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The logo for 'insights' features the word in a lowercase, sans-serif font. The 'i' is gold, and the remaining letters 'nsights' are blue.

Honduras: Coup d'Etat in Constitutional Clothing? - Revision*

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* This version has been revised to reflect the 2003 repeal of Article 205(15) of the Honduran Constitution. See endnote 44. The author is indebted to Mr. Frank Walsh for bringing this oversight to his attention.

Introduction

Legal confusion has clouded the recent *de facto* change of government in Honduras. Some of this arises from the passionate political debate over President Manuel Zelaya and his *de facto* removal. Without entering that debate, this analysis addresses only questions of international law and related questions of law.

In the early morning hours of Sunday, June 28, 2009, acting on a judicial warrant to arrest President Zelaya for alleged crimes, the nation's military stormed the presidential palace, and arrested the chief executive in his pajamas. Then, exceeding its warrant, and in violation of an express provision of the Honduran Constitution,[1] (/print/170#_edn1) the military put the pajama-clad president on a plane to Costa Rica.[2] (/print/170#_edn1) With Zelaya involuntarily exiled, the Honduran Congress met that afternoon, listened to a reading of a supposed letter of resignation from him, and promptly accepted it.[3] (/print/170#_edn1) The Congress then issued a decree purporting to

depose Zelaya on other grounds, and to replace him by the president of the Congress, Rigoberto Micheletti.[4] (/print/170#_edn1)

President Zelaya's removal and replacement were swiftly denounced as a *coup d'état* by governments throughout the region,[5] (/print/170#_edn1) including by U.S. President Obama,[6] (/print/170#_edn1) and by the United Nations General Assembly,[7] (/print/170#_edn1) the Inter-American Commission on Human Rights,[8] (/print/170#_edn1) and the General Assembly of the Organization of American States (OAS).[9] (/print/170#_edn1) Invoking the Inter-American Democratic Charter,[10] (/print/170#_edn1) the OAS General Assembly termed the coup an "unconstitutional alteration of the democratic order,"[11] (/print/170#_edn1) thus triggering the suspension of Honduras from participation in the OAS.[12] (/print/170#_edn1)

Although the United States joined in the 33-0 OAS vote,[13] (/print/170#_edn1) the Obama Administration stopped short of deeming Zelaya's ouster a "military coup," which would trigger a statutorily mandated suspension of U.S. inter-governmental foreign assistance to Honduras.[14] (/print/170#_edn1) Nonetheless, the Administration suspended military and inter-governmental development aid as a matter of policy.[15] (/print/170#_edn1) At least one witness at a congressional hearing went further, calling Zelaya's removal a "military coup" requiring an aid suspension.[16] (/print/170#_edn1)

By contrast, the removal and replacement of Zelaya were vigorously defended by a broad, if not unanimous,[17] (/print/170#_edn1) array of Honduran civil authorities – including all 15 members of the Supreme Court,[18] (/print/170#_edn1) the chief prosecutor,[19] (/print/170#_edn1) an overwhelming majority of Congress,[20] (/print/170#_edn1) and the new, *de facto* government.[21] (/print/170#_edn1) In written communiqués, they insisted that his ouster was a lawful and constitutional action to defend Honduran democracy and the rule of law from a president who had defied both courts and Constitution, and who was maneuvering to amend the Constitution to allow him to run for a second term.[22] (/print/170#_edn1) Similar views have been expressed by a number of members of the U.S. Congress.[23] (/print/170#_edn1)

On the day he was deposed, President Zelaya, in violation of a court order, was attempting to conduct a referendum on whether to call a constitutional convention.[24] (/print/170#_edn1) His arrest that

morning was pursuant to a judicial warrant from a civilian court,[25] (/print/170#_edn1) for alleged crimes against the form of government, treason, abuse of authority and usurpation of functions.[26] (/print/170#_edn1) The person later selected by Congress to replace him – the president of the Congress – followed the constitutionally mandated line of succession.[27] (/print/170#_edn1) Civilian authorities remained in office after Zelaya's removal. The courts, the Congress, and the autonomous agencies, such as the chief prosecutor and the human rights ombudsman, all continued operating normally. The only change in the government seems to have been the removal of Zelaya and members of his Administration, and their replacement by a new, civilian president and his team.

If this was a military coup, it bore little resemblance to the classic overthrow of civilian authorities by colonels and generals, followed by the rule of a military *junta* or *caudillo*, which has so marred Latin American history.[28] (/print/170#_edn1) But was it nonetheless a *coup d'état*? There was an odd omission in the after-the-fact official communiqués: they did not even address whether the Honduran Constitution empowers Congress to remove a president in these circumstances. They made no reference to Zelaya's supposed letter of resignation. They did not so much as cite the congressional decree purporting to oust him.[29] (/print/170#_edn1)

Defenders of the change of government later attempted to fill the void by citing a supposedly “self-executing” provision of the Constitution.[30] (/print /170#_edn1) Article 239 provides that any official who proposes to reform the Constitution, in order to allow a president to run for a second term, “immediately” ceases in the exercise of his office.[31] (/print/170#_edn1) Reading the Constitution to effectuate a “self-executing” removal of a president, however, with no prior hearing or procedure, and no specification of who decides on the removal, or on what evidentiary basis, would offend elemental concepts of due process of law.[32] (/print /170#_edn1) In any event, this proposed justification was *ex post facto*: the congressional decree ousting Zelaya cited numerous provisions of the Constitution, but Article 239 was not among them.

