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Fostering justice and stability: rights protection and national sovereignty in the Honduran Zones for Employment and Economic Development

Promoção da justiça e da estabilidade: proteção de direitos e soberania nacional nas zonas hondurenhas para emprego e desenvolvimento econômico

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Abstract: Honduras's Zonas de Empleo y Desarrollo Económico ("Zones of Employment and Economic Development"; "ZEDEs") are new, independent governing institutions for designated zones of the country, established by popular consent and international best practices for governance. Honduras's National Congress approved the ZEDEs' legal framework as a solution to confront the institutional instability, corruption, and violence that have undermined the protection of basic human rights. Given their novelty and their troubled emergence against a backdrop of institutional failure, ZEDE critics have voiced concerns about individual rights, Honduran sovereignty, and exposure of the Honduran people to abuse and exploitation by foreign companies. This paper addresses the question of whether the ZEDEs are consistent with Honduran sovereignty and human rights. It constructs a general rule for ZEDE autonomy that defines the scope of what a ZEDE can legally do. It begins by highlighting contemporary challenges in Honduras. It then analyses the laws creating the ZEDEs to formulate the general rule of ZEDE autonomy. It details the human rights safeguards that ZEDEs must comply with and the relationship between ZEDE autonomy and Honduran sovereignty. The paper clarifies the ZEDE's legal obligations regarding human rights and national sovereignty, thus helping define the scope of ZEDE autonomy.

Keywords: Law. Government. Sovereignty. Human rights. Statutory construction.

Resumo: As Zonas de Trabalho e Desenvolvimento Econômico de Honduras ("Zonas de Emprego e Desenvolvimento Econômico"; "ZEDEs") são novas instituições governamentais independentes para zonas designadas do país, estabelecidas pelo consentimento popular e pelas melhores práticas internacionais de governança. O Congresso Nacional de Honduras aprovou a estrutura legal dos ZEDEs como uma solução para enfrentar a instabilidade institucional, corrupção e violência que minaram a proteção dos direitos humanos básicos. Dada sua novidade e seu surgimento conturbado em um cenário de fracasso institucional, os críticos do ZEDE manifestaram preocupação com os direitos individuais, a soberania hondurenha e a exposição do povo hondurenho ao abuso e exploração por empresas estrangeiras. Este artigo aborda a questão de saber se os ZEDEs são consistentes com a soberania hondurenha e os direitos humanos. Ele constrói uma regra geral para a autonomia do ZEDE que define o escopo do que um ZEDE pode fazer legalmente. Começa destacando os desafios contemporâneos em Honduras. Em seguida, analisa as leis que criam os ZEDEs para formular a regra geral de autonomia do ZEDE. Ele detalha as salvaguardas de direitos humanos que os ZEDEs devem cumprir e a relação entre a autonomia dos ZEDE e a soberania hondurenha. O documento esclarece as obrigações legais da ZEDE em relação aos direitos humanos e soberania nacional, ajudando assim a definir o escopo da autonomia da ZEDE.

Palavras-chave: Lei. Governo. Soberania. Direitos Humanos. Construção Estatutária.

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1 Introduction

In the first half of the 2010s, Honduras' National Congress embraced an audacious solution to confront the country's persistent challenges. For decades, endemic issues with institutional instability, corruption, and violence had, and still have, prevented the government from protecting basic rights. The Congress saw that overcoming these challenges required the formation of new, independent governing institutions for designated zones of the country, established by the consent of the people and operating under international best practices.

Thus were born the *Zonas de Empleo y Desarrollo Económico* (“Zones of Employment and Economic Development” or “ZEDEs”). Established by *constitutional amendment and organic law*, the ZEDEs are intended to adopt new public management models operating with a high degree of autonomy, yet without renouncing Honduran sovereignty.¹ This autonomy allows for the creation of new institutions, including independent legal systems, policies, and regulations that foster a transparent, competitive, and stable legal and economic environment.² These changes are intended to introduce high-value technologies, economic growth, and job creation, which will reduce social inequalities and provide infrastructure, education, health, and public-safety services that improve the lives of Hondurans.³

Given their novelty and their troubled emergence against a backdrop of institutional failure, the ZEDEs have encountered understandable skepticism, confusion, and criticism. The main concerns have been that the ZEDEs do not protect individual rights and instead expose the Honduran people to abuse and exploitation by foreign companies. Many authors also assert that the ZEDEs undermine Honduran sovereignty.⁴

As strong supporters of human rights and institutional accountability, the authors take these concerns seriously. Both are engaged in a multi-year effort to analyze and strengthen the ZEDE legal regime, including its human rights protections. This paper is a product of those efforts.

This paper addresses the question of whether the ZEDEs are consistent with Honduran sovereignty and human rights by way of constructing a general rule for ZEDE autonomy that defines the scope of what a ZEDE can legally do. This construction is made by applying principles of statutory construction accepted both internationally and in Honduras to the laws establishing the ZEDEs. This general rule establishes respect for sovereignty and human rights as limitations or outer bounds on ZEDE autonomy, thereby forcing ZEDEs to not transgress these core principles.

Thus, while the general rule for ZEDE autonomy allows the ZEDEs wide latitude to develop new laws and administrations, it also ensures consistency with human rights norms and Honduran sovereignty. Moreover, it helps position the ZEDEs to greatly improve the status of human rights and institutional strength in Honduras. This paper begins by highlighting the major challenges facing Honduras today. It then analyses the laws creating the ZEDEs to formulate the general rule of ZEDE autonomy. It then details the human rights safeguards that ZEDEs must comply with and, finally, the relationship between ZEDE autonomy and Honduran sovereignty.

¹ *Decreto No. 236-2012 (amending Articles 294, 303, and 329 of the Honduras Constitution), Preamble §3.*

² *Decreto No. 120-2013. Article 1.*

³ *Decreto No. 120-2013. Article 1.*

⁴ See e.g. Report of the National Lawyers Guild Delegation Investigation of Zones for Economic Development and Employment in Honduras, September 14, 2014.

As a result, the paper clarifies the ZEDE's legal obligations regarding human rights and national sovereignty, thus helping define the scope of ZEDE autonomy.

2 Current status of human rights protection in Honduras

To understand the Honduran Congress's purpose in creating the ZEDES, it is essential to understand the human rights and governance challenges Honduras faces. As a matter of law, Honduras's legal framework generally aligns with international human rights standards; but as a matter of practice, human rights are routinely violated.

Honduras's Constitution guarantees as inviolable the rights to life; dignity; physical, moral and mental integrity; and the right not to be subjected to torture or cruel, inhuman, or degrading treatment.⁵ It also protects the freedoms of expression, movement, speech, thought, religion, assembly, association, and recognizes the writ of habeas corpus and the remedy of *amparo*.⁶ Moreover, article 16 of the Constitution states that international treaties ratified by the state form part of Honduras's domestic law.⁷ This means that each of the rights embedded in the main international human rights treaties, all of which Honduras has ratified,⁸ are incorporated into Honduras's legal order.

Nevertheless, many Hondurans routinely face human rights violations. Issues plaguing the country today include: unlawful killings; arbitrary arrest; grossly inadequate conditions of detention; cruel, inhumane, and degrading treatment; militarization of the national territory; arbitrary declaration of states of emergency; widespread corruption; suppression of public demonstration; grave violations of political rights; serious restrictions on the right of freedom of expression; persistent infringement of labor rights; racial discrimination; unlawful interference with privacy; violations of women's and children's rights; violence against indigenous and Afro-descendent communities; and violence against lesbian, gay, bisexual, transgender, and intersex (LGBTI) persons.⁹

⁵ *Constitución Política de la República de Honduras (1982, as amended in 2013)* (hereinafter "Honduras Constitution"). Articles 59, 61, 68.

⁶ Honduras Constitution. Articles 72, 77, 78, 81, 182, 183.

⁷ Honduras Constitution. Article 16.

⁸ See United Nations Office of the High Commissioner of Human Rights, Treaty Ratifications by Country - Honduras, http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/Treaty.aspx?CountryID=76&Lang=EN (listing the treaties ratified by Honduras, including all main human rights treaties).

⁹ Annual report of the United Nations High Commissioner of Human Rights on the human rights situation in Honduras, U.N. Doc. A/HRC/37/3/Add.2, para. 9, Mar. 19, 2018; Canadian Parliament Standing Committee on Foreign Affairs and International Development – Sub-Committee on International Rights, *Overcoming Violence and Impunity: Human Rights Challenges in Honduras*, 41st Parliament, Second Session, p. 4, March 2015; US State Department 2017 Human Rights Report, Honduras, p. 1.

Despite recent efforts, and measured progress, in improving the conditions in Honduras, these human rights issues persist, largely owing to institutional weakness, corruption, violence, and impunity — all of which overlap and are embedded in several parts of Honduran governance.

2.1 Institutional weakness

Honduran democratic and governmental institutions are fragile. In December 2017, Juan Orlando Hernández was declared the winner of the country's elections.¹⁰ International observers determined that the elections were generally free, but raised concerns regarding the fairness and transparency of the results. Specifically, observing missions from the European Union and the Organization of American States (OAS) expressed concern about the counting of votes and the transmission and delay of results.¹¹ Public protest in response to these discrepancies was met with violent police suppression.¹²

The election issues echo long-existing institutional distrust in Honduras, where government operations have historically been opaque and inefficient.¹³ Informal social structures are embedded in governmental infrastructure, where clientelism, particularism, and nepotism permeate nearly all institutions.¹⁴ In this context, organized criminal groups have exploited governmental capacity gaps and stand between most Hondurans and the government's basic apparatus.¹⁵

Lack of secure land tenure is a major challenge to the country's institutional stability. Despite ongoing titling programs, ambiguity surrounding ownership causes significant problems and, at times, violent conflict. According to the UN High Commissioner of Human Rights, small plot holders are most affected, as many of them live in poverty as small-scale subsistence farmers and lack official titles to their land.¹⁶ This is particularly true for indigenous communities where communal

¹⁰ Kinoshian, Sarah. US recognizes reelection in Honduras despite fraud allegations. *The Guardian*, Dec. 22, 2017.

¹¹ See European Union Election Observation Mission, *Final Report – Honduras Elections 2017*. At https://cdn5-eeas.fpfis.tech.ec.europa.eu/cdn/farfuture/uWDWxSx4PeWjqRjCvXthsqygf_PYI6cf04Qy-7M8gEk/mtime:1520374595/sites/eeas/files/final_report_eu_eom_honduras_2017_en.pdf; Organization of American States (OAS) Electoral Observation Mission, *General Elections Honduras–November 26, 2017: Final Report*. At <http://scm.oas.org/pdfs/2017/CP38551E01H.pdf>.

¹² *Honduras Election: Violent clashes ahead of final result*, BBC News, Dec. 1, 2017. At <https://www.bbc.com/news/world-latin-america-42190454>.

¹³ Freedom House, *Freedom in the World 2018*. At <https://freedomhouse.org/report/freedom-world/2018/honduras>.

¹⁴ Bertelsmann Stiftung, *Transformation Index BTI 2018: Honduras*. p. 28. At https://www.bti-project.org/fileadmin/files/BTI/Downloads/Reports/2018/pdf/BTI_2018_Honduras.pdf.

¹⁵ Canadian Parliament Standing Committee on Foreign Affairs and International Development – Sub-Committee on International Rights, *Overcoming Violence and Impunity: Human Rights Challenges in Honduras*, 41st Parliament, Second Session, p.1, March 2015.

