


The Struggle for Control of Occupied Venezuela

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Commentary

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January 23, 2019

On January 10, 2019, according to articles 233, 333, and 350 of the Venezuelan Constitution, the populist socialist regime of Nicholas Maduro in Venezuela legally ended, although President Maduro and those who have taken advantage of that government to systematically loot the country, have not yet accepted that reality.

Venezuela is today at a transition point, which is both dangerous and fleeting but may represent the country's last best chance to avoid a more extensive disintegration into violence and chaos, gravely impacting the security and prosperity of the United States and the rest of the hemisphere.

The condemnation of Venezuela's elections as fraudulent by the majority of the countries of the region and the broader international community and the withdrawal of ambassadors from Venezuela by most Latin American governments create a unique opportunity to move Venezuela back toward democracy without military intervention.

Key to the opportunity is the failure of Venezuela's "presidential election" in May 2018 to comply with a broad range of conditions specified by the nation's own constitution. This includes the exclusion of political parties representing key parts of the Venezuelan polity, credible indications of widespread, officially-condoned or conducted fraud. It also includes the failure to provide the physical and security conditions for the Venezuelan people to express their will. More fundamentally, as Venezuelan legal scholar Jose Ignacio Hernandez notes, the election was called by the National Constituent Assembly, which is "an illegitimate body with no authority to organize elections."

The widespread condemnation of the May voting event by the international community— more than 50 countries refused to recognize its results as legitimate (including 19 in Latin America) —highlights the international consensus regarding its lack of validity as an "election" compliant with Venezuela's constitution.

According to Article 233 of the Venezuelan Constitution, if at the end of a president's term there is not a legitimately elected successor who can assume the office, power devolves into the hands of the National Assembly until new elections can be called. While the wording of Article 233 is oriented toward a president, who dies or is incapacitated before he takes office, rather than the absence of a legally valid election, its instructions for handling the absence of a legitimately elected successor when the presidential term expires is clear.

On January 5, 2019, the democratically elected Venezuelan National Assembly voted to select Juan Guaidó as its president. Until new democratic elections can be held, thus as the personification of the will of the democratically elected assembly, Guaidó is arguably now Venezuela's most constitutionally legitimate head of state. Correspondingly, during this interim period, for the perspective of contracts, treaties, and diplomatic engagement, Guaidó and the National Assembly are arguably the legitimate representative of the Venezuelan state.

To acknowledge the obvious, Venezuela's territory is currently under the de facto control of a group of persons, including multiple armed groups, which prior to January 10, had some legal claim to being the country's government and armed forces (the so-called "Bolivarian" armed forces, associated militias and armed colectivos, as well as groups not officially associated with them such as the Revolutionary Armed Forces of Colombia (FARC) and the National Liberation Army (ELN), as well as various prison gangs [pranes] among others). A significant number of those persons have been sanctioned by the United States and other countries for having committed acts for which they are criminally liable in international courts. Many others are suspected of crimes or may have criminal investigations against them but have not yet been explicitly named. As with common criminals in a stand-off with the police, those individuals are understandably reluctant to relinquish control of the territory that they occupy for fear of losing their current positions of privilege at best, and possibly losing that which they have stolen from Venezuela and facing imprisonment for their crimes.

The prospect of external military intervention in Venezuela has repeatedly been rejected by the international community, including by many thought leaders in the United States, and some of the United States' closest allies in the region. It is indeed prudent to be concerned about the impact of military action. Such action would surely be resisted by the armed groups, which have de facto control of the country. This would not only cause loss of life but would also risk fragmenting the already fragile balance among criminal and other entities, unleashing a wave of violence and refugees far beyond the tragedy already witnessed to date. Yet, however valid the reasons not to intervene militarily due to the possible consequences, the legitimacy of any such act now depends on the will of Venezuela's constitutionally legitimate government, now headed by Juan Guaidó.

Guaidó's brief kidnapping in early January 2019 by members of the SEBIN (the intelligence services of the de facto Maduro government), are a reminder that he and the rest of the National Assembly are physically vulnerable to those who still control Venezuelan territory. These forces clearly understand that Guaidó's acceptance of his legitimate constitutional role as head of the country is a direct challenge to that control. Indeed, Diosdado Cabello, head of the constitutionally illegitimate alternative legislature created by the Maduro regime, menacingly threatened to eliminate the elected National Assembly of which Guaidó is president.

Leveraging the democratic legitimacy of Guaidó and the National Assembly to bring about a democratic transition in Venezuela will require a carefully orchestrated series of steps, and close collaboration between them, the United States, and other members of the international community. If Guaidó, the National Assembly, and the international community do not rise to

the challenge, the opportunity will vanish. Yet if Guaidó and the National Assembly actively embrace their role as the legitimate government of Venezuela, and the international community does not respond, the episode could end in Guaidó's imprisonment or killing, the dissolution of the National Assembly, and a postponed, far more violent collapse of the country months or years down the road.

