

## IN SEARCH OF AN ATTORNEY GENERAL FOR HONDURAS: THE CHRONICLE OF A REELECTION UN-FORETOLD

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In recent days, Honduran legislators have come out to defend the controversial decision to reelect Óscar Chinchilla, the current Attorney General of Honduras, despite not having been part of the list of five candidates presented to the National Congress on June 26 by the *Junta Nominadora* (Nominating Committee) – the provisional body established to conduct a technical evaluation and preselection of applicants. –There is no way to whitewash what happened: Chinchilla’s appointment was the product of an *ad hoc* legislative procedure that violates the law, the Constitution, international law, and, above all, the credibility of the institution charged with criminal prosecution in the country.

- **Putting the legal puzzle together**

Let us start with some necessary legal details. What does the Honduran legal framework mandate, permit, and prohibit? First, [Article 233 of the Constitution](#) notes that both the Attorney General (AG) and Deputy Attorney General (DAG) “shall be elected by the National Congress for a period of five years, with the favorable vote of at least two-thirds of its members, *from a list of five candidates selected by a Nominating Committee*, conformed according to the law.”

Although this rule does not expressly refer to the possibility of reelecting these two officials, neither does it exclude it. Like any other citizen interested in a call for applications, the AG and DAG have the option of seeking the office again. What is clear is that the Constitution establishes a rule, which does not provide for any exceptions: that **the AG and DAG must be selected from a list of candidates preselected by the Nominating Board and presented to Congress**. This is the first piece of the puzzle.

The second piece is [Article 22 of the Organic Law of the Attorney General’s Office](#), which replicates the Constitutional formula for the selection process; that is, it states that the Attorney General and Deputy Attorney General, *shall be elected by the National Congress, with the favorable vote of two-thirds of the totality of its members, from a list of five candidates presented by a Nominating Committee*. In other words, it reiterates that the only way to be appointed AG and DAG is by getting past the technical evaluation of the Nominating Committee. **No other special procedure exists, nor could there be, because organic legislation cannot establish an exception not provided for in the Constitutional text.**

Third, the organic legislation regulates the duration of the mandate of the AG and DAG. Article 23 establishes that the Attorney General and Deputy Attorney General will serve for five years, and may be reelected for only one additional term. As such, this rule establishes that the reelection of these two officials by the National Congress would be a valid decision from a Constitutional point of view, as long as it follows the procedure provided by the foundational norms. From none of the above-mentioned rules does it follow that reelection is automatic, or that it is subject to special rules. If an acting AG or DAG intends to seek reelection, he or she must meet the same requirements and complete the same evaluations as the rest of the contenders. **This is the only possible interpretation, for a simple reason: because it is the only interpretation that lends coherence to the three applicable rules.** Any interpretation to the effect that the National Congress can reelect the AG or his or her Deputy directly, without having gone through the stage

of preselection before the Nominating Committee, fundamentally contradicts the text of Article 233 of the Constitution.

- **The international law piece**

This legal analysis must also consider international law and Honduras' obligations with respect to human rights, and, in particular, judicial independence. In accordance with applicable international standards, every selection mechanism must guarantee the **equality of conditions and non-discrimination** in access to these offices, **including with respect to individuals who already hold the position in question**. In its report [Guarantees for the independence of Justice Operators](#), the Inter-American Commission of Human Rights (IACHR) highlighted that there should be neither differences nor privileges, nor disadvantages, among candidates. On this point, the CIDH gave the example of people who occupy the office temporarily, which we consider applicable to all candidates:

*“The goal of any selection and appointment process must be to appoint applicants based on their merit and professional qualifications, and also to ensure equality of opportunity. Accordingly, States must ensure that persons who have the qualifications are able to compete as equals, even in the case of persons temporarily occupying the positions; [if] a person [is] temporarily in a position, he or she cannot be treated with privileges and advantages or disadvantages.”<sup>1</sup>*

The UN Commission and Special Rapporteur for the Independence of Judges and Lawyers<sup>2</sup> has **also expressly referred to the possibility of reelection** as a factor that can weaken the independence of the elected official. For the IACHR it is preferable that reelection does not exist, “especially when a justice operator’s election or ratification may be discretionary.”<sup>3</sup> This is precisely what happens when the acting AG does not undergo the same objective evaluation as the other candidates, since their reelection depends solely on the discretionary decision of a political body.

