

**INTER-AMERICAN COURT OF HUMAN RIGHTS\***

**CASE OF WONG HO WING\*\* V. PERU**

**JUDGMENT OF JUNE 30, 2015**

***(Preliminary objection, merits, reparations and costs)***

In the case of *Wong Ho Wing*,

the Inter-American Court of Human Rights (hereinafter “the Inter-American Court,” or “the Court”), composed of the following judges:

Humberto Antonio Sierra Porto, President  
Roberto F. Caldas, Vice President  
Manuel E. Ventura Robles, Judge  
Alberto Pérez Pérez, Judge  
Eduardo Vio Grossi, Judge, and  
Eduardo Ferrer Mac-Gregor Poisot, Judge;

also present,

Pablo Saavedra Alessandri, Secretary, and  
Emilia Segares Rodríguez, Deputy Secretary

pursuant to Articles 62(3) and 63(1) of the American Convention on Human Rights (hereinafter “the American Convention” or “the Convention”) and Articles 31, 32, 42, 65 and 67 of the Court’s Rules of Procedure (hereinafter “the Rules of Procedure” or “the Court’s Rules of Procedure”), delivers this Judgment structured as follows:

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\* Judge Diego García-Sayán, a Peruvian national, did not take part in the hearing of the case and the deliberation of this Judgment, in accordance with the provisions of Article 19(1) of the Court’s Rule of Procedure.

\*\* According to the information in the file, the official name of the presumed victim in Chinese is Huang Haiyong, while Wong Ho Wing is a transliteration of his name into English *Cf.* Advisory decision of the Permanent Criminal Chamber of January 27, 2010 (evidence file, folio 164). Despite this, in a statement made in the domestic sphere, Wong Ho Wing indicated that Huang is his surname in Mandarin, while Wong corresponds to the version in Cantonese, but that “they both have the same meaning.” Statement made by Wong Ho Wing on September 23, 2013, before representatives of the Public Prosecutor for Money-laundering and the Public Prosecution Service (evidence file, folio 7173). For the purposes of this Judgment, the Court will identify the presumed victim as Wong Ho Wing, as he has been identified in the domestic extradition process, as well as throughout these proceedings before the inter-American human rights system.

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I

**INTRODUCTION OF THE CASE AND PURPOSE OF THE DISPUTE**

1. *The case submitted to the Court.* On October 30, 2013, in accordance with the provisions of Articles 51 and 61 of the American Convention and Article 35 of the Court's Rules of Procedure, the Inter-American Commission on Human Rights (hereinafter "the Inter-American Commission" or "the Commission") submitted the case of *Wong Ho Wing against the Republic of Peru* (hereinafter "the State" or "Peru") to the jurisdiction of the Inter-American Court. According to the Commission, the facts of this case related to a series of presumed violations of the rights of Wong Ho Wing, a national of the People's Republic of China, from the time of his detention on October 27, 2008, and throughout the extradition process that continues to date. According to the Commission, Wong Ho Wing has been and continues to be subjected to an alleged arbitrary and excessive deprivation of liberty that is not justified by procedural requirements. The Commission also concluded that, at different stages of the extradition proceedings, the domestic authorities had presumably been responsible for a series of omissions and irregularities in the processing of the case, which constituted, in addition to presumed violations of several aspects of due process, alleged non-compliance with the obligation to ensure the right to life and to humane treatment of Wong Ho Wing. In addition, it concluded that, since May 24, 2011, the date on which the Peruvian Constitutional Court ordered the Executive Branch to refrain from extraditing Wong Ho Wing, the State authorities had allegedly failed to comply with a court ruling, which was incompatible with the right to judicial protection.

2. *Proceedings before the Commission.* The proceedings before the Commission were as follows:

a) *Petition.* On March 27, 2009, Wong Ho Wing lodged the initial petition before the Commission.<sup>1</sup>

b) *Admissibility Report.* On November 1, 2010, the Commission adopted Admissibility Report No. 151/10.<sup>2</sup>

c) *Merits Report.* On July 18, 2013, the Commission adopted Merits Report No. 78/13, pursuant to Article 50 of the Convention (hereinafter "Merits Report"), in which it reached a series of conclusions and made several recommendations to the State:

- *Conclusions.* The Commission concluded that the State was responsible for the violation of the rights to personal liberty, life, humane treatment, judicial guarantees and judicial protection, established in Articles 7, 4, 5, 8 and 25 of the American Convention in relation to the obligations established in Article 1(1) of this instrument, to the detriment of Wong Ho Wing.
- *Recommendations.* Consequently, the Commission made a series of recommendations to the State, including that it:
  - i. Order the measures necessary to ensure that the extradition process is brought to a conclusion as soon as possible, in accordance with the procedures set forth in the Peruvian Code of Criminal Procedure, denying the extradition in strict compliance with the Constitutional Court's ruling of May 24, 2011. In compliance with this recommendation the State must ensure that none of its authorities instigates mechanisms that would obstruct or delay enforcement of that ruling.

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<sup>1</sup> Cf. Initial petition lodged on March 27, 2009, by Luis Lamas Puccio and Wong Ho Wing (evidence file, folio 753).

<sup>2</sup> Cf. Admissibility Report No. 151/10, *Case of Wong Ho Wing v. Peru*, November 1, 2010 (evidence file, folio 1154).

- ii. Order an *ex officio* review of Wong Ho Wing's provisional arrest. In that review the State must take into consideration his legal situation upon the conclusion of the extradition process, in accordance with the terms of the preceding recommendation. In particular, any court decision pertaining to the personal liberty of Wong Ho Wing must be made in strict compliance with the principles of exceptionality, necessity, and proportionality in the terms described in the [Merits] Report.
- iii. Make full reparations to Wong Ho Wing for the violations established in the Merits Report.
- iv. Within a reasonable period, order measures of non-repetition to ensure that, in extradition processes, the procedures established in the Code of Criminal Procedure are followed to the letter and that the necessary safeguards are in place to ensure that any diplomatic or other assurances offered by the requesting State are obtained and weighed in accordance with the standards set out in th[is] Merits Report.

*d) Notification of the State.* The Merits Report was notified to the State on July 30, 2013, granting it two months to report on compliance with the recommendations. The State presented a report on the measures taken to comply with the said recommendations on September 30, 2013.

3. *Submission to the Court.* On October 30, 2013, the Commission submitted this case to the Court "in order to obtain justice for the [presumed] victim." The Commission appointed Commissioner José de Jesús Orozco Henríquez and Executive Secretary, Emilio Álvarez Icaza, as delegates, and Elizabeth Abi-Mershed, Deputy Executive Secretary, and Silvia Serrano Guzmán as legal advisers.

4. *Requests of the Inter-American Commission.* Based on the foregoing, the Inter-American Commission asked this Court to conclude and declare the international responsibility of Peru for the violations contained in its Merits Report and to order the State, as measures of reparation, to comply with the recommendations included in that report (*supra* para. 2).

5. *Provisional measures.* In the instant case, starting in May 2010, provisional measures were granted under Article 63(2) of the Convention for the State to refrain from extraditing Wong Ho Wing until the organs of the inter-American human rights system had examined and ruled on the case (*infra* para. 31).

## II

### PROCEEDINGS BEFORE THE COURT

6. *Notification of the State and the representative.* The submission of the case was notified to the State and to the representative of the presumed victim on December 9, 2013.

7. *Brief with motions, arguments and evidence.* On February 5, 6 and 9, 2014, the lawyer, Luis Lamas Puccio, acting on behalf of the presumed victim (hereinafter "the representative"), presented the brief with motions, arguments and evidence (hereinafter "the motions and arguments brief"), in accordance with Articles 25 and 40 of the Court's Rules of Procedure.

8. *Answering brief.* On May 6, 2014, Peru submitted to the Court its brief with a preliminary objection, answering the Commission's submission of the case, and with observations on the motions and arguments brief (hereinafter "the answering brief"). In this brief, the State filed a preliminary objection owing to the presumed failure to exhaust domestic remedies, described the facts, and contested all the alleged violations.

9. *Observations on the preliminary objection.* On June 27 and 28, 2014, the representative and the Inter-American Commission, respectively, presented their observations on the preliminary objection filed by the State.

10. *Public hearing.* On July 28, 2014, the President of the Court issued an order,<sup>3</sup> in which he convened the State, the representative, and the Inter-American Commission to a public hearing on the preliminary objection and eventual merits, reparations and costs, in order to hear the final oral arguments of the parties, and the final oral observations of the Commission on those issues. In addition, in this order, he requested that the statements of the presumed victim, two witnesses and five expert witnesses be received by affidavit, and these were presented by the parties and the Commission on August 18, 25 and 29, 2014, respectively. The representative and the State were given the opportunity to pose questions and make observations to the deponents offered by the other party.<sup>4</sup> The Commission was able to question one of the State's expert witnesses. Also, in the same order, the President convened three expert witnesses proposed by the State to testify during the public hearing. The public hearing took place on September 3, 2014, during the fifty-first special session of the Court, held in Asunción, Paraguay.<sup>5</sup> During this hearing, the State presented certain documents and the judges of the Court requested specific helpful information and explanations.

11. *Amicus curiae.* The Court received one *amicus curiae* brief from María Isabel Mosquera Ayala on September 18 and 23, 2014.

12. *Final written arguments and observations.* On October 3, 2014, the parties and the Commission presented their final written arguments and observations, respectively. With their final written arguments, the parties provided some of the helpful information, explanations and evidence requested by the judges of this Court (*supra* para. 10), as well as certain documentation. On November 3, 2014, the Secretariat of the Court, on the President's instructions, asked the parties and the Commission to present any observations they deemed pertinent on this documentation.

13. *Helpful information and evidence.* On November 3, 2014, and March 25, 2015, the President of the Court asked the State and the representative for specific helpful information and documentation. The State presented the requested information and explanations on November 17 and December 1, 2014, and on April 10, 2015.

14. *Observations on the helpful information and evidence, as well as on the supervening evidence on costs and expenses.* On November 17, 2014, the State and the representative presented their observations on the helpful information, explanations and documentation provided with the final written arguments (*supra* para. 12). On December 19, 2014, the Commission indicated that it had no observations to make on the documentation submitted by the State on November 17 and December 1, 2014, and, on May 4, 2015, it forwarded its observations on the documentation provided on April 10, 2015. The representative did not present observations on the helpful information and documentation submitted by the State on November 17 and December 1, 2014, and April 10, 2015.

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<sup>3</sup> Cf. *Case of Wong Ho Wing v. Peru*. Decision of the President of the Court of July 28, 2014. Available at: [http://www.corteidh.or.cr/docs/asuntos/wong\\_28\\_07\\_2014.doc](http://www.corteidh.or.cr/docs/asuntos/wong_28_07_2014.doc).

<sup>4</sup> Although, under the second operative paragraphs of the President's order of July 28, 2014, both parties were given the opportunity to pose questions to the deponents whose statements were required by affidavit, the representative did not forward any questions for the deponents proposed by the State and the Commission.

<sup>5</sup> There appeared at this hearing: (a) for the Inter-American Commission: James Louis Cavallaro, Commissioner and Silvia Serrano Guzmán and Erick Acuña, Advisers of the Executive Secretariat; (b) for the presumed victim: Luis Lamas Puccio and Miguel Ángel Soria Fuerte, and (c) for the State: Luis Alberto Huerta Guerrero, Special Supranational Public Prosecutor, Agent, and Sofia Janett Donaires Vega and Carlos Miguel Reaño Balarezo, lawyers of the Special Supranational Public Prosecutor's Office.

15. *Supervening facts.* On April 13, and June 11 and 18, 2015, the representative forwarded information on a request to “change the house arrest” of Wong Ho Wing filed in the domestic sphere on March 3, 2015. On April 20, May 4, and June 19 and 23, 2015, the State and the Commission presented their observations in this regard.

16. *Deliberation of this Judgment.* The Court began its deliberation of this Judgment on June 24, 2015.

### **III JURISDICTION**

17. The Court is competent to hear this case, in the terms of Article 62(3) of the Convention, because Peru has been a State Party to the American Convention since July 28, 1978, and accepted the contentious jurisdiction of the Court on January 21, 1981.

### **IV PRELIMINARY OBJECTION**

#### ***A. Arguments of the State and observations of the representative and of the Commission***

18. The State indicated that “the petition was presented to the [Commission] on March 27, 2009, while an application for *habeas corpus* filed on January 26, 2009, was being processed,” and that this application was subsequently “declared partly justified.” In addition, at that time, “the extradition was being processed” and, even at the present time, the Executive Branch has not taken a final decision. The State underlined that, according to the Admissibility Report, “the petitioner had exhausted the domestic remedies [...] with the ruling [of the Supreme Court] of January 27, 2010,” as well as with the application for *habeas corpus*, all of them “decided following the filing of this petition.” Furthermore, it noted that, when the Admissibility Report was issued, other applications for *habeas corpus* were awaiting a final decision.<sup>6</sup>

19. The Commission observed that the State had filed the objection of failure to exhaust domestic remedies at the appropriate opportunity, during the admissibility stage. However, the Commission argued that it had analyzed the exhaustion of domestic remedies “based on the situation in force when it makes a ruling on admissibility” because, in many cases, the situation regarding compliance with the admissibility requirements changes and/or is updated. Therefore, it examined “compliance with the requirement of exhaustion of domestic remedies [...], in light of the evolution of the facts and the information available at that time.” The Commission also “took into consideration the length of time taken by the respective authorities to examine [the applications for *habeas corpus*] that, by their nature, should be decided promptly.”

20. The representative emphasized that “the situation that should be taken into account in order to establish whether the domestic remedies have been exhausted is the one which exists when deciding on admissibility.” Thus, he indicated that this interpretation “has entered the domain of international inter-American custom accepted and not rejected by the American States, including Peru.” The representative indicated that, when the Admissibility Report was issued, “the extradition proceedings against Wong Ho Wing had been decided in a single and final court, by the Supreme Court of Peru, and during those proceedings, a series of irregularities had occurred that violated

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<sup>6</sup> Moreover, during the public hearing, the State argued that “the main purpose of the presumed victims and their representatives” is to obtain financial compensation, and they had filed no domestic remedies in this regard using the existing mechanisms. The Court underscores that this argument was presented for the first time during the public hearing, so that it is time-barred.

due process. Therefore, not only had the appropriate remedies offered by Peruvian law been exhausted, but also, the exception to the exhaustion of domestic remedies established in Article 46(2)(a) of the American Convention on Human Rights was applicable, because due process of law had not been ensured." Regarding the State's argument that the extradition was still being processed, the representative argued that the decision of the Executive Branch had been pending "for more than four years," so that there had been "an unjustified delay in the extradition decision."

### ***B. Considerations of the Court***

21. Article 46(1)(a) of the American Convention establishes that, in order to determine the admissibility of a petition or communication lodged before Inter-American Commission in accordance with Articles 44 or 45 of the Convention, the remedies under domestic law must have been pursued and exhausted in accordance with generally recognized principles of international law.<sup>7</sup> Thus, the Court has affirmed that an objection to the exercise of its jurisdiction based on the supposed failure to exhaust domestic remedies must be presented at the appropriate procedural moment; that is, during the admissibility procedure before the Commission.<sup>8</sup>

22. In this regard, it can be seen that, during the admissibility procedure before the Commission, the State argued, in communications received on May 1 and 15, August 13 and December 4, 2009, and January 11, March 1, July 16, August 20 and October 26, 2010, that the requirement of exhaustion of domestic remedies had not been met, because decisions remained pending on the applications for *habeas corpus* filed by the representative.<sup>9</sup> Therefore, the Court observes that this preliminary objection was filed at the appropriate procedural moment.

23. The Court notes that, basically, the State has submitted two arguments: (i) that, when the initial petition was lodged, domestic remedies had not been exhausted, and (ii) that, when taking its decision on admissibility, the Commission did not take into account that other applications for *habeas corpus* filed by the representative were being processed (*supra* para. 18).

24. On the first point, the Court notes that the initial petition was lodged before the Commission on March 27, 2009. On March 31 that year, the petition was forwarded to the State. Following numerous submissions of additional information by both parties, on November 1, 2010, the Commission issued the Admissibility Report.<sup>10</sup> In this report, with regard to the exhaustion of domestic remedies, the Commission decided that:

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<sup>7</sup> Cf. *Case of Velásquez Rodríguez v. Honduras. Preliminary objections*. Judgment of June 26, 1987. Series C No. 1, para. 85, and *Case of Cruz Sánchez et al. v. Peru. Preliminary objections, merits, reparations and costs*. Judgment of April 17, 2015. Series C No. 292, para. 48.

<sup>8</sup> Cf. *Case of Velásquez Rodríguez v. Honduras. Preliminary objections*, *supra*, para. 85, and *Case of Cruz Sánchez et al. v. Peru*, *supra*, para. 49.

<sup>9</sup> Cf. The State's brief of May 1 and 15, 2009, in which it referred to the application for *habeas corpus* filed on January 26, 2009 (evidence file, folio 668); the State's brief of August 13, 2009, in which it referred to the application for *habeas corpus* filed on January 26, 2009 (evidence file, folio 575); the State's brief of December 4, 2009, in which it referred to the application for *habeas corpus* filed on October 12, 2009 (evidence file, folios 407 to 409); the State's brief of January 11, 2010, in which it referred to the application for *habeas corpus* filed on October 12, 2009 (evidence file, folios 482 to 484); the State's brief of March 1, 2010, in which it referred to the applications for *habeas corpus* filed on October 12, 2009, and February 9, 2010 (evidence file, folios 1028 to 1030); the State's brief of July 16, 2010, in which it referred to the applications for *habeas corpus* filed on January 26, 2009, October 12, 2009, and February 9, 2010 (evidence file, folios 844 to 851); the State's brief of August 20, 2010, in which it referred to the application for *habeas corpus* filed on February 9, 2010 (evidence file, folios 773 to 778), and the State's brief of October 26, 2010, in which it referred to the applications for *habeas corpus* filed on January 26, 2009, October 12, 2009, and February 9, 2010 (evidence file, folios 1189 to 1193).

<sup>10</sup> Cf. Admissibility Report No. 151/10, *Case of Wong Ho Wing v. Peru*, November 1, 2010 (evidence file, folios 1145 to 1155).



[T]he alleged victim first argued the failure to comply with the legal and constitutional requirements for admission of the extradition request throughout the advisory proceeding decided in the final instance by the Supreme Court of Justice on January 27, 2010. Secondly, he submitted two applications for *habeas corpus* against the members of the Second Transitory Criminal Chamber and the Permanent Criminal Chamber of the aforementioned Supreme Court, pointing to alleged defects in the advisory proceeding and an alleged inadequate evaluation of the guarantees provided by the Government of the People's Republic of China that the death penalty would not be imposed. In addition, the presumed victim filed a preventive application for *habeas corpus* against the President of the Republic and the Council of Ministers, which has been pending a final decision from the Constitutional Court on constitutional injury since July 14, 2010.

40. Based on the foregoing considerations, the [Commission] consider[ed] that the presumed victim [had] exhausted the available remedies under domestic law aiming at rectifying the alleged irregularities in the advisory proceeding decided in final instance by the Permanent Criminal Chamber of the Supreme Court of Justice on January 27, 2010. In this regard, the requirement indicated in Article 46(1)(a) of the American Convention has been met.<sup>11</sup>

25. As the State mentioned, the decisions that, according to the Commission, exhausted the domestic remedies were adopted after the initial petition had been lodged. However, the Court notes that, by requiring that "admission by the Commission of a petition or communication [...]" shall be subject to" the said exhaustion (underlining added), Article 46 of the American Convention, should be interpreted in the sense that exhaustion of the remedies is required when deciding on the admissibility of the petition and not when this is lodged.

26. The Court notes that the lodging of the petition, its notification to the State, and the issue of the Admissibility Report are three distinct occasions: the first derived from an act of the petitioner, and the other two arising from acts of the Inter-American Commission.<sup>12</sup> The Inter-American Commission's Rules of Procedure specifically regulate these stages.<sup>13</sup> According to articles 28(h) (now 28(8), 29 and 30 of these Rules of Procedure, before forwarding a petition to the State, an initial processing is made during which the Commission analyzes, among other matters, whether the petition contains information on "any steps taken to exhaust domestic remedies, or the impossibility of doing so as provided in Article 31 of the [said] Rules of Procedure." Once the petition has been forwarded to the State, the admissibility stage starts and, consequently, the adversarial proceedings on whether the petition meets the admissibility requirements, including the requirement of exhaustion of domestic remedies. According to those Rules of Procedure, it is when examining admissibility that the Commission decides whether or not the petition complies with this requirement, or whether any of the exceptions established in the Convention are applicable. Thus, the Commission's Rules of Procedure make a distinction between the time at which the initial processing is carried out, when it only examines whether the petition includes information on "any steps taken to exhaust domestic remedies, or the impossibility of doing so," and the moment when it decides on admissibility, when it determines whether such remedies were exhausted, or applies an exception to this requirement.

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<sup>11</sup> Admissibility Report No. 151/10, *Case of Wong Ho Wing v. Peru*, November 1, 2010 (evidence file, folio 1152).

<sup>12</sup> Cf. *Case of Castillo Petruzzi et al. v. Peru. Preliminary objections*. Judgment of September 4, 1998, Series C No. 41, para. 54. See also: *Exceptions to the Exhaustion of Domestic Remedies* (Arts. 46.1, 46.2.a and 46.2.b, American Convention on Human Rights). Advisory Opinion OC-11/90 of August 10, 1990. Series A No. 11, paras. 37 and 40.

<sup>13</sup> During the processing of this case before the Commission, the Commission's 2008 Rules of Procedure were in force when the initial petition was received, and the 2009 Rules of Procedure were in force at the admissibility stage (when the Admissibility Report was issued). The articles cited above were the same in both versions. The Commission's Rules of Procedure were subsequently amended in 2011 and 2013, and the latter version is the one currently in force. The separation of the stages mentioned above has been maintained in all the Commission's Rules of Procedure in force during the processing of this case before the inter-American system.

27. The Court recalls that the rule of prior exhaustion of domestic remedies was conceived in the interests of the State, because it seeks to exempt it from responding before an international organ for acts it is accused of before it has had the occasion to remedy them by its own means.<sup>14</sup> Nevertheless, the subsidiary nature of the inter-American system is not affected by the fact that the analysis of compliance with the requirement of exhaustion of domestic remedies is made based on the situation when a decision is taken on a petition's admissibility. To the contrary, if any domestic remedy is pending, the State has the opportunity to resolve the situation alleged during the admissibility stage.

28. In addition, the Court considers that it would be contrary to the principle of procedural economy if petitions were not admitted based on the fact that, at the time of the initial presentation, domestic remedies had not been exhausted and if, when the admissibility of these remedies was analyzed, they had already been exhausted. The European Court of Human Rights (hereinafter "the European Court") has ruled similarly in some cases,<sup>15</sup> as has the International Court of Justice in relation to access to its jurisdiction.<sup>16</sup>

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<sup>14</sup> Cf. *Case of Velásquez Rodríguez v. Honduras. Merits*. Judgment of July 29, 1988. Series C No. 4, para. 61, and *Case of Cruz Sánchez et al. v. Peru*, *supra*, para. 48.

<sup>15</sup> In general, the European Court has considered that domestic remedies should normally have been exhausted when lodging a petition, but has recognized that this rule is subject to exceptions, so that this exhaustion can be achieved shortly after the lodging of the petition, provided this is before its admissibility is determined. However, the European Court has also emphasized that the rule of exhaustion of domestic remedies should be applied with a certain degree of flexibility and without formalistic interpretations (ECHR, *Case of Ringeisen v. Austria*, No. 2614/65. Judgment of 16 July 1971, para. 89), and has therefore admitted petitions where domestic remedies have not been exhausted when the petition is lodged, but were exhausted when the decision on admissibility was made, even when the exhaustion occurred years later. In this regard, see the cases: ECHR, *Case of Trabelsi v. Belgium*, No. 140/10. Judgment of September 4, 2014, para. 92. In this case, the European Court considered a petition admissible, *inter alia*, considering that, in any case, the extradition process ended before the decision on admissibility (even though this was four years after the presentation of the petition). ECHR, *Case of Enzile Özdemir v. Turkey*, No. 54169/00, January 8, 2008, para. 36. In this case, the European Court admitted a petition lodged five years before the corresponding criminal proceedings had ended, considering that those proceedings were exhausted when the Court examined admissibility. ECHR, *Kopylov v. Russia*, No 3933/04. Judgment of 29 July 2010, para. 119. In this case, the European Court admitted a petition lodged more than four years before the decision that exhausted the remedies, considering that the State's objection of exhaustion of domestic remedies had no purpose when the Court decided on admissibility, because those remedies had been exhausted following the presentation of the initial petition.

<sup>16</sup> In this regard, in 1924, in the case of the *Mavrommatis Palestine Concessions*, the Permanent Court of International Justice established that the fact that it did not have jurisdiction when the application was filed was not a sufficient reason to reject its jurisdiction, if this circumstance was rectified subsequently: "Even assuming that before that time [when the application was filed] the Court had no jurisdiction because the international obligation referred to in Article 11 [of the Mandate for Palestine] was not yet effective, it would always have been possible for the applicant to re-submit his application in the same terms after the coming into force of the Treaty of Lausanne, and in that case, the argument in question could not have been advanced. Even if the grounds on which the institution of proceedings was based were defective for the reason stated, this would not be an adequate reason for the dismissal of the applicant's suit. The Court, whose jurisdiction is international, is not bound to attach to matters of form the same degree of importance which they might possess in municipal law. Even, therefore, if the application were premature because the Treaty of Lausanne had not yet been ratified, this circumstance would now be covered by the subsequent deposit of the necessary ratifications." Permanent Court of International Justice, *Mavrommatis Palestine Concessions*, Judgment of 30 August 1924, Series A, No. 2, p. 34. This opinion was adopted by the International Court of Justice in the cases concerning *the Military and Paramilitary Activities in and against Nicaragua* and the *Application of the Convention on the Prevention and Punishment of Genocide*. In the former, the International Court of Justice established that: "It would make no sense to require Nicaragua now to institute fresh proceedings based on the [1956] Treaty [of Friendship], which it would be fully entitled to do." *Case concerning the Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, *Jurisdiction and Admissibility*, Judgment, I.C.J. 1984 Reports, paras. 80 to 83. In the case of the *Application of the Convention on the Prevention and Punishment of Genocide*, the International Court of Justice established that: "It would not be in the interests of justice to oblige the Applicant, if it wishes to pursue its claims, to initiate fresh proceedings. In this respect it is of no importance which condition was unmet at the date the proceedings were instituted, and thereby prevented the Court at that time from exercising its jurisdiction, once it has been fulfilled subsequently. [...] It is concern for judicial economy, an element of the requirements of the sound administration of justice, which justifies application of the jurisprudence deriving from the *Mavrommatis* Judgment in appropriate cases. The purpose of this jurisprudence is to prevent the needless proliferation of proceedings." *Case of the Application of the Convention on the Prevention and Punishment of Genocide (Croatia v. Serbia)*, *Preliminary objections*, Judgment, I.C.J. Reports 2008, paras. 87 and 89, and Cf. *Case of the Application of the Convention on the Prevention and Punishment of Genocide (Bosnia and Herzegovina v. Yugoslavia)*, *Preliminary objections*, Judgment, I.C.J. 1996 Reports, para. 26.

29. On the second point alleged by the State, the Court notes that, at the admissibility stage of the petition, two applications for *habeas corpus* had been filed and decided in relation to the “certain and imminent threat of violation of the rights to life and personal integrity of Wong Ho Wing” (*infra* paras. 65 and 74) and a decision was pending on a third application for *habeas corpus* filed by the presumed victim and his representative (*infra* para. 79). These applications for *habeas corpus* were filed in parallel to the extradition proceedings and could be appropriate as regards some of the alleged violations. However, the Court stresses that the application for *habeas corpus* is not part of the regular extradition process in Peru<sup>17</sup> and, thus, the filing of additional remedies by the petitioner could not preclude access to inter-American justice.

30. Based on the foregoing considerations, the Court finds it unnecessary to diverge from the opinion indicated by the Commission in its Admissibility Report in this case. Consequently, the Court rejects the preliminary objection.

## V PROVISIONAL MEASURES

31. On February 24, 2010, the Inter-American Commission, during the proceedings before this organ, asked the Court to adopt provisional measures in favor of Wong Ho Wing. The measures were granted for the first time in May 2010.<sup>18</sup> Following orders of November 26, 2010, and March 4 and July 1, 2011, that extended their effects,<sup>19</sup> they were lifted in October 2011, after the decision of the Peruvian Constitutional Court of May 24 that year ordering the Executive Branch to refrain from extraditing Wong Ho Wing.<sup>20</sup> Nevertheless, on June 26, 2012, this Court again granted provisional measures in favor of Wong Ho Wing due to “the State’s uncertainty” about the possibility of extraditing him, based on presumed “new facts.” These measures were maintained by orders dated December 6, 2012, February 13, May 22 and August 22, 2013, and January 29 and March 31, 2014.<sup>21</sup> In both May 2010 and June 2012, the provisional measures were ordered to allow the inter-American system to examine and rule on this case, as well as to prevent frustration of compliance with an eventual decision by its organs.<sup>22</sup> Based on the orders of January and March 2014, the measures remain in force.<sup>23</sup>

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<sup>17</sup> Cf. Code of Criminal Procedure promulgated by Legislative Decree No. 957 of July 29, 2004, articles 516 to 524. Available at: <http://www.leyes.congreso.gob.pe/Documentos/Decretoslegislativos/00957.pdf>, cited in the Commission’s Merits Report, folio 24. Moreover, in its brief with final arguments, the State itself indicated that “[t]he intervention of the Peruvian Constitutional Court is not established in extradition proceedings.”

<sup>18</sup> Cf. *Matter of Wong Ho Wing. Provisional measures with regard to Peru*. Order of the Court of May 28, 2010. Previously, the President of the Court had required the State to “refrain from extraditing Wong Ho Wing while the request for provisional measures [had not been] decided by the plenary of the Inter-American Court”. *Matter of Wong Ho Wing. Provisional measures with regard to Peru*. Order of the acting President of the Court of March 24, 2010.

<sup>19</sup> Cf. *Matter of Wong Ho Wing. Provisional measures with regard to Peru*. Order of the Court of November 26, 2010; *Matter of Wong Ho Wing. Provisional measures with regard to Peru*. Order of the Court of March 4, 2011, and *Matter of Wong Ho Wing. Provisional measures with regard to Peru*. Order of the Court of July 1, 2011.

<sup>20</sup> Cf. *Matter of Wong Ho Wing. Provisional measures with regard to Peru*. Order of the Court of October 10, 2011.

<sup>21</sup> Cf. *Matter of Wong Ho Wing. Provisional measures with regard to Peru*. Order of the Court of June 26, 2012, fourth having seen paragraph and *considerandum* 38, and subsequent orders extending their effects: *Matter of Wong Ho Wing. Provisional measures with regard to Peru*. Order of the acting President of the Court of December 6, 2012; *Matter of Wong Ho Wing. Provisional measures with regard to Peru*. Order of the Court of February 13, 2013; *Matter of Wong Ho Wing. Provisional measures with regard to Peru*. Order of the Court of May 22, 2013; *Matter of Wong Ho Wing. Provisional measures with regard to Peru*. Order of the Court of August 22, 2013; *Case of Wong Ho Wing. Provisional measures with regard to Peru*. Order of the Court of January 29, 2014, and *Case of Wong Ho Wing. Provisional measures with regard to Peru*. Order of the Court of March 31, 2014.

<sup>22</sup> Cf. *Matter of Wong Ho Wing. Provisional measures with regard to Peru*. Order of the Court of May 28, 2010, first operative paragraph; *Matter of Wong Ho Wing. Provisional measures with regard to Peru*. Order of the Court of June 26, 2012, first operative paragraph, and *Case of Wong Ho Wing. Provisional measures with regard to Peru*. Order of the Court of January 29,

## VI PRELIMINARY CONSIDERATIONS

32. In his motions and arguments brief, the representative included Wong Ho Wing's wife, daughters and brother as presumed victims of the facts of this case. The Commission did not include these persons as presumed victims in its Merits Report. Consequently, their inclusion was contested by the State. However, in his final written arguments, the representative "withdr[ew this request], preserving the right of those persons to demand their rights within the jurisdiction of the Peruvian State." Therefore, this Court takes note of the said waiver and finds that it is not necessary to make any additional observations in this regard.

### **A. The factual framework of the case**

#### **A.1) Arguments of the State and observations of the representative and of the Commission**

33. The State argued that the representative had "not respected the factual framework disputed before the Court [...] and unduly s[ought] to expand it to allege the supposed violation of the right to personal integrity." According to the State, the facts included in the Merits Report concerning a supposed violation of the personal integrity of Wong Ho Wing relate to the extradition process and the supposed lack of security owing to the risk of the application of the death penalty and torture, but not to the supposed effects of the deprivation of Wong Ho Wing's liberty as the representative alleges. In addition, in its final written arguments, the State indicated that the representative "alleges facts that differ from those delimited by the [Commission], such as a presumed unlawful detention" and also the applications for *habeas corpus* filed on March 13, 2012, and April 26, 2013, that "are not mentioned by the Commission in the section of the [Merits Report] on the facts of the case." The representative and the Commission argued that the facts indicated by the State were included in the factual framework established in the Merits Report.

#### **A.2) Considerations of the Court**

34. This Court recalls that the factual framework of the proceedings before it consists of the facts submitted to its consideration in the Merits Report. Consequently, it is not admissible for the parties to allege new facts that differ from those contained in that report, without prejudice to describing those that may explain, clarify or reject the facts that have been mentioned in the report and submitted to the Court's consideration.<sup>24</sup> The exception to this principle are any facts classified as supervening, provided that these are connected to the facts of the proceedings.<sup>25</sup>

35. The Court notes that the representative bases himself on the facts relating to the deprivation of liberty of Wong Ho Wing to argue that, in addition to the presumed violation of personal liberty, his personal integrity had also been violated. These facts are included in the factual framework.<sup>26</sup> The State's arguments concerning supposed new facts refer to the

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2014, *consideranda* 5 and 9.

<sup>23</sup> Cf. *Case of Wong Ho Wing. Provisional measures with regard to Peru*. Order of the Court of January 29, 2014, and *Case of Wong Ho Wing. Provisional measures with regard to Peru*. Order of the Court of March 31, 2014.

<sup>24</sup> Cf. *Case of the Five Pensioners v. Peru. Merits, reparations and costs*. Judgment of February 28, 2003. Series C No. 98, para. 153, and *Case of Cruz Sánchez et al. v. Peru, supra*, para. 90.

<sup>25</sup> Cf. *Case of the Five Pensioners v. Peru, supra*, para. 154, and *Case of Cruz Sánchez et al. v. Peru, supra*, para. 90.

<sup>26</sup> In this regard, see paragraphs 67 to 141 of the Commission's Merits Report.

representative's legal arguments that, although they differ from the legal conclusions of the Commission, do not refer to new facts. In this regard, the Court recalls its consistent case law according to which the presumed victims and their representatives may mention the violation of rights other than those included in the Merits Report, provided they relate to the facts contained in the said document, because the presumed victims are the holders of all the rights recognized in the Convention.<sup>27</sup> Similarly, the representative's arguments on the unlawfulness of Wong Ho Wing's detention and on the applications for *habeas corpus* filed after the 2011 ruling of the Constitutional Court are legal arguments and not new facts. Although the appeal filed on April 26, 2013,<sup>28</sup> is not mentioned specifically, this Court considers that the fact that, following the ruling of the Constitutional Court, the representative filed numerous remedies to try and obtain Wong Ho Wing's liberty forms part of the factual framework.<sup>29</sup> The references to all the remedies that were filed constitute facts that complement and describe in greater detail this factual situation that the Commission included in its Merits Report. The Court also considers that the representative's arguments about supposed pressure placed on Peru and on Wong Ho Wing's family so that the extradition would be granted constitutes factual circumstances that would be part of the extradition process in Peru; accordingly, these are facts that explain or clarify the facts contained in the factual framework established by the Merits Report in this case. Consequently, the Court does not find the State's objection admissible as regards the facts relating to the alleged suffering of Wong Ho Wing, his detention and the remedies filed following the ruling of the Constitutional Court, as well as with regard to the alleged pressure to grant the extradition. Despite the above, in the chapter on the facts, the Court will determine those that it considers proved in the instant case.

36. To the contrary, the Court notes that the facts included in the statements of the presumed victim and his next of kin with regard to Wong Ho Wing's detention conditions, or the treatment received during his deprivation of liberty, as well as the proceedings for money-laundering opened in Peru do not constitute facts that explain, clarify or reject those included in the Merits Report. Consequently, the Court will not take them into account in this case.

## **VII EVIDENCE**

### ***A. Documentary, testimonial and expert evidence***

37. This Court received diverse documents presented as evidence by the Commission and the parties attached to their main briefs (*supra* paras. 3, 7 and 8). The Court also received from the parties documents it had requested as helpful evidence under Article 58 of the Rules of Procedure. In addition, the Court received the affidavits made by the presumed victim, Wong Ho Wing, and the witnesses, Kin Mui Chan and He Long Huang, as well as the expert opinions of Carmen Wurst de Landázuri, Ben Saul and Geoff Gilbert, Huawen Liu and Jean Carlo Mejía Azuero.<sup>30</sup> Regarding the evidence provided during the public hearing, the Court heard the expert opinions of Bingzhi Zhao, Ang Sun and Víctor Oscar Shiyin García Toma.

### ***B. Admission of the evidence***

#### **B.1) Admission of the documentary evidence**

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<sup>27</sup> Cf. *Case of the Five Pensioners v. Peru*, *supra*, para. 155, and *Case of Cruz Sánchez et al. v. Peru*, *supra*, note at pie 47.

<sup>28</sup> The remedies specifically indicated by the State do not explicitly mention the appeal of April 26, 2013. The appeal of March 13, 2012, is indicated in paragraph 138 of the Commission's Merits Report.

<sup>29</sup> In this regard, see paragraphs 124 to 131, 133, 134, 138 and 141 of the Commission's Merits Report.

<sup>30</sup> The purpose of these statements was established in the President's order of July 28, 2014 (*supra* note 3).

38. In this case, as in others, this Court admits those documents presented by the parties and the Commission at the appropriate opportunity that were not challenged or contested, and the authenticity of which was not questioned.<sup>31</sup> The documents requested by the Court or its President and provided by the parties after the public hearing were incorporated into the body of evidence in application of Article 58 of the Rules of Procedure.

39. Regarding the newspaper articles presented by the parties and the Commission, this Court has considered that they may be assessed when they refer to well-known public facts or declarations by State officials, or when they corroborate aspects related to the case.<sup>32</sup> The Court decides to admit those documents that are complete or that, at least, allow their source and date of publication to be verified.

40. Also, with regard to some documents indicated by the parties and the Commission by means of electronic links, this Court has established that, if a party provides at least the direct electronic link to the document that it cites as evidence and it is possible to Access it, neither legal certainty nor procedural equality is affected, because it can be located immediately by the Court and by the other parties.<sup>33</sup> In this case, neither the other parties nor the Commission opposed or commented on the content and authenticity of such documents.

41. Regarding the procedural occasion to present documentary evidence, according to Article 57(2) of the Rules of Procedure, in general, it must be presented with the briefs submitting the case, with motions and arguments, or answering the submission of the case, as appropriate.

42. The State presented certain documentation with its final written arguments.<sup>34</sup> The parties and the Commission were able to present their observations on this information and documentation. The representative asked that the new diplomatic assurances presented by Peru with its final written arguments be "rejected" because they were time-barred. According to the representative, "any guarantee not to impose the death penalty or that there is no risk of being subjected to torture or other cruel, inhuman or degrading treatment or punishment must be presented before the domestic courts and, in this case, before Peru's Supreme Court of Justice and Constitutional Court." The Court considers that these objections of the representative refer to matters relating to the merits of this dispute; hence, it is not appropriate to decide them when examining the admissibility of the evidence.

43. In addition, the Commission "called the Court's attention to the lack of clarity of the nature

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<sup>31</sup> Cf. *Case of Velásquez Rodríguez v. Honduras. Merits*, *supra*, para. 140, and *Case of Cruz Sánchez et al. v. Peru*, *supra*, para. 102.

<sup>32</sup> Cf. *Case of Velásquez Rodríguez v. Honduras. Merits*, *supra*, para. 146, and *Case of Cruz Sánchez et al. v. Peru*, *supra*, para. 104.

<sup>33</sup> Cf. *Case of Escué Zapata v. Colombia. Merits, reparations and costs*. Judgment of July 4, 2007. Series C No. 165, para. 26, and *Case of Cruz Sánchez et al. v. Peru*, *supra*, para. 103.