First, with the help of respected multilateral entities such as the Organization of American States (OAS), and possibly funding by Venezuelan expatriates, Venezuela's National Assembly must construct a significant and capable legal apparatus. Such a body must be able to make its case as the legitimate representative of the Venezuelan state to the international community. In the process, it must be able to legally defend itself in international tribunals against the counterclaims of the de facto Venezuelan state, and develop and exert credible legal positions on issues from contracts of the Venezuelan oil company PdVSA to debt, to international agreements such as the border dispute with Guyana, to the treatment of Venezuelan migrants abroad, to cooperation with international entities on criminal matters involving Venezuelan citizens.

Given the unconstitutional expansion of Venezuela's Supreme Court in 2015, the National Assembly will also need to establish an independent, legally valid interim judiciary, capable of making rulings on political and constitutional disputes arising out of actions taken by the (now de facto) Chavista government. It will also need to appoint representatives of the legitimate Venezuelan government to other countries in the region, and to international bodies such as the OAS and the UN. It must further create an interim prosecutorial organization capable of gathering evidence against those officials of the de facto government and others engaging in criminal acts (although enforcement may have to wait until the legitimate government reestablishes control over Venezuelan territory).

Finally, the National Assembly must establish a constitutionally legitimate military command authority. Such an entity must, however, take care not to be perceived as a force designed to "re-take" the country, or as an agent of foreign militaries, but simply, as the constitutionally legitimate embodiment of the armed forces that members of the militias of the de facto government may choose to swear allegiance to as the crisis of legitimacy of the de facto government deepens. Following a raid on January 21 by dissenting military units against a National Guard outpost in the Greater Caracas neighborhood of Cotiza, Guaidó courageously invited the Venezuelan military to join the assembly in defending the constitutional order. While Guaidó is technically avoiding calls for insurrection, he, and the rest of Venezuela's legitimate government must be clear that they are playing with fire, provoking a cornered group of criminal usurpers who, for the moment, have the monopoly of force in the country. No one in Venezuela or the United States should be surprised if the de facto government imprisons or kills Guaido for his efforts. It would be the height of irresponsibility for Venezuelans struggling to restore democracy in their country, and politicians in Washington not to have a well-considered response when that happens.

Vice-President Mike Pence January 21 declaration that the United States stands with the Venezuelan people was a positive and principled act, yet having now said it, the United States

must also be prepared to back up those words.

At the same time, if the United States and the international community do not believe that the United States can reasonably prevent the de facto government and armed actors currently allegiant to it from harming the legitimate de jure government on Venezuelan territory, the United States must be prepared to host the members of the de jure government in a safe site from which that government can manage the legal affairs and external relations of the country until physical control over its territory can be restored.

With respect to upcoming struggles in the region's institutions, the United States must fully embrace the legal legitimacy of the interim government and use its own influence to promote the acceptance of its designated representatives, versus those of the de facto government, by countries of the region, organizations such as the OAS, the UN, and its associated organs such as the Economic Commission on Latin America and the Caribbean (ECLAC), Interpol, the Financial Action Task Force (GAFI), and multilateral entities such as the Interamerican Development Bank (IDB).

The United States should also strongly back the right of the legitimate government to contract and work with governments and international relief agencies to bring much needed food, medicine, and other emergency supplies into the country, as soon as the conditions have been created on the ground so that those relief agencies feel that they can operate there. The United States should further coordinate with its international partners to pressure the forces occupying Venezuelan territory not to obstruct humanitarian aid brought into the country by the legitimate government.

The United States, in partnership with the OAS, should also adopt strong positions against the legality and propriety of attempts by the de facto government to commit the resources of Venezuela to foreign actors such as Cuba, Russia, and China. Doing so will be particularly urgent if the de facto government invites such foreign powers to deploy police, military, intelligence, or other state actors on Venezuelan soil.

While the actions outlined in this work may seem like a charade in light of the physical control of Venezuela's territory and resources by the de facto government, the formal position of the United States and other governments has an often-overlooked importance in international courts, in decisions regarding the validity and honoring of contracts and the control of bank accounts in the name of the Venezuelan state. Effectively, the formal positions of governments matter, insofar as that, if the contracts that companies and foreign governments (e.g., Russia and China) sign with the de facto government do not have validity in international courts, they will have a much stronger incentive to work with the legitimate Venezuelan government toward a solution, which protects their long-term legal and strategic interests in the country. Obliging them to work with the legitimate government of Venezuela, in turn, will accelerate the process by which the resources of the de facto government evaporate, and the de facto government is obliged to seek a solution.

With respect to military action, if the armed forces do fracture and the country degenerates into chaos, the broad international recognition of the de jure government, and working relations with it, creates a vehicle for that government to legitimately invite in international peacekeepers, or a coalition of foreign forces, to help it to restore order.

The course of action argued by this work is risky, and its results are far from guaranteed. Nonetheless, it is arguably the only option that proceeds from a basis in respect for national sovereignty, democratic practices, and the rule of law. For others across the region flaunting international commitments and the rights of their peoples under their own democratic frameworks, such as the Ortega dictatorship in Nicaragua the lesson is clear; democracy, human rights, and constitutional commitments matter, and the region can be respectful of sovereignty and slow to intervention yet still use its collective legal and diplomatic authority to bring justice to those who transgress the rights of and commitments to their own people.

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