The IACHR has also highlighted “that a justice operator looking to be re-elected or ratified runs the risk that he or she will behave in a manner to curry favor with the authority in charge of this decision or at least to be perceived as doing so by those facing or standing trial.”<sup>4</sup> These considerations of international law reinforce the interpretation that the reelection of the AG and DAG in Honduras is possible only if the candidates go through a mechanism of objective evaluation, such as the technical preselection by the Nominating Committee.

- **The conclusive facts**

The possible reelection of the current Attorney General, Óscar Chinchilla, was already a subject of public debate weeks before the Nominating Committee published the call for applications. Once the process was open for nominations, the AG [decided not to apply](#). Moreover, he effectively rejected the nomination that a group of citizens made on his behalf, by not confirming his willingness to accept the nomination. In this way, he decided not to undergo public scrutiny, in equal conditions with the other candidates. To date, this official has not commented on the renewal of his mandate. Neither do we know the legal reasoning offered by the legislature to reelect the Attorney General, as there appears to be no public justification (and even if there was, it would not be possible to consult it as the electronic portal to access legislation in the

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<sup>1</sup> IACHR. “Guarantees for the Independence of Justice Operators.” 2013. Paragraph 62.

<sup>2</sup> NACIONES UNIDAS. Asamblea General., Promoción y Protección de todos los derechos humanos, civiles, políticos, económicos, sociales y culturales, incluido el derecho al desarrollo. Informe del Relator Especial sobre la independencia de los magistrados y abogados Leandro Despouy, Adición. Misión a Guatemala, A/HRC/11/41/Add.3, 1 de octubre de 2009, párr. 57.

<sup>3</sup> IACHR. “Guarantees for the Independence of Justice Operators.” 2013. Paragraph 87.

<sup>4</sup> IACHR. “Guarantees for the Independence of Justice Operators.” 2013. Paragraph 88.

Honduran Congress always seems to be [under construction](#).) Furthermore, some have pointed to [alleged involvement by the United States](#) in this questionable reelection.

- **Comparative experience**

In the region, other Attorney Generals have sought reelection, and have accordingly undergone the same procedure as the other candidates for office. We don't have to look very far for examples: in September 2015, the then-Attorney General of El Salvador (currently indicted for corruption), [Luis Martínez](#), presented his candidacy to the Legislative Assembly of that country, while in Guatemala, then-Attorney General [Claudia Paz y Paz](#) did the same in March 2014.

In countries like Ecuador (Article 218 of the Constitution), Colombia (Article 249 of the Constitution), Chile (Article 85 of the Constitution), and Bolivia (Article 228 of the Constitution), the reelection of the Attorney General is expressly prohibited.

- **Starting off on the wrong foot**

At least on paper, the Nominating Committee has a composition that would seem to ensure that the evaluations of the merits of the individual candidates would happen in accordance with the highest professional standards. In accordance with the current text of Article 22 of the Organic Law, the Nominating Committee has six members: the President of the Supreme Court of Justice as well as another justice from said tribunal, a representative of the National Autonomous University of Honduras, a representative of the private universities of the country, a representative of the Bar Association, and the National Commissioner for Human Rights. That is to say, the elite of the Honduran legal world is responsible for carrying out a technical evaluation, and then proposing the individuals best qualified to lead criminal prosecutions in the country. It is not at all a negligible task. It demands extraordinary political and technical skills, as the members of the Nominating Committee would be able to attest.

However, the Nominating Committee faced an obstacle that marked its development from the moment of its inception last March. Since its formation, a representative of civil society was included despite the fact that, in the strictest sense, the Organic Law in force today does not contemplate such a member of the Nominating Committee.

Despite this, the Ministry of Governance, Justice, and Decentralization – at the request of the President of the Supreme Court of Justice, who, in turn, presides over the Nominating Committee – convoked a Public Assembly to elect a representative of civil society to join the Committee, by a vote of the organizations present.

Thereafter, an intense debate was unleashed about the legitimacy – including the legal validity – of the above-mentioned representation. A large group of civil society presented an appeal of unconstitutionality pointing out the irregularities in the process of the formation of the Committee. However, on May 4, the matter was [resolved by the Nominating Committee itself](#), without giving the reason to that discontented sector of the Honduran population.