In short, after being forced out of the country in breach of the Constitution, President Zelaya was formally deposed by a Congress with no clear constitutional power to remove him in the circumstances at hand, let alone summarily, without so much as a hint of due process of law. This was indeed a *coup d'état* (even if the relative degrees of

responsibility of the civilian and military authorities for the coup remain unclear).

Unconstitutional Alteration of the Democratic Order

On September 11, 2001, the OAS General Assembly unanimously adopted the Inter-American Democratic Charter.[33] (/print/170#_edn1) Although the Democratic Charter is not a treaty, it may be viewed as an authoritative interpretation of the OAS Charter[34] (/print/170#_edn1) by the parties to that treaty, and thus to have binding legal effect.[35] (/print/170#_edn1)

Article 9 of the OAS Charter authorizes the General Assembly to suspend a member state from participation in the OAS when its “democratically constituted government has been overthrown by force.” If that were the only applicable norm, the Honduras case would be debatable: although President Zelaya was forcibly taken out of the country, and forcibly prevented from returning,[36] (/print/170#_edn1) his formal removal from office and replacement were accomplished peacefully in Congress.

The Democratic Charter, however, goes further. Article 20 authorizes a special session of the OAS General Assembly whenever there is an “unconstitutional alteration of the constitutional regime that seriously impairs the democratic order in a member state.” If initial diplomatic efforts fail, Article 21 authorizes the General Assembly to suspend a member state from participating in the OAS if there has been an “unconstitutional interruption of the democratic order.”

This poses a challenge for international lawyers. Ordinarily international law imposes its own, autonomous norms for the permissible conduct of a government. Questions of domestic law – including constitutionality – are left to domestic authorities, both as a matter of their sovereign entitlements, and because they are presumed better able to interpret their own constitution.

The Democratic Charter is an exception. In order to create a collective regional safeguard for democracy in each country, it sets international standards which demand (among other things) that each nation comply with its own constitution. To the extent that democracy depends on constitutionalism, this incorporation of domestic law into international law is unavoidable.

But this requires international lawyers – and other

OAS member states – to consider whether domestic authorities have breached their own constitution, in order to evaluate whether they meet their international commitments. This task should be undertaken with humility and respect for domestic expertise. But it cannot be avoided, lest *de facto* regimes be given *carte blanche* to fabricate their constitutionality. On close questions of constitutional law, deference should be paid to domestic authorities. But where the breach is clear and its effect undemocratic, the international whistle must be blown.[37] (/print/170#_edn1)

In the Honduran case, several elements combine to make out a clear case of unconstitutionality. First was the forced expatriation of President Zelaya, an action whose constitutionality – in the face of an express constitutional prohibition of expatriation[38] (/print/170#_edn1) – has few if any defenders.[39] (/print/170#_edn1)

Second was the immediate congressional acceptance of his purported letter of “resignation” – when it was known that he had been forcibly exiled to Costa Rica that very morning. President Zelaya promptly denied writing the letter, and the U.S. State Department publicly doubted its authenticity.[40] (/print/170#_edn1) Perhaps reflecting doubts, the congressional decree deposing Zelaya makes no mention of his “resignation.” Nor do the subsequent official communiqués. The “resignation” now appears to have been nothing more than an embarrassing ploy.

Third is the evident lack of congressional power to depose Zelaya in the circumstances. With one exception, none of the constitutional articles cited by the congressional decree purport to grant Congress power to remove or replace a president.

The first four articles cited by Congress – Articles 1-4 – do not even mention Congress, let alone grant it any powers. Article 1 provides that Honduras is a democratic state under the rule of law.[41] (/print/170#_edn1) Article 2 states that usurpation of powers is treason,[42] (/print/170#_edn1) while Article 4 provides that alternation in the presidency is obligatory and that violation of that norm constitutes treason.[43] (/print/170#_edn1)

But a determination of whether or not Zelaya committed treason is a matter for the Honduran Supreme Court, not Congress. Unlike common law constitutions, the Honduran Constitution does not provide for impeachment and trial of a president by the legislature.[44] (/print/170#_edn1) Instead, the Honduran Constitution mandates that the case be

adjudicated by the Supreme Court, not by Congress.[45] (/print/170#_edn1)

Article 3 of the Constitution provides that no one need obey a government which engages in usurpation or uses unconstitutional means; its actions are null, and the people have a right to engage in insurrection.[46] (/print/170#_edn1) But insurrection is a right of the people, not a power of Congress. And the people of Honduras – as shown by the large crowds who came to the airport in the capital in order to try to welcome President Zelaya home[47] (/print/170#_edn1) – are clearly divided in their sympathies.

