

I. Introduction

This analysis document has been prepared by the Association for a More Just Society (ASJ, by its Spanish acronym), to explain the content, scope and effects of the sentence SCO-0189-2018RI (referred to as “Ruling”, “Judgement” or “Sentence” in the text of this document), rendered by the Constitutional Chamber¹ of the Supreme Court of Justice (2016-2023) of Honduras on May 29th, 2018, which responds to the Action of Unconstitutionality filed by the Attorney Juan Carlos Sánchez Cantillano on May 6th, 2018, in his position as legal representative of Geovanny Castellanos Deras, Jeremías Castos Andrade y José Napoleón Banegas², against the Legislative Decree No.23-2016 that approves the “*Convention between the Republic of Honduras and the Organization of American States (OAS), for the establishment of the Mission of Support Against the Corruption and Impunity in Honduras –MACCIH*” (from now on “MACCIH Convention”)³.

The purpose of this analysis is to make both the citizens of Honduras and the international community aware of how the ruling has affected the objectives and spirit of the MACCIH, as well as initiatives and actions in the past, present and future to combat corruption and impunity. In order to do this, this document is presented in four parts. The first describes the post-electoral context and corruption cases that surround the ruling SCO-0189-2018RI. The second presents the antecedents of the ruling through the action of unconstitutionality admitted by the Constitutional Branch of the Supreme Court on March 14th, 2018. The third provides a legal analysis of the reasons of the judgement, as well as its inconsistency with the contents of its preamble. The fourth part presents the effects and repercussions that the ruling can have in the rule of law, on the institutions associated with the MACCIH and the Honduran population’s expectations of justice.

II. Context

It is impossible to separate the ruling from the current post-electoral context of Honduras and the latest legal proceedings related to corruption that have been filed against politicians and senior officials in the last six months on behalf of the Special Fiscal Unit Against Impunity and Corruption (UFECIC, by its Spanish acronym) of the Attorney General’s Office (MP, by its Spanish acronym), in collaboration with the MACCIH.

As a result of the post-electoral crisis in the country, political power has shifted from highly concentrated to more fragmented – which is equally dangerous for the governance and stability of the country. Where power is more uncertain, those who hold that power will govern through short-term incentives and immediate fears. If we add to this the threat of being investigated or prosecuted for actions of corruption, losing the power they hold, the natural reactions will be impulsive and abrupt, without taking into consideration the effects and consequences of justice and the Rule of Law. This is exactly what has transpired in the last months in Honduras, where sectors of the political class see themselves threatened by the actions of the MP and the MACCIH. Among the emblematic cases that have produced these reactions, we find the following:

¹ This Division is comprised of the attorneys Edwin Ortez, Lidia Álvarez Sagastume, Jorge Alberto Zelaya Zaldaña, Reina Hércules and Jorge Serrano.

² These three citizens are associated with the Case of the Network of Congressmen, through the National Association of Producers and Industrialists of Neighborhoods and Districts of Honduras (ANPIBCH) that emitted the checks in favor of the five Congressmen charged. This case will be explained later in greater detail.

³ Decree emitted by the National Congress of the Republic on April 7th, 2017 and published in the Official Newspaper *La Gaceta* on April 23rd, 2017.

