

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

OF MARCH 31, 2014

**PROVISIONAL MEASURES
REGARDING THE REPUBLIC OF PERU**

CASE OF WONG HO WING

HAVING SEEN:

1. The Order of the former President in-exercise in this case (hereinafter “the President in exercise”) of the Inter-American Court of Human Rights (hereinafter “the Inter-American Court,” “the Court,” or “the Tribunal”) of March 24, 2010, as well as the Orders of this Court of May 28 and November 26, 2010, March 4 and July 1, 2011, wherein it was decided to *inter alia*, require the Republic of Peru (hereinafter “the State” or “Peru”) to refrain from extraditing Mr. Wong Ho Wing.

2. The Order of the Court of October 10, 2011, wherein it was decided to lift the provisional measures that had been ordered.

3. The Order of the Court of June 26, 2012, wherein the State was required to “refrain from extraditing Mr. Wong Ho Wing until December 14, 2012, in order for the Inter-American Commission to examine and rule on case No. 12.794.”

4. The Order of the former President in-exercise of December 6, 2012, as well as the Orders of the Court of February 13, May 22, and August 22, 2013, and of January 29, 2014, wherein the validity of the present measures was extended. In the last of these, the Court decided to:

1. Require the State, in accordance with the provisions of the [that] Order, to abstain from extraditing Mr. Wong Ho Wing until the Court resolves this case in a definite manner in the context of its contentious jurisdiction.

2. Require the State to maintain the Court informed about the situation of the deprivation of liberty of Mr. Wong Ho Wing, and, to this end, it must submit a report to the Inter-American Court of Human Rights by June 2, 2014, at the latest.

3. Request the representative of Mr. Wong Ho Wing to submit any observations deemed pertinent to the report requested in the preceding operative paragraph within four weeks from the date of receipt of the aforementioned report from the State.

4. Request the Inter-American Commission on Human Rights to present any observations it deems relevant to the report from the State requested in the second operative paragraph and the corresponding comments of the representative of the beneficiary within two weeks of the deadline for the submission of the foregoing observations of the representative.

* Judge Diego García-Sayán, of Peruvian nationality, did not participate in the hearing or deliberation of this order, pursuant to that established in Articles 19(2) of the Statute and 19(1) of the Rules of the Court.

5. The brief of October 30, 2013, wherein the Inter-American Commission submitted the case of *Wong Ho Wing v. Peru* (12.794) before this Court, related to these provisional measures.

6. The brief of February 6, 2014, wherein the representative of Mr. Wong Ho Wing (hereinafter “the representative”) filed a brief of pleadings, motions and evidence (hereinafter “the brief of pleadings and motions”) in the framework of the contentious proceeding in this case. In said brief, the representative requested that these provisional measures be expanded to order the State “to grant the immediate liberty of Mr. Wong Ho Wing while a decision by the Executive Branch of Peru and before the jurisdiction of the Inter-American Court of Human Rights is pending.”

7. The brief of March 12 and 19, 2014, wherein the State and the Commission, respectively, provided their observations to the request to expand the provisional measures requested by the representative.

CONSIDERING THAT:

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

2. Article 63(2) of the American Convention provides that “[i]n cases of extreme gravity and urgency, and when necessary to avoid irreparable damage to persons, the Court shall adopt such provisional measures as it deems pertinent in matters it has under consideration.” This provision is regulated by Article 27 of the Rules of Procedure of the Court.

3. Article 63(2) of the Convention requires that for the Court to order the adoption of provisional measures, three conditions must be present: i) “extreme gravity”; ii) “urgency,” and iii) necessity of avoiding irreparable harm to persons.” These three conditions must coexist and be present in all the situations in which the intervention of the Tribunal is requested. Similarly, the three conditions must continue to exist in order for the Court to maintain the protection.¹

4. In order to determine if the request made by the representative (*supra* Having Seen clause 6) is admissible, the Court will assess (A) the background of these provisional measures and (B) the arguments of the parties and of the Commission, and then render its (C) consideration on the matter.

