

**ORDER OF THE
INTER-AMERICAN COURT OF HUMAN RIGHTS***

OF APRIL 27, 2012

**REQUEST FOR PROVISIONAL MEASURES
WITH REGARD TO THE REPUBLIC OF PERU**

MATTER OF WONG HO WING

HAVING SEEN:

1. The order of the acting President of the Inter-American Court of Human Rights (hereinafter "the Inter-American Court" or "the Court") of March 24, 2010, as well as the orders of the Court of May 28 and November 26, 2010, and March 4 and July 1, 2011, whereby it decided, *inter alia*, to require the Republic of Peru (hereinafter also "the State" or "Peru") to abstain from extraditing Wong Ho Wing.
2. The order of October 10, 2011, whereby the Court decided to lift the provisional measures it had ordered.
3. The brief of March 2, 2012, and its attachments, in which the Inter-American Commission on Human Rights (hereinafter "the Inter-American Commission" or "the Commission") again requested provisional measures in favor of Wong Ho Wing. The Commission founded its request on the fact that, after the provisional measures had been lifted, it had received a series of briefs from the representative of the former beneficiary, indicating the existence of new facts that placed the latter at risk of extradition. The representative provided information on notes exchanged between different State entities that appeared to indicate that the extradition procedure was continuing and pending the final decision of the Executive, despite the decisions of the Constitutional Court. In addition, the Ministry of Justice had asked the Supreme Court of Justice to emit a "complementary advisory decision" on the extradition procedure.
4. The arguments of the Commission to justify its request for provisional measures relate to the fact that, eight months after the Constitutional Court issued the decisions ordering the Executive to abstain from extraditing Wong Ho Wing, those decisions have not resulted in terminating this procedure with a negative decision in the terms ordered by that Court. To the contrary, the Commission has received information from the State that it continued to await a decision on whether or not the extradition was in order, and affirmed categorically that, in its opinion, there was no risk that the death penalty would be imposed in this case. According to the Commission, this affirmation was inconsistent with the State's previous declarations to the effect that it was

* Judge Diego García-Sayán, a Peruvian national, recused himself from hearing this matter in accordance with Articles 19 of the Court's Statute and 19 of its Rules of Procedure. Accordingly, in keeping with Articles 4(2) and 5 of the Court's Rules of Procedure, Judge Manuel Ventura Robles, Vice President of the Court, replaced him as acting President with regard to this request for provisional measures.

complying scrupulously with the decision of the Constitutional Court. The Commission underscored the change in the State's position and that, furthermore, the Executive, alleging the existence of supposed "new facts," had asked the Supreme Court for a complementary advisory decision in the extradition procedure. It added that, in its presentations to the Commission, the State had recognized the possibility that the final decision in the extradition procedure could be favorable to the application made by the requesting State. Furthermore, regarding the State's arguments, the Commission indicated that the "new fact" that had been alleged, namely the amendment of the Chinese Criminal Code eliminating the death penalty for one of the crimes for which Wong Ho Wing was required, occurred more than a year ago and the State already knew about it when the Constitutional Court issued its decisions. The Inter-American Court was informed of this fact in February 2011, and the Commission had also ruled in this regard.

5. The note of March 2, 2012, in which the Secretariat of the Inter-American Court (hereinafter "the Secretariat"), on the instructions of the Court in plenary, asked the State to present, by March 22, 2012, at the latest, observations on the Inter-American Commission's request.

6. The brief of March 9, 2012, and its attachments, in which the Inter-American Commission forwarded additional information and indicated that the Ministry of Justice had continued to insist on the request for a "complementary advisory decision" from the Supreme Court of Justice, which had convened a hearing to be held on March 14, 2012. The Commission advised that this proceeding would be held in parallel to the rulings in the context of monitoring compliance with the judgments of the Constitutional Court, "establishing the immutability of the said rulings as regards the prohibition of extradition."

7. The note of March 12, 2012, in which the Secretariat, on the instructions of the acting President, forwarded the said additional information to the State and asked it to comment on the information provided by the Commission in the brief to be presented to the Court by the State on March 22, 2012.

8. The brief of March 22, 2012, and its attachments, in which the State forwarded information and its observations on the request for provisional measures presented by the Commission. In summary, Peru indicated that the situation of extreme gravity is not present in this matter owing to the elimination of the death penalty for the crime of smuggling ordinary goods, a derogation that would be applicable to Wong Ho Wing should he be extradited, so that his life was in no real or imminent danger. Furthermore, the requirement of urgency is not met either, because there is no imminent threat of irreparable harm, and also the requesting State has given satisfactory and repeated guarantees that the death penalty will not be applied. In view of these guarantees and the amendment of the Criminal Code, there is no probability that the death penalty will be applied. The Peruvian State indicated that the Court must assess the information it had presented demonstrating that the requirements for the adoption of the requested measures have not been met. In its current request, the Commission has not proved the concurrence of the necessary requirements for the adoption of the provisional measures.

9. The note of March 26, 2012, in which the Secretariat, on the instructions of the acting President, forwarded the State's report and granted the Commission until April 2, 2012, to forward observations on this report.