<sup>34</sup> The State presented: (Annex 1) information from the Public Prosecution Service on preliminary investigations into money-laundering against Wong Ho Wing, his brother and sister-in-law; (Annex 2) information on the actions taken by the Ombudsman in response to the requests to intervene in favor of WHW; (Annex 3) information on the criminal legislation and the criminal procedural system in the People's Republic of China and the guarantees of due process if Wong Ho Wing were to be extradited; (Annex 4) the second instance judgment in the case of Pan Ziniu; (Annex 5) information from the National Council of the Judicature on the control of the judges who issued the first advisory decision; (Annex 6) video of the hearing before the Constitutional Court; (Annex 7) the additional diplomatic assurances offered by the People's Republic of China to the Peruvian State and presented during the hearing before the Inter-American Court; (Annex 8) the documentation on the request for information of the defense of WHW in the domestic sphere; (Annex 9) the complete file of the extradition proceedings against Wong Ho Wing, and (Annex 10) the order of December 21, 2009, of the Permanent Criminal Chamber of the Supreme Court.

and purpose of annex 3 of the State's final arguments brief." It underlined that "the procedurally acceptable content of that brief is exclusively as the State's final arguments and, in no way, can be understood as a clarification or in the sense of modifying the scope and content of the opinion provided by the said expert witness during the hearing." The Court notes that, in this annex, Peru "present[ed] its point of view with regard to the expert opinion of Professor Bingzhi Zhao," owing to the difficulties of translating Chinese into Spanish, and the explanation of a legal system that differs from that of the States Parties to the Convention, because some concepts did not have an exact translation. This could make it difficult to understand the expert opinion; nevertheless, "the original sense of the information and ideas of the deponent were retained." In this regard, the Court notes that, insofar as it was received on the date on which the time frame for the presentation of the final written arguments expired, it would consider this annex to be an expansion of the State's arguments concerning the issues dealt with by expert witness Bingzhi Zhao during the public hearing. However, these arguments do not form part of the said expert opinion and do not possess the probative value of that opinion.

44. The admissibility of the remaining documents presented by the State with its final written arguments was not contested, and their authenticity and veracity were not questioned. Pursuant to Article 58(a) of its Rules of Procedure, the Court finds it in order to admit those documents, insofar as they may be useful to decide this case, help contextualize other evidence provided to the file, and explain some of the parties' arguments.

45. Also, on November 17 and December 1, 2014, and also on April 10, 2015, the State presented the helpful information and documentation requested by the judges of the Court during the public hearing and by its President subsequently (*supra* para. 13). The parties and the Commission were able to present their observations on this information and documentation and its admissibility was not contested or its authenticity and veracity questioned. Pursuant to Article 58(a) of its Rules of Procedure, the Court finds it in order to admit these documents, insofar as they may be useful to decide this case.

46. The State opposed the admission of the additional costs requested by the representative in the "complementary motions and arguments brief" presented on February 9, 2014, as well as the requests for costs contained in the brief of August 30, 2013, addressed to the Inter-American Commission, which the representative included among the annexes to his motions and arguments brief. The State argued that any request for costs should be made in the motions and arguments brief, so that the additional costs contained in the two briefs should be rejected. The Court notes that the representative forwarded his motions and arguments brief on February 5, 2014, and sent a complementary brief on February 9, 2014, in which he included additional requests for costs and expenses (*supra* para. 7). The Court notes that the complementary brief was received within the time frame for the presentation of the motions and arguments brief in this case, which expired on February 9, 2014. Therefore, it finds that the latter brief should be considered an integral part of the first brief forwarded by the representative and considers admissible the requests for costs and expenses contained therein. Furthermore, with regard to the brief of August 30, 2013, sent with the annexes to the motions and arguments brief, the Court has verified that it forms part of the file of the processing of this case before the Commission, so that finding it inadmissible would be pointless. Nevertheless, the Court notes that, when determining costs and expenses, it will take into account the requests contained in the representative's motions and arguments brief addressed to the Court (received in communications of February 5, 6 and 9, 2014) and not those included in the brief of August 30, 2013, addressed to the Commission, since the former constituted the appropriate procedural stage for its presentation to this Court in accordance with Article 40(2)(d) of the Court's Rules of Procedure. This does not preclude the possibility of indicating and providing the evidence of the costs and expenses incurred during the proceedings before the Court subsequently, as indicated *infra*.

47. The representative forwarded, with his final written arguments, vouchers for the expenses he incurred following the submission of the motions and arguments brief. The State argued that these new requests for costs should be declared inadmissible as they were time-barred, because the representative should have made the requests in his motions and arguments brief. The Court recalls that, under Article 57(2) of the Rules of Procedure, evidence of facts that take place following the motions and arguments brief is admissible in the case of the representative of the presumed victim. Therefore, following its consistent practice, the Court admits the documentation on costs and expenses incurred after the presentation of the motions and arguments brief, sent by the representative together with his final written arguments, and incorporates it into the body of evidence.

48. On April 13, and June 11 and 18, 2015, the representative sent information on a request made on March 3, 2015, in the domestic sphere to "change house arrest to an order to appear in court periodically," for the Court to assess it, "because it related to a supervening fact." The State opposed the admission of this information because, in its opinion, the representative had not founded his request satisfactorily and the results of the request "are not included in the matters that are being analyzed by the Court [...] in this case." According to the State, the representative did not identify the specific purpose of his request or the provisions of the Rules of Procedure on which he based it. In addition, he did not specify why the request to change the house arrest would represent, "strictly, a 'supervening fact,'" and had failed to indicate what he sought to prove with this documentation, or with which to the disputed issues it was related. In this regard, this Court finds that the documentation forwarded by the representative constitutes updated information on the detention situation of Wong Ho Wing, which is part of the factual framework and purpose of this case. Since it refers to facts that have occurred and remedies filed following the representative's last communication, it constitutes information and evidence of supervening facts; therefore, the Court admits the said information under Article 57(2) of the Rules of Procedure.

## **B.2) Admission of the testimonial and expert evidence**

49. The Court also finds it pertinent to admit the statements of the presumed victim and the witnesses, and the expert opinions provided during the public hearing and by affidavit, to the extent that they are in keeping with the purpose defined by the President in the order requiring them (*supra* para. 10) and the purpose of this case.

50. The representative asked the Court to reject the expert opinions offered by the State because they were not objective. He argued that, during the hearing, the State had accepted that its agents "had 'levels of coordination' with the expert witnesses that they proposed"; thus, expert witness Ang Sun read his answers to the questions posed by the State. According to the representative, "[t]his situation not only violated the right to defense of [his] client, because he was unable to have the same 'levels of coordination,' but also completely invalidates the opinion of [the] expert witnesses." In addition, specifically with regard to Ang Sun, he argued that the latter had a direct interest in the result of the case, asking the Court more than once to take a prompt decision on Wong Ho Wing's extradition. The Court considers that the representative's observations refer to the scope and probative value that should be granted to these expert opinions, which does not affect their admissibility as part of the body of evidence. The Court will take these observations into account when assessing this evidence in its analysis of the merits of the case.

51. For its part, the State asked the Court to reject the expert opinions of Geoff Gilbert, Carmen Wurst and Ben Saul. According to the State, expert witness Geoff Gilbert did not have the required profile and sufficient experience in the matter covered by his opinion; it also contested the application of the precedents used by the expert witness to the case of Wong Ho Wing.



Regarding the expert opinion of Carmen Wurst, the State questioned the methodology used, raising doubts about the quality of the report and its proper scientific rigor, as well as the fact that Ms. Wurst, who was a psychologist, had made a medical diagnosis. In the case of the expert opinion of Ben Saul, the State questioned the precedents used, the analysis made, and that he had not answered one of the questions posed by Peru. On the latter point, the Court recalls that it has asserted that the fact that the Rules of Procedure establish the possibility that the parties may pose written questions to the deponents offered by the other party and, when appropriate, by the Commission, imposes the corresponding obligation of the party that offered the statement to coordinate and take the necessary steps to forward the questions to the deponents and to ensure that they include the respective answers. In certain circumstances, the fact that different questions are not answered may be incompatible with the obligation of procedural cooperation and the principle of good faith that governs the international proceedings. Despite this, the Court has considered that the failure to answer the questions of the other party does not affect the admissibility of a statement and is an aspect that, based on the implications of the silences of a deponent, may have an impact on the probative weight of the respective statement, an aspect that must be assessed when examining the merits of the case.<sup>35</sup> Accordingly, the Court will take these observations into account when assessing the evidence.

52. The State also asserted “its most vehement rejection” of the statements made by Wong Ho Wing, his wife and brother, that the extradition request was the result of political persecution. The Court considers that the State’s objections refer to the content of these statements and not to their admissibility. The arguments contained in the said statements will be assessed when analyzing the merits of the matter, taking into account the corresponding observations of the State.

### **C. Assessment of the evidence**

53. Based on the provisions of Articles 46, 47, 48, 50, 51, 57 and 58 of the Rules of Procedure, as well as on its consistent case law regarding evidence and its assessment,<sup>36</sup> the Court will examine and assess the documentary evidence provided by the parties and the Commission, the videos, the statements, testimony, and expert opinions, as well as the helpful evidence requested by this Court and incorporated into the file when establishing the facts of the case and ruling on the merits. To this end, it will abide by the principles of sound judicial discretion, within the corresponding legal framework, taking into account the whole body of evidence and the arguments presented in this case.<sup>37</sup>

54. Also, in accordance with this Court’s case law, the statement made by the presumed victim cannot be assessed in isolation, but rather in the context of all the evidence in the proceedings, insofar as it may provide further information on the presumed violations and their consequences.<sup>38</sup>

## **VIII PROVEN FACTS**

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<sup>35</sup> Cf. *Case of Díaz Peña v. Venezuela. Preliminary objection, merits, reparations and costs*. Judgment of June 26, 2012. Series C No. 244, para. 33, and *Case of Cruz Sánchez et al. v. Peru*, *supra*, para. 115.

<sup>36</sup> Cf. *Case of the “White Van” (Paniagua Morales et al.) v. Guatemala. Merits*. Judgment of March 8, 1998. Series C No. 37, paras. 69 to 76, and *Case of Cruz Sánchez et al. v. Peru*, *supra*, para. 129.

<sup>37</sup> Cf. *Case of the “White Van” (Paniagua Morales et al.) v. Guatemala. Merits*, *supra*, para. 76, and *Case of Cruz Sánchez et al. v. Peru*, *supra*, para. 129.

<sup>38</sup> Cf. *Case of Loayza Tamayo v. Peru. Merits*. Judgment of September 17, 1997. Series C No. 33, para. 43, and *Case of Cruz Sánchez et al. v. Peru*, *supra*, para. 131.

55. This case relates to the request for the extradition of Wong Ho Wing, a Chinese citizen, and the ensuing extradition proceedings in Peru. In this regard, the relevant facts will be described as regards: (A) the extradition treaty between China and Peru; (B) the extradition proceedings in Peru; (C) the extradition process in the case of Wong Ho Wing, and (D) the detention of Wong Ho Wing and the remedies filed in this regard.

#### **A. Extradition Treaty between China and Peru**

56. An extradition treaty exists between the People's Republic of China and Peru that was signed on November 5, 2001, and entered into force on April 5, 2003. It establishes the obligation to extradite "anyone who is in their territory and is required by the other party in order to institute criminal proceedings or execute a judgment against them." In addition, the treaty indicates the offenses that are subject to extradition; the obligatory and discretionary grounds for rejecting an extradition request; the conditions and requirements that an extradition request should meet, as well as the procedure, and communication and information channels in the case of an extradition request from either of the contracting parties. This treaty does not include an express clause on the way to proceed in the case of offenses for which the death penalty is established; however, it does establish as a condition for the extradition that "it [shall] not be contrary to the legal system of the Requested Party."<sup>39</sup> The specific provisions of the Extradition Treaty that are relevant for this case are described in greater detail in the corresponding chapters (*infra* paras. 138 and 239).

#### **B. The extradition process in Peru**

57. In Peru, extradition is carried out by means of "a joint procedure consisting of a jurisdictional stage and a political stage."<sup>40</sup> According to the Constitution, extradition must be granted by the Executive Branch.<sup>41</sup> To implement this constitutional provision, the Code of Criminal Procedure establishes that the Government will decide on extradition by means of a "supreme decision issued with the agreement of the Council of Ministers, following a report by an official commission presided by the Ministry of Justice and incorporating the Ministry of Foreign Affairs." However, before the Government decision, "the Criminal Chamber of the Supreme Court is required to intervene to issue an advisory decision." This advisory decision is binding "[w]hen the Criminal Chamber of the Supreme Court issues an advisory decision contrary to extradition," but only advisory when it is "favorable to the return or considers it in order to request a foreign country to grant an extradition," so that "the Government may take the appropriate decision."<sup>42</sup>

58. However, domestic law conditions the granting of extradition "to the existence of assurances that justice will be imparted correctly in the Requesting State" and that it does not have "political implications" for a third State. In addition, among the reasons for rejecting a request for extradition, the procedural norm establishes that extradition shall not be granted when "the act on

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<sup>39</sup> Extradition Treaty between the Republic of Peru and the People's Republic of China (evidence file, folios 1633 to 1636), and decision of October 5, 2009, of the Permanent Criminal Chamber of the Supreme Court of Justice, (evidence file, folio 101).

<sup>40</sup> Statement made by Víctor García Toma during the public hearing held in this case.

<sup>41</sup> Article 37 of the Peruvian Constitution establishes that: "Extradition shall only be granted by the Executive Branch following a report by the Supreme Court, in compliance with the law and the treaties, and based on the principle of reciprocity. Extradition shall not be granted if it is considered that it has been requested in order to persecute or punish for reasons of religion, nationality, opinion or race. The extradition of those pursued for political offenses or for acts related to such offenses is precluded; this does not include genocide, magnicide and terrorism." 1993 Constitution of Peru. Available at: [www.congreso.gob.pe/ntley/ConstitucionP.htm](http://www.congreso.gob.pe/ntley/ConstitucionP.htm), cited in the Commission's Merits Report, folio 19.

<sup>42</sup> Code of Criminal Procedure, promulgated by Legislative Decree No. 957 of July 29, 2004, articles 513 to 515. Available at: <http://www.leyes.congreso.gob.pe/Documentos/Decretoslegislativos/00957.pdf>, cited in the Commission's Merits Report, folio 24. Similarly, see Statement made by Víctor García Toma during the public hearing held in this case.

which the process is founded does not constitute an offense in either the requesting State or Peru, and if neither legislation establishes a criminal sanction of any kind, equal to, or in excess of, one year's imprisonment," or when "[t]he offense for which extradition is requested is punishable by the death penalty in the requesting State and the latter has not provided assurances that this will not be applicable."<sup>43</sup>

59. In addition, regarding the procedure to be followed, Peruvian procedural law establishes that, once the person whose extradition has been requested has been detained, a preliminary investigation judge will take a statement. In this statement, the person sought "may state whatever he considers appropriate." Subsequently, within no more than 15 days, a public hearing must be convened where evidence and arguments are presented in favor of or against extradition, and the individual sought may again make a statement "if he finds this appropriate." Following this hearing, the file is referred to the consideration of the Criminal Chamber of the Supreme Court, which must issue the advisory decision (*supra* para. 57). When it has received the case file, and before forwarded it to the parties, the Criminal Chamber will convene an extradition hearing, following which it issues the corresponding advisory decision within five days at the most. Three days after this decision has been notified to the parties, the Criminal Chamber must forward it to the Ministry of Justice and, as of this moment, the second stage of the procedure commences before the Executive Branch.<sup>44</sup> The rules relating to the extradition process in Peru are described in greater detail in the corresponding chapters (*infra* paras. 137, 138 and 240 to 242).

### ***C. The extradition process in the case of Wong Ho Wing***

60. Since 2001, Wong Ho Wing has been "an international fugitive, [owing to an INTERPOL Red Notice,] wanted by the judicial authorities of Hong Kong, China, for the offense of smuggling that occurred between [August 1996 and May 1998]."<sup>45</sup> Early on October 27, 2008, Wong Ho Wing was arrested in the "Jorge Chávez International Airport" that serves Lima, when he was entering Peru from the United States of America. That same day, the police brought him before the Permanent Criminal Court of El Callao.<sup>46</sup>

#### **C.1) First stage of the process (from the arrest of Wong Ho Wing until the second advisory decision)**

61. On October 28, Wong Ho Wing gave a preliminary statement in the presence of his lawyer and asked the Peruvian authorities to accord him "special treatment based on the defense of [his] human rights, [because if he was] returned [to his] country for the offenses that [he was] accused of, [he] could be executed or the death penalty would be imposed" on him. Consequently, he "asked to be tried in [...] Peru."<sup>47</sup>

62. On November 14, 2008, the Seventh Criminal Court of El Callao received the request to extradite Wong Ho Wing from the People's Republic of China (hereinafter also "China" or "the

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<sup>43</sup> Code of Criminal Procedure, promulgated by Legislative Decree No. 957 of July 29, 2004, articles 516 and 517. Available at: <http://www.leyes.congreso.gob.pe/Documentos/Decretoslegislativos/00957.pdf>, cited in the Commission's Merits Report, folio 24.

<sup>44</sup> Cf. Code of Criminal Procedure, promulgated by Legislative Decree No. 957 of July 29, 2004, article 521. Available at: <http://www.leyes.congreso.gob.pe/Documentos/Decretoslegislativos/00957.pdf>, cited in the Commission's Merits Report, folio 24.

<sup>45</sup> Note of the Peruvian National Police of October 27, 2008 (evidence file, folio 6). Cf. INTERPOL Red Notice entitled "Wanted for Prosecution" (evidence file, folio 8), and arrest warrant dated April 16, 2001 (evidence file, folio 6391).

<sup>46</sup> Cf. Note of the Peruvian National Police of October 27, 2008 (evidence file, folio 6).

<sup>47</sup> Preliminary statement made by Wong Ho Wing on October 28, 2008, before the Special Criminal Court of El Callao (evidence file, folio 15).

Requesting State”), requiring that “the suspect be held in custody.” As established in this request, the acts presumably committed by Wong Ho Wing constituted the “offense of smuggling ordinary merchandise,<sup>48</sup> the offense of money-laundering, and the offense of bribery,” which are defined in articles 153, 154, 191, 389 and 390 of the Criminal Code of the People’s Republic of China.<sup>49</sup> According to the request, “the taxes evaded amounted to [more than 717 million yuans].” Furthermore, Wong Ho Wing had allegedly transferred the sum of 4,048 million United States dollars out of China. Among other documents, the applicable articles of the Criminal Code of the People’s Republic of China on the statute of limitations, the relevant penalties, and the arrest warrant were attached to the request.<sup>50</sup> These articles did not include article 151 of the Chinese Criminal Code which establishes the possibility of the death penalty for the offense of smuggling (*infra* para. 146).<sup>51</sup>

63. On December 10, 2008, a public hearing was held during which Wong Ho Wing and his representative mentioned that the applicable provision was article 151, which established the death penalty.<sup>52</sup> Following the procedure established in the Procedural Code (*supra* para. 59), on January 6, 2009, the case file was referred to the Supreme Court of Justice.<sup>53</sup> On January 19, 2009, the Second Transitory Criminal Chamber of the Supreme Court of Justice held the extradition hearing.<sup>54</sup> That same day, a report of the Smuggling Investigation Department of the Wuhan Customs’ Office was received from the representative of the People’s Republic of China explaining the acts that Wong Ho Wing was accused of, and the applicable law,<sup>55</sup> with no mention of the possibility of imposing the death penalty for one of the offenses for which his extradition was requested. In addition, the representative presented his written arguments and provided the translation of the relevant parts of articles 151 and 153 of the Chinese Criminal Code, which reveal that, when the amount defrauded is “more than [500,000] yuans, as in this case,” smuggling merchandise and objects is punished in accordance with the provisions of paragraph 4

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<sup>48</sup> The offense established in article 153 of the Chinese Criminal Code is entitled “smuggling ordinary merchandise.” However, this offense is similar to the offense entitled “evasion of customs duty” under Peruvian law. *Cf.* Advisory decision of the Permanent Criminal Chamber of January 27, 2010 (evidence file, folios 168 and 169). Consequently, the offense established in article 153 of the Chinese Criminal Code, for which Wong Ho Wing was required, is referred to with both terms in different documents from the extradition process. Whichever the name used, this is the offense established in article 153 of the Chinese Criminal Code, and the penalty for “very serious” cases is established in article 151 of the Chinese Criminal Code (*infra* para. 146). For the purposes of this Judgment, the Court will use the term that appears in the respective document; nevertheless, it should be understood that both terms, “evasion of customs duty” or “smuggling ordinary merchandise” refer to the same offense established in article 153 of the Chinese Criminal Code.

<sup>49</sup> *Cf.* Extradition request from General Directorate No. 24 of the Ministry of Public Security of the People’s Republic of China of November 3, 2008 (evidence file, folio 29), and Decision of November 14, 2008, of the Second Criminal Court of El Callao (evidence file, folios 1737 and 1738). The request was sent accompanied by a note from the Embassy of the People’s Republic of China dated November 13, 2008 (evidence file, folio 35).

<sup>50</sup> *Cf.* Extradition request from General Directorate No. 24 of the Ministry of Public Security of the People’s Republic of China of November 3, 2008 (evidence file, folio 29), and table (general) with the amount of duty evaded by smuggling (evidence file, folio 8404).

<sup>51</sup> *Cf.* Pertinent parts of the Criminal Code of the People’s Republic of China provided with the extradition request (evidence file, folio 8406).

<sup>52</sup> *Cf.* Record of the hearing of December 10, 2008 (evidence file, folios 8477 and 8478).

<sup>53</sup> *Cf.* Record of the Seventh Special Criminal Court of El Callao of January 6, 2009 (evidence file, folio 1942).

<sup>54</sup> *Cf.* Record of extradition hearing of January 19, 2009 (evidence file, folio 1993).

<sup>55</sup> This report indicates that Wong Ho Wing “was responsible for importing soybean oil and re-selling it in China” and explains his alleged participation in the acts, together with other individuals. The document does not indicate the offense of which Wong Ho Wing was accused. However, it does indicate the articles of the Criminal Code applicable to the other individuals who took part in the events. *Cf.* Communication of the representative of the People’s Republic of China of January 19, 2009 (evidence file, folios 7801 to 7813).

of article 151 of this law," and this establishes that, "in very serious cases, the accused shall be condemned to life imprisonment or to death."<sup>56</sup>

64. On January 20, 2009, the Second Transitory Chamber of the Supreme Court of Justice issued the first advisory decision in the extradition proceedings. In this decision, the Supreme Court declared the extradition request admissible for the offenses of evasion of customs duty and bribery, considering that the requirements established in the extradition treaty between the two States had been met, and clarifying that, with regard to the offense of evasion of customs duty, extradition was only in order "for the criminal offense established in the first paragraph of article [153] of the Chinese Criminal Code." At the same time, it declared that extradition for the offense of money-laundering was inadmissible because, at the time that, presumably, "the acts were committed in the country of the individual sought [...], this offense was not defined in [Peruvian] criminal law."<sup>57</sup>

65. Following this decision, on January 26, 2009, Wong Ho Wing's brother filed a **first application for habeas corpus** against the judges of the Second Transitory Criminal Chamber of the Supreme Court of Justice, "based on the certain and imminent threat of violation of the rights to life and personal integrity of [...] Wong Ho Wing." Among other grounds, he indicated that "in a malicious and covert manner, the extradition request [...] did not attach the relevant translation of article 151 of the Chinese Criminal Code because this provision contains the death penalty for the offense of smuggling." He also indicated that, in an extradition process in which the offense involved was punished with the death penalty, "it was for the Prosecutor General [...] to safeguard the lawfulness of the proceedings by issuing an opinion in the extradition process, and ruling on the admissibility of the request." The application also asked for the release of Wong Ho Wing.<sup>58</sup>

66. On February 2, 2009, the People's Republic of China submitted an explanation from the Ministry of Public Security to the Official Commission for Extraditions and Prisoner Transfers of the Ministry of Justice of Peru, indicating that, according to "the provisions of the Criminal Code of the People's Republic of China, there is no possibility of imposing life imprisonment or the death penalty on him"<sup>59</sup> (*infra* para. 92.a).

67. On February 10, the Official Commission for Extraditions and Prisoner Transfers issued its report on the extradition request, indicating that "it ha[d] not received the translation of article 151 of the Criminal Code of the People's Republic of China, an article [...] referred to in the first paragraph of article 153, as revealed by the translation [in the case file]." Consequently, it considered that it was necessary "to receive the [said] translation." In addition, taking into account the precautionary measures granted by the Inter-American Commission, it established that:

[R]egarding extradition, the treaties signed by Peru allow it to grant extradition even in a case where the death penalty may be applied; [however, it is necessary to be] certain that it will not be applied; in other words, [...] the corresponding assurances must have been presented that the death penalty will not be applied, or that it will not be implemented even if it is imposed by the courts of the requesting State.

Although the treaty with the People's Republic of China does not contain an express clause on the death penalty, article 5 of the treaty establishes as a condition for extradition: "Extradition shall only be carried out if it is not contrary to the legal system of the requested party." [...]

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<sup>56</sup> Communication of January 19, 2009 (evidence file, folios 7777 to 7790).

<sup>57</sup> Advisory decision of January 20, 2009 (evidence file, folios 46 to 50).

<sup>58</sup> Cf. Application for *habeas corpus* of January 26, 2009 (evidence file, folios 52, 55, 56 and 59).

<sup>59</sup> Brief of General Directorate No. 24 of the Ministry of Public Security of February 2, 2009 (evidence file, folios 67 and 68).

Thus, according to the communication of the Inter-American Commission on Human Rights, [...] the offense would merit the death penalty and, since the case file does not include the requesting State's guarantee not to apply the death penalty, the Judiciary should first be requested to forward this guarantee if this has been presented or, if not, requested to rule on the alert raised by the Inter-American Commission [...]; that is, on the possible application of the death penalty.<sup>60</sup>

68. On February 12, 2009, the 56th Criminal Court of Lima ordered the "temporary suspension of the processing of the passive extradition process [...] until the constitutional *habeas corpus* proceeding has concluded," taking into account that "the continuation of [the] process before the Council of Ministers and the implementation of the return of the individual whose extradition has been requested to the requesting country was imminent."<sup>61</sup> The Public Attorney of the Judiciary appealed this decision.<sup>62</sup> On April 24, 2009, the Second Special Criminal Chamber of the Superior Court of Justice of Lima annulled the decision of February 12, 2009, because the precautionary measures and the suspension were not established by law in *habeas corpus* proceedings.<sup>63</sup>

69. On February 24, 2009, the Embassy of the People's Republic of China in Peru sent the translation of articles 151, 153, 154, 191, 389 and 390 of the Criminal Code of the People's Republic of China to the 56th Criminal Court of Lima.<sup>64</sup>

70. On April 24, 2009, the 56th Criminal Court of Lima considered well-founded the application for *habeas corpus*, and declared "invalid the advisory decision [of] January 20, [2009,]" because it "was insufficiently substantiated."<sup>65</sup> The decision was based on the fact that the advisory decision "does not state clearly and categorically that the accused cannot be extradited to be prosecuted for the supposed perpetration of offenses that require the death penalty."<sup>66</sup> It also declared inadmissible the request to release Wong Ho Wing, indicating that this request was not affected by the annulment of the advisory decision.<sup>67</sup> Following an appeal, the decision was confirmed on June 15, 2009.<sup>68</sup>

71. On August 25, 2009, the Ambassador of the People's Republic of China sent the Supreme Court of Justice a note in which he indicated that case law existed of similar cases where the

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<sup>60</sup> Report of the Official Commission for Extraditions and Prisoner Transfers dated February 10, 2009 (evidence file, folios 73 and 74).

<sup>61</sup> Decision of February 12, 2009 (evidence file, folio 77).

<sup>62</sup> This appeal was granted on March 9, 2009, and "the respective file" was prepared. Cf. Appeal by the Public Attorney of the Judiciary of March 3, 2009 (evidence file, folios 4415 to 4420), and decision of March 9, 2009 (evidence file, folio 2043).

<sup>63</sup> Cf. Decision of the Second Special Criminal Chamber (evidence file, folio 8481).

<sup>64</sup> Cf. Note of the Embassy of the People's Republic of China of February 24, 2009 (evidence file, folios 1627 to 1630).

<sup>65</sup> Decision of April 24, 2009 (evidence file, folios 89 and 90).

<sup>66</sup> Decision of April 24, 2009 (evidence file, folio 89). Following this decision, on October 14, 2009, the members of the Second Transitory Criminal Chamber of the Supreme Court of Justice were accused before the National Council of the Judicature "for presumed functional misconduct in the issue of the decision of January 20, 2009." Following the respective investigation, on September 19, 2012, the National Council of the Judicature decided "[t]o conclude the disciplinary procedure [...], filing the proceedings and to acquit them of the accusations; ordering that the disciplinary proceedings be filed and the corresponding record annulled," considering that the judges had not failed to analyze the case and motivate their findings appropriately. On November 14, 2012, the National Council of the Judicature declared that an appeal for review that had been filed was unsubstantiated, "and considered that the administrative jurisdiction had been exhausted." Decisions of the National Council of the Judicature of December 11, 2009, August 12, 2010, February 14, 2011, September 19, 2012, and November 14, 2012 (evidence file, folios 7343, 7345, 7348, 7355, 7356, 7364, 7365 and 7373).

<sup>67</sup> Cf. Decision of April 24, 2009 (evidence file, folio 90).

<sup>68</sup> Cf. Appeal of April 8, 2009 (evidence file, folios 92 and 93), and decision of the Second Special Criminal Chamber of Lima for proceedings where the accused is in prison of June 15, 2009 (evidence file, folio 6231).

sentence had been 15 years' imprisonment, "so that there was no possibility that the death penalty would be imposed on the applicant" (*infra* para. 92.b).<sup>69</sup>

72. On October 2, 2009, the Supreme Prosecutor advised the Permanent Criminal Chamber of his opinion that the advisory decision on extradition should be unfavorable.<sup>70</sup>

73. On October 5, 2009, the Permanent Criminal Chamber of the Supreme Court of Justice held a public hearing during which it ordered the return of the case file to the judge of the Seventh Criminal Court of the Superior Court of Justice of El Callao, to rectify the failure to comply with the requirement "to attach the certification that the guarantee that the death penalty will not be imposed if he is convicted has been presented or, if not, that it has been requested," and to reschedule the hearing.<sup>71</sup>

74. On October 12, 2009, the representative of Wong Ho Wing filed a **second application for habeas corpus** against the judges of the Permanent Criminal Chamber of the Supreme Court of Justice "based on the certain and imminent threat of violation of the rights to life and personal integrity that subsists against [...] Wong Ho Wing."<sup>72</sup> On January 5, 2010, the 53rd Criminal Court of the Province of Lima considered that this application was inadmissible, finding that what was sought was the inadmissibility of extradition and that the arguments had already been analyzed in the decision of April 24, 2009 (*supra* para. 70).<sup>73</sup> On February 4, 2010, the representative filed an appeal against this decision,<sup>74</sup> which was confirmed on June 30, 2010.<sup>75</sup> The representative filed an appeal based on constitutional injury which was declared inadmissible on August 5, 2011, because the Constitutional Court had already ruled on another constitutional remedy (*infra* paras. 81 to 83).<sup>76</sup>

75. On December 9, 2009, a passive extradition hearing was held before the Permanent Criminal Chamber.<sup>77</sup> On December 11, 2009, the Embassy of the People's Republic of China in Peru advised the Permanent Criminal Chamber that the People's Supreme Court of the People's Republic of China had decided not to impose the death penalty on Wong Ho Wing, if he was extradited and then convicted, "even if his offense is legally subject to the death penalty"<sup>78</sup> (*infra* para. 92.c).

76. On December 15, the Permanent Criminal Chamber ordered the hearing of October 5, 2009, to be nullified so that the parties could present their arguments concerning the note from the Embassy of the People's Republic of China (*supra* para. 75).<sup>79</sup>

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<sup>69</sup> Cf. Note of August 25, 2009 (evidence file, folios 8272 and 8273).

<sup>70</sup> Cf. Opinion of the Assistant Supreme Prosecutor of October 2, 2009 (evidence file, folios 7965 to 7967).

<sup>71</sup> Cf. Decision of October 5, 2009, of the Permanent Criminal Chamber of the Supreme Court of Justice (evidence file, folios 101 and 102).

<sup>72</sup> Application for *habeas corpus* of October 12, 2009 (evidence file, folio 105).

<sup>73</sup> Cf. Judgment of the 53rd Criminal Court of the Province of Lima of January 5, 2010 (evidence file, folio 161).

<sup>74</sup> Cf. Appeal of February 4, 2010 (evidence file, folios 183 and 184).

<sup>75</sup> Cf. Judgment of the Superior Court of Justice of Lima of June 30, 2010 (evidence file, folios 1521 to 1526).

<sup>76</sup> Cf. Judgment of the Constitutional Court of August 5, 2011, and separate opinion of Judges Álvarez Miranda and Vergara Gotelli giving reasons for their vote (evidence file, folios 6416 and 6417).

<sup>77</sup> Cf. Record of the hearing of December 9, 2009, before the Permanent Criminal Chamber of the Supreme Court of Justice (evidence file, folio 8278).

<sup>78</sup> Note of the Embassy of the People's Republic of China in the Republic of Peru of December 11, 2009 (evidence file, folio 140).

<sup>79</sup> Cf. Decision of the Permanent Criminal Chamber of December 15, 2009 (evidence file, folio 142).

77. On December 21, 2009, a new passive extradition hearing was held before the Permanent Criminal Chamber.<sup>80</sup> On that date, the Chamber ordered that the translation of article 151 of the Criminal Code of the People's Republic of China should be requested and added to the case file, together with the undertaking of the People's Supreme Court mentioned in the Embassy's note of December 11, 2009<sup>81</sup> (*supra* para. 75). On December 29, 2009, the People's Republic of China again sent the translation of article 151 of the Criminal Code (*supra* para. 69).<sup>82</sup>

### **C.2) Second stage of the process (from the second advisory decision to date)**

78. On January 27, 2010, the Permanent Criminal Chamber issued the advisory decision in which it decided, by the legal majority, "the passive extradition request [...] in relation to the offenses of evasion of customs duty and bribery against the People's Republic of China," established in articles 153, 154, 389 and 390 of the Chinese Criminal Code.<sup>83</sup> Regarding the punishment for the offense of evasion, the Chamber noted the possibility that the death penalty could be applied to this offense. However, it considered that the decision of the People's Supreme Court of December 8, 2009, "reveals an evident undertaking by the judicial authorities of the People's Republic of China not to impose the death penalty on the individual whose extradition is requested if he is found criminally responsible. Therefore, it should be considered that there is no real risk of the application of the death penalty or a similar sanction to this individual in the requesting State."<sup>84</sup> It also declared, unanimously, the inadmissibility of the extradition request in relation to money-laundering, because it ran counter to the principle of double jeopardy.<sup>85</sup> The Chamber conditioned the return of Wong Ho Wing:

[T]o the undertaking made by the competent authorities of the People's Republic of China not to impose the death penalty, if he should be convicted; in addition, it should advise the Peruvian State of the sentence handed down to the [individual extradited] when this is delivered.<sup>86</sup>

79. Following the second advisory decision, on February 9, the representative filed a **third application for habeas corpus** "against the certain and imminent threat of violation of the rights to life and personal integrity [of Wong Ho Wing], against the President of the Republic of Peru, the Ministry of Justice, and the Ministry of Foreign Affairs."<sup>87</sup> On February 25, 2010, the 42nd Special

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<sup>80</sup> Cf. Record of the hearing of December 21, 2009, before the Permanent Criminal Chamber of the Supreme Court of Justice (evidence file, folio 8303).

<sup>81</sup> Cf. Decision of the Permanent Criminal Chamber of December 21, 2009 (evidence file, folios 144 and 145).

<sup>82</sup> This was added to the case file the following day. Cf. note from the Ambassador Extraordinary and Plenipotentiary of the People's Republic of China to the Republic of Peru of December 29, 2009 (evidence file, folio 149), and advisory decision of the Permanent Criminal Chamber of January 27, 2010 (evidence file, folio 165).

<sup>83</sup> Cf. Advisory decision of the Permanent Criminal Chamber of January 27, 2010 (evidence file, folios 169 and 173).

<sup>84</sup> Advisory decision of the Permanent Criminal Chamber of January 27, 2010 (evidence file, folios 171 and 172).

<sup>85</sup> Cf. Advisory decision of the Permanent Criminal Chamber of January 27, 2010 (evidence file, folio 173).

<sup>86</sup> Advisory decision of the Permanent Criminal Chamber of January 27, 2010 (evidence file, folios 173 and 174).

<sup>87</sup> The representative argued that, "from the start, the extradition process [...], has been plagued with a series of grave errors and omissions"; among these, he underlined that: (1) "[t]he extradition request was not accompanied by any evidence in relation to the charges it contained"; (2) "[t]he extradition request was not accompanied either by the provision of the Chinese Criminal Code relating to the offense that was the reason for requesting the extradition, which is punished by the death penalty"; (3) the advisory decision and the "opinion of the Special Supranational Public Attorney "ignore the binding nature of the decision issued by the [Inter-American Commission] that the Government of Peru refrain from extraditing the said Chinese citizen," and (4) the undertaking not to apply the death penalty was delivered "[44] days after the Ambassador was notified, [when] the time limit was [30] days according to article 2 of Supreme Decree No. 016-2006-JUS." Application for *habeas corpus* of February 9, 2010 (evidence file, folios 188 and 191).



Criminal Court of Lima declared the application for *habeas corpus* inadmissible.<sup>88</sup> The representative appealed this decision and, on April 14, 2010, the declaration of inadmissibility was confirmed, because there had been no “violation or threat by [the President, Minister of Justice and Minister for Foreign Affairs] during the passive extradition,” or any “objective and specific harm to the rights cited,” because these persons had not issued the contested decision.<sup>89</sup> The representative filed an appeal based on constitutional injury, which was considered admissible on May 24, 2011 (*infra* paras. 81 to 83).<sup>90</sup>

80. On May 1, 2011, the eighth amendment to the Chinese Criminal Code entered into force annulling the death penalty for the offense of smuggling for which the extradition of Wong Ho Wing was being requested.<sup>91</sup> The Chargé d’Affaires of the People’s Republic of China advised the Constitutional Court of the adoption of this amendment on April 6, 2011.<sup>92</sup>

81. On May 24, 2011, the Constitutional Court decided the appeal filed based on constitutional injury (*supra* para. 79) indicating that:

[T]he diplomatic assurances offered by the People’s Republic of China are insufficient to ensure that the death penalty will not be imposed on Wong Ho Wing. This is because, in the United Nations, the requesting State has not demonstrated that it guarantees the real protection of the right to life, because it allows extrajudicial, summary or arbitrary executions. Also, it is known in international circles that the death penalty is not imposed objectively, but is influenced by public opinion.<sup>93</sup>

82. Regarding the information received about the eighth amendment (*supra* para. 80), the Constitutional Court clarified that this amendment, “to a great extent, ha[d] modified the Criminal Code of the People’s Republic of China for the offense of smuggling ordinary merchandise.” However, it specified that:

[T]he case file does not reveal [...] that this amendment [...] has been communicated officially using the diplomatic procedures of the Peruvian State. Moreover, there is no mention of whether the Constitution of the People’s Republic of China recognizes the favorable retroactivity of criminal law. Consequently, the Court f[ound] that the said letter c[ould] not be understood and interpreted as a guarantee of the non-application of the death penalty to the beneficiary of the application.<sup>94</sup>

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<sup>88</sup> Cf. Judgment of February 25, 2010 (evidence file, folio 214).

<sup>89</sup> Cf. Judgment of the Third Criminal Chamber of the Superior Court of Justice of Lima of April 14, 2010 (evidence file, folios 216 to 224).

<sup>90</sup> Cf. Appeal based on constitutional injury of May 4, 2010 (evidence file, folios 6419 to 6423).

<sup>91</sup> Cf. Decision of the Permanent Criminal Chamber of February 15, 2012 (evidence file, folio 2595).

<sup>92</sup> Cf. Judgment of the Constitutional Court of May 24, 2011 (evidence file, folio 280), and decision of the Constitutional Court of June 9, 2011 (evidence file, folio 295). Regarding the offense of smuggling, the said amendment establishes that “the first clause of article 153 of the Criminal Code is amended as follows: ‘Anyone who shall smuggle merchandise and objects that are not mentioned in articles 151, 152 and 347 of this law shall be punished pursuant to the following provision, according to the severity of the offense: (a) Anyone who shall smuggle merchandise and objects involving significant evasion of customs duty or who is a repeat offender with more than two administrative sanctions for smuggling in a year, shall be punished with imprisonment for less than three years or detention and fines of from 100% to 500% of the customs duty evaded; (b) Anyone who shall smuggle merchandise and objects involving a very high evasion of customs duty or in very serious cases, shall be punished with imprisonment for from three to 10 years and fines of from 100% to 500% of the customs duty evaded; (c) Anyone who shall smuggle merchandise and objects involving an extremely high evasion of customs duty, or in extremely serious cases, shall be punished with imprisonment for more than 10 years or life imprisonment and fines of from 100% to 500% of the customs duty evaded, or seizure of personal property.’” Cf. Eighth amendment (evidence file, folio 7555).

