Proposal to activate the principle of Responsibility to Protect in Venezuela.

Based on the United Nations Security Council alternative mechanisms: Resolution 377A (V) and the Inter-American System of Human Rights.

Madrid, October 14th, 2020

Soranib Hernandez de Deffendini[1]. Professor of International Law and International Relations. Rey Juan Carlos University. Madrid.

Juan Carlos Gutiérrez[2], human rights lawyer
Human Rights Institute World Jurist Association

Background

The judiciary in Venezuela has failed in due diligence to administer and enforce justice, to investigate and punish human rights violation and crimes against humanity committed by Nicolas Maduro and others state agents since 2014, they had been broken legal rules of international human rights law that require it to guarantee the fundamental rights of its population. However, it has failed to comply with effective judicial protection to provide justice and reparation to victims. In the face of this scenario, unprotected by the unwillingness of the Venezuelan State, the international community must assist the Venezuelan population.

R2P in Venezuela? UNHO Union For Peace Resolution to unlock security council veto. Collective action through the Inter-American System of Human Rights.

The *erga omnes nature* of International Human Rights Law refers to a State's international obligations to the International Community (CI) as a whole. The International Court of Justice (ICC) stated that all States have legal rights in the protection of human rights fundamentals[3]. The *erga omnes obligations* proper to the responsibility of States are delimited on the basis of the proposal of the International Court of Justice in the Barcelona *Traction* case by noting that: "In particular, an essential distinction must be drawn between the obligations of the States to respect the international community as a whole and those abounding with respect to another State within the framework of diplomatic protection. By their similar nature, the former concern all States

---

[1] Initiative and research. soranibhd@icloud.com

[2] Teamwork. jcgutierrez@cremadescalvosotelo.com

[3] *Barcelona Traction* (Belgium *v. Spain*) (second stage), judgment of 5 February 1970, CIJ Reports 1970, p. 33.

given the importance of rights in question, all States may be regarded as possessing a legitimate interest in their protection; these are *erga omnes* obligations".

In response to the provisions of the International Responsibility Project of the States of the 2001 International Law Commission, the CIJ, in the case of the construction of the wall in Palestinian territory, argued that Israel's obligations were *erga omnes* in nature and imply an "community-wide interest" and "all States have a legal interest in protection". In this regard, he strained that States "should not recognize" the illegal situation by building the wall in the occupied Palestinian territory, nor should they cooperate in maintaining unlawfulness[4].

This relationship between *erga omnes obligations* and *ius cogens standards* has been underlined by Article 48 of the Project, according to which all States of the International Community must be considered injured States in the face of serious human rights violations by an offending State. Injured States should therefore take action in defense of the legal value infringed[5], take formal measures such as a claim against another State, or take proceedings before an international court.

This issue was contained in Article 5 of the Document *"Obligations and rights erga omnes* in international law" other Institute of International Law (Krakow, 2005)[6]. It refers to the mechanisms available for States to act against transgression, specifically: the use of the dispute resolution methods provided for by the UN Charter; the misrecognize of the wrongful act; and the feasibility of adopting non-coercive countermeasures analogous to the infringement.

Moreover, various international human rights law instruments consider the feasibility of complaint to another State for the violation of *erga omnes parties obligations.* These include: the American Convention on Human Rights (art. 45); the European Convention on Human Rights (art. 33); the International Covenant on Civil and Political Rights (art. 41); the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (arts. 21 and 30); the International Convention on the Elimination of All Forms of Racial Discrimination (art. 11); among others. In addition, the special procedures of the Human Rights Council[7], enable Member States to examine situations of serious, widespread, and systematic violations of fundamental rights that are happening in any State. The subsidiarity and complementarity of

---

[4]CIJ, Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 9 July 2004, para. 155.

[5]IBAEZ, D., "International custom, ius cogens and erga omnes obligations; ius cogens as the sole source of erga omnes obligations», Public. University of Chile, Santiago, 2008, p. 29.

[6] Institute of International Law, Obligations, and rights erga omnes in international law, Fifth Commission, Krakow, 2005.