¹⁶ Annual report of the United Nations High Commissioner of Human Rights on the human rights situation in Honduras. U.N. Doc. A/HRC/37/3/Add.2. para. 10. Mar. 19, 2018.

ownership was the norm for most indigenous land, providing land-use rights for individual members of the community.¹⁷ The few title documents that exist for these communities date to the mid-19th century and are poorly rendered.¹⁸ While the government has continued efforts to recognize indigenous titles, lack of clear land titles gives way to land access issues, causing conflicts with non-indigenous agricultural laborers, businesses, and government entities interested in developing lands that indigenous and other ethnic minority communities traditionally occupied or used.¹⁹ These conflicts often end with the titleless land dwellers being forcibly evicted.²⁰ These evictions are often carried out jointly by the police and the military and sometimes involve the use of excessive force, including the destruction of homes and crops.²¹ The UN High Commissioner has found that despite ongoing titling programs, more must be done to secure land tenure and, importantly, to address the socioeconomic conditions underlying the issue.²²

Poverty is entrenched, affecting more than 60% of Hondurans — about 5.3 million persons out of a total population of 8.7 million.²³ While Honduras has experienced modest economic growth since adopting more open economic policies, more than a third of Hondurans live in extreme poverty.²⁴ Food security, malnutrition and stunted growth in children under 5 years are widespread.²⁵ One in six Hondurans is illiterate.²⁶ According to the UN Office of the High Commissioner for Human Rights, current economic growth rates are insufficient to reduce poverty levels.²⁷ Contributing to this is the fact that corruption, crime, and gang activity inhibit the ability to conduct business and dissuade entrepreneurs from establishing new ventures.²⁸

¹⁷ US State Department 2017 Human Rights Report, Honduras, p. 26.

¹⁸ US State Department 2017 Human Rights Report, Honduras, p. 26.

¹⁹ US State Department 2017 Human Rights Report, Honduras, p. 26.

²⁰ Annual report of the United Nations High Commissioner of Human Rights on the human rights situation in Honduras. U.N. Doc. A/HRC/37/3/Add.2. para. 11. Mar. 19, 2018.

²¹ Annual report of the United Nations High Commissioner of Human Rights on the human rights situation in Honduras. U.N. Doc. A/HRC/37/3/Add.2. para. 11. Mar. 19, 2018.

²² Annual report of the United Nations High Commissioner of Human Rights on the human rights situation in Honduras. U.N. Doc. A/HRC/37/3/Add.2. para. 12. Mar. 19, 2018.

²³ Annual report of the United Nations High Commissioner of Human Rights on the human rights situation in Honduras. U.N. Doc. A/HRC/37/3/Add.2. paras. 4-7. Mar. 19, 2018.

²⁴ Annual report of the United Nations High Commissioner of Human Rights on the human rights situation in Honduras, U.N. Doc. A/HRC/37/3/Add.2. paras. 4-7. Mar. 19, 2018; Report of the UN High Commissioner of Human Rights, Human rights violations in the context of the 2017 elections in Honduras, para. 115 (2018?); See Instituto Nacional de Estadística, *Households in Condition of Poverty 2016*. At www.inec.gov.hn/index.php/25-publicaciones-ine/91-linea-de-pobreza.html.

²⁵ Canadian Parliament Standing Committee on Foreign Affairs and International Development – Sub-Committee on International Rights, *Overcoming Violence and Impunity: Human Rights Challenges in Honduras*, 41st Parliament, Second Session, p. 3, March 2015.

²⁶ Canadian Parliament Standing Committee on Foreign Affairs and International Development – Sub-Committee on International Rights, *Overcoming Violence and Impunity: Human Rights Challenges in Honduras*, 41st Parliament, Second Session, p. 3, March 2015.

²⁷ Annual report of the United Nations High Commissioner of Human Rights on the human rights situation in Honduras, U.N. Doc. A/HRC/37/3/Add.2, para. 17. Mar. 19, 2018.

²⁸ Freedom House, *Freedom in the World 2018*. At <https://freedomhouse.org/report/freedom-world/2018/honduras>.

The Government has yet to adopt formal guidance for businesses on their human rights responsibilities.²⁹ As a result, various labor rights violations persist and remain unpunished. For example, employers inconsistently pay minimum wage, frequently deny legally mandated benefits, fail to meet occupational safety and health standards, and discriminate against women, persons with disabilities, indigenous and Afro-Hondurans, LGBTI persons, and persons with HIV/AIDS.³⁰ Many companies pay government fines assessed for labor law violations, but continue to violate the law.³¹ Labor unions are legally protected, but the government does not enforce the pro-union laws effectively.³² Workers have difficulty exercising their rights to form and join unions as well as to collective bargaining.³³ Union leaders and labor activists in both the public and private sector face harassment and dismissal for their activities.³⁴ In May 2017, Congress passed a new law on labor inspections and increased the budget of the Ministry of Labor and Social Security.³⁵ These reforms have led to an increased number of inspections, but problems persist outside major population centers.

In 2016, the Committee on Economic, Social and Cultural Rights expressed concern regarding land-grabbing and the hoarding of natural resources.³⁶ These issues have been particularly challenging for Honduras's indigenous population. Honduran law contains scarcely few protections for indigenous rights—the only Constitutional reference being article 346, which establishes the duty of the State to “adopt measures to protect the rights and interests of indigenous communities in the country, especially the lands and forests where they have settled”.³⁷ According to the UN Special Rapporteur on Indigenous Persons' Rights, “the lack of protection for [indigenous] lands, territories and natural resources, together with impunity and inadequate access to justice, are fundamental problems that leave [indigenous persons] totally defenseless in the face of acts of violence by various parties”.³⁸ This

²⁹ Annual report of the United Nations High Commissioner of Human Rights on the human rights situation in Honduras, U.N. Doc. A/HRC/37/3/Add.2, para. 17, Mar. 19, 2018.

³⁰ US State Department 2017 Human Rights Report, Honduras. p. 33-35.

³¹ US State Department 2017 Human Rights Report, Honduras. p. 30.

³² US State Department 2017 Human Rights Report, Honduras. p. 28-29.

³³ US State Department 2017 Human Rights Report, Honduras. p. 28-30.

³⁴ Freedom House, *Freedom in the World 2018*. At <https://freedomhouse.org/report/freedom-world/2018/honduras>.

³⁵ Annual report of the United Nations High Commissioner of Human Rights on the human rights situation in Honduras, U.N. Doc. A/HRC/37/3/Add.2, para. 14, Mar. 19, 2018.

³⁶ See E/C.12/HND/CO/2, para. 41.

³⁷ Honduras Constitution, Article 346; Other constitutional provisions refer to the obligation of the State to foster the country's anthropological richness, native cultures and folklore (arts. 172 and 173).

³⁸ Report of the Special Rapporteur on indigenous persons on her visit to Honduras, U.N. Doc. A/HRC/33/42/Add.2, para. 18, July 21, 2016.

vulnerability exasperates the extreme inequality and lack of basic social services available for indigenous persons.³⁹

Finally, in recent years, human rights organizations have alleged a wide range of abuses by the Honduran government. The Special Rapporteur on the Situation of Human Rights Defenders noted that “human rights defenders and their families continue to be vulnerable to extrajudicial executions, enforced disappearance, torture and ill-treatment, arbitrary arrest and detention, death threats, attacks, surveillance, harassment, stigmatization, displacement and enforced exile”.⁴⁰ Human rights advocates also have criticized the Honduran government’s “widespread practice of criminalizing human rights defenders for their human rights work, in particular in the context of exercising their right to protest and freedom of expression”.⁴¹

2.2 Corruption

Corruption is endemic in Honduras and almost all types of government officials participate.⁴²

The justice system particularly struggles owing to its being poorly funded, under-staffed, inadequately equipped, and subject to intimidation, politicization, and patronage.⁴³ *Judicial proceedings are lengthy and courts face significant trial backlogs. These factors* allow for powerful special interests, including organized criminal groups, to exercise improper influence in court proceedings through bribery and other forms of corruption.⁴⁴ To combat these challenges, the Supreme Court recently approved a National Plan to Eradicate Judicial Delay, aimed primarily at aimed at reducing wait times for court cases by inaugurating new courts and establishing mobile justices of the peace.⁴⁵

Honduras’s national police force is similarly stricken and is seen as one of the most corrupt police forces in Latin America.⁴⁶ Local law enforcement officers

³⁹ Report of the Special Rapporteur on indigenous persons on her visit to Honduras, U.N. Doc. A/HRC/33/42/Add.2. para. 18. July 21, 2016.

⁴⁰ Report of the Special Rapporteur on the situation of human rights defenders, Margaret Sekaggya. Mission to Honduras, Human Rights Council, UN Doc. A/HRC/22/47/Add.1. para. 65. December 13, 2012.

⁴¹ Meyer, P. *Honduras: Background and U.S. Policy*. Congressional Research Service, p. 22. October 2018; United Nations Office of the High Commissioner of Human Rights, *End of Mission Statement by Michel Forst, United Nations Special Rapporteur on the Situation of Human Rights Defenders on his Visit to Honduras*, 29 April to 12 May, 2018.

⁴² Lehmann, K. The Social Conditions of Corruption in Honduras: What They Are, What They Mean, and What Can Be Done About Them. In *Rotberg, Corruption in Latin America: How Politicians and Corporations Steal from People*. p. 265. [s.n.]: Springer, 2018.

⁴³ US State Department 2017 Human Rights Report, Honduras. p. 11.

⁴⁴ US State Department 2017 Human Rights Report, Honduras. p. 11.

⁴⁵ US State Department 2017 Human Rights Report, Honduras. p. 11.

⁴⁶ Bertelsmann Stiftung, *Transformation Index BTI 2018: Honduras*. p. 9. At https://www.bti-project.org/fileadmin/files/BTI/Downloads/Reports/2018/pdf/BTI_2018_Honduras.pdf.

often work for, or are controlled by, gangs.⁴⁷ Despite several failed attempts to clean up law enforcement since 2011,⁴⁸ police are regularly involved in acts of bribery, extortion, murder and collusion with gangs.⁴⁹ One such attempt was the Special Commission for Purging and Transformation of the National Police. While this effort was successful at removing thousands of corrupt police officials, none of those expelled have been convicted of corruption-related or other crimes.⁵⁰ Generally, investigations and prosecution for corruption have been limited to a few high-profile cases.⁵¹

Campaign and political party financing has been identified as one of the main sources of corruption in Honduras.⁵² Still, meaningful reform proposals have faced significant resistance from Congress and other parts of the government.⁵³ In January 2016, President Hernández entered into an agreement with the OAS to establish the Mission to Support the Fight against Corruption and Impunity in Honduras (*Misión de Apoyo contra la Corrupción y la Impunidad en Honduras, MACCIH*).⁵⁴ However, Congress has fought strongly to dilute or block legislative proposals presented by MACCIH.⁵⁵ As a result, MACCIH enjoys limited independence when compared to other anti-corruption mechanisms in the region.⁵⁶ Civil society organizations have widely condemned the organ's limited power to force the government and other state actors to act upon its recommendations.⁵⁷ Nevertheless, MACCIH has pushed forward, successfully promoting the passage of legislation aimed at curbing illegal

⁴⁷ Bertelsmann Stiftung, *Transformation Index BTI 2018: Honduras*. p. 9. At https://www.bti-project.org/fileadmin/files/BTI/Downloads/Reports/2018/pdf/BTI_2018_Honduras.pdf.

⁴⁸ Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions on his mission to Honduras, U.N. Doc. A/HRC/35/23/Add.1, para. 87, Apr. 11, 2017.

⁴⁹ Canadian Parliament Standing Committee on Foreign Affairs and International Development – Sub-Committee on International Rights, *Overcoming Violence and Impunity: Human Rights Challenges in Honduras*, 41st Parliament, Second Session, p. 12. March 2015; Inter-American Commission of Human Rights, “Honduras,” para. 255, Annual Report 2013.

⁵⁰ Freedom House, *Freedom in the World 2018*. At <https://freedomhouse.org/report/freedom-world/2018/honduras>.

⁵¹ Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions on his mission to Honduras, U.N. Doc. A/HRC/35/23/Add.1. para. 22. Apr. 11, 2017; US State Department 2017 Human Rights Report, Honduras, p. 21.

