

INTERNATIONAL CRIMINAL LAW

Former President of Honduras Extradited to the United States

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On April 21, 2022, former Honduran president Juan Orlando Hernández, who was praised by President Donald Trump for “stopping drugs at a level that has never happened,” was extradited by Honduras to the United States on narcotics charges.¹ He appeared before a federal magistrate judge the next day and pled not guilty at his arraignment on May 10.² A tentative trial date has been set for January 17, 2023.³ In the sealed superseding indictment that was handed down hours after he left office on January 27, 2022,⁴ Hernández had been charged by a federal grand jury with three counts: conspiracy to import cocaine into the United States (count one); possession of machine guns and destructive devices during and in relation to a drug trafficking crime (count two); and conspiracy to possess machine guns and destructive devices (count three).⁵ Though the allegations were for violations of federal narcotics laws, they amounted to charges of public corruption, as Hernández was accused of accepting bribes to use his official position, including while president, to protect traffickers transshipping cocaine through Honduras to the United States in order to enrich himself and secure and maintain political power. Honduras, the indictment alleged, was a “narco-state” during the Hernández presidency.⁶ If found guilty, Hernández could be sentenced to life in prison. Hernández’s indictment was anticipated, as he was implicated publicly as a co-conspirator (CC-4) in multiple prosecutions since 2019, including during the criminal proceedings against his brother, Juan Antonio (Tony) Hernández, a former member of the Honduran National Congress who was convicted on federal drug charges (including the same charges that would later be brought against his brother) on October 18, 2019.⁷ Tony Hernández is

¹ Parker Asmann, *How “El Chapo” Allegedly Helped Put One of Trump’s “Proven Partners” into Power*, BUS. INSIDER (July 14, 2020), at <https://www.businessinsider.com/trump-praises-honduras-hernandez-despite-drug-trafficking-allegations-2020-7>. Hernández had worked with both the Obama and Trump administrations. See Michael Stott & Christine Murray, *Ex-Honduras President’s Arrest Puts US War on Drugs into Focus*, FIN. TIMES (Feb. 18, 2022), at <https://www.ft.com/content/af3d85a8-c10a-46da-a217-328c80e74116>; Kevin Sieff, *Honduran President, a Trump Ally Implicated in Drug Trafficking, Tries to Win Over Biden*, WASH. POST (Feb. 12, 2021), at https://www.washingtonpost.com/world/the_americas/honduras-president-narcotrafficking-hernandez/2021/02/11/1fa96044-5f8c-11eb-ac8f-4ae05557196e_story.html; Parker Asmann, *Criminal Allegations Unravel Honduras President’s Crime Fighting Façade*, INSIGHT CRIME (Sept. 3, 2019), at <https://insightcrime.org/news/analysis/criminal-allegations-unravel-honduras-president-crime-fighting-facade>.

² Docket for Case No. 1:15-cr-379 (SDNY) [hereinafter Docket].

³ *Id.*

⁴ An arrest warrant was issued at the same time.

⁵ Superseding Indictment, United States of America v. Juan Orlando Hernandez, a/k/a “JOH,” SDNY Case No. 1:15-cr-379 (Jan. 27, 2022) [hereinafter Indictment]. The indictment included forfeiture allegations for all three counts.

⁶ *Id.*, para. 3.

⁷ Emily Palmer & Benjamin Weiser, *El Chapo Said to Have Given \$1 Million to Honduran President’s Brother*, N.Y. TIMES (Oct. 2, 2019), at <https://www.nytimes.com/2019/10/02/world/americas/el-chapo-honduras-drug-trial.html>; U.S. Dep’t of Justice Press Release, *Honduran Drug Trafficker Arrested in Florida on Drug Trafficking and Weapons Charges* (Mar. 3, 2020), at <https://www.justice.gov/usao-sdny/pr/honduran-drug-trafficker-arrested-florida-drug-trafficking-and-weapons-charges>; U.S. Dep’t of Justice Press Release, *Former Chief of Honduran National Police Charged with Drug Trafficking and Weapons Offenses* (Aug. 30, 2020), at <https://>

now serving a sentence of life in prison plus thirty years.⁸ Juan Carlos Bonilla Valladares, the former chief of the Honduran National Police, was extradited to the United States three weeks after Hernández for alleged offenses that were part of the same scheme.⁹

