk that established legal procedures are overcome by powerful States, such as happened in Kosovo 1999. We will develop this topic in the following section.

a. Sovereignty as Responsibility

Sovereignty[71] is a plastic concept which has been readapted over time, namely since the Westphalian paradigm[72] up to contemporary concepts such as Deng's "sovereignty as responsibility". As George Nolte notes, "the concept of sovereignty invites projections by its interpreters of their respective *Weltanschauung,* their world vision."[73]

Nolte further explains that in the past, sovereignty was described as an absolute power and intrinsically related to the right to go to war, being the basis for the rule of law in interstate relations and the prohibition on going to war, whereas nowadays the concept of sovereignty is discussed in its relationship with globalization.

Georg Nolte points to two functions of the concept of sovereignty: "(i) sovereignty must leave enough room for the requirements of globalization; (ii) sovereignty must protect against undue interference by equals."[74] In legal terms, the liberty of states can be restricted in the general interest, however, their status as equals should be preserved[75].

Conceiving the concept of sovereignty as implicitly encompassing a set of responsibilities is not a new idea. Max Huber, in the *Island of Palmas* arbitration case

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[69] Paragraph 135.
[70] Nolte, 2005.
[71] As Alexander Orakhelashvili explains, saying that a State is sovereign means that the State is independent and autonomous (is not in dependence of another State). One key implication of sovereignty is that no rule of International Law can bind a State without its consent. Another aspect of sovereignty is that the use of sovereignty leads to the assumption of legal obligations by States through the expression of their consent. See Orakhelashvili, 2019, pp. 10 ff.
[72] "This framework emphasizes the equality of all States as participants in the international legal system, the necessity of consent both express and implied for the application of the Law upon a State, and the exclusion of external actors from the State's "domestic jurisdiction." Kenny, Butler, 2018, p. 147.
[73] Nolte, 2015.
[74] *Idem*.
[75] *Idem.*

(1928) said that "Territorial sovereignty (…) has as its corollary a duty: the obligation to protect within the territory the rights of other states (…)"[76]

However, it should be noted that it can prove dangerous, and it did in the past, to make use of Responsibility to Protect rhetoric only to overcome the barrier of a more restrictive concept of sovereignty. In 1999 the Kosovo war represented a case where a military appraisal was engaged against an alleged infringing State, without Security Council's authorization. Additionally, when the Security Council addressed the case in resolution 1244, from 10 June 1999, it remained silent as to the question of legitimacy for the use of force. As Azeredo Lopes[77] remarked, this could represent a precedent for legitimizing the doctrine of unilateral military intervention. However, following Azeredo Lopes' opinion, such argument cannot proceed.

Azeredo Lopes[78] further explains that the NATO-led intervention in Kosovo was conducted outside the limits of International Law. NATO's declarations often invoked *moral* justifications for the use of force based on humanitarian urgency and necessity due to the risks suffered by Kosovans. Moreover, this behaviour can be understood through the fact that prior to Kosovo's intervention, the United States and United Kingdom had tried to justify the use of force against the Former Republic of Yugoslavia (based on Security Council's resolutions 1199 and 1201). Having failed to obtain Security Council's authorization, the referred States opted to act outside the scope of the Council's authority.

4. Lessons

As we have pointed out above, Conflict Prevention is normatively poorly delimited. Taking the view that in order to fulfil this gap, cooperation between International Law and International Relations scholars and practitioners is necessary[79], one way to foster a prosperous dialogue would be bringing the two scientific fields together.

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[76] Island of Palmas Case (Neth. v. USA), 2 R.I.A.A. 829, 839 (Perm. Ct. Arb. 1928) *apud*. Nolte, G. 2005.
[77] Lopes, 2003, p. 1063 ff.
[78] *Idem*, p. 1064 – 1065.
[79] Taking the view of authors such as Michael Byers (Byers, 2008), who has highlighted that although the profound connection between International Law and International Relations, this matter has received very little attention from scholars on both sides.

Law and Politics are intrinsically related, since politicians are law-makers. Moreover, international rules are materialized in international relations, the two fields being constantly in symbiosis. Responsibility to Protect as it is today, theoretically conceptualized by the 2005 World Summit Outcome Document, emerged from political will and has ever since gained a more secure legal foundation – the United Nations (and, specifically, the Security Council) being the primary stakeholder pushing for its development.

However, on the one hand, we currently observe a fragmentation of world politics. It has continuously become clear that States are too cautious to commit to preventive binding rules. Under-developed States fear preventive rhetoric may only be a trojan horse for sovereignty breaches, while the rest of the world is held back by economic concerns.[80] Another factor is, as Michael Lund[81] notes, the fact that successful cases of peaceful prevention of conflicts usually go unnoticed and, thus, there is a general unawareness, outside the professional circles, on how peace is maintained. This contributes to a certain degree of "pessimism", in Lunds's words, towards the value of Conflict Prevention efforts.

On the other hand, there is a communicational gap between the fields of (Public) International Law and International Relations. Experts from both fields, as well as politicians and actors of international society theorize about the necessity of a change of the paradigm of the International Community's action concerning massive violence and atrocity[82]. However, the two fields adopt contradicting standpoints regarding the concept of 'Responsibility to Protect'. International Relations scholars are reluctant to conceptualize Responsibility to Protect as a legal principle[83], whereas international lawyers assume its legal nature[84]. Dialogue becomes difficult when one reality is theorized in such different formats.

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[80] Namely interests/costs assessments which usually put more weight on immediate action than in preventive action, denoting that States are usually more willing to wait than to early act, under the assumption that it will be less costly. However, reality shows the inaccuracy of the underlying logic. See Jentleson, 2003.
[81] Lund, 2009.
[82] See, for all, Ackermann, 2003.
[83] See, for all, Reike & Bellamy, 2010. The authors conduct a legal assessment about Responsibility to Protect. However, they conclude that it is not a legal norm.
[84] As we earlier presented it.

As a consequence, we underline an inadequate operation of Responsibility to Protect by the International Community's actors, who have chosen to enhance only the reactive aspect of this doctrine, calling on it to "legally" justify the use of force – such as in the Libya Case[85]. Monica Naime[86], analysing the Libya case, reflected on the context under which the Security Council Resolution No. 1973 was adopted and on the synergy between law-making and world politics/geopolitical interests. Five members – the "BRIC" (Brazil, Russia, India and China), together with Germany – abstained from the vote, some of them alleging the disproportion of the measures. Naime notes that they were all economic powers with special interests in Libya oil contracts. However, instead of exercising their veto right, these countries choose an abstention. Perhaps this state behaviour was merely a political decision in order to avoid a direct confrontation with Libya, and no opposition to the resolution text.