⁵² Bertelsmann Stiftung, *Transformation Index BTI 2018: Honduras*. p. 15. At https://www.bti-project.org/fileadmin/files/BTI/Downloads/Reports/2018/pdf/BTI_2018_Honduras.pdf.

⁵³ Bertelsmann Stiftung, *Transformation Index BTI 2018: Honduras*. p. 15. At https://www.bti-project.org/fileadmin/files/BTI/Downloads/Reports/2018/pdf/BTI_2018_Honduras.pdf.

⁵⁴ See Organization of American States, *What is the MACCIH?* At http://www.oas.org/es/sap/dsdme/maccih/sobre/puntos_relevantes.asp.

⁵⁵ Bertelsmann Stiftung, *Transformation Index BTI 2018: Honduras*. p. 14. At https://www.bti-project.org/fileadmin/files/BTI/Downloads/Reports/2018/pdf/BTI_2018_Honduras.pdf.

⁵⁶ Bertelsmann Stiftung, *Transformation Index BTI 2018: Honduras*. p. 14. At https://www.bti-project.org/fileadmin/files/BTI/Downloads/Reports/2018/pdf/BTI_2018_Honduras.pdf.

⁵⁷ Bertelsmann Stiftung, *Transformation Index BTI 2018: Honduras*. p. 14. At https://www.bti-project.org/fileadmin/files/BTI/Downloads/Reports/2018/pdf/BTI_2018_Honduras.pdf.

funding for political campaigns.⁵⁸ In June 2018, together with the public prosecutor's office, MACCIH indicted 38 individuals, including members of congress and other government officials, for abuse of authority, fraud, embezzlement, money laundering, and falsification of public documents.⁵⁹

Perhaps unsurprisingly, corruption is a major obstacle to doing business in Honduras.⁶⁰ While some efforts to stem corruption have been undertaken, the social and political conditions, which cause and sustain corruption, remain largely unchanged.

2.3 Violence

Violent crime is rampant in Honduras. While the homicide rate declined in 2017—standing at roughly 46.5 people per 100,000, compared to 60 per 100,000 in 2016⁶¹—*the rate is consistently amongst the highest in the world.*⁶² *Persistent high levels of violence are rooted in systemic and regionally inter-linked factors such as “gang activity, organized crime, drug trafficking, the arms trade, corruption and extortion, ineffective law enforcement, lack of accountability for crimes against life, and deep and systemic poverty, unemployment, inequality and lack of opportunities for the population”.*⁶³ Recent militarization of public security has compounded Honduras's issues with violence, with repeated instances of excessive use of force by the police force and military.⁶⁴

*Journalists and human rights defenders are amongst the most vulnerable.*⁶⁵ Nongovernmental organizations and their staff face serious threats, including harassment, surveillance, detention, serious violence, and smear campaigns aimed

⁵⁸ Human Rights Watch, *World Report 2017-Honduras*. At <https://www.hrw.org/world-report/2018/country-chapters/honduras>.

⁵⁹ Meyer, Peter. *Honduras: Background and U.S. Policy*, Congressional Research Service, p. 7. October 2018; Equipo de Reflexión, Investigación y Comunicación, Compañía de Jesús, *Sonde de Opinión Pública: Percepciones Sobre la Situación Hondureña en el Año 2017*, April 2018; Organization of American States, MACCIH-OAS/UFECIC-MP Team Presents Fourth Case of Integrated Criminal Investigation: 'Pandora', press release, June 13, 2018.

⁶⁰ The World Bank, *Enterprise Surveys: Honduras 2016 Country Profile*. At <https://www.enterprisesurveys.org/~media/GIAWB/EnterpriseSurveys/Documents/Profiles/English/Honduras-2016.pdf>.

⁶¹ Freedom House, *Freedom in the World 2018*. At <https://freedomhouse.org/report/freedom-world/2018/honduras>.

⁶² Human Rights Watch, *World Report 2017-Honduras*. At <https://www.hrw.org/world-report/2018/country-chapters/honduras>.

⁶³ Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions on his mission to Honduras, U.N. Doc. A/HRC/35/23/Add.1, para. 16, Apr. 11, 2017.

⁶⁴ Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions on his mission to Honduras, U.N. Doc. A/HRC/35/23/Add.1, para. 16, Apr. 11, 2017.

⁶⁵ Human Rights Watch, *World Report 2017-Honduras*. At <https://www.hrw.org/world-report/2018/country-chapters/honduras>; Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions on his mission to Honduras, U.N. Doc. A/HRC/35/23/Add.1, para. 33, Apr. 11, 2017; Human Rights Committee, Concluding Observations on the Second Periodic Report of the Republic of Honduras, U.N. Doc. CCPR/C/HND/CO/2. para. 40, Aug. 22, 2017.

at undermining their work.⁶⁶ Women, children, LGBTI and indigenous persons also face high levels of violence. Child abuse, and in particular the commercial sexual exploitation of children and sex trafficking, is a recurring problem.⁶⁷ Violence and discrimination against LGBTI people, indigenous and Garifuna populations persist, and while antidiscrimination laws are on the books, in practice victims of such abuses have little recourse.⁶⁸

Decades of violent crime have reduced personal autonomy for the country's residents, prompting large-scale emigration.⁶⁹ In certain high-migration corridors, migrants are vulnerable to extortion and other abuses by gangs and criminal organizations.⁷⁰

2.4 Impunity

Impunity is a widespread problem in Honduras, which faces the highest levels of impunity in Latin America.⁷¹

*Blighted by corruption and abuse, the judiciary and police struggle to be effective. Judges face interference from executive branch officials and business elites, who exert excessive influence over the Honduran judiciary.*⁷² Judicial appointments are made with little transparency and judges have been removed from their posts for political reasons.⁷³ Prosecutors and whistleblowers handling corruption cases are often subject to threats of violence and a number of legal professionals have been killed in recent years. According to the UN's Special Rapporteur on extrajudicial killings, "lack of resources and technical capacity, intimidation and killings of justice operators, lack of independence of the judiciary, corruption of public officials and

⁶⁶ Freedom House, *Freedom in the World 2018*. At <https://freedomhouse.org/report/freedom-world/2018/honduras>.

⁶⁷ Human Rights Watch, *World Report 2017-Honduras*. At <https://www.hrw.org/world-report/2018/country-chapters/honduras>.

⁶⁸ Freedom House, *Freedom in the World 2018*. At <https://freedomhouse.org/report/freedom-world/2018/honduras>.

⁶⁹ Freedom House, *Freedom in the World 2018*. At <https://freedomhouse.org/report/freedom-world/2018/honduras>; Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions on his mission to Honduras, U.N. Doc. A/HRC/35/23/Add.1, para. 15, Apr. 11, 2017; Amnesty International, *International Report 2017/18: The State of the World's Human Rights*, p. 187.

⁷⁰ Freedom House, *Freedom in the World 2018*. At <https://freedomhouse.org/report/freedom-world/2018/honduras>.

⁷¹ Bertelsmann Stiftung, *Transformation Index BTI 2018: Honduras*. p. 11. At https://www.bti-project.org/fileadmin/files/BTI/Downloads/Reports/2018/pdf/BTI_2018_Honduras.pdf.

⁷² Human Rights Watch, *World Report 2017-Honduras*. At <https://www.hrw.org/world-report/2018/country-chapters/honduras>; Freedom House, *Freedom in the World 2018*, <https://freedomhouse.org/report/freedom-world/2018/honduras>.

⁷³ Freedom House, *Freedom in the World 2018*. At <https://freedomhouse.org/report/freedom-world/2018/honduras>.

infiltration by organized crime are substantial barriers to obtaining justice and have virtually stalled the judicial system”.⁷⁴

Some reports indicate that only 20% of all crimes are reported in Honduras.⁷⁵ Such a low reporting rate is generally caused by a lack of public confidence in the judicial system and its incapacity to obtain justice. The absence of accountability sends a message to Hondurans that violence is tolerated by the State, undermining the public’s trust in governmental authorities.

In 2017 the Government took steps to reduce levels of impunity, including: the establishment of a specialized jurisdiction to combat corruption and extortion; the recruitment of 126 prosecutors and 191 judges; the establishment of new courts in rural areas; and the implementation of a plan to reduce delays in judicial proceedings by promoting compliance with judicial deadlines.⁷⁶ However, impunity remains a structural problem that affects the full enjoyment of Hondurans’ human rights.

In sum, despite recent efforts at reform, the situation of human rights in Honduras remains feeble, characterized by high levels of institutional instability, corruption, violence and insecurity, and impunity. These conditions have led to high levels of inequality, social exclusion, pervasive social conflict, and ongoing human rights violations.

It is in this broader factual context that Honduras’s ZEDE Constitutional Amendment and Organic Law were passed. By creating specially designated areas intended to attract investment, the ZEDEs — if managed well— can provide a counter weight to the human rights troubles in Honduras more broadly by creating stable, reliable and prosperous zones that fully respect the human rights belonging to all Hondurans.

3 ZEDE autonomy and its limitations

Analyzing the effect of the ZEDEs on sovereignty and human rights requires first a more comprehensive understanding of the scope of ZEDE autonomy. Sovereignty and human rights must be seen as limitations on this autonomy, if the ZEDEs are to avoid transgressing them. These limitations must be grounded in the laws governing the ZEDEs if they are to be legitimate and binding. Thus, one must examine what

⁷⁴ Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions on his mission to Honduras, U.N. Doc. A/HRC/35/23/Add.1, para. 76, Apr. 11, 2017.

⁷⁵ Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions on his mission to Honduras, U.N. Doc. A/HRC/35/23/Add.1, para. 80, Apr. 11, 2017, at para. 80.

⁷⁶ Annual report of the United Nations High Commissioner of Human Rights on the human rights situation in Honduras, U.N. Doc. A/HRC/37/3/Add.2, para. 30-31, Mar. 19, 2018.

limitations these laws place on ZEDE autonomy before proceeding to examine whether these limitations are sufficient to preserve sovereignty and protect human rights.

3.1 Background of the ZEDE legal framework

The ZEDE Constitutional Amendment⁷⁷ and ZEDE Organic Law⁷⁸ were established with the intent to promote public management models with high degrees of autonomy in certain areas of the country, without renouncing sovereignty.⁷⁹ This autonomy includes independent legal systems, policies, and regulations that foster a transparent, competitive, and stable legal and economic environment.⁸⁰ The anticipated result is the introduction of high-value technologies, economic growth, and job creation, which will reduce social inequalities and provide infrastructure, education, health, and public-safety services, thereby improving the lives of Hondurans.⁸¹ A critical component of the ZEDes is that they are to have independent courts with exclusive jurisdiction over their territory, independent fiscal regimes with the ability to impose and collect taxes, and their own educational, health, civil service, and social-security systems.⁸²

The ZEDE Constitutional Amendment and ZEDE Organic Law replace earlier laws declared unconstitutional that established *Regiones Especiales de Desarrollo* (REDS), or “Special Development Regions.” The Honduran Supreme Court found that the REDs violated constitutional principles of sovereignty, national territory, and form of government.⁸³ When the ZEDE Organic Law was introduced, it walked back some of the more controversial aspects to the REDs—especially the powers regarding international relations.⁸⁴ Also, in contrast to the RED Constitutional Amendment, the ZEDE Constitutional Amendment specified that the ZEDes were subject to Articles 10 and 11 of the Constitution (which define the territory of Honduras) and the International Court of Justice Decision of 1992 regarding the Gulf of Fonseca.⁸⁵ In light

⁷⁷ *Decreto No. 236-2012 (amending Articles 294, 303, and 329 of the Constitution) (hereinafter “ZEDE Constitutional Amendment”).*

⁷⁸ *Decreto No. 120-2013 (hereinafter “ZEDE Organic Law”).*

⁷⁹ *ZEDE Constitutional Amendment. Preamble.*

⁸⁰ *See ZEDE Organic Law. Preamble & Article 1.*

⁸¹ *ZEDE Organic Law. Article 1.*

⁸² *Honduras Constitution. Article 303; ZEDE Organic Law. Articles 4, 10.*

⁸³ Castle-Miller, Michael. The Ciudades Modelo Project: Testing the Legality of Paul Romer’s Charter Cities Concept by Analyzing the Constitutionality of the Honduran Zones for Employment and Economic Development. *Willamette Journal of International Law and Dispute Resolution*, v. 22, n. 2, p. 271. 2015.