Extradition between the United States and Honduras is governed by a 1909 Extradition Treaty,¹⁰ which was supplemented in 1927, as well as by the domestic laws and practices of both countries.¹¹ Unlike modern treaties entered into by the United States that typically provide that an “offense shall be an extraditable offense if the conduct on which the offense is based is punishable under the laws in both States by deprivation of liberty for a period of one year or more or by a more severe penalty” (dual criminality treaties),¹² old agreements, like those still in force with Honduras, allow extradition only for those crimes that are specifically listed in the treaty (list treaties). The 1909 Treaty did not include drug-related crimes as extraditable offenses, but the 1927 Treaty added to the list of crimes for which extradition was possible: “Crimes against the laws for the suppression of the traffic in narcotic products.”¹³ As treaties operate directly under Honduran law, this provision established a legal basis for U.S. extradition request. Also unlike most modern treaties entered into by the United States,¹⁴ but typical for its time, the 1909 Treaty did not require either the United States or Honduras to extradite their own nationals.¹⁵ That provision has never been amended. Though U.S. law has long permitted the extradition of U.S. nationals to other countries when a treaty so provides, Honduran law has not.¹⁶ While earlier Honduran law provided discretion to extradite,¹⁷ the Honduran Constitution of 1982 did not permit the extradition of Honduran nationals until it was amended in 2012 to allow for the

www.justice.gov/usao-sdny/pr/former-chief-honduran-national-police-charged-drug-trafficking-and-weapons-offenses; U.S. Dep’t of Justice Press Release, Former Honduran Drug Trafficker Sentenced to Life in Prison for Distributing Over 150 Tons of Controlled Substances (Aug. 2, 2019), at <https://www.justice.gov/usao-sdny/pr/former-honduran-drug-trafficker-sentenced-life-prison-distributing-over-150-tons>.

⁸ Docket, *supra* note 2; see also Emily Palmer & Elisabeth Malkin, *Honduran President’s Brother Is Found Guilty of Drug Trafficking*, N.Y. TIMES (Oct. 18, 2019), at <https://www.nytimes.com/2019/10/18/world/americas/honduras-president-brother-drug-trafficking.html>; U.S. Dept. of Justice Press Release, Former Honduran Congressman Tony Hernández Sentenced to Life in Prison and Ordered to Forfeit \$138.5 Million for Distributing 185 Tons of Cocaine and Related Firearms and False Statements Offenses (Mar. 30, 2021), at <https://www.justice.gov/usao-sdny/pr/former-honduran-congressman-tony-hernandez-sentenced-life-prison-and-ordered-forfeit>. Tony Hernández was also ordered to forfeit \$138.5 million. He has filed an appeal before the U.S. Court of Appeals for the Second Circuit, which is pending.

⁹ U.S. Dept. of Justice Press Release, Former Chief of Honduran National Police Extradited to the United States on Drug Trafficking and Weapons Offenses (May 11, 2022), at <https://www.justice.gov/usao-sdny/pr/former-chief-honduran-national-police-extradited-united-states-drug-trafficking-and>.

¹⁰ Convention Between the United States and Honduras for the Extradition of Fugitives from Justice, 37 Stat. 1616 (1909, *entered into force* July 10, 1912) [hereinafter 1909 Extradition Treaty].

¹¹ Supplementary Extradition Convention Between the United States of America and the Republic of Honduras, 45 Stat. 2489 (1927, *entered into force* June 5, 1928) [hereinafter 1927 Supplementary Treaty].

¹² Extradition Treaty Between the United States of America and the United Kingdom of Great Britain, Art. 2(1) [hereinafter U.S.-UK Extradition Treaty].

¹³ 1927 Supplementary Treaty, *supra* note 11, Art. I.

¹⁴ *E.g.*, U.S.-UK Extradition Treaty, *supra* note 12, Art. 3 (“Extradition shall not be refused based on the nationality of the person sought.”).

¹⁵ 1909 Extradition Treaty, *supra* note 10, Art. VIII.

¹⁶ 1 RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, sec. 475, cmt. f, rep. n. 4 (1987); 18 USC 3196.

