

Executive Summary

This legal research paper is divided into two parts. Part One analyzes whether President Zelaya's premature termination was in accordance with Honduran Law. The general conclusion of this part is that both his expatriation to Costa Rica by the armed forces, as well as the removal from office by Congress that ensued, were unconstitutional. After a detailed analysis of the steps that should be followed in the case of a presidential criminal trial in Honduras, Part One also finds that the Honduras Supreme Court could have used its constitutional powers to successfully try, suspend, and, eventually, remove President Zelaya from office—particularly under criminal charges for abuse of authority—but chose instead to validate the unconstitutional actions taken against Zelaya by Congress and the armed forces.

Part Two examines whether the actions taken by the OAS, before, during, and after June 28, were in accordance with the OAS Charter or the Inter-American Democratic Charter. The general conclusion of this part is that, throughout the democratic crisis in Honduras, the OAS acted as an international agent of the executive power of Honduras, rather than an organization with the duty to promote and protect democracy in its member states. Before reaching this conclusion, the legal report evaluated in detail all actions by the OAS in response to the three anti-democratic events that took place in Honduras throughout the crisis: (1) the *erosion* of democracy carried out by President Zelaya from March 23 to June 28; (2) the *coup d'état* carried out by the armed forces in the morning of June 28; and (3) the unconstitutional removal effected by Congress—also referred to as *impeachment coup*—that took place later that same day. According to international democracy law, each one of these anti-democratic events should have triggered the application of the democracy clause by OAS organs.

OAS action facing the erosion of democracy (March 23 to June 28, 2009)

The erosion of democracy in Honduras was initiated by the March 23 decision of the executive branch to call for a “popular consultation” to be held on June 28. This “popular consultation” would ask the Honduran people whether they wanted a Constituent Assembly to be elected on November 29, the date already designated for the presidential, legislative, and municipal elections. According to what the Honduran representative told the OAS Permanent Council on June 26, “if the fourth ballot is victorious,” a Constituent Assembly was expected to take office on November 29 and start drafting a new constitution. This constitutional reform would take place by circumventing the current constitutional amendment provisions in the Honduran Constitution, under the following two “legal” arguments made by the Honduran representative to the OAS: (1) that the Constituent Assembly was not actually going to “*reform* the current constitution,” but rather “draft a *new* Constitution;” and (2) that the June 28 “opinion poll” could not be subject to any type of constitutional or legal judicial scrutiny because it was not a referendum process but rather an instrument to “take the pulse of the people, to listen to the popular will.”

The consultation was publicly rejected by the National Congress and the Supreme Electoral Tribunal, which jointly have the authority under the constitution, to call for and administer any type of popular consultation in Honduras. Further, the Attorney General's Office publicly warned the president that it would present criminal charges against him for usurping the Legislative and Electoral functions. On May 27, the attorney general won a judicial victory when the Administrative District Court of Tegucigalpa issued a preliminary injunction enjoining the president from carrying out acts towards the challenged consultation. A day earlier, President Zelaya had decreed the change of the consultation's name—from "wide popular consultation" to "national opinion poll." Facing this, on May 29, the administrative court complemented its ruling to include "any actions that may lead to the same end as the ... suspended act, as well as any change in terminology, the consultation or inquiry process, which implies an evasion of the preliminary injunction and this explanatory sentence." In response to this setback, President Zelaya appeared on television next to the Commander of the Armed Forces, Gen. Romeo Vásquez, ratifying that the consultation was constitutional and that the armed forces guaranteed that it would be carried out. That day, defying the attorney general's position, President Zelaya reportedly said, "Now they have to arrest the general." As a result, throughout June, the judicial communications enjoining the consultation and warning of criminal actions were addressed both to the president and to the chief of the armed forces.

It was in this context that the Honduran executive branch held discussions with the OAS Secretary General about the type of mission the OAS could send to Honduras in order to observe and legitimize the opinion poll. On June 9, the Honduran executive sent a formal request for an Electoral Observation Mission, but the Secretary General responded—through another letter—that, "due to the nature" of the act, it would be "impossible" to send such a mission. Instead, he said he was sending a "Mission of Accompaniment of the OAS," not to observe, but to "accompany," to "witness" the "poll:"

On June 19, Ambassador Raúl Alconada Sempé (head of the Electoral Observation Mission of the OAS during the primary elections in Honduras in November 2008, and Director of the Department of Democratic Sustainability and Special Missions at the OAS) declared that the person in charge of the Accompaniment Mission for the poll of June 28 would be Ambassador Alfonso Quiñónez (Executive Secretary for Integral Development and Director General of the Inter-American Agency for Cooperation and Development of the OAS). The next day, however, Ambassador Pablo Gutiérrez (Director of the Department for Electoral Cooperation and Observation) clarified that Alconada, not Quiñónez, would be responsible for the Accompaniment Mission.

