

**ORDER OF THE ACTING PRESIDENT OF THE
INTER-AMERICAN COURT OF HUMAN RIGHTS*
MARCH 24, 2010.**

**PROVISIONAL MEASURES PRESENTED BY
THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS
REGARDING THE REPUBLIC OF PERU**

WONG HO WING MATTER

HAVING SEEN:

1. The brief by the Inter-American Commission on Human Rights (hereinafter "the Inter-American Commission" or "the Commission") dated February 24, 2010, and its annexes submitting a request to the Inter-American Court of Human Rights (hereinafter "the Inter-American Court" or "the Court") for provisional measures under Article 63(2) of the American Convention on Human Rights (hereinafter "the American Convention" or "the Convention") and Article 27 of the Rules of Procedure of the Court (hereinafter "the Rules of Procedure"), requesting that the Court order the Republic of Peru (hereinafter "Peru" or "the State") to refrain from extraditing Mr. Wong Ho Wing to the People's Republic of China (hereinafter "China") until the bodies of the Inter-American system issue a final judgment on the complaint presented to the Inter-American Commission, in keeping with Article 44 of the Convention.

2. The note of February 26, 2010, in which, following the instructions of the Court's Acting President in this matter (hereinafter the "Acting President"), the Secretariat of the Court (hereinafter "the Secretariat") requested that the State submit the following information by March 3, 2010: a) comments on this request for provisional measures that it considers pertinent; b) a copy of the order of December 8, 2009, issued by the People's Supreme Court of the People's Republic of China, duly translated into Spanish, and c) any other documentation that it deems pertinent for the Court to consider the Inter-American Commission's request with all necessary information. Likewise, also following the Acting President's instructions, the Secretariat requested that the Commission submit the aforementioned order of the People's Supreme Court of the People's Republic of China, along with its observations on the implications of this ruling with regard to its request for provisional measures, by the deadline indicated.

* Judge Diego García-Sayán, of Peruvian nationality, recused himself from this matter, pursuant to Article 19 of the Statute and Article 21 of the Rules of Procedure of the Court, passed in the LXXXV Ordinary Period of Sessions held on November 16-28, 2009, and accepted by the Court. For this reason, Judge García-Sayán ceded the Presidency under the terms of Article 4(2) of the Rules of Procedure to the Vice President of the Court, Judge Leonardo A. Franco, who is the Acting President in this matter.

3. The brief of March 2, 2010, in which the State requested a deadline extension in order to present additional information and the comments required by the Acting President with regard to the request for provisional measures.

4. The brief of March 3, 2010, in which the Inter-American Commission submitted, in a timely fashion, the comments requested by the Acting President.

5. The note of March 3, 2010, note in which the Secretariat, following the instructions of the Acting President, granted the State the deadline extension it had requested, giving it until March 8, 2010. It also informed Peru that it had until that deadline to submit comments on the brief filed by the Commission on March 3, 2010.

6. The brief of March 5, 2010, in which the Commission presented additional information related to its request.

7. The brief and its annexes, of March 8, 2010, and received the following day, in which Peru submitted its comments and the requested documents on time (*supra* Having Seen 2 and 5).

8. The March 24, 2010, note in which the Secretariat sent the parties the briefs of the Inter-American Commission and the State, respectively dated March 5th and 8th, 2010, along with their corresponding annexes.

9. The alleged facts on which the request for provisional measures presented by the Commission is based, to wit:

a) On January 20, 2009, the Supreme Court of Justice of Peru (hereinafter "the Supreme Court" or "CSJP") granted a request by China to extradite Mr. Wong Ho Wing, a Chinese citizen who has been in detention since October 27, 2008. The request was based on the alleged commission of the crimes of smuggling, customs fraud, and bribery under current domestic Chinese law. Following this ruling, on January 21, 2009, Mr. Wong Ho Wing sent the Commission a request for provisional measures, given that the crimes for which he was to be extradited can, when considered aggravated, be punished with life in prison or the death penalty;

b) Mr. Wong Ho Wing's representative argued that the extradition procedure has not met all the legal requirements and has suffered from irregularities with regard to deadlines, the extradition hearing, defense attorney participation, and the participation of the Public Prosecutors. Likewise, the representative pointed to issues related to incomplete or erroneous translations that formed the basis of the Supreme Court's ruling. As for the merits of the case, the representative indicated that under legislation governing Peruvian criminal procedure, the Supreme Court must rule to reject the extradition, as the following are among the grounds for doing so: a) the minimum requirements of due process are not guaranteed, and b) the death penalty could be applicable and no guarantees that it will not be have been granted;

c) On January 27, 2009, the Commission requested information from the State on the situation at issue. In a response dated February 2, 2009, Peru indicated that there was no imminent risk to the life of Mr. Wong Ho Wing given that the extradition process is still ongoing and that, given that there were no guarantees that the death penalty would not be applied, the State would refrain from

