

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

OF JUNE 26, 2012

**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, in which it was 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, in which 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 the adoption of provisional measures in favor of Wong Ho Wing. The Commission founded its request on the fact that, following the lifting of the provisional measures, 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 letters exchanged between different State agencies that would indicate that the extradition procedure was still being processed and pending a final decision from the Executive, despite the rulings of the Constitutional Court. In addition, the Ministry of Justice had asked the Supreme Court of Justice to issue a "complementary advisory decision" on the extradition procedure.

4. The arguments used by the Commission to found its request for provisional measures refer, *inter alia*, to the fact that, more than eight months after the Constitutional Court had issued the rulings ordering the Executive to abstain from extraditing Wong Ho Wing, these rulings had still not had the effect of terminating the said procedure with a negative decision, as ordered by that court. On the contrary, the Commission had received information from the State that the decision on whether or not the extradition was in order remained pending, and that the State had declared

* 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(1) of its Rules of Procedure. Consequently, in accordance with Articles 4(2) and 5 of the Court's Rules of Procedure, Judge Manuel Ventura Robles, Vice President of the Court, became acting President in this request for provisional measures.

“categorically that there was no risk” that the death penalty would be applied in this case. The Commission considered that this statement was “inconsistent” with the previous declarations of the State that it was complying “scrupulously” with the Constitutional Court’s rulings. The Commission underlined the State’s changed position, and also that the Executive, arguing the existence of supposed “new facts,” had asked the Supreme Court for a complementary advisory decision in the extradition procedure. The Commission added that, in its presentations before the Commission, the State had acknowledged the possibility that the final decision in the extradition procedure could be favorable to the requesting State’s application. Furthermore, regarding the State’s arguments, the Commission indicated that the “new fact” that had been alleged – that is, the amendment of the Chinese Penal Code revoking the death penalty for one of the offenses for which Wong Ho Wing was wanted – dates from more than a year ago and that the State was aware of it at the time the Constitutional Court issued its rulings. It added that the Inter-American Court had been informed of this fact in February 2011, and the Commission has also provided observations concerning the effects of the amendment on the provisional measures in May 2011.

5. The notes of March 2, 12 and 26, 2012, in which the Secretariat of the Inter-American Court (hereinafter “the Secretariat”), on the instructions of the Court in plenary and of its acting President, asked the State to present observations on the Commission’s request, and the Inter-American Commission to present observations on the corresponding report sent by Peru. Also, the note of April 18, 2012, in which the Secretariat, on the instructions of the acting President, requested Peru, by April 23, 2012, at the latest, to provide information on the legal effects of the ruling of March 14, 2012, of the Permanent Criminal Chamber of the Supreme Court of Justice, as regards: (a) the extradition procedure, in particular whether, following this ruling, the only pending requirement under domestic law would be the decision of the Executive; (b) the rulings of the Constitutional Court ordering that Wong Ho Wing should not be extradited, and (c) whether, pursuant to domestic law, the rulings of the Constitutional Court ordering that Wong Ho Wing should not be extradited were legally binding for the Executive and other State authorities.

6. The briefs of March 9, April 5 and 16, May 4 and June 11, 2012, and their respective attachments, in which the Inter-American Commission submitted, *inter alia*, additional information and also its observations on the information provided by the State concerning the request for provisional measures.

7. The briefs of March 22 and May 25, 2012, and their attachments, in which the State forwarded information and its observations on the request for provisional measures presented by the Commission, and its answer to a request for information made by the Court (*infra* having seen paragraph 8).

8. The Order of the Court of April 27, 2012, in which, owing to the failure of Peru to forward the information requested (*supra* having seen paragraph 5), it required the State to forward information on:

- 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.

[...]

AND DECIDE[D]:

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.

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.

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.¹

4. The Court has indicated that provisional measures have two aspects: one preventive and the other protective.² The preventive aspect of provisional measures is related to the framework of international litigations. In this regard, these measures are designed to preserve the rights that are possibly at risk until the dispute has been decided. Their object and purpose are to ensure the integrity and effectiveness of the decision on merits and, in this way, avoid harm to the rights in dispute, a situation that could neutralize the practical effects of the final decision or render them useless. Thus, provisional measures permit the State concerned to comply with the final decision and, as appropriate, proceed to make the reparations ordered.³ Regarding the protective aspect of provisional measures, this Court has indicated that provisional measures

¹ Cf. *Case of Carpio Nicolle*. Provisional measures with regard to Guatemala. Order of the Court of July 6, 2009, fourteenth considering paragraph, and *Matter of González Medina and family*. Provisional measures with regard to Dominican Republic. Order of the Court of June 21, 2012, second considering paragraph.