According to the press, Ambassador Alconada was in Honduras on June 27, as part of the Accompaniment Mission.

On June 23, 2009, the Honduran Congress sent a letter to the OAS expressing "profound outrage" over this action and requesting the immediate withdrawal of the mission of accompaniment. According to a statement by his representative during the Permanent Council emergency meeting of June 26, the Secretary General was planning to "send a response to the president of Congress clarifying, in an unequivocal manner, the nature of

that mission, so that this—what has already been expressed by Ambassador Alconada—is also expressed in a written note by the Secretary General.”

The emergency meeting of the Permanent Council that day was not called to respond to the letter by the Honduran Congress, but instead was convened to assist the Honduran executive because in what the Honduran representative at the OAS denounced as the insubordination of the armed forces, and the “terrible and very painful precedent” that a Supreme Court ruling had set:

In a television interview broadcasted live by Telesur, on June 26, General Romeo Vásquez said that days earlier he had informed President Zelaya that “they were ready to carry out the mission” he had ordered, but that they had “a problem of legal nature” because “some judges had said that the task was not possible from the perspective of the country’s legality.” General Vásquez had appeared before the president “to see whether he could, still, given his scope of influence as president, try to find a solution to this problem—we had received many communications from jurisdictional authorities saying that if we committed that [action], if we complied with the president’s order, we would incur in an illegality.”

In response to the new position of the armed forces, President Zelaya appeared on national television at approximately 10:00 p.m. on June 24. He informed “both the national and international public, as well as the Honduran people” that he had “decided to dismiss the commander of the armed forces, General Romeo Vásquez, and to accept the resignation of the Minister of Defense, Edmundo Orellana Mercado.” As a result of this presidential communiqué, the commanders of the three military forces of Honduras—the army, the air force, and the navy—resigned.

On June 25, General Romeo Vásquez filed an action for constitutional protection with the constitutional chamber of the Supreme Court in response to the president’s decision, arguing the “grave and imminent violation of his fundamental rights,” because of the “arbitrary separation from his position.” That same day, by unanimous vote, the constitutional chamber of the Supreme Court admitted the action and decreed the “provisional suspension” of the appealed presidential resolution, until it could reach a final decision on the merits of the claim. The Supreme Court formally communicated its interim decision to the president for its compliance.

After finding out that the erosion of democracy in Honduras had escalated, the Permanent Council instructed the Secretary General to create another “special commission,” instead of asking him to withdraw his accompaniment mission from Honduras. This commission would analyze the facts and contribute “to broad national dialogue aimed at finding democratic solutions to the current situation.” Even though this new mission seemed favorable to democracy, the Permanent Council’s decision was inconsistent with the fact that the Secretary General was simultaneously accompanying the “political act” that had led to the erosion of democracy. Indeed, the Permanent Council’s resolution was used to justify the presence of OAS officials in Honduras, this time not just accompanying, but also “evaluating” the events. In any case, neither the written note by the Secretary General, nor the special commission ever made it to Honduras, because only two days later, a coup d’état occurred.

OAS action facing the coup d’état of June 28

According to the Honduran press, minutes before 6:00 a.m., four squads from the national army surrounded the presidential residence in order to subdue the presidential guard and detain President Zelaya. At around 9:32 a.m., President Zelaya was taken to an Air Force facility, from which he was subsequently flown to Costa Rica. On July 1, in his address to the General Assembly of the OAS, Zelaya would narrate the following:

It turns out that at about a few minutes past five in the morning, still somewhat dozy, I started hearing screams, cries, bangs and I heard the first two shots—fast, fast shots. I immediately got up and walked to the window, to see my personal guard fighting, throwing themselves, with guns, [against] the hooded military men. More than 200 soldiers, all of them with balaclavas, ... helmets, bullet-proof vests and high-tension firearms [*sic*], with guns and daggers, subduing the [presidential] guard, tying them and beating them against the main entrance door. And you started hearing the gun shots being fired to open the entrance gates and enter. I descended to the first floor, I knocked on my daughter's bedroom door and said, "The soldiers are here, get up."