A. Background of these provisional measures

5. The Court recalls that these provisional measures were ordered for the first time in May 2010². The measures were lifted in October 2011, once the Constitutional Tribunal of Peru ordered the Executive Branch to refrain from extraditing Mr. Wong Ho Wing on May 24 of that year. Notwithstanding, on June 26, 2012, this Court once again ordered these provisional measures given the “uncertainty of the State” as to the possibility of extraditing

¹ Cf. *Case of Carpio Nicolle*. Provisional measures regarding Guatemala. Order of the Court of July 6, 2009, Considering clause 24, and *Case of Wong Ho Wing*. Provisional measures regarding Perú. Order of the Court of January 29, 2014, Considering clause 3.

² Cf. *Matter of Wong Ho Wing*. Provisional measures regarding Perú. Order of the Court of May 28, 2010, considering clause 12, 13, 15, and operative paragraph 1.

Mr. Wong Ho Wing, based on alleged “new facts.”³ Both in May 2010 and in June 2012, the provisional measures were ordered to allow the Inter-American Commission to assess this case and render a decision.⁴ On July 18, 2013, the Commission adopted the Report on the Merits No. 78/13 on this case and issued recommendations for the State.⁵ On October 30, 2013, the Commission submitted this case before the Court, indicating that it involved “a sequence of violations against the rights of Mr. Wong Ho Wing, a national of the People’s republic of China, since his detention on October 27, 2008, and throughout the extradition process that is still valid today.”⁶ The State reported to the Court that “it disagrees with the arguments carried out by the Inter-American Commission” in its Report on the Merits and that “the Extradition process is not over [...] since the process is in its final stages at the moment.”⁷

6. Taking this information into account, this Court once again extended the validity of these measures on January 29, 2014, “until this Court resolves this case in a definitive manner in the framework of its contentious jurisdiction.” Upon adopting this decision, the Court took into account that the case had been filed before its jurisdiction, uncertainty remained about the possibility of Mr. Wong Ho Wing’s extradition despite the decision by the Constitutional Court, the conclusions made by the Commission in its Report on the Merits, the absence of a final decision by the Executive Branch, the fact that the extradition process is in the final stages, and the request made by the Commission to deny the extradition of the alleged victim, in light of the alleged violations to Mr. Wong Ho Wing’s rights committed in the framework of the extradition process. Moreover, the Court noted that it seeks to avoid frustration in the fulfillment of a possible determination by the Court, particularly considering that the beneficiary would be extraditing to a State out of the protective grasp of the Inter-American System and that he would be processed for a crime that could entail the death penalty.⁸

B. Arguments of the parties and of the Commission

7. After this decision, the representative of Mr. Wong Ho Wing made a request to expand these measures in the brief of pleadings and motions to order “the immediate liberation of Mr. Wong Ho Wing.” According to the representative in this case “there appears to be good law” to the extent that Mr. Wong Ho Wing “has benefited from the final

³ Cf. *Matter of Wong Ho Wing*. Provisional measures regarding Perú. Order of the Court of June 26, 2012, Having seen clause 4 and Considering clause 38, and *Matter of Wong Ho Wing*. Provisional measures regarding Perú. Order of the Court of August 22, 2013, Considering clause 4.

⁴ Cf. *Matter of Wong Ho Wing*. Provisional measures regarding Perú. Order of the Court of May 28, 2010, operative paragraph 1, and *Matter of Wong Ho Wing*. Provisional measures regarding Perú. Order of the Court of June 26, 2012, operative paragraph 1.

⁵ Specifically, the Commission issued four recommendations to the State, and pursuant to the procedures established in Articles 50 and 51 of the Convention, it forwarded the Report on the Merits and requested information on the monitoring of compliance of said recommendations in a period of two months. Cf. *Case of Wong Ho Wing*. Provisional measures regarding Perú. Order of the Court of January 29, 2014, Considering clause 5.