Without discrediting the work of the person who represented civil society on the Nominating Committee, the participation of citizens in an appointment process of such high public interest cannot be subject to randomness, or to the passing will of public officials. That is to say, the Organic Law should not only be reformed to formally include a representative of civil society, but must contemplate a stable, appropriate, and inclusive mechanism to ensure the representativeness of the person chosen to perform the above-mentioned work. This would add greatly to the legitimacy of the process as a whole.

This takes on a greater relevance when one considers that, according to the Organic Law, it is up to the Nominating Committee to issue rules to regulate its operation and the different stages of the preselection

mechanism for which it is responsible. That is to say, the rules of the Nominating Committee are one of the most important normative instruments for the selection process in Honduras because it is where the phases, deadlines, legal requirements, and the objective criteria to be fulfilled by the candidates, including how they will be evaluated, are established. These rules provide the ideal opportunity to design and regulate in detail the ways that candidates are subject to public scrutiny.

- **Process matters: The questionable actions of the Nominating Committee**

The fact that the Nominating Committee has not designed an open mechanism so that any interested individual could offer observations and comments on the Committee's regulations; and that approximately a month passed between the approval of the final document and its public dissemination, are two errors that have, to this day, had an impact on the selection process. This is a procedural critique.

Substantively, the Regulations suffered from fundamental problems such as peremptory deadlines for the Nominating Committee to disclose crucial data on the process: information related to their meetings, the meetings' minutes, and the information presented on the candidates. It never created a website containing the list of nominations, nor was the documentation presented at the time of registration made public, even though article 23 of the Regulation requires it. Incidentally, a historic low of less than 30 candidates applied for the position.

- **An innovative oversight mechanism proposed by civil society**

Civil society organizations in Honduras were polarized by the way they were incorporated into the selection process within the Nominating Committee (discussed above). For this reason, the Student Anti-Corruption Coordinator of Honduras (CEA), the Honduran Council of Private Enterprise (COHEP), together with the UN High Commissioner for Human Rights in Honduras (OHCHR-Honduras), and the Mission to Support the Fight against Corruption and Impunity in Honduras (MACCIH) joined forces to create a network of observers called "Public Eye" to oversee the selection process of Honduras' Attorney General, based on article 44 of the Regulations of the Nominating Committee.

This oversight mechanism renewed hope, at least in the eyes of some international organizations, that there would be an impeccable and objective evaluation during the preselection process, attuned to international law standards. This type of oversight had the potential to contribute greatly to the strengthening of citizens' confidence in the selection process, which in turn would give much-needed legitimacy for the newly-selected individual to undertake the difficult task of leading the fight against corruption.

This required an essential condition to be met: that the Nominating Committee maintain active, timely, and complete communication with the public at each stage of the process and, above all, about the content evaluated in said process.

Unfortunately, this was never the case, despite both national and international organizations' demands for a public hearing with the IACHR to alert the latter organ about the potential consequences of carrying out a process with unclear rules and a lack of public information. In acknowledgment of the importance of Attorney General selection processes in the context of the fight against corruption in Central America, the IACHR granted a hearing on the matter. This was entitled "Human Rights and the Selection of the Public Prosecutor in Honduras" during the 168th Session of the IACHR in Santo Domingo, Dominican Republic. Before Honduran officials, petitioners denounced the lack of a calendar of activities that civil society groups

could follow; the lack of notice to the “Public Eye” on meetings held by the Nominating Committee; the absence of a website with complete and relevant information on the candidates, among many other deficiencies and noncompliance by the Nominating Committee with its own Regulations. During the hearing, the State’s delegation merely read a statement that pointed to the legal norms that govern the selection process, without responding to the questions by civil society or those of the Commissioners.

- **Lack of transparency of Congress’ Special Commission and the selection of a Deputy Attorney General**

After various meetings by the troubled Nominating Committee, the ad hoc organ finally sent its list of the five finalists on June 26. The list was received by a “Special Commission” within Honduras’ National Congress, whose mandate requires developing the final phase of examination and scrutiny before making a decision.

