



Briefing note

Issue concerning the recognition of 'Interim President' Juan Guaidó following the parliamentary elections in Venezuela on 6 December 2020

The first point at issue is how the recognition of Juan Guaidó, the self-appointed 'Interim President' of Venezuela, by the German Federal Government after the expiry of his parliamentary mandate on 5 January 2021 is to be assessed in terms of international law; the second is how possible attempts by the EU to influence the electoral process in Venezuela are to be regarded.

The Research Services of the German Bundestag have already dealt in depth with the first point in recent times, which means that **we may, in principle, refer to their findings regarding the legal position, which remain applicable**. The Research Services found that the recognition of 'Interim President' Juan Guaidó, based on a controversial interpretation of Article 233 of the Venezuelan Constitution, was a questionable position in international law, given the principle of non-interference in other countries' internal affairs, as was the premature recognition as interim president of an opposition member who had not yet effectively consolidated his position in the power structure of the state.

The question that has now arisen is whether the election of the National Assembly on 6 December 2020 has significantly altered this assessment of the position in international law.

The parliamentary elections in Venezuela on 6 December 2020 were won by the Government of President Nicolás Maduro. A total of 68% of the votes cast went to President Maduro's governing Socialist Party. Turnout, however, was only 31%, large sections of the Venezuelan opposition having boycotted the elections, citing their expectation of electoral fraud. The EU, too, had already taken the view ahead of the vote that the elections would be neither free nor fair.

The international **reaction to the outcome of the parliamentary elections was varied**. Many countries, like the United States and the members of the Lima Group and the EU, did not recognise the election result, while others, such as Russia and the People's Republic of China, emphasised the legitimacy and transparency of the electoral process. The EU declared that the election results were not "representative of the will of the Venezuelan people" because of a "lack of respect for political pluralism and the disqualification and prosecution of opposition leaders". A spokeswoman for the Federal Foreign Office stated that the elections had been "neither free nor fair" and had not met the minimum international standards for elections. The low voter turnout, she added, indicated that the population had had little trust in the process. The

elections had not altered Germany's position on the "whole Venezuela issue" and on Guaidó, she said. Josep Borrell, EU High Representative for Foreign Affairs and Security Policy, said that the electoral process was not transparent, and so the EU did not send any election observers.

The EU, however, seems to be shifting away from its previous position of recognising 'interim President' Guaidó ; in Josep Borrell's latest statement, Guaidó is referred to only as a representative "of the outgoing National Assembly". This conveys the impression that the EU is now pinning its political support for the opposition forces to a lesser extent on the person of Juan Guaidó and intends to focus that support more sharply on the various players in civil society and in the opposition groups – the internally divided opposition. A majority of the European Parliament, however, are still behind Guaidó.

In January 2019, Juan Guaidó, President of the National Assembly at that time, invoked Article 233 of the Venezuelan Constitution to proclaim himself Interim President of Venezuela. Article 233 lays down that the President of the National Assembly may take over the office of President for a period of 30 days in order to arrange for fresh elections – if the elected President has not taken office. Although Nicolás Maduro was sworn in on 10 January 2019, his re-election in 2018 was not recognised by many of the opposition groups, which was interpreted as a 'prolonged unavailability to serve'. Mr Guaidó, however, did not succeed in organising the fresh elections required by the Constitution in these circumstances, because authorities loyal to the Government resisted that move. After the parliamentary elections of 6 December 2020, Guaidó spoke again of rigged elections.

The consequence of the election result is that the opposition has lost control of its last institutional power base, the National Assembly, and Juan Guaidó has not yet managed to assert himself against the authoritarian rule of the Head of State, Nicolás Maduro. At the first sitting of the National Assembly, held on 5 January 2021, the Members of Parliament elected a representative of the governing United Socialist Party of Venezuela (PSUV), Jorge Rodríguez, as the new President of the National Assembly.

In the previous parliamentary elections of 2015, the opposition alliance Democratic Unity Round Table (*Mesa de la Unidad Democrática* – MUD) had won 109 out of 167 seats in the National Assembly, thereby securing a two-thirds majority. In March 2017, the Supreme Tribunal of Justice decided to strip the National Assembly of its legislative powers on the grounds that three seats held by the MUD alliance had allegedly been won as a result of voting irregularities. The Court initially transferred the legislative powers to itself but revised its decision a few days later. On 1 May 2017, Nicolás Maduro initiated the election of a Constituent Assembly, which then transferred the powers of the National Assembly to itself in August 2017.