On the other hand, as Graham Cronogue[87] explains, the abstaining countries were also concerned that the authorization of force would be used as authority for a regime change. In fact, the decision not to exercise their veto right was made under the assurance that the use of force was limited to protecting civilians. However, NATO stepped beyond the scope of its stated rules of engagement and the Security Council authorization. As a consequence, both China and Russia felt that they had been misled by the United States and other Western powers. In the aftermaths of the intervention in Libya, Chinese and Russian officials vowed to never approve such kinds of intervention again[88].

From our perspective, there is an urgent need for a better understanding of the synergies between International Law and International Relations, as well as an overture from both sides to interchange and reciprocity. The Libya case illustrates how political games may undermine the chances of acceptance by States of legally binding parameters of conflict prevention.

The use of force in preventing the escalation of conflicts is the most fragile aspect of Responsibility to Protect doctrine, and thus the most contested. Nevertheless, we argue that the focus should be on peaceful methods which can be used as a replacement for bullets. In our point of view, speech about conflict prevention, and consequently, death

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85 S/RES/1973 (2011), *in*: https://www.undocs.org/S/RES/1973%20(2011).
86 Naime, 2012.
87 Cronogue, 2012.
88 *Idem*.

and mass atrocity prevention, should encompass peace-making discourse. Otherwise, we are talking about fighting fire with fire.

III. Mediation

In this chapter we intend to provide a theoretical insight on Mediation. Firstly, we briefly introduce the topic of peaceful dispute settlement mechanisms and the theory of so-called Conflict Transformation. Together these two concepts set the context for our analysis on the relevance of Mediation. Then, we introduce some doctrinal contributions for the understanding of the outcome of Mediation by explaining the role Mediators play in the process and how they affect conflict structures. Lastly, we present some concrete techniques which could be used in the course of Mediation, namely under Nonviolent Communication auspices.

Our goal is to show how Mediation could also be a tool for conflict prevention. At the same time, we intend to provide ground for exchanges between several scientific fields and their respective approaches regarding this mechanism. Ultimately, we adopt the view that international actors should combine efforts to develop a common framework for an appropriate and timely enaction of Mediation. By doing this, we pave the way for a shifting paradigm, which we have been referring to above.

1. Peaceful Dispute Settlement Mechanisms briefly

Chapter VI of the Charter of the United Nations deals with the peaceful settlement of disputes and with the peaceful adjustment of situations which might give rise to a dispute[89]. According to Tomuschat[90], a dispute arises when one States addresses another State with opposing claims. The term 'situations' refers to contexts of political tension between States from which further negative consequences may flow. Article 33, which should be interpreted in combination with Article 2(3) of the Charter[91], provides that

> "1. The parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice.

[89] Orakhelashvili, 2019, p. 512.
[90] Tomuschat, 2002, p. 107.
[91] Tomuschat, 2002 p.584.

2. The Security Council shall, when it deems necessary, call upon the parties to settle their dispute by such means."

Article 33 (1) explicitly mentions the principle of free choice of means for the peaceful settlement of disputes[92]. Although States are obliged to settle their disputes by peaceful means, they may not be tied to a specific procedure[93]. Among traditional mechanisms for pursuing the prevention or peaceful settlement of disputes, two classes of means can be distinguished: the ones which aim at inducing the disputants to reach agreement and those which are designated to confer a third party the power to settle the dispute by a legally binding decision[94]. Examples of the first set of mechanisms are negotiation, inquiry or fact-finding, good offices, mediation and conciliation.

Arbitration is an example of a traditional mechanism for settling disputes by a legally binding decision[95], an option provided for in several treaties, plus endeavoured by the creation of permanent bodies, such as the Permanent Court of Arbitration (PCA), settled in 1899 by the First Hague Convention on the Peaceful Settlement of International Disputes and situated in the Peace Palace, in the Hague[96].

States resort to international arbitration courts, which typically have a contractual jurisdiction, limited to a small number of States[97]. These are effective peaceful dispute settlement mechanisms, suited to resolving certain types of disagreements within the context of treaty law. One example could be the World Trade Organization dispute settlement system. This mechanism's "qualitative step", in Cassese's words, concerns the judicial nature of the process and the fact that the courts' findings are legally binding to the parts.

In view of this it can be concluded that, Arbitration is particularly relevant in '*ordinary responsibility'* cases, and it undeniably represents a big achievement for Public International Law. Nevertheless, each of the above-mentioned peaceful settlement mechanisms suit different contexts of conflict. Disputing States shall exercise their free choice of means in order to elect the most appropriate method in each situation.

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[92] Tomuschat, 2002, p. 59.
[93] *Idem*.
[94] Cassese, 2001, p. 213.(Cassese, 2001, p.213)
[95] That is, besides traditional international courts, like the International Court of Justice (ICJ) and the International Criminal Court (ICC).
[96] Cassese, 2001, p. 214.
[97] Orakhelashvili, 2019, p. 552.

2. Conflict Transformation

The shifting paradigm we have been referring to finds conceptualization in *Conflict Transformation*, as John Paul Lederach[98] presented it. In his opinion, Peace is embedded in Justice and conflict is normal in human relations, acting as a motor of change. The definition proposed by the author is that Conflict Transformation

> "is to envision and respond to the ebb and flow of social conflict as life-giving opportunities for creating constructive change processes that reduce violence, increase justice in direct interaction and social structures, and respond to real-life problems in human relationships.[99]"

In summary, and paraphrasing Lederach, this is a constructive paradigm with the focus on the creation of adaptive responses to human conflict through change processes which increase justice and reduce violence. The targets are our face-to-face interactions and the ways we structure our social, political, economic and cultural relationships. Peace is viewed as a continuously evolving and developing quality of relationships and non-violent approaches are at the centre of Peace work. The process is thus based on constant dialogue structures.

It is nonetheless important to emphasize that so-called Conflict Transformation approaches involve those conflict resolution solutions which are best suited to each conflict. By choosing this approach, it will be possible for the International Community to solve a crisis in a quick and definite way. The difference is that a strict conflict resolution approach would miss the chance to raise the appropriate questions which would include social/structural change.

Boutros Boutros-Ghali referred in his report *An Agenda for Peace* from 1992 explicitly to the Conflict Transformation theory. At that time, the report was ground breaking and served as a basis for restructuring the United Nations' perspective towards the International Community's approaches to conflicts after the Cold War[100]. Quoting its 59th paragraph:

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[98] Lederach, 2014.
[99] *Idem, p. 21.*
[100] Herz, 1999 *apud* Ayres Pinto, 2014.

