

**ORDER OF THE
THE INTER-AMERICAN COURT OF HUMAN RIGHTS
OF MARCH 4, 2011**

PROVISIONAL MEASURES

WITH REGARD TO THE REPUBLIC OF PERU

CASE OF WONG HO WING

HAVING SEEN:

1. The order of the acting President of the Inter-American Court of Human Rights¹ (hereinafter “the Inter-American Court” or “the Court”) of March 24, 2010, and the orders of the Court of May 28 and November 26, 2010, in which it was decided, *inter alia*, to require the Republic of Peru (hereinafter “the State” or “Peru”) to abstain from extraditing Wong Ho Wing. In the last order the Court decided:

1. To convene the Inter-American Commission on Human Rights, the Republic of Peru and the legal representative of the beneficiary, to a public hearing to be held at the seat of the Inter-American Court of Human Rights during its next regular session, from February 21 to March 5, 2011, in order to receive the arguments of the parties on the request to extend the provisional measures, in accordance with the sixth considering paragraph of the [...] order. In due course, the Secretariat will advise the parties of the date and time of the public hearing.

2. To maintain the [...] provisional measures in force until March 31, 2011, in order to permit the public hearing requested by the State to be held.

3. To require the State, in accordance with the provisions of the [...] order, to abstain from extraditing Wong Ho Wing until March 31, 2011, in the terms of the order of May 28, 2010.

[...]

2. The brief of January 12, 2011, in which the representative of the beneficiary (hereinafter “the representative”) requested a copy of the request for a public hearing submitted by the State.

¹ Judge Diego García-Sayán, a Peruvian national, recused himself from hearing this matter, in keeping with Articles 19 of the Statute and 21 of the Court’s Rules of Procedure, and this was accepted by the Court. Consequently, Judge García-Sayán ceded the Presidency to the Vice President of the Court, Judge Leonardo A. Franco, acting President for this matter, under Article 4(2) of the Rules of Procedure.

3. The note of the Secretariat of the Inter-American Court (hereinafter “the Secretariat”) of January 13, 2011, in which, on the instructions of the acting President, it again forwarded the representative the briefs of November 22, 2010, of the Inter-American Commission on Human Rights (hereinafter “the Inter-American Commission” or “the Commission”) and of the State, together with a copy of the order of November 26, 2011.
4. The briefs of January 31, February 1 and 15, 2011, and their attachments, in which, *inter alia*, the State, the Commission and the representative, respectively, forwarded their accreditations for the public hearing.
5. The brief of February 24, 2011, and its attachments, in which the representative submitted observations and asked the Court to maintain the provisional measures.
6. The brief of February 24, 2011, in which the State accredited a deputy agent for the public hearing.
7. The public hearing on the provisional measures held on February 25, 2011, during the ninetieth regular session of the Inter-American Court,² the oral arguments of the parties, and the brief and attachments presented by the State on that occasion.
8. The brief of February 28, 2011, in which the State requested an extension of the time frame for presenting certain information required by the Court during the public hearing.
9. The communication of February 28, 2011, in which the Secretariat, on the instructions of the acting President of the Court, granted the State an extension of the time frame for forwarding the information requested.
10. The briefs of March 2, 2011, and their attachments, in which the State requested an additional extension of the time to present the information required by the Court during the public hearing, forwarded additional observations on various issues and, lastly, advised that “on February 25, [2011] the Chinese People’s Assembly had approved the abolishment of capital punishment for the offense of smuggling,” attaching a document in this regard.
11. The brief of March 3, 2011, and its attachment, in which the State sent additional observations regarding the said abolition of the death penalty.

CONSIDERING THAT:

² There appeared at this hearing: (a) for the Inter-American Commission: Paulo Sérgio Pinheiro, Commissioner, and Silvia Serrano Guzmán, legal adviser; (b) for the representatives: Luis Lamas Puccio and Chan Kin Mui, and (c) for the State: Delia Muñoz Muñoz and Ada Constantino.