⁶ Moreover, the Commission concluded that “in the different stages of the extradition process the domestic authorities have incurred in a series of omissions and irregularities in the processing of the case, in the reception and assessment of the supposed guarantees granted by the Republic of China.” Pursuant to the Commission, “such omissions and irregularities constitute, in addition to violations in various extremes of due process, noncompliance with the obligation to guarantee the right to life and personal integrity of Mr. Wong Ho Wing.” Brief submitting the case by the Commission (case file on the merits, Tome I, folio 2).

⁷ *Case of Wong Ho Wing*. Provisional measures regarding Perú. Order of the Court of January 29, 2014, Considering clause 6.

⁸ Cf. *Case of Wong Ho Wing*. Provisional measures regarding Perú. Order of the Court of January 29, 2014, Considering clause 12.

and unappealable resolution of the Constitutional Tribunal of May 24, 2011, which ordered the State of Peru not to extradite Mr. Wong Ho Wing to the People's Republic of China." The representative stated that the State has not adopted a final decision on Mr. Wong Ho Wing's legal situation, "not fulfilling the Constitutional Tribunal's decision for more than two years and eight months," given that "the only action that the State needs to take is that its Executive Branch render a final decision as to Mr. Wong Ho Wing's extradition." The representative noted that "[t]he delay in issuing a final decision by the Executive Branch, [...], implies that Mr. Wong Ho Wing remain deprived of liberty for an indefinite period of time, and not only is he losing time that will not be returned to him but his personal integrity is diminishing." He noted that the conditions of extreme gravity and urgency, "are justified in the [O]rder of the [Court of] August 22, 2013" issued in the framework of this case.

8. The State asked that the request made by the representatives to expand the measures be dismissed. It noted that "it was inappropriate" that the representative "request that the Court [...] assess and render a decision beforehand on the deprivation of liberty of [Mr. Wong Ho Wing], prior to the periods already established by the Tribunal" in its Order of January 29, 2014. Peru argued that the representative "incorrectly seeks that the [beneficiaries] immediate freedom be granted without basis to appeal on 'the appearance of good law'". Moreover, it argued that the representative doesn't "consider that the assessment regarding the [requirements of extreme gravity and urgency] occurs case by case in relation to a particular matter and that in [the Order of August 22, 2013], it occurred in regard to the request to refrain from extraditing Mr. Wong Ho Wing, but not in regard to his deprivation of liberty." In addition, it reported that "it has fulfilled its obligations providing information to the Judiciary in order for the Judiciary to render a decision, pursuant to its powers, in relation to the provisional arrest of Mr. Wong Ho Wing." Likewise, Peru highlighted that the matters involving the deprivation of liberty of Mr. Wong Ho Wing "will be the subject of an assessment regarding matters of substance in the context of the merits of the proceeding before the Court." Lastly, it highlighted that "annulling deprivation of liberty [...] without first ordering, as well, the implementation of other measures that somehow place a restriction on liberty (such as home arrest), could [...] prevent competent national authorities from effectively rendering a decision on the viability of a judgment at the domestic level and would render a possible extradition illusory."

9. The Commission noted that "since its first request for provisional measures" in this case, it has considered that the purpose of the measures is to "preserve the purpose of this case before the Inter-American System, as well as protect the life and personal integrity of Mr. Wong Ho Wing given the threat of extradition to the People's Republic of China." Notwithstanding, it noted that in its Report on the Merits it highlighted "the continuity of the arbitrary deprivation of liberty of Mr. Wong Ho Wing without legal basis," despite the fact that the Constitutional Tribunal has stated the inadmissibility of the extradition in several times and has ordered the government to reject the request of the People's Republic of China. According to the Commission, this "is particularly serious and it is an aspect of this matter that deserves to be considered by the [...] Court."