> "There is a new requirement for technical assistance which the United Nations has an obligation to develop and provide when requested: *support for the transformation of deficient national structures and capabilities*, *and for the strengthening of new democratic institutions*. The authority of the United Nations system to act in this field would rest on the consensus that *social peace is as important as strategic or political peace*. There is an obvious connection between democratic practices - such as the rule of law and transparency in decision-making - and the achievement of true peace and security in any new and stable political order. These elements of good governance need to be promoted *at all levels of international and national political communities* (emphasis added)."

The change of approach within the UN is still taking place and more recently, the Security Council expressed its intention to consider the role and responsibilities of UN within peacekeeping and peace-building mandates in supporting efforts aimed at addressing the "root causes of conflicts"[101].

3. Mediation

Mediation is an ancient tool and effective method for preventing, managing and resolving conflict, as well as for peace building purposes in post-conflict environments. Its roots stem back to as far as ca. 2000 BC, from references in the Bible[102], going up to 209 BC, when an attempt at mediating the First Macedonian War between the Aetholian League and Macedonia was made[103]. Furthermore, it has been present in multilateral treaties since the 1899 and 1907 Hague Conventions for the Pacific Settlement of International Disputes, to the 1982 Manila Declaration on the Peaceful Settlement of International Disputes[104].

In the United Nation's 1992 *Handbook on the Peaceful Settlement of Disputes between States*[105], Mediation is defined as "a method of peaceful settlement of an international dispute where a third party intervenes to reconcile the claims of the contending parties and to advance his own proposals aimed at a mutually acceptable compromise solution".

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[101] See S/PRST/2017/27, twelfth paragraph.
[102] Bercovitch, Rubin, 2003.
[103] Greirg, Diehl, 2012.
[104] United Nations, 1992.
[105] Adopted by General Assembly resolution 37/10, annex. (United Nations, 1992).

Jacob Bercovitch[106], providing a more extensive analysis of the definition of Mediation, summarizes its characteristics in the following quotation:

> "(1) Mediation is an extension and continuation of the parties' own conflict management efforts.
> (2) Mediation involves the intervention of an individual, group or organization into a dispute between two or more actors.
> (3) Mediation is a non-coercive, non-violent and ultimately non-binding form of intervention.
> (4) Mediation turns an original bilateral dispute into triadic interaction of some kind. By increasing the number of actors from two to three, mediation effects considerable structural changes and creates new focal points for an agreement.
> (5) A mediator enters a dispute in order to affect, change, resolve, modify or influence it in some way.
> (6) Mediators bring with them, consciously or otherwise, ideas, knowledge, resources and interests of their own or of the group or organization they represent. Mediators are often important actors with their own assumptions and agendas about the dispute in question. International mediators are both interested and concerned parties.
> (7) Mediation is a voluntary form of intervention. This means the parties retain their control over the outcome (if not always the process) of their dispute, as well as their freedom to accept or reject mediation or mediator's proposals.
> (8) Mediation operates on an *ad hoc* basis only."

From the information above, we would like to highlight three essential aspects of Mediation: firstly, Mediation involves restructuring a conflict by introducing a third party. Furthermore, Mediation is non-violent. Finally, Mediation is a voluntary process by nature. We will address these three main issues by elaborating on the role of the mediator.

a. The Mediator

Paul F. Diehl and J. Michael Greig[107] point to the diversity of cases in which Mediation is applicable as a conflict management tool. The range goes from divorce settlement talks to labour management negotiations to peace efforts between warring States. Common to these processes is that a third party is introduced into the negotiation process.

Since this third party is crucial to the Mediation process, it is necessary to elaborate on the role of this third party. In order to understand this role, it is necessary to

[106] Bercovitch, Rubin, 2003.
[107] Greirg, Diehl, 2012, p. 1.

comprehend the voluntary nature of Mediation. In the first place, Mediation processes depend on the existence of an outsider entity willing to engage in the dispute. On a second level, both disputing parties must consent to the Mediation process. Furthermore, during negotiations, any suggestion made by the mediator aimed at the settlement of the dispute is submitted to acceptance by the contending parties. Especially in international mediation, it is necessary to acknowledge the underlying reasons for both the mediator and the parties to participate in the process[108].

In the following, we briefly explain four different roles mediators can play: (i) outsider-neutral, (iii) transformative mediator, (ii) insider-partial and (iv) international mediator.

Wehr and Lederach[109] introduced the insider-partial concept, relating it to the outsider-neutral and the international mediator. What differentiates these concepts is the degree of externality, neutrality and impartiality, as well as the authority of the mediator in the process.

An outsider-neutral mediator is both external to the conflict and impartial. In this case, the third party is not related to either disputing parties and has no interest outside the settlement of the dispute. These qualities specify the choice of the mediator for a process. This kind of mediator suits inter-group or inter-personal conflict management.

In transformative mediation[110], mediators focus solely on the process of conflict transformation. Besides being neutral, impartial and external to the conflict, transformative mediators are not authoritative. Their role is to support the parties as they discuss issues between themselves, as well as supporting their "empowerment" and "recognition shifts". Transformative mediators do not lead nor guide the discussion or intend to influence the outcome.

In its turn, an insider-partial is "the mediator from within the conflict". His/her success relies on connectedness and trusted relationships with the conflicting parties[111]. In trust-based mediation, thus, the relationship between mediators and disputants continues after the settlement of the conflict.

In complex international and intercultural disputes, the mediator needs to take on a variety of roles. For this reason, the concept of an international mediator remains open.

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[108] *Idem,* pp. 61 ff.
[109] Wehr, Lederach, 1991.
[110] Bush, Pope, 2002.
[111] Wehr and Lederach suggest this mediator role may be adequate to more traditional societies.

However, as Wehr and Lederach explain, neutrality and impartiality are usually not requisites for successful international mediation, whereas externality is perceived as important.

b. Readiness to Negotiate Theory

In order to understand how mediators change and restructure conflict dynamics, we will briefly discuss Dean G. Pruitt's Readiness to Negotiate Theory[112].

Prior to the concept of *readiness to negotiate* is the concept of *conflict escalation* – the shifting of one or both parties to more extreme tactics. According to Pruitt, blame and distrust as well as dehumanization of the other party are both products and sources of conflict escalation[113].

Readiness for conflict resolution is a variable which pertains to a single party, rather than the situation between the two parties. Thus, a party's *readiness* is in direct proportionality to the likelihood of entering and staying in negotiation, or mediation, putting human resources into the negotiation, making concessions, and taking risks – in order to achieve a peaceful outcome.

