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Study

Legal questions concerning recognition of the interim president in Venezuela

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1. Historical precedents

To a certain extent, the recognition of the opposition politician *Juan Guaidó* as the interim president of Venezuela¹ represents a **departure from the previous recognition practice of the Federal Republic of Germany**. It has hitherto been **German political practice, going back many years, to recognise states alone, not governments or presidents**.² In 1979, for example, Klaus von Dohnanyi, Minister of State at the Federal Foreign Office, replying to a question regarding German policy on recognition of Namibia and Rhodesia, stated that “The Federal Government explicitly grants recognition only to new states and not to new governments [...]”.³

Examples from German political practice of recognitions granted to foreign governments or to governments in exile or provisional governments are rare. They relate exclusively to **civil-war scenarios**, as in the cases of Libya and Syria, and cannot really be compared with the situation in Venezuela.

In the case of **Libya** in 2011, against a backdrop of civil war-like uprisings against the *Gaddafi* regime, the question arose as to whether the Federal Government should recognise the *National Transitional Council*. In June 2011, Federal Foreign Minister *Guido Westerwelle* described the National Transitional Council as the “legitimate representative of the Libyan people”.⁴ In its reply to a minor interpellation, the Federal Government referred to the “**political recognition of the National Transitional Council** by the Federal Government”.⁵ When asked whether support for the new Libyan Government of National Accord under Prime Minister *Fayez al-Serraj* was the reason why the Federal Government had withdrawn its recognition from the government in Tobruk, however, the Federal Government stated that it “recognises states, not governments”.⁶

In the case of **Syria**, the Federal Government stated in response to a minor interpellation in 2015 that, although it regarded the National Coalition for Syrian Revolutionary and Opposition Forces

1 Bundesregierung erkennt Übergangspräsidenten an, 4.2.2019, <https://www.bundesregierung.de/breg-de/suche/bundesregierung-erkennt-uebergangspraesidenten-an-1576740>.

2 Siehe dazu *Talmon, Stefan*, “Recognition of Governments: An Analysis of the New British Policy and Practice”, in: *British Year Book of International Law*, 63 (1992), S. 231-297 (247 f.).

3 Vgl. *Völkerrechtliche Praxis der Bundesrepublik Deutschland im Jahre 1979*, in: *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht (ZaöRV)* 41 (1981), S. 599.

4 Siehe z.B. „Überraschungsbesuch in Bengasi – Westerwelle erkennt libyschen Übergangsrat an“, *FAZ* v. 13.6.2011, <https://www.faz.net/aktuell/politik/ausland/ueberraschungsbesuch-in-benghasi-westerwelle-erkennt-libyschen-uebergangsrat-an-13506.html>; „Westerwelle erkennt Rebellen politisch an“, *ZEIT Online* v. 13.6.2011, <https://www.zeit.de/politik/ausland/2011-06/westerwelle-niebel-bengasi>.

5 Antwort der Bundesregierung auf die Kleine Anfrage der Fraktion DIE LINKE, BT-Drs. 17/7349 (vom 13.10.2011), Frage 16; <http://dipbt.bundestag.de/doc/btd/17/073/1707349.pdf>.

6 Antwort der Bundesregierung auf die Kleine Anfrage der Fraktion DIE LINKE, BT-Drs. 18/8593 (vom 31.5.2016), Frage 1a; <http://dipbt.bundestag.de/doc/btd/18/085/1808593.pdf>.

as the “legitimate representative” of the Syrian people, “in international law” the Federal Government explicitly recognised only states, not governments”.⁷

The cases of Libya and Syria make it clear that there have repeatedly been situations in the recent history of Germany in which the Federal Government has **described a regime as the ‘legitimate representative’** of a particular people or has announced its **‘political’ recognition** of that regime. In the past, moreover, the Federal Government has established diplomatic relations with governments or with representatives of resistance groups but has declined as a rule to make a formal declaration of recognition.⁸