- **Network of Congressmen (Red de Diputados).** On December 11th, 2017, the MP, through the UFECIC, presented an indictment for the misappropriation of public funds (approximately 8.3 million lempiras or US\$346,000.00), against former members of Congress **Héctor Enrique Padilla Hernández, Audelia Rodríguez, Augusto Domingo Cruz Ascencio, Dennys Antonio Sánchez Fernández** and **Eleazar Alexander Juárez Saravia**⁴. According to the accusation of the UFECIC, public funds designated to social projects were diverted through the non-governmental organization (NGO) National Association of Producers and Industrialists of Neighborhoods and Districts of Honduras (ANPIBCH), managed by **Geovanny Castellanos Deras, Jeremías Castos Andrade** and **José Napoleón Banegas**. As a result of the indictment, the National Congress reformed the Budget Law to avoid the criminal investigation of the MP, until they first had the respective audit reports from the Supreme Audit Tribunal (TSC)⁵. As a result of this legislative action to block criminal prosecution (commonly referred to as the “Impunity Pact”), the case was set aside by Supreme Court Magistrate, Alma Guzman, and transferred to TSC where it will have 3 years to investigate.
- **The First Lady’s Cash Box.** On February 28th, 2018, the Technical Office of Criminal Investigation (ATIC, by its Spanish acronym), arrested the former first lady **Rosa Elena Bonilla**, who became the first person to be turned over to the recently created Criminal Corruption Court. The investigations highlighted that, since 2011, the official account of the former first lady was used to emit checks to third parties who would cash the checks, and return the money to Rosa Elena Bonilla. The former first lady’s personal account was also used to transfer public funds days before then-president Porfirio Lobo Sosa finished his term. Also involved in this scheme were Manuel Mauricio Mora Padilla (brother-in-law of the first lady), Saúl Fernando Escobar Puerto (the first lady’s private secretary), and Julio Jesús Galdámez Figueroa (employed by the Family Allowance Program-PRAF). The initial crimes were misappropriation of public funds, money laundering, and illicit association, for taking control of more than 16 million lempiras (about \$680,000). Nevertheless, on April 27th, 2018, the Criminal Court of Appeals revoked the crimes of money laundering and misappropriation of public funds, and the accusation turned to fraud and misappropriation. It is also worth mentioning that this case produced an attempt to reform the Asset Forfeiture Law as well as the Law against Money Laundering, in an attempt to prevent asset seizure of public functionaries before a conviction. However, President Juan Orlando Hernández vetoed the legislative decree of the reform on April 2nd, 2018⁶.
- **“Errata” Case –Impunity Pact:** On May 24th, 2018, the UFECIC accused members of Congress **José Tomás Zambrano** and **Román Villeda Aguilar**, of the crimes of abuse of authority, falsification of public documents and crimes against the form of government. The prosecution points out that while the initial trial against the five former Congressmen of the “Network of Congressmen” took place, the National Congress modified the Budget Law. In the modification, decrees different from that approved by the plenary were included, which would have made it impossible to initiate criminal investigations against the functionaries who manage public funds as long as the administrative investigation of TSC continues. After public

⁴ It is important to mention that the same attorney Juan Carlos Sánchez who presented the action of unconstitutionality Geovanny Castellanos Deras, Jeremías Castos Andrade and José Napoleón Banegas, is also legal representative of the five deputies. Source: El Heraldo, digital version. Date of Publication December 13, 2017, titled: *ONG que entregaba fondos a diputados, debió cerrarse en 2014*. Consulted in <https://goo.gl/rY852m>

⁵ On January 18th, 2018, the last legislature of the 2014-2018 term finalized, the National Congress approved the reform of articles 16 and 131-A of the Organic Budget Law. The reform limits the investigation and judicialization of the Public Ministry, until the Superior Court of Auditors emits an audit report of the case. Source: La Prensa, digital version. Story from January 24, 2018, titled “*Tribunal Superior de Cuentas tiene tres años para investigar “red de diputados”*”. Consulted in <https://goo.gl/Re8q1u>

⁶ See: Presidential veto, at <https://goo.gl/qVnsFZ>

outcry of the “Impunity Pact”, the Secretary of the National Congress emitted an “erratum” on January 25th, 2018, claiming that what had occurred was a product of a simple “error” and not of a premeditated act that caused jurisdictional consequences.

The above demonstrates a sequence of events, with the “Impunity Pact” as the epicenter, created as a reaction to the case of the “Network of Congressmen”, not only to avoid that the five former Congressmen charged would have to respond to justice, but also that any other member of Congress (acting or not) who has managed public funds since 2009 until the present would have to respond judicially. Without a doubt, the MP is a threat for corrupt networks of public servants that misappropriate public funds, and thus, should be neutralized, reducing their legal mandate and that of the UFECIC. MACCIH is in a similar position; despite being govern by international law and having a constituent Convention that established the mechanism of resolution of controversies with the Republic of Honduras, there is the intent to annul it completely. It is in this context and incentives that on March 6th, 2018 the action of unconstitutionality against the Convention MACCIH was presented in the Supreme Court.