As Pruitt further explains, two states of mind contribute to readiness: *motivation to escape the conflict* and *optimism*[114]. The former derives from the circumstances the parties are in and their conviction about the conflict's dysfunctionality and counter productiveness. Optimism, on the other hand, if it develops at all, derives largely from events that occur after both sides have become motivated to escape and move beyond the conflict. It means that the parties have a sense that it is possible to move towards a mutually acceptable agreement. Consequently, for optimism to be maintained, a party must perceive the outlines of a possible agreement.

This is where third parties, acting as intermediaries, make the difference. They can encourage optimism from both parties, by stimulating a "courtship dance", a circular reassurance process. In addition to this, by entering the dispute, third parties become affected by this state of mind. As a consequence of this, the greater the chances of settling the dispute, the harder they will work. Third parties, *inter alia*, enable *communication chains* between the two sides, which lead to the increase of optimism and its components.

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[112] Pruitt, 2005.
[113] Pruitt, 2005.
[114] *Idem*.

4. Mediation Techniques: Nonviolent Communication

In this part of our analysis we will focus on the process of Mediation and providing an example of concrete techniques. During this analysis we will point out the underlying theoretical conceptualization – which may be used by mediators to enable communication between the disputing parties.

As a starting point, reference is made to the UNESCO Constitution's preamble[115], where it is stated: "(…) since wars begin in the minds of men, it is in the minds of men that the defences of peace must be constructed".

From this quote it follows that Mediation encompasses parts of Psychology. Nonviolent Communication (NVC) [116] was developed by Dr. Marshall B. Rosenberg (1934-2015), and it is sometimes called "compassionate communication" or "the language of life". Nonviolent Communication techniques enable self-expression in a way that supports empathy for both oneself and for others. Moreover, it is credited with allowing an overcoming of religious, cultural and language constraints[117].

In *Speak Peace in a World of Conflict: What You Say Next Will Change Your World*[118], Rosenberg expresses his belief that at the core of violence is the mindset which pertains that reward and punishment are deserved. As individuals, as groups and as a society, we have become accustomed to thinking and judging each other in ways that imply that reward is justified, and punishment is justified. Illustrating, Rosenberg refers to retributive principles which inform judicial systems and reinforce the referred idea[119]. Further, the author of the book affirms that Nonviolent Communication implies awareness regarding blame and judgement. When we worry about how we are going to be judged by other people, we lose consciousness regarding our own needs. Finally, under

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[115] *In:* http://portal.unesco.org/en/ev.php-URL_ID=15244&URL_DO=DO_TOPIC&URL_SECTION=201.html#targetText=The%20purpose%20of%20the%20Organization,Charter%20of%20the%20United%20Nations.

[116] For a more in-depth analysis of the principles of Nonviolent Communication works, we refer to Marshall Rosenberg's books. In the present thesis we will only summarize those principles, that are relevant to Mediation processes. We denote, however, that the scope of Nonviolent Communication is much broader.

[117] Bazirake, Zimmermann, 2018.

[118] Rosenberg, 2005.

[119] *Idem,* p. 106.

this mindset, we develop language that disconnects us from ourselves and other people, making compassion very difficult.

Related to this, as source of conflict, are *enemy images* – the thinking that there is something wrong with individuals, or groups "which act in ways we don't like" (*gangs*, in Rosenberg's terminology[120]). In view of this, it is often difficult to recognize that those who are doing these things are human beings like us. Rosenberg explains that in Mediation processes, whether the parties are two individuals, two groups, or two countries, he commonly found that people don't know how to properly express their needs and requests[121]. Instead, they begin the discussion with enemy images, i.e., pointing out what is wrong with the other person/group/country.

In this book, Marshall Rosenberg describes how he mediated a conflict between two warring tribes in northern Nigeria. When he arrived, violence was intense and one hundred of the four hundred people in the community had been killed that year. The conflict was about how many stands each tribe would get in the marketplace. Rosenberg explains that the first thing he usually said in a Mediation process was "I'm confident that if anybody's needs get expressed and understood, we'll find a way to get everybody's needs met. So, who would like to begin, please? I'd like to hear what needs of yours are not being met." From here, parties usually express criticisms, judgments and enemy images. By resorting to Nonviolent Communication, the mediator translates these images into needs. One of the tribe's chief had answered the first question by saying "You're murderers". Rosenberg reformulated this statement, asking "Chief, are you expressing a need for safety that isn't being met? You have a need for safety. You would hope that no matter what's going on, things could be resolved with nonviolence, correct?". After understanding the needs behind judgments, such as demonstrated, the mediator ensures that the other party hears those needs. So, he asks the other party to repeat what needs were expressed. In this case, Rosenberg had to repeat the message two or more times until the other party was able to tell him what had been said. The process develops following this pattern. The mediator asks questions, reformulates answers and asks the parties to repeat what is being said, in order to enable communication. As Rosenberg states,

[120] *Idem,* p. 107.
[121] *Idem*, p. 121.

conflicts can be resolved peacefully if we can express our needs without putting it in an enemy image[122].

5. Challenges

Grieg and Diehl[123] discuss the challenge of distinguishing between Mediation success and failure. As these authors explain, it is not unusual for a Mediation effort to produce a cease-fire without achieving a permanent conflict settlement. For example, during the war in the former Yugoslavia, forty-six separate mediated cease-fires were subscribed. However, even when perceived as a failure, Mediation efforts may contribute to peace in the long run, as well as helping build trusting relations between the disputants, by bringing the two sides to conversation[124]. Context conditions, such as the severity of the conflict and issues over which it is fought, tell more about success and failure than statistical rates regarding the achievement of a full settlement.

Afolabi and Idowu[125] conducted an assessment of negotiation and mediation performed in the Mano River Basin[126]. These authors refer to the high level of migration, internally displaced persons and refugees in the region, relating them to the failure of negotiation and mediation processes. A lack of effective supervision and management of internally displaced persons and refugees is linked to a multiplication of violence and conflicts. Despite the significant drop denoted, the level of violence and conflicts has remained intermittent. For this reason, Afolabi and Idowu question the effectiveness and viability of negotiation and mediation. Among other factors, the authors point to the lack of financial funding as a limitation of negotiations and mediation processes, as well as the disregard for indigenous structures and institutions. Emphasis is also given to a lack of neutrality of the mediators. Nevertheless, the authors recognize the usefulness of negotiation and mediation techniques in the pursuit of sustainable peace in the Mano River Basin.

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[122] *Idem*, p. 124.
[123] Greirg, Diehl, 2012.
[124] *Idem*.
[125] Afolabi, Idowu, 2018.
[126] https://peacekeeping.un.org/en/mano-river-basin-25-years-of-peacekeeping.