[7] United Nations Human Rights Council since 14 March 2006. Available at: https://www.ohchr.org/SP/HRBodies/HRC/Pages/Home.aspx (accessed March 29, 2019)

international human rights law in the situation in Venezuela is then demonstrated, which must be activated when the internal justice of States fails in the performance of the main role(s)[8].

This issue is related to the non-interpretation of Article 45 of the American Convention on Human Rights in the Judgment in *Blake v. Guatemala* (IACHR Court, 1998). In that regard, Judge Cancado Trindade criticized the non-execution of the provisions of that article as a complaint mechanism for the breach of the provisions of the Convention in his words: "... a true embryo of *actio populari* in international law."[9]. However, although the ICHR cannot receive complaints from third States under its internal regulations, it may be noted that this opinion implicitly favors the right of intervention in the face of sub-compliance with *ius cogens rules* under international law.

To this extent, we have analyzed at the theoretical level the notion of claiming for non-compliance with fundamental principles of di, whereby which states not directly affected become assented by the wrongdoings of another State. But what happens when, despite using international instruments to invoke the international responsibility of the offending State— in this case we are dealing with: the Venezuelan State — this is insufficient? This debate briefly focuses the analysis on the principle of non-interference vs the right to intervene, the latter receipted by the international Community as the idea of a State (or several) which, as the active subject of *an actio popularis,* are entitled to claim compliance with international obligations.

The right of intervention[10] consists of the interference of one State in the internal or external affairs of another State to order it, to refrain from or cease action[11]. The principle of non-interference in internal affairs is *an ius cogens* rule of customary international law, enshrining the right of the sovereign state to conduct its affairs without the interference of other States[12]. This principle has been regarded by the International Court of Justice as a peremptory provision of customary international law imposing obligations on States, and also with or an absolute rule of law[13]. The UNGA Resolution 2625 identifies cases in which direct or indirect intervention in the internal or external affairs of another State is constrained.

---

[8] CARROZA, P., «Subsidiarity as a structural principle of International Human Rights Law", in American Journal of International *Law*,2003, vol. 1, p. 38 y ss.

[9] *Blake case vs. Guatemala (fund),* IDH Court, Judgment January 24, 1998, paras. 77-79.

[10] IBAEZ, D., "International custom... note No. 1398, p. 30.

[11] ROUSSEAU, C., Public International Law, Ed. Arial, Barcelona, 1991, p. 30.

[12] REY, E., "The Principle of Non-Intervention in the Jurisprudence of the International Court of Justice", Yearbook of *the Hispanic-Luso-American* Institute of International Law, Separata del Vol. 9, Madrid, 1991, p. 341.

[13] Case Concerning Military and Paramilitary Activities in Nicaragua and Against Nicaragua (Nicaragua v. United States), CIJ, Opinion separate from Judge Nagendra Singh [1984], p. 219.

Furthermore, the right of intervention does not seek to use force over the territory of the offending State, instead the injured States duly turn to the means of resolving disputes provided for by international law. For its part, the principle of non-interference concerns circumstances linked to military intervention and related to the abstention from resorting to threat or use of force to ensure international peace and security in the light of the provisions of the UN Charter, indeed, the right to intervene would seem to collide and the principle of non-interference raises the question of how a state (or states) should act when another state commits "... serious and systematic violations of human rights that violate the principles of our common humanity[14]. The answer to this question is in the flexibilization experienced by the principle of non-interference, given the threats of today's world, which have urged the international community to adopt alternative mechanisms to address the challenges of serious human rights violations in situations such as those in Venezuela.

Consequently, the notion of humanitarian intervention that legitimizes the military interference of third States only in situations of armed conflict arose, with the aim of providing humanitarian aid to victims, and/or acting coercively to safeguard the human rights of nationals in the State under armed conflict[15]. Consecutively the concept of Responsibility to Protect (R2P) emerged, with the aim of overcoming the practical weaknesses of the application of the humanitarian intervention principle during the Kosovo conflict. After intense discussions at the International Commission on State Intervention and Sovereignty (CIISE), the R2P principle was the legal possibility—with the authorization of the United Nations Security Council—to intervene in another State in which war crimes, genocide, or crimes against humanity 14 could be perpetrated.[16]. At this point in the reflection, it can be said that even though the prohibition of interference in the internal affairs of other State is a guiding principle, however, the humanization of international law has made more flexible the notion of non-intervention, in the sense of not admitting grievances on essential values to the international community.