III. Antecedents of the SCO-0189-2018RI Sentence

The action of unconstitutionality presented by the attorney Sánchez Cantillano on March 6th, 2018 was based on two reasons⁷: First, the **content** of the Convention, arguing that the international treaty **restricts the principle of sovereignty and independence** of the Republic of Honduras, through **attributions conceded to the MACCIH** that correspond exclusively to the Legislative Branch (PL), Judicial Branch (PJ), Attorney General (MP), General Procurator (PGR) and the Supreme Audit Tribunal (TSC). The second reason is the **procedure** in which the International Convention was approved, allegedly not respecting the **principle of legality** in the approval of an international convention which affects constitutional provisions. For the attorney Sánchez Cantillano, the special procedure of constitutional reform that implies the approval by two-thirds of Congress and the ratification in the subsequent legislature by the same number of votes, was not applied in the case of the MACCIH⁸.

On March 14th, 2018, the Constitutional Branch of the Supreme Court proceeded to admit the action of unconstitutionality, recognizing the **direct, personal, and legitimate interest** of Geovanny Castellanos Deras, Jeremías Castos Andrade and José Napoleón Banegas, as “citizens” affected in their rights by the approval of the MACCIH Convention. According to the arguments of the attorney Sánchez Cantillano, by conceding constitutional attributions to the MACCIH that corresponded to the public powers and institutions of Honduras, the regulatory environment and relations of the State will be modified, limiting the rights of those it represents. In the same way, the approval of the MACCIH caused powers and institutions of the State to be affected in their ability to meet their constitutional mandates related to assuring the “*enjoyment of justice, liberty, culture, and economic and social well-being*”⁹, as they are under MACCIH. Sánchez Cantillano also argued that Article 40 of the Constitution of Honduras establishes, as a responsibility of all Honduran citizens, the duty to “*fulfill, defend and ensure that the Constitution and the laws are met*”; and, by virtue, that those represented were legitimately affected by the violation of precepts are in the public interest. Additionally, he stated that the MACCIH generates immediate effects and jurisdictional consequences that “*undermine the*

⁷ It is appropriate to mention should be mentioned that the attorney Sánchez Cantillano, as well as being the legal representative of Geovanny Castellanos Deras, Jeremías Castos Andrade, and José Napoleón Banegas, is also the same defense attorney of members of the “Network of Congressmen” the deputies of the “Group of Deputies”.

⁸ In other words, the constitutional attributions conceded to the MACCIH, in addition to affecting the sovereignty of the State of Honduras and Independence of the public institutions associated with the MACCIH Convention, did not follow due legal course for its approval in the National Congress.

⁹ Article 1 of the Constitution of the Republic of Honduras

strength and stability of the Rule of Law that can give place to the disfiguration in the investigation and criminal persecution and in the application of the ruling of the courts.”

To emphasize the “legitimacy” of his clients, Sánchez Cantillano also remitted to Honduran jurisprudence that the Supreme Court through its Constitutional Branch, has previously emitted sentences responding to citizen accusations, such as the complaint of unconstitutionality presented against the Special Development Regions¹⁰, and that of the Law of the Judicial Career.

Before the admission of the Action of Unconstitutionality by the Constitutional Division, based on the jurisdictional explanation presented by Sánchez Cantillano, there are two large observations to take into consideration that demonstrate the inconsistency of the Constitutional Division:

1. Admitting the action of unconstitutionality, based on the argument that the approval of the MACCIH Convention by Congress automatically implied a limitation to the rights of the three clients of Sánchez Cantillano, without taking into consideration factual or material elements **implied an alteration in the jurisprudential precedents of the Supreme Court**. By allowing individuals to directly place an action of unconstitutionality against the MACCIH, without doing it through official entities (Attorney General or Ombudsman), as was their argument in the resolution from February 13th, 2018, in which they declared inadmissible the Action of Unconstitutionality presented by the **Association for a More Just Society (ASJ)**, against the legislative decree behind the Impunity Pact.
2. On January 31st, 2018 and February 2nd, 2018, the **National Anti-Corruption Council (CNA)** and the **Association for a More Just Society (ASJ)** presented actions of unconstitutionality against the Legislative Decree 141-2017, that reformed the Budget Law, interfering in the constitutional attribution that the Attorney General (MP) had to exercise criminal investigations on the use of public monies by members of Congress. Despite the fact that the legal representations of both organizations of civil society presented rigorous legal arguments (including constitutional provisions and international conventions) and factual evidence to demonstrate their direct, personal and legitimate interest, in addition to the necessary jurisprudence, neither action of unconstitutionality was admitted. As the previous point mentioned, the Constitutional Branch, without a legal or doctrinal argument, changed its jurisprudence, evidencing weakness in their role as the final and definite interpreter of the Constitution of the Republic.

On May 29th, 2018, the Constitutional Branch of the Supreme Court rendered a judgment, **declaring the Constitutionality of the Legislative Decree No.23-2016 that approved the MACCIH**. As can be seen in the subsequent section, though the sentence’s ruling does recognize that the MACCIH fits within the Honduran constitutional framework, some parts of the sentence preamble seek to regulate the scope and actions of the MACCIH and of the powers and public institutions associated with the MACCIH Convention.

IV. Legal scope Sentence SCO-0189-2018RI

1. **The Sentence is considered *extra petita* (beyond that which is sought)**. The action of unconstitutionality solicited by Sánchez Cantillano on March 6th, 2018, **only intends to declare the unconstitutionality of the MACCIH for reasons of content and form, and not because of institutional, procedural or operational aspects** related to relations between the MACCIH, the General Attorney or other state entities in the framework of the Constitution.

¹⁰ Decree 283-2010, ratified by Decree 4-2011; Decree 123-2011.

In this sense, the THIRD numeral of the ruling **exceeds itself in ordering the Attorney General Office (MP), the three branches of government and other state agencies**, to harmonize all documents (current or future) derived from the MACCIH Convention to that which is determined in the ruling of the Constitutional Branch. In the same way, in Recital No. 32, the Supreme Court urges MP **“to comply with the established parameters in the Ruling”**, in which they refer to the Mechanism of Understanding between the Organization of American States (OAS) and the Attorney General Office ¹¹.

2. **The reasons of the judgement (*ratio decidendi*) regulate the MACCIH Convention.** The rationale for the decision – the support of the judgment – establishes a framework for duties (limitations and prohibitions), specifically for the MACCIH, practically becoming a regulation of the MACCIH Convention. Below are the arguments that explain this affirmation.
- a) **Reason 3**, expresses that the reasons are accessories of the judgment, for which the ruling cannot be understood alone, without the arguments and reasoning that support the decision. If the Constitutional Branch **is the last interpreter of the Constitution of Honduras¹², but it is not entitled to regulate internal aspects of public institutions.** This last point, respecting the principle of separation of powers and the functional autonomy of the institutions, falls to each entity responsible of implementing the rules and regulation of their mandate.
 - b) **Reason 25**, established that *“the processes of training, oversight and analysis that the MACCIH performs on the proceedings of the accusatory and judiciary entities should be performed by distinct persons, with emphasis on criteria, in a way that the topics before the judiciary be treated in abstract, so that preferential treatment to those accused in judiciary and/or administrative processes is not possible...”*. This reason limits the MACCIH’s actions towards general topics and **not to collaborate in cases that are concrete or specific to the public interest** (e.g. investigations or emblematic cases of corruption). In consequence, the Court limits the assistance that Honduras can receive, through the active collaboration of the MACCIH. At the same time, it creates an obstacle for the effective combat against corruption and impunity.
 - c) **Reason 26**, establishes that *“...one cannot institutionally evaluate the alleged relevance of the emitted criteria on the elements of law and de facto given by the judges in specific processes; because the MACCIH has integrated itself in the institutions of the justice sector, both accusatory and judicial.”* Through this reasoning, **the Court prohibits MACCIH from evaluating the performance of judges and prosecutors**, in the view that it has presence in the Judicial Branch (PJ, by its Spanish acronym) and the Attorney General Office. It’s important to remember that since 2001, the **Center of Justice Studies of the Americas** (CEJA, by its Spanish acronym), affiliated with the OEA, evaluates the impact of the Procedural Penal Reform in Latin America, through indicators of performance that are applied to the PJ and the MP, as part of the penal justice system, with Honduras included in these exercises and reports since 2004¹³. At the same time, the **Monitoring Mechanism of the Inter-American Convention Against Corruption (MESICIC)**, also affiliated with the OEA, performs evaluations and emits recommendations that the Republic of Honduras and its institutions, including justice agencies, should implement as part of the fulfillment of