In view of this, it can be stated that a theoretical discourse about Conflict Prevention through Mediation involves constant reality checking. It is important to comprehend that contexts within violence-torn societies are extremely fractured and thus relations are very fragile[127]. Issues brought to negotiation tables are, consequently, of utmost sensitivity. Additionally, it is required to conceptualize an assistance framework that can enable setting the proper conditions for negotiations or mediation, as well as other activities aimed at creating peace, to take place. All of this depends on the existence of both political will, and availability of financial resources. Moreover, it only is achievable through cooperation between various civil society and international actors.

[127] Doughty, 2014.

IV. CASE STUDY: VENEZUELA

So far, we have addressed the thematic of Conflict Prevention from a purely theoretical point of view. In the present chapter, we aim at complementing our assessment by analysing the current Venezuelan crisis. The aim of this chapter is to provide insight on theory that can be applied to reality.

Venezuela's case was elected for its contemporaneity, not least because it illustrates several concepts presented throughout our dissertation, as well as mirroring some of the concerns expressed. The analysis is based on information retrieved from news sources (journals, newspapers), United Nations Meetings Coverage and Press Releases, and reports from United Nations agencies, namely, the International Organization for Migration (IOM) and the International Monetary Fund (IMF) as well as related NGOs. Our commentaries are based on the theories and discussions presented in the preceding chapters.

1. Overview

In May 2018, Nicolás Maduro was elected President of the Republic for the second time. The election was controversial and boycotted by most opposition parties. Under allegation that the election was not fair, the National Assembly, controlled by opposition, did not recognise Maduro's re-election. On 23rd January 2019, Juan Guaidó, president of the National Assembly, declared himself acting president, under the scope of Article 233 and Article 333 of Venezuela's Constitution[128].

Venezuela's political crisis has had an economic, social and humanitarian impact. Around a quarter of the country's population (an estimated seven million people) are currently in need of urgent humanitarian assistance[129]. In addition, it is estimated that over 4.3 million Venezuelans have fled the country[130], a situation referred to as unparalleled

[128] Source: https://www.bbc.com/news/world-latin-america-36319877.
[129] According to data provided by United Nations Office for the Coordination of Humanitarian Affairs (OCHA), via ReliefWeb, from 14th August 2019. *In*: https://data.humdata.org/group/ven.
[130] According to an overview by the International Organization for Migration (IOM), dated from September. 2019. *In*: https://www.iom.int/venezuela-refugee-and-migrant-crisis.

in Latin America's modern history[131]. In their daily lives, hyperinflation is perhaps the biggest problem faced by Venezuelans. According to the International Monetary Fund[132], Venezuela inflation rate arrived at 10 million% in April 2019.

On 27th September 2019, an Independent International Fact-Finding Mission on the Bolivarian Republic of Venezuela was established by the United Nations Human Rights Council, through resolution 42/25[133], for a period of one year, to assess alleged human rights violations since 2014.

2. Security Council division

The Security Council debated the situation in Venezuela for the fourth time on 10th of April 2019[134]. The geopolitical division is visible through statements made by the different States' representatives. Michael R. Pence, Vice-President of the United States (US), declared support to Juan Guaidó as the legitimate President of Venezuela, describing Maduro's regime as a threat to peace and stability in the wider region. Pence urged Member States to support the text of a resolution being drafted by the United States recognizing the legitimacy of the interim President. Furthermore, he stated that although the US will continue to exert pressure for the restoration of peace and democracy, "all options are on the table".

Vassily A. Nebenzia, representing the Russian Federation, contested the United States' declarations and referred to Maduro's Government as the legitimate Government, further alleging that Venezuelans have the right to determine their own future. Additionally, Nebenzia established a parallel between the situation in Venezuela and the crises in Syria, Iraq and Libya, which, under his view, resulted from Western interventions.

In its turn, Venezuela's representative Samuel Moncada referred to United States' statements as a threat of war. Moncada revealed concerns regarding a "plan by the United

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[131] Statement of Eduardo Stein, Joint Representative of the Office of the United Nations High Commissioner for Refugees (UNHCR) and the International Organization for Migration (IOM), in Security Council's 8506th Meeting. UN Meeting Coverage of Security Council's 8506th meeting of 10 April 2019, *in*: https://www.un.org/press/en/2019/sc13771.doc.htm

[132] *In*: https://www.imf.org/external/datamapper/PCPIPCH@WEO/VEN?zoom=VEN&highlight=VEN

[133] *In:* https://documents-dds-ny.un.org/doc/UNDOC/LTD/G19/284/21/PDF/G1928421.pdf?OpenElement

[134] Op. Cit. note 43.

States and United Kingdom to wreak economic destruction by provoking a social implosion that could be used as a pretext for military intervention under the guise of the responsibility to protect"[135]. Samuel Moncada further recognized that the Government is killing its own people[136]. However, he accused the United States and United Kingdom of worsening the situation with the application of economic sanctions without the Council's consent.

3. Norway Mediation

In May, representatives from both Venezuelan "presidents" met in Oslo, upon agreement, to initiate a dialogue process mediated by the State of Norway. Further negotiations took place in the Caribbean Island of Barbados. The Ministry of Foreign Affairs of Norway made several announcements from May 2019 to August 2019. According to these, parties were in search of a constitutional solution for the country aiming at the well-being of Venezuelans. The solutions to be found should include political, economic and electoral matters[137].

At the time of writing, however, the mediation process was suspended. In a public statement, Maduro announced that the dialogue had been interrupted, following the economic sanctions imposed by the Government of the United States, which, as he stated, Guaidó's administration supports[138].

For a Mediation process to succeed, both parties need to maintain their *optimism* regarding the achievement of a solution agreed upon (in "Readiness to Negotiate" terminology). Although little is known about the Mediation process, which by nature is secret, the parties had in public statements shown resistance to make concessions. For example, on 6th September 2019, Nicolás Maduro declared that he would remove himself from the negotiations' table if Juan Guaidó didn't change his position regarding Guayana

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[135] This statement illustrates what in section four of chapter II we have mentioned about under-developed countries fearing responsibility to protect rhetoric may be utilized has a trojan horse for sovereignty breaches.

[136] Source: UN Meeting Coverage of Security Council's 8506th meeting of 10 April 2019, *in*: https://www.un.org/press/en/2019/sc13771.doc.htm.

[137] Norway's Ministry of Foreign Affairs Press releases from 29/05/2019, and from 02/08/2919. In: https://www.regjeringen.no/en/aktuelt/uttalelse_venezuela/id2652785/, and https://www.regjeringen.no/en/aktuelt/statement-on-venezuela-2-august-2019/id2663576/, respectively.