I went down to the main floor and that is where I was immediately captured. Eight hooded individuals with helmets approached me, guns to my chest, face, directly to my person. They came to me and said, "Drop your cell phone. Drop your cell phone or we'll shoot"—because I was carrying a cell phone, because I was speaking with a journalist to inform them that the military was raiding my house—and they yelled at me, especially the leader of the group, "If you don't drop the cell phone, we will shoot you. Drop the cell phone!" And they had their rifles directly in front of me, aiming at me, and the poor soldiers knew that they were aiming at the president, because I would tell them, "I am the president, if your order is to kill me, shoot, shoot your weapon." ... [O]ne of them snatched the cell phone from me and said, "You have to come with us." And, an hour and 45 minutes later, they were dropping me off in the Costa Rican airport....

Confronted with the facts that indicated the existence of a military coup, the OAS Secretary General acted correctly in activating the democracy clause through the immediate convocation of the Permanent Council. During the meeting of the Permanent Council, the Secretary General did right in: (1) describing the actions of that morning as a "coup" and, in legal terms, as an unconstitutional alteration that seriously impairs the democratic order; (2) proposing to the Permanent Council to arrange for the implementation of diplomatic measures, including good offices, to foster the restoration of democracy; (3) saying that the restoration of democracy in Honduras meant the reinstatement of the constitutional president of Honduras; (4) offering his services and experience as Secretary General so that the Permanent Council would authorize him to take measures that would enable the restoration to occur; and (5) proposing to the Permanent Council that no further violations of human rights take place.

OAS action facing the unconstitutional removal or impeachment coup by Congress on June 28

During the June 28 Permanent Council emergency meeting, the OAS Secretary General spoke over the phone with the president of the Supreme Court of Honduras:

... the president of the Supreme Court of Honduras argued that the interruption of democracy, "according to him, and according to some other persons with which he

was meeting—had occurred at the moment of ... carrying out a poll that would not have been provided for in the Constitution and the law. The intention of this poll—according to what he said—would have been to inquire [the people] directly about the call for a constituent assembly.” Upon hearing this, the Secretary General stopped him and said: “I understand that we were talking about a fourth ballot box to decide on the constituent assembly.’ He said that was not case, and that the text of the consultation called for directly convening a constituent assembly.”

In the words of Insulza: “I told him that, in my view, nothing justified the interruption of the institutional order effected through the kidnapping and expulsion of the president. ... I told him about our concern and our condemnation of these events.” According to the Secretary General, the Supreme Court responded stating that “these issues had been explained to the president many times, but that, unfortunately, he had not listened to them, and that, as a result, this action was carried out.”

While describing the details of the telephone conversation he held with him, Insulza said that the president of the Supreme Court “was meeting with the president of [Congress], and other authorities [including the president of the Electoral Tribunal,] examining the way to restore the constitutional order that was broken. He did not say how, but I suppose it will be by installing a new authority.”

Minutes later, the Secretary General said that he had been informed that, “indeed, Mr. Micheletti was sworn in as president—I have no idea if interim or de facto.” Confronted with these new facts, Insulza proposed that the Permanent Council’s resolution should state that “we will not recognize any de facto government that emerges from this pronunciamiento.”

President Zelaya’s expulsion to Costa Rica qualified as an “expatriation” under Honduran law, and as a “coup d’état” under international democracy law. According to Honduran law, nothing, not even a president’s unconstitutional actions, can justify his kidnapping and expulsion without a previous trial. According to international democracy law, nothing, not even the antidemocratic actions of a president, justifies the international community’s condoning of a coup d’état. This is especially true in President Zelaya’s particular case, where an independent Supreme Court could have criminally tried him, and, as part of this trial, suspend or remove him. Therefore, regarding the coup on the morning of June 28, the OAS Secretary General acted in accordance with international democracy law, when stating that “nothing justified ... the kidnapping and expulsion of the president” and that, consequently, these facts solely deserved “concern” and “condemnation.”

Nevertheless, in cases of erosion of democracy, it is equally imperative that the action by the OAS be swift in response to the antidemocratic actions of a president, which, by definition, threaten the democratic order of a member state. If this response to erosions is not done in a swift manner, democracy can reach a point of breakdown. When this is the case, the OAS must suspend the antidemocratic State, in the same way as it must suspend a member state following a coup. Upon hearing the Supreme Court was “examining” the best way to restore the democratic order, the Secretary General, without justifying or condoning the coup, should have recognized the repeated anti-democratic actions made by Zelaya and offered his good offices in order to: (1) gain as much support from the international community for the Supreme Court, so that they may duly declare the coup d’état void and unconstitutional; and (2) gain support from the international community

for the Supreme Court, so that any criminal proceedings against President Zelaya, and his eventual suspension or removal from office as a result of the presidential trial, would be carried out according to the Honduran constitution and under full international support.