Article 205, paragraph 20, gives Congress power to “approve or disapprove” administrative conduct,[48] (/print/170#_edn1) while Article 218 bars the president from vetoing certain legislation, including bills that refer to the conduct of the executive.[49] (/print/170#_edn1) Neither article says anything about removal. Articles 321-23 are general provisions providing that no official is above the law, and that they take an oath to obey the law.[50] (/print/170#_edn1) None purports to empower Congress to do anything, much less to remove and replace a president.

The only article invoked by the decree that grants Congress a relevant power is Article 242.[51] (/print/170#_edn1) It empowers Congress to replace an absent president whose absence or incapacity is permanent or indefinite.[52] (/print/170#_edn1) But Congress well knew that Zelaya’s absence was involuntary, and that he wanted to return immediately. To force a president out of the country in violation of the Constitution, to deny him reentry, and then to replace him on the ground that he is “absent,” illustrates the sort of constitutional chicanery the Inter-American Democratic Charter is designed to condemn.[53] (/print/170#_edn1)

Defenders of the *de facto* government later invoked a different provision to justify the removal of President Zelaya.[54] (/print/170#_edn1) Article 239 provides that anyone who proposes to reform the constitutional ban on re-election of a president, and those who help him, “will cease immediately in the exercise of their respective positions.”[55] (/print/170#_edn1) But to treat this provision as “self-executing” is problematic. For example, if President Zelaya violated Article 239, when did he cease to be president? Months ago, when he openly began to advocate a constitutional reform to allow his re-election?[56] (/print/170#_edn1) And who is to say? Do the courts decide? Does the Congress?

What if they disagree? What if the president disputes their accusation? What is the evidentiary standard? How and when does Honduras know that it no longer has a lawfully elected president? Plainly Article 239 is unworkable without some procedure to implement it. And in any case, Article 239 was not the basis on which Congress purported to depose Zelaya.

A fourth flaw in the removal of the president was the absence of due process of law. Under the American Convention on Human Rights,[57] (/print/170#_edn1) to which Honduras is a party,[58] (/print/170#_edn1) and which under the Honduran Constitution prevails over domestic law,[59] (/print/170#_edn1) high officials are entitled to due process of law before being removed from office.[60] (/print/170#_edn1) Not only does President Zelaya enjoy this right as a matter of fairness to him, but the voters who elected him also have a right not to be deprived of the fruits of their electoral victory, without some reasonable process for removal.

The Honduran Congress chose not to await the outcome of the only constitutional remedy – a criminal trial before the Supreme Court.[61] (/print /170#_edn1) Instead, it summarily removed the president without so much as a hearing. If interpreted as self-executing, Article 239 would do the same. Either avenue of summary removal is inconsistent with Honduras' treaty obligations, violative of due process of law, and anti-democratic.

Conclusion

Despite the condemnation of the *coup d'état* by the United Nations, the Inter-American Commission on Human Rights, and the OAS, and by many governments including the United States, and despite suspension of Honduras from receipt of U.S. and European aid,[62] (/print/170#_edn1) and from participation in the OAS, diplomatic efforts to return President Zelaya to Honduras have not succeeded as of the date of this writing.[63] (/print/170#_edn1) Most recently, the U.S. has revoked the diplomatic visas of four persons associated with the *de facto* regime, and has many more visas under review.[64] (/print/170#_edn1) As diplomatic efforts and political debates continue, at least the threshold legal question should be put to rest: the purported removal and replacement of President Zelaya were, in the words of the Inter-American Democratic Charter, an "unconstitutional interruption of the democratic order." Whatever one's views of the president and his prior conduct, the June 28 coup was an assault on constitutional order. If allowed to stand, it will become a menacing precedent for democracy, not only in

Honduras, but throughout the hemisphere.

About the Author

Doug Cassel, an ASIL member and former member of the ASIL Executive Council, is Professor of Law and Director of the Center for Civil and Human Rights at Notre Dame Law School. He has long experience in Latin America. He is President of the Due Process of Law Foundation, which promotes judicial reform in the region, and was twice elected by the Organization of American States to the Board of the Justice Studies Center of the Americas, which he served as President.

Endnotes

[1] (/print/170#_ednref1) Constitución de la República de Honduras, art. 102 (“Ningún hondureño podrá ser expatriado ni entregado por las autoridades a un Estado extranjero”) [hereinafter “Constitution”].

Unofficial translation: “No Honduran can be expatriated or delivered by the authorities to a foreign State.” (This and all other translations of the Constitution in this essay are unofficial translations by the author).

[2] (/print/170#_ednref2) William Booth & Juan Forero, *Honduran Military Ousts President; Zelaya Flown to Costa Rica; Congress Votes Him Out, Names Successor*, WASH. POST, June 29, 2009, at A1.

[3] (/print/170#_ednref3) *Congreso destituye a Manuel Zelaya*, LA TRIBUNA, June 29, 2009, available at <http://www.latribuna.hn/web2.0/?p=14265> (<http://www.latribuna.hn/web2.0/?p=14265>) [1] (last visited July 26, 2009).

[4] (/print/170#_ednref4) *Decreto de Destitución de Zelaya*, June 28, 2009, *reprinted in id.* The author has not found a copy of the decree on the Honduran Congress website, and relies on the text (subject to one obvious correction in note 48 *infra*) as published in LA TRIBUNA.