¹⁷ See, e.g., *Re Extradition of López Saravia*, 24 ILR 492, 493 (1957) (Hond.) (affirming the refusal to extradite a Honduran national to El Salvador because “according to the provisions of Article 345 of the Bustamante Code, the contracting parties are not compelled to deliver their own nationals, but rather to try them in their own competent courts”).

extradition of those accused of trafficking in narcotics.¹⁸ Hernández was president of the National Congress when this amendment was adopted. It has been estimated that thirty-one Hondurans have been extradited to the United States between 2014 and July 2022, the vast majority during Hernández's administration.¹⁹

Hernández's term as president ended on January 27, and less than three weeks later, on February 14, the United States requested his provisional arrest for the purpose of extradition. In accordance with Honduran law, that request was forwarded by the Foreign Ministry to the Supreme Court of Justice.²⁰ Hernández was arrested by Honduran authorities at his home in Tegucigalpa the next day pursuant to the order of Supreme Court Judge Edwin Ortez, who had been appointed by the Court as a first instance extradition judge.²¹ The United States subsequently submitted a formal extradition request in accordance with the 1909 Extradition Treaty. On March 16, Judge Ortez granted that request, and the Supreme Court of Justice, sitting in plenary session as an extradition tribunal of second instance, confirmed that order on March 28.²² On April 6, an Ad Hoc Constitutional Chamber of the Supreme Court unanimously rejected as inadmissible Hernández's *amparo*, which had challenged the Court's extradition decision as a violation of the American Convention on Human Rights and Honduran constitutional law.²³ The Supreme Court's decision affirming Judge Ortez's order was subsequently signed by its fifteen judges, all of whom were selected by the National Congress in 2016 when Hernández was President of the Republic. On April 13, Judge Ortez sent the certification of Hernández's extradition to the ministers of defense, foreign affairs, and security for it to be carried out.²⁴ Eight days later, on April 21, Hernández

¹⁸ Compare Constitution of Honduras (1982), Art. 102 ("Ningún hondureño podrá ser expatriado ni entregado por las autoridades a un Estado extranjero.") with Constitution of Honduras (amended 2012), Art. 102 (adding "Se exceptúan de esta disposición los casos relacionados con delitos de tráfico de estupefacientes en cualquiera de sus tipologías . . ."). See La Gaceta: Diario Oficial de la Republica de Honduras, at 1–2 (Jan. 24, 2012). At the same time, the Honduran Constitution was amended to allow for the extradition of Honduran nationals for offenses related to terrorism and organized crime. It has been speculated that the United States sought the amendment to Article 102. A few years earlier similar changes were made in El Salvador and Guatemala. See Hannah Stone, *With Extradition Law, Honduras Outsources Justice to US*, IN SIGHT CRIME (Jan. 31, 2012), at <https://insight-crime.org/news/analysis/with-extradition-law-honduras-outsources-justice-to-us>.

¹⁹ *Extradition in Honduras as a Tool for Cooperation with the US and a Reflection of Deficiencies in the Justice System*, EXPEDIENTE PÚBLICO (Aug. 11, 2022), at <https://www.expedientepublico.org/extradition-in-honduras-a-weak-legal-system-and-cooperation-with-the-us>.

²⁰ See Expediente Público, @ExpePublico, TWITTER (Feb. 14, 2022, 10:27 p.m.), at <https://twitter.com/ExpePublico/status/1493426707658772481>.

²¹ Controversially, the rules governing the review and approval of extradition requests are not set out in an extradition law but in an "auto acordado" (agreed order) that was issued by the Supreme Court of Justice in 2013. See La Gaceta: Diario Oficial de la Republica de Honduras, at 5–7 (June 11, 2013), available at <https://www.poderjudicial.gob.hn/CEDIJ/Documents/Auto%20Acordado%20sobre%20Se%C3%B1alar%20Juez%20Natural%20en%20Procedimientos%20de%20Extradici%C3%B3n.pdf>.

²² Boletín Informativo, Juez de Primera Instancia Otorga la Solicitud de Extradición Que Involucra a Ex Presidente Hernández Alvarado (Mar. 16, 2022), at <https://www.poderjudicial.gob.hn/Paginas/BolPJ16032022.aspx>; Boletín Informativo, Pleno de Magistrados de CSJ Confirma Extradición de Ex Mandatario Juan Orlando Hernández (Mar. 28, 2022), at <https://www.poderjudicial.gob.hn/Paginas/BolPJ28032022.aspx>. The Supreme Court approved extradition unanimously for count one of the indictment and by a majority for counts two and three.

²³ Sala de lo Constitucional AD-HOC, Recurso de Amparo Administrativo, SCO-0527-2002, available at <https://www.poderjudicial.gob.hn/SiteAssets/Paginas/CSJHN/SCO-0527-2022.pdf>.