⁸⁴ *E.g., Compare RED Organic Law, Decreto No. 123-2011, Articles 7, 67-71 (empowering the REDs to establish treaties subject to congressional approval and engage in foreign relations) with ZEDE Organic Law (including no such provision).*

⁸⁵ *Compare Honduras Constitution, article 329 §7, sentence 1 (“The National Congress ... must guarantee that where appropriate there is respect for the ruling issued by the International Court of Justice of the Hague on the 11th of September, 1992 and that provided in articles 10, 11, 12, 13, 15, and 19 of the Constitution of the Republic regarding the territory” (emphasis added)) with the corresponding sentence*

of these, and other, changes, the Supreme Court declared the ZEDE Constitutional Amendment and ZEDE Organic Law constitutional in 2014.

The ZEDE Organic Law and Article 329 of the Constitution (collectively referred to herein as the “ZEDE Legal Framework”) place a strong emphasis on legal stability within the ZEDEs. The import of legal stability is that ZEDEs maintain a degree of autonomy and remain relatively uninfluenced by political changes at the national level. To accomplish this, there are strong limits on the application of national laws to the ZEDEs and on the ability of Congress to modify the ZEDE Organic Law. The ZEDE Organic Law may only be modified, reformed, interpreted, or repealed by a majority of two-thirds of the members of the National Congress (plus a referendum of residents for a ZEDE with over 100,000 residents).⁸⁶ Legal stability is also provided under international law via the Kuwait-Honduras Bilateral Investment treaty, which guarantees the provisions of the ZEDE Law for at least 50 years.⁸⁷ Furthermore, the ZEDE Law anticipates that Technical Secretaries will form legal stability agreements, which would limit changes to the internal rules of a ZEDE.⁸⁸

Thus, the ZEDEs are firmly rooted⁸⁹ in the Constitution and laws of the nation.⁸⁹ The background and text of the ZEDE Legal Framework reveals a strong inclination toward legal independence and an aversion to intervention from national political entities. However, it does not go so far as to transgress basic aspects of Honduran sovereignty or human rights protection.

3.2 A general rule for ZEDE autonomy

The ZEDEs clearly have a special status under the law, giving them autonomy over many areas of government. However, this autonomy is not unlimited. Distinct provisions of the ZEDE Legal Framework require that certain aspects of national and international law influence ZEDE internal rules. When looked at collectively, these provisions give rise to the following rule, which can guide questions about the ways in which the Constitution, international treaties, and national legislation influence the ZEDEs, including concerning sovereignty and human rights.

of the previous version of article 329 before the ZEDE Constitutional Amendment (“At the moment of their creation they must guarantee all that is provided in Articles 12, 13, 15, and 19 of this Constitution is respected.”).

⁸⁶ Honduras Constitution. Article 329 §8; ZEDE Organic Law. Article 45.

⁸⁷ Bilateral Investment Treaty, Honduras-Kuwait (Agreement Between the Government of the Republic of Honduras and The Government of the State of Kuwait For the Encouragement and Reciprocal Protection of Investments), Article 16, Jan. 15, 2014.

⁸⁸ ZEDE Organic Law. Article 12(2).

⁸⁹ See Castle-Miller, Michael. The Ciudades Modelo Project: Testing the Legality of Paul Romer’s Charter Cities Concept by Analyzing the Constitutionality of the Honduran Zones for Employment and Economic Development. *Willamette Journal of International Law and Dispute Resolution*, v. 22, n. 2, p. 271. 2015. (analyzing whether the ZEDE Constitutional Amendment and ZEDE Organic Law are consistent with the Honduran Constitution and suggesting that they are).

General Rule of ZEDE Autonomy

ZEDEs are free to develop their own rules, policies, laws, procedures, and forms of administration in any manner that meets all of the following requirements:

1. Applies articles 10, 11, 12, 13, 15, and 19 of the Constitution and the laws listed in article 41 of the ZEDE Organic Law.⁹⁰
2. Comports with the international rights and obligations contained within treaties concluded by the State of Honduras.⁹¹
3. Meets or exceeds the human rights principles contained within the Constitution and provides an effective means of defending human rights through the ZEDE Courts.⁹²
4. Is otherwise fully compliant with the provisions on ZEDEs in articles 294, 303, and 329 of the Constitution and with the ZEDE Organic Law.⁹³

The above rule derives from the ZEDE Legal Framework and the special status afforded the ZEDEs therein. The ZEDE Constitutional Amendment establishing the ZEDEs reveals a clear congressional intent to make the ZEDEs autonomous by default, except where otherwise stated. According to the preamble, one of the purposes of the ZEDEs is to establish “models of public management that rest on granting high degrees of autonomy to certain areas of the country, without the renunciation of sovereignty”.⁹⁴ In twelve places, articles 303 and 329 of the Constitution refer to the ZEDEs as a “special regime”.⁹⁵ These articles further state that part of the ZEDEs’ special status under the Constitution includes “functional and administrative autonomy”⁹⁶ and the power to create a new court system with exclusive competence over the ZEDEs.⁹⁷ This new court system can adopt legal systems and traditions from other parts of the world (such as common law).⁹⁸ The only stated limitation on Congress’s ability to allow these new legal systems and traditions is that “they guarantee equal or better constitutional principles for the protection of human rights”.⁹⁹

⁹⁰ Honduras Constitution. Article 329 §7, sentence 1; ZEDE Organic Law. Articles 1 and 41.

⁹¹ ZEDE Organic Law. Articles 8(2), 35.

⁹² Honduras Constitution. article 329 §11; ZEDE Organic Law. Articles 3, 16.

⁹³ ZEDE Organic Law. Article 8.

⁹⁴ ZEDE Constitutional Amendment. Preamble §3.

⁹⁵ Honduras Constitution. Articles 303, 329.

⁹⁶ Honduras Constitution. Article 329 §5.

⁹⁷ Honduras Constitution. Articles 303, 329 §10.

⁹⁸ Honduras Constitution. Article 329 §11.

⁹⁹ Honduras Constitution. Article 329 §6. (“Los Tribunales de las zonas sujetas a un régimen jurídico especial podrán adoptar sistemas o tradiciones jurídicas de otras partes del mundo siempre que garanticen igual o mejor los principios constitucionales de protección a los Derechos Humanos previa aprobación del Consejo Nacional.”)

An even stronger indication of the autonomous status of ZEDEs comes from Article 329, paragraph 7, sentence 1 of the Constitution. This provision identifies six other articles of the Constitution that Congress “must ensure the enforcement... of” when approving the creation of ZEDEs – Articles 10, 11, 12, 13, 15, and 19.¹⁰⁰ These generally concern the territory of Honduras and its international relations.

The expressed listing of Articles 10-13, 15, and 19, and the notable omission of all other parts of the Constitution, suggests Congress was permitted to exclude other articles of the Constitution from being fully applied in the ZEDEs as they do in the rest of the country. Three internationally accepted principles of legal interpretation lead to this conclusion.

First, the rule against surplusage provides that laws should not be interpreted in a way that renders a word or provision redundant or inoperative. Article 329 §7 lists six particular articles of the Constitution that must be enforced. If we adopted the interpretation that all articles of the Constitution apply, then this list would be redundant. Therefore we should avoid this interpretation.

Second, the doctrine of *expressio unius est exclusio alterius*, also referenced as the *per argumentum e contrario* rule in civil law countries, declares that the expression of one thing in the law implies the exclusion of that which is not expressed. This doctrine is a universally applied interpretative rule for construing laws in both common law and civil law countries.¹⁰¹ In applying this rule, it is critical that Article 329 only mentions six of the articles of the Constitution as necessarily applicable to ZEDEs when drafting the ZEDE Organic Law and does not mention any other

¹⁰⁰ Honduras Constitution. Article 329 §7. (*El Congreso Nacional al aprobar la creación de zonas sujetas a regímenes especiales, debe garantizar que se respeten en su caso... lo dispuesto en los artículos 10, 11, 12, 13, 15 y 19 de la Constitución de la República referente al territorio.*)

¹⁰¹ See *Waibell, Michael. The Origins of Interpretive Canons in Domestic Legal Systems, University of Cambridge Faculty of Law Legal Studies Research Paper Series. Paper No. 27/2018, p. 13-15. April 2018*; *Linderfalk, Ulf. On the Interpretation of Treaties: The Modern International Law as Expressed in the 1969 Vienna Convention on the Law of Treaties. p. 299-303. [s.n.]: Springer, 2007 (citing The Law Dictionary: A Dictionary of Legal Words and Phrases with Latin and French Maxims of the Law Translated and Explained, Gilmer's Revision. 6th ed. 1986)*; *AUST, Anthony. The Theory and Practice of Informal International Treaties, International and Comparative Law Quarterly. v. 35. p. 201. [s.l.]: [s.n.], 1986*; *Jennings, R. and Watts, A. eds., Oppenheim's International Law. 9th ed. v. 1. p. 1279-1280. [s.n.]: Harlow, Longman, 1992*; *Brownlie, Ian. Principles of Public International Law. 4th ed. p. 629. Oxford: Clarendon, 1990*; *BOS, Maarten. A Methodology of International Law. p. 141, Amsterdam et al.: North-Holland, 1984*; *Haraszti, György. Some Fundamental Problems of the Law of Treaties. p. 110-111, Budapest: Akadémiai Kiadó, 1973*; *Verzijl, J.H.W. International Law in Historical Perspective. v. 6, p. 316. Leiden: A.W. Sijthoff, 1973*; *Rest, Alfred. Verschiedene Lösungsmöglichkeiten, p. 79-80. [s.n.]: Diss. Universität zu Köln, 1971*; *Bernhardt, Rudolf. Die Auslegung völkerrechtlicher Verträge, Beiträge zum ausländischen öffentlichen Recht und Völkerrecht. v. 40, p. 180-181. Köln, Berlin: Carl Heymanns, 1963*; *De Visscher, Charles. Problèmes D'interprétation Judiciaire En Droit International Public. p. 113. Paris: Pédone, 1963*; *Degan, V.D. L'interprétation des accords en droit international. p. 113-114. La Haye: Martinus Nijhoff, 1963*; *McNair, Arnold. The Functions and Differing Legal Character of Treaties. British Yearbook of International Law, v. 11, p. 399-410. [s.n.]: [s.l.], 1930*; *Schwarzenberger, Georg. International Law. v. 1, 3rd ed. p. 511-512. London: Stevens and Sons, 1957*; *Fitzmaurice, Gerald. The Law and Procedure of the International Court of Justice: Treaty Interpretation and Other Treaty Points. British Yearbook of International Law, v. 28, p. 25. [s.n.]: [s.l.], 1951.*

articles of the Constitution. Thus, the rule of *expressio unis* and *argumentum e contrario* leads to the conclusion that Congress was free to exclude other generally applicable articles of the Constitution, such that those articles do not override the special autonomy of ZEDES.