C. Considerations of the Court

10. This Court has noted that the provisional measures have two aspects: one is precautionary and the other is protective.⁹ The protective nature of the provisional

⁹ Cf. *Case of Herrera Ulloa v. Costa Rica* (Newspaper "La Nación"). Provisional measures regarding Costa Rica. Order of the Court of September 7, 2001, Considering clause 4, and *Case of Wong Ho Wing*. Provisional measures regarding Perú. Order of the Court of January 29, 2014, Considering clause 8.

measures is related to the framework of the International contentious realm. In this sense, the measures are aimed at preserving those rights that are in a state of possible risk until the controversy is resolved in order to assure the integrity and effectiveness of the decision on the merits, and in this way avoid harm to the rights under litigation, a situation which could render the *effect utile* of the decision meaningless. In regard to the protective nature of provisional measures, become a real jurisdictional guarantee of a preventive nature, as they protect human rights, in so much as they seek to avoid irreparable harm to persons.¹⁰

11. Until now the purpose of these measures has been to prevent the extradition of Mr. Wong Ho Wing, as a precautionary measure, to prevent any problems with the fulfillment of a possible decision by the Inter-American system and as a protective measure, to protect the right to life and personal integrity of Mr. Wong Ho Wing, who risks being extradited and subsequently prosecuted for a crime that could entail the death penalty. The requirements of extreme gravity and urgency and the necessity of avoiding irreparable harm¹¹ have been satisfied in the context of these measures by the fact that the extradition of Mr. Wong Ho Wing is in its final stage,¹² and thus it corresponds to the Executive Branch to issue a final decision on the request for extradition to a State that is outside the scope of the protection offered by the Inter-American System, where the beneficiary is being prosecuted for a crime which could entail the death penalty. The request of the representative of the beneficiary seeks to modify the purpose of these measures so as to protect, through the implementation of the provisional measures, the liberty and physical integrity of the beneficiary, ordering his "immediate release." Therefore, the Court finds that the representative's request does in fact constitute a broadening of the subject matter of the present measures.

12. The Court notes that this case is currently being heard by this Court. To date, the brief submitting the case and the Report on the Merits have been filed by the Commission, as well as the brief containing pleadings and motions by the representative. The Court awaits the submission of the answer brief from the State.

13. In its Report on the Merits to this case, the Commission concluded that there had been "an excessive delay in the deprivation of liberty of the [alleged] victim, [who has been detained for five years] in violation of Article 7(5)" of the Convention. Pursuant to the Commission, since the decision of the Constitutional Tribunal in 2011, "there is a definitive judicial order that is not advisory in nature" to not extradite Mr. Wong Ho Wing. It noted that a final decision by the Executive Branch has left the alleged victim in a state of "legal limbo," in violation of Article 7(3) of the Convention and that "the absence of a period expressly provided for the provisional arrest with likelihood of extradition" is incompatible

¹⁰ Cf. *Case of Newspaper "La Nación"*. Provisional measures regarding Costa Rica. Order of the Court of September 7, 2001, Considering clause 4, and *Case of Wong Ho Wing*. Provisional measures regarding Perú. Order of the Court of January 29, 2014, Considering clause 8.

¹¹ Regarding these three requirements, the Court noted that: gravity, for purposes of the adoption of provisional measures, must be "extreme," that is that it be at its highest or most intense level; the urgent nature implies that the risk or threat involved is imminent, which requires the answer be immediate, and lastly, in regard to the damage, there must be a reasonable probability that it materialize and it must not fall on legal interests that can be repaired. Cf. *Matter of Monagas Judicial Internment Center ("La Pica")*, *Yare I y Yare II Capital Region Penitentiary Center (Yare prison)*, Penitentiary Center of the Central Occidental Region (Uribana Prison), and El Rodeo I and El rodeo II Capital Judicial Confinement Center. Provisional measures regarding Venezuela. Order of the Court of November 24, 2009, Considering clause 3; *Matter of Belfort Istúriz et al.* Provisional measures regarding Venezuela. Order of the Court of April 15, 2010, Considering clause 8, and *Case of the Caracazo*. Request for provisional measures regarding Venezuela. Order of the Court of May 28, 2010, Considering clause 6.