2. Economic sanctions

In this section we shall examine the issue of the freezing of Venezuela’s foreign assets and hence the admissibility of economic sanctions.⁹ Various scholars of international law have already made critical comments in the press on the current freezing of Venezuela’s accounts and tangible assets:

“Foreign state property **cannot** simply be confiscated **without any legal grounds**, particularly if the economy of that state depends on it”, says Kai Ambos. Christoph Vedder adds that “When sanctions are applied to obtain **regime change**, that is an **intervention in breach of international law**”.¹⁰

This is not to say that the imposition of economic sanctions is, *eo ipso*, contrary to international law. For example, economic sanctions applied by one state against another may be compliant with international law if the sanctioning state applies them in response to a violation of international law on the part of the sanctioned state; such sanctions are classed as **countermeasures**.¹¹

7 Antwort der Bundesregierung auf die Kleine Anfrage der Fraktion DIE LINKE, BT-Drs. 18/6962 (vom 4.12.2015), Frage 12; <http://dipbt.bundestag.de/doc/btd/18/069/1806962.pdf>.

8 Vgl. Völkerrechtliche Praxis der Bundesrepublik Deutschland im Jahre 1984, in: ZaöRV 46 (1986), S. 295-381 (308 f.) – Beispiele China/Taiwan sowie Völkerrechtliche Praxis der Bundesrepublik Deutschland im Jahre 1989, in: ZaöRV 51 (1991), S. 683-823 (703) – Beispiel Afghanistan.

9 Zum Begriff vgl. statt vieler *Carter Barry E.*, Economic Sanctions (Stand: April 2011), in Wolfrum (Hrsg.), MPEPIL, <http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1521?prd=EPIL#law-9780199231690-e1521-div1-2>.

10 *Stefan Ulrich*, „Sympathie reicht nicht aus. Viele Staaten erkennen Venezuelas selbsternannten Präsidenten an. Juristen sagen: Das widerspricht dem Völkerrecht“, in: SZ vom 8.2.2019, <https://www.sueddeutsche.de/politik/juan-guaid-sympathie-reicht-nicht-aus-1.4320612> (Hervorh. vom Bearb.).

11 Siehe im Einzelnen *Knut Ipsen*, Völkerrecht, 7. Auflage, München 2018, § 30, S. 661 bis 671. Zum Begriff der Gegenmaßnahme siehe auch *Federica Paddeu*, Countermeasures (Stand: September 2015), in: Wolfrum (Hrsg.), MPEPIL, <http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1020?rskey=e3x3OJ&result=4&prd=EPIL>.

Venezuelan accounts and deposited assets held by banks that are based in Europe are subject in the first instance to universally applicable standards, particularly those established by **customary international law**. To date, however, a clear rule of customary international law regarding the inadmissibility of economic sanctions has not developed.¹²

Other legal bases for economic sanctions are to be found in **Articles 39 and 41 of the UN Charter**. These provisions empower the UN Security Council to decide on measures to be employed in order to maintain international security. These measures may include complete or partial interruption of economic relations.

The particular circumstances in which economic sanctions would violate the **prohibition of the threat or use of force** enshrined in Article 2(4) of the UN Charter are a matter of controversy. The legal opinion of some developing countries and countries of the former Eastern bloc that economic sanctions, as instruments of economic coercion, *always* amount to the threat or use of force within the meaning of the UN Charter has not found widespread currency. On the contrary, the International Court of Justice, the UN Secretariat-General and leading academics consider that economic sanctions are not essentially incompatible with the obligation to refrain from the threat or use of force.¹³

Nevertheless, even below the force threshold, economic sanctions may constitute inadmissible interventions and so violate international law. The **prohibition of intervention in domestic matters** is a recognised tenet of customary international law and is reflected in Article 2(7) of the UN Charter.¹⁴

The question whether a sanction crosses the inadmissibility threshold in international law is subject to a complex assessment in which the objective of the sanctioning state, the specific matter requiring regulation, the rigour of the measure, the significance of its implications and the relation between means and ends must be considered in each particular case.¹⁵

12 Carter, Barry E., Economic Sanctions, in: Lachemann/Wolfrum (Hrsg.), International Economic Law, Vol. I, Oxford Univ. Press 2015, S. 242 ff., Rdnr. 29 f.