[5] (/print/170#_ednref5) See, e.g., WASH. POST, *supra* note 2.

[6] (/print/170#_ednref6) Remarks by President Obama and President Uribe of Colombia in Joint Press Availability, June 29, 2009 (President Obama remarked: “We believe that the coup was not legal and that President Zelaya remains the President of Honduras, the democratically elected President there”), available at http://www.whitehouse.gov/the_press_office/Remarks-by-President-Obama-and-President-Urbe-of-Colombia-in-Joint-Pres-

Availability/ (http://www.whitehouse.gov/the_press_office/Remarks-by-President-Obama) [2] (last visited July 26, 2009).

[7] ([/print/170#_ednref7](#)) G.A. Res. 63/301, U.N. Doc. A/RES/63/301 (July 1, 2009).

[8] ([/print/170#_ednref8](#)) Press Release 42/09, Inter-Am. C.H.R., *IACHR Strongly Condemns Coup in Honduras* (June 28, 2009).

[9] ([/print/170#_ednref8](#)) AG/RES. 1 (XXXVII-E/09) (July 1, 2009), 37th Sess., OEA/Ser.P/XXXVII-E/09 (2009), ¶1.

[10] ([/print/170#_ednref8](#)) Inter-American Democratic Charter, AG/RES. 1 (XXVIII-E/01), Sept. 11, 2001, arts. 20 (“unconstitutional alteration of the constitutional regime that seriously impairs the democratic order”) and 21 (“unconstitutional interruption of the democratic order”) [hereinafter “Democratic Charter”].

[11] ([/print/170#_ednref8](#)) AG/RES. 1, *supra* note 9, ¶ 1; AG/RES. 2 (XXXVII-E/09) (July 4, 2009), 37th Sess., OEA/Ser.P/XXXVII-E/09 (2009), (first preamb. paragraph).

[12] ([/print/170#_ednref8](#)) *Id.* (invoking art. 21 of the Democratic Charter).

[13] ([/print/170#_ednref8](#)) U.S. Dept. of State, *Background Briefing on the Organization of American States Decision on Honduras*, July 5, 2009, available at <http://www.state.gov/r/pa/prs/ps/2009/july/125638.htm> (<http://www.state.gov/r/pa/prs/ps/2009/july/125638.htm>) [3] (last visited July 26, 2009).

[14] ([/print/170#_ednref8](#)) Department of State, Foreign Operations, and Related Programs Appropriations Act, 2009 (division J of the Omnibus Appropriations Act, 2009; P.L. 111-8; 123 Stat. 524 at 831), § 7008.

[15] ([/print/170#_ednref8](#)) U.S. Dept. of State, Office of the Spokesman, *Question Taken at the July 6 Daily Press Briefing*, July 7, 2009, available at <http://www.state.gov/r/pa/prs/dpb/2009/july/125757.htm> (<http://www.state.gov/r/pa/prs/dpb/2009/july/125757.htm>) [4] (last visited July 26, 2009).

[16] ([/print/170#_ednref8](#)) *Hearing of the Western Hemisphere Subcommittee of the House Foreign Affairs Committee; Subject: The Crisis in Honduras*, July 10, 2009, FED. NEWS SERV., (witness Joy Olson, Exec. Dir., Washington Office in Latin

America) [hereinafter "House Hearing"].

[17] (/print/170#_ednref8) Some officials opposed or did not fully endorse the coup. The human rights ombudsman proposed a national plebiscite on whether to restore President Zelaya to office. Comisionado Nacional de los Derechos Humanos de la República de Honduras, *Propuesta Para Legitimar el Ejercicio de la Soberanía Nacional y Del Principio de Autodeterminación de Pueblos*, July 1, 2009, available at www.conadeh.hn (<http://www.conadeh.hn/>) [5] (last visited July 26, 2009). *Unofficial translation*: "Proposal to Legitimize the National Sovereignty and the Principle

[18] (/print/170#_ednref8) Corte Suprema de Justicia, Comunicado Especial, June 30, 2009; and *Comunicado del 20 de Julio*, July 20, 2009; both available at www.poderjudicial.gob.hn (<http://www.poderjudicial.gob.hn/>) [6] (last visited July 26, 2009).

[19] (/print/170#_ednref8) Ministerio Público, *Comunicado*, June 30, 2009, ¶ 3, available at www.mp.hn (<http://www.mp.hn/>) [7] (last visited June 26, 2009)

[20] (/print/170#_ednref8) The vote in Congress on June 28 to depose President Zelaya was reportedly "by unanimity." *Congreso destituye a Manuel Zelaya*, LA TRIBUNA, June 29, 2009. At least one member of Congress, however, left the session before the vote because she objected to the entire proceeding. See *No Hubo Contundencia en Elementos Para Improbar la Conducta de Zelaya*, LA TRIBUNA, July 2, 2009 (Congresswoman Elvia Argentina Valle). Both articles are available at www.latribuna.hn (<http://www.latribuna.hn/>) [8] (last visited July 26, 2009).

[21] (/print/170#_ednref8) Secretaría de Relaciones Exteriores, *Boletín Informativo*, June 29, 2009, available at www.sre.hn (<http://www.sre.hn/>) [9] (last visited July 26, 2009).