In our view, the law of intervention is an alternative mechanism of the international law to intervene in situations that threaten international peace and security. **We support the view of a part of the doctrine that argues that R2P addresses the dilemma of armed intervention from** the perspective of victims of serious human rights **violations, and not from the**

---

14 ANNAN, K., “Report of the Secretary General, We the peoples : The Role of the United Nations in the Twenty-First Century”, U.N. Doc. A/542000, Nueva York, 2000.

15 KOLB, R., (2003) "Observations on Humanitarian Interventions, International Journal of the Red Cross, Geneva, 2003, p. 31.

16 Final Document of the World Summit, High-Level Plenary Meeting, 14-16 September, United Nations, New York, 2005, Para. 138-139; Secretary-General of the United Nations, Report of the Secretary-General, Annan, K. In Larger Freedom: Towards Development, Security, and Human Rights for All» (2005) UN Doc A/59/2005; GLANEVILLE, L., "The Responsibility to Protect", Human Rights *Law Review*, Vol. 1, 2012, Oxford.

perspective of the subjects of Inter-Sectional Law who claim their right to intervention[17]. Therefore, in the situation of Venezuela, the debate on responsibility to protect, should focus on the rights of victims, in addition the States have committed themselves (regionally and universally) the duty to respect international instruments for the guarantee and protection of universal human rights.

Analysis of the possible application of the principle of Responsibility to Protect in the situation in Venezuela.

The principle of responsibility to protect in Venezuela would involve the activation of three phases:

1. **Responsibility to prevent**: At this stage, two measures must be implemented: preventive and coercive nature. The causes of the internal conflict and the crisis caused by the action or omission of Venezuela's state actors, who have endangered the Venezuelan population, must be eliminated. In our view, in the situation of the country all means have been exhausted in the context of preventive measures: international diplomacy, foreign assistance programs, contributions to peacekeeping, the presentation of reports on human rights and field missions, humanitarian action in situations where there is a threat of international crimes and the protection of refugees fleeing heinous crimes and the humanitarian crisis in Venezuela.

Likewise, coercive measures (restrictive measures) have also been taken in the financial, economic and mobility context. The measures have been both unilateral (by some States) and collective by internal organizations. Therefore, on the basis of the 2005 Responsibility to Protect Report, progress should be made to the intervention phase.

2. **Responsibility for reacting**: Preventive measures have not been effective, and serious human rights violations of crimes against humanity continue to occur by the Power Apparatus of the Venezuelan State. Therefore, some States have reacted on the basis of the 2001 Draft Articles: That is, they have become injured States and have required the Venezuelan State – as an offender – to stop the wrongdoing and repair the victims of serious human rights violations. However, it is clear that the regime triggers the call of the international community As a result, some States have taken coercive measures such as: diplomatic actions (mediators sent to provide possible solutions to the Venezuelan crisis); breakdown of diplomatic relations; expulsion of ambassadors; withdrawal of representatives from diplomatic missions; unilateral coercive measures such as those taken by the US; and those of the EU based on its Common Foreign and Security Policy); legal action (referral of the situation in Venezuela to the ICC by the States members of

---

[17] Carsten Stahn. Responsibility to Protect: Political Rhetoric or Emerging Legal Norm? The American Journal of International Law Vol. 101, No. 1 (Jan., 2007)..

the Rome Statute). Therefore, on the basis of the 2005 R2P Report, progress should be made to the intervention phase.