<sup>93</sup> Judgment of the Constitutional Court of May 24, 2011 (evidence file, folio 279).

<sup>94</sup> Judgment of the Constitutional Court of May 24, 2011 (evidence file, folio 280).

83. Based on the foregoing conclusions, the Constitutional Court declared that the application was admissible and “order[ed] the Peruvian State, represented by the Executive Branch, to refrain from extraditing Wong Ho Wing to the People’s Republic of China.” In addition, it “urge[d] the Peruvian State, represented by the Executive Branch, to proceed in accordance with the provisions of article 4(a) of the Extradition Treaty between the Republic of Peru and the People’s Republic of China.”<sup>95</sup>

84. The public attorneys of the Ministries of Justice and Foreign Affairs, and the Presidency of the Council of Ministers submitted requests to clarify the judgment of the Constitutional Court.<sup>96</sup> On June 9, 2011, the Constitutional Court issued a decision in which it indicated that, “regarding the request to clarify the reasons why it had considered that the diplomatic assurances offered by the People’s Republic of China were insufficient, [it recalled] that at the time the [judgment] was delivered, the case file did not contain any of the diplomatic assurances referred to by the public attorneys who were requesting the clarification”; rather, it only included information on the promulgation of the eighth amendment that annulled the death penalty for the offense of smuggling ordinary merchandise, which did “not constitute diplomatic assurances.”<sup>97</sup> The diplomatic assurances were incorporated into the case file following the delivery of this judgment on July 7, 2011.<sup>98</sup> On this basis, the Constitutional Court considered that conclusions 9 and 10 of the judgment constituted material errors (*supra* para. 81),<sup>99</sup> and therefore amended them as follows:

[The diplomatic assurances offered by the People’s Republic of China are insufficient to ensure that the death penalty will not be imposed on Wong Ho Wing]. This is because, since the case file does not contain any diplomatic assurances provided to the Peruvian State by the Republic of China, it has not been proved that real protection of the right to life has been ensured. Also it is *communis opinio* that the mere risk that the death penalty could be applied in the requesting State prevents the requested State from authorizing extradition. Indeed, in the case of Yin Fong, Kwok v. Australia of October 23, 2009, the Human Rights Committee emphasized that: ‘It is not necessary to prove [...] that the author “will be sentenced to death, but that there is a ‘real risk’ that the death penalty will be imposed on her.

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<sup>95</sup> Judgment of the Constitutional Court of May 24, 2011 (evidence file, folio 281).

<sup>96</sup> Cf. Ruling of the Constitutional Court of June 9, 2011 (evidence file, folio 291).

<sup>97</sup> Ruling of the Constitutional Court of June 9, 2011 (evidence file, folios 295 and 296).

<sup>98</sup> Cf. Ruling of the Constitutional Court of June 9, 2011 (evidence file, folio 296).

<sup>99</sup> Conclusions 9 and 10 of the judgment of the Constitutional Court of May 24, 2011, established that:

“9. In this case, this Court considers that the diplomatic assurances offered by the People’s Republic of China are insufficient to ensure that the death penalty will not be imposed on Wong Ho Wing. This is because, in the United Nations, the requesting State has not demonstrated that it guarantees the real protection of the right to life, because it allows extrajudicial, summary or arbitrary executions. Also, it is known in international circles that the death penalty is not imposed objectively, but is influenced by public opinion. Indeed, the Human Rights Council in the Report A/HRC/WG.6/4/CHN/2, of January 6, 2009, emphasized that ‘16. In 2005, the Government of China explained to the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions that the death penalty is applicable only to “extremely serious crimes” and that one of the factors leading to its use in that context is public opinion.”

10. Bearing in mind the report cited, this Court finds that the People’s Republic of China does not grant the necessary and sufficient guarantees to safeguard the right to life of Wong Ho Wing, because, as revealed by the report of the Human Rights Council of the United Nations, one of the factors to impose the death penalty in that country is public opinion. In addition, it should be recalled that, in the instant case, the extradition of the beneficiary would not be in order, because the principle of reciprocity is not respected, since the offenses based on which the extradition is sought are not punished with the death penalty in the Peruvian State. Consequently, the Peruvian State must comply with its obligation to try Wong Ho Wing in accordance with the provisions of article 4(a) of the Extradition Treaty between the Republic of Peru and the People’s Republic of China.” Judgment of the Constitutional Court of May 24, 2011 (evidence file, folios 279 and 280).

10. Bearing in mind the inexistence of diplomatic assurances in the case file, this Court finds that it has not been proved that the People's Republic of China has granted the necessary and sufficient guarantees to safeguard the right to life of Wong Ho Wing.<sup>100</sup>

85. The Constitutional Court also amended the legal grounds for the recommendation that Wong Ho Wing be tried in Peru, indicating that it was "pursuant to the provisions of article 3 of the [Peruvian] Criminal Code" and not pursuant to article 4(a) of the Extradition Treaty (*supra* para. 83).<sup>101</sup>

#### C.2.a) Subsequent request made by Executive Branch

86. Following the judgment of the Constitutional Court, the Executive Branch filed various judicial remedies to clarify the way in which this decision should be executed. On November 25, 2011, the representative of the Ministry of Justice presented a brief in the procedure of execution of the judgment of the Constitutional Court, indicating that the prohibition to extradite Wong Ho Wing imposed by the Constitutional Court was "applicable only to the possibility of extradition for the offense of evasion of customs duty or smuggling and not with regard to the offense of bribery, for which the possibility of imposing the death penalty is not established."<sup>102</sup> Therefore, it asked the 42nd Special Criminal Court of the Superior Court of Justice of Lima to take the foregoing into account and to rule "that this corresponds to the execution of judgment."<sup>103</sup> On November 30, 2011, it declared that the "request for clarification (definition) of the scope of the mandate of the Constitutional Court" was inadmissible.<sup>104</sup> The representative of the Ministry of Justice appealed this decision and, on February 20, 2012, the "Criminal Chamber for proceedings involving detainees" confirmed this decision. In particular, the Chamber indicated that "under article [4] of the Organic Law of the Judiciary, the content of a judgment is immutable, apart from the exceptions established by law."<sup>105</sup> The representative of the Ministry of Justice filed an appeal based on constitutional injury requesting an interpretation of the judgment of the Constitutional Court (*infra* para. 90).<sup>106</sup>

87. On December 22, 2011, the Embassy of the People's Republic of China forwarded "the documents relating to the pertinent legal provisions, [including article 12 regarding the retroactivity of criminal law,] and clarification on [the application] of the eighth amendment of the Chinese Criminal Code, issued by the [People's Supreme Court] of the People's Republic of China."<sup>107</sup> The latter established that:

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<sup>100</sup> Ruling of the Constitutional Court of June 9, 2011 (evidence file, folios 297 and 302).

<sup>101</sup> *Cf.* Ruling of the Constitutional Court of June 9, 2011 (evidence file, folio 302).

<sup>102</sup> Brief of November 25, 2011, filed before the judge of the 42nd Special Criminal Court of the Superior Court of Justice of Lima (evidence file, folio 337).

<sup>103</sup> Brief of November 25, 2011, before the judge of the 42nd Special Criminal Court of the Superior Court of Justice of Lima (evidence file, folio 340).

<sup>104</sup> Decision of the 42nd Special Criminal Court of the Superior Court of Justice of Lima of November 30, 2011 (evidence file, folio 8492).

<sup>105</sup> Appeal of December 12, 2011 (evidence file, folios 2712 to 2715), and decision of February 20, 2012, of the Criminal Chamber for proceedings involving detainees of the Superior Court of Justice of Lima (evidence file, folios 354 to 357).

<sup>106</sup> The Ministry of Justice argued that the effects of the constitutional decision cannot be permitted to exceed those of the application for *habeas corpus* filed in the instant case in favor [of] Wong Ho Wing, because the Supreme Court of Justice of the Republic has declared admissible the passive extradition of the Chinese citizen for the offenses of evasion of customs duty and also for the offense of bribery. Nevertheless, as can be appreciated from the arguments presented and the decisions made at the constitutional level, no ruling was made on the possibility of carrying out the extradition for the less serious offense; that is, for the offense of passive bribery." *Cf.* Constitutional remedy of March 19, 2013 (evidence file, folios 8496 and 8497).

<sup>107</sup> Note of the People's Republic of China of December 22, 2011 (evidence file, folios 7479 and 7480). The case file does not reveal the date on which the translation of article 12 on criminal retroactivity was sent, because this translation is dated

Regarding the retroactive effects of the Criminal Code, according to paragraph [1] of article [12] of the Criminal Code of the People's Republic of China, the principle of sentencing in accordance with the law at the time of the act is followed, and also the principle of applying the lesser punishment; in other words, for offenses that have not been sentenced prior to the entry into force of the Criminal Code, if there has been no change in the status of the punishment between the law at the time of the act and the law in force, the law at the time of the act is applied. If the law in force imposes a lesser punishment, the law in force is applied. Under the eighth amendment, which came into force on May 1, 2011, the first paragraph of article 153 of the Criminal Code was amended. The presumed offenses committed by [Wong Ho Wing] occurred before this amendment came into force and, at the same time, pursuant to the provisions of the amended article, the maximum punishment is less than the maximum punishment before the amendment. Based on the above-mentioned principles, the eighth amendment will be applied in the case of [Wong Ho Wing]. The undertaking made by the Supreme Court of the People's Republic of China not to impose the death penalty on [Wong Ho Wing] remains in effect.<sup>108</sup>

88. On February 9, 2012, the Ministry of Justice and Human Rights asked the President of the Supreme Court of Justice to issue a "complementary advisory decision," taking into account "the entry into force of the eighth amendment of the Criminal Code of [the People's Republic of China, which annuls] the death penalty for the offense of smuggling ordinary merchandise."<sup>109</sup> Accordingly, on February 15, 2012, the Permanent Criminal Chamber ordered that a passive extradition hearing be held on February 21, 2012<sup>110</sup> (*infra* para. 89). On March 13, 2012, the representative filed **a fifth application for *habeas corpus*** against the convening of this hearing.<sup>111</sup> According to information provided by the State on December 1, 2014, this procedure is still pending.<sup>112</sup>

89. However, the February 21 hearing was annulled due to lack of information on the applicable Chinese legislation.<sup>113</sup> After this information had been obtained, on March 6, the Permanent Criminal Chamber again convened the hearing for March 14, 2012.<sup>114</sup> That day, the Criminal Chamber indicated that it was unnecessary to hold the hearing and "pointless, as the matter had been dealt with owing to the issue of a new advisory decision." In this regard, it emphasized that, "in sum, there are two final rulings, one of an advisory nature (by the Judiciary), and the other of a binding nature (by the Constitutional Court) that the Executive Branch must comply with, taking into account the provisions of article [113] of the Code of Constitutional Procedure."<sup>115</sup>

90. Meanwhile, on March 12, 2013, the Constitutional Court decided that the request for interpretation of its mandate with regard to Wong Ho Wing was inadmissible (*supra* para. 86).<sup>116</sup> It stressed that, regarding this appeal for interpretation:

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February 24, 2012. *Cf.* Official translation of article 12 (evidence file, folios 7504 and 7505).

<sup>108</sup> Clarification of the case to which the eighth amendment is applicable (evidence file, folio 7512).

<sup>109</sup> Brief of February 9, 2012, before the President of the Supreme Court of Justice (evidence file, folio 352).

<sup>110</sup> *Cf.* Decision of the Permanent Criminal Chamber of February 15, 2012 (evidence file, folio 2595).

<sup>111</sup> *Cf.* Application for *habeas corpus* of March 13, 2012 (evidence file, folio 361).

<sup>112</sup> *Cf.* The State's brief of December 1, 2014 (merits file, folio 1159). The application for *habeas corpus* was admitted on April 29, 2013. *Cf.* Admissibility decision of April 29, 2013 (evidence file, folios 8517 to 8520).

<sup>113</sup> *Cf.* Decision of February 21, 2012 (evidence file, folios 7456 to 7460).

<sup>114</sup> *Cf.* Note of the Embassy of the People's Republic of China of February 27, 2012 (evidence file, folio 7471), and decision of March 6, 2012, of the Permanent Criminal Chamber of the Supreme Court of Justice (evidence file, folio 359).

<sup>115</sup> Decision of March 14, 2012 of the Permanent Criminal Chamber (evidence file, folio 373).

<sup>116</sup> *Cf.* Decision of March 12, 2013, of the Constitutional Court (evidence file, folio 377).

[T]he purpose sought is that, [...] with the pretext of “clarifying” one element of its judgment, [the Constitutional Court] “amend” its decision, so that it affirms something that it did not indicate at the time, also affecting the *res judicata* guarantee established in article 139(2) of the Constitution. [...]. That, in this regard, in accordance with the content of both the judgment and the clarification ruling issued by the Constitutional Court, it should be pointed out that in these decisions it did not make an individual or separate analysis of the offenses of which the applicant is accused, not only because this was not in order [...], but also because what was relevant was to determine whether or not the right to life of the beneficiary of the *habeas corpus* proceeding was in danger if the extradition request was declared admissible.<sup>117</sup>

### C.2.b) The actual situation

91. Following this last decision, the case file does not show that any new appeals have been filed against the judgment of the Constitutional Court or with regard to the extradition process before the Supreme Court. Consequently, at this time, the advisory decision of the Criminal Chamber of the Supreme Court of January 27, 2010, which finds extradition admissible and a binding *prima facie* ruling of the Constitutional Court of May 24, 2011, ordering the State to refrain from extraditing Wong Ho Wing are both in force simultaneously. Since that time, the process has been in the hands of the Executive Branch, which has not taken a final decision in this regard.

### **C.3) Diplomatic assurances granted by the People’s Republic of China in relation to the extradition of Wong Ho Wing**

92. In this case, the following diplomatic assurances or notes have been given to Peru by the People’s Republic of China progressively, between February 2009 and January 2010, when the second advisory decision was issued (*supra* para. 78):

- a. First diplomatic note: note of February 2, 2009  
General Directorate No. 24 of the Ministry of Public Security of the People’s Republic of China<sup>118</sup> presented the following explanation to the Official Commission for Extraditions and Prisoner Transfers of the Ministry of Justice of Peru:
  - A. Based on the nature of the offenses for which the extradition of Wong Ho Wing is requested and the provisions of the Criminal Code of the People’s Republic of China, there is no possibility of imposing on him the punishment of life imprisonment or the death penalty.
  - B. Chinese justice will impose criminal responsibilities on Wong Ho Wing based on the law and respecting fully the Extradition Treaty between the Governments of China and Peru.<sup>119</sup>
- b. Second diplomatic note: note of August 25, 2009  
The Ambassador Extraordinary and Plenipotentiary of the People’s Republic of China to Peru sent the Supreme Court of Justice a note indicating that “[c]ase law exists from similar cases” where 15 years’ imprisonment has been imposed for acts with the same name, or the same offense, and involving an equally important sum and the amount of duty evaded, and where the *modus operandi* has also been similar, “there was, therefore, no possibility of imposing the death penalty on the person sought.”<sup>120</sup>
- c. Third diplomatic note: notes of December 10 and 11, 2009

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<sup>117</sup> Decision of March 12, 2013, of the Constitutional Court (evidence file, folio 377).

<sup>118</sup> This explanation was presented by the Consul of the Embassy of the People’s Republic of China in Peru to the President of the Commission for Extraditions and Prisoner Transfers (evidence file, folio 1615).

<sup>119</sup> Brief of the General Directorate No. 24 of the Ministry of Public Security of February 2, 2009 (evidence file, folios 67, 68 and 1617).

<sup>120</sup> Brief No. 135/2009 of the Ambassador Extraordinary and Plenipotentiary of the People’s Republic of China to Peru addressed to the President of the Supreme Court of Justice of August 25, 2009 (evidence file, folio 2417).

The Ambassador Extraordinary and Plenipotentiary of the People's Republic of China to Peru informed the Permanent Criminal Chamber of the Supreme Court of Justice that "the People's Supreme Court of the People's Republic of China has taken the following decision: if the extradition from Peru to China is executed, and if [...] Wong Ho Wing is tried by a court and found guilty, the court will not impose the death penalty [...] on [...] Wong Ho Wing, even though his crime is subject to the death penalty by law." In addition, the Ambassador advised that he had "full authorization to undertake that the death penalty would not be imposed on [...] Wong Ho Wing if the extradition request of the Government of the People's Republic of China was found admissible."<sup>121</sup>

d. Fourth diplomatic note: note of December 29, 2009

The Ambassador Extraordinary and Plenipotentiary of the People's Republic of China to Peru sent the Permanent Criminal Chamber of the Supreme Court of Justice a copy and the translation of the decision issued by the People's Supreme Court, establishing that: "[if he is extradited from Peru to China and if] a court finds that Wong Ho Wing is guilty, the court will not sentence Wong Ho Wing to death (including the immediate death penalty or the death penalty with a temporary two-year suspension) [...], even though his crime is legally subject to the death penalty."<sup>122</sup>

93. Following the second advisory decision of the Supreme Court of Justice and up until August 2014, the following assurances were provided:

e. Fifth diplomatic note: note of February 22, 2011

The Ambassador of the People's Republic of China informed the Minister of Justice of Peru, that "the Government Chino undertakes formally, apart from the commitment not to apply the death sentence [...], to invite the Peruvian Government to send observers to be present during the hearings held in [the proceedings] against Mr. Wong and to monitor compliance with the [eventual] judgment."<sup>123</sup>

f. Sixth diplomatic note: note of June 10, 2011

The Ambassador of the People's Republic of China advised the Minister of Justice, attaching the translation of article 12 of the Chinese Criminal Code, that he officially confirmed that the eighth amendment of the Chinese Criminal Code would be applicable to Wong Ho Wing's case "because a preliminary hearing has not yet been held; which proves that the annulment of the death penalty will be applicable to him; thus, there is no risk that this punishment will be imposed."<sup>124</sup>

g. Seventh diplomatic note: received on December 22, 2011

The Embassy of the People's Republic of China addressed a communication to the Ministry of Foreign Affairs of Peru (*supra* para. 87), in which it indicated that:

Based on the decision of the Supreme Court of the People's Republic of China, in a note dated December 11, 2009 [...], the Chinese party made a formal undertaking to the Peruvian party that the death penalty would not be imposed on [Wong Ho Wing], even if he was tried and convicted following his extradition to China. This undertaking by the Chinese party continues to be in effect.

With the entry into force of the eighth amendment to the Criminal Code of the People's Republic of China on May 1, 2011, the death penalty has been annulled for the offense of smuggling ordinary

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<sup>121</sup> Notes Nos. 200/2009, 201/2009 and 202/2009 sent by the Ambassador Extraordinary and Plenipotentiary of the People's Republic of China to Peru to the President of the Permanent Criminal Chamber of the Supreme Court of Justice and the judge of the Seventh Criminal Court of the Superior Court of Justice of El Callao (evidence file, folios 964, 1116 and 1117).

<sup>122</sup> Note No. 204/2009 of December 29, 2009, sent by the Ambassador of the People's Republic of China to the Republic of Peru to the President of the Permanent Criminal Chamber of the Supreme Court of Justice (evidence file, folios 1622 and 1624).

<sup>123</sup> Note No. 010/2011 of February 22, 2011, sent by the Ambassador of the People's Republic of China to the Republic of Peru to the Minister of Justice of the Republic of Peru (evidence file, folio 5755).

<sup>124</sup> Note No. 036/2011 of June 10, 2011, cited in the ruling of the Constitutional Court of June 9, 2011 (evidence file, folio 296).

merchandise in which [Wong Ho Wing] is involved. To demonstrated this, the documents with the pertinent legal provisions are attached to [this note], together with the clarification about the cases to which the eighth amendment of the Chinese Criminal Code issued by the Supreme Court of the People's Republic of China is applicable, and also the official translation into Spanish.<sup>125</sup>

h. Eighth diplomatic note: note of August 19, 2014

The Embassy of the People's Republic of China addressed a communication to the Ministry of Foreign Affairs, in which it affirmed the following:

1. In 2009, the Chinese Government gave guarantees that, pursuant to the decision of the People's Supreme Court, the death penalty would not be imposed on Mr. [Wong] and, as a State Party to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the Chinese Government guarantees that Mr. [Wong] will not be subjected to torture or other cruel, inhuman or degrading treatment or punishment. The Chinese party will abide by this undertaking.
2. The information regarding the place where Mr. [Wong] would be detained will be accessible to the Peruvian party. In response to the requests of the Peruvian party, the Chinese party will organize visits to the place where Mr. [Wong] will be detained, including his room, as soon as possible, and meetings between Mr. [Wong] and the Peruvian diplomats or consular officials resident in China. The Peruvian officials may be accompanied by an interpreter chosen by the Peruvian party.
3. If necessary, video conferencing facilities will be available so that Mr. [Wong] may contact the Peruvian diplomats or consular officials resident in China during his detention at the request of the Peruvian party.
4. According to the Code of Criminal Procedure of the People's Republic of China and the Lawyers Act of the People's Republic of China, Mr. [Wong] has the right to authorize a lawyer licensed to practice law in China to defend him. He also has the right to reject the defense of the lawyer he chose and to appoint another one. Mr. [Wong] is allowed to meet with his lawyer without being monitored.
5. The Peruvian party may send its diplomats or consular officials resident in China to observe the open trial in the criminal case against Mr. [Wong] in accordance with the Code of Criminal Procedure of the People's Republic of China and the Criminal Code of the People's Republic of China.
6. After Mr. [Wong] has been returned to China, the Chinese judicial authorities will prepare simultaneous audio and video recordings of the pre-trial and trial interrogations, and will record the identity of all those present during the pre-trial and trial interrogations of Mr. [Wong]. These audio and video recordings will be available to the Peruvian party as requested.
7. Pursuant to the Prisons Act of the People's Republic of China and the Detention Center Regulations of the People's Republic of China, every detainee has access to any medical care that is required.

In response to a reasonable request from the Peruvian party, the Chinese party will permit an independent social medical institution with a license to operate in the continental part of China, to provide medical care to Mr. [Wong].

Given the private nature of the medical report, the Peruvian party requires the consent of Mr. [Wong] to access the content of the report.

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<sup>125</sup> Note of the People's Republic of China of December 22, 2011 (evidence file, folios 7479 and 7480). With this note, the People's Republic of China forwarded to Peru: (i) the "Clarification of the cases to which the eighth amendment of the Criminal Code of the People's Republic of China is applicable," in which the People's Supreme Court indicated that the eighth amendment of the Criminal Code would be applicable to the case of Wong Ho Wing; (ii) the official translation of the eighth amendment of the Criminal Code of the People's Republic of China (evidence file, folios 7504 and 7505). However, (iii) the official translation of articles 87 and 88 of the Criminal Code of the People's Republic of China, concerning the statute of limitations, and (iv) the official translation of article 12, paragraph 1, of the Criminal Code of the People's Republic of China, which recognizes the principle of the retroactivity of the most favorable criminal law seems to have been sent later, on February 24, 2012 (evidence file, folios 7497 to 7505). In addition, on April 19, 2013, the Embassy of the People's Republic of China sent a communication to the Ministry of Justice and Human Rights of Peru, with which it forwarded new certifications of those documents as well as complementary documentation on the inapplicability of the death penalty to Wong Ho Wing, particularly the text of articles 151 and 153 of the Chinese Criminal Code before the amendment. Cf. Note No. 26/2013 of April 18, 2013, sent by the Ambassador of the People's Republic of China to the Republic of Peru to the Minister of Justice and Human Rights of Peru (evidence file, folio 3491).

The Treaties and Laws Department of the Ministry of Foreign Affairs of the People's Republic of China and the Peruvian Embassy in China shall be the communication channels for all matters related to the above-mentioned articles.<sup>126</sup>

***D. The detention of Wong Ho Wing and the remedies filed in this regard***

94. Peru's procedural law establishes the mechanism of "provisional or pre-extradition arrest" for the detention of individuals wanted by foreign authorities. According to this law, the provisional arrest is in order mainly when a person is "formally requested by the central authority of the interested country." This request must be sent to the Prosecutor General, who must forward it "immediately to the judge of the competent preliminary investigation, advising the respective provincial prosecutor." It is for the said investigating judge to issue the provisional arrest warrant, "provided that the act which is considered an offense is also considered an offense in Peru and that any type of criminal punishment, equal to or in excess of one year's imprisonment, is not established." Once "the provisional arrest has been order, the preliminary investigation judge shall hear the person who has been arrested within 24 hours and will appoint a defense counsel if the person arrested does not appoint a lawyer of his own choice" (*infra* para. 241). The arrest will be lifted if the judge observes that the conditions indicated above do not exist, and "will become an order to appear in court periodically, and the prohibition to leave the country," or will cease "if it is proved that the individual arrested is not the person sought, or when the time limit of 30 days for the formal presentation of the extradition request has expired." The said norm also establishes the possibility of "obtaining provisional release, if the legal time limits established in the treaty or law that supports the extradition request expire, or if the individual sought meets the procedural conditions for this measure," and in this case, "the procedure established for the termination of preventive detention will be followed."<sup>127</sup>

95. In addition, the Extradition Treaty between China and Peru establishes the possibility that "[i]n urgent cases, before the presentation of the extradition request, the requesting party may request the preventive detention of the person sought."<sup>128</sup>

96. Wong Ho Wing was arrested on October 27, 2008, in the "Jorge Chávez International Airport", and from there he was transferred to the cells of the Judicial Police of El Callao and brought before a judge (*supra* para. 60). Subsequently, Wong Ho Wing was interned in the Transitory Pre-trial Prison of El Callao.<sup>129</sup> In this section, the Court will establish the facts relating to the detention of Wong Ho Wing, which occurred in parallel to the extradition process.

97. On October 28, 2008, the special court ordered the provisional arrest of Wong Ho Wing:

[I]n order to ensure his presence in the country while the corresponding extradition request is processed, because he has not proved that he has a domicile or known employment in the country.<sup>130</sup>

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<sup>126</sup> Note No. 030/2014 of August 19, 2014, sent by the Embassy of the People's Republic of China in the Republic of Peru to the Ministry of Foreign Affairs of Peru (evidence file, folios 7377 to 7382).

<sup>127</sup> Code of Criminal Procedure, promulgated by Legislative Decree No. 957 of July 29, 2004, article 523. Available at: <http://www.leyes.congreso.gob.pe/Documentos/Decretoslegislativos/00957.pdf>, cited in the Commission's Merits Report, folio 24.

<sup>128</sup> Extradition Treaty between the Republic of Peru and the People's Republic of China, article 9 (evidence file, folio 1635).

<sup>129</sup> Cf. Note of the First Criminal Court of the Superior Court of El Callao of October 28, 2008 (evidence file, folio 21), and Note of the Peruvian National Police of October 27, 2008 (evidence file, folio 11)

<sup>130</sup> Provisional arrest warrant of October 28, 2008 (evidence file, folios 18 and 19).



98. Wong Ho Wing's defense filed an appeal against this provisional arrest warrant, contesting that he did not have "known employment in the country," because he was the "founder and main shareholder of a company [that] he administers: the [...] 'Hotel Maury.'" Also, regarding the domicile, he indicated that "when he is in [Peru], he stays at this hotel."<sup>131</sup>

99. On November 6, 2008, the Embassy of the People's Republic of China sent a note asked "the competent Peruvian authorities [to take the necessary steps] to ensure the provisional arrest of [Wong Ho Wing] before the arrival of the Chinese commission that would open the extradition process officially."<sup>132</sup>

100. On December 11, 2008, the First Transitory Combined Superior Chamber of El Callao confirmed the arrest warrant decision, indicating that it met the requirements established in paragraphs 1, 4 and 10 of article 523. Regarding the arguments contained in the appeal, it indicated that "it was not incumbent [on the court] to analyze [the procedural risks] in the case of a provisional arrest with a view to extradition; rather, that corresponds to a criminal proceeding instituted in [Peru] for a specific offense, which has not occurred [in this case]."<sup>133</sup>

101. On September 18, 2009, the representative presented a release request to the Second Transitory Criminal Chamber of the Peru's Supreme Court of Justice.<sup>134</sup> On September 21, 2009, this Second Criminal Chamber ordered that the request be forwarded "to another Supreme Court for a new ruling," considering that it did not have the required competence.<sup>135</sup> The file before this Court does not contain information on whether another court ruled on this request.

102. On August 5, 2010, the representative filed another application for release on bail before the Permanent Criminal Chamber of the Supreme Court of Justice requesting that it impose "an order to appear in court periodically with the prohibition to leave the country, pursuant to [...] paragraph 6 [of Article 523]." In this regard, he indicated that, since the advisory decision had already been issued, "during the extradition process that was underway, the circumstances that surrounded it at the outset had changed substantially, which led to the conclusion that, if he is released, he will not abuse of his freedom to flee or to fail to comply with the obligations imposed on him." Accordingly, he stated that "the provisions of paragraph 9 of article 523 of the Code of Criminal Procedure are applicable, not only due to the length of [the deprivation of liberty], but also because [he meets] the conditions required to be granted this type of measure," added to which this provision establishes 'that the person arrested may obtain his provisional release, once the legal time limits established in the [extradition] treaty have expired.'<sup>136</sup>

103. On October 19, 2010, the Chamber declared the request for provisional release inadmissible.<sup>137</sup> The four judges who voted in favor of its inadmissibility indicated, among other arguments, that there was no legal time limit for detention in extradition processes.<sup>138</sup> They also

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<sup>131</sup> Appeal filed on October 29, 2008 (evidence file, folio 24).

<sup>132</sup> Note of November 5, 2008, received on November 6, 2008 (evidence file, folios 32 and 33).

<sup>133</sup> Decision of December 11, 2008, of the First Transitory Combined Superior Chamber (evidence file, folios 43 and 44).

<sup>134</sup> Cf. Release request of September 18, 2009 (evidence file, folio 6405).

<sup>135</sup> Cf. Decision of the Second Transitory Criminal Chamber of the Supreme Court of Justice of September 21, 2009 (evidence file, folio 8532).

<sup>136</sup> Request for release on bail of August 5, 2010 (evidence file, folio 227).

<sup>137</sup> Cf. Decision of October 19, 2010 (evidence file, folio 263).

<sup>138</sup> Cf. Vote of Supreme Justice José Antonio Neyra Flores of October 13, 2010 (evidence file, folios 1608 to 1611); Vote of José Luis Lecaros Cornejo and Jorge Calderón Castillo of September 10, 2010 (evidence file, folio 1598), and Vote of Judge Santa María Morillo of September 30, 2010 (evidence file, folio 1601).

indicated that, in the case of Wong Ho Wing, the proceedings had been delayed owing to the appeals filed by his representative at the domestic and the inter-American level.<sup>139</sup> Judge José Neyra Flores added that “the probability that he will avoid prosecution has not disappeared; to the contrary, the risk of his absconding is greater, because the Permanent Criminal Chamber has [now] declared [...] the extradition request admissible [...]; moreover, the processing of the order given in the said judicial ruling is suspended or pending execution,” in compliance with the provisional measures ordered by the Inter-American Court.<sup>140</sup> Meanwhile, the dissenting judges indicated that it was in order to grant the provisional release of Wong Ho Wing because, at that time, there was no risk of his absconding. In addition, they took into account the length of time that the presumed victim had been detained.<sup>141</sup>

104. Following the ruling of the Constitutional Court ordering the Executive Branch to refrain from extraditing Wong Ho Wing (*supra* para. 83), on October 5, 2011, his representative asked the Permanent Criminal Chamber for his “immediate release without any restrictions.”<sup>142</sup> On October 10, 2011, the Criminal Chamber declared that this request should “be submitted [...] to the corresponding court.”<sup>143</sup> On October 18, the representative filed the request before the Seventh Criminal Court of El Callao.<sup>144</sup>

105. On November 2, 2011, the judge asked the Ministry of Justice to forward the provisional arrest file.<sup>145</sup> On November 4, the representative asked the Ministry of Justice to forward the file.<sup>146</sup> On November 8, the representative asked the Seventh Criminal Court to ask the Ministry of Justice to forward the file.<sup>147</sup>

106. On November 25, 2011, the Ministry of Justice forwarded the said file and advised the court of the reasons for the delay in forwarding it.<sup>148</sup> In this regard, it explained that the “request to

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<sup>139</sup> Cf. Vote of Supreme Justice José Antonio Neyra Flores of October 13, 2010 (evidence file, folios 1608 to 1611); Vote of José Luis Lecaros Cornejo and Jorge Calderón Castillo of September 10, 2010 (evidence file, folio 1598), and Vote of Judge Santa María Morillo of September 30, 2010 (evidence file, folio 1602).

<sup>140</sup> Cf. Vote of Supreme Justice José Antonio Neyra Flores of October 13, 2010 (evidence file, folios 1608 to 1611).

<sup>141</sup> Cf. Vote of Judges San Martín Castro, Prado Saldarriaga and Príncipe Trujillo of September 10, 2010 (evidence file, folios 1593 and 1594).

<sup>142</sup> Request dated October 5, 2011 (evidence file, folio 2724).

<sup>143</sup> Decision of the Permanent Criminal Chamber of October 10, 2011 (evidence file, folio 304).

<sup>144</sup> Cf. Request dated October 18, 2011 (evidence file, folio 306).

<sup>145</sup> Cf. Note of the Seventh Criminal Court of October 26, 2011, received on November 2, 2011 (evidence file, folio 318).

<sup>146</sup> Cf. Request dated November 4, 2011 (evidence file, folio 320).

<sup>147</sup> Cf. Request dated November 8, 2011 (evidence file, folio 322). Additionally, following a request by the representative that he rule in this regard, on November 24, 2011, the Ombudsman sent a note to the Ministry of Justice asking it to forward the file of the provisional arrest so that he could decide the application for *habeas corpus* and asked the Vice Minister of Justice for “a report on the objective reasons why the official in charge of the sector had not responded to the note of the Seventh Court of El Callao [requesting the provisional arrest file], and had not forwarded this file.” This request was answered on December 1, indicating that the court’s request had already been answered and that “any evaluation of the reasonableness of the time taken by the extradition process could not be made without considering the procedural activity of the defense of the individual sought.” Cf. Request dated November 21, 2011 (evidence file, folio 331); note of the Ombudsman of November 24, 2011 (evidence file, folios 315 and 316), and brief of the Ministry of Justice of December 1, 2011 (evidence file, folios 348 and 349).

<sup>148</sup> Cf. Note of November 25, 2011, to the 30<sup>th</sup> Criminal Court of Lima (evidence file, folios 6469 and 6470), and communication of the Ministry of Justice of December 1, 2011 (evidence file, folios 348 and 349). The Office of Legal Advisory Services indicated that “it is necessary to comply with the request of the judge of the Seventh Criminal Court of the Superior Court of Justice of El Callao, consisting in forwarding the documentation of the provisional arrest that forms part of the case file related to the passive extradition request of the Chinese citizen, Wong Ho Wing, because this is an order or demand made by the judge who is hearing the corresponding criminal proceeding.” In addition, it clarified that, as the Ministry of Justice does not have competence to deal with and/or decide release requests, the court’s note “constitutes a document that should be dealt with by the Ministry of Justice, without this signifying that it has decision-making powers.”

send the arrest file was about to be answered [...] when another note was received [...] forwarding the proceedings regarding the release request that was the reason the file was required." It indicated that, since the extradition request "had not been decided by the Executive Branch," it was necessary to consult the Office of Legal Advisory Services how to proceed.<sup>149</sup> It also underlined that: (i) "it was not the Ministry of Justice that requested the arrest [...] and it [...] cannot decide his release"; (ii) the arrest of [...] Wong Ho Wing was made with a view to an extradition process that has not ended," so that "no one can affirm that they know, or foresee, or state in advance, what decision the Peruvian State will take [...] on the extradition," and (iii) this "does not change the fact that a ruling of the Constitutional Court exists ordering that he not be extradited."<sup>150</sup>

107. On December 1, 2011, the Seventh Criminal Court ordered the return of the provisional arrest and extradition files to the Ministry of Justice, and denied the release request, because the final decision was still pending.<sup>151</sup>

108. At the same time, on November 16, 2011, the representative filed a **fourth application for *habeas corpus*** against the Ministry of Justice and the judge of the Seventh Criminal Court of the Court Superior of El Callao based on the initial forwarding of the file of the provisional arrest to the Ministry of Justice and the subsequent failure to forward it to the court.<sup>152</sup> On May 30, 2012, the application for *habeas corpus* was declared inadmissible, because it was not possible to observe "any harm to the constitutional rights of the beneficiary."<sup>153</sup>

109. On April 26, 2013, the representative filed a **sixth application for *habeas corpus*** "asking [that] the immediate release of [Wong Ho Wing] without any restriction be ordered."<sup>154</sup> On October 24, 2014, the corresponding court considered the application inadmissible, taking into account that the deprivation of liberty had already been changed to house arrest, and also that "the decision to release the beneficiary is currently before [the Inter-American Court, so that *lis pendens* applies]."<sup>155</sup>

110. On November 20, 2013, Wong Ho Wing requested a change in the provisional arrest.<sup>156</sup>

111. On January 24, 2014, the representative filed a brief before the Constitutional Court requesting that it "make the necessary requests to the corresponding authorities so that they archive the extradition process in Peru against Wong Ho Wing and order his immediate release, with the return of his passport and other personal document."<sup>157</sup> On January 27, 2014, an order was issued to return the brief "to the appellant so that, if appropriate, he can defend it before the corresponding court."<sup>158</sup>

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<sup>149</sup> Cf. Note of November 24, 2011 (evidence file, folios 6466 and 6467).

<sup>150</sup> Note of November 25, 2011, to the Seventh Criminal Court of El Callao (evidence file, folios 6469 and 6470). On November 28, the Ministry of Justice sent another similar note to the 30th Criminal Court of Lima. Cf. Communication of November 28, 2011, to the judge of the 30th Criminal Court of Lima (evidence file, folio 346).

<sup>151</sup> Cf. Decision of the Seventh Criminal Court of El Callao of December 1, 2011 (evidence file, folio 6472).

<sup>152</sup> Cf. Application for *habeas corpus* of November 16, 2011 (evidence file, folios 325 and 326).

<sup>153</sup> Decision of the 30th Special Criminal Court of Lima of May 30, 2012 (evidence file, folios 6443 to 6448).

<sup>154</sup> Application for *habeas corpus* of April 26, 2013 (evidence file, folio 6086).

<sup>155</sup> Judgment of the 33rd Criminal Court of October 24, 2014 (evidence file, folios 8538 and 8539).

<sup>156</sup> Cf. Brief of the representative of November 20, 2013 (evidence file, folio 6450).

<sup>157</sup> Brief of January 24, 2014 (evidence file, folio 6118).

<sup>158</sup> Note of the Secretary-Rapporteur of the Constitutional Court of January 27, 2014 (evidence file, folio 8545).

112. On March 10, 2014, the Seventh Criminal Court decided the request to change the provisional arrest in favor of Wong Ho Wing (*supra* para. 110), indicating that “the failure to establish a time limit for a provisional arrest with a view to extradition is incompatible with the principle of predictability and is also contrary to Article 7(5) of the American Convention.”<sup>159</sup> Furthermore, it indicated that:

[I]t is unreasonable that, in a passive extradition process such as this one, an individual may endure imprisonment for more than the maximum time that [the] procedural norm has established for an ordinary criminal proceeding; particularly if, in the extradition process, as in this case, there is no particular evidentiary activity, and neither numerous agents nor numerous victims are involved.<sup>160</sup>

113. The court concluded that “Wong Ho Wing [has been] deprived of his liberty for more than a reasonable time [...]; therefore, it is necessary [...] to impose on him a less severe measure that is less restrictive of his liberty, but that ensures that he remains in the country until the Executive Branch finally rules definitively on the extradition request.”<sup>161</sup> The Court ordered “house arrest [...] in the custody of his brother.”<sup>162</sup> On March 24, the Seventh Criminal Court executed this order.<sup>163</sup>

114. On March 3, 2015, the representative requested a change in the house arrest order, owing to the “urgency of an operation for the presence of neoplasia.” He indicated that the change in the arrest warrant would mean that Wong Ho Wing could be treated promptly by the corresponding doctors. In addition, he underscored the length of time that the presumed victim’s deprivation of liberty had lasted.<sup>164</sup> On June 3, 2015, the court declared the request inadmissible, indicated that the need to undergo an operation, “was not sufficient for the effect of changing the legal status of the applicant.”<sup>165</sup> On June 11, the representative appealed this decision.<sup>166</sup> The Court has no information on the result of this appeal.