Upon hearing that the president of Congress had been sworn in as president of the republic, the Secretary General reacted simply by proposing to the Permanent Council to not recognize “any de facto government that emerges from this pronunciamiento.” Having been informed of this new situation, instead of avoiding to engage in dialogue with the “de facto government” put in place almost unanimously by the democratically elected Congress, the Secretary General, without justifying or condoning the *impeachment coup* Congress had just committed, should have recognized the repeated anti-democratic actions by Zelaya and offered his good offices in order to: (1) gain as much support from the international community for the members of Congress, so that the permanent constitutional succession be reverted and that a provisional succession be put in place until the return of President Zelaya; and (2) gain all the support of the international community for Congress and the Supreme Court Justices, so that any criminal proceeding against President Zelaya can be carried out according to the Honduran constitution and under full international support. None of these actions would have implied the recognition of the coup d’état, or the recognition of the impeachment coup. On the contrary, they would have been considered acts of good faith on the Secretary General’s behalf and demonstrated his commitment to revert the June 28 anti-democratic events, while at the same time recognizing the responsibility Zelaya had as a result of his anti-democratic actions prior to June 28.

However, at no point did the Secretary General recognize the anti-democratic actions of President Zelaya (not before or after June 28), nor did he offer his good offices to the Honduran Congress or the Honduran Supreme Court in order to criminally try President Zelaya via constitutional means. Following the Secretary General’s lead, the OAS Permanent Council failed to address the erosion of democracy and circumscribed itself to approve the resolution of June 28 in which it declared that “no government arising from this unconstitutional interruption will be recognized.” On June 30, confronted with the actions taken by the OAS, the Supreme Court of Honduras informed it had validated the coup d’état and the impeachment coup of June 28. A number of documents were published by the Supreme Court that day, including search and arrest warrants dated June 26, which had allegedly been ordered “secretly.” But not even these secret orders called for the expulsion of the president, or for Congress to remove him without having the power to do so. In the same line, later, on January 2010, the Supreme Court acquitted the military for “having in mind justifiable ends” when expatriating Zelaya.

On July 1, the OAS General Assembly (1) ratified the Permanent Council’s decision not to recognize any government emerging from “this unconstitutional interruption;” (2) instructed the Secretary General to carry out the necessary diplomatic efforts in order to restore democracy and the rule of law, and reinstate President Zelaya; and (3) stated that, were the Secretary General’s initiatives to bear no results within 72 hours, the State of Honduras would be suspended from participation in the OAS. During the deliberations in the General Assembly, neither the Secretary General nor any member state commented

on the erosion of democracy that had been taking place under the mandate of President Zelaya, but rather limited themselves to condemn the coup d'état and "the de facto government." In response to the OAS ultimatum the new Honduran government declared its withdrawal from the OAS.

On July 3, the Secretary General traveled to Honduras and met with a group of representatives of civil organizations, but he did not meet with Congress, nor with the Attorney General's Office, nor with the Supreme Electoral Tribunal, nor with any other institution that he thought had had a "direct role in the coup d'état." He only met with justices of the Supreme Court because he thought they did not have "a direct role in the coup d'état." In virtue of this one conversation, the report prepared by the Secretary General concluded that "the events that transpired on Sunday, June 28 of this year, constitute an interruption of the institutional and democratic order, legitimized by the legislative and judicial branches;" that "the behavior displayed by the de facto regime is extremely rigid, without a willingness to change their position, but rather, to strengthen it;" and that "presented with the inflexible attitude of the de facto regime, there seems to be no other choice than to adhere to the position assumed by this Assembly and apply Article 21 of the Inter-American Democratic Charter, with the resulting implications."

It is true that reverting the anti-democratic events in Honduras became far more difficult after June 30—when the Supreme Court indirectly validated the coup and the impeachment coup. However, the OAS should have tried to achieve this goal by performing good offices precisely with the former president of Congress, with the current Congress, and, especially, with the Supreme Court. Nevertheless, the Secretary General interpreted the July 1 General Assembly resolution as a prohibition to perform good offices before the democratically-elected Congress and the Supreme Court, including them in what he called "the de facto regime." On the contrary, both the Secretary General and, later, the General Assembly treated Zelaya at all times as an exemplary democratic leader. Considering this biased approach by OAS officials and organs throughout the crisis up to July 4, all diplomatic initiatives between June 28 and July 4 were expectedly fruitless in reverting any of the anti-democratic events in Honduras. Instead, they likely caused most Honduran institutions affected by Zelaya's previous actions to become further entrenched in their positions. As a result, the General Assembly applied the ultimatum and suspended Honduras from the OAS.