[22] (/print/170#_ednref8) Even some who recognize the purported deposing of President Zelaya as a *coup d'état*, nonetheless fear that he was leading the country down the path taken by Bolivia, Ecuador and Venezuela, "where elected presidents have spearheaded processes of constitutional reform that erode checks and balances, strengthen the power of the executive branch and create alternative participatory mechanisms for the exercise of so-called 'popular democracy.'" *House Hearing*, *supra* note 16 (testimony of Cynthia Arnson, Director of the Latin America Program at the Woodrow Wilson

International Center for Scholars).

[23] (/print/170#_ednref8) See generally *House Hearings*, *supra* note 16.

[24] (/print/170#_ednref8) Corte Suprema de Justicia, *Comunicado Especial*, *supra* note 18. The referendum would have asked, “¿Está de acuerdo que en las elecciones generales del 2009 se instale una Cuarta Urna en la cual el pueblo decida la convocatoria una Asamblea Nacional Constituyente?” *Unofficial translation*: “Do you agree that in the 2009 general elections there should be installed a fourth ballot box in which the people can decide on the convening of a National Constituent Assembly?” El Presidente de la República en Consejo de Ministros, Decreto Ejecutivo PCM-005-2009, LA GACETA, June 25, 2009, art. 1.

[25] (/print/170#_ednref8) Fuerzas Armadas de Honduras, *Comunicado de Prensa No. 1*, 30 de Junio de 2009, ¶¶ 3 & 5, available at www.ffaah.mil.hn (<http://www.ffaah.mil.hn/>)^[10] (last visited July 26, 2009); Corte Suprema de Justicia, *Comunicado Especial*, *supra* note 18, ¶ 6.

[26] (/print/170#_ednref8) *Comunicado*, *supra* note 19, ¶ 2 (“delitos contra la forma del gobierno, abuso de autoridad, traición a la patria y usurpación de funciones”).

[27] (/print/170#_ednref8) Constitution, *supra* note 1, art. 242.

[28] (/print/170#_ednref8) On July 24 – by which time it was clear that diplomatic negotiations were intended to return President Zelaya to the country and to the exercise of his office – the Armed Forces publicly “reaffirmed” their subordination to civil authority and their “strict respect” for the outcome of the negotiations. Fuerzas Armadas de Honduras, *Comunicado No. 7*, July 24, 2009, available at www.ffaah.mil.hn (<http://www.ffaah.mil.hn/>)^[10] (last visited July 26, 2009).

[29] (/print/170#_ednref8) See communiqués in *supra* notes 18, 19 & 21.

[30] (/print/170#_ednref8) *House Hearings*, *supra* note 16, (witness Lanny Davis).

[31] (/print/170#_ednref8) For text, see *infra* note 55.

[32] (/print/170#_ednref8) See *Constitutional Court v. Peru*, 2001 Inter-Am. Ct. H.R. (ser. C) No. 71, ¶¶ 81-85, 110 (Jan. 31, 2001) (constitutional court judges may not be removed without due process of law).

[33] (/print/170#_ednref8) Democratic Charter, *supra* note 10.

[34] (/print/170#_ednref8) Charter of the Organization of American States, 1948, *as amended* 1967, 1985, 1992 and 1993, OAS T.S. No. 41, OEA/Ser.G/CP/INF.3964/96 rev. (Oct. 6, 1998).

[35] (/print/170#_ednref8) Vienna Convention on the Law of Treaties, *opened for signature* May 23, 1969, *entered into force* Jan. 27, 1980, 1155 U.N.T.S. 331, art. 31 (“General Rule of Interpretation”). Art. 31.3(a) provides, “[t]here shall be taken into account, together with the context: (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions. . . .” The Democratic Charter is such a “subsequent agreement” among the parties to the OAS Charter. Its last preambular paragraph bears in mind “the progressive development of international law and the advisability of clarifying the provisions set forth in the OAS Charter and related basic instruments on the preservation and defense of democratic institutions, according to established practice” *Cf.* Interpretation of the American Declaration, Adv. Op. OC-10/89, Inter-Am. Ct. H.R. (ser. A) No. 10, ¶¶ 43, 45 & 47 (July 14, 1989) (American Declaration, as an “authoritative interpretation” of the OAS Charter, has “legal effect” and is a source of “international obligations”).

[36] (/print/170#_ednref8) Marc Lacey & Ginger Thompson, *Honduras is Rattled as Leader Tries Return*, N.Y. TIMES, July 6, 2009, at A4.

[37] (/print/170#_ednref8) *Cf.* Sunday Times v. United Kingdom, 2 Eur. Ct. H.R. (ser. A) at 245, ¶59 (1979) (national authorities are granted a “margin of appreciation” in complying with the norms of the European Convention on Human Rights, but subject to a “European supervision”).

[38] (/print/170#_ednref8) Constitution, *supra* note 1, art. 102.