## **71X**

### **RIGHTS TO LIFE AND PERSONAL INTEGRITY AND PRINCIPLE OF NON-REFOULEMENT, IN RELATION TO THE OBLIGATION TO ENSURE RIGHTS**

115. In this chapter, the Court will examine the arguments of the Commission and of the parties concerning the extradition process in Peru against Wong Ho Wing. In this regard, the Court takes note that Peru was asked to extradite the presumed victim by the People’s Republic of China in 2008. To date, Wong Ho Wing has not been extradited. Under the laws of Peru, the extradition process has two parts, with the participation of the Supreme Court of Justice and of the Executive Branch. In this case, although the Supreme Court of Justice considered that the extradition was admissible, this determination constituted an advisory decision that, although favorable, was not

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<sup>159</sup> Decision of the Seventh Criminal Court of El Callao of March 10, 2014 (evidence file, folio 6459).

<sup>160</sup> Decision of the Seventh Criminal Court of El Callao of March 10, 2014 (evidence file, folio 6463).

<sup>161</sup> Decision of the Seventh Criminal Court of El Callao of March 10, 2014 (evidence file, folio 6463).

<sup>162</sup> Decision of the Seventh Criminal Court of El Callao of March 10, 2014 (evidence file, folio 6464).

<sup>163</sup> *Cf.* Decision of the Seventh Criminal Court of El Callao of March 24, 2014 (evidence file, folio 6453). See also, affidavit made by Wong Ho Wing on August 1, 2014 (evidence file, folio 6850).

<sup>164</sup> *Cf.* Request of the representative of March 3, 2015 (merits file, folios 1240 to 1247).

<sup>165</sup> Decision of the Seventh Criminal Court of June 3, 2015 (merits file, folios 1307 to 1311).

<sup>166</sup> *Cf.* Appeal of June 11, 2015 (merits file, folios 1325 to 1331).

binding. As has been shown and explained, the final decision in this regard falls to the Executive Branch and, to date, it has not ruled.

116. The Commission and the representative argue that, if he had been extradited, Wong Ho Wing would have been exposed – and still is to a certain extent – to different types of risk in the requesting State, particularly with regard to his right to life, owing to the possibility of the imposition of the death penalty; his right to personal integrity, owing to a presumed risk of being subjected to torture or other forms of cruel, inhuman or degrading treatment and, to a lesser degree, owing to a risk of presumed irregularities and violations of due process in the requesting State.

117. In this regard, in May 2011, the Constitutional Court issued a binding *prima facie* decision ordering the Executive Branch to refrain from extraditing Wong Ho Wing, considering that a risk to his life persisted if he was extradited, because the concerns about the possibility that the death penalty would be imposed if he was convicted had not been fully dispelled.

118. In principle this constitutional ruling would prevent the presumed victim's extradition, so that much of this dispute between the parties would be pointless. However, the Court notes that the position of the State before this Court questions the conclusions of that ruling, as well as the scope and interpretation that should be given to it. Therefore, the Court observes that, in this case, the dispute between the parties subsists in relation to the possibility of extraditing Wong Ho Wing to the People's Republic of China, owing to the alleged risk of violation of his rights in the requesting State, as well as owing to the May 2011 order of the Constitutional Court.

119. This Court emphasizes, as it has in previous cases although in other contexts, the importance of the mechanism of extradition and the obligation of the States to collaborate in this regard.<sup>167</sup> It is in the interests of the community of Nations that individuals who have been accused of certain offenses may be brought to justice. However, the Court notes that, in the context of extradition processes or other forms of international judicial cooperation, the States Parties to the Convention must observe the human rights obligations arising from this instrument. Thus, the international human rights obligations of the States and the requirements of due process must be observed in extradition proceedings, and this legal mechanism cannot be used as a path or impunity.<sup>168</sup>

120. In order to determine the possible responsibility of the State for the eventual extradition of Wong Ho Wing, in this chapter the Court will analyze the obligation to ensure the right to life and to personal integrity of the presumed victim, together with the obligation to respect the principle of non-refoulement in case of extradition, when there is an alleged risk of harm to those rights.

#### **A. Arguments of the parties and of the Commission**

121. The Commission argued that, in this case there are three different levels of risk for Wong Ho Wing: a risk as regards the legal imposition of the death penalty for one of the offenses for which his extradition was requested; a risk of the clandestine or secret application of the death penalty, and a risk of the application of torture or cruel, inhuman or degrading treatment. Consequently, it

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<sup>167</sup> Cf. *Case of Goiburú et al. v. Paraguay. Merits, reparations and costs*. Judgment of September 22, 2006. Series C No. 153, para. 132; *Case of La Cantuta v. Peru. Merits, reparations and costs*. Judgment of November 29, 2006. Series C No. 162, paras. 159 and 160; *Case of the Ituango Massacres v. Colombia. Monitoring compliance with judgment*. Order of the Court of July 7, 2009, *considerandum* 19, and *Case of the Mapiripán Massacre v. Colombia. Monitoring compliance with judgment*. Order of the Court of July 8, 2009, *consideranda* 40 and 41.

<sup>168</sup> Cf. *Matter of Wong Ho Wing. Provisional measures with regard to Peru*. Order of the Court of May 28, 2010, *considerandum* 16, and *Matter of Wong Ho Wing. Provisional measures with regard to the Republic of Peru*. Order of the Court of January 29, 2014, *considerandum* 13.

argued that the obligations to respect and ensure the rights to life and to personal integrity have “a procedural component” that “requires the State to request and assess diligently the assurances that the death penalty will not be imposed on him legally, and also a careful examination of the context in the requesting country, in terms of both the death penalty and of torture or cruel, inhuman or degrading treatment.” It underlined that Peru has not taken “into account that the requesting State committed serious omissions and irregularities in the initial request, and has an internationally-“known context as regard the application of the death penalty and reports of the use of torture.” It indicated that the assurances given to date “only seek to respond to the first level of risk”; that is, that the death penalty would not be imposed legally, but “serious concerns [remain] in view of the inexistence of judicial mechanisms to implement them.” The Commission concluded that the State had failed to comply with its obligation to ensure the rights to life and personal integrity of Wong Ho Wing.

122. The representative indicated that Peru had failed to comply with its obligation to ensure the rights to life and personal integrity of Wong Ho Wing at “two moments”: (i) when twice approving the extradition of the presumed victim even though the authorities had not obtained “sufficient, clear and reliable assurances” that the death penalty would not be imposed on him and that he would not be subjected to torture or other forms of cruel, inhuman or degrading treatment, and (ii) by the “authorities’ systematic failure [...] to take a final decision on the extradition of Wong Ho Wing in compliance with the judgment of the Constitutional Court.” Regarding the second advisory decision, he indicated that “the supposed assurances presented to the Peruvian State by the People’s Republic of China that it would not impose the death penalty are not reliable.” He added that, owing to the context of torture that existed in the People’s Republic of China, the Peruvian State “should also have requested [...] the assurance that torture or other cruel, inhuman or degrading treatment would not be applied.” In addition, he indicated “that the assurances alone are insufficient to provide adequate protection against the risk of ill-treatment”; the State should also examine the human rights situation in China and the special situation of Wong Ho Wing. Furthermore, the representative argued that the obligations arising from the American Convention and the Inter-American Convention to Prevent and Punish Torture were complemented by article 5 of the bilateral Extradition Treaty between Peru and the People’s Republic of China and by article 517 of the new Code of Criminal Procedure that, interpreted together, establish that extradition shall not take place, among other reasons: (1) if the offense for which extradition is requested bears the death penalty in the requesting State and the latter fails to provide assurances that it will not be applied, and (2) if the proceedings to which the individual extradited will be subject do not comply with the international requirements of due process.

123. The State affirmed that it had complied with its international obligation to respect and ensure the rights to life, personal integrity and judicial guarantees of the petitioner. It underlined that the Supreme Court of Justice and the Constitutional Court had assessed the guarantees that existed when they took their decision, but were unable to rule on the additional assurances provided by China and on the annulment of the death penalty as a criminal sanction for the offense of smuggling ordinary merchandise, which had also not been assessed by the Commission. The State emphasized that the Court should consider the circumstances at the time of the proceedings before it, and assess carefully the outdated or, at the very least, incomplete sources of the Commission and the petitioner. The State also indicated that the principle of non-refoulement of Article 13(4) of the Inter-American Convention to Prevent and Punish Torture operates provided that there is a well-founded presumption (and not a mere unsubstantiated affirmation) about the risk that an individual’s life could be harmed or that he could be subjected to torture or cruel, inhuman or degrading treatment. The State argued that, in this case, this well-founded presumption has not been proved and that, in the domestic courts, the burden of proof was on the presumed victim and/or his representative. Regarding the actions of the State authorities from the time of the extradition request and until the first advisory decision, the State argued that the Commission had not taken into account that the nullification of the ruling of the Supreme Court of January 20,

2009, rectified, in the domestic sphere, by means of effective and appropriate remedies, any possible errors or omissions that could have occurred during that first stage of the process. Regarding the second advisory decision of January 27, 2010, the State underlined that the Supreme Court of Justice had assessed the assurances that the death penalty would not be applied presented by the diplomatic authorities and the People's Supreme Court of China and considered them an incontrovertible commitment. It also indicated that "the present context in the requesting State is not as the [Commission] and the representative [...] seek to affirm."

## **B. Considerations of the Court**

124. In order to examine the State's international responsibility owing to the alleged risk to violation of the rights of Wong Ho Wing in the requesting State, the Court will present some considerations on: (B.1) the scope of the obligation to ensure rights and the principle of non-refoulement in relation to possible risk to the rights to life, to personal integrity and to due process in the context of extradition proceedings; (B.2) the nature of the international responsibility of the State in this case and the information that the Court must examine in order to analyze the specific circumstances with regard to (B.3) the alleged risk of the application of the death penalty, and (B.4) the alleged risk of torture and other forms of cruel, inhuman or degrading treatment in this case.

### **B.1) General considerations on the obligation to ensure rights and the principle of non-refoulement in the face of possible risks to the rights to life, to personal integrity and to due process in extradition proceedings**

125. The general obligation to respect and ensure rights gives rise to special duties, which are determined based on the particular needs for protection of the subject of law, owing to his personal situation or to the specific situation in which he finds himself.<sup>169</sup> The Court considers that, in this case, the obligation of the State, faced with the request for Wong Ho Wing's extradition, gave rise to the obligation to ensure the rights recognized in Articles 4 (Right to Life)<sup>170</sup> and 5 (Right to Humane Treatment),<sup>171</sup> in relation to Article 1(1) of the Convention,<sup>172</sup> together with the principle of non-refoulement established in Article 13(4)<sup>173</sup> of the Inter-American Convention to Prevent and Punish Torture (hereinafter also "the ICPPT").<sup>174</sup>

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<sup>169</sup> Cf. *Case of the Pueblo Bello Massacre v. Colombia. Merits, reparations and costs*. Judgment of January 31, 2006. Series C No. 140, para. 111, and *Case of the Pacheco Tineo Family v. Bolivia, Preliminary objections, merits, reparations and costs*. Judgment of November 25, 2013. Series C No. 272, para. 128.

<sup>170</sup> The relevant part of Article 4 of the Convention establishes that: "Every person has the right to have his life respected. This right shall be protected by law and, in general, from the moment of conception. No one shall be arbitrarily deprived of his life. 2. In countries that have not abolished the death penalty, it may be imposed only for the most serious crimes and pursuant to a final judgment rendered by a competent court and in accordance with a law establishing such punishment, enacted prior to the commission of the crime. The application of such punishment shall not be extended to crimes to which it does not presently apply. 3. The death penalty shall not be reestablished in States that have abolished it. 4. In no case shall capital punishment be inflicted for political offenses or related common crimes."

<sup>171</sup> The relevant part of Article 5 of the Convention establishes that: "1. Every person has the right to have his physical, mental, and moral integrity respected. 2. No one shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment. All persons deprived of their liberty shall be treated with respect for the inherent dignity of the human person."

<sup>172</sup> Article 1(1) of the Convention establishes that: "The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition."

<sup>173</sup> Article 13 (paragraph 4) of the Inter-American Convention to Prevent and Punish Torture establishes that: "Extradition shall not be granted nor shall the person sought be returned when there are grounds to believe that his life is in danger, that he will be subjected to torture or to cruel, inhuman or degrading treatment, or that he will be tried by special or *ad hoc* courts in the requesting State."

<sup>174</sup> The State ratified the Inter-American Convention to Prevent and Punish Torture on March 28, 1991. In this case, only the

126. Regarding the right to life, the Court recalls that, even though the Convention does not expressly prohibit the application of the death penalty, this Court has established that the relevant provisions of the Convention should be interpreted in the sense of “definitively limiting its application and its sphere, so that it is progressively reduced, until it is eliminated completely.”<sup>175</sup> Therefore, the provisions of the Convention in relation to the application of the death penalty should be interpreted in light of the *pro persona* principle; that is, in favor of the individual.<sup>176</sup> The imposition of this punishment is subject to certain procedural guarantees and compliance with them must be strictly observed and reviewed.<sup>177</sup> Owing to the exceptionally serious and irreversible nature of the death penalty, the possibility of imposing or applying it is subject to certain procedural requirements, compliance with which must be strictly observed and reviewed.<sup>178</sup>

127. With regard to the right to humane treatment or personal integrity, this Court has already indicated that Article 5 of the American Convention, read in conjunction with the obligations *erga omnes* to respect and ensure respect for the norms for the protection of human rights, reveals the obligation of the State not to deport, return, expel, extradite or remove in any other way an individual subject to its jurisdiction to another State, or to a third State that is not safe, when there are grounds for believing that he would be in danger of being subjected to torture or cruel, inhuman or degrading treatment.<sup>179</sup>

128. Additionally, the inter-American system includes a specific treaty, the Inter-American Convention to Prevent and Punish Torture, which refers to the principle of non-refoulement as follows: “Extradition shall not be granted nor shall the person sought be returned when there are substantial grounds to believe that his life is in danger, that he will be subjected to torture or to cruel, inhuman or degrading treatment, or that he will be tried by special or *ad hoc* courts in the requesting State.” In addition, as it is regulated, the principle is also associated with protection of the right to life and certain judicial guarantees, so that it is not restricted merely to protection against torture. Added to this, it is not enough that States abstain from violating this principle, it is also essential that they adopt positive measures. In situations in which an individual is faced with a risk of torture the principle of non-refoulement is absolute.<sup>180</sup>

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representative argued a presumed violation of this provision. In this regard, the Court reiterates that the presumed victims or their representatives may cite the violation of other rights than those included in the Commission's Merits Report, provided that they abide by the facts contained in that document (*supra* para. 35).

<sup>175</sup> *Case of Hilaire, Constantine and Benjamin. Merits, reparations and costs.* Judgment of June 21, 2002. Series C No. 94, para. 99, and *Case of Boyce et al. v. Barbados. Preliminary objection, merits, reparations and costs.* Judgment of November 20, 2007. Series C No. 169, para. 52. *Cf. Restrictions to the Death Penalty (Arts. 4.2 and 4.4 American Convention on Human Rights).* Advisory Opinion OC-3/83 of September 8, 1983. Series A No. 3, para. 57.

<sup>176</sup> *Cf. Case of Boyce et al. v. Barbados, supra*, para. 52, and *Case of Dacosta Cadogan v. Barbados. Preliminary objections, merits, reparations and costs.* Judgment of September 24, 2009. Series C No. 204, para. 49.

<sup>177</sup> *Cf. Case of Fermín Ramírez v. Guatemala. Merits, reparations and costs.* Judgment of June 20, 2005. Series C No. 126, para. 79, and *Case of Dacosta Cadogan v. Barbados, supra*, para. 47. See also *Restrictions to the Death Penalty (Arts. 4.2 and 4.4 American Convention on Human Rights)*, *supra*, para. 55, and *The Right to Information on Consular Assistance within the Framework of the Guarantees of Due Process of Law.* Advisory Opinion OC-16/99 of October 1, 1999. Series A No. 16, para. 135.

<sup>178</sup> *Cf. Case of Boyce et al. v. Barbados, supra*, para. 50, and *Case of Dacosta Cadogan v. Barbados, supra*, para. 84. *Cf. Restrictions to the Death Penalty (Arts. 4.2 and 4.4 American Convention on Human Rights)*, *supra*, para. 55.

<sup>179</sup> *Cf. Rights and guarantees of children in the context of migration and/or in need of international protection.* Advisory Opinion OC-21/14 of August 19, 2014. Series A No. 21, para. 226.

<sup>180</sup> *Cf. Rights and guarantees of children in the context of migration and/or in need of international protection, supra*, paras. 225, 227 and 236.



129. Consequently, when an individual alleges before a State that he is in danger if he is returned, the competent authorities of that State must, at least, interview him and make a preliminary assessment in order to determine whether or not that risk exists if he should be expelled.<sup>181</sup> This signifies that the aforementioned basic guarantees must be respected as part of the opportunity given to the individual to explain the reasons why he should not be expelled and, if that risk is verified, the individual should not be returned to the country where the danger exists.<sup>182</sup>

130. This case represents the first occasion on which the Inter-American Court rules on the obligations of the States Parties to the Convention in the context of extradition proceedings. In this regard, the State contested the application of precedents in cases of deportation, asylum or expulsion. The Court notes that the obligation to ensure the rights to life and to personal integrity, as well as the principle of non-refoulement, when there is a risk of torture and other forms of cruel, inhuman or degrading treatment or risk to the right to life, "is applicable to all methods of returning a person to another State, even extradition."<sup>183</sup>

131. Based on the above, this Court finds it pertinent to take note of the extensive case law of the European Court on this matter, as well as the opinions and decisions of the Human Rights Committee of the International Covenant on Civil and Political Rights (hereinafter "the Human Rights Committee" or "the Committee") and of the Committee against Torture of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and its Optional Protocol (hereinafter "the Committee against Torture").

132. In general, the Human Rights Committee has indicated that States are obliged "not to extradite, deport, expel or otherwise remove a person from their territory where there are substantial grounds for believing that there is a real risk of irreparable harm, such as that contemplated in Articles 6 (right to life) and 7 (prohibition of torture or cruel, inhuman or degrading treatment or punishment) of the [International] Covenant [on Civil and Political Rights], either in the country to which removal is to be effected or in any country to which the person may subsequently be removed."<sup>184</sup> In particular, with regard to the death penalty, the Committee has indicated that: "For countries that have abolished the death penalty, there is an obligation not to expose a person to the real risk of its application. Thus, they may not remove, either by deportation or extradition, individuals from their jurisdiction if it may be reasonably anticipated that they will be sentenced to death, without ensuring that the death sentence would not be carried out."<sup>185</sup> Regarding the prohibition of torture, the Committee against Torture has stated that, under Article 3, paragraph 1, of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the State Party has the obligation not to expel a person to another State

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<sup>181</sup> Cf. *Rights and guarantees of children in the context of migration and/or in need of international protection*, *supra*, para. 232. See also, UN, Human Rights Committee, *Case of Jonny Rubin Byahuranga v. Denmark*, Communication No. 1222/2003, U.N. Doc. CCPR/C/82/D/1222/2003, December 9, 2004, para. 11.3, and *Case of Jama Warsame v. Canada*, Communication No. 1959/2010, UN. Doc. CCPR/C/102/D/1959/2010, September 1, 2011, para. 8.3.

<sup>182</sup> Cf. *Case of the Pacheco Tineo Family v. Bolivia*, *supra*, para. 136.

<sup>183</sup> Affidavit made by Ben Saul on August 18, 2014 (evidence file, folio 6960), citing UN, Committee against Torture, *Case of Chipana v. Venezuela*, Communication No. 110/1998, U.N. Doc. CAT/C/21/D/110/1998, November 10, 1998, para. 6.2, and *Case of G.K. v. Switzerland*, Communication No. 219/2002, U.N. Doc. CAT/C/30/D/219/2002, May 7, 2003, paras. 6.4 and 6.5. The European Court has ruled similarly. Cf. ECHR, *Case of Babar Ahmad and Others v. The United Kingdom*, Nos. 24027/07, 11949/08, 36742/08, 66911/09 and 67354/09. Judgment of April 10, 2012, para. 168 and 176.

<sup>184</sup> Cf. UN, Human Rights Committee, General Comment No. 31, Nature of the General Legal Obligation on States Parties to the Covenant, CCPR/C/21/Rev.1/Add.13, May 26, 2004, para. 12.

<sup>185</sup> UN, Human Rights Committee, *Case of Roger Judge v. Canada*, Communication No.829/1998, UN. Doc. CCPR/C/78/D/829/1998, October 20, 2003, paras. 10.4 and 10.6. Similarly, *Case of Yin Fong, Kwok v. Australia*, Communication No. 1442/2005, UN. Doc. CCPR/C/97/D/1442/2005, October 23, 2009, para. 9.7.

when there are substantial grounds for believing that he would be in danger of being subjected to torture.<sup>186</sup>

133. Meanwhile, the European Court has established repeatedly that the expulsion or extradition of a person under the jurisdiction of a State Party may engage its international responsibility “where substantial grounds have been shown for believing that the person in question, if expelled, would face a real risk of being subject to treatment contrary to” the prohibition of torture or other forms of cruel, inhuman or degrading treatment.<sup>187</sup> Also, with regard to the death penalty, this Court has indicated that Article 2 of the European Convention for the Protection of Human Rights and Fundamental Freedoms which recognizes the right to life, and Article 1 of its Protocol No. 13 concerning the abolition of the death penalty in any circumstance, prohibit the extradition or deportation of an individual to another State when substantial grounds exist for believing that he could be subjected to the death penalty.<sup>188</sup>

134. Taking into account all the preceding considerations and based on the facts of this case, the Court establishes that, pursuant to the obligation to ensure the right to life, States that have abolished the death penalty may not expose an individual under their jurisdiction to the real and foreseeable risk of its application and, therefore, may not expel, by deportation or extradition, persons under their jurisdiction, if it can be reasonably anticipated that they may be sentenced to death, without requiring guarantees that the death sentence would not be carried out. Furthermore, the States Parties to the Convention that have not abolished the death penalty may not jeopardize, by deportation or extradition, the life of any person under their jurisdiction who runs a real and foreseeable risk of being sentenced to death, unless this is for the most serious crimes for which the death penalty is currently imposed in the requested State Party. Consequently, States that have not abolished the death penalty may not expel anyone under their jurisdiction, by deportation or extradition, who may face the real and foreseeable risk of the application of the death penalty for offenses that are not punished with the same sanction within their jurisdiction, without requiring the necessary and sufficient assurances that this punishment will not be applied.

135. In addition, the obligation to ensure the right to personal integrity, together with the principle of non-refoulement recognized in Article 13(4) of the ICPPT, imposes on States the obligation not to expel, by extradition, any individual under their jurisdiction when there are substantial grounds for believing that he will face a real, foreseeable and personal risk of suffering treatment contrary to the prohibition of torture or cruel, inhuman or degrading treatment.

136. The Court takes note that, during the domestic extradition process, the representative also alleged that certain characteristics of the judicial proceedings in China would constitute violations of due process. In this regard, the States Parties to the Convention also have the obligation to

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<sup>186</sup> The application of Article 3 of the Convention against Torture is restricted to cases in which there are well-founded reasons to believe that the author would be in danger of being subjected to torture as defined in Article 1 of the Convention. Cf. UN, Committee against Torture. General Comment No. 1: Implementation of Article 3 of the Convention in the Context of Article 22, U.N. Doc. CAT, A/53/44, November 21, 1997, para. 1.

<sup>187</sup> Cf. ECHR, *Case of Shamayev and Others v. Georgia and Russia*, No. 36378/02. Judgment of April 12, 2005, para. 335, citing: *Case of Chahal v. The United Kingdom* [GS], No. 22414/93. Judgment of November 15, 1996, paras. 73 and 74; *Case of Soering v. The United Kingdom*, No. 14038/88. Judgment of July 7, 1989, paras. 34 to 36, and *Case of Cruz Varas and Others v. Sweden*, No. 15576/89. Judgment of March 20, 1991, paras. 69 and 70. Similarly, see *inter alia*, *Case of Saadi v. Italy* [GS], No. 37201/06. Judgment of February 28, 2008, para. 125; *Case of Nizomkhon Dzhurayev v. Russia*, No. 31890/11, Judgment of October 3, 2013, para. 105, and *Case of Othman (Abu Qatada) v. The United Kingdom*, No. 8139/09. Judgment of January 17, 2012, para. 185.

<sup>188</sup> Cf. ECHR, *Case of Al-Saadoon and Mufdhi v. The United Kingdom*, No. 61498/08. Judgment of March 2, 2010, para. 123; *Case of Hakizimana v. Sweden*, No. 37913/05, Decision of March 27, 2008, and *Case of Kaboulov v. Ukraine*, No. 41015/04. Judgment of November 19, 2009, para. 99.

avoid the extradition, return or expulsion of any individual under their jurisdiction who has suffered or runs the risk of suffering a flagrant denial of justice in the State of destination.<sup>189</sup> However, this Court notes that the representative's arguments about a risk of violation of due process in the requesting State refer mainly to the presumed use of evidence obtained under torture and to the absence of the safeguards required by the American Convention in proceedings that could conclude with the imposition of the death penalty. Therefore, the Court will examine this alleged risk when making the relevant considerations on the presumed risk of torture and other forms of cruel, inhuman or degrading treatment, as well as on the alleged risk of the imposition of the death penalty and, if pertinent, it will include the corresponding conclusions in relation to a possible flagrant denial of justice in the requesting State.

137. In addition, this Court underlines that, for the purposes of this case, some of the said obligations arising from the Convention are also established in the Peruvian State's domestic laws. Specifically, article 517 of Peru's Code of Criminal Procedure establishes that extradition shall not be ordered when "[t]he offense for which extradition is requested bears the death penalty in the requesting State and the latter has not provided assurances that it will not be applied."<sup>190</sup>

138. Also, article 516 of this Code conditions granting extradition "to the existence of assurances that justice will be imparted fairly in the requesting State."<sup>191</sup> Meanwhile, although the Extradition Treaty between China and Peru does not establish specific rules with regard to the death penalty or possible risk of treatment contrary to personal integrity, its article 5 does establish, as a condition for the extradition, that: "Extradition shall only be carried out if it is not contrary to the legal system of the Requested Party."<sup>192</sup>

## **B.2) Nature of the international responsibility of the State in this case and information to be considered by the Court**

139. The parties differ as regards the moment and the information that must be examined by the Court in order to analyze this case. According to the Commission and the representative, the State's acts and omissions during the extradition proceedings constitute "violations that have been committed" of the American Convention and the situation must be examined based on the information obtained by the State that was available to the judicial authorities when the Supreme Court issued the opinion that the extradition was admissible and when the Constitutional Court

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<sup>189</sup> In this regard, the European Court has indicated that: "It is established in the Court's case-law that an issue might exceptionally be raised under Article 6 by an expulsion or extradition decision in circumstances where the fugitive had suffered or risked suffering a flagrant denial of justice in the requesting country. [...] In the Court's case-law, the term "flagrant denial of justice" has been synonymous with a trial which is manifestly contrary to the provisions of Article 6 or the principles embodied therein. [...] [C]ertain forms of unfairness could amount to a flagrant denial of justice, includ[ing]: conviction *in absentia* with no possibility subsequently to obtain a fresh determination of the merits of the charge; a trial which is summary in nature and conducted with a total disregard for the rights of the defence; detention without any access to an independent and impartial tribunal to have the legality the detention reviewed; deliberate and systematic refusal of access to a lawyer, especially for an individual detained in a foreign country. [...] A flagrant denial of justice goes beyond mere irregularities or lack of safeguards in the trial procedures such as might result in a breach of Article 6 if occurring within the Contracting State itself. What is required is a breach of the principles of fair trial guaranteed by Article 6 which is so fundamental as to amount to a nullification, or destruction of the very essence, of the right guaranteed by that article." ECHR, *Case of Othman (Abu Qatada) v. The United Kingdom*, No. 8139/09. Judgment of January 17, 2012, para. 258 to 260.

<sup>190</sup> Code of Criminal Procedure, promulgated by Legislative Decree No. 957 of July 29, 2004, article 517. Available at: <http://www.leyes.congreso.gob.pe/Documentos/Decretoslegislativos/00957.pdf>, cited in the Commission's Merits Report, folio 24.

<sup>191</sup> Code of Criminal Procedure, promulgated by Legislative Decree No. 957 of July 29, 2004, article 516. Available at: <http://www.leyes.congreso.gob.pe/Documentos/Decretoslegislativos/00957.pdf>, cited in the Commission's Merits Report, folio 24.

<sup>192</sup> Extradition Treaty between the Republic of Peru and the People's Republic of China, article 5 (evidence file, folio 1634).

ordered the State to refrain from extraditing Wong Ho Wing. Meanwhile, the State argues that the information obtained by Peru subsequently should be examined, including the new diplomatic assurances and explanations on the applicability of the death penalty to the case of Wong Ho Wing, and it is on this basis that it indicates that its actions fall within its obligation to respect and ensure the rights to life and to personal integrity.

140. The consistent case law of the European Court concerning extradition establishes that, in order to determine the responsibility of a State, the information that the requested State was, or should have been, aware of at the time of the extradition should be analyzed and, in those cases in which extradition has not yet taken place, the information available when the European Court considers the case should be examined.<sup>193</sup>

141. This Court agrees with this conclusion. The nature of the State's international responsibility in this type of case, according to the criteria established above, consists in exposing an individual under its jurisdiction to a foreseeable risk of suffering violations of the rights protected by the Convention.<sup>194</sup> In this case, the eventual action of the State (the removal of Wong Ho Wing from Peru and his extradition to China) has not occurred, partly owing to the existence of the provisional measures ordered by this Court for the State to refrain from extraditing Wong Ho Wing. Therefore, when analyzing the possible risk that Wong Ho Wing would face in the requesting State, the Court will take into account and assess all the information available at this time, including the legislative developments in China following the second advisory decision of the Supreme Court, as well as the diplomatic assurances presented after the issue of the ruling of the Constitutional Court. The situation of risk that existed when that last ruling was issued will be taken into account, as pertinent and necessary, in the analysis of the alleged violation of the right to judicial protection (*infra* paras. 193 to 206).

142. The Court also notes that the examination of the State's responsibility in this case is conditional on the granting and implementation of the eventual extradition. According to Article 62 of the Convention, this Court has jurisdiction to hear all cases concerning the interpretation and application of the provisions of the Convention. Furthermore, Article 44 of the Convention establishes the right to "lodge petitions with the Commission containing denunciations or complaints of violation of this Convention by a State Party." Consequently, it is not normally for this Court to pronounce on the existence of potential violations of the Convention. However, when the presumed victim claims that, if he is expelled or, in this case, extradited, he would be subject to treatment contrary to his rights to life and personal integrity, it is necessary to ensure his rights and to prevent the occurrence of grave and irreparable harm.<sup>195</sup> Since the ultimate aim of the Convention

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<sup>193</sup> Cf. ECHR, *Case of Chahal v. The United Kingdom* [GS], No. 22414/93. Judgment of November 15, 1996, paras. 86 and 97; *H.L.R. v. France* [GS], No. 24573/94. Judgment of April 29, 1997, para. 37; *Mamatkulov and Askarov v. Turkey* [GS], Nos. 46827/99 and 46951/99. Judgment of February 4, 2005, para. 69. "The existence of the risk must be assessed primarily with reference to those facts which were known or ought to have been known to the Contracting State at the time of the expulsion [...]. Where the applicant has not yet been expelled, the material point in time is that of the Court's consideration of the case." ECHR, *Case of Ryabikin v. Russia*, No. 8320/04. Judgment of June 19, 2008, para. 111.

<sup>194</sup> Similarly, see ECHR, *Case of Mamatkulov and Askarov v. Turkey* [GS], Nos. 46827/99 and 46951/99. Judgment of February 4, 2005, para. 69, which establishes that: "Since the nature of the Contracting States' responsibility under Article 3 in cases of this kind lies in the act of exposing an individual to the risk of ill-treatment, the existence of the risk must be assessed primarily with reference to those facts which were known or ought to have been known to the Contracting State at the time of the extradition [...] However, if the applicant has not been extradited or deported when the Court examines the case, the relevant time will be that of the proceedings before the Court [...]."

<sup>195</sup> Similarly, see: ECHR, *Case of Soering v. The United Kingdom*, No. 14038/88. Judgment of July 7, 1989, para. 90. In this case, the European Court established that: "It is not normally for the Convention institutions to pronounce on the existence or otherwise of potential violations of the Convention. However, where an applicant claims that a decision to extradite him would, if implemented, be contrary to Article 3 by reason of its foreseeable consequences in the requesting country, a departure from this principle is necessary, in view of the serious and irreparable nature of the alleged suffering risked, in order to ensure the effectiveness of the safeguard provided by that Article 3."

is the international protection of human rights, it must be permissible to analyze this type of case before the violation takes place. Therefore, the Court must rule on the possibility that such harm may occur if the person is extradited. Thus, since the extradition has not occurred yet (which would constitute the internationally unlawful act if a foreseeable risk to the rights of Wong Ho Wing existed), the Court must examine the State's responsibility conditionally, in order to determine whether or not there would be a violation of the rights to life and personal integrity of the presumed victim should he be extradited.

143. The European Court of Human Rights and some United Nations committees, such as the Human Rights Committee and the Committee against Torture, have proceeded similarly.<sup>196</sup> Consequently, this Court establishes that, in cases in which extradition or expulsion has not occurred (but in which its acceptance or implementation is imminent), the analysis made by the Court consists in determining whether, based on the information available at the time the Inter-American Court considers the case, the State was, or should have been, aware that the extradition of the presumed victim, if granted and implemented, would be a violation of the American Convention.

144. The presumed harm to the right to judicial protection recognized in Article 25(2)(c) of the Convention (particularly based on compliance with decisions of the domestic courts), in view of the ruling of the Constitutional Court, will be examined in the following section (*infra* paras. 193 to 206), and separately from the presumed risk that Wong Ho Wing would face currently if he were to be extradited, for the reasons described *supra*.

145. Taking into account: (1) the protection standards in extradition processes described above, and (2) the information and guarantees that are currently available, the Court will examine (3) the alleged risk of application of the death penalty, and (4) the alleged risk of torture or other cruel, inhuman or degrading treatment, in order (5) to determine whether the extradition of Wong Ho Wing would result in the State's international responsibility based on the possible violation of its obligation to ensure the presumed victim's rights to life and personal integrity.

### **B.3) Alleged risk of application of the death penalty in this case**

146. One of the offenses for which Wong Ho Wing is sought called for the death penalty when he was arrested and his extradition was requested. Article 153 of the Chinese Criminal Code established:

Smuggling merchandise and objects that are not mentioned in articles 151, 152 and 347 of this Law are punished pursuant to the following provisions, according to the severity:

a. Smuggling merchandise and objects where the amount of the duty evaded is in excess of 500,000 yuans is punished by imprisonment for more than 10 years, or life imprisonment, and fines of from 100% to 500% of the amount of the duty evaded, or seizure of personal property;

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<sup>196</sup> In this regard, see: the European Court, *inter alia*, ECHR, *Case of Ryabikin v. Russia*, No.8320/04. Judgment of June 19, 2008, para. 115; *Case of Hilal v. The United Kingdom*, No.45276/99. Judgment of March 6, 2001, para. 68; *Case of Venkadajalasarma v. The Netherlands*, No. 58510/00, Judgment of February 17, 2004, para. 69, and *Case of Jabari v. Turkey*, No. 40035/98. Judgment of July 11, 2000, para. 42. The Human Rights Committee, *inter alia*, *Case of Mehrez Ben Abde Hamida v. Canada*, Communication No.1544/2007, U.N. Doc. CCPR/C/98/D/1544/2007, March 18, 2010, para. 8.6, 8.7 and 9; *Case of G.T. v. Australia*, Communication No.706/1996, U.N. Doc. CCPR/C/61/D/706/1996, November 4, 1997, para. 8.2 and 8.3, and *Case of Thuraiamy v. Canada*, Communication No. 1912/2009, U.N. Doc. CCPR/C/106/D/1912/2009, October 31, 2012, para. 8. The Committee against Torture, *inter alia*, *Case of v. N. I. M. v. Canada*, Communication No.119/1998, U.N. Doc. CAT/C/40/D/293/2006, November 12, 2002, para. 8; *Case of Attia v. Sweden*, Communication No. 199/2002, U.N. Doc. CAT/C/31/D/199/2002, November 17, 2003, para. 12.3; *Case of Ke Chung Rong v. Australia*, Communication No.416/2010, CAT/C/49/D/416/2010, November 5, 2013, para. 7.5.

in extremely serious cases, this will be punished pursuant to the provisions of paragraph 4 of [article] 151 of this Law [...].<sup>197</sup> (Underlining added)

Then, paragraph 4 of article 151 stipulates:

In the case of the offenses mentioned in paragraphs 1 and 2, if they are extremely serious, they will be punished by life imprisonment or the death penalty, and seizure of personal property.<sup>198</sup> (Underlining added)

147. According to the expert witness in Chinese criminal justice, Bingzhi Zhao, “[b]efore the eighth amendment, a trial against Wong Ho Wing for his offense, would fall within the third category that ranges from more than 10 years’ imprisonment to life imprisonment or the death penalty.”<sup>199</sup> However, in May 2011, the eighth amendment to the Criminal Code of the People’s Republic of China, promulgated in February 2011, came into force,<sup>200</sup> and this eliminated the possibility of the death penalty for smuggling ordinary merchandise for which Wong Ho Wing’s extradition had been requested.<sup>201</sup>

148. The pertinent part of this amendment establishes:

Amendments to the Offense of Smuggling  
Section XXVII

The first clause of article 153 of the Criminal Code is amended as follows: Anyone who shall smuggle merchandise and objects that are not mentioned in articles 151, 152 and 347 of this law shall be punished pursuant to the following provisions, according to the severity of the case:

[...]

c. Anyone who shall smuggle merchandise and objects where the amount of the duty evaded is extremely high or in very serious cases, shall be punished by more than 10 years’ imprisonment or life imprisonment and fines of from 100% to 500% of the duty evaded [or] seizure of personal property.<sup>202</sup> (Underlining added)

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<sup>197</sup> Official translation of the Criminal Code of the People’s Republic of China (evidence file, folio 1628).

<sup>198</sup> Official translation of the Criminal Code of the People’s Republic of China (evidence file, folio 1627).

<sup>199</sup> Statement made by Bingzhi Zhao during the public hearing held in this case. Similarly, a legal opinion prepared by the Max Planck Institute explains that the first paragraph of article 153 establishes the application of the death penalty “if the circumstances are especially serious.” This opinion explains that “[a]ccording to a ‘judicial interpretation’ adopted by the People’s Supreme Court in 2008, ‘especially serious circumstances’ include the fact that the amount of the payable duty evaded or avoided is more than 2.5 million yuans.” Opinion of Experts in Chinese Criminal Law with regard to money-laundering, bribery, smuggling and customs duty evasion in the case of Wong Ho Wing (merits file, folio 815 and 816).

<sup>200</sup> According to an opinion of the Max Planck Institute, the eighth amendment eliminated 13 non-violent economic offenses from the list of 68 offenses punishable with the death penalty under the Criminal Code of the People’s Republic of China. However, the death penalty continues to be applicable for smuggling ‘weapons and ammunition’ or “nuclear material,” or “counterfeiting currency” in especially serious circumstances. Cf. Opinion of Experts in Chinese Criminal Law with regard to money-laundering, bribery, smuggling and customs duty evasion in the case of Wong Ho Wing (merits file, folios 813, 815 and 816).

<sup>201</sup> Cf. Statement made by Bingzhi Zhao during the public hearing held in this case, and Report of Experts on Chinese Criminal Law on money-laundering, bribery, smuggling and customs duty evasion in the case of Wong Ho Wing (merits file, folios 815 and 816).

<sup>202</sup> Eighth amendment to the Chinese Criminal Code (evidence file, folio 7555). Expert witness Bingzhi Zhao explained that, in the case of Wong Ho Wing, “owing to the amount involved, it falls within the third category of imprisonment under article 153, which is imprisonment ranging from 10 years to life”; however, “in the trial of his [presumed] accomplices [...] they were sentenced to 13 years’ imprisonment, thus [...] the court will take into consideration the effects on his accomplices for the same offense and the same amount in order to decide his sentence.” Statement made by Bingzhi Zhao during the public hearing held in this case.

149. In addition, as explained by expert witness Bingzhi Zhao during the hearing,<sup>203</sup> and also in a legal opinion of the Max Planck Institute<sup>204</sup> and the text of the norm, article 12 of the Criminal Code recognizes the principle of the retroactivity of the most favorable criminal law for the purpose of punishment.<sup>205</sup>

150. Peru has not abolished the death penalty completely. The Peruvian Constitution accepts the possibility of the death penalty for crimes of treason and terrorism.<sup>206</sup> However, article 517 of the Peruvian Code of Criminal Procedure indicates that extradition shall not be ordered when “[t]he offense for which extradition is requested shall contemplate the death penalty in the requesting State and the latter shall not provide assurances that it will not be applied (*supra* para. 137). Since Wong Ho Wing is wanted for smuggling and other economic offenses, it is evident that Peru was obliged to demand the necessary and sufficient assurances that the death penalty would not be applied to him if his extradition was granted (*supra* para. 134).