² Cf. *Case of Herrera Ulloa v. Costa Rica* (“*La Nación*” Newspaper). Provisional measures with regard to Costa Rica. Order of the Court of September 7, 2001, fourth considering paragraph, and *Matter of Martínez Martínez et al.* Request for provisional measures with regard to Mexico. Order of the Court of March 1, 2012, fourth considering paragraph.

³ Cf. *Matter of El Rodeo I and El Rodeo II Capital Detention Center*. Provisional measures with regard to Venezuela. Order of the Court of February 8, 2008, seventh considering paragraph, and *Matter of Martínez Martínez et al.*, *supra* note 2, fourth considering paragraph.

become a real jurisdictional guarantee of a preventive nature because they protect human rights to the extent that they seek to avoid irreparable harm to persons.⁴

i) Arguments of the Inter-American Commission and of the State

5. Following its initial submission, the Inter-American Commission added that the Ministry of Justice had continued insisting on its request for a “complementary advisory decision” by the Supreme Court of Justice, a procedure that would be conducted in parallel to the decisions made in the context of monitoring compliance with the Constitutional Court’s judgments. The Commission reiterated its concern because of the change in Peru’s position before the organs of the inter-American system and, in this regard, recalled that, when the State asked the Court to lift the provisional measures, it did so based on the undertaking to comply with the Constitutional Court’s rulings that ordered that Wong Ho Wing should not be extradited. This occurred months after the authorities were aware of the amendment of the Chinese Penal Code, which they now argue as a “new fact.” The State is now arguing that there is no risk of the application of the death penalty, openly disregarding the rulings of the Constitutional Court. According to the Commission, this position of the Ministry of Justice “is a reinterpretation” of the Constitutional Court’s rulings that “directly and specifically ordered that Wong Ho Wing should not be extradited.” The Commission argued that “[i]n the absence of the undertaking to abide by the rulings of the Constitutional Court, the grounds for lifting the provisional measures no longer existed, and [the analysis of gravity, urgency and irreparability made in the Order of May 28, 2010,] was fully applicable to the actual circumstances of the extradition procedure.”

6. The Commission also stressed “that its opinion in favor of lifting the measures was based exclusively on the Peruvian State’s explicit declaration that it would comply with the rulings of the Constitutional Court, and not on the supposed amendment.” In addition, the Commission underscored that the State had requested that the petition be archived “arguing that, in compliance with the rulings of the Constitutional Court, the Executive was about to issue the final decision, denying the extradition.”

7. Furthermore, the Commission observed that the State was insisting on the guarantees offered by the requesting State, a matter that the Inter-American Court had decided in its first ruling concerning the provisional measures adopted previously in this matter, to the effect that it was not appropriate to analyze them during these proceedings, because they related to the merits of the matter. The Commission also considered that the information provided by the State about the amendment to the Chinese Penal Code (*infra* considering paragraph 12) “was insufficient to conclude categorically that there was no risk of the application of the death penalty.” In this regard, it explained that, since the State had requested guarantees and translations piecemeal, “it is not possible to understand clearly the offenses for which the extradition of Wong Ho Wing is being requested, their characteristics, and the punishments that could be imposed for each of them.” According to the Commission, the translation provided on “the supposed favorable retroactivity” of this amendment gives rise to concern, because “it contains serious grammatical errors that make it difficult to understand,” in addition to the fact that “it appears to regulate a situation other than that of the amendments”; apart from the fact that, in any case, the analysis of this point relates to the merits of the matter.

⁴ Cf. *Case of Herrera Ulloa v. Costa Rica* (“La Nación” Newspaper). *supra* note 4, fourth considering paragraph, and *Matter of Martínez Martínez et al.*, *supra* note 2, fourth considering paragraph.