When adopting the ZEDE Organic Law, Congress took the liberty afforded by Article 329 to exclude the full application of articles of the Constitution other than those expressly mentioned therein. Article 1 states that “Articles 10, 11, 12, 13, 15, and 19 of the Constitution of the Republic have full applicability.” Following the same reasoning above, the rule against surplusage and *expressio unis*, here again support the position that only these articles have full applicability, since Article 1 would not expressly list these articles if Congress envisioned that other articles would also apply.¹⁰²

Third, many courts adopt the purposive approach to legal interpretation, in which judges look beyond the text of a law to determine its purpose, such as to preambles and legislative debates.¹⁰³ The Honduran Civil Code expresses a somewhat similar approach, stating that “obscure or contradictory passages will be interpreted in a manner that most closely resembles the general spirit of the legislation and natural equity”.¹⁰⁴ As discussed above, the preamble to the ZEDE Constitutional Amendment indicates that one of the purposes of the ZEDES is “to grant high degrees of autonomy to certain areas of the country, without the renunciation of sovereignty”.¹⁰⁵ Further, the Constitutional Amendment itself states that ZEDES “shall enjoy functional and administrative autonomy” and contains numerous references to the ZEDE’s “special regimes” pertaining to judiciary, territorial governance, taxation, and more.¹⁰⁶ This language suggests that the overall purpose of the ZEDE Constitutional Amendment and its general spirit is to make the ZEDES as autonomous as possible, short of renouncing sovereignty. Reading Article 329 as only binding the ZEDES to the listed articles of the Constitution, and no others, is consistent with this purpose.

¹⁰² Another strong indication that Congress did not intend for all of the Constitution to apply is Article 36 of the ZEDE Organic Law. Article 36 directly restates Article 137 of the Constitution, which would be unnecessary if all articles of the Constitution (including Article 137) applied anyway. Here again, the rule against surplusage suggests we should adopt the interpretation that avoids making Article 36 redundant and conclude that only those articles of the Constitution explicitly listed are meant to apply by default to the ZEDES.

¹⁰³ This approach is now commonplace in the U.K., E.U., Canada, Australia and other common law countries. International law and European Union Law also give due regard to teleological or purposive approaches to interpretation. The Vienna Convention on the Law of Treaties permits supplementary recourse to *travaux préparatoires* - the official record of negotiations - to determine the purpose of the treaty. Similarly, the European Court of Justice adopts a decidedly purposive or teleological approach and considers *travaux préparatoires*, among other extrinsic aids, to determine the purpose of EU legislation or treaties.

¹⁰⁴ Código Civil, Decreto No. 76-1906. Article 20.

¹⁰⁵ ZEDE Constitutional Amendment. Preamble §3. (“...mediante la adopción de modelos de gestión pública que descansan en el otorgamiento de altos grados de autonomía a ciertas zonas del país, sin que ello implique renunciar a la soberanía.”).

¹⁰⁶ Honduras Constitution. Article 329.

In addition to the exclusion of articles of the Constitution, Article 41 of the ZEDE Organic Law states that, within the ZEDEs, “only the following national laws apply: 1) the legislative decrees that adopt the national anthem, national emblem, national flag and other national symbols; 2) legislation concerning the territorial sea and the contiguous national zone; and 3) ... the Criminal Code and complementary legislation...”.¹⁰⁷ Moreover, Article 8 places the ZEDE Organic Law itself as superior to all of these national laws and subordinate only to the “Constitution of the Republic as applicable” and “international treaties concluded by the State of Honduras as applicable”.

The implication of these articles is that laws not mentioned in Article 41 are not applicable to the ZEDEs. This is derived from the principle of legal interpretation that words in laws should be given their ordinary meaning as they are commonly used, in addition to the *expressio unius* and *surplusage* rules discussed above. Article 41 uses the word “only”, which ordinarily means the exclusion everything except for those items listed. In this case, the use of “only” indicates that all of Honduras’s national laws not listed in Article 41 do not fully apply within the ZEDEs. Stated in the positive, the ZEDE Law explicitly overrides these laws from direct application within the borders of the ZEDEs.¹⁰⁸

While many Honduran laws are not applicable to the ZEDEs, the ZEDEs are nevertheless limited when adopting new rules. Those limitations are listed in the general rule provided above. Limitations concerning human rights protection and Honduran sovereignty are especially analyzed below.

¹⁰⁷ ZEDE Organic Law. Article 41 (“*En el ámbito espacial de competencia de las Zonas de Empleo y Desarrollo Económico sólo se aplicarán las leyes nacionales siguientes: 1) Los Decretos Legislativos mediante los cuales se adoptan el Himno Nacional, Escudo Nacional, Bandera Nacional y los demás símbolos nacionales; 2) Legislación sobre el Mar Territorial de la Nación y Zona contigua; 3) Mientras las Zonas de Empleo y Desarrollo Económico no cuenten con las suyas propias o incorporen por referencia, previa aprobación del Congreso Nacional, las que consideren más eficientes para el alcance de sus propósitos, se aplicarán las siguientes leyes: El Código Penal y la legislación complementaria donde se tipifiquen delitos e impongan penas o permitan la extradición de nacionales o extranjeros, especialmente por delitos como el narcotráfico, lavado de activos, trata de personas, genocidio, terrorismo, pornografía infantil, explotación de menores y crimen organizado.*”).

¹⁰⁸ Article 41’s exclusion of many national laws indirectly leads to an additional reason why no other articles of the Constitution other than 10-13, 15, and 19 apply within the ZEDEs. Allowing other articles of the Constitution to apply, while Article 41 clearly excludes most national laws, would lead to an absurd result. Many articles of the Constitution give general powers to the state and particular entities within the government. However, government power can only be exercised in accordance with applicable laws. This principle is fundamental to the rule of law. Most of the national laws that ordinarily guide and limit the governmental powers conferred under the constitution are inapplicable in the ZEDEs according to Article 41. Attempting to apply articles of the Constitution conferring power on government entities without laws that limit that power would lead to serious rule-of-law concerns in the ZEDEs, a problem the ZEDEs were designed to remedy, not contribute to.

4 Effect of ZEDEs on Honduran sovereignty

The ZEDEs do not abdicate sovereignty over Honduran territory. Rather, the Constitution and the ZEDE Organic Law explicitly subject them to Honduran sovereignty, which serves as a boundary on the scope of ZEDE power.

Instead of placing them outside the state, the Constitution sees the ZEDEs as special units of the Honduran Government. Articles 294 of the Constitution situate the ZEDEs as special fourth units within a national framework that otherwise consists of the national, departmental, and municipal governments.¹⁰⁹ Similarly, Article 303 of the Constitution places the ZEDE courts as special fourth units within a judiciary that otherwise consists of the Supreme Court, Courts of Appeals, and lower Courts.¹¹⁰ The ZEDEs clearly have a unique autonomy and range of responsibilities that gives them a distinct and independent place within this broader framework, but this distinction does not make them any less part of the state of Honduras.

The ZEDE Legal Framework safeguards Honduran sovereignty over the ZEDEs primarily through the national laws that it explicitly applies within the ZEDEs – namely, articles 10-13, 15, and 19 of the Constitution and those laws listed in Article 41 of the ZEDE Organic Law. Application of these laws is reflected in the first limitation in the General Rule of ZEDE Autonomy, expressed in Section III. As discussed below, these laws include all that is necessary to preserve Honduras’s sovereignty over the ZEDEs.

Additionally, the ZEDEs are subject to the international treaties to which Honduras is a state party, as expressed in the second limitation of the General Rule of ZEDE Autonomy. Thus, as a matter of both constitutional and international law, ZEDEs are entities within Honduras’s broader sovereignty.

4.1 Honduran sovereignty is fully preserved through the laws applicable in the ZEDEs

At the outset, it must be noted that it is logically impossible for any ZEDE compliant with the ZEDE Legal Framework to infringe Honduran sovereignty. Article 329 §7 sentence 2 states, *inter alia* “These zones are subject to national legislation in all matters relating to sovereignty...”.¹¹¹ Similarly, Article 1 of the ZEDE Organic Law states that the ZEDEs “are an inalienable part of the State of Honduras, subject to the Constitution and the national government on issues related to

¹⁰⁹ See Honduras Constitution. Article 294.

¹¹⁰ See Honduras Constitution. Article 303.

¹¹¹ Honduras Constitution, Article 329 §7 (“*Estas zonas están sujetas a la legislación nacional en todos los temas relacionados a soberanía...*”).

sovereignty...”.¹¹² Thus the conclusion that the ZEDEs do not undermine Honduran sovereignty is tautological.

However, more critical questions arise from this conclusion: what does “national legislation in all matters relating to sovereignty” include? What does being “subject to the Constitution and the national government on issues relating to sovereignty” involve? Does this involve the direct application of national laws other than those asserted above to be exclusive – i.e., Articles 10, 11, 12, 13, 15, and 19 of the Constitution and those laws listed in Article 41 of the ZEDE Organic Law? Here again, the principles of legal interpretation offer guidance and strongly indicate that they do not.

If it were concluded that the ZEDE’s being subject to Honduras on “all issues relating to sovereignty” involved the direct application of laws other than those explicitly listed, it would create a conflict with two other provisions of the ZEDE Legal Framework. First, it would conflict with the preceding sentence of Article 329 §7 of the Constitution and with Article 1 §2 of the ZEDE Organic Law, both of which list only six articles of the Constitution that have full applicability in the ZEDEs. As observed above, the rules against surplusage and *expressio unius*, lead to the conclusion that other articles of the Constitution do not fully apply in the ZEDEs.¹¹³ Secondly, it would conflict with Article 41 of the ZEDE Organic Law. Article 41 provides an exclusive list of *leyes nacionales* [national laws] that apply within the *ámbito espacial de competencia* [spatial ambit of jurisdiction] of the ZEDEs. These laws generally deal with the national symbols (e.g., the flag, anthem, etc.), national territory, and criminal law. Article 41 explicitly states that only these laws apply, implying that no others have direct applicability within the ZEDEs.

These conflicts are resolved by principles of legal interpretation recognized around the world, including in Honduras.

For instance, the rule of *generalialia specialibus non derogant* means when a both a general provision and a specific provision both cover the same matter, the specific provision should govern the matter, and not the general one. The term “sovereignty” is a general provision. By contrast, the specific constitutional articles (articles 10, 11, 12, 13, 15, and 19) provided just before these categories, and the laws mentioned in Article 41 of the ZEDE Organic Law, are lists of specific laws that are applicable within the “spatial ambit of competence” of the ZEDEs. The general provision therefore should give way to the specific laws, and its meaning should be supplied by those laws.

¹¹² ZEDE Organic Law. Article 1 (“*Las Zonas de Empleo y Desarrollo Económico... son parte inalienable del Estado de Honduras, sujetas a la Constitución de la República y al gobierno nacional en los temas relacionados a soberanía, aplicación de la justicia, territorio, defensa nacional, relaciones exteriores, temas electorales, emisión de documentos de identidad y pasaportes...*”).

¹¹³ See *supra* Part 3.2.

Looking first at the specific articles of the Constitution that have “full applicability” in the ZEDES, we observe that:

- Article 10 defines the land-based territory of Honduras and subjects the Gulf of Fonseca to a special regime.
- Article 11 defines the sea-based territory of Honduras.
- Article 12 gives the state sovereignty over its airspace and subsoil.
- Article 13 makes the domain of Honduras over its territory, airspace, and subsoil “inalienable and imprescriptible”.
- Article 15 affirms Honduras’s support for the “principles and practices of international law that promote the solidarity and self-determination of peoples, non-intervention, and the strengthening of universal peace and democracy”. It also recognizes the validity and obligation to execute international arbitral and judicial decisions.
- Article 19 requires that “no authority may enter into or ratify treaties or grant concessions that damage the territorial integrity, the sovereignty, or the independence of the Republic” and that doing so is considered treason.

Applying the *generalia specialibus* principle means that these articles should define the more general term “sovereignty” in Article 329 §7, sentence 2, of the Constitution and Article 1 §1 of the ZEDE Organic Law. Several of these articles give specificity to the term “sovereignty” because of their direct assertions of Honduras’s control over its territory and borders, of independence, and of non-intervention by other countries.