151. Despite the foregoing, the Court considers that it has been proved that, based on the principle of the favorable retroactivity of the criminal law and the annulment of the death penalty for the offense of smuggling ordinary merchandise, this punishment could not be applied to Wong Ho Wing, if he is extradited and subsequently sentenced and convicted in China.<sup>207</sup> Although the death penalty was in force until May 2011 for one of the offenses for which Wong Ho Wing's extradition was requested, the Court reiterates that, in order to determine whether there is a real risk to the right to life of Wong Ho Wing if his extradition is granted, it is necessary to examine and assess all the information available at this time (*supra* paras. 140 and 141). Bearing this in mind,

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<sup>203</sup> Cf. Statement made by Bingzhi Zhao during the public hearing held in this case.

<sup>204</sup> According to this opinion, “[t]he principle of legality (*nullum crimen sine lege, nulla poena sine lege*) is recognized in Chinese criminal law: according to article 12(1) of the Criminal Code, [...] the retroactive application of a new criminal provision is prohibited by article 12(1), unless the punishment contained in the new provision is more favorable (the *lex mitior* principle). In other words, if the new provision is more favorable, its application is compulsory.” It also explained that, currently, “under Chinese criminal law, the death penalty is not applicable to the case of Wong Ho Wing for [any of the offenses for which his extradition is being requested].” Opinion of Experts in Chinese Criminal Law with regard to money-laundering, bribery, smuggling and customs duty evasion in the case of Wong Ho Wing (merits file, folio 820).

<sup>205</sup> The said article 12 stipulates that: “For those acts committed after the founding of the People's Republic of China and before the application of this Code, the laws in force at that date shall be applied if the laws at that date did not define such acts as offenses; if those laws defined such acts as offenses and there are reasons to continue the proceedings as stipulated in the eight section of Chapter IV (General Aspects) of this Code, the laws in force at that time shall be applied; however, if this Code does not define such acts as offenses or defines them as acts that would involve a light punishment, this Code shall be applied. Sentences that have been handed down continue in effect according to the laws in force on the date they were delivered prior to the entry into force of this Code.” Official translation of the Criminal Code of the People's Republic of China (evidence file, folio 7504).

<sup>206</sup> Article 140 of the Constitution establishes that: “The death penalty may only be applied for the crime of treason in case of war, and of terrorism pursuant to the laws and treaties to which Peru is a party and by which it is bound.” 1993 Constitution of Peru. Available at: [www.congreso.gob.pe/ntley/ConstitucionP.htm](http://www.congreso.gob.pe/ntley/ConstitucionP.htm). Despite this, the Commission and the representative indicated that such punishments are not applied in practice because the death penalty is not contemplated for the said crimes in the substantive criminal laws in force. Cf. Merits Report of the Commission (merits file, folio 79), motions and arguments brief of the representative (merits file, folio 305). The Permanent Criminal Chamber of the Supreme Court of Justice, in its second advisory decision, indicated that “the punitive probability [of the death penalty] is contrary to Peru's extradition laws, because our domestic laws expressly prohibit the application of the death penalty. Indeed: (i) article 140 of the Constitution establishes that the death penalty is only applicable to the crimes of treason in case of war, and terrorism; (ii) article 517(3)(d) of the Code of Criminal Procedure indicates that extradition shall be denied when the offense for which extradition is requested contemplates the death penalty in the requesting State and the latter has not provided assurances that it will not be applied; (iii) article 55 of the Constitution establishes the supremacy and observance of the provisions of the human rights treaties, such as the American Convention on Human Rights, the Inter-American Convention against Torture, and the International Covenant on Civil and Political Rights and its Second Optional Protocol aiming at the abolition of the death penalty.” Advisory decision of the Permanent Criminal Chamber of January 27, 2010 (evidence file, folio 170).

<sup>207</sup> Expert witness Bingzhi Zhao emphasized that “following the eighth amendment of the Criminal Code, even when diplomatic assurances are given that the death penalty will not be imposed, the death penalty would not be imposed for smuggling ordinary merchandise.” Statement made by Bingzhi Zhao during the public hearing held in this case.

and based on the principle of the favorable retroactivity of the criminal law, the Court considers that, following the annulment of the death penalty for the offense of smuggling, there is no real risk that the death penalty will be applied legally to Wong Ho Wing if he is extradited to China.

152. Nevertheless, the Commission and the representative argue that there have already been autonomous violations of the right to life of Wong Ho Wing, owing to the failure to consider the risk of the application of the death penalty in the first advisory decision and to the absence of sufficient guarantees that it would not be applied in the second advisory decision of the Supreme Court, regardless of its subsequent annulment. Regarding the first advisory decision (dated January 20, 2009), the Court emphasizes that this decision was annulled as a result of an application for *habeas corpus*, so that it has no legal effects (*supra* para. 70). Regarding the second advisory decision (dated January 27, 2010), the Court reiterates that, inasmuch as the extradition process has not concluded and Wong Ho Wing has not been extradited, in order to determine whether, at this time, there is a risk to his right to life if he is extradited, the Court must assess all the information, including information subsequent to that judicial decision (*supra* paras. 140 and 141). When a possible risk to his right to life existed, the Court's provisional measures were effective to protect Wong Ho Wing. However, it would not be appropriate that, based on the information that the State had at the time of the second advisory decision, the Court determine that, at the present time, there is risk to the right to life of Wong Ho Wing if he is extradited, owing to the supposed possibility of the application of the death penalty, when subsequent measures and information have eliminated that possibility, as previously determined (*supra* para. 151).

153. In addition, the Court notes that the Commission also argued that there was "a risk of the clandestine or secret application of the death penalty" (*supra* para. 121). In this regard, the Court stresses that neither the Commission nor the representative have provided specific information on the alleged risk. In general, and as part of the contextual elements in relation to the application of the death penalty in the requesting State, the Commission and the representative indicated that data and statistics on its application are not public, they are presumable handled as State secrets, and there is no detailed information on the number of persons condemned to death,<sup>208</sup> and this has been confirmed by the requesting State itself.<sup>209</sup> Nevertheless, this Court considers that a real, foreseeable and personal risk that Wong Ho Wing could be subjected to extrajudicial execution if he is extradited to China cannot be derived from this information.

154. Furthermore, the Commission and the representative referred to information on reports concerning due process in trials for crimes punishable by the death penalty, and the number of

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<sup>208</sup> In this regard, the case file contains reports of the Committee against Torture (2008); the Office of the United Nations High Commissioner for Human Rights (2009); the former United Nations Special Rapporteur on Torture, Manfred Nowak (2010), and the Periodic Universal Review Working Group (2013). *Cf.* UN, Committee against Torture, Concluding Observations on China, December 12, 2008, CAT/C/CHN/CO/4, paras. 17 and 34. Available at: <http://www2.ohchr.org/english/bodies/cat/docs/CAT.C.CHN.CO.4.pdf>; Human Rights Council, Compilation prepared by the Office of the High Commissioner for Human Rights, in accordance with paragraph 15(b) of the annex to Human Rights Council resolution 5/1. People's Republic of China (including Hong Kong and Macao Special Administrative Regions (HKSAR and MSAR)), January 6, 2009, A/HRC/WG.6/4/CHN/2, para. 16. Available at: [http://lib.ohchr.org/HRBodies/UPR/Documents/Session4/CN/A\\_HRC\\_WG6\\_4\\_CHN\\_2\\_S.pdf](http://lib.ohchr.org/HRBodies/UPR/Documents/Session4/CN/A_HRC_WG6_4_CHN_2_S.pdf); Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment. Follow-up to the recommendations. China, February 26, 2010, A/HRC/13/39/Add.6, p. 45. Available at: [http://www2.ohchr.org/english/bodies/hrcouncil/docs/13session/A\\_HRC.13.39.Add%206\\_EFS.pdf](http://www2.ohchr.org/english/bodies/hrcouncil/docs/13session/A_HRC.13.39.Add%206_EFS.pdf), and Human Rights Council, Report of the Periodic Universal Review Working Group. China (including Hong Kong (China) and Macao (China)), December 4, 2013, A/HRC/25/5, p. 22. Available at: <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G13/188/58/PDF/G1318858.pdf?OpenElement>.

<sup>209</sup> In answer to the conclusions and recommendations of the Committee against Torture, the People's Republic of China indicated that the statistics for cases involving the death penalty were consolidated with those involving life imprisonment and imprisonment for more than five years. *Cf.* Committee against Torture, Comments by the Government of the People's Republic of China concerning the conclusions and recommendations of the Committee against Torture, December 18, 2009, CAT/C/CHN/CO/4/Add.2, p. 20. Available at: <http://www2.ohchr.org/english/bodies/cat/docs/followup/CAT.C.CHN.CO.4.Add2.pdf>



crimes to which it is applicable, as grounds for the alleged risk to the right to life of Wong Ho Wing in the requesting State, while Peru underscored the progress and improvements made in the requesting State. However, the Court considers that, inasmuch as, currently, the death penalty would not be legally applicable to the offense of smuggling ordinary merchandise in China, this information is not relevant or pertinent, and it is not incumbent on the Court to assess it in this case.

#### **B.4) Alleged risk of torture and other forms of cruel, inhuman or degrading treatment**

155. When examining the principle of non-refoulement in relation to possible risks to the rights to life or liberty of an individual, this Court has affirmed that the risk “must be real; in other words, it must be a foreseeable consequence. Thus, the State must make an individualized analysis in order to verify and evaluate the circumstances cited by the individual which reveal that he may suffer harm to his life or liberty in the country to which it is sought to return him (that is, his country of origin), or that, if he is expelled to a third country, he runs the risk of the being sent to the place where he runs this risk. If his explanation that he could face a situation of risk is credible, convincing and coherent, the principle of non-refoulement should be observed.”<sup>210</sup>

156. Furthermore, the Court reiterates that when an individual alleges before a State Party that there is a risk if he is returned, the competent authorities of that State should, at least, interview him, giving him the opportunity to explain the reasons why he contests the return, and make a prior or preliminary assessment in order to determine whether or not that risk exists and, if it is verified, the individual should not be deported to the country where the risk exists (*supra* para. 129).

157. In this type of situation, the Human Rights Committee has applied the standard of real risk, according to which any treatment contrary to the Covenant must be a necessary and foreseeable consequence of the extradition,<sup>211</sup> while the Committee against Torture has indicated that the risk must be foreseeable, real and personal.<sup>212</sup> The European Court has affirmed this standard indicating that substantial grounds must be shown for believing that there is a real risk of suffering treatment contrary to the prohibition of torture and cruel treatment. This Court agrees with these criteria and considers that “to determine the existence of a risk of ill-treatment, the Court must examine the foreseeable consequences of sending the petitioner to the receiving State, bearing in mind the general situation of that State as well as the personal circumstances of the petitioner.”<sup>213</sup>

158. Both the Commission and the representative argue that the extradition of Wong Ho Wing to China would expose him to treatment contrary to the prohibition of torture or other forms of cruel,

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<sup>210</sup> *Rights and guarantees of children in the context of migration and/or in need of international protection, supra*, para. 221.

<sup>211</sup> Cf. UN, Human Rights Committee, *Case of G.T. v. Australia*, Communication No.706/1996, U.N. Doc. CCPR/C/61/D/706/1996, November 4, 1997, para. 8.1, and *Case of Mahmoud Walid Nakrash and Liu Qifen v. Sweden*, Communication No. 1540/2007, U.N. Doc. CCPR/C/94/D/1540/2007, October 30, 2008, para. 7.3.

<sup>212</sup> See, *inter alia*, UN, Committee against Torture, *Case of E.A. v. Switzerland*, Communication No. 28/1995, U.N. Doc. CAT/C/19/D/28/1995, November 10, 1997, para. 11.5; *Case of U.S. v. Finland*, Communication No. 197/2002, U.N. Doc. CAT/C/30/D/197/2002, May 1, 2003, para. 7.8; *Case of Zare v. Sweden*, Communication No. 256/2004, U.N. Doc. CAT/C/36/D/256/2004, May 12, 2006, para. 9.3; *Case of Ke Chun Rong v. Australia*, Communication No. 416/2010, U.N. Doc. CAT/C/49/D/416/2010, November 5, 2012, para. 7.4, and *Case of Y.G.H. et al. v. Australia*, Communication No. 434/2010, U.N. Doc. CAT/C/51/D/434/2010, November 14, 2013, para. 8.3. See also, Affidavit made by Ben Saul on August 18, 2014 (evidence file, folio 6960).

<sup>213</sup> ECHR, *Case of Ryabikin v. Russia*, No. 8320/04. Judgment of June 19, 2008, para. 112, and *Case of Vilvarajah and Others v. The United Kingdom*, Nos. 13163/87, 13164/87, 13165/87 13447/87, and 13448/87. Judgment of October 30, 1991, para. 108.

inhuman or degrading treatment. However, in this case, the judicial authorities who intervened did not analyze this risk.

159. Based on the above, the Court will now examine: (a) the State's obligation to consider the argument concerning the risk of a violation of personal integrity, and (b) the existence of the alleged risk of treatment contrary to the prohibition of torture or other forms of cruel, inhuman or degrading treatment in the case of Wong Ho Wing, taking into account: (i) the alleged situation of risk in the requesting State, and (ii) the diplomatic assurances provided by the People's Republic of China in this regard.

#### B.4.a) Obligation to consider the arguments concerning the risk of a violation of personal integrity

160. Regarding a possible risk of torture in case of return, the Committee against Torture has indicated that "the State party and the Committee are obliged to assess whether there are substantial grounds for believing that the author would be in danger of being subjected to torture were he/she to be expelled, returned or extradited, [thus,] the risk of torture must be assessed on grounds that go beyond mere theory or suspicion[, although] the risk does not have to meet the test of being highly probable." It also indicated that the petitioner "must establish that he/she would be in danger of being tortured and that the grounds for so believing are substantial [...], and that such danger is personal and present."<sup>214</sup>

161. Although it is true that the main allegation of risk by the presumed victim and his representative throughout the extradition process has been the possible application of the death penalty, the Court notes that at different times during the extradition process, both the presumed victim and his representative have mentioned the possible violation of his right to personal integrity if he is extradited to China and, on one occasion, they even referred to Article 13(4) of the ICPPT.<sup>215</sup> In addition, the file of the extradition process contains news and reports of

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<sup>214</sup> UN, Committee against Torture, General Comment No. 1: Implementation of Article 3 of the Convention in the Context of Article 22, U.N. Doc. CAT, A/53/44, November 21, 1997, paras. 6 and 7. To verify a substantial, personal and present danger of torture, the Committee against Torture has provided the following, non-exhaustive, guidelines, on some of the pertinent considerations to assess whether expulsion entails a real risk of torture: (a) Is the State concerned one in which there is evidence of a consistent pattern of gross, flagrant or mass violations of human rights? (b) Has the author been tortured or maltreated by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity in the past? If so, was this the recent past? (c) Is there medical or other independent evidence to support a claim by the author that he/she has been tortured or maltreated in the past? Has the torture had aftereffects? (d) Has the situation referred to in (a) above changed? Has the internal situation in respect of human rights altered? (e) Has the author engaged in political or other activity within or outside the State concerned which would appear to make him/her particularly vulnerable to the risk of being placed in danger of torture were he/she to be expelled, returned or extradited to the State in question? (f) Is there any evidence as to the credibility of the author? (g) Are there factual inconsistencies in the claim of the author? If so, are they relevant? Cf. UN, Committee against Torture, General Comment No. 1: Implementation of Article 3 of the Convention in the Context of Article 22, U.N. Doc. CAT, A/53/44, November 21, 1997, para. 8.

<sup>215</sup> In this regard: (i) in the second application for *habeas corpus*, of October 2009, the representative mentioned "the certain and imminent risk of violation of the rights to life and personal integrity that subsists against [...] Wong Ho Wing." He asserted that "[t]here is a certain and imminent risk to personal liberty and rights related to this, among which the rights to life and personal integrity are particularly significant; because, if he is extradited to the People's Republic of China, there are no guarantees that he will be subject to a fair trial and, consequently, he may be sentenced to death." Application for *habeas corpus* of October 12, 2009 (evidence file, folios 105 and 106); (ii) in the third application for *habeas corpus* of February 9, 2010, even though he made no specific allegations in this regard, the representative based himself on the principle of non-refoulement established in Article 13(4) of the ICPPT. Thus, he indicated that "Article 13(4) of the Inter-American Convention against Torture, to which Peru is a party, includes an article on non-refoulement that expressly prohibits extradition in cases in which the life of a person whose extradition is requested is in danger, and establishes that: *Extradition shall not be granted nor shall the person sought be returned when there are grounds to believe that his life is in danger, that he will be subjected to torture or to cruel, inhuman or degrading treatment.*" He also indicated that "[t]he rights affected include the rights to right to life and personal integrity, [...] because if passive extradition is granted and the Chinese citizen [Wong Ho Wing] is returned to the People's Republic of China, his life and physical integrity would be jeopardized, because there is no material possibility that the Peruvian authorities could monitor the execution of the sentence, owing, among other reasons, to the fact that not even

international and non-governmental organizations indicating and describing practices contrary to the prohibition of torture and other forms of cruel, inhuman or degrading treatment in China.<sup>216</sup>

162. In this regard, the Court takes note of the European Court's case law, according to which, although, "in principle, the petitioner must provide the evidence that proves the existence of substantial grounds for believing that, [if he is extradited] he would be exposed to a real risk of being subject to treatment contrary to Article 3," it is for the requested State "to dispel any concerns" when evidence has been presented in this regard. The European Court has also affirmed that "[i]n determining whether substantial grounds have been shown for believing that a real risk of treatment contrary to Article 3 exists, if he is extradited, the Court will assess the issue in the light of all the material placed before it and, if necessary, material obtained on its own motion."<sup>217</sup>

163. The Court considers that, owing to the absolute nature of the prohibition of torture, the specific obligation not to extradite when there is a risk of treatment contrary to personal integrity established in Article 13(4) of the ICPPT and the obligation of all States Parties to the American Convention to take all necessary measures to prevent torture or other cruel, inhuman or degrading treatment, the States Parties to the Convention must assess this possibility effectively during their extradition proceedings when this risk is alleged by those subject to extradition.<sup>218</sup> The same

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international authorities can obtain access to the Chinese prison system, which is completely unreliable and discredited." He added that the presumed victim, "would be executed or kept in physical conditions that would entail a grave and progressive deterioration of his health in order to shorten his life." Application for *habeas corpus* of February 9, 2010 (evidence file, folios 189 and 192); (iii) in a statement made before the 42nd Special Criminal Court of Lima on February 11, 2010, the representative indicated that: "The possibility exists that [...] it is decided to extradite the said person, subject of the extradition request, to the People's Republic of China and, once he has been returned to that country, he will be sentenced to death in summary proceedings or else subjected to inhuman prison conditions that place his health and life in grave danger, as has happened on numerous occasions with thousands of people who are either executed or subjected to cruel and inhuman treatment. What I have described has been reiterated in different reports of Amnesty International and other international agencies that indicate, among other matters, that last year more than 10,000 people were executed in China following summary proceedings during which their procedural guarantees were not respected, and in which the execution was carried out on the same day as the sentence." Preliminary statement by Luis Alberto Lamas Puccio on February 11, 2010, before the 42nd Special Criminal Court of Lima (evidence file, folios 8485 and 8486), and (iv) also, following the second advisory decision of the Supreme Court, during the hearing before the Constitutional Court of November 17, 2010, the representative indicated that "vast information can be found on the Internet about the precarious conditions of those deprived of their liberty in that country [China] and, in many cases, they are cut off, in a totally inhuman manner, from basic nutrition so that they weaken and can die sooner." He also indicated that he would be "unable to control whether or not this person [Wong Ho Wing] has been executed or subjected to inhuman treatment, which was also mentioned in the Inter-American Commission's report." Video of the hearing before the Constitutional Court of November 17, 2010 (evidence file, folio 7375).

<sup>216</sup> The National Human Rights Coordinator, a coalition of Peruvian non-governmental organizations presented an *amicus curiae* brief to the Permanent Criminal Chamber of the Supreme Court noting some irregularities concerning the risk of the death penalty, as well as the way it was implemented, and about the alleged risk of torture and other forms of cruel, inhuman or degrading treatment. Cf. *Amicus curiae* of the National Human Rights Coordinator of Peru presented on October 2, 2009 (evidence file, folios 2095 to 2114). In addition, the representative provided relevant parts of 2007 and 2008 reports of Amnesty International in the domestic proceedings, which reveal information on the alleged risk of torture (evidence file, folios 8420 and 8422).

<sup>217</sup> ECHR, *Case of N. v. Finland*, No. 38885/02. Judgment of July 26, 2005, para. 167; *Case of Ryabikin v. Russia*, No. 8320/04. Judgment of June 19, 2008, para. 112; *Case of Nizomkhon Dzhurayev v. Russia*, No. 31890/11. Judgment of October 3, 2013, para. 108; *Case of Saadi v. Italy* [GS], No. 37201/06. Judgment of February 28, 2008, para. 128; *Case of Cruz Varas and Others v. Sweden*, No. 15576/89. Judgment of March 20, 1991, paras. 75 and 76; *Case of Vilvarajah and Others v. The United Kingdom*, Nos. 13163/87, 13164/87, 13165/87 13447/87, and 13448/87. Judgment of October 30, 1991, para. 107, and *Case of Mamatkulov and Askarov v. Turkey* [GS], Nos. 46827/99 and 46951/99. Judgment of February 4, 2005, para. 69. Also, the European Court has indicated that: "the Court must be satisfied that the assessment made by the authorities of the Contracting State is adequate and sufficiently supported by domestic material as well as by material originating from other reliable and objective sources such as, for instance, other Contracting or non-Contracting States, agencies of the United Nations and reputable non-governmental organisations. [...] Accordingly, the Court will first assess in detail the relevant arguments raised by the applicant in the extradition proceedings and the consideration given to them by the competent authorities." *Case of Nizomkhon Dzhurayev v. Russia*, No.31890/11. Judgment of October 3, 2013, paras. 108 and 114, and Cf. *Case of Salah Sheekh v. The Netherlands*, No.1948/04. Judgment of January 11, 2007, para. 136, and *Case of Ismoilov and Others v. Russia*, No.2947/06. Judgment of April 24, 2008. para. 120.

<sup>218</sup> The Human Rights Committee has ruled similarly in several decisions in individual cases, stating that it is not possible to

reasons require this Court to examine the said arguments in this case with reference to current circumstances in the requesting State.

164. In the instant case, none of the judicial authorities that have intervened to date gave any consideration to the representative's arguments concerning a possible risk to the personal integrity of the presumed victim. As previously determined, States have the obligation to examine all the available information in order to determine the possible situation of risk of the person who may be extradited. If, having examined the information provided, the State determines that the arguments lack adequate grounds or the necessary evidence, then it may reject the situation of risk alleged by the presumed victim. This is the second step that requires or would have required the State, and now this Court, to assess the risks alleged by the presumed victim at that time, and then, if appropriate, reject them owing to lack of adequate grounds.

165. In response to the Supreme Court's failure to consider the human rights situation in the requesting State, the State argued that there was no law that required the judicial organ to assess this, and that the alleged context could be taken into account at the political stage of the extradition process. In this regard, the Court notes that the State has presented contradictory arguments because, on the one hand, it has affirmed that the individual subject to extradition does not have the right to be heard at the political stage (*infra* paras. 226 to 234) and, on the other hand, it alleges that it is at that stage that any objections to the extradition request raised by the said individual or his representative could be decided. If the right to be heard of the individual whose extradition is sought is ensured by his participation at the judicial stage of the process, then it is at that stage where any objections to his extradition based on the contextual situation of possible human rights violations in the requesting State should be decided. In this case, at the judicial stage, Wong Ho Wing raised objections concerning the human rights situation in the requesting State and the possible risk to his life or personal integrity. Consequently, the Judiciary, in this case through the Supreme Court, should have responded to these allegations, especially bearing in mind that the Supreme Court found that the extradition was in order. The Court also underlines that, according to expert witness García Toma, offered by the State, "the Council of Ministers evaluates aspects relating to the political advisability of denying the extradition," and "if such political considerations against the extradition are uncertain [...], the extradition goes forward."<sup>219</sup> Therefore, despite the arguments put forward by the State, it is unclear whether the alleged situation of risk to the human rights of Wong Ho Wing in the requesting State could be examined during the political stage of the extradition process.

166. Nevertheless, the Court notes that the mere failure to consider these allegations would not lead to a violation of the right to personal integrity of Wong Ho Wing, in the specific circumstances of this case. As mentioned previously, insofar as the extradition and, thus, the exposure to the alleged risk, has not happened, the Court must determine whether, in the actual circumstances, the extradition of Wong Ho Wing would result in a violation of the prohibition of torture or other cruel, inhuman or degrading treatment or punishment established in Article 5 of the American Convention and the principle of non-refoulement recognized in Article 13(4) of the ICPPT.

#### B.4.b) Alleged risk to Wong Ho Wing in the requesting State

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extradite, deport, expel or remove in any way a person from the territory of a State if there are sufficient reasons to believe that there is a risk of irreparable harm to his rights, and without first taking into consideration that person's arguments concerning the existing risk. Cf. UN, Human Rights Committee, *Joseph Kindler v. Canada*, Communication No. 470/1991, UN Doc. CCPR/C/48/D/470/1991, November 11, 1993, para. 6.2; *Charles Chitat Ng v. Canada*, Communication No. 469/991, UN Doc. CCPR/C/49/D/469/1991, January 7, 1994, para. 6.2; *Jonny Rubin Byahuranga v. Denmark*, Communication No. 1222/2003, UN Doc. CCPR/C/82/D/1222/2003, December 9, 2004, para. 11.3; *Jama Warsame v. Canada*, Communication No. 1959/2010, UN Doc. CCPR/C/102/D/1959/2010, September 1, 2011, para. 8.3, and *Thuraisamy v. Canada*, Communication No. 1912/2009, November 2, 2012, para. 8.

<sup>219</sup> Statement made by Víctor García Toma during the public hearing held in this case.

167. In order to determine whether the presumed victim would face a real, foreseeable and personal risk if he is extradited, the Court must examine all the information available and consider all relevant circumstances. To determine whether there is a risk of torture or other forms of cruel, inhuman or degrading treatment, it must examine the relevant conditions in the requesting State, the specific circumstances of the presumed victim and, as an additional factor, the diplomatic assurances, if these have been provided.<sup>220</sup> The Court will now analyze: (i) the alleged situation of risk in the requesting State and (ii) the diplomatic assurances provided.

168. The State has argued, with regard to the need to examine the human rights situation in the requesting State, as well as to how the diplomatic assurances are assessed that, “there are no international standards for extradition,” and that it was in the Merits Report that the Commission first “ruled on what it considered were the international standards as regards diplomatic assurances to guarantee the life and integrity of a person in relation to an extradition request.” However, despite the inexistence of specific inter-American case law on extradition, this Court notes that the obligations of the States Parties to the Convention result from the American Convention and not from the Court’s case law.<sup>221</sup>

*i) Alleged situation of risk in the requesting State*

169. When examining the alleged situation of risk in the requesting State, the Court must necessarily examine the conditions in the destination country which are the grounds for the alleged risk, and compare the information presented with the standards derived from the American Convention. Nevertheless, the Court notes that this does not mean that it is judging the conditions in the destination country or signify that it is establishing responsibility with regard to the requesting State; particularly when the latter is not a State Party to the Convention. When establishing violations by means of this analysis in the context of processes of extradition, any liability incurred will correspond to the State Party to the Convention, whose act or omission exposed or would expose an individual under its jurisdiction to a risk contrary to the prohibition of torture or cruel, inhuman or degrading treatment.<sup>222</sup>

170. The State objected to certain information used by the Inter-American Commission as grounds for the presumed situation of risk to human rights in the requesting State. Specifically, it noted that “the situations observed by some United Nations human rights treaty bodies, as well as some thematic rapporteurs, [cited by the Commission, refer to] previous years and not [...] necessarily to the reality today.” When determining the relevant conditions in the People’s Republic of China, the Court will take this observation by the State into account.

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<sup>220</sup> In the *Othman* case, the European Court established that: “In any examination of whether an applicant faces a real risk of ill-treatment in the country to which he is to be removed, the Court will consider both the general human rights situation in that country and the particular characteristics of the applicant. In a case where assurances have been provided by the receiving State, those assurances constitute a further relevant factor which the Court will consider. ECHR, *Case of Othman (Abu Qatada) v. The United Kingdom*, No. 8139/09. Judgment of January 17, 2012, para. 187.

<sup>221</sup> *Mutatis mutandi*, regarding the standards relating to military criminal justice, see: *Case of Vélez Restrepo and family v. Colombia. Preliminary objection, merits, reparations and costs*. Judgment of September 3, 2012. Series C No. 248, para. 241, and *Case of Rodríguez Vera et al. (The Disappeared of the Palace of Justice) v. Colombia. Preliminary objections, merits, reparations and costs*. Judgment of November 14, 2014. Series C No. 287, paras. 444 and 445.

<sup>222</sup> Similarly, the European Court has indicated that: “The establishment of such responsibility inevitably involves an assessment of conditions in the requesting country against the standards of Article 3 of the Convention. Nonetheless, there is no question of adjudicating on or establishing the responsibility of the receiving country, whether under general international law, under the Convention or otherwise. In so far as any liability under the Convention is or may be incurred, it is liability incurred by the extraditing Contracting State by reason of its having taken action which has as a direct consequence the exposure of an individual to proscribed ill-treatment”. ECHR, *Case of Mamatkulov and Askarov v. Turkey* [GS], Nos. 46827/99 and 46951/99. Judgment of February 4, 2005, para. 67.

171. The Court considers that, to assess the possible situation of risk to the human rights of an individual under the jurisdiction of a State Party in a destination country, it can use domestic sources, as well as reports of international or non-governmental organizations.<sup>223</sup>

172. When examining a possible situation of risk for an individual whose extradition has been requested in the destination country, the real conditions in that country must be taken into account, and not merely the formal conditions, so that the ratification of treaties alone is insufficient to ensure that he will not be subjected to torture.<sup>224</sup> Furthermore, the existence of domestic norms that ensure respect for human rights or the prohibition of torture and other forms of cruel, inhuman or degrading treatment, is insufficient, in itself, to ensure adequate protection against treatment contrary to the Convention.<sup>225</sup> However, the European Court has indicated that:

[I]n assessing whether there is a risk of ill-treatment in the requesting country, the Court assesses the general situation in that country, taking into account any indications of improvement or worsening of the human-rights situation in general or in respect of a particular group or area that might be relevant to the applicant's personal circumstances.<sup>226</sup>

173. In addition, the Court notes that, when analyzing a possible situation of risk in the destination country, it is not sufficient to refer to the general situation of human rights in the respective State, but rather it is necessary to demonstrate the particular circumstances of the person to be extradited that would expose him to a real, foreseeable and personal risk of being subject to treatment contrary to the prohibition of torture or cruel, inhuman or degrading treatment if he is extradited, such as membership in a persecuted group, prior experience of torture or ill-treatment in the requesting State, and the type of offense for which he is sought, among other matters, depending on the specific circumstances in the destination country. In this regard, the European Court has indicated that:

"[R]eference to a general problem concerning human rights observance in a particular country cannot alone serve as a basis for refusal of extradition [...]. Where the sources available to the Court describe a general situation, an applicant's specific allegations in a particular case require corroboration by other evidence, with reference to the individual circumstances substantiating his fears of ill-treatment [...]. The Court would not require evidence of such individual circumstances only in the most extreme cases where the general situation of violence in the country of destination is of such intensity as to create a real risk that any removal to that country would necessarily violate Article 3."<sup>227</sup>

174. Similarly, the Committee against Torture has indicated that "the existence of a consistent pattern of gross, flagrant or mass violations of human rights in a country does not, as such, constitute sufficient grounds for determining that the particular person would be in danger of being

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<sup>223</sup> Cf. ECHR, *Case of Saadi v. Italy* [GS], No. 37201/06. Judgment of February 28, 2008, para. 131; *Case of Chahal v. The United Kingdom* [GS], No. 22414/93. Judgment of November 15, 1996, paras. 99 and 100; *Case of Müslim v. Turkey*, No. 53566/99. Judgment of April 26, 2005, para. 67; *Case of Said v. The Netherlands*, No. 2345/02. Judgment of July 5, 2005, para. 54; *Case of Al-Moayad v. Germany*, No. 35865/03. Judgment of February 20, 2007, paras. 65 and 66, and *Case of Nizomkhon Dzhurayev v. Russia*, No. 31890/11, Judgment of October 3, 2013, para. 109.

<sup>224</sup> Cf. Affidavit made by Ben Saul on August 18, 2014 (evidence file, folio 6961).

<sup>225</sup> Cf. ECHR, *Case of Saadi v. Italy* [GS], No. 37201/06. Judgment of February 28, 2008, para. 147; *Case of Muminov v. Russia*, No. 42502/06. Judgment of December 11, 2008, para. 96; *Case of Garayev v. Azerbaijan*, No. 53688/08. Judgment of June 10, 2010, para. 73, and *Case of Boutagni v. France*, No. 42360/08. Judgment of November 18, 2010, para. 44.

<sup>226</sup> ECHR, *Case of Nizomkhon Dzhurayev v. Russia*, No. 31890/11, Judgment of October 3, 2013, para. 109. See also, *Case of Saadi v. Italy* [GS], No. 37201/06. Judgment of February 28, 2008, para. 131, and *Case of Shamayev and Others v. Georgia and Russia*, No. 36378/02. Judgment of April 12, 2005, para. 337.

<sup>227</sup> ECHR, *Case of Nizomkhon Dzhurayev v. Russia*, No. 31890/11, Judgment of October 3, 2013, para. 110. See also: *Dzhakysybergenov v. Ukraine*, No. 12343/10. Judgment of February 10, 2011, para. 37; *Case of Mamatkulov and Askarov v. Turkey* [GS], Nos. 46827/99 and 46951/99. Judgment of February 4, 2005, para. 73.

subjected to torture upon his return to that country; additional grounds must be adduced to show that the individual concerned would be personally at risk.”<sup>228</sup>

175. In this case, regarding the possible risk of torture or cruel, inhuman or degrading treatment, the Commission and the representative argued that different international bodies, such as the Committee against Torture and the former Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak, as well as non-governmental organizations such as Amnesty International and Human Rights Watch have expressed concern owing to shortcomings in the legal framework with regard to torture,<sup>229</sup> constant reports of the use of confessions obtained by torture,<sup>230</sup> detention conditions in China,<sup>231</sup> and the failure to investigate, prosecute and punish those responsible for acts of torture.<sup>232</sup> For its part, the State

<sup>228</sup> Cf. UN, Committee against Torture, *Case of G.K. v. Switzerland*, Communication No. 219/2002, UN. Doc. CAT/C/30/D/219/2002, May 12, 2003, para. 6.4. Similarly, Affidavit made by Ben Saul on August 18, 2014 (evidence file, folio 6961).

<sup>229</sup> In this regard, they underlined that the Committee against Torture, in its 2008 Concluding Observations on China, as well as the former Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak, in 2006, indicated shortcomings in the legal framework relating to torture, especially the failure to include its basic constituent elements. Cf. UN, Committee against Torture, Concluding Observations. China. CAT/C/CHN/CO/4, December 12, 2008, para. 32, Available at: <http://www2.ohchr.org/english/bodies/cat/docs/CAT.C.CHN.CO.4.pdf>; UN, Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment. Mission to China. E/CN.4/2006/6/Add.6, March 10, 2006, para. 17, Available at: <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G06/117/50/PDF/G0611750.pdf?OpenElement>. Also, in 2008, Amnesty International indicated that domestic law was not adapted to the provisions of the Convention against Torture, and, in 2012, several non-governmental organizations mentioned this to the former Special Rapporteur Manfred Nowak. Cf. Amnesty International, Summary presented to the Committee against Torture prior to its consideration of the fourth periodic report of China, November 3-21, 2008, p. 1, Available at: [http://www2.ohchr.org/english/bodies/cat/docs/ngos/AI\\_China\\_41.pdf](http://www2.ohchr.org/english/bodies/cat/docs/ngos/AI_China_41.pdf); UN, Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment. Follow-up to the recommendations. China. A/HRC/13/39/Add.6, February 26, 2010, p. 38, Available at: [http://www2.ohchr.org/english/bodies/hrcouncil/docs/13session/A.HRC.13.39.Add%206\\_EFS.pdf](http://www2.ohchr.org/english/bodies/hrcouncil/docs/13session/A.HRC.13.39.Add%206_EFS.pdf).

<sup>230</sup> Regarding this use of confessions obtained by torture, in 2006, the former Special Rapporteur Manfred Nowak indicated that the use of confessions extracted through torture as evidence before the court was not explicitly prohibited, while, in 2008, the Committee against Torture, and the former Special Rapporteur Manfred Nowak in his 2010 report on the follow-up to his visit to China indicated that they had received continued allegations of the widespread use of the torture and ill-treatment of suspects in police custody, especially to extract confessions or information to be used in criminal proceedings. Non-governmental organizations had also emphasized the use of evidence extorted through torture which, according to Amnesty International is not specifically prohibited by domestic law. Cf. UN, Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment. Report on mission to China. March 10, 2006, E/CN.4/2006/6/Add.6, paras. 37 and 73, Available at: <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G06/117/50/PDF/G0611750.pdf?OpenElement>; UN, Committee against Torture, Concluding Observations on China, December 12, 2008, CAT/C/CHN/CO/4, para. 11. Available at: <http://www2.ohchr.org/english/bodies/cat/docs/CAT.C.CHN.CO.4.pdf>; UN, Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment. Follow-up on recommendations. China. A/HRC/13/39/Add.6, February 26, 2010, paras. 19 and 41, Available at: [http://www2.ohchr.org/english/bodies/hrcouncil/docs/13session/A.HRC.13.39.Add%206\\_EFS.pdf](http://www2.ohchr.org/english/bodies/hrcouncil/docs/13session/A.HRC.13.39.Add%206_EFS.pdf); UN, Office of the High Commissioner for Human Rights, Compilation prepared by the Office of the High Commissioner for Human Rights, in accordance with paragraph 15(b) of the annex to Human Rights Council resolution 5/1. People's Republic of China (including Hong Kong and Macao Special Administrative Regions (HKSAR and MSAR)), January 6, 2009, para. 15, Available at: [http://lib.ohchr.org/HRBodies/UPR/Documents/Session4/CN/A\\_HRC\\_WG6\\_4\\_CHN\\_3\\_E.pdf](http://lib.ohchr.org/HRBodies/UPR/Documents/Session4/CN/A_HRC_WG6_4_CHN_3_E.pdf); Human Rights Watch, World Report 2012. Evens of 2011. China, p. 2, Available at: [http://www.hrw.org/sites/default/files/related\\_material/china\\_2012\\_0.pdf](http://www.hrw.org/sites/default/files/related_material/china_2012_0.pdf), and Amnesty International, Summary presented to the Committee against Torture prior to its consideration of the fourth periodic report of China, November 3-21, 2008, p. 16, Available at: [http://www2.ohchr.org/english/bodies/cat/docs/ngos/AI\\_China\\_41.pdf](http://www2.ohchr.org/english/bodies/cat/docs/ngos/AI_China_41.pdf).

<sup>231</sup> Cf. UN, Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment. Report on mission to China. E/CN.4/2006/6/Add.6, March 10, 2006, para. 37 and 73, Available at: <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G06/117/50/PDF/G0611750.pdf?OpenElement>; UN, Committee against Torture, Concluding Observations. China. CAT/C/CHN/CO/4, December 12, 2008, para. 11, Available at: <http://www2.ohchr.org/english/bodies/cat/docs/CAT.C.CHN.CO.4.pdf>; UN, Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment. Follow-up on recommendations. China. A/HRC/13/39/Add.6, February 26, 2010, para. 19, Available at: [http://www2.ohchr.org/english/bodies/hrcouncil/docs/13session/A.HRC.13.39.Add%206\\_EFS.pdf](http://www2.ohchr.org/english/bodies/hrcouncil/docs/13session/A.HRC.13.39.Add%206_EFS.pdf).