8. 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” (*infra* considering paragraph **¡Error! No se encuentra el origen de la referencia.**). The Commission indicated that this decision was relevant because: (a) it reveals that it was the Ministry of Justice and Human Rights that had asked the Supreme Court of Justice to issue a complementary advisory decision, as the Commission stated in its request, and which the State had contested; (b) the ruling establishes the mandatory and *res judicata* nature of the judgments of the Constitutional Court ordering the Executive to abstain from extraditing Wong Ho Wing; (c) the Supreme Court of Justice’s position appears to contradict the position of the State before the Inter-American Court; the Executive’s position is in favor of the extradition, despite the rulings of the Constitutional Court that examined in detail the possible risk of the application of the death penalty, and (d) the new ruling of the Supreme Court of Justice implies compliance with the requirement of extreme urgency, since the only aspect that remains pending is the decision of the Executive, which is discretionary, and the latter has indicated to the organs of the inter-American system that there is no risk that the death penalty will be applied, despite the concerns raised and the absence of a final ruling by 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 effects of the decision that the Inter-American Commission will eventually adopt in this matter.

9. The Commission added that “the extradition procedure is at the top of the Executive’s agenda; that is, at the same stage at which the Inter-American Court – when granting the provisional measures in favor of Wong Ho Wing on May 28, 2010, - considered that it was an imminent situation and that, accordingly, the requirement of urgency was met.” The Commission indicated that, in addition to the request for a complementary advisory decision, which was decided in March 2012, the Executive also requested a reinterpretation “before the judicial authorities with competence in the execution of the Constitutional Court’s ruling, a mechanism that [...] has also been unsuccessful to date.” The State has not provided information “on the other procedural mechanisms that it was exploring to obtain a ruling that would allow the Executive to validate its position in the sense that there is no risk whatsoever of the application of the death penalty.”

10. The Commission reiterated that “the rulings of the Constitutional Court refer not only to the guarantees in this specific case, but also to a series of elements related to the context and the legal framework in China – for example, the application of the death penalty as a State secret,” the massive application of the death penalty, and the lack of access to information on the application of the death penalty in China. The Commission also indicated that all the aspects relating to the guarantees granted by China, their assessment, the context, the applicable legal framework, the supposed repeal of the death penalty, the rulings of the Constitutional Court and compliance with them, must be assessed by the Inter-American Commission in its decision on the merits of this matter.” It indicated that it was unable to rule in detail on these points, because “this would constitute a prejudgment and would exceed the purpose of this mechanism.” In addition, it recalled that “[i]f Wong Ho Wing is extradited, an eventual decision [on the merits of the matter] in favor of the arguments of the petitioner in this case would have no practical effects.” Lastly, the Commission reiterated that this matter has been processed “with the promptness required by the situation,” that it had brought to bear the pertinent regulatory mechanisms to expedite a final decision in the

matter, which "is [...] at the merits stage as case No. 12,794," and advised that, on March 26, 2012, it had held a public hearing on the merits of the case.

11. Regarding the Commission's request for provisional measures, Peru indicated that a situation of extreme gravity did not exist in the instant case, owing to the repeal of the death penalty for the offense of smuggling ordinary goods, and that this repeal would apply to Wong Ho Wing if he was extradited, so that there was no real and imminent danger to his life. In addition, the requirement of urgency was not met, "because there was no imminent risk of irreparable harm," owing to the said repeal, in addition to the "adequate and reiterated guarantees that the death penalty would not be applied" given by the requesting State. It asserted that, based on these guarantees and the amendment to the Chinese Penal Code, "there is no reasonable probability that the death penalty will be applied." It indicated that the Court should assess the information presented by the State, as well as the guarantees that the death penalty would not be applied given by the requesting State, which reveal that the requirements to adopt the requested measures are not met. It indicated that, in its request, the Commission had not proved the concurrence of the requirements for the adoption of the provisional measures.

12. With its brief, the State presented, *inter alia*, an official translation of the Eighth Amendment to the Chinese Penal Code, as well as the official translation of article 12 of the said code and the official translation of a "Clarification" issued by the Supreme People's Court of the Peoples' Republic of China in which, in addition to recalling the undertaking it had made not to apply the death penalty, it indicated that the Eighth Amendment would be applicable to the case of Wong Ho Wing. In addition, Peru advised that there was a "'new fact' [which] consisted in the original document of the Eighth Amendment of the Chinese Penal Code modifying the first paragraph of article 153 of the Penal Code; this amendment was approved on February 25, 2011, and entered into force on May 1, 2011"; this document proved the repeal of the death penalty for the offense of smuggling ordinary goods, one of the offenses for which the extradition of Wong Ho Wing was requested. Peru indicated that the said information had been forwarded to the Supreme Court of Justice which had "communicated this situation to the Ministry of Justice, indicating the need to issue a complementary advisory decision on this 'new fact' and others relating to the implications of the execution of the judgment of the Peruvian Constitutional Court in relation to the offenses that involve the risk of the application of the death penalty" in the case of Wong Ho Wing.