Looking next at the specific national laws that, according to Article 41 of the ZEDE Organic Law, are the only ones that are applicable in the ZEDES, it is clear that these also help define “sovereignty”. Specifically, Article 41(1) (“legislative decrees concerning the national anthem, national emblem, national flag, and other national symbols”) supplies meaning to the concept of “sovereignty”, because they are the unique symbols of Honduras, as distinct from other nations.¹¹⁴ Article 41(2) (“legislation concerning the territorial sea and contiguous national zones”) further solidifies the concepts of “sovereignty” by defining the territory that must remain part of Honduras.¹¹⁵ Finally, Article 41(3) (“the Criminal Code and complementary legislation that criminalizes offenses and imposes penalties or allows the extradition of nationals or foreigners, especially for crimes such as drug trafficking, money laundering, human

¹¹⁴ ZEDE Organic Law. Article 41(1) (“*Los Decretos Legislativos mediante los cuales se adoptan el Himno Nacional, Escudo Nacional, Bandera Nacional y los demás símbolos nacionales...*”)

¹¹⁵ ZEDE Organic Law. Article 41(2) (“*...Legislación sobre el Mar Territorial de la Nación y Zona contigua...*”)

trafficking, genocide, terrorism, child pornography, child exploitation, and organized crime”) retains the state’s power to define crimes in the ZEDEs.¹¹⁶

Other rules of legal interpretation also lead to this same conclusion. For instance, the rules of textual integrity require us to interpret provisions of a law in a way that is consistent with other provisions. These rules are echoed in Article 19 of the Honduran Civil Code, which states that obscure passages of law can be illustrated by other passages dealing with a similar subject. As previously noted, the phrases subjecting the ZEDEs to national laws and the national government on matters relating to sovereignty are accompanied by clear statements applying only certain specified laws within the ZEDEs and excluding all others. The rules of textual integrity require us to interpret these two sets of provisions in a way that are consistent with one another, which is only possible if we understand the specified laws as entirely encompassing the ZEDEs’ obligations concerning sovereignty.

Finally, the purposive approach, and the general principle that ambiguous provisions should be interpreted in a way that most resembles the general spirit and intent of the legislation, also support the same conclusion. This approach and principle is supported by both international practice and Article 20 of the Honduran Civil Code, which states that “obscure or contradictory passages will be interpreted in a manner that most closely resembles the general spirit of the legislation and natural equity”.¹¹⁷ As discussed earlier, the stated intention of the ZEDE Constitutional Amendment to create a “special legal regime” in the ZEDEs with “high degrees of autonomy”.¹¹⁸ This purpose and spirit behind the ZEDEs is best adhered to by interpreting the “sovereignty” requirement in Article 329 §7, sentence 2 as fully satisfied by and requiring the application of no other laws other than those explicitly applied to the ZEDEs by the ZEDE Legal Framework.

Thus, adherence to Articles 10-13, 15, and 19 of the Constitution, the ZEDE Constitutional Amendment, applicable international law, the ZEDE Organic Law, and the national laws listed in Article 41 of the ZEDE Organic Law fulfills the ZEDEs’ obligation with regard to Honduran sovereignty.¹¹⁹

¹¹⁶ ZEDE Organic Law. Article 41(3) (“...Mientras las Zonas de Empleo y Desarrollo Económico no cuenten con las suyas propias o incorporen por referencia, previa aprobación del Congreso Nacional, las que consideren más eficientes para el alcance de sus propósitos, se aplicarán las siguientes leyes: El Código Penal y la legislación complementaria donde se tipifiquen delitos e impongan penas o permitan la extradición de nacionales o extranjeros, especialmente por delitos como el narcotráfico, lavado de activos, trata de personas, genocidio, terrorismo, pornografía infantil, explotación de menores y crimen organizado.”).

¹¹⁷ See, e.g., Código Civil, Decreto No. 76-1906, Article 20 (“En los casos en que no pudieren aplicarse las reglas anteriores, se interpretarán los pasajes oscuros o contradictorios del modo que más conforme parezca al espíritu general de la legislación y a la equidad natural.”).

¹¹⁸ See supra, Section 3.1 and text accompanying notes 103-106.

¹¹⁹ The term “sovereignty” in Article 329 §7, sentence 2 is included in a list of other matters that the ZEDEs are “subject to national legislation” on. The list includes “application of justice, national defense, foreign affairs, electoral issues, issuance of identity cards, and passports”. The rules of interpretation applied in this subsection apply equally well to these other terms, such that the meaning of these terms can be

4.2 ZEDEs do not undermine Honduran sovereignty under International Law

*The ZEDEs are obligated to abide by Honduras' commitments under international law. Article 8(2) of the ZEDE Organic Law states "the rules applicable in [ZEDEs] shall be: ... International treaties concluded by the State of Honduras as applicable..."*¹²⁰ *This plain statement clearly establishes that treaties to which Honduras is a State Party apply to ZEDEs to the extent such applicability is consistent with a ZEDE's constitutional status as a special regime.*¹²¹

International law recognizes that there are multiple different legal systems under which a state may be organized, and therefore treats the state as a unity, consistent with its recognition as a single legal entity in international law.¹²² The government of Honduras is the seat of this unity under international law. It is the

entirely derived from Articles 10-13, 15, and 19 of the Constitution and the laws listed in Article 41 of the ZEDE Organic Law. This approach is even more obvious when some of the other terms are considered. For instance, "application of justice" cannot be understood to encompass laws governing the other courts of Honduras, since the ZEDE Legal Framework explicitly creates a new court and legal system for the ZEDEs. The provisions creating this new justice system would be entirely nullified if "application of justice" were understood to mean all of the legislation applicable to the other parts of the Honduran judiciary.

¹²⁰ ZEDE Organic Law. Article 8(2) ("*La jerarquía normativa aplicable en las Zonas de Empleo y Desarrollo Económico será la siguiente: ... 2) Los Tratados Internacionales celebrados por el Estado de Honduras en lo que sean aplicables...*") This language mirrors the provision in ZEDE Organic Law Article 8(1) relating to the application of the Honduran Constitution: "The hierarchy of rules applicable in [ZEDEs] shall be: (1) the Constitution of the Republic as applicable".

¹²¹ There are at least two ways in which a treaty might be inconsistent with the ZEDEs special autonomy under the Constitution. First, treaties that affect the administrative and governmental autonomy of the ZEDEs, and which are formed after a ZEDE comes into existence might not be properly ratified if they were agreed to without the consent of that ZEDE. This argument follows from the recognition that only Articles 10-13, 15, and 19 of the Constitution apply in the ZEDEs, for the reasons explained above. Importantly, Congress was careful to make sure that Articles 16-18, which concern the process by which treaties are ratified and conflicts between treaties and domestic law are resolved, do not apply to the ZEDEs. Omission of these articles arguably means the exact process for ratifying a treaty that affects the ZEDEs is done in a manner different than that established in Articles 16-18, and that ratifying such treaties is not something that can be done by Congress and the President alone. If that is the case, some special process by which ZEDE approval is obtained is needed for new treaties affecting the administrative and governmental autonomy of a ZEDE. Treaties that were already ratified prior to the formation of a ZEDE, on the other hand, likely apply to a ZEDE by virtue of the fact that Congress does not appear to have explicitly disappplied any international law when it adopted the ZEDE Constitutional Amendment or ZEDE Organic Law. Thus, when a new ZEDE is formed out of national territory, it can be deemed to carry with it the then-existing body of international law already applicable to the territory. Secondly, even if the above argument is not correct, it is possible that a new treaty might be inconsistent with Articles 294, 303, or 329 of the Constitution. Such a treaty might, for instance, force the ZEDEs to relinquish part of their Constitutionally protected autonomy. In that event, the treaty would only be applicable to the ZEDEs if Congress validly amends the Constitution. (See Honduras Constitution, Article 17). Assuming the treaty also forces a modification to the ZEDE Organic Law, Congress would need to comply with the requirements specified for amendments of that law - namely a two-thirds majority, a referendum in ZEDEs with over 100,000 residents, and damages to investors protected under the legal stability provisions of contracts and investment treaties, such as the Kuwait-Honduras Bilateral Investment Treaty. (See, e.g., Honduras Constitution, Article 329 §8, ZEDE Organic Law, Article 45) Thus, entry into a treaty is not a feasible option for end-running the autonomy of a ZEDE absent undertaking these requirements.

¹²² See International Law Commission, Draft Articles on the Responsibility of States for Internationally Wrongful Acts, with Commentaries. 2001.

only entity with sufficient sovereignty to sign, ratify, accede to, join, modify, or terminate treaties on behalf of the State of Honduras. Similarly, no other entity has the capacity to be held accountable for violations, breaches, or failures under any particular treaty regime. All other government structures within Honduras, such as municipalities and the ZEDES, for purposes of international law, are sub-entities.¹²³ Under international law, actions of these sub-entities are attributed to the state for purposes of international responsibility.¹²⁴

Notwithstanding that Honduras, as a state, is still internationally liable for what occurs in the ZEDES, the unique autonomy enjoyed by the ZEDES empowers them to administer and otherwise ensure compliance with international treaties within their borders. This derives from the somewhat awkward language in ZEDE Organic Law Article 8 §2 that provides, within the ZEDES, international treaties are “applicable... as applicable”.¹²⁵ The inclusion of “as applicable” to the rule applying treaties to the ZEDES indicates that the manner in which treaties regulate the ZEDES is different than in the rest of Honduras. In other words, “as applicable” is best taken to mean, “in accordance with the special way in which treaties are applied to the ZEDES,” which must be unique to the ZEDES in light of their considerable governmental autonomy. Any other interpretation would obviate the use of “applicable”—which would violate the rule of surplusage.¹²⁶ Thus, in light of the fact that the manner in which treaties regulate ZEDES must be unique, ZEDE authorities must be understood, at a minimum, to have full autonomy to interpret, administer, implement, monitor, enforce, and otherwise apply the international treaties concluded by the State of Honduras.

This interpretation is supported by the Congressional purpose in creating the ZEDES in the first place—to establish “models of public management that rest on granting high degrees of autonomy to certain areas of the country...”.¹²⁷ If treaties were applied in the same way to ZEDES as to the rest of Honduras—if the national government was responsible for applying, implementing, monitoring, enforcing, and/or otherwise administering treaties and their provisions inside ZEDES—their special status would be blunted. They would be unable to fully function as unique legal regimes, defeating the Constitution’s purpose in creating special regimes

¹²³ See International Law Commission, Draft Articles on the Responsibility of States for Internationally Wrongful Acts, with Commentaries. Article 4 & commentary paragraphs 9-10. 2001.

¹²⁴ See International Law Commission, Draft Articles on the Responsibility of States for Internationally Wrongful Acts, with Commentaries. Article 4. 2001.

¹²⁵ See ZEDE Organic Law, Article 8 (“The hierarchy of rules *applicable* in Zone Employment and Economic Development (ZEDE) shall be: ... 2) International treaties concluded by the State of Honduras as applicable”).

¹²⁶ See Eig, Larry M. *Statutory Interpretation: General Principles and Recent Trends*, Congressional Research Service, p. 44, Sept. 24, 2014.

¹²⁷ ZEDE Constitutional Amendment. Preamble §3.

outside the everyday administration of the national government. Accordingly, ZEDEs must retain autonomy to administer international treaties within their territories and be insulated from the ways in which the national government administers treaties elsewhere in the country.

ZEDE autonomy to administer treaties is further supported by Article 16 of the ZEDE Organic Law, which requires ZEDEs to: (1) indemnify the Honduran government for treaty violations and (2) comply with the measures imposed by international human rights bodies.¹²⁸ There would be no need for such requirements if treaty administration was the prerogative of the Honduran government. In that situation, ZEDEs could not be responsible to pay for violations they are not responsible for, and they would not be empowered to respond to decrees by human rights bodies. Stated positively, the indemnification and compliance provisions in Article 16 only make sense if ZEDEs are separately and autonomously responsible for overseeing and administering treaties within their spatial ambit.