¹² After the Supreme Court of Justice of Peru issued two advisory orders ruling in favor of Mr. Wong Ho Wing's extradition.

with the principle of foreseeability of the law. The Commission recommended in its report, and subsequently requested from the Court as a measure of reparation, that an ex officio review of the provisional arrest of Mr. Wong Ho Wing be carried out, taking into consideration that the extradition proceeding must end as briefly as possible and that “any judicial determination regarding the personal liberty of Mr. Wong Ho Wing must be made in strict compliance with the principles of exceptionality, necessity, and proportionality, in the terms described in the report.” In a similar sense, the representative argued in the brief containing pleadings and motions that, since the decision of the Constitutional Tribunal that ordered to refrain from extraditing Mr. Wong Ho Wing, “the State has nonetheless kept Mr. Wong Ho Wing in unlawful and arbitrary deprivation of liberty,” in addition to being detained “without judicial control and for an excessively prolonged period of time[,] in violation of Article 7(5) of the American Convention.” Like the Commission, the representative noted that there are no norms “establishing a maximum period of duration for a provisional arrest,” thereby impeding “the foreseeability of the deprivation of liberty and places the case in a situation of legal uncertainty as to rights and specifically personal liberty.” As a consequence of this argument, the representative requested as a measure of reparation that the State be ordered to grant “Mr. Wong Ho Wing’s immediate liberty.”

14. The Court recalls that in the context of provisional measures, it cannot consider the merits of any arguments other than those that relate directly and strictly with extreme gravity, urgency, and necessity of avoiding irreparable damage to persons. All other matters can only be brought to the attention of the Court in the framework of a contentious case.¹³ This Court has also noted that in a proceeding for provisional measures, it falls upon the Court to consider only the State’s procedural obligations pursuant to the American Convention, under which this Court has no jurisdiction, in the framework of provisional measures, to rule on the compatibility of the extradition proceeding with the Convention or the alleged violations of the rights of Mr. Wong Ho Wing.¹⁴

15. The alleged unlawfulness and arbitrariness of the detention of Mr. Wong Ho Wing constitutes one of the principle arguments of the Commission and of the representative in terms of the merits of the contentious case before this Court. Moreover, a review of the need for such detention, in the case of the Commission, or the immediate release, in the case of the representative, are principle claims of both participants. Therefore, as considered in other cases,¹⁵ this Court considers that it is not possible, in the proceeding for provisional measures, to assess that good law exists as claimed by the representative of Mr. Wong Ho Wing, without issuing a ruling on the merits of the case, which would in turn imply a revision of whether the State is adhering to the American Convention. In this case, one of the main claims made by the Commission and the alleged victim would be satisfied with the release of Mr. Wong Ho Wing. The adoption of such a measure would involve a rendering a ruling in advance through an incidental circumstance with the subsequent establishment *in limine litis* of the facts and the respective consequences which are subject of the main debate; and this obviously would take sense away from the decision on the merits, which is where the disputed legal responsibilities should be defined.¹⁶ The matter

¹³ Cf. *Matter of James et al.*. Provisional measures regarding Trinidad and Tobago. Order of the Court of August 29, 1998, Considering clause 6; *Case of the Caracazo*. Request for Provisional measures regarding Venezuela. Order of the Court of May 28, 2010, Considering clause 7, and *Matter of Alvarado Reyes et al.* Provisional measures regarding México. Order of the Court of November 23, 2012, Considering clause 4.

¹⁴ Cf. *Matter of Wong Ho Wing*. Provisional measures regarding Perú. Order of the Court of May 28, 2010, Considering clause 7, and *Case of Wong Ho Wing*. Provisional measures regarding Perú. Order of the Court of January 29, 2014, Considering clause 11.

¹⁵ Cf. *Matter of Castañeda Gutman*. Request for Provisional measures regarding México. Order of the Court of November 25, 2005, Considering clause 6.

¹⁶ Cf. *Matter of Castañeda Gutman*. Request for Provisional measures regarding México. Order of the Court of

before this Court is not a matter of provisional measures but rather one of the merits of the case pending before the Court.

16. Therefore, the Court does not consider that it is appropriate to grant, at this stage in the case, the representative's request.