13. In addition, the State indicated that the defense of Wong Ho Wing was "not addressed at defending the right to life, but to obtaining the release of this person subject to extradition," and that the intention of the petitioner's representative "is that his client evade the action of justice seeking impunity, using the inter-American system for the protection of human rights inappropriately."

14. Peru also affirmed that the Commission had not identified the flaws in due process or how they were related to the risk to the right to life and that, moreover, any flaws that might have existed in the initial processing of the extradition procedure had been resolved in the domestic sphere. Likewise, the State indicated that the Commission had not identified the facts that allow it to affirm that, "in any case," the extradition involved a risk to life for the person subject to extradition, despite the guarantees and the said repeal of the death penalty. Peru underscored that, in addition, the purpose of both the original petition, and the request for provisional

measures was to protect the right to life of Wong Ho Wing and not to prevent his extradition.

15. Peru recalled that the Inter-American Court had not considered the information on the repeal of the death penalty previously owing to the “supposed absence of [evidentiary] requirements” so that the documents provided by Peru on this occasion, which had been forwarded by the requesting State, were “intended to overcome the formal objections and prove that there was no risk whatsoever of the application of the death penalty” to Wong Ho Wing. The State affirmed that the Court should rule on these documents in order to decide whether there was a risk of the application of the death penalty in this case, without delaying its decision on their implications while waiting for the Commission to analyze the merits, which could take several years and would maintain Wong Ho Wing in a situation of legal uncertainty.

16. Regarding the Constitutional Court’s ruling ordering that Wong Ho Wing should not be extradited, Peru indicated that this decision “merely ruled on a supposed risk of application of the death penalty” and did not take into account the Supreme Court’s declaration of admissibility with regard to the offense of bribery, which had never been punished with the death penalty.

17. The State also reiterated that it had to comply with other international obligations, such as those included in the Inter-American Convention against Corruption, the United Nations Convention against Corruption, and the extradition treaty with the Peoples’ Republic of China, which established that “the only reasonable justification [not to extradite ...] would be an explicit jurisdictional mandate that [...] prevents this.” The State argued that the application of these treaties is not incompatible with the American Convention, but rather complementary to it.

18. In response to the questions posed by the Court regarding the recent decision of the Permanent Criminal Chamber of the Supreme Court of Justice (*supra* having seen paragraphs 5 and 8), the State argued that this decision did not change the procedure or “give rise to any effects in relation to the rulings of the Constitutional Court,” so that the Advisory Decision of the Supreme Court declaring the extradition request admissible based on the offenses of customs tax evasion and bribery, conditional on the guarantees of the Peoples’ Republic of China not to impose the death penalty on him continued to be valid. It also argued that the Supreme Court had not ruled on the new fact but had “merely clarified that it was not appropriate for it to deliver an additional ruling on the issues within its jurisdiction in relation to the extradition of Wong Ho Wing.” The State indicated that “the jurisdictional stage of the extradition procedure has terminated.” However, since the extradition procedure has been related to and affected by other jurisdictional proceedings in the domestic and the international spheres, the Executive has taken measures that allow it to establish, “with the greatest possible margin of safety,” the real content of these mandates in order to comply with its treaty-based obligations. In this regard, it added that the Executive “is in a position to take its decision; nevertheless, it is exhausting the formal and legal mechanisms to determine explicitly and certainly the margins within which its decision can be taken, without this being said to unduly affect, disobey or interpret the mandates of the jurisdictional organs that have issued them.”

19. In this regard, the State affirmed that it had considered it desirable to exhaust all the mechanisms to obtain one of two rulings from the jurisdictional organs: (a) a decision explicitly confirming that, with the elimination of the risk of the application of the death penalty, the extradition can be evaluated, either with the guarantees

provided or for the offense that was never punished with the death penalty, or (b) "a ruling that explicitly establishes that the person subject to extradition has obtained a mandate of impunity that protects him from prosecution, irrespective of whether or not his life is in danger." In this regard, the State indicated that the binding nature of the Constitutional Court's rulings does not mean that "the way in which [its] mandate must be executed is the one [...] proposed by Wong Ho Wing's defense counsel," according to which the Constitutional Court had prohibited any possibility of extradition.