1. Peru ratified the American Convention on Human Rights (hereinafter also “the American Convention” or “the Convention”) on July 28, 1978, and, pursuant to its Article 62, accepted the compulsory jurisdiction of the Court on January 21, 1981.

2. Article 63(2) of the American Convention establishes that “in 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.” This provision is, in turn, regulated by Article 27 of the Court’s Rules of Procedure.³

3. The State requested that these provisional measures be lifted “as there was no reason justifying the Commission’s request to extend them,” in the absence of the elements of extreme gravity, urgency and the need to avoid irreparable damage. It indicated, *inter alia*, that the element of urgency “had been eliminated by an action of the Commission itself,” because it had failed to issue a decision on merits in the proceedings before it on this matter within the time frame established by the Court in its order of May 28, 2010. The State indicated that the “Court should examine and rule on the guarantees for the life of Wong Ho Wing granted by the People’s Republic of China if he is extradited,” so as to be able to determine the existence of the elements required for provisional measures. In this regard, it asserted that, since it had not done this in its order of May 28, 2010, the Court had “violate[d] the guarantee of indicating the grounds for its orders, to which the State [...] has a right, [which could] give rise to a grave precedent of ensuring impunity for a person prosecuted for common offenses based on the unsupported argument of a risk to the life of the petitioner.” It added that the “insufficient grounds provided in the order [resulted in] a [decision] that limits the State’s exercise of its treaty-based rights and obligations [...], such as those derived from the Extradition Treaty [...] with the People’s Republic of China,” also violating its right to due process and the right of defense.

4. Peru also referred to a new guarantee offered by China, in addition to those previously indicated; according to this, it had “invite[d] the Peruvian State to intervene, in accordance with the undertakings made within the extradition procedure, to monitor both the trial and the execution of the corresponding judgment that could be handed down.” Furthermore, Peru indicated that it had a list of cases provided by the People’s Republic of China “in which, in the case of similar offenses for which the death penalty had been ordered, this had not been applied, and imprisonment had been imposed in all of them.” Peru advised that, although the State had ratified the American Convention and accepted the Court’s jurisdiction, it was also obliged to comply with the extradition treaty signed with China, “since the two instruments were not incompatible; but rather complementary.” Given that sufficient guarantees existed concerning the beneficiary’s life, the State was not failing to comply with the Convention if it extradited Wong Ho Wing in application of the said extradition treaty. Lastly, Peru indicated that, in application of the principle of representation or of administration of justice by representation, “the application of Peruvian

³ Rules of Procedure approved by the Court at its eighty-fifth regular session held from November 16 to 18, 2009.

criminal law for offenses committed outside national territory [...] arises as an alternative, if it is unable to hand over [Wong Ho Wing to China].”

5. The representative of the beneficiary informed the Court that he had presented “an application for [...] Wong Ho Wing to be tried in Peru, which [reveals that he and his client were not] trying to use the inter-American human rights system to protect illegal acts and to seek [...] impunity.” He reiterated that the extradition procedure “has been plagued with a series of grave irregularities,” including the fact that “the Chinese Government did not attach the pertinent article of the Criminal Code establishing the death penalty to the extradition request,” and indicated that “considerable political pressure [exists] that reveals the interference of the Executive Branch with the Judiciary throughout the extradition procedure.” He stated that “[t]he document shown by the [State was not credible] to be able to say [...] that, if Wong Ho Wing was extradited to China, the death penalty would not be applied.” He indicated that, as interested parties, they have been “completely excluded from the procedure, because they had never been informed of how the guarantees were presented and their content, [but rather] had been informed [of them] through information [...] provided by the Commission.” With regard to the new guarantee mentioned by the State, he indicated that “they had never received this new information.” He also indicated that “about 15 days previously, Wong Ho Wing had received a visit in the prison [...] where he is deprived of liberty [...] and was pressured by Chinese Embassy officials, who demanded that he agree to be extradited and that he waive the use of any means of defense.” Lastly, he observed that, if these measures were no longer in force, the State would “immediately extradite Wong Ho Wing and there would be no possibility of monitoring how [the extradition] would be implemented, and also, since the application of the death penalty was possible, the harm would be absolutely irreversible.”