From the perspective of the R2P Principle, the principle of complementarity and its three pillars are met in Venezuelan case. First, the Venezuelan population is at risk because of the constant instigation of hatred, and discrimination by the state power apparatus, which leads to the commission of heinous crimes. Second, the Venezuelan State is unable, because it does not have the will, to provide protection to its population, therefore the international community must assist Venezuelan victims in the implementation of the second pillar. Consequently, as the distinguished Professor Héctor Olásolo reflects, it can be said that "... the concept of responsibility for protecting puts its emphasis on prevention, which in turn has favored the focus of the debate from the determination of the criteria that would justify, or even require, armed intervention with or without the authorization of the United Nations, to the adoption of effective prevention measures."[18].

What mechanisms does the UN envisage to unlock the Security Council's veto on situations such as Venezuela?

In the scenario that the United Nations Security Council evades its responsibility for maintaining international peace and security, the States of the International Community must assume this responsibility, and for this it can use international instruments covered by the Universal System of Human Rights, I refer to Resolution 377A (V) also known as the "Union For Peace Resolution". Approval by the UNGA in 1950, Union for Peace contemplate convene a "special emergency session" within 24 hours. Who can request this extraordinary emergency session from UNGA: The Security Council through seven of its fifteen members; or half of the UN Member States:

> "Resolves **that if the Security Council, for lack of unanimity among its permanent** members, ceases to fulfil its primary responsibility to maintain international peace and security in any event where there **appears to be a threat to peace,** a breach of peace or an act of aggression, the General Assembly will examine the issue in full, with a view to addressing to members appropriate recommendations for collective action, including, in the event of a breach of peace or act of aggression, the use of armed forces where necessary, in order to maintain or restore international peace and security".

---

[18] Olásolo, Héctor "La función de la Corte Penal Internacional en la prevención de delitos atroces mediante su intervención oportuna: De la doctrina de la intervención humanitaria y de las instituciones judiciales ex post facto al concepto de responsabilidad para proteger". *Revista LOGOS CIENCIA &TECNOLOGÍA*. ISSN 2145-549X, Vol. 2, No. 1, Julio - diciembre 2010, pp. 112-120

In the current times and given the humanitarian challenges of the 21st century, unwarranted UNSC inaction has discredited it in the role of maintaining international peace and security. Venezuela's situation ceased to be a domestic conflict, the crisis has been internationalized, it affects international peace and security, it has already reached levels that move the International Community as a whole, an issue it demands and has not obtained or action by the UNSC. Instead, UNGA must then act on the basis of the provisions of the Pro-Peace Union Resolution.

Thus, what is contained in the full text of Resolution 377 states that "... if the security council is not able to fulfil its function of mating international peace, the General Assembly may consider the issue": "recognizing that in order for the General Assembly to fulfil its responsibilities in this regard, there must be the possibility of conducting an observation work to verify the facts and unmask the aggressors; that there are armed forces that can be used collectively; and that there is a possibility for the General Assembly to address, at all appropriate times, recommendations to Members of the United Nations with a view to undertaking collective action which, in order to be effective, should be swift.".

The Union for Peace Resolution which has been implemented in 10 subsequent UNGA resolutions stresses that UNSC must fulfil responsibility for maintaining peace international security. Its permanent members must make moderate and fair use of the right of veto. Otherwise, in the event of non-compliance with the UNSC, the UNGA acknowledges that UN States parties does not exempt their duty obligations under the Charter, nor does it exempt the Assembly itself from its rights in the light of the Charter or from the responsibilities imposed by this international instrument to fulfil its role in maintaining international peace and security.

In conclusion, the Member States of the United Nations may be led by the United Nations General Assembly in order to implement all the international actions necessary to respond to the crisis situation of Venezuelans.

How should we proceed according to the Report of the International Commission on State Intervention and Sovereignty (ICISS) – 2001?

It should be remembered that the ICISS concluded, on the one hand, that the sovereignty of the State also implies the responsibility of this subject of the International Law to protect its population, and on the other hand, underlined the secondary responsibility of the International Community to protect the population of another State who are victims of severe crimes and that the State of its nationality fails in due diligence to provide it with effective judicial protection, and that in addition by action or omission it does not take action to stop or prevent the serious violation of Human Rights and international crimes.