10. The briefs of April 2, 5 and 16, 2012, and the attachment to the latter, in which the Inter-American Commission, *inter alia*, forwarded its observations on the information provided by the State, as well as additional information on a decision of the Permanent Criminal Chamber of the Supreme Court of Justice. The Commission reiterated its concern owing to the change in the State's position before the organs of the inter-American system. In this regard, it recalled that, when the State asked the Court to lift the provisional measures, it did so on the undertaking to comply with the decisions of the Constitutional Court ordering that Wong Ho Wing must not be extradited. This took place months after the authorities were aware of the amendment to the Chinese Criminal Code, which is now argued as a "new fact." The State is now arguing that there is no danger of the application of the death penalty, which openly disregards the ruling of the Constitutional Court. This position of the Ministry of Justice reinterprets the Constitutional Court's decision ordering directly and specifically to abstain from extraditing Wong Ho Wing. Furthermore, the Commission observed that the State is insisting on the guarantees offered by the requesting State, an issue that was decided by the Inter-American Court in its first decision in relation to the provisional measures adopted previously in this matter, to the effect that it was not appropriate to analyze them in this proceeding, but rather they related to the merits of the matter. The Commission indicated that, in the absence of the State's undertaking to abide by the decision of the Constitutional Court, the grounds for lifting the provisional measures ceased to exist. Lastly, the Commission considered that the information provided by the State on the amendment of the Chinese Criminal Code "was insufficient to conclude categorically that there is no risk of the application of the death penalty." Among other aspects, the Commission indicated that the State had requested guarantees and translations piecemeal. The translation provided on the supposed beneficial retroactivity of this amendment is a cause for concern because the translation contains serious grammatical errors that make it difficult to understand the text, notwithstanding that, in any case, this analysis corresponds to the merits of the matter. Based on the above, the Commission reiterated its request of March 2, 2012, in its entirety.

11. In addition, in its brief of April 16, 2012, the Commission advised that, on March 14, 2012, the Permanent Criminal Chamber of the Supreme Court of Justice had rejected the request of the Ministry of Justice that it issue a "complementary advisory decision" indicating, in summary, that: (a) in the extradition procedure of Wong Ho Wing, both the ordinary and the constitutional jurisdiction had issued final rulings; (b) the Supreme Court of Justice had opportunely declared in order the request for the passive extradition of Wong Ho Wing with regard to the offenses of evasion of customs duties and bribery; (c) subsequently, the Constitutional Court had ordered the State, represented by the Executive, to abstain from extraditing this individual and urged the State to proceed in accordance with article 4 of the extradition treaty between Peru and the Peoples' Republic of China and, in an explanatory decision, had indicated that Peru should proceed in accordance with article 3 of the Criminal Code; (d) the Chamber of the Supreme Court had already delivered the respective ruling that was equivalent to an immutable judgment and that could not be amended through a so-called "complementary advisory decision"; (e) two final rulings existed, one of an advisory nature (of the Judiciary) and the other of a binding nature (of the Constitutional Court), which the Executive must obey, based on domestic law.

12. The Commission indicated that the said decision was relevant because: (a) it revealed that it had been the Ministry of Justice and Human Rights that asked the Supreme Court of Justice to issue a complementary advisory decision, as the Commission had stated in its request, but the State had contested; (b) the decision

establishes the *res judicata* and binding nature of the judgments of the Constitutional Court ordering the Executive to abstain from extraditing Wong Ho Wing; (c) the position of the Supreme Court of Justice appears to be contrary to the State's position before the Inter-American Court; the position of the Executive is in favor of the extradition, despite the rulings of the Constitutional Court analyzing the possible risk of the application of the death penalty, and (d) the new decision of the Supreme Court of Justice implies fulfillment of the requirement of extreme urgency, because the only element that remains pending is the decision of the Executive, which is discretionary, and the latter has indicated before the organs of the inter-American system that there is no risk of the death penalty, despite the concerns that have been expressed to the Executive and the absence of a final decision of the organs of the inter-American system. The Commission asked the Court to rule on the request for provisional measures as soon as possible, in order to avoid irreparable harm to Wong Ho Wing, as well as to ensure the practical effect of the decision that the Inter-American Commission will eventually adopt in this matter.

13. The note of April 18, 2012, in which the Secretariat, on the instructions of the acting President, asked Peru, by April 23, 2012, at the latest, to refer to the legal effects of the decision of the Permanent Criminal Chamber of the Supreme Court of Justice of March 14, 2012, with regard to: (a) the extradition procedure, in particular whether, following this decision, the only requirement pending under domestic law is the decision of the Executive; (b) the decisions of the Constitutional Court ordering that Wong Ho Wing must not be extradited, and (c) whether, under domestic law, the decisions of the Constitutional Court ordering that Wong Ho Wing must not be extradited are legally binding for the Executive and other State authorities.

CONSIDERING THAT:

1. Peru ratified the American Convention on Human Rights (hereinafter also "the American Convention" or "the Convention") on July 28, 1978, and, in accordance with its Article 62, accepted the binding jurisdiction of the Court on January 21, 1981.