Accordingly, while legally bound by international treaties concluded by Honduras and autonomous to implement treaties within their own borders on behalf of the government of Honduras, ZEDEs do not have capacity as states under international law and cannot claim to be sovereign. As such, the ZEDEs are not individually internationally liable or accountable to treaty review bodies, other states, or other entities under any particular treaty regime. Instead, in the event of a treaty violation occurring within the territory of a ZEDE, the government of Honduras is internationally responsible as a matter of international law.

4.3 Practical consequences of ZEDEs' obligation to respect Honduran sovereignty

Looking to the articles of the Constitution and national laws that are applicable to the ZEDEs paints a clearer picture of what types of activities would breach the ZEDEs' obligations to respect the sovereignty of Honduras. For instance, declaring independence or transferring territory in a ZEDE to a foreign nation would breach Articles 10-13 and 19 of the Constitution and Article 41(2) of the ZEDE Organic Law. Article 12 also gives Honduras sovereignty over subsoil resources, which likely means that a ZEDE could not deplete subsoil natural resources without the consent of the Honduran state. It may also mean the ZEDE cannot refuse to grant

¹²⁸ See ZEDE Organic Law. Article 16 ("Zones of Economic Development and Employment (ZEDE) are individually responsible to reimburse the indemnifications in the event that the State of Honduras gets condemned for violations that occurred within the ZEDE's spatial ambit of competence, as well as to comply with the recommendations, injunctions, or regulations issued by international human rights bodies.").

the state access to those resources on reasonable terms that respect the autonomy otherwise conferred upon the ZEDEs.

Additionally, rejecting the use of the Honduran flag or other emblems would breach Article 41(1) of the ZEDE Organic Law, which express Honduran sovereignty through the display of national symbols. Refusing to apply the Honduran Criminal Code without approval from Congress would violate Article 41(3) of the ZEDE Organic Law, which gives the national government sovereign control over its criminal laws. We may also infer, from these laws, that a ZEDE would be in breach of its obligations regarding sovereignty if it allowed a foreign military to invade and refused to either resist it itself or permit the national government to resist it.

Notably, Honduran legislation is only disapplied within the ZEDEs. All laws and powers of the state remain in full force outside the ZEDEs. Thus, it may be inferred that the ZEDEs may be prevented from directly interfering with state functions carried out outside the boundaries of a ZEDEs. This limitation on interference with state functions must be interpreted strictly if we are to respect the overriding emphasis on autonomy in the ZEDE Legal Framework.

5 Effect of the ZEDEs on human rights

The ZEDE Legal Framework promotes human rights in law and in practice. It applies the same basic protections enshrined under international law and the criminal law that are applicable throughout the country. However, the ZEDEs are able to develop new institutions that may be insulated from the problems that prevent ordinary national institutions from safeguarding rights in practice and that adopt international best practices for rights protection in law enforcement, judicial process, and regulatory enforcement. Thus, from the perspective of the average Honduran, the ZEDEs may protect their rights to a far higher degree compared with the status quo.

5.1 The ZEDEs are obligated to abide by Human Rights Law

As stated above, ZEDE Autonomy is circumscribed by the obligation to uphold human rights. Specifically, the ZEDEs must operate in a manner that: (a) meets or exceeds the human rights principles contained within Honduras's Constitution;¹²⁹ and (b) comports with the international rights and obligations contained within treaties concluded by the state of Honduras.¹³⁰ These obligations are reflected in limitations 2 and 3, in the General Rule on ZEDE Autonomy, expressed in Section III.

¹²⁹ Honduras Constitution. Article 329 §11, ZEDE Organic Law, articles 3, 16.

¹³⁰ ZEDE Organic Law. Articles 8(2), 35.

5.1.1 Constitutional human rights principles

The Constitution empowers ZEDE Courts to adopt foreign legal systems, provided those systems “guarantee equal or better constitutional principles for the protection of human rights, subject to the approval of the National Congress”.¹³¹ Congress granted such approval in Article 3 of the ZEDE Organic Law, which states that ZEDE Courts “can follow legal systems or traditions from elsewhere, and which must ensure the constitutional principles of human rights protection” [*los principios constitucionales de protección a los Derechos Humanos*].¹³² Furthermore, Article 16 of the ZEDE Organic Law requires that persons within the ZEDEs are able to protect their “fundamental rights” through a Court of Protection of Individual Rights.

Thus, the ZEDEs must respect human rights if they are to be legally compliant. As with the analysis of sovereignty, however, a more critical question arises: what does “the constitutional principles of human rights protection” include? Does it include the direct application of articles of the constitution other than those explicitly listed – i.e., Articles 10, 11, 12, 13, 15, and 19?

*Answering the last question in the affirmative would create a conflict with Article 329 §7 of the Constitution and Article 1 §2 of the ZEDE Organic Law, which apply only six articles of the Constitution to the ZEDEs. As observed in Section III, the rules against surplusage and *expressio unius*, lead to the conclusion that other articles of the Constitution do not fully apply in the ZEDEs.*

*Once again, this conflict is addressed through the rules of legal interpretation. For instance, the rule of *generalalia specialibus non derogant* requires us to let specific provisions prevail over general provisions. The phrase “constitutional principles of human rights protection” is more general than the specific constitutional articles (arts. 10, 11, 12, 13, 15, and 19). The specific articles should therefore prevail.*

The conflict is further avoided when we take a careful look at the text. General principles of statutory interpretation require us to accept the plain, ordinary meaning of words in statutes.¹³³ “Principles” (*principios*) are commonly understood in both English and Spanish as fundamental truths or propositions that serve as the basis for something—in this case, for the human rights articulated in the Constitution. To that end, the *Diccionario de la Real Academia Española* defines “*principio de derecho*” (principle of right) as “*Norma no legal supletoria de ella y constituida por doctrina o aforismos que gozan de general y constante aceptación de jurisconsultos*”

¹³¹ Honduras Constitution. Article 329, §11.

¹³² ZEDE Organic Law. Article 3.

¹³³ See Código Civil, Decreto No. 76-1906. Article 17. See also Eigh, Larry M. *Statutory Interpretation: General Principles and Recent Trends*, Congressional Research Service, p. 3. Sept. 24, 2014.

y tribunales” (a non-legal norm constituted by doctrine or aphorisms that enjoy general and constant acceptance of jurists and courts).¹³⁴

Thus, “*principios constitucionales de protección a los derechos humanos*” are best understood as non-legal supplementary rules regarding human rights, rather than specific human rights provisions. Stated differently, the “human rights principles contained within the Constitution,” are distinct from the specific rights of the Constitution and instead comprise foundational truths from which those specific human rights are derived. Accordingly, the ZEDEs need not adopt any specific rights in detail, but instead can adopt their own human rights laws that comport with these more abstract human rights principles of the Constitution.¹³⁵

Of course, the place to derive the Constitution’s human rights principles is the Constitution itself, seen through the lens of international human rights instruments. As mentioned above, the Honduran Constitution contains a robust set of individual rights.¹³⁶ International instruments, such as the Universal Declaration of Human Rights, help us determine the more abstract and fundamental principles undergirding these rights that are applied to the ZEDEs. These principles include the inviolability of life; human dignity; equality; individual safety; property; physical, moral and mental integrity; and the freedoms of association, assembly, speech, thought, conscience, movement, and religion.¹³⁷ Thus, the exact rights conferred in the ZEDEs, while open to specification by each ZEDE, must be in keeping with these fundamental human rights principles.

¹³⁴ Diccionario de la Real Academia Española, “principio de derecho,” <https://dle.rae.es/?id=UC5uxwk>, accessed 31 January 2019. (Unofficial translation.)

¹³⁵ More support for this interpretation is found in the relationship between Article 36 of the ZEDE Organic Law and Article 137 of the Honduran Constitution, both of which create a specific right of Honduran workers to be given preference over foreign workers. If all rights in the Constitution were meant to apply in the ZEDEs anyway, ZEDE Organic Law Article 36 would be unnecessary because it is coextensive with Constitution’s article 137. The rule against surplusage provides that when one interpretation of a law would make a provision of the law redundant, and another interpretation would avoid the redundancy, the interpretation avoiding redundancy is preferred. In this situation, an interpretation that requires the application of all Constitutional rights would make Article 36 of the ZEDE Organic Law redundant. Therefore it must be the case that not all rights under the Constitution automatically apply to the ZEDEs.

¹³⁶ See, e.g., Honduras Constitution. Articles 60-108, 127-129, and 182-183.

¹³⁷ These fundamental rights can be derived from comparing the specific rights of the Constitution with the foundational truths underpinning them in Universal Declaration of Human Rights (UDHR). For instance: All persons are born having equal rights and are entitled to equality before the law (Constitution, article 60; UDHR, articles 1-2); all persons have the rights to life, individual safety, freedom, and property (Constitution, articles 61, 65, 68, 69, 71, 105, 106, and 108; UDHR, articles 3-4, 17-20); persons have the right to freedoms of thought, expression, religion, association, assembly, and movement (Constitution, articles 72-81; UDHR, article 13); persons have a right to fair trial, a competent defense, protection from arbitrary detention or arrest, and the presumption of innocence (Constitution, articles 82-98; UDHR, articles 9-11); prisoners have a right to challenge the circumstances of their detention (Constitution, article 182); persons have a right to effective remedies for violations of their fundamental rights (Constitution, article 183; UDHR, article 8); persons have a right to privacy in their homes and communications (Constitution, articles 99-100; UDHR, article 12); persons have a right to work under freely chosen, just, and favorable conditions; to enjoy equal pay for equal work; to form unions; to enjoy rest and leisure; and to social security (Constitution, articles 127-129, 142; UDHR, articles 22-24).

5.1.2 Rights protections under international treaties

Article 8 §2 of the ZEDE Organic Law states “the rules applicable in [ZEDEs] shall be: ... International treaties concluded by the State of Honduras as applicable...” These treaties therefore directly form part of the legal framework applicable to ZEDEs. Honduras is a “monist” system (as opposed to “dualist” system) and as such makes domestic law and international law all a part of the same legal order.¹³⁸ This means that international law does not need to be transmuted into national law by way of implementing legislation.¹³⁹ This is true regardless of the type of treaty or its specific terms.

Importantly, Honduras is a state party to all of the international human rights treaties,¹⁴⁰ the major regional human rights treaties,¹⁴¹ and all of the International Labour Organization’s fundamental conventions.¹⁴² The protections and obligations embedded in these instruments extend to the ZEDEs and their populations.

For example, *Article 25 of the International Covenant on Civil and Political Rights (ICCPR) recognizes the right to exercise political power, be it legislative, executive or administrative, by participating directly in public affairs.*¹⁴³ *Such participation requires the ability to exert influence over representatives, such as through freely choosing representatives through genuine periodic elections.*¹⁴⁴ *Accordingly, the ZEDEs have obligations to ensure persons within their territory enjoy the right to exercise political power by participating directly in the public affairs affecting the ZEDEs. These obligations are partially manifested in the ZEDE Legal Framework: ZEDEs in areas with population densities over 35 people per square kilometer*¹⁴⁵

¹³⁸ See Honduras Constitution. Article 16 §2; Kooijmans, Pieter. *Public International Law in a Nutshell*. p. 82. [s.n.]: Wolters-Noordhoff, 1994.

¹³⁹ See Wiarda, G.J. *In Cassese, Antonio. International Law in a Divided World*. p. 17. Oxford, Clarendon Press, 1992.

¹⁴⁰ United Nations Office of the High Commissioner of Human Rights, Status of Ratifications – Honduras. At https://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/Treaty.aspx?CountryID=76&Lang=EN (visited Feb. 2, 2019).