This Report establishes six lines of action to arrive at a military intervention:

1. **Competent Authority**: The Security Council is the body entitled to authorize the use of force. However, in view of the Council's unwarranted inaction over the use and abuse of the right to veto, other avenues for activating armed force are envisaged when it comes to dealing with situations in which serious international human right law international humanitarian law transgressions have occurred.
2. **Just Cause**: In accordance to the issues 4.18 and 4.19 of the ICISS Report, the just causes for military intervention would be "military intervention for human protection purposes is an exceptional and extraordinary measure and for it to be justified serious and irreparable human harm must exist or be imminent". About Venezuela's situation, serious human rights violations constituting crimes against humanity have been documented, justifying the end of this action and avoiding large losses of real or foreseeable human life with or without genocidal intent. It has been demonstrated in reports by the UN Human Rights Office that these facts have been caused by the negligence, inability to act and/or collapse of the Venezuelan State, and by its deliberate action.
3. **The Right Intention**: The main objective of intervention must be to prevent or stop human suffering. That is why we insist that the R2P debate should focus not on the right of the interveners, button the right of the victims.
4. **The Last resort**: Military coercion is justified when the provisions of responsibility to prevent have been exhausted. In Venezuela's situation, diplomatic and non-military avenues for the prevention and peaceful resolution of the humanitarian crisis have already been explored.
5. **Proportional Measures**: The scale, duration and intensity of military intervention in Venezuela must correspond to the achievement of the humanitarian objective. Based on the International Law, the means must be proportional for the purposes.
6. **Reasonable possibilities**: Military action in Venezuela would be justified if there is a real chance of being successful. This issue relates to the purpose of avoiding or stopping the atrocities that keep Venezuela's civilian population in a situation of suffering. It is a question of protecting human life, which would make it unjustifiable if, through military action, more suffering is inflicted on the population. It is recommended to deepen the ICISS Report to assess the command structure of operations, rules of combat, use of force, civil and military relations both external and internal.
7. **The responsibility to rebuild**: After the intervention of military character, support must be provided to recover the country, rebuild and assist in the corresponding process of national reconciliation, eliminate the causes that led to military intervention. This collective action must pursue to prevent or end the serious humanitarian situation that plagues all Venezuelans within and outside borders.

The ICISS Report acknowledges in paragraph 6.28 that "Given the inability or unwillingness sometimes demonstrated by the Council to stamp the expected role of the Council, it is difficult to completely rule out other alternative means of fulfilling the responsibility of protecting whether the Security Council expressly rejects a proposal for intervention when humanitarian or human rights issues are at stake or if it does not consider such a proposal within a reasonable period of time", other alternative means such as UNGPA Resolution Union for Peace AG 377 of 1950 and recurs or regional organizations that may take collective action should be assessed.

At this point, see the paragraph, although regional organizations must act – in strict sense – with the prior authorization of the UNSC, however, there are precedents in which organizations acted in the face of situations of serious International Human Right Law violation, and the UNSC authorization *occurred a posteriori.* African Union operations in Liberia or Sierra Leone, or NATO operations in Kosovo, are an example of this issue. That is why, following the announcement by the OAS General Secretariat on the implementation of R2P in Venezuela, it should be emphasized that the Regional Organization has the legal competence to assess the possible activation of the principle of responsibility to protect the situation of the Bolivarian Republic of Venezuela.

In conclusion, the situation of serious violations of Human Rights in Venezuela, aggravated by the current and unprecedented humanitarian crisis in the Americas, demands a solution in accordance to international human rights law. Koffi Annan, (Secretary-General of the UN) during the UNGA Plenary in 1999, noted that concern for human rights transcended claims of state sovereignty and publicly supported the intervention, even armed, of the International Community in States that massively violated human rights.

While we understand that the Responsibility to Protect is *considered soft law,* and that it is not a General Principle of International Law, we nevertheless consider that it should become an international legal standard binding on the through international customary law, crystallizing itself into customary law. The activation of R2P in the situation in Venezuela would be to take a step forward in the process of reviving this concept through international custom, as a legal issue pending in current international law.

Madrid, October 14, 2020