[39] (/print/170#_ednref8) On July 4, 2009, the Chief Prosecutor of Honduras, who earlier filed criminal charges against President Zelaya and who publicly supported the coup, announced that he was conducting an investigation to determine, among other things, whether “Manuel Zelaya” was well treated after his arrest and “the circumstances that led to his departure toward Costa Rica.” Ministerio Público, *Comunicado*, 4 de Julio de 2009, *available at* www.mp.hn (<http://www.mp.hn/>) [7] (last visited July 26, 2009).

[40] (/print/170#_ednref8) WASH. POST, *supra* note 2.

[41] (/print/170#_ednref8) Constitution, *supra* note 1, art. 1: "Honduras es un Estado de derecho, soberano, constituido como república libre, democrática e independiente para asegurar a sus habitantes el goce de la justicia, la libertad, la cultura y el bienestar económico y social." *Unofficial translation*: Honduras is a state under law, sovereign, constituted as a free, democratic and independent republic, in order to ensure its inhabitants the enjoyment of justice, liberty, culture and economic and social well-being."

[42] (/print/170#_ednref8) *Id.* art. 2: "La soberanía corresponde al pueblo del cual emanan todos los poderes del Estado que se ejercen por representación. La suplantación de la soberanía popular y la usurpación de los poderes constituidos se tipifican como delitos de traición a la Patria. La responsabilidad en estos casos es imprescriptible y podrá ser deducida de oficio o a petición de cualquier ciudadano." *Unofficial translation*: "Sovereignty belongs to the people, from whom emanate all the powers of the State, which are exercised by representation. The supplanting of popular sovereignty and usurpation of the powers conferred constitute the crimes of treason of treason against the Nation. There is no statute of limitations for these crimes and criminal proceedings can be initiated by public authority or by petition of any citizen."

[43] (/print/170#_ednref8) *Id.* art. 4: "La forma de gobierno es republicana, democrática y representativa. Se ejerce por tres poderes: Legislativo, Ejecutivo y Judicial, complementarios e independientes y sin relaciones de subordinación. La alternabilidad en el ejercicio de la Presidencia de la República es obligatoria. La infracción de esta norma constituye delito de traición a la Patria." *Unofficial translation*: "The form of government is republican, democratic and representative. It is carried out by three powers: Legislative, Executive and Judicial, which are complementary and independent and none is subordinate to another. Alternation in the exercise of the Presidency of the Republic is obligatory. Violation of this norm constitutes treason against the Nation."

[44] (/print/170#_ednref8) Until 2003, art. 205 (15) of the Constitution empowered Congress to "[d]eclarar si ha lugar o no a formación de causa contra el Presidente. . . ." *Unofficial translation*: "[t]o declare whether or not there are grounds to bring a case

against the President . . .” In 2003, this provision was repealed. See Decreto 175-2003, Nov. 28, 2003, art. 1, published in LA GACETA, Dec. 19, 2003, A2, available at <http://www.congreso.gob.hn/constituciones/DECRETO%20175-2003.pdf> (<http://www.congreso.gob.hn/constituciones/DECRETO%20175-2003.pdf>) [11] (last visited Aug. 18, 2009).

[45] (/print/170#_ednref8) Constitution, art. 319: “La Corte Suprema de Justicia, tendrá las atribuciones siguientes: . . . 2. Conocer de los procesos incoados a los más altos funcionarios del Estado . . .” *Unofficial translation*: “The Supreme Court of Justice shall have the following powers: . . . 2. To adjudicate charges brought against the highest officials of the State” (as amended by Decreto 175-2003, Nov. 28, 2003, art. 2, published in LA GACETA, Dec. 19, 2003, A2, available at <http://www.congreso.gob.hn/constituciones/DECRETO%20175-2003.pdf> (<http://www.congreso.gob.hn/constituciones/DECRETO%20175-2003.pdf>) [11] (last visited Aug. 18, 2009)).

[46] (/print/170#_ednref8) Constitution, art. 3: “Nadie debe obediencia a un gobierno usurpador ni a quienes asuman funciones o empleos públicos por la fuerza de las armas o usando medios o procedimientos que quebranten o desconozcan lo que esta Constitución y las leyes establecen. Los actos verificados por tales autoridades son nulos. El pueblo tiene derecho a recurrir a la insurrección en defensa del orden constitucional.” *Unofficial translation*: “No one owes obedience to a government which usurps, nor to those who assume public functions or employment by force of arms or by using means or procedures which violate or disregard those established by this Constitution and the laws. Acts certified by such authorities are null. The people have the right to resort to insurrection in defense of the constitutional order.”

[47] (/print/170#_ednref8) See Lacey & Thompson, *supra* note 36.

[48] (/print/170#_ednref8) Constitution, *supra* note 1, art. 205: “Corresponden al Congreso Nacional las atribuciones siguientes: . . . 20. Aprobar o improbar la conducta administrativa del Poder Ejecutivo, Poder Judicial y del Tribunal Nacional de Elecciones, Contraloría General de la República, Procuraduría General de la República e instituciones descentralizadas;” *Unofficial translation*: “The National Congress has the following powers: . . . 20. To approve or disapprove the administrative conduct of the Executive Power, Judicial Power and the

National Electoral Tribunal, the Comptroller General of the Republic, the Attorney General of the Republic and decentralized institutions. . . .” (The version of the congressional decree reported in LA TRIBUNA refers to article 205, and then to article 220(20). Article 220 does not have subsection 20, but article 205 does. I accordingly treat the reference as being to article 205(20)).