13 Vgl. ICJ, Military and Paramilitary Activities in und against Nicaragua (Nicaragua v. United States of America). Merits, Judgment, I.C.J. Reports 1986, <https://www.icj-cij.org/files/case-related/70/070-19860627-JUD-01-00-EN.pdf>.
Der VN-Generalsekretär führt aus: "There is no clear consensus in international law as to when coercive economic measures are improper", siehe UN GA, A/48/535 vom 25. Oktober 1993, file:///P:/unverschluesst/Eigene%20Dateien/A_48_535-EN.pdf, S. 1.
Aus wissenschaftlicher Sicht siehe statt vieler Albrecht Randelzhofer/Oliver Dörr, Kommentierung zu Art. 2 (4), S. 208 f., in: Simma u.a. (Hrsg.), The Charter of the United Nations, Oxford, 3. Aufl. 2012.

14 Statt vieler Kunig, Philip, Prohibition of Intervention (Stand: April 2008), in: Wolfrum (Hrsg.), MPEPIL, <http://opil.ouplaw.com/view/10.1093/law/epil/9780199231690/law-9780199231690-e1434#law-9780199231690-e1434-div2-4>, Rdnr. 7 ff.

15 Ebda. Rdnr. 25 f.

As far as the objective of the sanctioning state is concerned, the use of **economic sanctions in pursuit of human-rights goals**, for instance, has often been deemed legitimate in more recent times, especially as human rights are no longer perceived as purely internal affairs of states.¹⁶ This legitimacy depends on two things, however: the human-rights goals must be the real motivation behind the actions of the sanctioning state, and – as mentioned above – the means must be proportionate to the end.

In the **inter-American context**, in other words where Venezuelan assets are held by banks based in a member country of the Organization of American States, Articles 19 and 20 of the **OAS Charter** provide another basis on which to assess the legality of economic sanctions:

“No State or group of States has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State. The foregoing **principle prohibits** not only armed force but also **any other form of interference** or attempted threat against the personality of the State or against its political, economic, and cultural elements. **No State may use** or encourage the use of **coercive measures of an economic or political character** in order to force the sovereign will of another State and obtain from it advantages of any kind.”¹⁷

3. International recognition of the interim president in the light of the constitutional law of Venezuela

The discussion surrounding the recognition¹⁸ of the self-appointed interim president of Venezuela, *Juan Guaidó*, by some members of the international community, including Germany, is being conducted against the backdrop of a governmental crisis and an accompanying

16 Vgl. *Ziegler, Katja S.*, *Domaine Réservé* (Stand: April 2013), in: Wolfrum (Hrsg.), *MPEPIL*, <http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1398#law-9780199231690-e1398-div1-2>, insbesondere Rdnr. 6 und 12 ff.

Zu tatsächlichen und völkerrechtlichen Aspekten der Menschenrechtssituation in Venezuela siehe statt vieler: OHCHR, *Übersicht zu Menschenrechtsthemen in Venezuela von 2014 bis zur Gegenwart* (31.01.2019), <https://www.ohchr.org/en/NewsEvents/Pages/NewsSearch.aspx?CID=VE>;
UN News, *Independent UN rights expert calls for compassion, not sanctions on Venezuela*, 31 January 2019, <https://news.un.org/en/story/2019/01/1031722>;
Amnesty International, *Venezuela 2017/2018*, <https://www.amnesty.de/jahresbericht/2018/venezuela>;
Human Rights Watch, *Venezuela*, <https://www.hrw.org/world-report/2018/country-chapters/venezuela>.