20. Lastly, the State forwarded information obtained from newspaper articles on the extradition of a Chinese citizen from Canada, "who was required [...] for the same offenses as Wong Ho Wing," indicating that the offenses were "smuggling and bribery." Peru asked the Court to assess positively "that the punishment of the death penalty for the said person, also accused of one of the offenses attributed to [Wong Ho Wing], has not been considered. Based on the foregoing, it asked that the request of the Inter-American Commission be declared inadmissible.

ii) Considerations of the Court

21. The Court recalls that these provisional measures were granted on May 28, 2010, at the request of the Inter-American Commission in the context of petition P-366-09,⁵ in view of the *prima facie* threat of a risk inherent in the extradition of a person, which alleged possible flaws in due process, because the said extradition could lead to the application of the death penalty in a State outside the inter-American system. At that time, the extradition procedure was in its final stage, after the Supreme Court of Justice of Peru had declared that the extradition of Wong Ho Wing was admissible, and the only pending element was the decision of the Executive, which could have occurred at any moment. The adoption of the measures was ordered and then maintained by this Court only in order "to allow [the Inter-American Commission on Human Rights] to examine and rule on petition P-366-09 filed before that organ."⁶

22. Subsequently, on October 10, 2011, the Inter-American Court decided to lift the measures it had ordered considering that the Constitutional Court of Peru had "ordered the Peruvian State, represented by the Executive, to abstain from extraditing Wong Ho Wing to the Peoples' Republic of China" and that it should proceed to try him in Peru. The Inter-American Court took into consideration the State's request to lift the measures and the agreement of the Inter-American Commission since the said rulings of the Constitutional Court "would eliminate juridically the possibility of the State of Peru deciding to extradite Wong Ho Wing to the Peoples' Republic of China."⁷ On that

⁵ The petition was declared admissible on November 1, 2010, by Report No. 151/10 and 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) of this treaty. *Matter of Wong Ho Wing*. Provisional measures with regard to Peru. Order of the acting President of the Court of March 24, 2010 fourth considering paragraph; *Matter of Wong Ho Wing*. Provisional measures with regard to Peru. Order of the Court of May 28, 2010, fifth considering paragraph; *Matter of Wong Ho Wing*. Provisional measures with regard to Peru. Order of the Court of November 26, 2010, fourth considering paragraph; *Matter of Wong Ho Wing*. Provisional measures with regard to Peru. Order of the Court of March 4, 2011, eighth and ninth considering paragraphs; *Matter of Wong Ho Wing*. Provisional measures with regard to Peru. Order of the Court of July 1, 2011, eleventh considering paragraph, and *Matter of Wong Ho Wing*. Provisional measures with regard to Peru. Order of the Court of October 10, 2011, fifth considering paragraph

⁶ *Matter of Wong Ho Wing*. Order of the Court of May 28, 2010, *supra* note ¡Error! Marcador no definido., twelfth, thirteenth and fifteenth considering paragraphs and first operative paragraph.

⁷ *Matter of Wong Ho Wing*. Order of the Court of October 10, 2011, *supra* note ¡Error! Marcador no

occasion, the State had indicated that it requested the lifting of the measures because the Constitutional Court's ruling could not be appealed and, consequently, there was "no risk of the application of the death penalty to the Chinese citizen Wong Ho Wing, since the said person will not be extradited by the Peruvian State to the Peoples' Republic of China in compliance with the provisions of the judgment of the Constitutional Court."⁸

23. The Court observes that, contrary to its assertions on that occasion, the State now alleges that the Advisory Decision of the Supreme Court of Justice declaring the extradition request admissible "remains in force" and that the Executive could take a decision along these lines, but "is exhausting the formal and legal mechanisms to determine explicitly and certainly the margins within which its decision can be taken" (*supra* considering paragraph 18). Therefore, the Court notes that, following the lifting of the measures, the State became uncertain about the possibility of extraditing Wong Ho Wing and the scope and interpretation that it should give to the rulings of its own domestic courts in this regard.

24. In this regard, on February 20, 2012, the Superior Court of Justice of Lima decided an appeal filed by the Ministry of Justice in which the latter requested "clarification of the execution of the judgment delivered by [the Constitutional Court]," taking into account that "the possibility of issuing [a] ruling for the offense that is not punished with the death penalty is not excluded" and that it had not taken into consideration the existence of "a new fact" consisting in the repeal of the death penalty for one of the offenses notified. The Superior Court of Justice of Lima declared the petition inadmissible, considering that:

The content of a judgment cannot be changed, unless this is based on the exceptions allowed by law [...]; also [...] only the literal meaning is admitted to interpret a final and enforceable judgment; consequently, it is not possible to examine any "new fact" [...]; furthermore, taking into account that the law does not allow this possibility, then, based on this formal reason alone, the request is inappropriate and should be rejected; if we add to the above the validity of the principle "that it is not possible to do indirectly what the law prohibits doing directly," we must state that it is not admissible to "reduce" or "expand" the effects of a final judgment[.]