[49] (/print/170#_ednref8) *Id.* art. 218: “No será necesaria la sanción, ni el Poder Ejecutivo podrá poner el veto en los casos y resoluciones siguientes: 1. En las elecciones que el Congreso Nacional haga o declare, o en las renunciaciones que admita o rechace; 2. En las declaraciones de haber o no lugar a formación de causa; 3. En los decretos que se refieren a la conducta del Poder Ejecutivo;. . .”

Unofficial translation: “No sanction will be necessary, nor can the Executive Power exercise the veto in the following cases and resolutions: 1. In the elections which the National Congress makes or declares, or in the resignations which it accepts or rejects; 2. In the declarations that there is or is not ground to bring a case; 3. In the decrees which refer to the conduct of the Executive Power”

[50] (/print/170#_ednref8) *Id.* art. 321: “Los servidores del Estado no tiene más facultades que las que expresamente les confiere la ley. Todo acto que ejecuten fuera de la ley es nulo e implica responsabilidad.” *Unofficial translation:* “Public servants have no more powers than those which are expressly conferred upon them by law. Any act which they undertake outside the law is null and implies responsibility.” Art. 322: “Todo funcionario público al tomar posesión de su cargo prestará la siguiente promesa de ley: ‘Prometo ser fiel a la República, cumplir y hacer cumplir la Constitución y las leyes.’”

Unofficial translation: “Every public official upon assuming office will make the following promise under law: ‘I promise to be faithful to the Republic, to obey and to enforce the Constitution and the laws.’” Art. 323: “Los funcionarios son depositarios de la autoridad, responsables legalmente por su conducta oficial, sujetos a la ley y jamás superiores a ella. Ningún funcionario o empleado, civil o militar, está obligado a cumplir órdenes ilegales o que impliquen la comisión de delito.” *Unofficial translation:* “Public officials are granted authority, are legally responsible for their official conduct, and are subject to the law and never above it. No official or employee, civilian or military, is obligated to follow orders which are illegal or which imply the commission of a crime.”

[51] (/print/170#_ednref8) *Id.* art. 242: “Si la falta del Presidente fuere absoluta, el Designado que elija al

efecto el Congreso Nacional ejercerá el Poder Ejecutivo por el tiempo que falte para terminar el período constitucional. Pero si también faltaren de modo absoluto los tres designados, el Poder Ejecutivo será ejercido por el Presidente del Congreso Nacional, . . . por el tiempo que faltare para terminar el período constitucional. En sus ausencias temporales, el Presidente podrá llamar a uno de los designados para que lo sustituya. ...”

Unofficial translation (see *infra* note 52): “If the absence or incapacity of the President were permanent or indefinite, the Designee selected for that purpose by the National Congress will exercise the Executive Power for the time that remains until the end of the constitutional term of office. But if three designees are also permanently or indefinitely absent or incapacitated, the Executive Power will be exercised by the President of the National Congress, . . . for the time that remains until the end of the constitutional term of office. During his temporary absences, the President may call on one of the designees to replace him”

[52] (/print/170#_ednref8) The Spanish text refers to a “falta . . . absoluta.” In this context the word “falta” refers at least to an “absence,” and perhaps to an incapacity as well. (The immediately preceding article, Art. 241, provides that the president may not [seems that there is a verb missing here] himself from national territory for more than 15 days without congressional permission). In English “falta absoluta” would literally translate to an “absolute absence or incapacity,” which makes little sense. The better translation, I believe, is a “permanent or indefinite” absence or incapacity.

[53] (/print/170#_ednref8) The author has found no subsequent official defender of the removal of President Zelaya who justifies it on this ground.

[54] (/print/170#_ednref8) See, e.g., *House Hearing*, *supra* note 16 (testimony of Lanny Davis).

[55] (/print/170#_ednref8) Constitution, *supra* note 1, art. 239: “El ciudadano que haya desempeñado la titularidad del Poder Ejecutivo no podrá ser Presidente o Designado. El que quebrante esta disposición o proponga su reforma, así como aquellos que lo apoyen directa o indirectamente, cesarán de inmediato en el desempeño de sus respectivos cargos, y quedarán inhabilitados por diez años para el ejercicio de toda función pública.”

Unofficial translation: “The citizen who has been the Chief of the Executive Power cannot [again] be President or Designee. Anyone who breaches this provision or proposes its reform, as well as those

who assist him directly or indirectly, shall cease immediately in the discharge of their respective posts, and will remain ineligible for ten years for the exercise of any public function.”

[56] (/print/170#_ednref8) See, e.g., *President Wants Voters to Let Him Seek New Term*, TORONTO STAR, Mar. 25, 2009, at A20 (“President Manuel Zelaya called yesterday for a June referendum on changing the constitution to let him run for a second term”).

[57] (/print/170#_ednref8) American Convention on Human Rights, 22 Nov. 22, 1969, 1144 U.N.T.S. 123, reprinted in 9 I.L.M. 673 (1970).