Unlike the actions taken by the OAS throughout the crisis, the diplomatic initiatives carried out by the president of Costa Rica since mid-July were appropriate as they were aimed at reverting the three—and not just one—anti-democratic events in Honduras, without ruling out the possibility to carry out a presidential criminal trial against Zelaya. Specifically, the San José Accord proposal called on President Zelaya to refrain himself from "calling for a constituent assembly, in a direct or indirect way;" and called for the "return of the branches of government, to their composition before June 28." It specifically called on Congress to reinstate President Zelaya "until the conclusion of his term, on January 27, 2010," but did not rule out the possibility of criminally trying Zelaya for the crime of abuse of authority, upon the completion of his term in January 2010. Unlike the position adopted by the OAS Secretary General, the San José Accord also

called on all parties involved in the crisis to sit around the negotiation table and the president of Costa Rica explicitly offered his good offices before the democratically-elected Congress and the new chief of the executive, Roberto Micheletti—who had from the outset been recognized as president by the Congress and the Supreme Court. In the following weeks, many member states and the General Secretariat of the OAS aligned themselves with this new diplomatic approach by President Arias. On August 8, OAS envoys traveled to Honduras exclusively to meet with Micheletti. To the extent that the OAS eventually aligned its actions with the San José Accord proposal by the president of Costa Rica, they were in accordance with international democracy law because they were aimed at reverting the three anti-democratic events in order to restore democracy in Honduras.

According to a prominent 2003 study prepared by a group of experts on collective protection of democracy, under the auspices of the Council on Foreign Relations, when the restoration of democracy has not been achieved through reverting the anti-democratic events that caused the breakdown of democracy, the international community must get the anti-democratic regime to agree to hold democratic elections in the shortest timeframe possible, and to allow the international community to monitor them. Accordingly, the OAS should have decidedly promoted and monitored the elections of November 29 in order to foster the restoration of democracy in that country. However, in early November, the Secretary General of the OAS, with the support of the majority of its member states, publicly stated that a team of OAS observers for the upcoming elections of November 29 “is truly something we could not even consider.” This is the same Secretary General that five months earlier, in spite of the lack of any international legal provision allowing for this type of mission, and against a formal request by the Honduran Congress to withdraw it, did not hesitate in putting together an unprecedented “Accompaniment Mission of the OAS” that would “observe an opinion poll” that, “if victorious,” would have led to the election of a Constituent Assembly on November 29. By this action, the Secretary General once again acted as an international agent of the Honduran executive, rather than the leader of an organization with the duty to promote and protect democracy in its member states. Therefore, he did not act in accordance with international democracy law.

Conclusions

First, the report finds that, confronted with the erosion of democracy in Honduras at the hands of President Zelaya, the OAS did not act in accordance with international democracy law because, instead of activating the democracy clause against Zelaya, it decided to send an unprecedented “Mission of Accompaniment” that escalated the crisis in Honduras. Secondly, confronted with the coup d’état carried out by the armed forces, the OAS acted in accordance with international democracy law by activating the democracy clause and condemning this action, but did not act accordingly in its diplomatic initiatives when trying to revert the situation. Finally, faced with the president’s unconstitutional removal by Congress, the OAS did not act correctly because it failed both to condemn this action and to take appropriate diplomatic initiatives to revert it. The report also finds that, unlike the actions taken by the OAS throughout the crisis, the diplomatic initiatives carried out by the president of Costa Rica since mid-July

were appropriate as they were aimed at reverting the three—and not just one—anti-democratic events in Honduras, without ruling out the possibility to carry out a presidential criminal trial against Zelaya. The report concludes that, facing the great difficulty of reverting each of the anti-democratic events that took place in Honduras, the OAS should have decidedly promoted and monitored the elections of November 29 in order to foster the restoration of democracy in that country.

At no point did the OAS recognize the anti-democratic actions of President Zelaya (not before or after June 28), nor did it perform good offices with the Honduran Congress or the Honduran Supreme Court in order to criminally try President Zelaya in accordance with the constitution. Doing so would have likely avoided the consolidation of the coup d'état, avoided the impeachment coup, and avoided the validation of these anti-democratic events by the Supreme Court. On the contrary, the OAS maintained the “pre-June 28” biased position advocated by the Secretary General, and failed to act as a guarantor of democracy.

If the Secretary General and the Permanent Council had acted in adherence to their obligations while the erosion of democracy was occurring, it is reasonable to assume that the OAS intervention would have had a deterrent effect, and that the erosion of democracy, the coup d'état and impeachment coup of June 28, as well as the Supreme Court validation of these anti-democratic events later, would have been avoided. Sadly, however, throughout the Honduran crisis the OAS acted as an international agent of President Zelaya, rather than an international organization called to promote and protect democracy in its member states.