<sup>232</sup> Cf. UN, Committee against Torture, Concluding Observations. China. CAT/C/CHN/CO/4, December 12, 2008, paras. 20, 31 and 33, Available at: <http://www2.ohchr.org/english/bodies/cat/docs/CAT.C.CHN.CO.4.pdf>; UN, Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment. Follow-up on recommendations. China. A/HRC/13/39/Add.6, February 26, 2010, para. 19, Available at:

provided the opinion of expert witness Huawen Li to the case file to underscore the improvements or the new systems for the control, reporting on, and monitoring of the conditions and treatment received by persons detained in China in order to safeguard the prohibition of torture and other forms of cruel, inhuman or degrading treatment, as well as to exclude evidence obtained by torture or other acts of violence.<sup>233</sup>

176. This Court considers that the information on which both the Commission and the representative based themselves refers to the general situation of human rights in China. This is not sufficient to consider that Wong Ho Wing would be at real, foreseeable and personal risk of suffering treatment contrary to the prohibition of torture or other forms of cruel, inhuman or degrading treatment. Neither the representative nor the Commission offered arguments, evidence or grounds from which it can be inferred that this general situation creates a personal, individual and specific risk for Wong Ho Wing based on his particular circumstances. The representative referred to information on the human rights situation of individuals accused of terrorism, human rights defenders, those accused of political offenses, and the members of the Uyghur ethnic group, and this bears no relationship to the case of Wong Ho Wing.

177. In addition, and in view of the fact that diplomatic assurances were given in this case, the Court finds that any remaining concerns about the alleged risk of Wong Ho Wing suffering treatment contrary to Article 5 of the American Convention, should be satisfied by the last diplomatic assurance given by China in 2014, which will be examined below.

*ii) Diplomatic notes and assurances provided by the People's Republic of China*

178. Diplomatic assurances constitute a common practice among States in the context of extradition processes and it is usually presumed that they are given in good faith. Such diplomatic undertakings consist in promises or guarantees given by the requesting State to the requested State that the individual whose extradition is requested will receive treatment or punishment in keeping with the international human rights obligations of the requested State.<sup>234</sup> When examining cases of return, deportation, extradition or any form of expulsion of individuals from the jurisdiction of a State Party, the European Court, and also the Human Rights Committee, have granted relative value to the diplomatic assurances provided by the States.<sup>235</sup> Moreover, when examining the relevance of the diplomatic assurances it is important to bear in mind:

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[http://www2.ohchr.org/english/bodies/hrcouncil/docs/13session/A.HRC.13.39.Add%206\\_EFS.pdf](http://www2.ohchr.org/english/bodies/hrcouncil/docs/13session/A.HRC.13.39.Add%206_EFS.pdf).

<sup>233</sup> This expert witness underscored that the Criminal Code, the Code of Criminal Procedure and the Law on the People's Police of the People's Republic of China contain explicit prohibitions of torture and ill-treatment, and the new Code of Criminal Procedure includes provisions that exclude evidence obtained unlawfully; for example, through torture or other acts of violence, such as threats. In addition, he reported that there are numerous norms which establish the steps to follow when investigating unlawful practices to obtain evidence or forced confessions or the physical punishment of detainees, such as the Code of Criminal Procedure, the Law on Administrative Supervision, the Law on the People's Police, the Commission for the Disciplinary Supervision and Control of the Public Security Body, and the Organic Law of People's Prosecutors. In addition, he clarified that rapid channels of communication exist for accusations or reports of torture or ill-treatment; that audio and video records are being promoted in investigation and interrogation procedures, and that frequent physical examinations are performed on detainees. He also highlighted several programs that are being implemented to prevent torture. Cf. Affidavit made by Liu Huawen on August 19, 2014 (evidence file, folios 6787, 6790, 6798, 6799, 6816 to 6818, 6824, 6830 to 6834, 6836 and 6837).

<sup>234</sup> According to expert witness Ben Saul, diplomatic assurances or guarantees "are typically political promises, rather than binding legal safeguards, and therefore they must be considered prudently." Affidavit made by Ben Saul on August 18, 2014 (evidence file, folio 6977). The United Nations High Commissioner for Refugees (UNHCR) has indicated that "the term 'diplomatic assurances,' as used in the context of the transfer of a person from one State to another, refers to an undertaking by the receiving State to the effect that the person concerned will be treated in accordance with conditions set by the sending State or, more generally, in keeping with its human rights obligations under international law." Cf. UNHCR Note on Diplomatic Assurances and International Refugee Protection, August 2006, para. 1.

<sup>235</sup> In this regard, see ECHR, *Case of Othman (Abu Qatada) v. The United Kingdom*, No. 8139/09. Judgment of January 17,



In a case where assurances have been provided by the receiving State, those assurances constitute a further relevant factor which the Court will consider. However, assurances are not in themselves sufficient to ensure adequate protection against the risk of ill-treatment. There is an obligation to examine whether assurances provide, in their practical application, a sufficient guarantee that the applicant will be protected against the risk of ill-treatment. The weight to be given to assurances from the receiving State depends, in each case, on the circumstances prevailing at the material time.<sup>236</sup>

179. Both expert witnesses who testified on the use of diplomatic assurances, offered by the Commission and the State, agreed that diplomatic assurances are an additional factor that may be analyzed when there is a possible risk of violation of human rights in the context of the extradition of a person, so that they must be assessed and considered with prudence, taking into account all the circumstances of the case, on a case-by-case basis.<sup>237</sup>

180. Following the case law of the European Court, the Court considers that, when assessing diplomatic assurances, the quality of the assurances and their reliability must be analyzed.<sup>238</sup> In the case of *Othman (Abu Qatada) v. The United Kingdom*<sup>239</sup> the European Court systematized some of the factors that are relevant when evaluating the quality and reliability of the diplomatic assurances:

- (i) Whether the terms of the assurances have been disclosed to the Court.<sup>240</sup>
- (ii) Whether the assurances are specific or are general and vague.<sup>241</sup>
- (iii) Who has given the assurances and whether that person can bind the receiving State.<sup>242</sup>
- (iv) If the assurances have been issued by the central government of the receiving State, whether local authorities can be expected to abide by them.<sup>243</sup>

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2012, para. 187, and the Human Rights Committee, *Mohammed Alzery v. Sweden*, Communication No. 1416/2005, U.N. Doc. CCPR/C/88/D/1416/2005, November 10, 2006, para. 11.5.

<sup>236</sup> ECHR, *Case of Nizomkhon Dzhurayev v. Russia*, No. 31890/11. Judgment of October 3, 2013, para. 111. See also, *Case of Saadi v. Italy* [GS], No. 37201/06. Judgment of February 28, 2008, para. 148, and *Case of Othman (Abu Qatada) v. The United Kingdom*, No. 8139/09. Judgment of January 17, 2012, para. 187.

<sup>237</sup> Cf. Affidavit made by Ben Saul on August 18, 2014 (evidence file, folio 6977), and Affidavit made by Jean Carlo Mejía Azuero on August 15, 2014 (evidence file, folios 6566, 6592y 6593).

<sup>238</sup> In this regard, see, ECHR, *Case of Othman (Abu Qatada) v. The United Kingdom*, No. 8139/09. Judgment of January 17, 2012, para. 189. In addition, the Human Rights Committee has indicated that: "The existence of diplomatic assurances, their content and the existence and implementation of enforcement mechanisms are all factual elements relevant to the overall determination of whether, in fact, a real risk of proscribed ill-treatment exists". UN, Human Rights Committee, *Case of Mohammed Alzery v. Sweden*, Communication No.1416/2005, U.N. Doc. CCPR/C/88/D/1416/2005, November 10, 2006, para. 11.5.

<sup>239</sup> Cf. ECHR, *Case of Othman (Abu Qatada) v. The United Kingdom*, No. 8139/09. Judgment of January 17, 2012, para. 189.

<sup>240</sup> ECHR, *Case of Othman (Abu Qatada) v. The United Kingdom*, No. 8139/09. Judgment of January 17, 2012, para. 189, citing, *inter alia*: ECHR, *Case of Ryabikin v. Russia*, No. 8320/04. Judgment of June 19, 2008, para. 119, and *Case of Muminov v. Russia*, No. 42502/06. Judgment of December 11, 2008, para. 97.

<sup>241</sup> ECHR, *Case of Othman (Abu Qatada) v. The United Kingdom*, No. 8139/09. Judgment of January 17, 2012, para. 189, citing: ECHR, *Case of Saadi v. Italy* [GS], No. 37201/06. Judgment of February 28, 2008, para. 147; *Case of Klein v. Russia*, No. 24268/08. Judgment of April 1, 2010, para. 55, and *Case of Khaydarov v. Russia*, No. 21055/09. Judgment of May 20, 2010, para. 111.

<sup>242</sup> ECHR, *Case of Othman (Abu Qatada) v. The United Kingdom*, No. 8139/09. Judgment of January 17, 2012, para. 189, citing: ECHR, *Case of Shamayev and Others v. Georgia and Russia*, No. 36378/02. Judgment of April 12, 2005, para. 344; *Case of Kordian v. Turkey*, No. 6575/06. Decision of July 4, 2006; *Case of Abu Salem v. Portugal*, No. 26844/04. Decision of May 9, 2006, and, to the contrary, *Case of Ben Khemais v. Italy*, No. 246/07. Judgment of February 24, 2009, para. 59; *Case of Garayev v. Azerbaijan*, No. 53688/08. Judgment of June 10, 2010, para. 74; *Case of Baysakov and Others v. Ukraine*, No. 54131/08. Judgment of February 18, 2010, para. 51, and *Case of Soldatenko v. Ukraine*, No. 2440/07. Judgment of October 23, 2008, para. 73.

<sup>243</sup> ECHR, *Case of Othman (Abu Qatada) v. The United Kingdom*, No. 8139/09. Judgment of January 17, 2012, para. 189,

- (v) Whether the assurances concerns treatment which is legal or illegal in the receiving State.<sup>244</sup>
- (vi) Whether they have been given by a Contracting State.<sup>245</sup>
- (vii) The length and strength of bilateral relations between the sending and receiving States, including the receiving State's record in abiding by similar assurances.<sup>246</sup>
- (viii) Whether compliance with the assurances can be objectively verified through diplomatic or other monitoring mechanisms, including providing unfettered access to the applicant's lawyers.<sup>247</sup>
- (ix) whether there is an effective system of protection against torture in the receiving State, including whether it is willing to cooperate with international monitoring mechanisms (including international human rights NGOs), and whether it is willing to investigate allegations of torture and to punish those responsible.<sup>248</sup>
- (x) Whether the applicant has previously been ill-treated in the receiving State.<sup>249</sup>
- (xi) Whether the reliability of the assurances has been examined by the domestic courts of the sending/Contracting State.<sup>250</sup>

181. Meanwhile, the Human Rights Committee has considered that: "The existence of diplomatic assurances, their content and the existence and implementation of enforcement mechanisms are all factual elements relevant to the overall determination of whether, in fact, a real risk of proscribed ill-treatment exists."<sup>251</sup> This Committee, and also the Committee against Torture, have emphasized the need for mechanisms for monitoring the enforcement of the assurances and other provisions so as to ensure they are implemented.<sup>252</sup>

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citing: ECHR, *Case of Chahal v. The United Kingdom* [GS], No. 22414/93. Judgment of November 15, 1996, paras. 105 to 107.

<sup>244</sup> ECHR, *Case of Othman (Abu Qatada) v. The United Kingdom*, No. 8139/09. Judgment of January 17, 2012, para. 189, citing, *inter alia*: ECHR, *Case of Cipriani v. Italy*, No. 221142/07. Decision of March 30, 2010; *Case of Saudi v. Spain*, No. 22871/06, Decision of September 18, 2006; *Case of Ismaili v. Germany*, No. 58128/00, Decision of March 15, 2001; *Case of Nivette v. France*, No. 44190/98. Decision of July 3, 2001, and *Case of Einhorn v. France* No. 71555/01. Decision of October 16, 2001.

<sup>245</sup> ECHR, *Case of Othman (Abu Qatada) v. The United Kingdom*, No. 8139/09. Judgment of January 17, 2012, para. 189, citing: ECHR, *Case of Chentiev and Ibragimov v. Slovakia*, Nos. 21022/08 and 51946/08. Decision of September 14, 2010, and *Case of Gasayev v. Spain*, No. 48514/06. Decision of February 17, 2009.

<sup>246</sup> ECHR, *Case of Othman (Abu Qatada) v. The United Kingdom*, No. 8139/09. Judgment of January 17, 2012, para. 189, citing: ECHR, *Case of Babar Ahmad and Others v. The United Kingdom*, Nos. 24027/07, 11949/08, 36742/08, 66911/09 and 67354/09. Judgment of April 10, 2012, paras. 107 and 108; *Case of Al-Moayad v. Germany*, No. 35865/03. Decision of February 20, 2007, para. 68.

<sup>247</sup> ECHR, *Case of Othman (Abu Qatada) v. The United Kingdom*, No. 8139/09. Judgment of January 17, 2012, para. 189, citing, *inter alia*: ECHR, *Case of Chentiev and Ibragimov v. Slovakia*, Nos. 21022/08 and 51946/08. Decision of September 14, 2010, and *Case of Gasayev v. Spain*, No. 48514/06. Decision of February 17, 2009, and, to the contrary, *Case of Ben Khemais v. Italy*, No. 246/07. Judgment of February 24, 2009, para. 61; *Case of Ryabikin v. Russia*, No. 8320/04. Judgment of June 19, 2008, para. 119, and *Case of Kolesnik v. Russia*, No. 26876/08, Judgment of June 17, 2010, para. 73.

<sup>248</sup> ECHR, *Case of Othman (Abu Qatada) v. The United Kingdom*, No. 8139/09. Judgment of January 17, 2012, para. 189, citing: ECHR, *Case of Ben Khemais v. Italy*, No. 246/07. Judgment of February 24, 2009, paras. 59 and 60; *Case of Soldatenko v. Ukraine*, No. 2440/07. Judgment of October 23, 2008, para. 73, and *Case of Koktysh v. Ukraine*, No. 43707/07. Judgment of December 10, 2009, para. 63.

<sup>249</sup> ECHR, *Case of Othman (Abu Qatada) v. The United Kingdom*, No. 8139/09. Judgment of January 17, 2012, para. 189, citing: ECHR, *Case of Koktysh v. Ukraine*, No. 43707/07. Judgment of December 10, 2009, para. 64.

<sup>250</sup> ECHR, *Case of Othman (Abu Qatada) v. The United Kingdom*, No. 8139/09. Judgment of January 17, 2012, para. 189 citing: ECHR, *Case of Gasayev v. Spain*, No. 48514/06. Decision of February 17, 2009; *Case of Babar Ahmad and Others v. The United Kingdom*, Nos. 24027/07, 11949/08, 36742/08, 66911/09 and 67354/09. Judgment of April 10, 2012, para. 106, and *Case of Al-Moayad v. Germany*, No. 35865/03. Decision of February 20, 2007, paras. 66 to 69.

<sup>251</sup> UN, Human Rights Committee, *Case of Mohammed Alzery v. Sweden*, Communication No.1416/2005, U.N. Doc. CCPR/C/88/D/1416/2005, November 10, 2006, para. 11.3

<sup>252</sup> Cf. UN, Human Rights Committee, *Case of Mohammed Alzery v. Sweden*, Communication No. 1416/2005, U.N. Doc. CCPR/C/88/D/1416/2005, November 10, 2006, para. 11.5; the Committee against Torture, *Case of Agiza v. Sweden*, Communication No. 233/2003, U.N. Doc. CAT/C/34/D/233/2003, May 20, 2006, para. 13(4), and *Case of Elif Pelit v. Azerbaijan* Communication No. 281/2005, U.N. Doc. CAT/C/38/D/281/2005, May 1, 2007, para. 11.

182. Expert witness Ben Saul emphasized the different nature of the diplomatic assurances provided in relation to non-application of the death penalty (a conduct that is not prohibited by international law) and those provided when there is a risk of torture and other forms of cruel, inhuman or degrading treatment (a conduct that is absolutely prohibited under international law).<sup>253</sup> In this regard, the Court takes note of the critiques and difficulties as regards the use and support of diplomatic assurances when there is a possible risk of torture.<sup>254</sup> Nevertheless, the European Court considers that it is not for that Court to reject the possibility of their use, when they constitute a usual practice of States,<sup>255</sup> even though their value and degree of reliability depend on the particular circumstances of the case, and the assurances offered.<sup>256</sup>

183. In this case, the Court notes that the assurances provided by the People's Republic of China gradually changed. Initially the assurances were addressed at the risk of the application of the death penalty, while the last ones, provided in 2014, cover aspects related to the alleged risk of torture or other cruel, inhuman or degrading treatment (*supra* paras. 92 and 93). This Court recalls that, at the present time, the possibility of Wong Ho Wing being tried and sentenced to death has been eliminated (*supra* para. 151), so that it does not find it necessary and pertinent to analyze the sufficiency of the diplomatic assurances provided in relation to the death penalty in order to determine the current circumstances of the risk for Wong Ho Wing. The Court also recalls that it has determined that the Commission and the representative have not proved that Wong Ho Wing faces a real, foreseeable and personal risk of suffering treatment contrary to the prohibition of torture or cruel, inhuman or degrading treatment if he is extradited (*supra* para. 176). However, in addition, it considers that the assurances provided in the eighth diplomatic note would help to eliminate any concerns about the presumed victim's situation of risk. The last assurance provided by the People's Republic of China was detailed and proposed a system for monitoring implementation, in keeping with several of the standards described above (*supra* paras. 180, 181 and 182). In this diplomatic note, the requesting State undertook to advise Peru about the possible

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<sup>253</sup> Cf. Affidavit made by Ben Saul on August 18, 2014 (evidence file, folios 6979 and 6980).

<sup>254</sup> In this regard, the former Special Rapporteur against torture, Manfred Nowak, "called attention to the importance of maintaining the focus and remaining vigilant on practices such as the use of diplomatic assurances, which attempt to erode the absolute prohibition on torture in the context of counter-terrorism measures. He reiterates that diplomatic assurances are not legally binding and undermine existing obligations of States to prohibit torture, are ineffective and unreliable in ensuring the protection of returned persons, and therefore should not be resorted to by States. Cf. Human Rights Council discusses reports on torture, arbitrary detention and independence of judges and lawyers, September 19, 2006. Available at: <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=1384>. Furthermore, in 2006, Louise Arbour, the High Commissioner for Human Rights at the time, indicated that, "[b]ased on the long experience of international monitoring bodies and experts, it is unlikely that a post-return monitoring mechanism set up explicitly to prevent torture and ill-treatment in a specific case would have the desired effect. These practices often occur in secret, with the perpetrators skilled at keeping such abuses from detection. The victims, fearing reprisal, often are reluctant to speak about their suffering, or are not believed if they do. Cf. Statement by Louise Arbour, United Nations High Commissioner for Human Rights, to the Council of Europe Group of Specialists on Human Rights and the Fight against Terrorism (DH-S-TER), March 29 to 31, 2006.

<sup>255</sup> In the case of *Othman (Abu Qatada) v. The United Kingdom*, the European Court "accepted that [...] there is widespread concern within the international community as to the practice of seeking assurances to allow for the deportation of those considered to be a threat to national security. [...] However, it not for this Court to rule upon the propriety of seeking assurances, or to assess the long term consequences of doing so; its only task is to examine whether the assurances obtained in a particular case are sufficient to remove any real risk of ill-treatment." ECHR, *Case of Othman (Abu Qatada) v. The United Kingdom*, No. 8139/09. Judgment of January 17, 2012, para. 186. It has also indicated that: "In extradition matters, Diplomatic Notes are a standard means for the requesting State to provide any assurances which the requested State considers necessary for its consent to extradition. In *Ahmad and Others*, the Court also recognised that, in international relations, Diplomatic Notes carry a presumption of good faith and that, in extradition cases, it was appropriate that that presumption be applied to a requesting State which has a long history of respect for democracy, human rights and the rule of law, and which has longstanding extradition arrangements with Contracting States". ECHR, *Cases of Harkins and Edwards v. The United Kingdom*, Nos. 9146/07 and 32650/07. Judgment of January 17, 2012, para. 85.

<sup>256</sup> Cf. ECHR, *Case of Othman (Abu Qatada) v. The United Kingdom*, No. 8139/09. Judgment of January 17, 2012, para. 142, and *Case of Rustamov v. Russia*, No. 11209/10. Judgment of July 3, 2012, para. 131.

place of detention of Wong Ho Wing, to give Peruvian diplomats access to and different means of contacting Wong Ho Wing during his detention; offered guarantees as regards his right of defense and the possibility of professional assistance and medical care, as well as granting the Peruvian diplomatic authorities authorization to monitor the proceedings eventually instituted against Wong Ho Wing (*supra* para. 93.h).

184. In addition to taking into account the standards of the European Court and other international bodies when assessing these assurances, the Court underlines that the terms of this last diplomatic note accord with what both of the Commission's expert witnesses considered a sufficient guarantee in the context of an extradition. Expert witness Ben Saul emphasized as adequate characteristics of the diplomatic assurances that they were "solid, significant and verifiable"; that they "included an effective monitoring system that was prompt, regular and included private interviews," and also "prompt access to a lawyer, (video) recording of all interrogations sessions with a record of the identity of all those present, a prompt and independent medical examination, and the prohibition of solitary confinement or detention in clandestine places."<sup>257</sup> Meanwhile, expert witness Geoff Gilbert indicated that "[f]or the assurances to be sufficient to allow the return, they should refer specifically to the person whose extradition is requested; they must depend on the circumstances (including the source and content of the assurances [...]), and they must be independently verifiable after the extradition."<sup>258</sup> The last guarantee provided by the People's Republic of China to Peru complies with these characteristics. Consequently, this Court finds that, in the circumstances of this case, the assurances provided may be considered sufficient to satisfy the concerns that remained about the alleged risk to Wong Ho Wing were he to be extradited.

185. The representative and the Commission contested assessment of this latest assurance, considering it time-barred. However, the Court notes that, under international law, there is no limit to the number of assurances that may be provided by the requesting State or required by the requested State. Moreover, there is no impediment to sufficient assurances being provided progressively and increasingly. As mentioned throughout this Judgment, in order to determine whether Wong Ho Wing would face a risk that would harm his right if he were extradited, this Court must examine and assess all the information currently available, because the extradition has not taken place yet. The possibility of obtaining the necessary and sufficient assurances progressively could be restricted by the guarantees of due process that protects every person under the jurisdiction of a State, if there was a limit in this sense in the domestic law of the State in question or, in any case, owing to the obligation to hold the trial within a reasonable time, but this does not mean that the Court cannot take these last assurances into account in order to determine Wong Ho Wing's presumed situation of risk in the requesting State if he were to be extradited. The possible consequences of the State's delay in obtaining appropriate assurances must be examined when analyzing the alleged violation of reasonable time made in another section of this Judgment (*infra* paras. 207 to 223)

186. The representative also argued that the assurances provided by China were not reliable, because in three other cases where, presumably, the Chinese Government had provided assurances, these had not been fulfilled.<sup>259</sup> In this regard, the Court notes that the representative

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<sup>257</sup> Affidavit made by Ben Saul on August 18, 2014 (evidence file, folio 6980).

<sup>258</sup> Affidavit made by Geoff Gilbert on August 16, 2014 (evidence file, folio 7024).

<sup>259</sup> The representative referred to three cases mentioned in an Urgent Action of Amnesty International concerning the case of Wong Ho Wing. This organization indicated that: "China executed the Tibetan, Lobsang Dhondup, in January 2003, one month after it had assured the United States that his case would be subject to extensive review by the People's Supreme Court. Extraditions and expulsions implemented previously suggest that the Chinese assurances should not be relied on. In 1995, Wang Jianye was executed after he had been extradited from Thailand, despite the assurances given to the Thai authorities that he would not be sentenced to death. In June 2000, Fang Yong was sentenced to death after being returned from Canada. Unconfirmed reports suggest that China had provided assurances that he would not be sentenced to death. His sentence was

did not provide any evidence for this affirmation. In addition, the representative's arguments refer to the presumed risk of the application of the death penalty, which, as the Court has reiterated, was eliminated with the eighth amendment to the Chinese Criminal Code (*supra* para. 151). The Commission argued that there are no judicial mechanisms to implement the said assurances. However, the Court takes note of the opinion of expert witness Ang Sun, according to which, "following the offer of diplomatic assurances by the Ministry of Foreign Affairs of China, such assurances are binding for all Chinese courts," pursuant to article 50 of the Chinese Extradition Law.<sup>260</sup> This Court considers that, in the particular circumstances of this case, the assurances and the monitoring mechanisms offered are sufficient.

#### **B.5) General conclusion on the alleged risk of violation of the rights to life and personal integrity of Wong Ho Wing if he is extradited**

187. Based on all the preceding conclusions, the Court finds that, at the present time, it would not be legally possible to impose the death penalty for the offense of smuggling ordinary merchandise, for which the extradition of Wong Ho Wing has been requested. In addition, it has not been proved that the extradition of Wong Ho Wing would expose him to a real, foreseeable and personal risk of being subject to treatment contrary to the prohibition of torture or other cruel, inhuman or degrading treatment.

188. Therefore, the Court concludes that, if Wong Ho Wing is extradited in the current circumstances, the State would not be responsible for violating its obligation to ensure his rights to life and to personal integrity recognized in Articles 4 and 5 of the Convention, in relation to Article 1(1) of this instrument, or the prohibition of non-refoulement established in Article 13 (paragraph 4) of the Inter-American Convention to Prevent and Punish Torture.

### **X**

#### **RIGHTS TO JUDICIAL PROTECTION AND JUDICIAL GUARANTEES, IN RELATION TO THE OBLIGATION TO RESPECT AND ENSURE RIGHTS**

189. Despite the Court's conclusion concerning the risk of violation of the rights to life and to personal integrity (*supra* para. 188), in this case, the relevant factor is that, following the Supreme Court's second advisory decision, the Constitutional Court ordered the Executive Branch to refrain from extraditing Wong Ho Wing to China (*supra* paras. 81 to 85). Therefore, this Court must decide whether, notwithstanding the inexistence of a risk at this time, the State may extradite Wong Ho Wing without being in non-compliance with other obligations derived from the Convention, such as the right to judicial protection and the enforcement of final judicial decisions, established in Article 25<sup>261</sup> of the American Convention, as argued by the Commission and the representative. In this chapter, the Court will analyze this aspect of the dispute, as well as the alleged violations of the guarantees of a reasonable time and due process of law established in Article 8<sup>262</sup> of the Convention.

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commuted to life imprisonment on appeal."

<sup>260</sup> Cf. Statement made by Ang Sun during the public hearing held in this case.

<sup>261</sup> The relevant part of Article 25 of the American Convention establishes that: "1. Everyone has the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights recognized by the constitution or laws of the state concerned or by this Convention, even though such violation may have been committed by persons acting in the course of their official duties. 2. The States Parties undertake: [...] (c) to ensure that the competent authorities shall enforce such remedies when granted."

<sup>262</sup> Article 8(1) of the American Convention establishes that: "Every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law, in the substantiation of any accusation of a criminal nature made against him or for the determination of his rights and obligations of a civil, labor, fiscal, or any other nature."

### ***A. Arguments of the parties and of the Commission***

190. The Commission indicated that “[t]he order of Peru’s Constitutional Court [...] required that it was necessary that the final decision in the extradition process deny extradition.” However, and even though Wong Ho Wing is still deprived of his liberty, the Executive Branch “has failed to take a final decision in the extradition process,” abstaining from executing the judgment and actively seeking numerous legal mechanisms to modify the scope of this ruling that protects the rights of Wong Ho Wing. The Commission concluded that the State had failed to comply with its obligation to implement final judicial decisions. It also argued that “the legal time frames for the advisory procedure were not met in this case and, in addition, the absence of a legal time frame for the final decision of the Executive Branch encouraged the delay.” Furthermore, in general, it objected to the “disproportionate time of six years that the extradition process has lasted.” In this regard, it affirmed that this, “of itself, violates the guarantee of a reasonable time.” It considered that “it was not [the] complexity [of the case] or the diligence in obtaining assurances that caused the delay” and that, “for long periods of time, the competent domestic authorities [...] had failed to issue the final decision in the extradition process.” In addition, it clarified that the remedies filed by Wong Ho Wing formed part of the mechanisms established for his defense. Regarding the analysis of the legal situation of the person concerned, it underscored that “the delay in the final decision in the extradition process [...] has meant that Wong Ho Wing remains deprived of his liberty.”

191. The representative emphasized that there had been a “systematic failure by the authorities of the Executive Branch to take a final decision on the extradition of Wong Ho Wing that complied with the ruling of the Constitutional Court ordering the Peruvian State to refrain from extraditing him.” He argued that the State had confused the provisional nature of the measures adopted by this Court with the final nature of the ruling of the Constitutional Court and concluded that Peru had violated Wong Ho Wing’s right to judicial protection for the more than three years during which it had not executed the Constitutional Court’s ruling. The representative indicated that there had been a lack of due diligence in the adoption of a final decision by the Executive Branch. In this regard, he argued that the Executive Branch “has been taking a series of delaying measures before adopting a final decision,” despite the ruling of the Constitutional Court; among these, he mentioned the request to the Supreme Court to issue a complementary advisory decision, as well as the “request submitted to the 42<sup>nd</sup> Special Criminal Court of the Superior Court of Justice of Lima on November 25, 2011, that the Public Attorney responsible for the Judicial Matters of the Ministry of Justice present some ‘clarifications’ regarding compliance with the ruling of the Constitutional Court of May 24, 2011”.

192. The State stressed that the Constitutional Court had ordered it to refrain from extraditing Wong Ho Wing, but had not decided on the denial of the extradition request. It noted that the ruling of the Constitutional Court was binding for the Executive Branch, but that “legal discrepancies or questions may exist regarding its execution.” According to the State, the requests for clarification “in no way signify the intention to disregard a jurisdictional ruling or prevent its execution, but their purpose was to resolve any questions that arose.” Regarding the reasonable time, the State indicated that, “non-compliance with the reasonable time does not entail the immediate and direct harm to the right to a reasonable time for the duration of a process.” In relation to the complexity of the matter, it asked that the Court take into account the “absence of case law of the inter-American system for the protection of human rights concerning the basic diplomatic assurances that a State should request in extradition matters; the absence of domestic case law on the constitutional control of acts of the Executive Branch in relation to extradition; the lack of clarity in the ruling of the Constitutional Court, and the fact that the provisional measures of the Inter-American Court were in force.” With regard to the procedural activity of the person concerned, the State indicated that “[the applications for *habeas corpus*] were filed at each stage of the extradition procedure, preventing it from going forward normally.” The State did not rule on

the conduct of its judicial authorities, because it considered that this had “not been questioned” and that, “regarding the conduct of the authorities, the Commission only referred to those who were part of the Executive Branch.” Thus, it affirmed that “the ruling of the Constitutional Court [...] does not result in any obligation to issue a decision rejecting the extradition.” The State also understood that the Commission’s argument on the legal situation of the person involved in the process should “be rejected,” because it was the result of its continuing confusion about the real scope of the ruling of the Constitutional Court.” It underscored that “[t]he delay in the final decision in the extradition process has been the result of the actions of [the representative] in the domestic and international, and those of the Commission.”

### ***B. Considerations of the Court***

193. The Court notes that, following the second advisory decision of the Supreme Court, the representative of Wong Ho Wing filed an application for *habeas corpus* in view of the certain and imminent risk that the presumed victim could be extradited, using the remedies established by Peruvian law. This *habeas corpus* was ultimately decided in May 2011 by the Constitutional Court, by means of a constitutional appeal, when that court considered that sufficient assurances that the death penalty would not be imposed had not been provided, and therefore: (i) ordered the State to refrain from extraditing Wong Ho Wing, and (ii) urged the State to try him in Peru (*supra* paras. 79 to 85).

194. Following that ruling, the State has not taken a final decision regarding the request for the extradition of Wong Ho Wing. Since then, the Executive Branch has tried different procedural channels to incorporate new information that would: (i) clarify or interest the scope of the Constitutional Court’s ruling in order to permit the extradition of Wong Ho Wing; (ii) complement the Supreme Court’s advisory decision so that it is admissible to extradite Wong Ho Wing, without infringing the literal text of the Constitutional Court’s ruling, or (iii) interpret that it is possible to extradite Wong Ho Wing for the offense of bribery that was never subject to the death penalty.

195. Taking into account the arguments of the parties and of the Commission, the Court will now examine: (B.1) the alleged violation of the right to judicial protection, and (B.2) the alleged failure to comply with the guarantee of a reasonable time in the extradition process. Subsequently, the Court will examine: (B.3) the other presumed violations of judicial guarantees alleged by the representative.

#### **B.1) The alleged violation of the right to judicial protection**

196. Regarding the right to judicial protection, in the terms of Article 25 of the Convention it is possible to identify two specific State responsibilities. The first is to establish by law and to ensure the due application of effective remedies before the competent authorities that protect all persons subject to their jurisdiction against acts that violate their fundamental rights or that lead to the determination of their rights and obligations.<sup>263</sup> The second is to guarantee the means to executive the respective final decisions and judgments issued by those competent authorities, so that the declared or recognized rights are truly protected.<sup>264</sup> The latter is required because a judgment that is *res judicata* grants certainty about the right or dispute discussed in the specific case and,

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<sup>263</sup> Cf. *Case of the “Street Children” (Villagrán Morales et al.) v. Guatemala. Merits*. Judgment of November 19, 1999. Series C No. 63, para. 237, and *Case of the Afrodescendant Communities displaced from the Cacarica River Basin (Operation Genesis) v. Colombia. Preliminary objections, merits, reparations and costs*. Judgment of November 20, 2013. Series C No. 270, para. 405.

<sup>264</sup> Cf. *Case of Baena Ricardo et al. v. Panama. Jurisdiction*. Judgment of November 28, 2003. Series C No. 104, para. 79, and *Case of the Afrodescendant Communities displaced from the Cacarica River Basin (Operation Genesis) v. Colombia, supra*, para. 405.

consequently, one of its effects is its binding nature or the need to comply with it.<sup>265</sup> Otherwise, there would be a denial of the right concerned.<sup>266</sup>

197. In this regard, Article 25(2)(c) of the Convention establishes the right “that the competent authorities shall enforce such remedies when granted.”

198. The Court has indicated that States have the obligation to ensure the means to execute such final decision.<sup>267</sup> Effective mechanisms must exist to execute the decisions or judgments so that they truly protect the rights that have been declared.<sup>268</sup> In addition, the Court has established that the effectiveness of a judgment depends on its execution. The proceedings must attempt to implement the protection of the right recognized in the legal ruling by the appropriate execution of that ruling.<sup>269</sup>

199. The relevant part of the judgment of the Constitutional Court of May 24, 2011, indicated that:

[...] the Inter-American Court of Human Rights has emphasized that Articles 4 and 1(1) of the American Convention on Human Rights recognize the international obligation of the States Parties “not to subject a person to the risk of the application of the death penalty via extradition” [...].

Evidently, the Peruvian State has two obligations that, supposedly, it must meet. On the one hand, it has the obligation to extradite Wong Ho Wing based on the Extradition Treaty between the Republic of Peru and the People’s Republic of China. On the other hand, it also has the obligation not to subject Wong Ho Wing to the risk of the application of the death penalty via extradition, and to try him for the offenses for which his extradition is sought.

Apparently, the obligations described above are incompatible, because if Wong Ho Wing is extradited, the Peruvian State would be unable to try him. Conversely, if the Peruvian State decides to try Wong Ho Wing, it would be unable to extradite him, because it would prefer to safeguard the right to life.

This apparent conflict between obligations must be decided bearing in mind the protection of the right to life of Wong Ho Wing, which is also an obligation imposed on the Peruvian State under Articles 4 and 1(1) of the American Convention on Human Rights.

Indeed, should the death penalty be imposed on Wong Ho Wing, following his trial in the People’s Republic of China, his right to life would be evidently and truly harmed, and this could be attributed to the Peruvian State, because it had not assessed sufficiently and reasonably the sufficient and real assurances provided by the requesting State that it would not impose the death penalty on him.

In such cases, the European Court of Human Rights has emphasized that the Convention for the Protection of Human Rights and Fundamental Freedoms does not guarantee the right not to be

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<sup>265</sup> Cf. *Case of Acevedo Jaramillo et al. v. Peru. Preliminary objections, merits, reparations and costs*. Judgment of February 7, 2006. Series C No. 144, para. 167, and *Case of the Afrodescendant Communities displaced from the Cacarica River Basin (Operation Genesis) v. Colombia, supra*, para. 405.

<sup>266</sup> Cf. *Case of Cantos v. Argentina. Merits, reparations and costs*. Judgment of November 28, 2002. Series C No. 97, para. 54, and *Case of Mémoli v. Argentina. Preliminary objections, merits, reparations and costs*. Series C No. 265, para. 193.

<sup>267</sup> Cf. *Case of Baena Ricardo et al. v. Panama. Jurisdiction, supra*, para. 79, and *Case of the Afrodescendant Communities displaced from the Cacarica River Basin (Operation Genesis) v. Colombia, supra*, para. 405.

<sup>268</sup> Cf. *Case of Acevedo Jaramillo et al. v. Peru, supra*, para. 220.

<sup>269</sup> Cf. *Case of Baena Ricardo et al. v. Panama. Jurisdiction, supra*, para. 73, and *Case of Liakat Ali Alibux v. Suriname. Preliminary objections, merits, reparations and costs*. Judgment of January 30, 2014. Series C No. 276, para. 33.



extradited; however, if an extradition decision may affect the exercise of a right protected by the Convention, it is reasonable to require certain obligations of the Requesting State aimed at preventing the violation [...].<sup>270</sup>

200. The Court notes that, following the delivery of the judgment of the Constitutional Court in May 2011, that court issued a ruling clarifying it in which, regard the existence of new elements (the diplomatic assurances and the annulment of the death penalty for the offense for which the extradition of Wong Ho Wing was sought), it indicated that “the belated awareness of the content [of the diplomatic assurances] cannot change the sense of the decision adopted [...], because it is now constitutional *res judicata*.”<sup>271</sup> The court that decided to change the provisional detention of Wong Ho Wing ruled similarly,<sup>272</sup> and the Supreme Court of Justice also<sup>273</sup>

201. In addition, in a ruling of March 12, 2013, the Constitutional Court rejected the possibility of extraditing Wong Ho Wing for the offense of bribery. When denying an appeal for interpretation filed by the Public Attorney responsible for Judicial Matters of the Ministry of Justice,<sup>274</sup> the Constitutional Court noted, regarding the possibility of extraditing Wong Ho Wing r the offense of bribery, that “with the pretext of ‘clarifying’ an element of its judgment” it was sought “to ‘amend’ its decision, so that it would express something that it had not done originally, also affecting the guarantee of *res judicata*.” It indicated that “pursuant to the content of both the judgment and the clarifying ruling issued by the Constitutional Court, [...] they did not make an individual or separate analysis of the offenses that the individual sought is accused of, not only because this was not in order [...], but also because the relevant point was to determine whether the right to life of the beneficiary in the *habeas corpus* proceeding was threatened if the extradition request was declared admissible” (*supra* para. 90).

202. Nevertheless, the Court underscores that, at the date of the delivery of this Judgment, the Executive Branch has not taken a final decision in this case. According to Peru’s domestic laws, although extradition involves a joint process, it corresponds exclusively to the Executive Branch to grant or reject extradition, in those cases where the Supreme Court has considered it admissible, such as in this one (*supra* para. 57). Expert witness García Toma explained that the judgment of the Constitutional Court has not been contravened, insofar as this decision consists merely in an obligation “to refrain from extraditing Wong Ho Wing,” and this has been complied with rigorously to date.

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<sup>270</sup> Judgment of the Constitutional Court of May 24, 2011 (evidence file, folios 278 and 279).

<sup>271</sup> Ruling of the Constitutional Court of June 9, 2011 (evidence file, folio 297).

<sup>272</sup> Cf. Decision of the Seventh Criminal Court of El Callao of March 10, 2014 (evidence file, folio 6462).

<sup>273</sup> The Supreme Court indicated, when it was asked to issue a complementary advisory decision, that, “in fact, there have been two final decision, one of an advisory nature (of the Judiciary) and the other of a binding nature (of the Constitutional Court), that the Executive Branch must comply with, taking into account the legal provisions (article 113 of the Code of Constitutional Procedure).” Decision of the Permanent Criminal Chamber of the Supreme Court of Justice March 14, 2012 (evidence file, folio 372 and 373). This article establishes: “Article 113. Effects of Judgments: The court’s judgments are binding on the public authorities and shall have full effects for all of them. They determine the State branches or entities to which the disputed attributes and jurisdictions correspond, and annul unlawful provisions, decisions or acts. In addition, they decide, when appropriate, what is admissible in the legal situations produced by such administrative acts. When there is a negative conflict of jurisdictions or attributes, the judgment, in addition to deciding the appropriate responsibility, may indicate, as appropriate, a time frame within which the State branch or entity in question should exercise this.” Code of Constitutional Procedure (evidence file, folio 8587).

<sup>274</sup> On that occasion, the said attorney expressly asked if it was possible to extradite Wong Ho Wing for the offense of bribery, for which the death penalty was not established, taking into account that “since the Constitutional Court’s judgment makes no distinction between the offenses that result in protection by the judgment, the extradition can be carried out for the offense that does not entail the risk of the death penalty and, in that eventuality, the State’s action would be aligned with the execution of the Constitutional Court’s judgment.” Judgment of the Constitutional Court of March 12, 2013 (evidence file, folio 376).