25. In addition, on March 14, 2012, the Permanent Criminal Chamber of the Supreme Court of Justice ruled on another request by the Executive, this time for the said court to issue a "complementary advisory decision" in the extradition procedure taking into account that, on May 1, 2011, "the death penalty for the offense of smuggling ordinary goods, of which Wong Ho Wing is accused, had been repealed" and other facts "relating to the implications of the execution of the Constitutional Court's judgment in relation to the offenses that entail the risk of the death penalty." 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," and (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:

definido., sixth, eighth and tenth considering paragraphs.

⁸ Report No. 410-2011-JUS/PPES presented by the State on August 4, 2011 (provisional measures file, Tome IV, folios 1329 and 1331).

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 [...] two final judgments already exist, 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 [...].

26. The above reveals that the Constitutional Court's ruling ordering the domestic authorities not to extradite Wong Ho Wing, and its clarification, have not been modified by a subsequent judicial decision and that they are binding for the Executive. However, the State has asserted before the Court that it is not clear about the mandates of the domestic jurisdictional organs and that there is another possible interpretation of the Constitutional Court's ruling; basically that the extradition is admissible insofar as there is no risk to the life of Wong Ho Wing because one of the offenses he is accused of does not carry the death penalty while, for the other offense, this penalty has been repealed.

27. In addition to the uncertainty expressed by the State regarding the applicable criteria, Peru also argued that, at the present time, the requirements of extreme gravity, urgency and risk of irreparable harm cannot be verified in relation to the extradition of Wong Ho Wing, owing to the repeal of the death penalty, the Eighth Amendment to the Chinese Penal Code and its article 12, and the guarantees given by the Peoples' Republic of China that the death penalty will not be applied to the proposed beneficiary.

28. Regarding the repeal of the death penalty, the Court recalls that it had been advised in the past that the requesting State had repealed the death penalty for one of the offenses for which Wong Ho Wing was required. Indeed, the Court recalls that, on March 2, 2011, Peru advised this Court that, "on February 25, [2011,] the Chinese People's Assembly had approved the repeal of the death penalty for the offense of smuggling," attaching a document in this regard.⁹ The note that advised the entry into force of this reform was presented by Peru both to the domestic courts and to this Court as a "new fact," on which it asked the Inter-American Court to rule.

⁹ Cf. *Matter of Wong Ho Wing*. Order of the Court of March 4, 2011, *supra* note **¡Error! Marcador no definido.**, tenth having seen paragraph.

29. In its Order of July 1, 2011, the Court assessed positively the presentation of the information and documentation forwarded by the State on the alleged normative amendment that had occurred in the Peoples' Republic of China. However, it observed that, at that time, it did not have an official text reflecting the repeal of the death penalty for the offense of smuggling ordinary goods in China.¹⁰ In addition, the Court did not have sufficient information on the entry into force of this amendment, whether it would be applicable to this case, and the specific eventual effects in relation to Wong Ho Wing.¹¹

30. The Court takes note of the documentation provided by Peru as a result of this request and observes that it would allow several of the obstacles previously indicated to be overcome, because it includes an official translation of the Eighth Amendment of the Chinese Penal Code and of article 12 of the code. The Court observes that this amendment did in fact repeal the death penalty for the offense of smuggling goods and objects, which is one of the offenses for which the proposed beneficiary's extradition is requested. However, the Court also notes that the official translation of article 12 forwarded by the State does not allow the Court to be certain whether this amendment would be applicable to the case of Wong Ho Wing.

31. In addition, the Court considers that the exact determination and clarification of whether the said amendment to the Penal Code will be applicable in the eventual proceedings against Wong Ho Wing in the requesting State calls for an examination of the merits of the facts, the evidence provided, and the legal situation reported, which exceeds the arguments of the State and the information in the body of evidence. Hence, it constitutes an analysis that is inappropriate in the proceedings on provisional measures. This analysis is one of the issues that must be considered during the examination of the dispute pending before the Inter-American Commission on Human Rights.