6. The Inter-American Commission observed that “the situation that gave rise to the provisional measures has not changed and, consequently, [it] reiterate[d] all the arguments made during the proceedings before the Inter-American Court.” In addition, it indicated that, when ordering the provisional measures the Court was aware of most of the guarantees that the State referred to during the hearing and, despite this, it determined that the requirements for the adoption of measures had been met; while the analysis of the guarantees was a fundamental aspect when examining the merits of the case. In addition, it stressed that “the request was not unconditional, but rather in addition to protecting the beneficiary, it sought and continues seeking precisely to preserve the purpose of the petition and the effectiveness of an eventual decision of the organs of the inter-American system.” Regarding the elimination of the situation of urgency owing to the alleged failure to comply with the mandate issued in the order of the Court of May 28, 2010, the Commission considered “that the said order only contained a mandate for the Peruvian State,” which “consisted in abstaining from extraditing Wong Ho Wing until a specific date.”

7. In addition, the Inter-American Commission stated that the proceedings on the dispute “have been processed [...] promptly, balancing this promptness with compliance with the regulatory time frames, the adversarial principle, and due process of law for the parties.” It indicated that the “petition was received and three days later was forwarded to the State; whereas, according to practice and the volume of cases before the Commission, this usually takes two to three years.” In addition, it advised that “the case is in the initial

stages of the merits of the matter in which, in addition to the inherent complexity of the case, the Rules of Procedure establish different procedural scenarios, such as the request for more time by the parties, the initiation of a friendly settlement procedure, or the holding of a hearing on the merits.” In this way, “the Commission will continue processing the case as rapidly as possible and hopes to have all the substantive and procedural elements to be able to deliberate and approve a decision on the merits this year [...], taking into account the remaining sessions [of this organ].” It concluded by asking the Court to maintain these provisional measures because the need persists to ensure that an eventual decision of the organs of the system will be effective and in order to avoid actions that could make the situation irreparable.

8. The Court recalls that these provisional measures were granted at the request of the Inter-American Commission in the context of petition P-366-09. This petition was declared admissible by Report No. 151/10 of November 1, 2010, with regard to Articles 4 (Right to Life), 5 (Right to Humane Treatment), 7 (Right to Personal Liberty), 8 (Right to a Fair Trial) and 25 (Right to Judicial Protection) of the American Convention, in relation to Article 1(1) (Obligation to Respect Rights) thereof.

9. In addition, the Court also recalls that the adoption of these provisional measures was ordered only in order to “permit [the Commission] to examine and rule on petition P-366-09.” Furthermore, the Court emphasizes that the acting President for this matter convened a public hearing in order to receive the arguments of the parties on the pertinence of maintaining the provisional measures and on the request to extend them made by the Inter-American Commission.⁴ Consequently, in this order, the Court will not deal with the arguments of the parties that exceed the purpose defined opportunely or that are related to the merits of the dispute.

10. The Court reiterates that, regarding the preventive aspect, the object and purpose of these measures is to preserve the rights that are possibly at risk until the dispute is resolved. Their object and purpose are to ensure the integrity and effectiveness of the decision on merits and, thus, avoid harm to the rights in litigation, a situation that could impair or annul the usefulness of the final decision. Regarding the protective nature of the provisional measures, they represent a real jurisdictional guarantee of a preventive nature, because they protect human rights, insofar as they seek to avoid irreparable damage to persons.⁵

11. In relation to the argument presented by Peru that the Court failed to found its decision to adopt these measures and did not provide grounds for the existence of the

⁴ Cf. *Case of Wong Ho Wing*. Provisional measures with regard to the Republic of Peru. Order of the Inter-American Court of Human Rights of November 26, 2010, first operative paragraph.