¹¹ The complete name is Interinstitutional Mechanism of Bilateral Cooperation between the Public Ministry and the Republic of Honduras and the General Secretary of the Organization of American States, through the Mission of Support Against Corruption and Impunity in Honduras.

¹² See: Article 74 of the Law of Constitutional Justice

¹³ Source: <http://www.cejamericas.org/areas-de-trabajo/reforma-a-la-justicia-penal/reformas-a-la-justicia-penal/informes#cuarta-etapa-2>

the Inter-American Convention Against Corruption (CICC)¹⁴. This reason, intends to prohibit the MACCIH from evaluating justice operators (justices and criminal attorneys), in addition to being contradictory to the precedents of the CEJA and the MESICIC, it is contradictory to the same objective that gave origin to the establishment of the MACCIH. That is to say, the necessity to have an external international entity that can evaluate, in an independent manner, state institutions that are fragile and vulnerable to corruption.

- d) **Reason 27** expresses the authority that the Judicial Branch (PJ) has in the naming of its judicial functionaries, assistants, and administrative personnel, who cannot be subject to external pressures. In the case of the monitoring of the processes of selection and naming, these should be performed through citizen oversight. It serves to remember that, in the selection process for the National Anticorruption Jurisdiction (JNA, by its Spanish acronym), the Supreme Court approved a series of rules and regulations responding to institutional commitments in the MACCIH Convention to formalize the participation and technical assistance of the MACCIH, among which are: *Agreement No. PCSJ-3-201613 “Designation of the Commission of Selection of Eligible Candidates for the Positions of Judges and Magistrates of the National Jurisdiction in Areas of Corruption”* and *Agreement No. PCSJ-15-2016 “Protocol for the selection and naming of the Secretaries, Recipients and Scribes of the Jurisdictional Bodies of the National Jurisdiction of Corruption”*. In this sense, through this reasoning, the Court seeks to exclude the recent past of the current CSJ, leaving clear that the MACCIH will not be able to accompany, monitor or technically assist in future processes of selection of judiciary officials. This exclusion leads to the risk of hindering and limiting the knowledge transfer, best practices, and the development of real administrative capacities in the Judicial Power, because one cannot forget the fiasco and corruption that existed with the failed Council of the Judiciary.
- e) **Reason 28** establishes “*that the assessments that the MACCIH can offer should regard the improvement of technical capacities and knowledge of regulatory, doctrinal and jurisprudential standards, national as well as international. In this sense, the certifications that the MACCIH performs should be separate processes among the accusatory entities [General] and the Judicial Branch, with distinct criteria and in respect to the guarantees of independence, in order to not limit rights like the duality of positions, contradiction, and due process*”. Through this rationale, the Constitutional Branch, **once again outlines regulations applicable to MACCIH**. Additionally, it seeks to confuse the functions of the MACCIH in areas of prevention and combatting corruption (article III of the MACCIH Convention), by showing that the technical assistance that it gives, is conducted in combination with judges and prosecutors at the same time and place. It should be noted that nowhere in the text of the MACCIH Convention is it mentioned that the technical assistance will be provided in a collective or joint manner. At the same time, it is public knowledge that this type of assistance has not been given, because it would imply different methodologies and techniques.