17 Charter of the Organization of American States, http://www.oas.org/en/sla/dil/docs/inter_american_treaties_A-41_charter_OAS.pdf (Hervorh. vom Bearbeiter).

18 Vgl. dazu Gutachten der Wissenschaftlichen Dienste WD 2 – 3000 – 016/19 vom 8.2.2019, „Völkerrechtliche Aspekte der Anerkennung eines ausländischen Staatsoberhauptes“, <https://www.bundestag.de/blob/592554/87e4ecf283d8bf72635da91a34f72b09/wd-2-014-19-pdf-data.pdf>.

constitutional crisis in Venezuela.¹⁹ *Juan Guaidó*, leader of the opposition movement and President of the National Assembly in Venezuela, is disputing the presidency of Venezuela with the *de facto* incumbent President, *Nicolás Maduro*, and is invoking Article 233 of the Venezuelan Constitution to substantiate his claim to the presidential office.

Article 233 translates into English as follows:²⁰

“The President of the Republic shall become permanently unavailable to serve by reason of any of the following events: death; resignation; **removal from office by decision of the Supreme Tribunal of Justice**;²¹ permanent physical or mental disability certified by a medical board designated by the Supreme Tribunal of Justice with the approval of the National Assembly; abandonment of his position, duly declared by the National Assembly; and recall by popular vote.

(...)

When the President of the Republic becomes permanently unavailable to serve during the first four years of this constitutional term of office, **a new election by universal suffrage and direct ballot shall be held within 30 consecutive days**. Pending election and inauguration of the new President, **the Executive Vice-President shall take charge of the Presidency of the Republic**.

(...)”

According to media reports, the constitutional grounds cited by the Venezuelan opposition for *President Maduro’s* “unavailability to serve” are that his re-election in 2018 was solely

19 *Samuel Misteli*, „Venezuela und seine zwei Präsidenten: das sagt das Völkerrecht“, in: NZZ online vom 8.2.2019, abrufbar unter: <https://www.nzz.ch/international/venezuela-guaidos-anspruch-und-das-voelkerrecht-ld.1457764>; *Sebastián Mantilla Blanco*, „Rival Governments in Venezuela: Democracy and the Question of Recognition“, in: Verfassungsblog `On Constitutional Matters` vom 28.1.2019, online abrufbar unter: <https://verfassungsblog.de/rival-governments-in-venezuela-democracy-and-the-question-of-recognition/>; *Max Fisher*, „Who Is Venezuela’s Legitimate President? A Messy Dispute, Explained“, in: The New York Times online vom 4.2.2019, abrufbar unter: <https://www.nytimes.com/2019/02/04/world/americas/venezuela-maduro-guaido-legitimate.html>.

20 Verfassung der Bolivarischen Republik Venezuela, Originaltext (span.), https://www.oas.org/juridico/mla/sp/ven/sp_ven-int-const.html, deutsche Übersetzung abrufbar unter: <https://kyrillow.net/wp-content/uploads/2019/01/Verfassung-der-Bolivarischen-Republik-Venezuela-2009-mit-nderung-N-1.pdf> (Hervorh. durch Bearbeiter).

21 Span.: “(...) la destitución decretada por sentencia del Tribunal Supremo de Justicia”.

attributable to rigging and therefore possessed no democratic legitimacy.²² This interpretation of the Constitution is regarded by some commentators²³ as ‘creative’, since Article 233 refers first and foremost to physical disqualifying factors, such as death, infirmity and permanent mental disability.