32. The Court notes that the State has forwarded an official translation of a "Clarification concerning the cases to which the Eighth Amendment to the Penal Code is applicable," issued by the Supreme Court of the Peoples' Republic of China, which indicates that, according to the said article 12, "the Eighth Amendment will be applied in the case [of Wong Ho Wing]" and reiterated "the commitment made by the Supreme Court of the Peoples' Republic of China not to apply the death penalty [to the proposed beneficiary]. The Court assesses positively the existence of the guarantees presented and does not doubt the good faith of Peru and of the Peoples' Republic of China with regard to the said documents. Nevertheless, the Court recalls that, as of its first Order in this matter, it had ruled on the alleged guarantees issued by the People's Republic of China, and then reiterated that:

The analysis of the guarantees received by Peru is a question of 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, by

¹⁰ On that occasion, the Court did not receive an official copy of the Eighth Amendment of the Chinese Penal Code that had been approved on February 25, 2011, by the Peoples' National Assembly of that country, but rather a copy in Chinese and in Spanish, of the articles of the said Penal Code with the wording prior to the amendment, and with the parts that had supposedly been repealed underlined in the text with the indication "the content underlined has been repealed by the new amendment to the Chinese Penal Code" in brackets. *Cf. Matter of Wong Ho Wing*. Order of the Court of July 1, 2011, *supra* note **¡Error! Marcador no definido.**, Fourteenth considering paragraph.

¹¹ *Cf. Matter of Wong Ho Wing*. Order of the Court of July 1, 2011, *supra* note **¡Error! Marcador no definido.**, Fourteenth considering paragraph.

way of extradition. In addition, it is related to the formalities of due process ensured by domestic law in the extradition procedure. Therefore, the assessment of the pertinence and aptness of the said guarantees, as well as of the alleged violations of the rights recognized in Articles 8 and 25 of the American Convention corresponds to the examination of the merits of the case that the Inter-American Commission must eventually make in the petition before it, and not to this proceeding on provisional measures.¹²

33. As this Court indicated in its Order of May 2010,¹³ in response to a request for provisional measures, the Court must consider only the procedural obligations of the State as a party to the American Convention; accordingly, the Court is not competent to rule on the compatibility of the extradition procedure with the Convention or the alleged violations of the judicial guarantees and protection of Wong Ho Wing. These aspects, including the analysis of the guarantees that have been given to Peru 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 ensure life. The same can be said of the determination of facts, assessment of the evidence and decision on merits concerning the application of the said legislative amendment to this specific case. These arguments can be debated by the petitioners and the State before the Inter-American Commission, in accordance with the rules established in the Convention and in the Rules of Procedure of the said organ.

34. In addition, regarding compliance with the requirements for granting the requested provisional measures, the Court recalls that, when it adopted the provisional measures in this matter, it reasoned that the requirement of *extreme gravity* existed in this case, in both the preventive and the protective dimensions of the measures. Thus, the adoption of these measures was:

Based, in its protective and preventive dimensions, 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 procedure 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 system.¹⁴

35. Similarly, with regard to the requirement of *urgency*, when adopting these provisional measures, the Court maintained that:

On January 27, 2010, the Supreme Court of Justice of Peru decided to declare the extradition of [Wong Ho] Wing 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

¹² *Matter of Wong Ho Wing*. Order of the Court of May 28, 2010, *supra* note **¡Error! Marcador no definido.**, ninth considering paragraph, and *Matter of Wong Ho Wing*. Order of the Court of March 4, 2011, *supra* note **¡Error! Marcador no definido.**, fourteenth considering paragraph.

¹³ *Matter of Wong Ho Wing*. Order of the Court of May 28, 2010, *supra* note **¡Error! Marcador no definido.**, seventh considering paragraph, and *Matter of Wong Ho Wing*. Order of the Court of March 4, 2011, *supra* note **¡Error! Marcador no definido.**, fourteenth considering paragraph.

¹⁴ *Matter of Wong Ho Wing*, Request for provisional measures with regard to the Republic of Peru. Order of the Court of May 28, 2010, twelfth considering paragraph.

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 [...]. Consequently, the possible extradition of [Wong Ho] Wing could occur at any moment.¹⁵

36. Lastly, regarding the requirement of *the irreparability of the harm*, in its Order of May 28, 2010, the Court verified the concurrence of the said requirement in the preventive and protective dimensions 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 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.¹⁶

37. The Court recalls that, based on these and other considerations, in order that the Inter-American Commission could fulfill its treaty-based mandate and rule on the alleged violations in the extradition procedure in which there is a risk of the eventual application of the death penalty, this Court opportunely decided to adopt provisional measures (*supra* considering paragraph 21).