A split then occurred in the National Assembly, leading to the parallel activity of two parliaments. Guaidó continued to preside over one parliament, which comprised opposition members. The pro-government members elected Luis Parra president of the other parliament. Following the general elections of 6 December 2020, Guaidó has sought to ensure that his position remains recognised by part of the international community. His **parallel national assembly** recently prolonged its mandate and that of its president "pending free, fair and transparent elections". Venezuela's Supreme Tribunal of Justice, however, has declared that decision null and void.

Guaidó's loss of the office of President of the National Assembly essentially removes any legitimacy from his claim to leadership of the government, even if he invokes the "principle of constitutional continuity". This situation should also be seen against a backdrop of dwindling support for him in opposition circles. Governmental authority remains in the hands of President Maduro, who has the support of the security forces.

At the heart of the controversy surrounding the political recognition of the Venezuelan 'interim President' Juan Guaidó is the basic conflict in international law between the legitimacy of state sovereignty and the *de facto* exercise of power.

There are strong indications – registered, for example, by the UN Fact-Finding Mission and Amnesty International – of repressive action on the part of Maduro against regime critics, of mass violations of human rights, of shutdowns of media providers that do not toe the government line and of large-scale emigration driven by social and economic hardship. Not least in view of this situation, recognition of 'interim President' Guaidó probably does not amount to inadmissible interference in the country's internal affairs, but it is at least an unfriendly act towards the incumbent Government of Venezuela. There are certainly some signs in international legal literature and practice of a shift towards linkage between the recognition of governments and their legitimacy and towards attaching greater importance to the people's right of self-determination. However, apart from the Stimson Doctrine, which applies to annexations, **these attempts to add additional recognition criteria to that of the effective exercise of power have yet to bear fruit in mainstream international legal literature and practice.** There are still widespread **fundamental reservations among scholars of international law regarding the recognition of new governments whose domestic constitutional basis has not yet been conclusively clarified.**

The following comments by international lawyer Jost Delbrück shed more light on this position:

"The appointment and composition of the government is not regulated by international law but by the national constitution of the state. States are bound to treat the government which, according to the national law of the state in question, holds office as the organ of that state in international legal transactions too. This also applies, however, to a revolutionary government which has truly established itself [...]. In cases where the new authority must first establish itself in a struggle with what has hitherto been the legitimate government, **that struggle must, by any objective and rational assessment, have been decided in favour of the revolutionaries but it need not have been ended.**

Recognition must not be premature, that is to say it must not be granted before the new state authority has established itself definitively. Premature recognition *per se* [...] does not make the government legitimate. In this respect it has no effect in international law. On the other hand, it represents a repudiation of the legitimate state authority by the recognising state, whereby the latter incurs tortious liability under international law, and also encounters serious reservations from a peacebuilding perspective."

Whether, in the present Venezuelan situation, the aforementioned conditions for a legally admissible recognition of 'interim President' Guaidó already obtain is ultimately difficult to ascertain, since this entails establishing **when the conflict between the president and the 'interim president' is finally decided, even if it is not yet ended.** However, the result of the parliamentary

elections of 6 December 2020, which yielded a clear victory for Nicolás Maduro's governing United Socialist Party, strongly suggests a reinforcement of the *de facto* rule of President Maduro and hence of an – inadmissible – premature recognition of 'interim President' Guaidó. A definitive resolution of the recognition issue is therefore based primarily on a *de facto* situation and, it follows, on a value judgement concerning the future; accordingly, it is essential to follow further political developments in the country very closely until it is conclusively assessed that the struggle between the president and the 'interim president' has been finally decided.

The question of possible targeted attempts by the EU to influence the electoral process in Venezuela cannot be answered, because the Research Services do not possess any relevant information of their own. If, however, objective evidence has been found of such activity – despite the absence, for instance, of any EU election observers in the country – that would constitute inadmissible interference in the internal affairs of a sovereign state and with its discretionary powers to shape its own electoral process. This was reaffirmed in UN General Assembly Resolution 68/164 on strengthening the role of the United Nations in enhancing periodic and genuine elections and the promotion of democratisation. The point is not whether the underlying purpose of influencing elections might be to protect human rights – even though that no longer falls entirely within the *domaine réservé* but is increasingly regarded as a communal task – and to safeguard international security. A mere exhortation by the EU that free and fair elections be conducted in Venezuela, on the other hand, does not conflict with any principles of the UN. Besides, there are diverse views among the international community as to whether the elections to the Venezuelan National Assembly on 6 December 2020 were free and fair.