[58] (/print/170#_ednref8) Honduras ratified the Convention on Sept. 5, 1977. See Convention ratification table at <http://www.cidh.oas.org/Basicos/English/Basic4.Amer.Conv.Ratif.htm> (<http://www.cidh.oas.org/Basicos/English/Basic4.Amer.Conv.Ratif.htm>) [12] (last visited July 26, 2009).

[59] (/print/170#_ednref8) Constitution, *supra* note 1, art. 16 reads: “. . . Los tratados internacionales celebrados por Honduras con otros estados, una vez que entran en vigor, forman parte del derecho interno.” *Unofficial translation*: “International treaties celebrated by Honduras with other status, once they enter into force, form part of domestic law.” Art. 18 adds: “En caso de conflicto entre el tratado o convención y la Ley prevalecerá el primero.” *Unofficial translation*: “In case of conflict between a treaty or convention and the law, the former will prevail.”

[60] (/print/170#_ednref8) See Constitutional Court v. Peru, *supra* note 32.

[61] (/print/170#_ednref8) At least one member of Congress objected that this procedure was not followed, instead of the decree deposing President Zelaya. See *No hubo Contundencia en Elementos Para Improbear la Conducta de Zelaya*, LA TRIBUNA, July 2, 2009 (Congresswoman Elvia Argentina Valle), available at www.latribuna.hn (<http://www.latribuna.hn/>) [8] (last visited July 26, 2009).

[62] (/print/170#_ednref8) Press Release 12255/09, Council of the European Union, Declaration by the Presidency on Behalf of the European Union on the Political Situation in Honduras (July 21, 2009), available at http://www.europa-eu-un.org/articles/en/article_8897_en.htm (http://www.europa-eu-un.org/articles/en/article_8897_en.htm) [13].

[63] (/print/170#_ednref8) On July 25, 2009, the Honduran military issued a communiqué which, according to a *New York Times* report, was the “first sign of support for the San Jose Accord – by which President Zelaya would return as president, but with limits on his powers, and with the date of the next elections moved up – by a powerful sector of the *de facto* government.” Ginger Thompson & Blake Schmidt, *Military in Honduras Backs Plan on Zelaya*, N. Y. TIMES, July 26, 2009, at A12; see Fuerzas Armadas de Honduras, *Comunicado No. 7*, July 24, 2009, available at www.ffaah.mil.hn (file:///Z:/IT/old%20work%20files/insights/www.ffaah.mil.hn) [14] (last visited July 26, 2009).

[64] (/print/170#_ednref8) U.S. Dept. of State, Daily Press Briefing, July 28, 2009, available at <http://www.state.gov/r/pa/prs/dpb/2009/july/126589.htm#honsuras> (<http://www.state.gov/r/pa/prs/dpb/2009/july/126589.htm#honsuras>) [15] (last visited July 29, 2009). The four visas revoked to date reportedly include those of the judge who issued the warrant to arrest President Zelaya, the current president of the Congress, the Human Rights Ombudsman and the head of the armed forces. Marc Lacey, *Honduras: Officials' Diplomatic Visas Revoked*, N.Y. TIMES, July 29, 2009, at A6; “*Esta decision nos deja un saldo positivo*,” LA TRIBUNA, June 29, 2009, available at

Organizations of Note:

- United Nations (<http://www.un.org/en/>) [16]
- Organization of American States (<http://www.oas.org/>) [17]
- Inter-American Court of Human Rights (<http://www.corteidh.or.cr/index.cfm?CFID=54495&CFTOKEN=16234367>) [18]
- National Congress of Honduras (Congreso Nacional de Honduras) (<http://congreso.gob.hn/index.html>) [19]

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%99etat-constitutional-clothing-revision)

Links:

- [1] <http://www.latribuna.hn/web2.0/?p=14265>
- [2] http://www.whitehouse.gov/the_press_office/Remarks-by-President-Obama
- [3] <http://www.state.gov/r/pa/prs/ps/2009/july/125638.htm>
- [4] <http://www.state.gov/r/pa/prs/dpb/2009/july/125757.htm>
- [5] <http://www.conadeh.hn/>
- [6] <http://www.poderjudicial.gob.hn/>
- [7] <http://www.mp.hn/>
- [8] <http://www.latribuna.hn/>
- [9] <http://www.sre.hn/>
- [10] <http://www.ffaah.mil.hn/>
- [11] <http://www.congreso.gob.hn/constituciones/DECRETO%20175-2003.pdf>
- [12] <http://www.cidh.oas.org/Basicos/English/Basic4.Amer.Conv.Ratif.htm>
- [13] http://www.europa-eu-un.org/articles/en/article_8897_en.htm
- [14] <file:///Z:/IT/old%20work%20files/insights/www.ffaah.mil.hn>
- [15] <http://www.state.gov/r/pa/prs/dpb/2009/july/126589.htm#honsuras>
- [16] <http://www.un.org/en/>
- [17] <http://www.oas.org/>
- [18] <http://www.corteidh.or.cr/index.cfm?CFID=54495&CFTOKEN=16234367>
- [19] <http://congreso.gob.hn/index.html>