⁵ Cf. *Case of the “La Nación” Newspaper*. Provisional measures with regard to Costa Rica. Order of the Inter-American Court of Human Rights of September 7, 2001, fourth considering paragraph; *Matter of Aragua Detention Center “Tocorón Prison.”* Provisional measures with regard to Venezuela. Order of the Inter-American Court of Human Rights of November 24, 2010, sixth considering paragraph, and *Matter of Alvarado Reyes et al.* Provisional measures with regard to México. Order of the Inter-American Court of Human Rights of November 26, 2010, fifth considering paragraph.

requirements established in the Convention, the Inter-American Court observes that this is merely a disagreement of the State with what was opportunely decided. Indeed, when adopting the provisional measures, the Court reasoned that the requirement of *extreme gravity* was present in this case, both in the preventive dimension and in the protective dimension of the measures. Thus, the adoption of these measures:

is based, in its protective and preventive dimension, on the rights involved; fundamentally, the right to life, embodied in Article 4 of the American Convention, owing to the risk arising from the possible application of the death penalty in the requesting State, when it has been denounced that the extradition process has not respected international law, particularly the judicial guarantees and judicial protection established in Articles 8 and 25 of the American Convention; as well as the possible harm of the right to petition established in Article 44 thereof. Indeed, the Court finds that the requisite of extreme gravity is satisfied in this matter with the determination *prima facie* of the inherent risk of extraditing anyone who alleges possible flaws in due process, when the said extradition may lead to the application of the death penalty in a State outside the inter-American system⁶.

12. Similarly, regarding the requirement of *urgency*, when adopting these provisional measures, the Court indicated that:

On January 27, 2010, the Supreme Court of Justice of Peru decided to declare that the extradition of [Wong Ho] Wing was admissible. Following this decision, the extradition process is in its final stage and the only matter pending, apart from possible appeals, is the decision of the Government, by means of a supreme decision issued with the agreement of the Council of Ministers, following the report of the Official Commission presided by the Ministry of Justice and composed of the Ministry of Foreign Affairs. [...] Thus, [Wong Ho] Wing could be extradited at any time.⁷

13. Lastly, with regard to the requirement of *irreparable damage*, in its order of May 28, 2010, the Court verified the existence of the said requirement in its preventive and protective dimension and concluded that it:

has been complied with, in its protective dimension, because of the risk of harm to the right to life owing to the possibility of an irremediable measure such as the death penalty. Indeed, the possible application of the death penalty entails the most extreme and irreversible situation. Regarding the preventive dimension, [Wong Ho] Wing's extradition would thwart compliance with an eventual decision of the organs of the system concerning the existence of a

⁶ *Matter of Wong Ho Wing*, Provisional measures with regard to the Republic of Peru. Order of the Inter-American Court of Human Rights de May 28, 2010, twelfth considering paragraph.

⁷ *Matter of Wong Ho Wing*, *supra* nota 6, thirteenth considering paragraph.

violation of Article 8 and 25 of the Convention. Indeed, if the examination of the petition lodged with the Commission leads to the conclusion that the alleged flaws in the extradition process truly existed, the damage caused could not be remedied. Thus, the right of petition embodied in Article 44 of the Convention would be affected irreversibly.⁸

14. Also, regarding the State's argument that the Court should have analyzed or verified the existence of the guarantees issued by the People's Republic of China and determine that the requirement for the provisional measures no longer existed, the Court recalls that it has already ruled in this regard when adopting these measures and affirmed that:

The analysis of the guarantees received by Peru is a question concerning the merits, related to compliance with the State's international obligation derived from Articles 4 and 1(1) of the Convention, not to subject anyone to the risk of the application of the death penalty via extradition. Furthermore, it is related to the formalities of due process that domestic law ensures in the extradition process. [...] Hence, assessment of the pertinence and appropriateness of the said guarantees, as well as of the alleged violations of the rights established in Articles 8 and 25 of the American Convention, corresponds to the examination of the merits of the case, which the Inter-American must eventually make in the petition lodged before it, and not by means of this provisional measures procedure.⁹

In the case of this request for provisional measures, the Court must define whether these requisites are met and consider only the State's obligations of a procedural nature as a party to the American Convention. To the contrary, on this occasion, the Court is not competent to rule on the compatibility of the extradition procedure with the Convention or on the alleged violations of [Wong Ho] Wing's judicial guarantees and protection. These aspects, including the analysis of the guarantees that Peru has that the death penalty will not be applied if [Wong Ho] Wing is extradited to China, are related to compliance with the obligation to protect and guarantee life [...]. These arguments can be debated by the petitioners and the State before the Inter-American Commission, according to the rules established in the Convention and in the Commission's Rules of Procedure¹⁰.