²⁴ Boletín Informativo, Juez de Primera Instancia Ordena Entrega a EEUU de Ex Mandatario Juan Orlando Hernández (Apr. 13, 2022).

was surrendered to U.S. Drug Enforcement Administration (DEA) agents at Toncontín International Airport and flown to the United States.²⁵

The extradition was praised at the highest levels of the Department of Justice and the DEA. Attorney General Merrick Garland stated: “The Department is committed to disrupting the entire ecosystem of drug trafficking networks that harm the American people, no matter how far or how high we must go.”²⁶ DEA Administrator Anne Milgram remarked: “Today’s extradition clearly shows that the DEA will stop at nothing to pursue the most powerful political actors who engage in drug trafficking, violence, and corruption. . . . [Hernández] used drug trafficking proceeds to finance his political ascent and, once elected President, leveraged the Government of Honduras’ law enforcement, military, and financial resources to further his drug trafficking scheme.”²⁷ She continued: “This case should send a message—to all political leaders around the world that trade on positions of influence to further transnational organized crime—that the DEA will stop at nothing to investigate these cases and dismantle drug trafficking organizations that threaten the safety and health of the American people.”²⁸

The timing of the indictment, arrest warrant, and extradition request was plainly intentional. The superseding indictment was issued not just on the same day that Hernández’s term as president ended but also after Xiomara Castro was sworn in that day as his successor. And the extradition request came a little more than two weeks after that. It was reported that Vice President Kamala Harris, after being briefed about Hernández’s criminal schemes shortly after taking office in January 2021, said: “Let’s go get him now.”²⁹ She was told in response that “the U.S. government had a long-standing unwritten policy against indicting sitting heads of state.”³⁰ The practice has indeed been consistent. When the United States has pursued criminal cases against a country’s president, it has always waited until after that person has left office.³¹ In 2013, former President of Guatemala Alfonso Portillo was extradited nine years after his term ended for offenses that occurred during his presidency.³² In 2020, former President of

²⁵ Benjamin Weiser & Joan Suazo, *Ex-Honduran President Extradited to United States to Face Drug Charges*, N.Y. TIMES (Apr. 21, 2022), at <https://www.nytimes.com/2022/04/21/nyregion/honduras-juan-orlando-hernandez-extradition.html>.

²⁶ U.S. Dep’t of Justice Press Release, *Juan Orlando Hernández, Former President of Honduras, Indicted on Drug-Trafficking and Firearms Charges, Extradited to the United States from Honduras* (Apr. 21, 2022), at <https://www.justice.gov/opa/pr/juan-orlando-hernandez-former-president-honduras-indicted-drug-trafficking>.

²⁷ *Id.*

²⁸ *Id.*

²⁹ Jon Lee Anderson, *False Friends: How the U.S. Looked Away from Corruption It Helped Create*, NEW YORKER, at 59, 61 (Nov. 15, 2021).

³⁰ *Id.* Harris attended Castro’s inauguration a year later, as the indictment was being issued. See Cleve R. Wootson Jr. & Kevin Sieff, *The Looming Question as Harris Returns to Northern Triangle: Will Corruption Stymie Progress?*, WASH. POST (Jan. 27, 2022), at <https://www.washingtonpost.com/politics/2022/01/27/harris-honduras>.

³¹ A previous president of Honduras, Rafael Callejas, pled guilty to federal corruption charges, though they were for acts subsequent to his presidency. See Former President of Honduran Soccer Federation Pleads Guilty to Racketeering and Corruption Charges (Mar. 28, 2016), at <https://www.justice.gov/usao-edny/pr/former-president-honduran-soccer-federation-pleads-guilty-racketeering-and-corruption>.

³² U.S. Dep’t of Justice Press Release, *Manhattan U.S. Attorney Announces Extradition of Former President of Guatemala, Alfonso Portillo, on Money Laundering Charge* (May 28, 2013), at <https://www.justice.gov/usao-sdny/pr/manhattan-us-attorney-announces-extradition-former-president-guatemala-alfonso-portillo>.