38. The Court reiterates that in the proceeding on provisional measures, it only has competence to make a *prima facie* analysis of the elements provided to the case file. Consequently and owing to the uncertainty of the State concerning the possibility of extradition (*supra* considering paragraphs 18, 19, 23 and 26), the Court finds that the preceding considerations regarding the existence of a situation of extreme gravity and urgency and the need to avoid irreparable damage are applicable to the actual situation of the proposed beneficiary.

39. The Court emphasizes that, regarding the preventive aspect, the object and purpose of provisional measures is to preserve the rights that may be at risk until the dispute has been settled. Their object and purpose are to ensure the integrity and effectiveness of the decision on merits and, in this way, avoid any harm to the rights in litigation, a situation that could render ineffective or detract from 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 harm to persons.¹⁷

40. The Court stresses that, in this matter, the preventive aspect of the measures seeks to avoid precluding compliance with an eventual decision of the organs of the

¹⁵ *Matter of Wong Ho Wing*. Order of the Court of May 28, 2010, *supra* note **¡Error! Marcador no definido.**, thirteenth considering paragraph.

¹⁶ *Matter of Wong Ho Wing*. Order of the Court of May 28, 2010, *supra* note **¡Error! Marcador no definido.**, fourteenth considering paragraph.

¹⁷ *Cf. Case of the "La Nación" Newspaper*. Provisional measures with regard to Costa Rica. Order of the Court of September 7, 2001, fourth considering paragraph; *Matter of Wong Ho Wing*. Order of the Court of March 4, 2011, *supra* note **¡Error! Marcador no definido.**, tenth considering paragraph, and *Matter of Wong Ho Wing*. Order of the Court of July 1, 2011, *supra* note **¡Error! Marcador no definido.**, twelfth considering paragraph.

inter-American system and, thus, to prevent “irreversible [harm] to the right of petition embodied in Article 44 of the Convention” (*supra* considering paragraph ¡Error! No se encuentra el origen de la referencia.), especially taking into account that, in this matter, the proposed beneficiary would be extradited to a State beyond the scope of the protection of the inter-American human rights system.

41. Accordingly, taking into account the preventive aspect indicated, the fact that the Commission is examining the observance of Peru’s international obligations in the extradition procedure, and the information provided by the State concerning the certainty required from the organs intervening in Wong Ho Wing’s extradition procedure, it is advisable that the Inter-American Commission decide case No. 12,794 promptly.

42. Consequently, in order that the Inter-American Commission may fulfill its mandate under the Convention, considering that the proceedings concerning case No. 12,794 are at the merits stage and that the Commission has advised that, on March 26, 2012, it held a public hearing on the merits of the case “in order to complete the steps required to proceed to issue a report on merits as soon as possible,” the Court finds it pertinent and opportune to order, for a short period, the adoption of provisional measures in this matter, which shall remain in force until December 14, 2012 (*infra* first operative paragraph).

43. Furthermore, the Court recalls what has been said in this matter as regards the importance of the mechanism of extradition and of the obligation of collaboration between the States in this regard. It is in the interest of the community of nations that individuals who have been accused of certain offenses can be brought to justice. Hence, the international human rights obligations of the States and the requirements of due process must be observed during extradition procedures, while this legal mechanism cannot be used as a means of ensuring impunity.¹⁸

44. Lastly, this Court reiterates that, until this matter has been decided by the organs of the inter-American system, Peru must continue taking the necessary measures in relation to Wong Ho Wing to avoid the eventual decision by the organs of the inter-American system being useless or illusory, owing to his extradition and the corresponding administration of justice in the requesting State.¹⁹

THEREFORE:

THE INTER-AMERICAN COURT OF HUMAN RIGHTS,

in exercise of its authority under Article 63(2) of the American Convention and Articles 27 and 31 of the Court’s Rules of Procedure,

DECIDES:

¹⁸ *Matter of Wong Ho Wing*. Order of the Court of May 28, 2010, *supra* note ¡Error! Marcador no definido., sixteenth considering paragraph.

¹⁹ *Matter of Wong Ho Wing*. Order of the Court of May 28, 2010, *supra* note ¡Error! Marcador no definido., eighteenth considering paragraph.

1. To require the State, as decided in this Order, to abstain from extraditing Wong Ho Wing, until December 14, 2012, to allow the Inter-American Commission on Human Rights to examine and rule on case No. 12,794.

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