2. Article 63(2) of the American Convention stipulates that in "cases of extreme gravity and urgency, and when necessary to avoid irreparable damage to persons," the Court may, in matters not yet submitted to its consideration, at the request of the Commission, order the provisional measures that it deems pertinent. This provision is, in turn, regulated in Article 27 of the Court's Rules of Procedure.¹

3. Article 63(2) of the Convention requires that, for the Court to be able to order provisional measures, three conditions must concur: (i) "extreme gravity"; (ii) "urgency" and (iii) that the purpose is to "avoid irreparable damage to persons." These three conditions must coexist and be present in any situation in which the Court is asked to intervene. In the same way, these three conditions must persist for the Court to maintain the protection ordered. If one of them has ceased to be valid, the Court must assess the pertinence of continuing the protection ordered.²

¹ Rules of Procedure approved by the Court at its eighty-fifth regular session held from November 16 to 28, 2009.

² Cf. *Case of De la Cruz Flores*. Request for provisional measures with regard to Peru. Order of the Inter-American Court of Human Rights of February 29, 2012, second considering paragraph.

4. On April 23, 2012, the time frame expired that had been granted to the State to forward its observations on the brief of April 16, 2012, in particular, on the legal effects of the decision of the Permanent Criminal Chamber of the Supreme Court of Justice in relation to the extradition procedure and the decisions of the Constitutional Court. At the time this order is issued, the Inter-American Court has not received from the State either these observations or a request for an extension of the time frame so that it can comply by submitting the information requested by the Court.

5. In its decision of March 14, 2012, the Permanent Criminal Chamber of the Supreme Court of Justice declared: (a) "purposeless" the holding of a complementary public hearing in the extradition procedure; (b) "purposeless, owing to the request being unfounded [*sustracción de la materia*]", the emission of [a] new advisory decision or 'complementary advisory decision' as the Ministry of Justice is seeking, and that the Executive must adopt the decision provided for by law"; (c) "the proceedings in the jurisdiction of the Supreme Court of the Republic of Peru had concluded" in relation to this extradition request. The grounds for this decision were as follows:

In these extradition proceedings, it appears that two jurisdictions, the ordinary and the constitutional, have already issued final rulings[;]

The Constitutional Court, in a judgment [...] of May 24, 2011, declared admissible the application for [*habeas corpus*] that has been filed and ordered the Peruvian State, represented by the Executive, to abstain from extraditing [...] Wong Ho Wing [and] urged [it to] proceed in accordance with article 4 of the Extradition Treaty between the Republic of Peru and the Peoples' Republic of China[;]

Likewise, it appears that, in an Explanatory Decision, the Constitutional Court [...], on June 9, 2011, clarified, at the request of the Attorney General's Office, the ruling in its judgment, indicating: "2. To urge the Peruvian State, represented by the Executive, to proceed in accordance with the provisions of article 3 of the Criminal Code[;]

This Supreme Chamber has already complied with its obligations by delivering the respective ruling, which is the equivalent of an immutable judgment and it cannot be amended by means of a so-called "complementary advisory decision"[;]

In this legal matter, there are [...] two final rulings, one of an advisory nature (of the Judiciary) and the other of a mandatory nature (of the Constitutional Court) that the Executive must comply with, taking into account the provisions of the law [...].

6. The foregoing reveals that the decision of the Constitutional Court ordering the domestic authorities not to extradite Wong Ho Wing, together with its clarification, has not been modified by any subsequently judicial ruling, and that they are binding for the Executive.

7. Nevertheless, in order to have all the elements needed to decide the request for provisional measures presented by the Inter-American Commission, the Court requires the State to confirm, by May 25, 2012, at the latest:

a) The legal effects of the decision of March 14, 2012, of the Permanent Criminal Chamber of the Supreme Court of Justice in relation to the extradition procedure and whether, following this decision, according to domestic law, the only requirement pending is the decision of the Executive;

b) The legal effects of the said decision in relation to the rulings of the Constitutional Court ordering that Wong Ho Wing should not be extradited, and

c) Whether, under domestic law, the ruling of the Constitutional Court and its clarification ordering that Wong Ho Wing must not be extradited are legally binding for the Executive and the other State authorities.

THEREFORE:

THE INTER-AMERICAN COURT OF HUMAN RIGHTS,

in exercise of its authority under Articles 63(2) of the American Convention and 27 of its Rules of Procedure,

DECIDES:

1. To require the State to forward the information requested by the Inter-American Court of Human Rights (*supra* seventh considering paragraph), by May 25, 2012, at the latest.
2. To require the Secretariat of the Court to notify this order to the Republic of Peru and the Inter-American Commission on Human Rights.

Manuel Ventura Robles
Acting President

Leonardo A. Franco

Margarette May Macaulay

Rhadys Abreu Blondet

Alberto Pérez Pérez

Eduardo Vio Grossi

Pablo Saavedra Alessandri
Secretary

So ordered,

Manuel Ventura Robles
Acting President

Pablo Saavedra Alessandri
Secretary