granting the extradition. Also, on February 6, 2010, Mr. Wong Ho Wing informed the Commission that he had submitted a writ of *habeas corpus* against the Supreme Court's January 20, 2009, ruling. That same date, Peru filed additional information consisting of a letter dated February 2, 2009, sent by a consular official in China, indicating that there was no possibility that Mr. Wong Ho Wing would be punished with the death penalty or life in prison. At the same time, the State requested that the Commission reject the precautionary measure due to the filing of the aforementioned writ of *habeas corpus* and its effect of suspending the legal proceeding granted with it. On February 10, 2009, Mr. Wong Ho Wing said that with regard to the communication from Peru, the guarantee given by China is not very reliable given that a note from a consular authority is not binding for the State and that, considering the seriousness of the accusations made against him, the crime could indeed be punished with the death penalty;

d) On March 31, 2009, the Commission granted precautionary measures for the benefit of Mr. Wong Ho Wing based on information indicating that, under certain circumstances, the crime of smuggling or customs fraud - that is, the crime for which the extradition was requested - may lead to the death penalty. On that same date, the Commission accepted application number P-366-09 for processing. The application was presented by Mr. Wong Ho Wing on March 27, 2010. The complaint was related to the State's supposed failure to comply with its international obligations due to alleged irregularities in the extradition proceeding in Peru. The complaint alleged failure to meet due process standards and failure to provide guarantees that the death penalty would not be applied in the case of extradition, as required by domestic law;

e) On May 1, 2009, the State communicated to the Commission that the judicial authority had partially granted the writ of *habeas corpus* and nullified the January 20, 2009, Supreme Court ruling, meaning that court would have to issue a new ruling;

f) On January 27, 2010, the Supreme Court ruled *inter alia* to grant the request for extradition on charges of customs fee fraud and bribery, given that the formal and substantive requirements have been met. The Peruvian State said it would turn over the Chinese citizen on the condition that the competent Chinese authorities commit to not imposing the death penalty. The Supreme Court found the September 8, 2009, ruling by the Chinese People's Supreme Court relevant. That ruling stated that in the case of Mr. Wong Ho Wing's extradition, the death penalty would not be imposed. The Peruvian Supreme Court therefore concluded that there was no risk that the death penalty would be applied. Separately, the Court indicated that although the Inter-American Commission had made a request for precautionary measures, the Inter-American Court had not ordered provisional measures. The Supreme Court therefore found that "no order from a competent authority has been issued binding the State [...] to refrain from complying with the terms of the Extradition Treaty signed with the People's Republic of China," and

g) Mr. Wong Ho Wing provided information on a request for a preventative writ of *habeas corpus* against Executive Branch authorities who make the decision in the final instance of an extradition proceeding. The writ would order them to refrain from making a decision that would violate the rights of the potential beneficiary. The writ was not granted and the potential beneficiary was notified on March 2, 2010.

10. The Commission's arguments on which it based its request for provisional measures. Among other arguments, the Commission noted that:

a) The information found in the case file allows one to infer that if the crime of smuggling or fraud is sufficiently serious, the applicable punishment is life imprisonment or the death penalty. Consequently, this request seeks the same goal as the application presented before the Commission and to ensure the effectiveness of the final ruling issued in the Inter-American proceeding. Although the State has mentioned the existence of supposed guarantees that the death penalty will not be applied, this could be a subject relevant for an eventual ruling on the merits that this request seeks to safeguard. Also, despite the possibility that the potential beneficiary has not yet been convicted and sentenced to death, his extradition would submit him to the jurisdiction of a State that is outside the authority of the bodies of the Inter-American system, and

b) In its opinion, "while there is a debate over the possibility that Wong Ho Wing would be sentenced to death under the jurisdiction of a State in which the bodies of the Inter-American system would have no authority whatsoever, it is the responsibility of the bodies of this system to take a position that would allow for the preservation of his life and personal safety, as any other decision could result in irreparable damage." Thus the Commission considers that the requirements of Article 63(2) of the American Convention for moving this request forward have been met.

11. The State's comments on this request for provisional measures. Among other arguments, the State expressed that:

a) There is no extremely grave and urgent situation in this case where irreparable damage must be avoided, as the extradition proceeding is still ongoing before the Peruvian authorities. In this respect, the Order issued by the Criminal Chamber of the Supreme Court granting the extradition is advisory in nature, and it is up to the Government to make a decision on the extradition through a Supreme Order issued in accordance with the Council of Ministers once the Official Extradition and Sentence Transfer Commission - which is made up of the Minister of Justice and the Minister of Foreign Affairs - issues its final report. The process is therefore a political one, and an immediate execution of the extradition is not expected;