Guaidó, however, bases his unavailability case on the decision of 29 October 2018 by which the Supreme Tribunal of Justice declared the **removal from office (Spanish *destitución*) of President Maduro** under the first paragraph of Article 233 of the Constitution and confirming that an ‘institutional vacuum’ now existed.²⁴ The decision of the Supreme Tribunal of Justice reads as follows:

“Se ratifica el “vacío institucional” que existe Constitucionalmente en el Poder Ejecutivo en Venezuela, de conformidad a lo establecido en el artículo 233 de la Constitución de la República Bolivariana de Venezuela; y como consecuencia de la condenatoria impuesta en este proceso penal especial, se decreta la destitución definitiva de Nicolás Maduro Moros del cargo de Presidente de la República Bolivariana de Venezuela. (...),

(...) en el sentido de que Nicolás Maduro Moros no es Presidente legítimo de Venezuela y está detentando ilegalmente la Presidencia del Estado Venezolano. En consecuencia, los tratados y contratos suscritos por Nicolás Maduro Moros por sí, o por interpuestas personas, no serán legítimos, ni válidos legalmente y menos comprometen en modo alguno a la República, empresas y corporaciones propiedad de Estado Venezolano. Es todo. Y así se decide.”

There seems, however, to be a constitutional problem, in that the judgment against *President Maduro* was delivered by **a supreme court (Tribunal Supremo de Justicia de Venezuela)** that

22 Samuel Misteli, „Venezuela und seine zwei Präsidenten: Das sagt das Völkerrecht“, in: NZZ online vom 8.2.2019. Vgl. zu den Wahlen den Bericht in der New York Times vom 20.5.2018, „Venezuela Election Won by Maduro. Amid Widespread Disillusionment“, <https://www.nytimes.com/2018/05/20/world/americas/venezuela-election.html>.

Kritik an der Durchführung der Wahlen 2018 erfolgte u.a. durch die Organisation Amerikanischer Staaten (OAS), vgl. *Resolution on the Situation in Venezuela* vom 5.6.2018, http://www.oas.org/en/media_center/press_release.asp?sCodigo=S-032/18.

Die Durchführung der Wahlen wurde durch den Wahlprüfungsausschuss (*Sala Electoral*) des Obersten Gerichtshofs Venezuelas, der als Exilgericht in Bogotá/Kolumbien tagte, angefochten. Vgl. Beschluss vom 14.5.2018, online unter: <http://tsjlegitimo.org/wp-content/uploads/2018/06/Sentencia-de-NULIDAD-de-CONVOCATORIA-a-ELECCIONES-PRESIDENCIALES-SE-2018-003-.pdf>.

23 So Max Fisher, „Who Is Venezuela’s Legitimate President? A Messy Dispute, Explained“, in: The New York Times online vom 4.2.2019, a.a.O. (Fn. 19).

24 Vgl. Urteil des Obersten Gerichtshofs der Bolivarischen Republik Venezuela, 208º y 159º, S. 150 f., online unter: <http://tsjlegitimo.org/wp-content/uploads/2018/11/Sentencia-Definitiva-Exp.-SP-2018-001-final.pdf>.

has been meeting in exile since 2017.²⁵ The 33 supreme judges of this ‘court in exile’ were **elected** in July 2017 by the **National Assembly, which is dominated by Venezuelan opposition parties** and whose President is *Juan Guaidó*.²⁶ Following a confrontation with the *Maduro* government, the judges fled into exile in countries such as Panama, Chile, Colombia and the United States. In October 2017, the exiled judges were given an office at the headquarters of the OAS, the Organization of American States, in Washington, D.C.²⁷

The various specialised panels of the Supreme Tribunal of Justice have subsequently been processing actions that they receive by e-mail on their own website;²⁸ they arrive at their decisions by means of online conference calls. The authority of this **supreme court in exile** is not recognised by the *Maduro* government, nor are its decisions implemented in Venezuela.²⁹

Instead, a *Tribunal Supremo* loyal to *Maduro*³⁰ continues to sit in Venezuela and recently even imposed a travel ban on opposition leader *Guaidó*.³¹

The applicability of Article 233 of the Venezuelan Constitution therefore depends on the constitutionality of the judgment delivered on 29 October 2018 by the court in exile, which, in the eyes of the *Maduro* administration, is not legitimate and is therefore unable to take constitutionally binding decisions. Because of the enduring governmental and constitutional crisis in Venezuela, it has also **proved impossible to implement Article 233 of the Constitution**.³²