Venezuela Nicolás Maduro Moros was indicted on narcotics and terrorism charges for acts during his presidency, a little more than a year after the United States announced it would no longer recognize him as head of government.³³ The same practice—to wait until a president’s term has concluded to take action against them—does not apply to listings or designations. On July 1, 2021, Hernández was listed on the United States’ Corrupt and Undemocratic Actors list, under Section 353 of the United States-Northern Triangle Enhanced Engagement Act, as amended.³⁴ That listing was classified until February 7, 2022.³⁵

USE OF FORCE, ARMS CONTROL, AND NON-PROLIFERATION

New U.S. Anti-Personnel Landmine Policy Adopted

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On June 21, 2022, the United States adopted a new Anti-Personnel Landmine (APL) Policy.¹ Coming nearly on the eighth anniversary of the Obama administration’s APL policy

³³ U.S. Dep’t of Justice Press Release, Nicolás Maduro Moros and 14 Current and Former Venezuelan Officials Charged with Narco-Terrorism, Corruption, Drug Trafficking and Other Criminal Charges (Mar. 26, 2020), at <https://www.justice.gov/opa/pr/nicol-s-maduro-moros-and-14-current-and-former-venezuelan-officials-charged-narco-terrorism>. For a discussion of Maduro’s indictment and head of state immunity, see Jean Galbraith, Contemporary Practice of the United States, 114 AJIL 494, 511 (2020).

³⁴ See U.S. Dep’t of State Press Release, Antony J. Blinken, U.S. Actions Against Former Honduran President Juan Orlando Hernandez for Corruption (Feb. 7, 2022), at <https://www.state.gov/u-s-actions-against-former-honduran-president-juan-orlando-hernandez-for-corruption>. Hernández was not the first sitting president to have his visa revoked by the United States. See, e.g., Michael Dobbs, *U.S. Revokes Visa for Head of Colombia*, WASH. POST (July 12, 1996), at <https://www.washingtonpost.com/archive/politics/1996/07/12/us-revokes-visa-for-head-of-colombia/5dfedca4-a805-44ae-8b8d-0f562e72f806>.

³⁵ *Id.* Hernández predecessor, Porfirio “Pepe” Lobo Sosa, was designated for involvement in significant corruption (accepting bribes from narco-traffickers) under Section 7031(c) of the Department of State, Foreign Operations, and Related Programs Appropriations Act, 2021. See U.S. Dep’t of State Press Release, Antony J. Blinken, Designations of Former Honduran President Porfirio “Pepe” Lobo Sosa and Former First Lady Rosa Elena Bonilla Avila for Involvement in Significant Corruption (July 20, 2021), at <https://www.state.gov/designations-of-former-honduran-president-porfirio-pepe-lobo-sosa-and-former-first-lady-rosa-elena-bonilla-avila-for-involvement-in-significant-corruption>. Lobo himself was named in the Hernández indictment but no charges have been made public. See Indictment, *supra* note 5, at 7. Lobo’s son, Fabio Porfirio Lobo, pled guilty to conspiring to import cocaine into the United States. See U.S. Dep’t of Justice Press Release, Son of the Former President of Honduras Sentenced to 24 Years in Prison for Conspiring to Import Cocaine into the United States (Sept. 5, 2017), at <https://www.justice.gov/usao-sdny/pr/son-former-president-honduras-sentenced-24-years-prison-conspiring-import-cocaine>.

¹ White House Press Release, Fact Sheet: Changes to U.S. Anti-Personnel Landmine Policy (June 21, 2022) at <https://www.whitehouse.gov/briefing-room/statements-releases/2022/06/21/fact-sheet-changes-to-u-s-anti-personnel-landmine-policy>; see White House Press Release, Statement by NSC Spokesperson Adrienne Watson on Changes to U.S. Anti-Personnel Landmine Policy (June 21, 2022), at <https://www.whitehouse.gov/briefing-room/statements-releases/2022/06/21/statement-by-nsc-spokesperson-adrienne-watson-on-changes-to-u-s-anti-personnel-landmine-policy>. Review of the policy began in April 2021. Its adoption fulfilled a campaign promise. John Ismay & Rick Gladstone, *Administration Decides It Is Keeping Land Mines in Arsenal, for Now*, N.Y. TIMES (Apr. 6, 2021), at <https://www.nytimes.com/2021/04/06/us/biden-land-mines.html>; Alex Ward, *6 Top 2020 Democrats Vow to Reverse Trump’s New Landmine Policy*, VOX (Feb. 6, 2020), at <https://www.vox.com/2020/2/3/21120684/2020-presidential-election-foreign-policy-landmines>. The announcement coincided with the inter-session meetings of the Ottawa Convention taking place in Geneva. Steven Costner, Deputy Director of the State Department’s Office of Weapons Removal and Abatement, took the floor to inform the meeting of the