203. This Court considers that, in May 2011, Wong Ho Wing obtained a ruling of the Constitutional Court, which ordered the Executive Branch to refrain from extraditing him. However, the Court takes note that, in this decision, the Constitutional Court found that, according to the circumstances that existed at the time, a risk to the right to life of Wong Ho Wing persisted, in view of the absence of the necessary and sufficient assurances to safeguard it.<sup>275</sup> In its decision of June 2011, the Constitutional Court clarified that, when issuing its decision, it was unable to take into account the assurances that had been provided up until that time, because they were not included in the case file, and that the diplomatic notes it had provided information on the annulment of the death penalty, but did not explain its applicability to the case of Wong Ho Wing.<sup>276</sup> Thus, the Constitutional Court was unable to assess either the annulment of the death penalty for the offense of smuggling ordinary merchandise and its applicability to Wong Ho Wing's situation, or the subsequent diplomatic assurances provided by the People's Republic of China, which this Court has been able to assess (*supra* paras. 146 to 188).

204. The Court notes that, following the decision of the Constitutional Court, the domestic judicial authorities have issued rulings indicating that it is not possible to review or amend the Constitutional Court's decision. However, it considers that the State must decide, pursuant to its domestic law, how to proceed with the request to extradite Wong Ho Wing, bearing in mind that, at this time, there would be no risk to his rights to life and personal integrity if he is extradited, but, at the same, that there is a Constitutional Court decision that, *prima facie*, cannot be amended and that, in principle, is binding for the Executive Branch.

205. In addition, the Court takes into account that, as indicated by the State and uncontested by the representative or the Commission, under the laws of Peru, the Executive Branch's discretionary acts may be subject to subsequent constitutional control. Expert witness García Toma expressed the same opinion, and explained that the decision of the Executive Branch, "although it is political, [...] is not exempt from control, and this is because, following this decision, any person subject to extradition may appeal that decision before the corresponding judge, using the constitutional procedures indicated in the Code of Constitutional Procedure."<sup>277</sup> Thus, Wong Ho Wing is still able to obtain a judicial review of the said decision if he does not agree with it. The Court notes that the review by a judge or court is a basic requirement to ensure an adequate control and scrutiny of administrative acts that affect fundamental rights.<sup>278</sup> In addition, it considers that the remedy used to contest the final decision in this matter must have suspensive effects, so that the measure is not implemented until the court hearing the appeal has issued a decision.<sup>279</sup>

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<sup>275</sup> Cf. Ruling of the Constitutional Court of May 24, 2011 (evidence file, folio 280), and ruling of the Constitutional Court of June 9, 2011 (evidence file, folio 302).

<sup>276</sup> Regarding the reasons why the diplomatic assurances granted by the People's Republic of China had been considered insufficient, the Constitutional Court noted in its ruling of June 9, 2011, that "when the [Judgment] was delivered, the case file did not contain any of the diplomatic assurances to which [...] the public attorney petitioner referred"; rather, "[t]he only documents it had were informative diplomatic notes" on the annulment of the death penalty for the offense of smuggling ordinary merchandise. The Constitutional Court indicated that it became aware of the existence of diplomatic assurances through the Inter-American Court's order on provisional measures of May 28, 2010, but that these were "insufficient or inappropriate because, since it was unaware of the content of the said documents, and since the right to life was at stake, mere information on the amendment made in the objective criminal law of the People's Republic of China was not enough; rather, it was necessary that the People's Republic of China certify that, in no circumstance, would the death penalty be applied to the beneficiary of the *habeas corpus*. Therefore, in Decision No. 11 of the STC 2278-2010-PHC/TC, it regret[ted] that the information provided concerning the legislative amendment did not specify 'whether the Constitution of the People's Republic of China recognized the favorable retroactivity of the criminal law.'" Ruling of the Constitutional Court of June 9, 2011 (evidence file, folios 295 and 296).

<sup>277</sup> Testimony of Víctor García Toma during the public hearing held in this case.

<sup>278</sup> Cf. *Case of Vélez Loor v. Panama. Preliminary objections, merits, reparations and costs*. Judgment of November 23, 2010. Series C No. 218, para. 126, and *Rights and guarantees of children in the context of migration and/or in need of international protection*, *supra*, para. 140.

<sup>279</sup> Cf. ECHR, *Case of Čonka v. Belgium*, No. 51564/99, Judgment of February 5, 2002, para. 79; *Case of Gebremedhin*

206. Based on the preceding conclusions, the Court finds that, in the actual circumstances of this case, it is not in order to issue a ruling on the alleged failure to comply with the decision of the Constitutional Court.

## **B.2) Reasonable time of the extradition process**

207. Regarding the guarantee of a reasonable time, Article 8(1) of the American Convention establishes that “[e]very person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law, in the substantiation of any accusation of a criminal nature made against him or for the determination of his rights and obligations of a civil, labor, fiscal, or any other nature.”

208. In principle, the jurisdictional function belongs preeminently to the Judiciary, notwithstanding the fact that other public authorities or bodies may exercise jurisdictional functions in certain specific situations. In other words, when the Convention refers to the right of every person to a hearing by “a competent tribunal” “for the determination of his rights,” this expression refers to any public authority, whether administrative, legislative or judicial, which by means of its decisions determines rights and obligations of the individual. For this reason, the Court considers that any State organ that exercises functions of a materially jurisdictional nature has the obligation to adopt decisions that respect the guarantees of due process of law in the terms of Article 8(1) of the American Convention.<sup>280</sup> Thus, the Court has established that, in proceedings such as those that may culminate in the expulsion or deportation of aliens, the State may not issue administrative acts or adopt judicial decisions without respecting certain basic guarantees, the content of which coincides substantially with those established in Article 8 of the Convention.<sup>281</sup> Although extradition processes are mechanisms for international cooperation between States in criminal matters, the Court reiterates that they must observe the States’ international human rights obligations, insofar as the respective decision may affect the rights of the individual (*supra* para. 119). In particular, extradition proceedings must respect certain basic guarantees of due process, taking into account the political and legal aspects of such processes.

209. This Court has indicated that the “reasonable time” referred to in Article 8(1) of the Convention must be assessed in relation to the total duration of the proceedings, from the first procedural action until a final decision is delivered, including any appeals that may eventually be filed.<sup>282</sup> In this case, the extradition process has not concluded, so that it is necessary to take into account the time that has elapsed from the arrest of Wong Ho Wing on October 27, 2008, to date. In order to determine the reasonableness of the time that this process has lasted, the Court will proceed to analyze, in light of the facts of this case, the four elements that case law has established to determine where the time is reasonable: (i) the complexity of the matter; (ii) the procedural activity of the interested party; (iii) the conduct of the judicial authorities,<sup>283</sup> and iv) the

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[*Gaberamadhien*] v. *France*, No. 25389/05, Judgment of April 26, 2007, para. 58, and *Case of Hirsi Jamaa and Others v. Italy* [GS], No. 27765/09, Judgment of February 23, 2012, para. 199. See also, *mutatis mutandi*, *Rights and guarantees of children in the context of migration and/or in need of international protection*, *supra*, para. 142.

<sup>280</sup> Cf. *Case of the Constitutional Court v. Peru. Merits, reparations and costs*. Judgment of January 31, 2001. Series C No. 71, para. 71, and *Case of Argüelles et al. v. Argentina. Preliminary objections, merits, reparations and costs*. Judgment of November 20, 2014. Series C No. 288, para. 146.

<sup>281</sup> Cf. *Case of Vélez Loor v. Panama*, *supra*, para. 142; *Case of the Pacheco Tineo Family v. Bolivia*, *supra*, para. 132, and *Rights and guarantees of children in the context of migration and/or in need of international protection*, *supra*, para. 112.

<sup>282</sup> Cf. *Case of Suárez Rosero v. Ecuador. Merits*. Judgment of November 12, 1997. Series C No. 35, para. 71, and *Case of Argüelles et al. v. Argentina*, *supra*, para. 188.

<sup>283</sup> Cf. *Case of Genie Lacayo v. Nicaragua. Merits, reparations and costs*. Judgment of January 29, 1997. Series C No. 30, para. 77, and *Case of Argüelles et al. v. Argentina*, *supra*, para. 189.

effects on the legal situation of the person involved in the proceedings.<sup>284</sup> In this chapter, the Court will only analyze the reasonableness of the time of the extradition process and not of the proceedings resulting from the applications for *habeas corpus*, which will be examined in the chapter on the deprivation of liberty of Wong Ho Wing (*infra* Chapter XI). However, the applications for *habeas corpus* will be taken into account to the extent that they affected the duration of the extradition process.

#### B.2.a) Complexity of the matter

210. This Court has taken different criteria into account to determine the complexity of a proceeding.<sup>285</sup> These include the complexity of the evidence,<sup>286</sup> the number of procedural subjects,<sup>287</sup> or the number of victims,<sup>288</sup> the time elapsed since the violation,<sup>289</sup> the characteristics of the remedies established by domestic law,<sup>290</sup> the context in which the violation occurred,<sup>291</sup> and the number of remedies filed in the proceedings.<sup>292</sup> The Court affirms that, contrary to the State's assertions, the lack of clarity in the judgments of the local courts or the application of provisional measures ordered by the inter-American system for the protection of human rights cannot exempt the State from its obligation to ensure the reasonable time of the proceedings, or to justify their delay. However, in this case, the Court notes that the extradition process between Peru and China involves diplomatic relations and communications between two States with different legal systems and languages and that require the participation of numerous and different entities of both States. In addition, the absence of case law in this matter at the domestic or regional level and the diversity of remedies filed by both the presumed victim and the organs of the State (*infra* B.2.b and B.2.c) have contributed to make the process more complex and had an impact on prolonging it.<sup>293</sup> Therefore, the Court recognizes that the case is complex. However, the other elements of a reasonable time must be examined to determine whether the State has complied with this guarantee.

#### B.2.b) Procedural activity of the interested party

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<sup>284</sup> Cf. *Case of Valle Jaramillo et al. v. Colombia. Merits, reparations and costs*. Judgment of November 27, 2008. Series C No. 192, para. 155, and *Case of Argüelles et al. v. Argentina, supra*, para. 189.

<sup>285</sup> Cf. *Case of Furlan and family members v. Argentina. Preliminary objections, merits, reparations and costs*. Judgment of August 31, 2012 Series C No. 246, para. 156, and *Case of Argüelles et al. v. Argentina, supra*, para. 190.

<sup>286</sup> Cf. *inter alia*, *Case of Genie Lacayo v. Nicaragua, supra*, para. 78, and *Case of Anzualdo Castro v. Peru. Preliminary objection, merits, reparations and costs*. Judgment of September 22, 2009. Series C No. 202, para. 157.

<sup>287</sup> Cf. *inter alia*, *Case of Acosta Calderón v. Ecuador. Merits, reparations and costs*. Judgment of June 24, 2005. Series C No. 129, para. 106, and *Case of López Álvarez v. Honduras. Merits, reparations and costs*. Judgment of February 1, 2006. Series C No. 14, para. 133.

<sup>288</sup> Cf. *inter alia*, *Case of Baldeón García v. Peru. Merits, reparations and costs*. Judgment of April 6, 2006. Series C No. 147, para. 152; *Case of the Pueblo Bello Massacre v. Colombia, supra*, para. 184, and *Case of Kwas Fernández v. Honduras. Merits, reparations and costs*. Judgment of April 3, 2009 Series C No. 196, para. 113.

<sup>289</sup> Cf. *inter alia*, *Case of Heliodoro Portugal v. Panama. Preliminary objections, merits, reparations and costs*. Judgment of August 12, 2008. Series C No. 186, para. 150 and *Case of Radilla Pacheco v. Mexico. Preliminary objections, merits, reparations and costs*. Judgment of November 23, 2009. Series C No. 209, para. 245.

<sup>290</sup> Cf. *inter alia*, *Case of Salvador Chiriboga v. Ecuador. Preliminary objection and merits*. Judgment of May 6, 2008. Series C No. 179, para. 83, and *Case of Argüelles et al. v. Argentina, supra*, para. 190.

<sup>291</sup> Cf. *inter alia*, *Case of the Pueblo Bello Massacre v. Colombia, supra*, para. 184, and *Case of the Ituango Massacres v. Colombia. Preliminary objection, merits, reparations and costs*. Judgment of July 1, 2006. Series C No. 148, para. 293.

<sup>292</sup> Cf. *Case of Mémoli v. Argentina, supra*, para. 173.

<sup>293</sup> Cf. *Case of Mémoli v. Argentina, supra*, para. 173. In this regard, see ECHR, *Case of Stoidis v. Greece*, No. 46407/99, Judgment of May 17, 2001, para. 18.

211. The Court observes that the case file does not reveal that, during the extradition process, Wong Ho Wing or his representative failed to comply with any deadline that could have delayed the proceedings. The representative has filed six applications for *habeas corpus*; however, in this regard, it should be stressed that the presumed victim was making use of judicial remedies established by the laws applicable to the defense of his rights, which *per se* cannot be used against him.<sup>294</sup> In this regard, this Court has considered that the filing of remedies is an objective factor that should not be attributed to either the presumed victim or to the defendant State, but should be taken into account as an objective element when determining whether the duration of the proceedings exceeded a reasonable time.<sup>295</sup> Also, following the Constitutional Court's decision, most of the briefs and remedies filed by the representative have sought the rapid resolution of the proceedings, requesting the adoption of a final decision.

212. Additionally, none of the applications for *habeas corpus* had suspensive effects on the extradition process, except the first application, where the court concerned ordered the suspension "of the processing of the extradition" from February 12, 2009, to April 24, 2009, when it annulled this suspension (*supra* para. 68). This period during which the proceedings were suspended will not be taken into account when determining whether the duration of the extradition process was reasonable.

213. The State referred to actions taken before the inter-American system and the fact that the provisional measures were in force as one of the factors that affected the prolongation of the process (*supra* para. 192). In this regard, the Court notes that, under the provisional measures, it had ordered the State to "refrain from extraditing Wong Ho Wing" until the case had been decided by the Inter-American Commission and subsequently by the Court. The purpose of those measures was to avoid Wong Ho Wing being physically removed from the jurisdiction of Peru and transferred to a jurisdiction outside the inter-American system, when violation of due process in his extradition proceedings and a possible risk to his life and personal integrity if he was returned to the requesting State had been alleged.<sup>296</sup> This order did not prevent the Executive Branch of Peru from taking a final decision for or against the extradition request; it merely sought to avoid the

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<sup>294</sup> *Mutatis mutandi*, *Case of Genie Lacayo v. Nicaragua*, *supra*, para. 79. See also, *Case of Mémoli v. Argentina*, *supra*, para. 174; ECHR, *Case of Kolomiyyets v. Russia*, No. 76835/01, Judgment of February 22, 2007, para. 29, and *Case of Eckle v. Germany*, No. 8130/78, Judgment of July 15, 1982, para. 82.

<sup>295</sup> *Cf. Case of Mémoli v. Argentina*, *supra*, para. 174. See also, ECHR, *Case of Eckle v. Germany*, No. 8130/78, Judgment of July 15, 1982, para. 82; *Case of Poiss v. Austria*, No. 9816/82, Judgment of April 23, 1987, para. 57, and *Case of Wiesinger v. Austria*, No. 11796/8, Judgment of October 30, 1991, para. 56.

<sup>296</sup> This is demonstrated by the orders of the Court in which it stated that: the requirement of extreme gravity was met in the case of Wong Ho Wing given "the inherent risk of extraditing an individual [...], when this extradition may lead to the application of the death penalty in a State outside the inter-American system; the requirement of urgency was met because "the possible extradition of [Wong Ho] Wing could occur at any time," while the possible irreparable harm was related to the preventive aspect, because if Wong Ho Wing was extradited "the harm caused was irreparable. Thus, the right of petition established in Article 44 of the American Convention would be harmed irreversibly." *Matter of Wong Ho Wing. Provisional measures with regard to Peru*. Order of the Court of May 28, 2010, *consideranda* 12, 13, 14; *Matter of Wong Ho Wing. Provisional measures with regard to Peru*. Order of the Court of March 4, 2011, *consideranda* 11, 12 and 13; *Matter of Wong Ho Wing. Provisional measures with regard to Peru*. Order of the Court of June 26, 2012, *consideranda* 34, 35 and 36; *Matter of Wong Ho Wing. Provisional measures with regard to Peru*. Order of the Court of May 22, 2013, *considerandum* and note 19. These conclusions are not applicable merely to the decision in favor of extradition, but to the effective extradition and physical removal of Wong Ho Wing from Peru and his return to the authorities of the People's Republic of China. In addition, starting with the new adoption of provisional measures in June 2012, this Court emphasized that, "in this matter, the preventive dimension of the measures seeks to avoid obstruction of compliance with an eventual decision of the organs of the inter-American system [...], especially considering 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." *Matter of Wong Ho Wing. Provisional measures with regard to Peru*. Order of the Court of June 26, 2012, *considerandum* 40; *Matter of Wong Ho Wing. Provisional measures with regard to Peru*. Order of the acting President of the Court of December 6, 2012, *considerandum* 6; *Matter of Wong Ho Wing. Provisional measures with regard to Peru*. Order of the Court of February 13, 2013, *considerandum* 6; *Matter of Wong Ho Wing. Provisional measures with regard to Peru*. Order of the Court of May 22, 2013, *considerandum* 6, and *Matter of Wong Ho Wing. Provisional measures with regard to Peru*. Order of the Court of August 22, 2013, *considerandum* 7.

presumed victim being removed from the State's jurisdiction. To the contrary, on repeated occasions, the Court called attention to the delay in the adoption of a final decision in the extradition proceedings by the Executive Branch.<sup>297</sup> Consequently, the Court does not find admissible the State's argument that the processing of this case before the inter-American system and, particularly, the fact that the provisional measures were in force, justify the delay in deciding the request for the extradition of Wong Ho Wing.

#### B.2.c) Conduct of the State authorities

214. In this case, the Court must analyze the actions of the judicial authorities responsible for the proceedings up until the issue of the second advisory decision, the authorities of the Executive Branch responsible for taking the final decision on the extradition request, as well as the other authorities who have intervened in the process. To facilitate the analysis, the process will be divided into two stages: (i) the first stage (from the arrest of Wong Ho Wing until the issue of the second advisory decision on January 27, 2010), and (ii) the second stage (from the issue of the second advisory decision on January 27, 2010, to date).

215. The first stage of the proceedings do not reveal periods of inactivity that can be attributed to the State and that could be considered the causes of the delay in obtaining a final decision. However, it does reveal negligent conduct by the State authorities who headed the proceedings, which resulted in their prolongation. Thus, on November 14, 2008, the Seventh Criminal Court of El Callao received the request to extradite Wong Ho Wing made by the People's Republic of China.<sup>298</sup> However, the extradition request did not include article 151 of the Criminal Code of the People's Republic of China, which was applicable to the case and established the possibility of the death penalty for the smuggling offenses (*supra* para. 62). In this regard, both the Extradition Treaty and the laws of Peru require the extradition request to be accompanied by the "texts of the pertinent legal provisions of the criminal jurisdiction, with the offense and the punished imposed on it."<sup>299</sup> The Extradition Treaty also establishes that:

If the Requested Party considers that the information provided to support the extradition request is insufficient, this Party may require that additional information be provided within thirty days. When the Requesting Party provides justified reasons, the time frame may be extended by fifteen days. If the Requesting Party does not present the additional information within this period, it will be considered that it has voluntarily waived the extradition request. However, the Requesting Party shall not be prevented from making a new extradition request for the same offense.<sup>300</sup>

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<sup>297</sup> Cf. *Matter of Wong Ho Wing. Provisional measures with regard to Peru*. Order of the Court of May 22, 2013, *considerandum* 19; *Matter of Wong Ho Wing. Provisional measures with regard to Peru*. Order of the Court of August 22, 2013, *consideranda* 5; *Case of Wong Ho Wing. Provisional measures with regard to Peru*. Order of the Court of January 29, 2014, *considerandum* 10, and *Case of Wong Ho Wing. Provisional measures with regard to Peru*. Order of the Court of March 31, 2014, *considerandum* 17.

<sup>298</sup> Cf. Extradition request from General Directorate No. 24 of the Ministry of Public Security of the People's Republic of China of November 3, 2008 (evidence file, folio 28), and Decision of the Second Criminal Court of El Callao of November 14, 2008 (evidence file, folios 1737 and 1738). The request was sent under a note of the Embassy of the People's Republic of China dated November 13, 2008 (evidence file, folio 35).

<sup>299</sup> Extradition Treaty between the Republic of Peru and the People's Republic of China, Article 7.1.d (evidence file, folio 8299), and Code of Criminal Procedure, promulgated by Legislative Decree No. 957 of July 29, 2004, article 518.1.d. Available at: <http://www.leyes.congreso.gob.pe/Documentos/Decretoslegislativos/00957.pdf>, cited in the Commission's Merits Report, folio 24.

<sup>300</sup> Extradition Treaty between the Republic of Peru and the People's Republic of China, article 8 (evidence file, folio 8299). See also, Supreme Decree No. 016-2006-JUS. Norms on judicial and government conduct in matters relating to extraditions and prisoner transfers. Published on July 26, 2006, article 2 (evidence file, folio 8548), and Code of Criminal Procedure, promulgated by Legislative Decree No. 957 of July 29, 2004, article 518. Available at: <http://www.leyes.congreso.gob.pe/Documentos/Decretoslegislativos/00957.pdf>, cited in the Commission's Merits Report, folio 24.

216. Even though, in his first statement, Wong Ho Wing indicated that the offense he was accused of was punishable by the death penalty and, during the extradition hearing, his representative underlined that China had not provided a copy of article 151 of its Criminal Code, the authorities did not request this information from the requesting State. To the contrary, the Second Transitory Chamber of the Supreme Court of Justice issued the advisory decision in the extradition process, which was subsequently annulled by means of a *habeas corpus* (*supra* para. 70). Furthermore, neither did the authorities request the necessary and sufficient diplomatic assurances that the death penalty would not be imposed, which was also grounds for the annulment of the first advisory decision.<sup>301</sup>

217. Regarding these delays, the Permanent Criminal Chamber indicated in the second advisory decision that the delays in the processing of the request “were a result of the requesting State [...] failing to comply promptly with the presentation of the essential supporting documents [...] so as not to violate the supranational law on international agreements.”<sup>302</sup> In this regard, it is important to point out that, even if the requesting State did not forward the complete documentation, it is the Peruvian State, as a State Party to the American Convention, that is obliged to conduct the extradition process in accordance with the obligations imposed by the American Convention, including that the process be conducted within a reasonable time.

218. Regarding the second stage of the process, once the annulment of the advisory decision was made final on June 15, 2009, a new decision was not issued until January 27, 2010 (*supra* para. 78). Between these dates, the Supreme Prosecutor gave his opinion on the request and several extradition hearings were held, the last on December 21, 2009. Nevertheless, the Court notes that the proceeding was twice as long as when the first advisory decision was issued, failing to comply with some of the legal deadlines. Thus, the Procedural Code establishes that, once the extradition hearing has been held, the Supreme Court has five days to issue the decision. In this case, the hearing was held on December 21, 2009, and the advisory decision was issued on January 27, 2010.

219. Following the issue of the advisory decision, the file was forwarded to the Ministry of Justice to start the procedure by which the Executive Branch would take a final decision on the extradition request. Over one year later, on May 24, 2011, the Constitutional Court “ordered the Peruvian State, represented by the Executive Branch, to refrain from extraditing Wong Ho Wing to the People’s Republic of China.”<sup>303</sup> Initially, the Executive interpreted that this decision meant that it could not extradite Wong Ho Wing. However, in November 2011, the Executive filed three different remedies or requests seeking a legal decision or interpretation that would allow it to extradite Wong Ho Wing without disregarding the decision of the Constitutional Court (*supra* paras. 86 to 90). Although, just as the presumed victim, the State authorities were using the remedies available under domestic law, it should be taken into account that all the remedies were declared inadmissible, considering that the Constitutional Court’s decision was *res judicata*, could not be amended, and was binding. In addition, the remedies were filed by the Executive Branch, which is responsible for taking the pending decision on extradition, and related to the Executive Branch’s options when deciding the extradition request. Therefore, contrary to the presumed victim, all the remedies filed directly affected the prolongation of the extradition process. Moreover, even though the last of these remedies was decided on March 12, 2013, more than two years later, the Executive Branch has still not decided the extradition request.

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<sup>301</sup> Cf. Decision of the Second Special Criminal Chamber for proceedings with the accused in prison of the Superior Court of Justice of Lima of June 15, 2009 (evidence file, folio 6228).

<sup>302</sup> Advisory decision of the Permanent Criminal Chamber of January 27, 2010 (evidence file, folios 164 and 165).

<sup>303</sup> Judgment of the Constitutional Court of May 24, 2011 (evidence file, folio 281).

220. This delay in the final settlement of the extradition process, which can be attributed to the actions of the State authorities, must be examined together with the fourth and last element for determining the reasonable time analyzed below.

B.2.d) Effects on the legal situation of the person involved in the proceedings

221. The Court recalls that, in order to determine whether the time is reasonable, it is necessary to take into account the effects caused by the duration of the proceedings on the legal situation of the person concerned, considering, among other aspects, the matter that is the purpose of the dispute. Thus, this Court has established that, if the passage of time has a relevant impact on the legal situation of the individual, the proceedings must be advanced with greater diligence so that the case is decided rapidly.<sup>304</sup>

222. The Court observes that the extradition process has lasted more than six and a half years and that, during this lapse, Wong Ho Wing has been deprived of his liberty (five and a half years in a detention center and one year under house arrest). In addition, the situation of uncertainty in which the presumed victim has been kept as regards his possible extradition to China should be mentioned. Despite this, throughout the extradition proceeding, the State has paid little or no attention to the effects on Wong Ho Wing of the delay in the final decision, and did not consider the possibility of tempering the impact of the duration of the proceedings on his individual rights until March 10, 2014, when house arrest was granted. In this regard, it should be emphasized that proceedings in which an individual is held in preventive detention should be held as rapidly as possible (*infra* para. 268). However, the Court does not find that this consideration has been taken into account in the processing of this extradition request.

B.2.e) Conclusion concerning a reasonable time

223. The extradition proceedings against Wong Ho Wing have lasted more than six years and have not yet concluded. Once the Executive Branch has issued its decision, it can still be appealed (*supra* para. 205), which would add more time to the duration of the extradition process. The Court stresses that the extradition process represents a very preliminary stage in the possible criminal proceedings to which Wong Ho Wing may be subject and, more than six years have been invested in this stage alone, without it having concluded. Having analyzed the four elements to determine whether the time is reasonable (*supra* para. 209), the Inter-American Court concludes that the State authorities have not acted with due diligence and respecting the obligation of promptness required by Wong Ho Wing's detention, and the extradition process has therefore exceeded a reasonable time, which violates the right to the guarantees established in Article 8(1), in relation to Article 1 of the American Convention, to the detriment of Wong Ho Wing.

**B.3) Other guarantees of due process (right to be heard and right to a defense)**

B.3.a) Arguments of the parties and of the Commission

224. The Commission indicated that "the legal framework does not reveal any form of participation or defense for the requested person or his legal representative at the decision-making stage before the Executive Branch." The Commission considered that Peru had "failed to meet its burden of proof" as regards the presumed victim's arguments in relation to the impossibility of accessing the complete file of the extradition request. In this regard, it indicated that the State had not provided the complete file of the extradition process or of the different remedies it had filed in the domestic sphere, and had not submitted documentation indicating that it had made available to Wong Ho

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<sup>304</sup> Cf. *Case of Valle Jaramillo et al. v. Colombia*, *supra*, para. 155, and *Case of Argüelles et al. v. Argentina*, *supra*, para. 196.



Wing the information he required to exercise his right to be heard or to file appropriate and prompt remedies during a proceeding in which his rights could be harmed.

225. The representative argued that “the procedural laws do not guarantee the right to be heard before [the authorities of the Executive Branch who exercise material jurisdiction to decide extradition matters] and they have not allowed Wong Ho Wing’s defense counsel to explain his arguments against extradition, to the detriment of the right of every person to be heard for the determination of his rights.” According to the representative, this “has established a context of secrecy and lack of transparency in the access to documentation of vital importance for the preparation of Wong Ho Wing’s defense against extradition, which has not been ensured by either the Judiciary or the Executive Branch during the proceedings,” in a case where the presumed victim was at risk of being condemned to death or suffering torture other ill-treatment.

226. The State argued that it had “not violated Wong Ho Wing’s right to be heard and to have information and means to defend himself.” In this regard, it underscored that, during the first stage of the extradition proceeding before the Judiciary, he was fully able to exercise his right of defense, while the second stage corresponded to a strictly political decision. Therefore, it considered that “[t]he responsibility of the State could only be involved if [the intervention of the person sought] was not established at any stage.” It also indicated that “the alleged normative omission [to establish by law, channels or means of intervention for the representative in the extradition proceedings before the Executive Branch] c[ould] not be cited as grounds for harming the presumed victim’s rights, since, in the practice, the extradition procedure before the Executive Branch was brought to a halt as a result of the legal actions filed by his procedural representative.” Also, it clarified that “if a political decision to extradite [...] is considered to harm fundamental rights, the person concerned may contest it using the urgent mechanisms to protect fundamental rights.” Lastly, with regard to the alleged lack of access to the documentation, the State indicated that the decision to deny the representative’s request for access to information, “was not contested during the administrative proceeding, even though the possibility is established in the relevant law.”

### B.3.b) Considerations of the Court

227. In Peru, the extradition process has a judicial stage and a political stage. The arguments of the parties reveal that the dispute on the right to be heard refers to the political stage, while the dispute on the right of access to documents would appear to refer to both stages.

228. Regarding the right to be heard, the Court has indicated that this is protected in Article 8(1) of the Convention, in the general sense of including the right of every person to have access to the court or State body responsible for determining his rights and obligations.<sup>305</sup> In this regard, the Court has indicated that the guarantees established in Article 8 of the American Convention suppose that the victims should have extensive possibilities of being heard and acting in their respective proceedings,<sup>306</sup> so that they may indicate their claims and present probative elements and that these are analyzed in a complete and serious manner by the authorities before a decision is taken on the facts, responsibilities, punishments and reparation.<sup>307</sup>

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<sup>305</sup> Cf. *Case of Genie Lacayo v. Nicaragua*, *supra*, para. 74, and *Case of the Constitutional Tribunal (Camba Campos et al.) v. Ecuador. Preliminary objections, merits, reparations and costs*. Judgment of August 28, 2013. Series C No. 268, para. 181.

<sup>306</sup> Cf. *Case of the Constitutional Court v. Peru*, *supra*, para. 81, and *Case of the Constitutional Tribunal (Camba Campos et al.) v. Ecuador*, *supra*, para. 181.

<sup>307</sup> Cf. *Case of Baldeón García v. Peru*, *supra*, para. 146, and *Case of the Constitutional Tribunal (Camba Campos et al.) v. Ecuador*, *supra*, para. 181.

229. The Court considers it necessary that the right to be heard is guaranteed in extradition proceedings. In this regard, expert witness Ben Saul asserted that the person must be allowed to explain the reasons why he or she should not be extradited.<sup>308</sup> However, this does not mean that this should be guaranteed at all stages of the proceedings. In this regard, the Court notes that, in many of the States Parties to the Convention, extradition proceedings have a political stage or element.<sup>309</sup> This circumstance or characteristic stems from the very nature of extradition processes, which constitute processes of international judicial cooperation between States.

230. Under the laws of Peru, during the judicial stage of the extradition proceedings, the statement of the person sought is taken and the latter has the right to take part in any hearings that are held before the issue of the advisory decision of the Supreme Court. Subsequently, the person sought does not intervene at the political stage of the proceedings. Nevertheless, the Court recalls that, as argued by the parties, the discretionary actions of the Executive Branch may be subject to subsequent constitutional control (*supra* para. 205).

231. The Court considers that, insofar as Wong Ho Wing took part in the judicial stage of the proceedings and retains the possibility of obtaining judicial control of the final decision on extradition, the State has not failed to comply with its obligation to guarantee the presumed victim's right to be heard.

232. Furthermore, with regard to the alleged lack of access to documentation in the case file,<sup>310</sup> the Court notes that, since there is no obligation to allow the person sought to participate at the political stage of the extradition proceedings, there is no obligation to ensure access to the file during that stage. Regarding the subsequent information received during that stage, the Court considers that the State has an obligation to make available to anyone subject to extradition the necessary elements to exercise their right of defense or to explain their particular circumstances of risk in an adequate and effective manner. Nevertheless, in this case, the extradition process has not concluded and, as shown, the final decision is subject to subsequent judicial control. Therefore, the Court considers that, in this case, access to these elements could be ensured at that subsequent judicial stage, without the need to grant this access during the political stage of the extradition process having been proved. Regarding the alleged lack of access to documentation

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<sup>308</sup> Cf. Affidavit made by Ben Saul on August 18, 2014 (evidence file, folios 6938 and 6942).

<sup>309</sup> The following States have a judicial stage and a political stage similar to Peru: Argentina (Law on International Cooperation in Criminal Matters, articles 22, 34 and 36, Available at <http://www.infoleg.gov.ar/infolegInternet/anexos/40000-44999/41442/norma.htm>); Brazil (Aliens Statute, articles 66 and 83, Available at <http://www.pge.sp.gov.br/centrodeestudos/bibliotecavirtual/dh/volume%20i/naclei6815.htm>); Colombia (Code of Criminal Procedure, articles 491, 492, 501 and 503, Available at [http://www.secretariassenado.gov.co/senado/basedoc/ley\\_0906\\_2004\\_pr012.html](http://www.secretariassenado.gov.co/senado/basedoc/ley_0906_2004_pr012.html)); Ecuador (Extradition Act, articles 13 and 14, Available at [https://www.oas.org/juridico/mla/sp/ecu/sp\\_ecu-ext-law-leyext.pdf](https://www.oas.org/juridico/mla/sp/ecu/sp_ecu-ext-law-leyext.pdf)); Mexico (Constitution of the United Mexican States, article 119, Available at <http://www.diputados.gob.mx/LeyesBiblio/htm/1.htm> and International Extradition Act, articles 27 and 30, Available at <http://www.diputados.gob.mx/LeyesBiblio/pdf/36.pdf>) and Suriname (See Extradition system framework, Available at <http://www.oas.org/juridico/mla/sp/sur/index.html#ultimaactualización>). In the following States, the decision on extradition corresponds exclusively to the Executive Branch, although judicial remedies are established to appeal the decision: Jamaica (The Extradition Act, articles 7, 8, 11 and 12, Available at [http://www.oas.org/juridico/MLA/en/jam/en\\_jam-ext.pdf](http://www.oas.org/juridico/MLA/en/jam/en_jam-ext.pdf)); Panama (Judicial Code of the Republic of Panama, articles 2504, 2510 and 2512, Available at [http://www.oas.org/juridico/spanish/mesicic3\\_pan\\_cod\\_judicial.pdf](http://www.oas.org/juridico/spanish/mesicic3_pan_cod_judicial.pdf)), and Dominican Republic (Extradition Act, article 1, Available at [http://www.oas.org/juridico/mla/sp/dom/sp\\_dom-ext-law-489.html](http://www.oas.org/juridico/mla/sp/dom/sp_dom-ext-law-489.html)).

<sup>310</sup> On July 9, 2010, the Official Commission for Extraditions and Prisoner Transfers of the Ministry of Justice issued a new report on the request for the extradition of Wong Ho Wing, as a contribution to the decision of the Executive Branch. On September 28, 2010, the representative asked the Ministry of Justice for a copy of this report, but his request was refused indicating that, pursuant to article 17 of the Law on Access to Public Information, the right to public information cannot be exercised in the case of "information prepared or obtained by legal advisers or lawyers of the entities of the Public Administration, the publication of which could reveal the strategy to be adopted in processing an administrative or judicial proceeding or in the defense. Cf. Request for copy of reasoned report of September 28, 2010 (evidence file, folio 265); report No. 34-2010-DNJ/DICAJ of September 29, 2010 (evidence file, folio 2997), and Law on Transparency and Access to Public Information No. 27806 (evidence file, folios 3014 and 3015).

during the judicial stage, the Court notes that, although the representative argued that the Judiciary had not ensured access to “documentation of vital importance for the preparation of Wong Ho Wing’s defense” (*supra* para. 225), he did not present clear and specific arguments in this regard; hence, the Court will not rule on this point.

233. The Court understands that the delay in the processing of the political stage has resulted in a situation of uncertainty for the presumed victim, particularly owing to the issue and reception of new diplomatic assurances during this stage, which he has become aware of incidentally, since he has not had direct access to the case file at this stage. However, the Court finds that this uncertainty is an effect of the delay in obtaining a final decision from the Executive Branch, which the Court considered when analyzing and declaring a violation of the guarantee of a reasonable time (*supra* para. 223).

234. Based on the above conclusions, the Court finds that, in this case, the State has not violated the right to be heard, the right of defense, and the right of access to the case file, recognized in Article 8(1) of the American Convention.

## XI

### RIGHTS TO PERSONAL LIBERTY AND PERSONAL INTEGRITY, IN RELATION TO THE OBLIGATION TO RESPECT AND ENSURE RIGHTS

235. In previous cases, this Court has referred, among other matters, to deprivations of liberty carried out as a preventive measure and as a punitive measure in the context of criminal proceedings before the ordinary<sup>311</sup> or the military jurisdiction,<sup>312</sup> owing to an individual’s migratory situation,<sup>313</sup> as well as to collective and planned detentions,<sup>314</sup> and those carried out totally unlawfully, which constituted the first act in the perpetration of extrajudicial execution<sup>315</sup> or enforced disappearance.<sup>316</sup> In this case, the holder of the rights whose situation is examined is an alien detained owing to the existence of an international warrant for his arrest and a subsequent extradition request. However, regardless of the reason for his detention, insofar as it relates to a deprivation of liberty executed by a State Party to the Convention, this deprivation of liberty must be strictly in keeping with the relevant provisions of the American Convention and domestic law, provided that the latter is compatible with the Convention.

236. In this chapter, the Court will examine separately each of the arguments presented by the parties and the Commission in relation to the right to personal liberty. This Court recalls that Article 7<sup>317</sup> of the American Convention includes two distinct types of regulations, one general and

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<sup>311</sup> Cf. *Case of García Asto and Ramírez Rojas v. Peru. Preliminary objection, merits, reparations and costs*. Judgment of November 25, 2005. Series C No. 137, paras. 115 and 134, and *Case of Yvon Neptune v. Haiti. Merits, reparations and costs*. Judgment of May 6, 2008. Series C No. 180, para. 100.

<sup>312</sup> Cf. *Case of Loayza Tamayo v. Peru. Merits, supra*, para. 61, and *Case of Argüelles et al. v. Argentina, supra*, paras. 128 and 137.

<sup>313</sup> Cf. *Case of Vélez Loor v. Panama, supra*, para. 106, and *Case of Expelled Dominicans and Haitians v. Dominican Republic. Preliminary objections, merits, reparations and costs*. Judgment of August 28, 2014. Series C No. 282, paras. 368, 370, 374, 379, and 380.

<sup>314</sup> Cf. *Case of Bulacio v. Argentina. Merits, reparations and costs*. Judgment of September 18, 2003. Series C No. 100, para. 38, and *Case of Expelled Dominicans and Haitians v. Dominican Republic, supra*, paras. 368, 374, 380 and 383.

<sup>315</sup> Cf. *Case of the “Street Children” (Villagrán Morales et al.) v. Guatemala. Merits, supra*, paras. 132, 135 and 143, and *Case of Rodríguez Vera et al. (The Disappeared of the Palace of Justice) v. Colombia, supra*, paras. 368 and 369.

<sup>316</sup> Cf. *Case of Velásquez Rodríguez v. Honduras. Merits, supra*, para. 186, and *Case of Rodríguez Vera et al. (The Disappeared of the Palace of Justice) v. Colombia, supra*, paras. 322, 324, 368 and 369.

<sup>317</sup> Article 7 of the Convention establishes that: “1. Every person has the right to personal liberty and security. 2. No one shall be deprived of his physical liberty except for the reasons and under the conditions established beforehand by the

the other specific. The general one is found in the first paragraph: "Every person has the right to personal liberty and security." While the specific one consists of a series of guarantees that protect the right not to be deprived of liberty unlawfully (Article 7(2)) or arbitrarily (Article 7(3)), to know the reasons for the detention and the charges brought against the detainee (Article 7(4)), to judicial control of the deprivation of liberty (Article 7(5)) and to contest the lawfulness of the detention (Article 7(6)).<sup>318</sup> Any violation of paragraphs 2 to 7 of Article 7 of the Convention necessarily results in the violation of its Article 7(1).<sup>319</sup>

237. Article 7(2) of the American Convention establishes that: "[n]o one shall be deprived of his physical liberty except for the reasons and under the conditions established beforehand by the Constitution of the State Party concerned or by a law established pursuant thereto." This Court has indicated that, in view of the reference to the Constitution and "a law established pursuant thereto," the examination of the observance of Article 7(2) of the Convention entails the analysis of compliance with the requirements established as specifically as possible and "beforehand" in the said laws as regards the "reasons" for and the "conditions" of the deprivation of physical liberty. If the domestic law is not observed, both materially and formally, when depriving an individual of his liberty, this deprivation will be unlawful and contrary to the American Convention<sup>320</sup> in light of Article 7(2).