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- 25 República Bolivariana de Venezuela. Tribunal Supremo de Justicia, Discurso de apertura de actividades, Washington D.C., <http://tsjlegitimo.org/apertura/>. Vgl. näher *Sebastián Mantilla Blanco*, „Rival Governments in Venezuela: Democracy and the Question of Recognition“, in: Verfassungsblog ‘On Constitutional Matters’ vom 28.1.2019, a.a.O. (Fn. 19).
- 26 “Venezuela row as National Assembly appoints judges”, BBC news vom 22.7.2017, <https://www.bbc.com/news/world-latin-america-40690251>.
- 27 “El régimen de Maduro Venezuela: Un <Tribunal Supremo de Justicia> en el exilio se instala en la OEA”, 12.10.2017, https://www.clarin.com/mundo/venezuela-tribunal-supremo-justicia-exilio-instala-oea_0_rjDm2r6h-.html.
- 28 Abrufbar unter: <http://tsjlegitimo.org/>. Der Gerichtshof firmiert dort als „Legitimes Oberstes Gericht“.
- 29 *Samuel Misteli*, „Venezuela und seine zwei Präsidenten: Das sagt das Völkerrecht“, in: NZZ online vom 8.2.2019, a.a.O. (Fn. 19).
- 30 „Krise in Venezuela: Wie sichert sich Maduro seine Macht?“, in: Epoch-Times vom 1.4.2017 <https://www.epochtimes.de/politik/welt/krise-in-venezuela-wie-sichert-sich-maduro-seine-macht-a2085678.html>.
- 31 „Oberster Gerichtshof verbietet Guaidó Auslandsreisen“, in: Die Welt online vom 29.1.2019, <https://www.welt.de/politik/ausland/article187922238/Venezuela-Oberster-Gerichtshof-verbietet-Juan-Guaido-Auslandsreisen.html>.
- 32 Nach dem Wortlaut des Artikels hätten sonst Neuwahlen binnen 30 Tagen nach dem gesetzlichen Hinderungsgrund bezüglich der Amtsausübung des Präsidenten – also der am 29.10.2018 gerichtlich verfügten Absetzung des Präsidenten – erfolgen müssen.

The recognition of interim president *Juan Guaidó* by the Federal Republic of Germany on 4 February 2019³³ is partly based on Article 233 of the Venezuelan Constitution.³⁴ The purpose of this reference is to express the German view that *President Maduro* does not possess, or no longer possesses, any democratic legitimacy.

By invoking Article 233 of the Venezuelan Constitution, **Germany is also adopting a position on a controversial issue of Venezuelan constitutional law.** In the light of the principle of **non-interference in other countries' internal affairs**, this seems to be just as questionable in terms of international law as the premature recognition as interim president of an opposition member who has not yet effectively consolidated his position in the power structure of a state.

* * *

33 Bundesregierung erkennt Übergangspräsidenten an, 4.2.2019, <https://www.bundesregierung.de/breg-de/suche/bundesregierung-erkennt-uebergangspraesidenten-an-1576740>.

34 Vgl. die Rede von Bundesaußenminister *Heiko Maas* in der Aktuellen Stunde des Bundestages „Aktuelle Entwicklungen in Venezuela – schnellstmögliche Wiederherstellung von Demokratie und Rechtsstaatlichkeit“, 30.1.2019, <https://www.auswaertiges-amt.de/de/newsroom/maas-bundestag-venezuela/2184556>.

In der Rede des Außenministers heißt es: „Im Einklang mit Artikel 233 der venezolanischen Verfassung wird es dann an Juan Guaidó sein, das Land zu Neuwahlen zu führen. Diese Sicht wird weltweit von immer mehr Staaten und Regierungen geteilt.“