15. In addition, with regard to the status of the proceedings concerning petition P-366-09, the Court takes note of the information provided by the Inter-American Commission, that the matter is at the merits stage and that measures have been taken to process it promptly. It also observes that the Commission advised that it anticipates issuing the corresponding report on merits during the current year (*supra* considering paragraph 7).

⁸ *Matter of Wong Ho Wing, supra* nota 6, fourteenth considering paragraph.

⁹ *Matter of Wong Ho Wing, supra* nota 6, ninth considering paragraph.

¹⁰ *Matter of Wong Ho Wing, supra* nota 6, seventh considering paragraph.

16. From the information provided by the parties during the public hearing, the Court considers that the circumstances persist that opportunely justified the adoption of these provisional measures. Notwithstanding the foregoing, the Court observes that the State has requested more time in order to prepare a report on matters that were discussed during the public hearing and that, on March 2, 2011, it forwarded a brief in which it advised that “the Chinese People’s Assembly has approved the abolishment of the death penalty for the offense of smuggling ordinary merchandise” and, consequently, according to the State, there are no longer any reasons to maintain these provisional measures (*supra* tenth having seen paragraph).

17. Based on the above considerations, the Inter-American Court finds it appropriate to grant the State the extension requested so that it can conclude and forward to the Court the pending information. Furthermore, it is essential that the State provide the Court with official copies with the necessary certified translation of the updated description of the offenses and their respective punishments for the offenses of bribery and tax evasion for which the Supreme Court of Justice of Peru has considered that it was in order to extradite Wong Ho Wing. The State has until April 14, 2011, to forward this information.

18. In addition, the Court considers it essential to receive the observations of the representative of the beneficiary and the Inter-American Commission, particularly on the change in the law that had been made in the requesting State and its eventual effects on the implementation of these provisional measures and the requirements established in Article 63(2) of the American Convention. To this end, the representative and the Inter-American Commission will have two and four weeks, respectively, from receiving the State’s report indicated in the preceding considering paragraph.

19. Lastly, while the matter is decided by the organs of the inter-American system, Peru must continue taking the necessary measures in relation to Wong Ho Wing to avoid this becoming ineffective illusory, if he is eventually subject to extradition and the corresponding administration of justice in the requesting State.

THEREFORE:

THE INTER-AMERICAN COURT OF HUMAN RIGHTS,

in exercise of the authority conferred on it by Article 63(2) of the American Convention and Article 27 of its Rules of Procedure,

DECIDES:

1. To require the State, as established in this order, to abstain from extraditing Wong Ho Wing until July 15, 2011.

2. To require the State to forward to the Inter-American Court of Human Rights, by April 14, 2011, at the latest, the report and the documentation indicated in the seventeenth considering paragraph of this order.
3. To ask the representative of the beneficiary and the Inter-American Commission on Human Rights to present their observations on the report of the State mentioned in the preceding operative paragraph within two and four weeks, respectively, of receiving it.
4. To require the Secretariat to notify this order to the Inter-American Commission on Human Rights, the representative of the beneficiary, and the Republic of Peru.

Leonardo A. Franco
President

Manuel Ventura Robles

Margarette May Macaulay

Rhadys Abreu Blondet

Alberto Pérez Pérez

Eduardo Vio Grossi

Pablo Saavedra Alessandri
Secretary

So ordered,

Leonardo A. Franco
President

Pablo Saavedra Alessandri
Secretary