¹⁴ Source: <http://www.oas.org/juridico/spanish/hnd.htm>

- f) **Reason 32** establishes that the agreements FGR-001-2017¹⁵ and FGR-002-2017¹⁶; just as the mechanism of understanding between the OEA and the MP¹⁷, do not follow the standards that the Constitutional Branch recognized as valid. These agreements refer to the creation of the UFECIC and the profiles and vetting requirements of its personnel. In reference to the mechanism of understanding, it is known that the original intention of the parties was to work on the development of joint strategies, with the effect to strengthen the capacity to investigate and prosecute cases of grand corruption, knowledge-sharing and best practices of criminal prosecution, and personnel training. In no case do these aspects violate the Constitution as those who have presented to the judges the indictments are the prosecutors of the UFECIC/MP. From this, it can be deduced that in no moment subordination has existed between MACCIH and MP. Likewise, in this reasoning, the Court utilizes subjective terms that are not verifiable over those on which the decision to affirm is based: “...practice that is observed with the conformation of the suspected criminal action integrated between the Public Ministry and an international organism...” In using the word “suspected”, the Court incurs in subjectivity because it does not affirm that it was or was not that way.

V. Consequences and effects

Taking into account the context of the country, the cases of corruption that have opened against politicians and senior officials in the last months, the previous performance that the Constitutional Branch of the Supreme Court has had, and the inconsistencies of the abovementioned reasoning, one can see the **political nature** of the Ruling SCO-0189-2018RI, which undermines the same judicial independence and justifies with much more reason the presence of a MACCIH.

Just as was argued at the beginning, the action of unconstitutionality presented by the attorney Sánchez Cantillano in representation of Geovanny Castellanos Deras, Jeremías Castos Andrade and José Napoleón Banegas, associated with the case “Network of Congressmen”, should not be seen as an isolated action, but as part of a series of events and actions aimed to remove the new anticorruption institution that has been promoting MACCIH through the UFECIC and the anticorruption courts. Without a doubt, the results obtained and their potential to open more corruption cases implies a real, tangible, and true threat for the corrupt.

In legal terms, the overreach of the Constitutional Branch of the Supreme Court, has every purpose to enable the path towards more impunity. The defendants in the emblematic cases in which the MACCIH has collaborated could present nullifications and exceptions based on an interpretation of the judgements reasoning. This could result in these cases going nowhere, **the accused obtaining their liberty, without have to be judged again for the same crimes**. Therefore the Constitutional Branch actions can be constituent even to the crime of Abuse of Authority, taking into account the following effects of the Ruling SCO-0189-2018RI:

- It seeks to limit the functions and scope of the MACCIH as subject a public international law, taking into account that the MACCIH Convention already established a procedure for the solution of controversies in Article XVI.
- It provides the legal instruments for the defense in processes of investigation or open corruption cases before the Ruling; as well as in the future, to invoke exceptions to the law.

¹⁵ Agreement of creation of the UFECIC

¹⁶ Relative agreement to the Protocol of Certification, Selection and Naming of Candidates to integrate the UFECIC

¹⁷ The complete name is Inter-institutional Mechanism of Bilateral Cooperation between the Public Ministry of the Republic of Honduras and the General Secretary of the Organization of the American States, through the Mission of Support Against Corruption and Impunity in Honduras.

- Upon interpreting that the Convention is constitutional, with the limitations established in the reasoning of the judgment, any public official (elected or appointed) of an administrative or judicial entity will need to frame themselves within the indications contained in the sentence, under protection of what is established in article 321 of the Constitution of the Republic which says that “*Officials of the States do not have more power than what the law explicitly confers them. All acts executed outside of the law are null and implies responsibility*”.

In conclusion, for the Constitutional Branch, is it important to remember the motive that produced the establishment of the MACCIH in 2016. After the national indignation caused by the theft of many millions from the Honduran Institute of Social Security (IHSS) and a year of social mobilization and citizen demands for justice, an international body of prosecutors and anticorruption specialists was established to accompany and collaborate with public institutions that have been prone to being captured by corrupt politicians and organized crime. In 2018, two years later, this reality still persists, shown by the numerous corruption scandals that have taken place and the involvement of powerful figure in politics. In this sense, is it advisable that the Constitutional Branch of the Supreme Court clarifies the rendered sentence if it really intends to show itself as independent of external interference and respectful of the Rule of Law.