b) Peruvian law establishes that in cases of crimes punished by the death penalty in the State making the request, the only way the extradition can proceed is if that State provides a guarantee that it will not apply that punishment. Thus any extradition request over the commission of a crime that would result in a death penalty, where the State making the request does not guarantee that the death penalty will not be applied, will be rejected. In this case, the People's Supreme Court of China has, through an order of December 8, 2009, committed to not imposing the death penalty on Mr. Wong Ho Wing should he be extradited. Two other communications providing the same guarantee - one from the Consul and the other from the Ambassador - also exist. Therefore, in the opinion of the Peruvian State, this case includes adequate and multiple guarantees that the death penalty would not be applied to the potential beneficiary, and

c) The guarantees of due process recognized in the Convention have been respected at all times during the extradition process. Mr. Wong Ho Wing has made use of the mechanisms provided for under domestic Peruvian law to protect his rights. He has applied for various remedies, some of which were granted. Also, among other procedural guarantees, he has had legal defense counsel, a translator, and access to the case files. In this sense, the State highlighted that two requests for writs of *habeas corpus* submitted by Mr. Wong Ho Wing are still being processed. Likewise, he can appeal the denial of the third writ of *habeas corpus* he filed on February 9, 2010. With this, Mr. Wong Ho Wing is, with total freedom, using the constitutional protective mechanisms offered by the *habeas corpus* remedy before domestic courts to claim alleged violations of his rights.

CONSIDERING THAT:

1. Peru ratified the American Convention on July 28, 1978, and, in accordance with Article 62 of the Convention, recognized the contentious jurisdiction of the Court on January 21, 1981.

2. Article 63(2) of the American Convention holds that, “[i]n cases of extreme gravity and urgency, and when necessary to avoid irreparable damage to persons, the Court shall adopt such provisional measures as it deems pertinent in matters it has under consideration. With respect to a case not yet submitted to the Court, it may act at the request of the Commission.”

3. Article 27 of the Rules of Procedure of the Court holds that:

1. At any stage of proceedings involving cases of extreme gravity and urgency, and when necessary to avoid irreparable damage to persons, the Court may, on its own motion, order such provisional measures as it deems appropriate, pursuant to Article 63(2) of the Convention.

2. With respect to matters not yet submitted to it, the Court may act at the request of the Commission.

[..]

5. The Court, or if the Court is not sitting, the Presidency, upon considering that it is possible and necessary, may require the State, the Commission, or the representatives of the beneficiaries to provide information on a request for provisional measures before deciding on the measure requested.

6. If the Court is not sitting, the Presidency, in consultation with the Permanent Commission and, if possible, with the other Judges, shall call upon the State concerned to adopt such urgent measures as may be necessary to ensure the effectiveness of any provisional measures that may be ordered by the Court during its next period of sessions.

[...]

4. This request for provisional measures does not originate in a case before the Court. Rather, provisional measures have been requested in the framework of petition number P-366-09, being processed by the Inter-American Commission since March 31, 2009. The petition is currently in the admissibility stage. The Commission holds that it applied Article 30(4) of its Rules of Procedure then in force to the petition. The Article provides for shorter deadlines in exceptional situations.

5. The request for provisional measures refers to an extradition request presented to Peru by a State that is not party to the Inter-American System and that has allegedly formally expressed its commitment to refrain from applying the death penalty to Mr. Wong Ho Wing should he be extradited to said State. However, taking into account the nature of the matter at hand, and particularly, the legal right that could allegedly be affected, and considering that this request for provisional measures was submitted by the Inter-American Commission when the Court was not in session, the Acting President for this matter finds it pertinent to adopt this Order with the sole purpose of allowing the full Court to consider and deliberate on the Inter-American Commission's request during its LXXXVII Regular Period of Sessions, to be celebrated at the Court's seat from May 17th to 28th, 2010.

6. In virtue of the foregoing, the Acting President finds it necessary to adopt these urgent measures for a time period of three months. While these measures are in effect, the State must refrain from taking actions that could have irreparable effects with regard to Mr. Wong Ho Wing.

7. The adoption of this Order does not imply a ruling on the merits of the Inter-American Commission's request. By adopting these urgent measures, the Acting President is only guaranteeing that the Inter-American Court of Human Rights will be able to comply with its mandate in the Convention.

THEREFORE:

THE ACTING PRESIDENT OF THE INTER-AMERICAN COURT OF HUMAN RIGHTS,

in consultation with the other judges of the Court and by way of the authority conferred by Article 63(2) of the American Convention on Human Rights and Article 27 of the Rules of Procedure,

DECIDES TO:

1. Require the State to refrain from extraditing Mr. Wong Ho Wing as long as this request for provisional measures has not been resolved by the full Inter-American Court of Human Rights, in keeping with the provisions of Considering clauses 4 through 7.

2. Order that this matter be heard by the full Inter-American Court of Human Rights during its LXXXVII Ordinary Period of Sessions, to be held at the seat of the Court from May 17th to 28th, 2010.

3. Ask the Secretariat to notify the Inter-American Commission on Human Rights and the State of Peru of this Order.

Leonardo A. Franco
Acting President

Pablo Saavedra Alessandri
Secretary

So ordered,

Leonardo A. Franco
Acting President

Pablo Saavedra Alessandri
Secretary