[138] Source: https://www.bbc.com/mundo/noticias-america-latina-49273326.

Esquiba[139]. Such a statement, of course, undermines the chances of achieving success in a peaceful settlement of the dispute. Nevertheless, the Government of Norway reaffirmed its availability to further conduct the Mediation process. Dag Halvor Nylander[140], who had been facilitating the process, published on his Twitter account, on 15th September 2019 the following statement:

> "Norway is facilitating the negotiation process in Venezuela at the request of the principal political actors in the country, and reiterates its readiness to continue in this role as long as the parties consider it useful, and advance in the search of a negotiated solution."

Also against the chances of success are the visible *enemy images* which the parties publicly have been demonstrating. For example, Vice-President of Venezuela, Delcy Rodriguez Gomez, addressing UN General Assembly on 27th September 2019, referred to Juan Guaidó's self-declaration as interim president as a "coup d'état".[141] In turn, Juan Guaidó refers to Maduro's led Government as an "usurpation"[142]. As we saw earlier, in the chapter on Readiness theory, blame and distrust are sources of conflict escalation. Referring to the teachings of Marshall Rosenberg[143], these *enemy images* can be worked throughout mediated conversations. For a lasting agreement to be celebrated, parties need to engage in a non-violent dialogue and overcome these barriers to communication.

As to the role of the mediator, Norway is an outsider-neutral party. In a speech at the UN General Assembly on 27th September 2019[144], Norway's Prime Minister Erna Solberg stated that since the end of the Cold War, mediation and conflict resolution have been cornerstones of the State's foreign policy. Solberg added that at the request of the parties, Norway has been engaged in resolving conflicts in Colombia, Venezuela, the Philippines, Afghanistan, in Africa, and in the Middle East.

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[139] Source: https://elpais.com/internacional/2019/09/07/america/1567824876_031923.html.
[140] Dag Halvor Nylander is a Norwegian diplomat, who formerly served as the Personal Representative of the United Nations Secretary-General on the Border Controversy between Guyana and the Bolivarian Republic of Venezuela.
[141] Source: https://news.un.org/en/story/2019/09/1048012.
[142] For example, in his Twitter account publication of 14th October 2019. In: https://twitter.com/jguaido/status/1183768685112156161.
[143] See section four of chapter III.
[144] *In:* https://www.regjeringen.no/en/aktuelt/norways-statement-at-the-united-nations-general-assembly/id2670474/.

We believe that, the statement of Norway could pave the way for an international norm of customary law[145]. As e.g. the ICJ stated in the Nicaragua Case, custom embodies consent tacitly given through practice, repetition of conduct, and legal conviction as to the legal nature of the underlying rule[146]. Furthermore, the Court affirmed the constitutional requirements of the existence of custom, under article 38 of its Statute, of generality of State practice and its acceptance as law[147]. As Orakhelashvili observes, State practise can be gathered, among others, from statements made by government spokespersons to Parliament, to the press, at international conferences and at meetings of international organisations[148]. Moreover, the author explains that the amount of practice required to create a customary rule is relatively small, if there is no practice which goes against the alleged rule of customary law, and if such practise is well-known, carries out either the intention to create or maintain the relevant rule, and meets no significant opposition from other States[149].

4. Considerations

In view of the above, and applying theories from the previous chapters, the following considerations can be made.

In the first place, Mediation by the Government of Norway fulfils the duty of cooperation established under the ICL's Draft Articles. As the ICL stated in commentary to the Draft Articles, the duty of cooperation can be non-institutionalized. In addition, international assistance is being provided by States hosting the four million Venezuelan refugees and migrants. Mostly, people have been fleeing to the neighbouring countries Colombia, Peru, Ecuador, Chile and Brazil[150].

Secondly, the contentious case illustrates the principle of 'sovereignty as responsibility', since Norway is assisting Venezuela to solve its internal political crisis. As we have explained above, international standards of Human Rights compel the

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[145] Article 38 (1) of the Statute of the International Court of Justice (ICJ) provides that "international custom, as evidence of a general practise accepted as law" is a source of International Law. See. Orakhelashvili, 2019 p. 31 ff.
[146] Orakhelashvili, 2019 p. 33.
[147] *Idem*, p. 35.
[148] *Idem,* p. 36.
[149] *Idem*, p. 40.
[150] According to an International Organization for Migration overview, op. cit., note 44, *in*: https://www.iom.int/venezuela-refugee-and-migrant-crisis.

International Community to react in rupturing cases, such as is the case of Venezuela. In the Security Council's meeting, Samuel Moncada, admitted that the country is itself perpetrating the killing of its own people. Besides, the State hasn't been able to provide a safe environment for the population, and neither has it assured basic humanitarian standards of living. If the State of Venezuela is not able to fulfil its responsibilities towards its inhabitants, under the principle of 'sovereignty as responsibility' the country is not in charge of its sovereignty. Additionally, the internal conflict has already spilt over to neighbouring countries, given the high outflow of migration and related tensions at the countries' borders.

In view of the above, we consider that the current reality in Venezuela exemplifies a context which could be covered by Responsibility to Protect framework. The prevention of mass atrocities begins long before they can possibly take place. However, the United Nations has not yet invoked the principle of 'Responsibility to Protect'. Nevertheless, Secretary-General António Gueterres demonstrated support for Norway's facilitation initiative[151].

Above, we noted that 'Responsibility to Protect' scope of application is limited to the committing of mass atrocity crimes. Thus, invoking this principle implies admitting that such crimes are being committed. Moreover, the demonstrated division among the Members of the Security Council concerning the situation in Venezuela, as well as Russia and China's concerns regarding past misuse of Responsibility to Protect doctrine, can be an impediment to a collective reaction under the Council.

Regrettably, the United Nations system doesn't foresee a concise normative response for cases such as is currently happening in Venezuela. In situations like this, taking into consideration the welfare of human beings, the complementary responsibility of the international community must be enacted. Mediation by the Government of Norway – who, in principle, is an outsider-neutral entity in the process, is representative of the shifting responsibility from territorial States to the International Community – and perhaps an attempt at shaping international customary law.

We consider the case of Venezuela an illustration of a timely enaction of conflict prevention measures. Despite the ongoing Fact-Finding Mission established by the

[151] Source: https://www.un.org/press/en/2019/sgsm19688.doc.htm

United Nations Human Rights Council, concerning the possible violation of human rights in the country and without underestimating the severity of the situation lived by the Venezuelan people, the conflict hasn't yet escalated into a civil war. It is still possible to prevent the eruption of an armed conflict in Venezuela.