¹⁴¹ Organization of American States, American Convention on Human Rights – “Pact of San Jose, Costa Rica,” List of Signatories and Ratifications. At http://www.oas.org/dil/treaties_B-32_American_Convention_on_Human_Rights_sign.htm (visited Feb. 2, 2019); Organization of American States, Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social, and Cultural Rights – “Protocol of San Salvador,” List of Signatories and Ratifications. At <http://www.oas.org/juridico/english/signs/a-52.html> (visited Feb. 2, 2019).

¹⁴² International Labour Organization, List of Ratifications – Honduras. At https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11200:0::NO::P11200_COUNTRY_ID:102675 (visited Feb. 2, 2019).

¹⁴³ International Covenant on Civil and Political Rights, General Comment 25 on Article 25 Right to Public Life, U.N. Doc. CCPR/C/21/Rev.1/Add.7. paras. 5 & 6, August 27, 1996.

¹⁴⁴ International Covenant on Civil and Political Rights, General Comment 25 on Article 25 Right to Public Life, U.N. Doc. CCPR/C/21/Rev.1/Add.7. paras. 7 & 9, August 27, 1996.

¹⁴⁵ Article 329 of the Constitution and the ZEDE Organic Law impose these requirements on ZEDEs that have “high population density” as certified by the *Instituto Nacional de Estadística* (INE). ZEDE Organic Law, Article 37. The INE has since set the threshold of high population density at 35 people per square kilometer.

must (1) must be approved by plebiscite of existing inhabitants,¹⁴⁶ and (2) must be overseen by Technical Secretaries, the key governing officials of the ZEDEs, who are nominated by residents.¹⁴⁷

The direct application of treaties to the ZEDEs should not be taken to mean that ZEDEs are “parties” to the treaties. The State of Honduras is the seat of sovereignty of the nation and therefore retains the nation’s international personality to negotiate, ratify, accede, or otherwise conclude international treaties — the Honduran state is the gateway through which treaties apply to the ZEDEs. And because the ZEDEs are sub-national entities functioning under the sovereignty of the State of Honduras, the State of Honduras remains internationally responsible for treaty violations occurring within the ZEDEs.¹⁴⁸

As described above, the unique autonomy enjoyed by the ZEDEs empowers them to administer and otherwise ensure compliance of international treaties to which Honduras is a state party within ZEDE borders.¹⁴⁹ Article 16 of the ZEDE Organic Law demonstrates ZEDE autonomy to administer treaties by requiring them to establish Courts of Protection of Individual Rights. As venues for ZEDE residents to sue the ZEDE administrations directly for violations of their rights, thereby giving local channels for rights protection, these courts will be major avenues for rights-based treaty compliance. As a result, individuals living within the ZEDEs should have a closer and more direct relationship with their fundamental and human rights than other Hondurans, especially in light of the corruption, violence, and impunity challenges that have plagued the country for years.

5.1.3 Rights protections in the ZEDE Organic Law

In addition to incorporating constitutional principles of human rights protection and international human rights treaties, the ZEDE Organic Law adds several provisions defending human rights itself. These provisions appear designed to address some of the specific problems with the country’s human rights performance – civil rights, judicial system, property rights, and indigenous peoples’ rights.

To protect civil rights, Article 9 of the ZEDE Organic Law forbids discrimination and requires equality in rights and duties for all persons. Article 10(1) requires that ZEDEs form “agreements of coexistence” with their residents that put in writing their rights and obligations to others and are consistent with “universal moral principles”. Article 10(2) requires the ZEDEs to create public spaces for residents to “peacefully

¹⁴⁶ Honduras Constitution, Article 329 §6; ZEDE Organic Law, Article 38(2).

¹⁴⁷ ZEDE Organic Law, Article 11(6).

¹⁴⁸ International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries (2001), Chpt. 2, §7.

¹⁴⁹ See section 4.2 above.

defend their rights” and to not cut off public services or communications media and systems.

To address problems with the justice system, Article 16 of the ZEDE Organic Law establishes new, independent courts. One of these courts is a Court of Protection of Individual Rights that allows people within the ZEDEs to challenge violations of their fundamental rights. Decisions of the court can be appealed to international tribunals. Moreover, Article 21 requires the ZEDEs to provide legal aid mechanisms for people who cannot afford to defend their rights in court.

Concerning property rights, Article 26 includes a procedure whereby parties can challenge decisions to register land as a ZEDE, an important protection in a country where land title is often unclear. Article 28 includes procedures for challenging expropriations.

Finally, Article 43 places emphasis on ZEDEs’ duty to not “violate the property rights of indigenous peoples and Afro-descendants on the land they have been granted by certificates” from the national government. It also requires them to apply ILO Convention 169, which pertains to the rights of indigenous people. Moreover, the Article encourages the ZEDEs to create “cooperation and development programs in collaboration with indigenous and Afro-descendant peoples under conditions of mutual acceptance and ensuring full respect for their culture and customs”.¹⁵⁰

5.2 New institutions should enable the ZEDEs to improve human rights protection in practice relative to the status quo

In addition to legal requirements, the ZEDE regime encourages the formation of new administrative institutions which may improve upon human rights protection in practice. These new administrative institutions are critical – Honduras already has *de jure* human rights protections, but its administrative institutions fail to enforce those protections in practice. The ZEDEs provide an opportunity to establish new, independent administrations that are free from the same influences that hinder ordinary Honduran institutions from effectively enforcing human rights and that create economic conditions necessary for the full realization of human rights.

¹⁵⁰ ZEDE Organic Law. Article 43 (“Las autoridades de las zonas de Empleo y Desarrollo Económico podrán crear programas de cooperación y desarrollo en colaboración con los pueblos indígenas y afrodescendientes bajo condiciones de mutua aceptación y garantizando el pleno respeto a su cultura y costumbres.”).

5.2.1 New independent administrations

Establishing new institutions as a means of improving the human rights situation in Honduras was part of the original inspiration for the ZEDE program. President Juan Orlando Hernández, while president of the Honduran National Congress, put forward the first version of the ZEDE program in 2009 in conjunction with *Paul Romer's "charter cities" concept*.¹⁵¹ According to Romer, charter cities would be special areas that could test new institutions as a way of overcoming existing institutions' internal resistance to change. These cities could incubate and jumpstart better ways of governing in the public interest. The preamble to the ZEDE Constitutional Amendment reflects this idea by stating that one of the purposes of the ZEDEs is to adopt "public management models" from countries that rapidly moved out of poverty and apply them to Honduras.¹⁵²

There is strong evidence that institutions –including rules, laws, and administrative practices– are the top factor in the social and economic success of countries.¹⁵³ Good institutions have been the primary reasons for the superior performance of, for instance, South Korea relative to North Korea, Botswana relative to other Sub-Saharan African countries, Hong Kong relative to the People's Republic of China, and Singapore relative to Malaysia. Honduras launched the ZEDEs as a way of creating a Central American version of Hong Kong that models good governance for the rest of the country.

5.2.2 Economic development as a means for realization of human rights

Moreover, ZEDE administrations have strong incentives to promote the overall economic development of the ZEDEs, which will, in turn, help improve the human rights situation within the ZEDEs.

ZEDE administrations have a strong incentive to promote economic development because they are entirely dependent on their internal economies for revenue. The ZEDE Organic Law imposes fiscal decentralization – i.e., it requires the ZEDEs to collect taxes from within their jurisdictions and remit only 12% of receipts to the national government.¹⁵⁴ Unlike other sub-national governments, the ZEDEs are not permitted to receive transfers from the national government, thus forcing them to

¹⁵¹ Castle-Miller, Michael. The Ciudades Modelo Project: Testing the Legality of Paul Romer's Charter Cities Concept by Analyzing the Constitutionality of the Honduran Zones for Employment and Economic Development. *Willamette Journal of International Law and Dispute Resolution*, v. 22, n. 2, p. 271. 2015.

¹⁵² ZEDE Constitutional Amendment. Preamble §3.

¹⁵³ See generally Acemoglu, Daron and Robinson, James A., *Why Nations Fail: The Origins of Power, Prosperity, and Poverty*. [s.n.]: [s.l.], 2012.

¹⁵⁴ ZEDE Organic Law. Articles 4, 29, 44.

rely entirely on their internal economies for revenue.¹⁵⁵ A weak internal economy will lead to low tax receipts and the ultimate failure of the ZEDE. Dependency on local revenue has been observed to be a primary reason for the success of China's special economic zones, such as Shenzhen, where local officials kept a portion of the tax revenue collected by the national government from within their jurisdictions.¹⁵⁶

Economic development in the ZEDEs will tend to promote human rights. United Nations instruments, such as the Declaration on the Right to Development¹⁵⁷ and the International Covenant on Civil and Political Rights, recognize the interdependence of economic development and human rights. Economic development is necessary for the full realization of human rights, as it creates conditions under which humans can enjoy more freedoms and access their potential.

6 Conclusion

In an effort to tackle enduring governance challenges, the Honduran legislature created the ZEDE Legal Framework. Seeking to make sure these zones maintain stability and are not affected by Honduras's enduring challenges, this Framework imbues the ZEDEs with significant autonomy in establishing independent legal systems, policies, and regulations that foster a transparent, competitive, and stable legal and economic environment.

However, this autonomy is not without its borders. The ZEDEs are free to develop their own rules, policies, laws, procedures, and forms of administration in any manner that meets all of the following requirements: (1) Applies articles 10, 11, 12, 13, 15, and 19 of the Constitution and the laws listed in article 41 of the ZEDE Organic Law; (2) Comports with the international rights and obligations contained within treaties concluded by the State of Honduras; (3) Meets or exceeds the human rights principles contained within the Constitution and provides an effective means of defending human rights through the ZEDE Courts; and (4) Is otherwise fully compliant with the provisions on ZEDEs in articles 294, 303, and 329 of the Constitution and with the ZEDE Organic Law.

From this general rule of ZEDE autonomy, two critical facts are made evident. First, the ZEDEs do not abdicate sovereignty over Honduran territory. Indeed, they are units of the Honduran Government. This is made clear both as a domestic and an international legal matter. Domestically, the ZEDE Legal Framework safeguards Honduran sovereignty over the ZEDEs primarily through the national laws that it explicitly applies within the ZEDEs – namely, articles 10-13, 15, and

¹⁵⁵ ZEDE Organic Law. Articles 4, 29, 44.

¹⁵⁶ Moberg, Lotta. *The Political Economy of Special Economic Zones*. p. 124-25 [s.n.]: [s.l.], 2017.

¹⁵⁷ United Nations General Assembly Resolution 41/128.

19 of the Constitution and those laws listed in Article 41 of the ZEDE Organic Law. Internationally, the ZEDEs are treated as sub-entities under the umbrella of Honduran sovereignty.

Second, human rights are duly protected in the ZEDEs. The ZEDEs must operate in a manner that meets or exceeds the human rights principles contained within Honduras' Constitution, which include the inviolability of life, individual safety, freedom, property, equality before the law, and the freedoms of association, assembly, speech, thought, conscience, movement, and religion. Also, the treaties to which Honduras is a state party, and their attendant rights and obligations, apply directly to the ZEDEs—this includes the international human rights treaties, the major regional human rights treaties, and all of the International Labour Organization's fundamental conventions. Further, the ZEDE regime encourages the formation of new administrative institutions which provide an opportunity to establish new, independent administrations that are free from the same influences that hinder ordinary Honduran institutions from effectively enforcing human rights and that create economic conditions necessary for the full realization of human rights.

Beyond the technical analysis in this paper, it is important to not lose sight of the overall impact the ZEDEs can have on the quality of governance and human rights protection in Honduras. Far from abdicating sovereignty or undermining human rights protection, the ZEDEs appear positioned to boost the status of the Honduran state and the lives of the Honduran people through new institutions. New institutions can make the difference between a continuation of the status quo and a future of prosperity, justice, and stability for all Hondurans.

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