It was during this final phase that the Office of the United Nations High Commissioner for Human Rights expressed its concerns over the lack of publicity, transparency and justification in the preparation of the final list of five candidates given to the National Congress by the Nominating Committee. OHCHR also reiterated how important it was for the National Congress to conduct a thorough evaluation of all five of the final candidates in terms of their suitability, merit, and capacity, including by holding public hearings as dictated by law. The IACHR followed suit with a [press release](#), urging the State to guarantee adherence to international standards in this designation. The UN Special Rapporteur on the Independence of Judges and Lawyers also [made his concerns](#) known regarding the limits on civil society participation in the selection process, and especially “that some of the members of the parliamentary commission in charge of reviewing the candidates have been publicly questioned, or even prosecuted, for corruption.”

It is worth remembering that the Rapporteur, in a previous case regarding the selection of judges for Guatemala’s Supreme Court, had affirmed the minimum aspects that must be considered by members of the legislative branch to carry out the selection process “in accordance with the spirit of international standards in the field.” These standards are: 1) Congress, or an ad hoc commission, should hold public interviews for every single one of the candidates, 2) the effective participation of civil society, 3) a discussion on each of the candidates based on objective criteria and taking into account the requirements previously established by the relevant authority and, consequently, that the justifications for which a candidate is chosen (or not) be made clear.

Sadly, the process undertaken by the National Congress did not meet these standards: Congress’ Special Commission held all interviews on the same day behind closed doors. There were no mechanisms for citizen participation during this phase and, to this day, the reasons for the Commission’s proposal to reelect the current Attorney General remain unknown.

Particularly noteworthy is the fact that, out of the candidates analyzed, Congress did conclude that there was one candidate that was sufficiently qualified to take on the role of Deputy Attorney General. Daniel Sibrián, who was selected for the role, had gone through both phases of the selection process. However, how can it be explained that this candidate was found to be a sufficiently competent professional who could carry out the role of Deputy Attorney General, but not that of Attorney General?

- **What message does this appointment send to the region?**

There is no doubt that the current Attorney General, Óscar Chinchilla, has played an important role in the fight against impunity in Honduras. Nor should there be doubt about the good collaboration between the Public Ministry and MACCIH during his time in office. These are favorable conditions that, without a doubt, should continue in the years to come, regardless of who is in charge of the institution. However, no Attorney General should act as if having been given a blank check. Was there a detailed review of the successes and failures of the Attorney General's office under Chinchilla's leadership? Is there hard and objective evidence regarding the suitability of this individual to continue in the position? And, if so, where can Hondurans find said evidence?

For the reasons stated above, the reelection of the current Attorney General, in addition to coming from out of nowhere given that he had not been a candidate, can be disputed from the point of view of both domestic and international law. It is possible that there could be legal actions that would seek to appeal Congress' decision and void the selection process so that it would have to start over. While no announcement about such litigation has been made thus far, it is important to note that compliance with the rules of the game must also depend on an effective remedy based on article 25 of the American Convention on Human Rights. As such, a violation of the standards of judicial independence and the right to an effective remedy could also be invoked in international courts.

However, whatever the outcome, it is time to think about how the current, reelected Attorney General could demonstrate that, apart from the political support he has just received, he is objectively the best candidate to continue in the role, strengthening citizens' confidence that non-political motives exist for him to be reelected. It would therefore be highly recommended and desirable that Attorney General Chinchilla be transparent by making all of his documentation and credentials accessible to the public as if he himself had decided to throw his hat in the ring to the Nominating Commission.

Good leadership at the Attorney General's office is, for obvious reasons, fundamental to the institutional and social development of the country, and plays a key role in the fight against corruption in the region. The autonomy, independence, honesty, capacity, and commitment to human rights of the person in charge of the procurement of justice is a topic of the highest interest in the international community.

What happened in Honduras should be an important lesson for the region. We must not forget that El Salvador will soon begin its own Attorney General selection process. Here, too, the possibility exists that the current Attorney General could run for an additional term. Under no standard is it acceptable for a public official with such broad responsibility to pass from one mandate to another without proper accountability and an evaluation of his or her work. Honduras' case serves as a good example for the need to monitor its neighboring country where, on occasion, political interests have managed to bend the rules under the Constitution.

It is essential to continue monitoring the appointment of Óscar Chinchilla. Honduran society deserves answers. For our part, DPLF will always join those who demand better selection processes for public officials who ultimately have a duty to put into practice the right of the population to have access to quality justice.