17. Notwithstanding the aforementioned, this Court notes that Mr. Wong Ho Wing has been deprived of his liberty since October 28, 2008, in a penitentiary center, given the extradition proceeding. On May 24, 2011, the Constitutional Tribunal issued a decision, in the framework of a *habeas corpus* proceeding, ordering the Executive Branch to refrain from extraditing Mr. Wong Ho Wing. Since then, the extradition proceeding remains pending while the Executive Branch, who has final say in the proceeding, renders its final decision. Notwithstanding, said decision has not been adopted to date, rather during this period of time, Mr. Wong Ho Wing has remained deprived of his liberty. All of this information has been provided by the State itself in the framework of the proceedings on provisional measures.¹⁷ Likewise, in the framework of the provisional measures, the State has reported on two occasions that it provided the Judiciary with documentation regarding the temporary arrest of Mr. Wong Ho Wing in order for the "legal situation regarding deprivation of liberty to be analyzed and resolved."¹⁸ Similarly, in its observations regarding the representative's request for expansion of the provisional measures, the State suggested that "other measures restricting liberty could be issued (such as house arrest)" in order to prevent a possible extradition of the beneficiary or administration of justice from being ineffective or illusory (*supra* Considering clause 0). Therefore, the Court considers it relevant that, in the report requested in operative paragraph two of the Order of the Court of January 29, 2014, the State must report on the results of the assessment carried out by the Judiciary regarding the deprivation of liberty of Mr. Wong Ho Wing.

18. The Court recalls that the States have the constant and permanent duty of complying with the general obligations that correspond to it under Article 1(1) of the Convention, of respecting the rights and liberties recognized in it and guaranteeing their free and full exercise to each person subject to its jurisdiction.¹⁹

THEREFORE:

THE INTER-AMERICAN COURT OF HUMAN RIGHTS,

In exercise of its powers established in Article 63(2) of the American Convention and Articles 27 and 31 of the Rules of Procedure of the Court,

November 25, 2005, Considering clause 6.

¹⁷ Cf. *inter alia*, *Matter of Wong Ho Wing*. Order of the Court of May 22, 2013, Considering clause 19; *Matter of Wong Ho Wing*. Provisional measures regarding Perú. Order of the Court of August 22, 2013, Considering clause 5, and *Case of Wong Ho Wing*. Provisional measures regarding Perú. Order of the Court of January 29, 2014, Considering clause 10.

¹⁸ Cf. *Case of Wong Ho Wing*. Provisional measures regarding Perú. Order of the Court of January 29, 2014, Considering clause 6 and *supra* Considering clause 8.

¹⁹ Cf. *Case of Velásquez Rodríguez*. Provisional measures regarding Honduras. Order of the Court of January 15, 1988, Considering clause 3; *Matter of Belfort Istúriz et al.* Provisional measures regarding Venezuela. Order of the Court of April 15, 2010, Considering clause 22, and *Case of the Caracazo*. Request for Provisional measures regarding Venezuela. Order of the Court of May 28, 2010, Considering clause 13.

DECIDES TO:

1. Dismiss the request to expand the provisional measures filed by the representative of Mr. Wong Ho Wing.
2. Reiterate that, pursuant to that provided in the Order of January 29, 2014, the State must refrain from extraditing Mr. Wong Ho Wing until the Court resolves this case in a final manner within the framework of its contentious jurisdiction.
3. Reiterate the requests for information to the State and requests for observations from the representative and the Commission on the deprivation of liberty of Mr. Wong Ho Wing, required within the Order of the Court of January 29, 2014, taking into account that provided in Considering clause 17 of this Order.
4. Provide that the Secretariat of the Court notify this Order to the Republic of Peru, the representative of Mr. Wong Ho Wing and the Inter-American Court of Human Rights.

Humberto Antonio Sierra Porto
President

Roberto F. Caldas

Manuel E. Ventura Robles

Alberto Pérez Pérez

Eduardo Vio Grossi

Eduardo Ferrer Mac-Gregor Poisot

Pablo Saavedra Alessandri
Secretary

So ordered,

Humberto Antonio Sierra Porto
President

Pablo Saavedra Alessandri
Secretary