Finally, after suspending the mediation process with the opposition, Maduro confirmed that negotiations between the Government of Venezuela and the Government of the United States have been taking place for months[152]. The United States have not recognized the Government of Maduro as legitimate. However, the reality is that Maduro has *de facto* power over the territory, since the military are in support of the Government. Thus, the United States have imposed economic sanctions upon Venezuela[153] in order to exert pressure on the Government of Maduro, so that the opposing leader Juan Guaidó can assume control of the Government and call new elections.

[152] Source: https://www.bbc.com/mundo/noticias-america-latina-49421110.
[153] Source: https://www.washingtonpost.com/opinions/2019/08/06/its-not-us-embargo-new-venezuela-sanctions-are-all-about-citgo/.

V. CONCLUSIONS

Globalization has had an impact on the concept of territorial sovereignty, which is no longer perceived as an absolute power held by States. The elevation of the individual as a subject of innate and inalienable human rights and fundamental freedoms has become a corollary of the respective duty shared between each State and the International Community to protect these standards. Thus, nowadays, the concept of sovereignty encompasses a set of responsibilities held by States towards their populations.

The idea of so-called 'sovereignty as responsibility' had been articulated in the 1928 arbitration case *Island of Palmas*. More recently, since the beginning of the century, scholars such as Francis Deng have brought to debate the development of normative parameters to enforce the responsibility of States to protect their citizens from mass atrocities. Under the proposed framework, the International Community plays a complementary role in the protection of populations and shall provide assistance or take collective action when a State is manifestly failing or unwilling to do so.

International Law imposes on States a general duty to ensure respect for Human Rights within their territory or jurisdiction. Moreover, specifically under the Genocide Convention, they are required to exercise due diligence in preventing genocide. On the other hand, the responsibility of the International Community to act proactively is different in nature. The ICL's Articles on State Responsibility (namely its Articles 40, 41 and 48) provide a positive duty of cooperation to end a serious breach, by a State, of an obligation arising under a peremptory norm of International Law. However, as observed in the ILC's commentary, the question whether general International Law proscribes such duty remains open.

The Preamble and Purposes of the United Nations are consistent with the existence of the duty of cooperation. Nevertheless, the organization lacks mechanisms of enforcement which would enable compliance with Human Rights Law and Humanitarian Law. The creation of such a legal framework is dependent on States' political will, which, among other factors, has been the biggest challenge faced by scholars who defend the need to develop the normative parameters of so-called 'Responsibility to Protect' principle.

The military intervention in Libya represented the first time the Security Council passed a resolution under 'Responsibility to Protect' scope. The members of the Council were divided, and concerns emerged regarding a possible attempt by The United States and other Western countries to interfere with the sovereignty of the State of Libya and force a change of regime. The Security Council's authorization for the use of force was limited to the protection of civilians. However, NATO acted in breach of the agreed rules. In the aftermath of the Libya case, the adoption by the Security Council of such normative parameters became undermined, as China and Russia felt that they had been misled by the Western States.

This geopolitical division of the Members of the Security Council is a constant challenge faced by the International Community in dealing with conflicts around the globe. More than ever, it is urgent to change the current reactive paradigm of dealing with the effects of mass atrocities in post-war tribunals. It is necessary to conceive of preventive procedures that could be enacted in a timely manner.

The Venezuela case is already a sign of a change of paradigm. Although the Mediation process has not succeeded in ending the internal dispute, we believe it has opened the doors for the subsequent negotiating process which is taking place between the Maduro's led Government (which has *de facto* power over the territory) and the Government of the United States.

Moreover, Norway has publicly stated that Mediation and conflict resolution are cornerstones of the country's foreign policy. From our point of view, this statement could pave the way for the development of a legal norm of customary law that would enable the enaction of Mediation in a timely manner in situations of internal conflicts.

Finally, putting on Conflict Transformation lenses, it must be emphasised that even if the International Community succeeds in preventing the outbreak of a war – and, therefore, achieving a state of negative peace – Venezuela still has a long way to go in the pursuit of positive peace. Conflict is an opportunity to raise the appropriate questions, which potentially allows restructuring and reforming national institutions. Furthermore, root causes of conflict must be addressed. People should be given the opportunity to actively participate in the process. Thus, dialogue structures are necessary. This can be achieved through cooperation among different national and international actors.

Bibliography:

Ackermann, A. (2003). The idea and practice of conflict prevention. *Journal of Peace Research*, *40*(3), 339–347. https://doi.org/10.1177/0022343303040003006.

Ayres Pinto, D. J. (2014). Mediação de conflitos no âmbito internacional: premissas e modelo de ação. *Revista Do Advogado, Nº 123*, 152–161.

Bazirake, J. B., & Zimmermann, G. (2018). Peace Profile: Marshall Rosenberg. *Peace Review*, *30*(2), 246–253. https://doi.org/10.1080/10402659.2018.1458970.

Bellamy, A. & Reike, R. (2010). The Responsibility to Protect and International Law. *Global Responsibility to Protect*, *2*(3), 267–286. https://doi.org/10.1163/187598410X500390.

Bercovitch, J., & Rubin Z., J. (Eds.). (2003). *Mediation in International Relations*. https://doi.org/10.4135/9781412959636.n352.

Bush, R. A. B., & Pope, S. (2002). Changing the quality of conflict interaction: The principles and practice of transformative mediation. *Pepperdine Dispute Resolution Law Journal*, *3*(1), 67–96.

Byers, M. (2008). International Law. In *Historicism and the Human Sciences in Victorian Britain*. https://doi.org/10.1093/oxfordhb/9780199219322.003.0035.

Carment, David & Schnabel, Albrecht. (2003). Conflict prevention – Taking stock, *in* The United Nations University. (2003). *Conflict prevention: path to peace or grand illusion?* (D. Carment & A. Schnabel, Eds.). United Nations University Press.

Cassese, A. (2001). *International Law*. New York: Oxford University Press Inc.

Cronogue, G. (2012). Responsibility to Protect: Syria the Law, Politics, and Future of Humanitarian Intervention Post-Libya. *Journal of International Humanitarian Legal Studies*, *3*(1), 124–159. https://doi.org/10.1163/18781527-00301004.

Diehl, P. F. (2016). Thinking about Peace Negative Terms versus Positive Outcomes. *Strategic Studies Quarterly, 10*(1), 3–9. Retrieved from http://www.jstor.org/stable/26271085.

Doughty, K. (2014). Our Goal Is Not to Punish but to Reconcile: Mediation in

Postgenocide Rwanda. American Anthropologist, Vol. 116, No. 4, pp. 780–794.

Greirg, J. M., & Diehl, P. F. (2012). *International Mediation*. Polity Press.

Guilfoyle, D. (2016). International Criminal Law. Oxford University Press, 2016.

Igrapé Institute. (2018). *The Handbook of Conflict Prevention* (pp. 1–40). pp. 1–40.

Jentleson, B. (2003). The realism of preventive statecraft, In The United Nations University. (2003). *Conflict prevention: path to peace or grand illusion?* (D. Carment & A. Schnabel, Eds.). United Nations University Press. 26-46.

Kenny, C.; Butler, S. (2018). The legality of intervention by invitation in situations of r2p violations. New York University Journal of International Law and Politics, 51(1), 135-178.

Lederach, J. (2014). The Little Book of Conflict Transformation. Good Books; Original ed. (2003).

Lopes, J. (2003), Entre Solidão e Intervencionismo, Direito de Autodeterminação dos Povos e Reações de Estados Terceiros, col. Gabinete de estudos internacionais, Porto: Publicações Universidade Católica – Porto.

Lund, M. S. (2009). Conflict Prevention: Theory in Pursuit of Policy and Practice AN IDEA WHOSE TIME HAS COME AND GONE? *The Sage Handbook of Conflict Resolution*, 35.

Mani, R., & Ponzio, R. (2018). Peaceful Settlement of Disputes and Conflict Prevention. In T. G. Weiss & S. Daws (Eds.), *The Oxford Handbook on the United Nations* (Vol. 1). https://doi.org/10.1093/oxfordhb/9780198803164.013.22.

Marshall B. Rosenberg, P. D. (2005). *Speak Peace in a World of Conflict: What You Say Next Will Change Your World* (1st ed.; D. (CopyProof) Shenk, Ed.). Enci nitas, CA.: PruddleDancer Press.

Monteiro, A. (2000). As Nações Unidas e a prevenção de conflitos. Nação e Defesa. Outono-Inverno 2000. Nº 95/96 – 2.ª Série. pp. 55-67.

Naime, M. (2012). Libya and Resolution 1973: The Law of Politics. *Journal of Strategic Security*, *5*(2), 105–112. https://doi.org/10.5038/1944-0472.5.2.6.

Nasu, H. (2009). Operationalizing the "responsibility to protect" and conflict prevention: Dilemmas of civilian protection in armed conflict. *Journal of Conflict and Security*

Law, *14*(2), 209–241. https://doi.org/10.1093/jcsl/krp017.

Nolte, G. (1999). Intervention upon Invitation – Use of Force by Foreign Troops in Internal Conflicts at the Invitation of a Government under International Law. Springer, Berlin.

Nolte, G. (2005). Sovereignty as Responsibility? *Proceedings of the Annual Meeting (American Society of International Law), 99*, 389-392.

Orakhelashvili, Alexander. (2019). Akehurst's Modern Introduction to International Law. 8th Edition, Routledge, Oxon.

Pruitt, D. (2005). Escalation, Readiness for Negotiation, and Third-Party Functions. In *Escalation and Negotiation in International Conflicts.* Zartman, I., Faure, G. (Ed.). Cambridge University Press., 251-270.

Ramsbotham, Oliver; Woodhouse, T. M. H. (2005). CONTEMPORARY CONFLICTS. In Blackwell Publishing Professional (Ed.), *Contemporary Conflict Resolution* (2nd ed., p. 399).

Rosenberg, M. (2005). Speak Peace in a World of Conflict: What you Say Next Will Change Your World. Centre for Nonviolent Communication. PuddleDancer Press.

Sharma, S. & Welsh, J. (2015). Introduction, *in* Oxford University Press 2015. (2015). The Responsibility to Prevent. In S. K. Sharma & J. M. Welsh (Eds.), *The Responsibility to Prevent*, 1-20.

Sluiter, G. (2009). Cooperation of States with International Criminal Tribunals. In *The Oxford Companion to International Criminal Justice*. (2009). Antonio Cassese (Ed.), 187-200.

Strauss, E. (2015). Institutional Capacities of the United Nations to Prevent and Halt Atrocity Crimes, *in* Oxford University Press 2015. (2015). The Responsibility to Prevent. In S. K. Sharma & J. M. Welsh (Eds.), *The Responsibility to Prevent*, 38-82.

Tavares, M. (2015). Guerra e Responsabilidade: a intervenção militar no Iraque em 2003. Porto: Publicações Universidade Católica - Porto.

Tomuschat, C. (2002). Ch. VI Pacific Settlement of Disputes, Article 33. In *The Charter of the United Nations: A Commentary*. Bruno Simma [et al.] (Ed). 2nd ed. Oxford:

Oxford University, cop. 2002 (reimp. 2010). 2 vol.; 25 cm. ISBN 978-0-19-925377-7 (set).

United Nations. Codification Division. (1992). *Handbook on the peaceful settlement of disputes between states.*

Wehr, P., & Lederach, J. P. (1991). Mediating Conflict in Central America. *Journal of Peace Research*, *28*(no.1), 85–98.

Wyler, E. & Castellanos-Jankiewicz, L. (2014). In Serious Breaches of Peremptory Norms. In Nollkaemper, A., & Plakokefalos, I. (2014). Principles of shared responsibility in international law: An appraisal of the state of the art. In *Principles of Shared Responsibility in International Law: An Appraisal of the State of the Art*. 284, 311.

LINKS:

https://www.bbc.com/mundo/noticias-america-latina-49421110. – last consulted on 18/10/2019.

https://www.washingtonpost.com/opinions/2019/08/06/its-not-us-embargo-new-venezuela-sanctions-are-all-about-citgo/.– last consulted on 18/10/2019.

https://www.un.org/press/en/2019/sgsm19688.doc.htm.– last consulted on 18/10/2019.

https://elpais.com/internacional/2019/09/07/america/1567824876_031923.html. – last consulted on 18/10/2019.

https://news.un.org/en/story/2019/09/1048012. – last consulted on 18/10/2019.

https://www.un.org/press/en/2019/sc13771.doc.htm. – last consulted on 18/10/2019.

https://www.regjeringen.no/en/aktuelt/uttalelse_venezuela/id2652785/. – last consulted on 18/10/2019.

https://www.regjeringen.no/en/aktuelt/statement-on-venezuela-2-august-2019/id2663576/.– last consulted on 18/10/2019.

https://www.bbc.com/mundo/noticias-america-latina-49273326. – last consulted on 18/10/2019.

https://www.bbc.com/news/world-latin-america-36319877. – last consulted on 18/10/2019.

https://www.un.org/press/en/2019/sc13771.doc.htm. – last consulted on 18/10/2019

https://data.humdata.org/group/ven. – last consulted on 18/10/2019.

https://ucdp.uu.se/. – last consulted on 6/08/2019.