238. With regard to the arbitrariness referred to in Article 7(3) of the Convention, the Court has established that no one may be detained or imprisoned for reasons and by methods that – although classified as lawful – may be considered incompatible with respect for the fundamental rights of the individual because, among other matters, they are unreasonable, unpredictable, or disproportionate.<sup>321</sup> Thus, the arbitrariness referred to in Article 7(3) of the Convention has its own legal content, which must be analyzed only in the cases of detentions that are considered lawful.<sup>322</sup> Nevertheless, the domestic law, the applicable procedure, and the relevant general express or tacit principles must, in themselves, be compatible with the Convention.<sup>323</sup> Thus, the concept of

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Constitution of the State Party concerned or by a law established pursuant thereto. 3. No one shall be subject to arbitrary arrest or imprisonment. 4. Anyone who is detained shall be informed of the reasons for his detention and shall be promptly notified of the charge or charges against him. 5. Any person detained shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to be released without prejudice to the continuation of the proceedings. His release may be subject to guarantees to assure his appearance for trial. 6. Anyone who is deprived of his liberty shall be entitled to recourse to a competent court, in order that the court may decide without delay on the lawfulness of his arrest or detention and order his release if the arrest or detention is unlawful. In States Parties whose laws provide that anyone who believes himself to be threatened with deprivation of his liberty is entitled to recourse to a competent court in order that it may decide on the lawfulness of such threat, this remedy may not be restricted or abolished. The interested party or another person in his behalf is entitled to seek these remedies. [...].

<sup>318</sup> Cf. *Case of Chaparro Álvarez and Lapo Íñiguez v. Ecuador. Preliminary objection, merits, reparations and costs*. Judgment of November 21, 2007. Series C No. 170, para. 51, and *Case of Espinoza Gonzáles v. Peru. Preliminary objections, merits, reparations and costs*. Judgment of November 20, 2014. Series C No. 289, para. 106.

<sup>319</sup> Cf. *Case of Chaparro Álvarez and Lapo Íñiguez v. Ecuador*, *supra*, para. 54, and *Case of Espinoza Gonzáles v. Peru*, *supra*, para. 106.

<sup>320</sup> Cf. *Case of Chaparro Álvarez and Lapo Íñiguez v. Ecuador*, *supra*, para. 57, and *Case of Argüelles et al. v. Argentina*, *supra*, para. 116.

<sup>321</sup> Cf. *Case of Gangaram Panday v. Suriname. Merits, reparations and costs*. Judgment of January 21, 1994. Series C No. 16, para. 47, and *Case of Expelled Dominicans and Haitians v. Dominican Republic*, *supra*, para. 364.

<sup>322</sup> Cf. *Case of Chaparro Álvarez and Lapo Íñiguez v. Ecuador*, *supra*, paras. 93 and 96, and *Case of Rodríguez Vera et al. (The Disappeared of the Palace of Justice) v. Colombia*, *supra*, para. 401.

<sup>323</sup> Cf. *Case of Chaparro Álvarez and Lapo Íñiguez v. Ecuador*, *supra*, para. 91, and *Case of Rodríguez Vera et al. (The Disappeared of the Palace of Justice) v. Colombia*, *supra*, para. 401.

“arbitrariness” should not be equated to “contrary to the law,” but should be interpreted more broadly in order to include elements of impropriety, injustice and unpredictability.<sup>324</sup>

239. Article 9 of the Extradition Treaty between China and Peru establishes:

Preventive detention

1. In urgent cases, before the presentation of the extradition request, the Requesting Party may require the preventive detention of the person sought. This request may be submitted in writing using the channels stipulated in article 6 of this Treaty, the International Criminal Police Organization (ICPO-INTERPOL), or other channels agreed between the Parties.

[...]

4. The preventive detention shall conclude if the competent authority of the Requested Party has not received the formal extradition request within 60 days of the detention of the person sought. This period may be extended for a further 30 days when the Requesting Party provides reasons that justify this.

5. The conclusion of the preventive detention pursuant to paragraph 4 of this article shall not affect the extradition of the person sought if the Requested Party subsequently receives the formal extradition request.<sup>325</sup>

240. The relevant part of article 2.24 (f) of the Constitution of Peru, in force at the time of the facts, establishes that:

No one may be detained unless it is with a reasoned written order issued by a judge, or by the police authorities in case of *in flagrante delicto*. The detainee must be brought before the corresponding court within 24 hours or in accordance with the distance.<sup>326</sup>

241. Meanwhile, Section II of the Seventh Tome of Peru’s Code of Criminal Procedure (Legislative Decree No. 957), regulates the provisional arrest with a view to extradition as follows:

Article 523. Provisional or pre-extradition arrest.

1. The provisional arrest of a person sought by foreign authorities shall be in order when:

- a) This has been formally requested by the central authority of the interested country;
- b) The person tries to enter the country while pursued by the authority of an adjoining country.

2. In the case of subparagraph (a) above, the formal request shall be sent to the Prosecutor General, either through the central authority or through INTERPOL. In urgent cases, a simple requisition made by any means, including telegram, telephone, radiogram or electronic mail, shall be required. The formal request shall contain:

- a) The name of the person sought, with personal identity data and the circumstances why he is in the country;
- b) The date and place of the offense committed and its legal definition;

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<sup>324</sup> Cf. *Case of Chaparro Álvarez and Lapo Íñiguez v. Ecuador*, *supra*, para. 92, and *Case of Rodríguez Vera et al. (The Disappeared of the Palace of Justice) v. Colombia*, *supra*, para. 401.

<sup>325</sup> Extradition Treaty between the Republic of Peru and the People’s Republic of China (evidence file, folio 1635).

<sup>326</sup> 1993 Constitution of Peru, Available at: [www.congreso.gob.pe/ntley/ConstitucionP.htm](http://www.congreso.gob.pe/ntley/ConstitucionP.htm), cited in the Commission’s Merits Report, folio 19.

- c) If the person sought has been accused, an indication of the punishment for the act perpetrated; and, if he has been convicted, an indication of the punishment imposed;
- d) Mention of the existence of the court order for arrest or prison, and of absence or contempt of court, if appropriate;
- e) The undertaking of the requesting State to present the formal extradition request within 30 days of the receipt of the requisition. If this time limit shall expire before the extradition request has been formally submitted, the person arrested shall be released immediately.

3. The Prosecutor General shall immediately forward this request to the competent preliminary investigation judge, advising the corresponding provincial prosecutor.

4. The judge will issue a provisional arrest warrant, provided that the act considered an offense is also an offense in Peru and a criminal punishment of any kind equal to or in excess of one year's imprisonment has not been established. If the perpetration of several offenses has been mentioned, it shall be sufficient that one of them complies with this condition in order for it to be in order for the other offenses. The decision issued shall be notified to the prosecutor and advised to the Prosecutor General and the local INTERPOL office.

5. In the case of paragraph 1(b), the border police shall immediately bring the detainee before the competent preliminary investigation judge of the place where the arrest is made, advising the provincial prosecutor. The judge, using the fastest means, which may be telephone, fax or electronic mail, shall advise the Prosecutor General and the diplomatic or consular official of the country seeking the detainee. The diplomatic or consular representative shall have two days to require the continuation of the provisional arrest, accompanying his request with the conditions established in paragraph 2 of this article. If this is not done, the person arrested shall be released immediately.

6. Once the provisional arrest has been ordered, the preliminary investigation judge shall hear the person arrested within 24 hours, and shall appoint a defense lawyers *ex officio*, if that person does not appoint one of his own choice. The arrest shall be lifted if, initially, the judge notes that the conditions indicated in paragraph 4 of this article have not been met, becoming an order to appear in court periodically, with the prohibition to leave the country. The arrest shall cease if it is proved that the person arrested is not the person sought, or when 30 days have passed without the formal submission of the extradition request.

7. The person arrested who is released because the extradition request was not submitted in time may be arrested again for the same offense, provided that a formal extradition request is received.

8. While the provisional arrest lasts, the person arrested may consent to be transferred to the Requesting State. In this case, the provisions of article 521(6) shall be followed.

9. The person arrested may obtain provisional release, if the legal time frames of the Treaty or of the law that justify the extradition request expire, or if the person whose extradition is requested meets the procedural conditions for this measure. In this case, an order of prohibition to leave the country shall be issued and his passport shall be retained, without prejudice to other measures of control that the judge may decide on a discretionary basis. The procedure established for the cessation of preventive detention shall be followed.<sup>327</sup>

242. The possibility of obtaining the provisional release indicated in paragraph 9 of article 523 (*supra* para. 241), is regulated in article 182 of the Procedural Code (Legislative Decree No. 638), which establishes that the accused who is detained may request provisional release when new evidence allows it to be reasonably envisaged that:

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<sup>327</sup> Code of Criminal Procedure, promulgated by Legislative Decree No. 957 of July 29, 2004, Available at: <http://www.leyes.congreso.gob.pe/Documentos/DecretosLegislativos/00957.pdf>, cited in the Commission's Merits Report, folio 24.

1. The prison sentence to be imposed on him will be less than four years, or when the accused has been detained for more than two-thirds of the prison term requested by the prosecutor in the written indictment.
2. The probability that the accused will evade prosecution or disrupt the probative activity has ceased.
3. The accused provides the surety that has been established or, if applicable, the person who is insolvent offers a personal guarantee.<sup>328</sup>

243. Based on the foregoing, the Court will analyze the alleged violations as regards: (A) the arbitrary nature of the provisional arrest; (B) the alleged unlawful and arbitrary nature of the detention following the decision of the Constitutional Court; (C) the duration of the provisional arrest, and (D) the right to appeal before a competent judge or court. Lastly, it will refer to (E) the alleged violation of the right to personal integrity.

### ***A. Arbitrary nature of the provisional arrest***

#### **A.1) Arguments of the parties and of the Commission**

244. The Commission argued that, when determining the need for provisional arrest with a view to extradition, the concept of "procedural risk" should also be taken into consideration. Thus, it concluded that "the decision in the appeal of December 11, 2008, was arbitrary" since it indicated that "the concept of 'procedural risk' did not have to be examined, because this was not a criminal case instituted in Peru, but a 'provisional arrest made with a view to extradition.'" The Commission also argued that "the absence of a time limit expressly established for a provisional arrest with a view to extradition [...] is incompatible with the principle of predictability."

245. The representative argued that the decision in the appeal concerning the detention of Wong Ho Wing did not take into account "whether [...] he would evade prosecution and interfere with the extradition process." He also underlined that the Chamber had not "verified the existence of other less onerous measures." Therefore, he argued that since the provisional arrest was "unreasonable, disproportionate and lacking appropriate grounds [...] Peru had violated the rights to personal liberty (Article 7(3)) and judicial guarantees (Article 8(1)) recognized in the Convention." He added that "the procedural laws with regard to extradition do not establish a time limit for deprivation of liberty during the extradition process or when they should conclude, [which] adds a degree of arbitrariness to the situation of Wong Ho Wing." Accordingly, he alleged the violation of Article 7(5) in relation to Articles 1(1) and 2 of the Convention.

246. The State indicated that "[t]he deprivation of liberty [of Wong Ho Wing] was the result of a duly founded provisional arrest warrant issued by the competent jurisdictional organ," so that it was in keeping with the laws of Peru. It also indicated that "the procedural risk was evaluated and his specific situation analyzed, and it was considered that his personal liberty should be limited to ensure that he could not interfere with the ongoing investigations or avoid prosecution." It emphasized that, during the appeal proceedings, "the presumed victim's defense counsel did not provide evidence in relation to the procedural risk." The State added that the representative had not filed any remedy against the second instance decision confirming the provisional arrest that could have been "contested by an application for *habeas corpus*." Regarding the failure to regulate the time limit for detention, it argued that "the inter-American system does not have a standard or guidelines in its case law related to the 'principle of predictability' that can be used as a reference to determine international responsibility for violation of Article 7(5)." On this point, it affirmed that

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<sup>328</sup> Procedural Code promulgated by Legislative Decree No. 638 of April 27, 1991 (evidence file, folio 8623).

the representative had alleged a violation of Article 2 of the Convention without providing grounds for this.

## A.2) Considerations of the Court

247. On October 27, 2008, Wong Ho Wing was detained based on an international arrest warrant. The following day, the special court ordered his provisional arrest and indicated that this arrest had been made "in order to ensure the presence in the country [of Wong Ho Wing] while the extradition request was fully processed, because he had not proved that he had any known domicile or employment in the country and, because the offense of which he was accused was established in the laws [of Peru] under Customs Offenses: evasion of customs duty"<sup>329</sup> (*supra* para. 97). Wong Ho Wing's defense lawyer filed an appeal against this measure before the First Transitory Combined Superior Chamber. On December 11, 2008, the First Combined Superior Chamber confirmed the provisional arrest warrant<sup>330</sup> (*supra* para. 100). Both decisions were delivered taking into account article 523 of the Code of Criminal Procedure (*supra* para. 241). There is no dispute about the conformity of these decisions with Peruvian law.

248. The Inter-American Court has indicated that, notwithstanding the lawfulness of a detention, in each case an analysis must be made of the law's compatibility with the Convention, in the understanding that the law and its application must respect the following requirements to ensure that the deprivation of liberty is not arbitrary:<sup>331</sup> (i) that the purpose of the measures that deprive or restrict liberty are compatible with the Convention; (ii) that the measures adopted are appropriate to achieve the purpose sought; (iii) that they are necessary, in the sense that they are absolutely essential to achieve the purpose sought and that there is no less onerous measure, with regard to the right affected, among all those with the same ability to achieve the proposed purpose - which is why the Court has asserted that the right to personal liberty presumes that any restriction of this right must be exceptional,<sup>332</sup> and (iv) that the measures are strictly proportionate,<sup>333</sup> so that the sacrifice inherent in the restriction of the right to liberty is not exaggerated or excessive in relation to the advantages obtained from its restriction and achievement of the purpose sought.<sup>334</sup> Any restriction of liberty that does not contain sufficient grounds which allow it to be evaluated to ensure that it meets these conditions will be arbitrary and, therefore, violate Article 7(3) of the Convention.<sup>335</sup>

249. The Court notes that the arguments of the Commission and the representative do not refer to the initial detention, or to the order of October 28, 2008. Therefore, the dispute between the parties does not relate to the lawfulness or arbitrariness of Wong Ho Wing's initial detention. This appears to have been carried out to meet the State's international obligations under the Extradition Treaty and also as a member of INTERPOL (*supra* para. 239), which has not been questioned before this Court. The dispute between the parties, regarding the alleged arbitrary nature of the

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<sup>329</sup> Provisional arrest warrant of October 28, 2008 (evidence file, folio 18).

<sup>330</sup> Cf. Decision of December 11, 2008, delivered by the First Transitory Combined Superior Chamber (evidence file, folio 44).

<sup>331</sup> Cf. *Case of Chaparro Álvarez and Lapo Íñiguez v. Ecuador*, *supra*, para. 93, and *Case of Argüelles et al. v. Argentina*, *supra*, para. 120.

<sup>332</sup> Cf. *Case of Ricardo Canese v. Paraguay. Merits, reparations and costs*. Judgment of August 31, 2004. Series C No. 111, para. 129, and *Case of Norín Catrimán et al. (Leaders, members and an activist of the Mapuche Indigenous People) v. Chile. Merits, reparations and costs*. Judgment of May 29, 2014. Series C No. 279, para. 310.

<sup>333</sup> Cf. *Case of Ricardo Canese v. Paraguay*, *supra*, para. 129, and *Case of Argüelles et al. v. Argentina*, *supra*, para. 120.

<sup>334</sup> Cf. *Case of Chaparro Álvarez and Lapo Íñiguez v. Ecuador*, *supra*, para. 93, and *Case of Argüelles et al. v. Argentina*, *supra*, para. 120.

<sup>335</sup> Cf. *Case of García Asto and Ramírez Rojas v. Peru*, *supra*, para. 128, and *Case of Argüelles et al. v. Argentina*, *supra*, para. 120.



detention of Wong Ho Wing, relates to the grounds for the decision on the appeal issued by the First Transitory Combined Superior Chamber of El Callao on December 11, 2008, as well as the lack of a time limit for this detention. Consequently, the Court will analyze whether the grounds for the said decision reveal that it was necessary and proportionate (*supra* para. 248) and will then examine the arguments regarding the unpredictability of the duration of the detention.

250. As already established, States have the authority and, in some cases the obligation, to facilitate the extradition of citizens sought by another State using procedures that are compatible with the American Convention (*supra* para. 119). Therefore, implementation of the extradition may be a legitimate purpose pursuant to the Convention. In this regard, in cases relating to pre-trial detentions during criminal proceedings, the Court has indicated that the deprivation of the accused's liberty cannot be founded on general or special preventive objectives that can be attributed to the punishment, but only on a legitimate purpose, namely: to ensure that the accused does not interfere with the development of the proceedings or evade prosecution.<sup>336</sup> It has also underscored that procedural risk cannot be presumed, but must be verified in each case, based on the objective and evident circumstances of the specific case.<sup>337</sup>

251. This Court considers that these criteria are also applicable to detentions with a view to extradition. Therefore, detention of individuals sought in extradition processes will be arbitrary when the competent authorities order the individual's detention without verifying whether, in the objective and evident circumstances of the case, this is necessary to achieve the legitimate purpose of the measure; that is, the possibility that this person may evade extradition. This analysis must be made in each specific case and by an individualized and founded assessment.

252. In this case, the Court notes that article 523 of the Code of Criminal Procedure does not condition the admissibility of the provisional arrest to the existence of a procedural risk, but merely establishes the possibility that the individual arrested may request his provisional release if he meets the corresponding procedural requirements (*supra* para. 241). Nevertheless, the Court notes that the arrest warrant of October 28, 2008, does take the procedural risk into account (*supra* paras. 97 and 247). Following the provisional arrest warrant of October 28, 2008, the representative filed an appeal refuting the fact that Wong Ho Wing did not have any "known employment in the country" because he was the "founder and main shareholder of a company [that] he administers: the [...] 'Hotel Maury.'" Also, regarding the domicile, he pointed out that, "when he is in [Peru,] he stays at this hotel"<sup>338</sup> (*supra* para. 98). When deciding the appeal on December 11, 2008, the Chamber indicated with regard to the arguments of procedural risk that "regarding the procedural risk [...], it was not for the Chamber to analyze this for a provisional arrest with a view to extradition; rather it corresponded to a criminal proceeding instituted in [Peru] for a specific offense, which was not the case with [Wong Ho Wing]."<sup>339</sup>

253. The Court finds that, by failing to evaluate the procedural risk in relation to Wong Ho Wing, it was impossible for the Combined Superior Chamber to examine whether the deprivation of liberty

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<sup>336</sup> Cf. *Case of Suárez Rosero v. Ecuador. Merits, supra*, para. 77, and *Case of Norín Catrimán et al. (Leaders, members and an activist of the Mapuche Indigenous People) v. Chile, supra*, para. 312.

<sup>337</sup> Cf. *Case of Barreto Leiva v. Venezuela. Merits, reparations and costs. Judgment of November 17, 2009. Series C No. 206*, para. 115, and *Case of Norín Catrimán et al. (Leaders, members and an activist of the Mapuche Indigenous People) v. Chile, supra*, para. 312.

<sup>338</sup> Appeal filed on October 28, 2008 (evidence file, folio 24). Similarly, on October 28, 2008, Wong Ho Wing had declared that he was in Peru "owing to a business investment of the Hotel Maur[y,] of which he was the majority shareholder, and also to see if he could invest in mines" and that, in Peru, he had "three hotels and a house that are the Hotel Maury and two small hotels and [his] house located in Camacho La Molina." Preliminary statement made by Wong Ho Wing on October 28, 2008, before the Special Criminal Court of El Callao (evidence file, folio 13).

<sup>339</sup> Decision of December 11, 2008, delivered by the First Transitory Combined Superior Chamber (evidence file, folio 44).

was necessary or whether, in the specific case of Wong Ho Wing, less harmful measures existed that would have ensured the implementation of the extradition. Consequently, the grounds for this decision were insufficient to justify the need for the measure of deprivation of liberty. Since it was not properly founded, following that decision the deprivation of liberty of Wong Ho Wing was arbitrary in violation of paragraphs 1 and 3 of Article 7 of the Convention, in relation to Article 1(1) of this instrument, to the detriment of Wong Ho Wing. Based on this conclusion, the Court considers it unnecessary to rule on the alleged violation of Article 8(1) of the Convention argued by the representative based on the same facts.

254. In addition, regarding the allegation of the detention's lack of predictability, this Court has established that the unpredictability of a deprivation of liberty may make it arbitrary (*supra* para. 238). Thus, the Court has indicated that the law on which the deprivation of personal liberty is based must establish as specifically as possible and "beforehand" the "reasons" for and "conditions" of the deprivation of physical liberty.<sup>340</sup> Compliance with these requirements is designed to protect the individual from arbitrary detention.<sup>341</sup> Among the conditions for deprivation of liberty, the applicable law should include criteria concerning the limits to its duration.<sup>342</sup> Similarly, expert witness Ben Saul indicated that laws that do not include time limits for a detention cannot comply with the requirement of predictability.<sup>343</sup> In addition, the Seventh Criminal Court, which decided the request to modify the provisional arrest, indicated that "the absence of a time limit expressly established for the mechanism of the provisional arrest with a view to extradition is incompatible with the principle of predictability."<sup>344</sup>

255. As the State has recognized, "there is no time limit for deprivation of liberty during the passive extradition proceedings, or a time limit for the final decision on it." This Court notes that neither the Extradition Treaty signed between China and Peru, nor the Peruvian Code of Criminal Procedure establish a time limit for the provisional detention in an extradition process once the formal extradition request is received or, if applicable, a time frame for the extradition process that could limit the duration of the detention.<sup>345</sup> The Court considers that the inclusion of time limits for a detention is a safeguard against the arbitrariness of the deprivation of liberty and, in this case, its omission also permitted the excessive duration of the detention of Wong Ho Wing, as the Court will analyze *infra* (paras. 267 to 275). In this case, the absence of a precise time limit to Wong Ho

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<sup>340</sup> Cf. *Case of Chaparro Álvarez and Lapo Íñiguez v. Ecuador*, *supra*, paras. 56 and 57, and *Case of Argüelles et al. v. Argentina*, *supra*, para. 116.

<sup>341</sup> Similarly, the European Court has established that the protection of the individual from arbitrariness means that the law must be sufficiently precise and its application foreseeable. Cf. ECHR, *Case of Ryabikin v. Russia*, No. 8320/04. Judgment of June 19, 2008, para. 127; *Case of Baranowski v. Poland*, No. 28358/95. Judgment of March 28, 2000, paras. 50 to 52; *Case of Khudoyorov v. Russia*, No. 6847/02. Judgment of November 8, 2005, para. 125; *Case of Calovskis v. Latvia*, No. 22205/13. Judgment of July 24, 2014, para. 182; *Case of L.M. v. Slovenia*, No. 32863/05. Judgment of June 12, 2014, paras. 121 and 122.

<sup>342</sup> In this regard, the European Court has indicated that: "The Court observes that the domestic law regulated in detail 'detention pending investigation' in ordinary criminal proceedings and set specific time-limits for the pre-trial detention of criminal defendants. However, there was no provision in the domestic law concerning a time-limit specifically applying to detention 'with a view to extradition'. The Court notes that in the absence of clear legal provisions establishing the procedure for ordering and extending detention with a view to extradition and setting time-limits for such detention, the deprivation of liberty to which the applicant was subjected was not circumscribed by adequate safeguards against arbitrariness". ECHR, *Case of Garayev v. Azerbaijan*, No. 53688/08. Judgment of June 10, 2010, para. 99. See also, ECHR, *Case of Ryabikin v. Russia*, No. 8320/04. Judgment of June 19, 2008, para. 129.

<sup>343</sup> Cf. Affidavit made by Ben Saul on August 18, 2014 (evidence file, folios 6904 and 6950).

<sup>344</sup> Decision of the Seventh Criminal Court of El Callao of March 10, 2014 (evidence file, folio 6459).

<sup>345</sup> Regarding the length of the detention, the Extradition Treaty between China and Peru only establishes that: "The preventive detention shall conclude if the competent authority of the Requested Party has not received the formal extradition request within 60 days of the detention of the person sought. This period may be extended by a further 30 days when the Requesting Party provides reasons that justify this." Extradition Treaty between the Republic of Peru and the People's Republic of China (evidence file, folio 1635).

Wing's detention was used by the judicial authorities as an element to justify keeping him detained (*supra* para. 103). Thus, since it was used as a factor to continue his detention, the lack of predictability of the duration of the detention constituted an additional element of the arbitrariness of the detention, which has already been declared in paragraph 253 *supra*.

256. Nevertheless, the Court notes that, although it is not expressly established in the pertinent laws, the duration of the proceedings was analyzed in at least three decisions concerning Wong Ho Wing's detention.<sup>346</sup> Although only one of those decisions was in favor of the presumed victim, the representative has not provided sufficient arguments as to why the absence of express regulation would violate Article 2<sup>347</sup> of the Convention. Consequently, this Court finds that it is not in order to rule on the alleged failure to comply with the obligation to adopt domestic legal provisions established in Article 2 of the Convention.

257. Regarding the State's arguments in relation to the failure to file an application for *habeas corpus* (*supra* para. 246), it should be emphasized that these arguments refer to a discussion on admissibility and not on merits, so that it is not necessary to analyze them at this time.

### ***B. The alleged unlawful and arbitrary nature of the detention after the decision of the Constitutional Court***

#### **B.1) Arguments of the parties and of the Commission**

258. The Commission argued that "Wong Ho Wing remains deprived of liberty without any legal justification [...] because the purpose of his arrest – that is, to ensure his eventual extradition – became pointless [...] following the order of the Constitutional Court not to extradite him," and "no criminal proceeding has been instituted in Peru [...], under which there would have to be a court order for his pre-trial detention in accordance with the Convention." Therefore, this "situation of legal limbo [...] constitutes an additional element of arbitrariness in light of Article 7(3) of the Convention." The Commission has not ruled on the alleged unlawfulness of the detention. Meanwhile, the representative argued that the State had violated Article 7(2) and 7(3) of the Convention "because, [following the decision of the Constitutional Court], there is no criminal proceeding or [...] extradition proceeding against Wong Ho Wing that would legally justify the restriction of his personal liberty." The State asked that the representative's "claim to include in the analysis of the case the presumed violation of the said Article 7(2) be disregarded, because it relates to facts that are outside the factual framework of the case delimited by the [Commission, which] has not raised the issue that the Peruvian State may have issued a detention order that was not in keeping with its domestic law." Furthermore, it indicated that the representative "confused [...] the exhortation of the [Constitutional] Court with a binding order to prosecute [Wong Ho Wing] in the domestic sphere," and stressed that "the judgment of the Constitutional Court [...] did not establish a mandate or order to release [Wong Ho Wing]."

#### **B.2) Considerations of the Court**

259. First, the Court recalls that, contrary to what the State has indicated, the facts relating to Wong Ho Wing's detention following the decision of the Constitutional Court do fall within the

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<sup>346</sup> Cf. Vote of Supreme Justice José Antonio Neyra Flores of October 13, 2010, with regard to the decision of the Permanent Criminal Chamber of the Supreme Court of Justice of October 19, 2010 (evidence file, folios 1608 to 1611); Judgment of the 30th Criminal Court Lima of May 30, 2012 (evidence file, folios 6447 and 6448), and Decision of the Seventh Criminal Court of El Callao of March 10, 2014 (evidence file, folio 6463).

<sup>347</sup> Article 2 of the Convention establishes that: "Where the exercise of any of the rights or freedoms referred to in Article 1 is not already ensured by legislative or other provisions, the States Parties undertake to adopt, in accordance with their constitutional processes and the provisions of this Convention, such legislative or other measures as may be necessary to give effect to those rights or freedoms."

factual framework of the proceedings. Also, the Court reiterates that the presumed victims and their representatives may claim the violation of rights other than those included in the Merits Report, provided these relate to the facts contained in that document (*supra* para. 35). Therefore, the Court will proceed to analyze the arguments of the representative and the Commission.

260. Regarding the detention of Wong Ho Wing following the Constitutional Court's judgment, the representative argued that it became unlawful and arbitrary, while the Commission only considered that the detention became arbitrary.

261. The analysis of whether a detention is lawful entails an examination of whether the domestic law was observed when a person was deprived of his liberty (*supra* para. 237). The Court must, therefore, verify whether, following the decision of the Constitutional Court, Wong Ho Wing's detention was in keeping with the laws of Peru.

262. The law in force at the time of the facts reveals that a person could be deprived of liberty when his extradition was being sought by foreign authorities (*supra* para. 241). Also, according to the law, the extradition process concluded with the Executive Branch's decision on whether or not to grant the extradition.<sup>348</sup> Pursuant to this law, the Constitutional Court "order[ed] the Peruvian State, represented by the Executive Branch, to refrain from extraditing Wong Ho Wing to the People's Republic of China" (*supra* para. 83). But, accordingly, this decision did not signify the end of the extradition process, and thus the conditions that allowed the detention to be lawful remained in effect. Consequently, the State is not responsible for a violation of Article 7(2) of the American Convention.

263. Regarding the alleged arbitrary nature of the detention following the Constitutional Court's decision (*supra* paras. 258 and 260), the Court reiterates that the order of the Constitutional Court did not signify the end of the extradition process. Moreover, considering that, in the preceding section, this Court has already determined that the detention was arbitrary (*supra* paras. 247 to 255), the Court finds it unnecessary to analyze its alleged arbitrariness following the decision of the Constitutional Court.

### ***C. The duration of the provisional arrest***

#### **C.1) Arguments of the parties and of the Commission**

264. The Commission indicated that "a duration of four years and nine months to take a final decision in an extradition process, is *prima facie* problematic, and requires sufficient justification by the State of the reasons for the delay in the final decision." In this regard, it underlined that, while "receiving the diplomatic assurances," the State "was responsible for errors and omissions [...] that affected the duration of the process and, consequently, the personal liberty of Wong Ho Wing," and that "the delay was not justified in light of the factors analyzed when examining the guarantee of a reasonable time." It added that, following the Constitutional Court's decision, "a situation of legal limbo [was created that] has resulted in an excessive duration of the deprivation of liberty [...] in violation of Article 7(5)".

265. The representative argued that "Wong Ho Wing [has been] deprived of his personal liberty without judicial control and for an excessive amount of time in violation of Article 7(5) of the Convention." He also indicated that, "in similar cases, [...] the assessment of the length of the detention has been made based on the due diligence with which the States had taken measures

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<sup>348</sup> Cf. Code of Criminal Procedure, promulgated by Legislative Decree No. 957 of July 29, 2004, Available at: <http://www.leyes.congreso.gob.pe/Documentos/Decretoslegislativos/00957.pdf>, cited in the Commission's Merits Report, folio 24. See also, testimony of Víctor García Toma during the public hearing in this case.

with a view to the extradition." In this case, "the Executive Branch has [taken] a series of measures that have delayed the adoption of a final decision, despite the existence of a Constitutional Court judgment [...] ordering it to refrain from extraditing him." He also stressed that the fact that "procedural law on extradition does not establish a time limit for the deprivation of liberty during the extradition process or a deadline for ending it [...] adds a degree of arbitrariness to Wong Ho Wing's situation."

266. The State responded that Article 7(5) of the Convention in relation Article 2 thereof had not been violated. Regarding due diligence, it argued that "in view of the fact that, in the opinion of the jurisdictional authorities, neither the conditions nor the procedural risk in this case had changed, the provisional arrest warrant was confirmed, [...] since it continued to seek the procedural purpose of passive extradition and grounds were provided for why the measure should not be modified." The State indicated that, "the extradition process has not concluded, but this is because it has been extended owing to the domestic and international mechanisms for the protection of [Wong Ho Wing's] rights filed by his representative, which have raised concerns about the protection of his rights in relation to the offenses for which his extradition is sought." It added that, "the time that has passed without a final decision is an objective factor that, of itself, does not allow it to be concluded that due diligence has not been exercised, but it is necessary to analyze the specific situation in order to identify whether there are sufficient grounds to justify the delay." Regarding the proportionality of the delay, it claimed that "it is in keeping with the law, because no time limit exists for deprivation of liberty during the passive extradition process, or for the final decision in the process."

## **C.2) Considerations of the Court**

267. Article 7(5) of the Convention establishes that: "[a]ny person detained [...] shall be entitled to trial within a reasonable time or to be released without prejudice to the continuation of the proceedings. His release may be subject to guarantees to assure his appearance for trial."

268. In cases relating to preventive or pre-trial detention in the context of criminal proceedings, the Court has indicated that this norm imposes time limits on the duration of preventive detention and, consequently, the authority of the State to ensure the purposes of the proceedings by means of this preventive measure. When the length of the preventive detention exceeds a reasonable time, the State may restrict the liberty of the accused with other less harmful measures that ensure his appearance at trial other than the deprivation of liberty. This right of the individual is accompanied by a judicial obligation to process the criminal proceedings during which the accused is deprived of his liberty with greater diligence and promptness.<sup>349</sup>

269. The American Convention does not establish a limitation to the exercise of the guarantee established in Article 7(5) of the Convention based on the reasons or circumstances why the person has been detained.<sup>350</sup> Consequently, the Court finds that this provisions is also applicable to detention for extradition purposes, as in this case.

270. The European Court of Human Rights has indicated, similarly, that detention with a view to extradition "will be justified only for as long as extradition proceedings are being conducted. It follows that if such proceedings are not being prosecuted with due diligence, the detention will cease to be justified under [the Convention]."<sup>351</sup> Thus, if the extradition proceedings are not

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<sup>349</sup> Cf. *Case of Bayarri v. Argentina. Preliminary objection, merits, reparations and costs*. Judgment of October 30, 2008. Series C No. 187, para. 70, and *Case of Argüelles et al. v. Argentina, supra*, para. 129.

<sup>350</sup> Cf. *Case of Vélez Loor v. Panama, supra*, para. 107.

<sup>351</sup> Cf. ECHR, *Case of Kolompar v. Belgium*, No. 11613/85. Judgment of September 24, 1992, para. 36; *Case of Quinn v. France*, No. 18580/91. Judgment of March 22, 1995, para. 48; *Case of Chahal v. The United Kingdom [GS]*, No. 22414/93.

conducted within a reasonable time, the person must be released, without prejudice to other less harmful measures than deprivation of liberty being adopted that ensure his appearance before the court.

271. In this case, Wong Ho Wing was detained in prison for more than five years following his initial arrest on October 27, 2008 (*supra* paras. 60 and 96). Subsequently, on March 10, 2014, the Seventh Criminal Court of El Callao changed this measure to “an order to appear in court periodically: house arrest” *supra* paras. 112 and 113), and he is currently detained in this way. Regarding the duration of the deprivation of liberty of Wong Ho Wing, first, the Court emphasizes that, from the time of his arrest and to date, the judicial authorities have committed different errors that have contributed to prolonging his detention (*supra* paras. 215 to 219). In this regard, the State has not acted with the greater diligence required when a person is detained (*supra* paras. 222 and 268).

272. Second, the Court recalls that the applicable regulations do not establish a time limit for preventive detention in extradition proceedings, once the formal extradition request has been received, or a time frame for the extradition process that might limit the duration of the detention (*supra* para. 255). This absence of a time frame was used in judicial decisions concerning Wong Ho Wing’s detention to justify its duration (*supra* paras. 103 and 255), preventing the analysis of the reasonable nature of the length of the presumed victim’s detention and allowing it to be prolonged excessively.

273. Lastly, the Court reiterates that the existence of precautionary and provisional measures cannot be used to justify the excessive duration of the extradition proceedings or the detention of Wong Ho Wing.<sup>352</sup> In various orders on the provisional measures ordered in this case, the Court indicated that, “while this case is decided by the organs of the inter-American system, Peru may continue to adopt the necessary measures in relation to Wong Ho Wing to prevent his eventual extradition and the corresponding administration of justice in the requesting State from being ineffective or unrealistic.”<sup>353</sup> This did not justify the deprivation of liberty of Wong Ho Wing indefinitely. Less harmful measures exist than imprisonment in a detention center that Peru could have adopted to avoid his eventual extradition becoming unrealistic, and this was not considered or analyzed by the State until March 2014. The Court stresses that orders for provisional measures must be interpreted taking into account the American Convention and this Court’s case law. Therefore, due diligence in the extradition process was required to ensure that the measures adopted were not arbitrary (*supra* paras. 248 and 255).

274. Similarly, in 2014, when examining the situation of Wong Ho Wing, the Ombudsman stated that:

Although extradition proceedings do not have a legal time limit, the deprivation of liberty of the Chinese citizen for 39 months represented a delay that could not be justified by the fact that his defense had made use of constitutional or supranational proceedings. Consequently, [the State] was urged to adopt the corresponding measures that would allow the situation of [Wong] Ho Wing to be defined promptly.

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Judgment of November 15, 1996, para. 113; *Case of Ryabikin v. Russia*, No. 8320/04. Judgment of June 19, 2008, para. 131; *Case of Akram Karimov v. Russia*, No. 62892/12. Judgment of May 28, 2014, para. 156, and *Case of Khomullo v. Ukraine*, No. 47593/10. Judgment of November 27, 2014, para. 52.

<sup>352</sup> Similarly, see, ECHR, *Case of Ryabikin v. Russia*, No. 8320/04. Judgment of June 19, 2008, para. 132, and *Case of Gafarov v. Russia*, No. 25404/09. Judgment of October 21, 2010, para. 200.

<sup>353</sup> *Case of Wong Ho Wing. Provisional measures with regard to Peru*. Order of the Court of January 29, 2014, *considerandum* 14. See also, *Matter of Wong Ho Wing. Provisional measures with regard to Peru*. Order of the Court of May 28, 2010, *considerandum* 18; *Matter of Wong Ho Wing. Provisional measures with regard to Peru*. Order of the Court of August 22, 2013, *considerandum* 13.

Also, it was recommended that the decision adopted must respect the Constitutional Court's arguments in the application for *habeas corpus* filed on behalf of Wong Ho Wing [...], ordering the Peruvian State to refrain from extraditing this individual.<sup>354</sup>

275. Based on the preceding conclusions, the State violated Article 7(1) and 7(5) of the Convention, in relation to Article 1(1) of this instrument, to the detriment of Wong Ho Wing. The arguments on the alleged lack of judicial control will be analyzed in the following section.

#### ***D. Right to appeal before a competent court***

##### **D.1) Arguments of the parties and of the Commission**

276. The Commission affirmed that "in the wake of the judgment of the Constitutional Court of May 24, 2011, [on October 18, 2011,] the representative [...] sought his immediate release based on the order in that judgment," but this "came up against several problems because the provisional arrest file was in the hands of the Ministry of Justice." In its Merits Report, the Commission indicated that, at that date, "Wong Ho Wing ha[d] not obtained a court ruling that, in the context of the remedies filed by his legal representative, decide[d] on the lawfulness of his detention after the judgment of the Constitutional Court," thus violating the "right recognized in Article 7(6) of the Convention".

277. The representative argued that, "[i]n this case, the Peruvian authorities have not ensured the effectiveness of the remedy of *habeas corpus*." In this regard, he indicated that "six applications for *habeas corpus*" had been filed," and the third one "was declared admissible by the Constitutional Court"; however, "the Peruvian State has not complied with this decision, because it has not denied the request for Wong Ho Wing's extradition and ordered his release." In addition, he indicated that, with regard to the fourth, fifth and sixth application for *habeas corpus*, the judicial authorities had "not decided on their merits to ensure his personal liberty." In this regard, he stressed that, at the time of the submission of the motions and arguments brief, the "fourth application for *habeas corpus*, filed on November 16, 2011," had not been decided after two years and two months, "which evidently also violates the guarantee of a reasonable time established in Article 8(1) of the American Convention." He also indicated that the fifth and sixth applications for *habeas corpus* filed on March 13, 2012, and April 26, 2013, had also not been decided. In addition, he indicated that the response of the Permanent Criminal Chamber to the release request of October 10, 2011, "mean[t] that the Peruvian State did not guarantee, in the terms of Article 25(1) of the Convention [...], a simple and prompt remedy, but rather obliged the [presumed] victim [...] to use a series of remedies that, owing to the passage of time, make execution of the Constitutional Court's judgment unrealistic." In addition, he indicated that in the context of the release request of October 18, 2011, "officials of the Executive Branch [...] failed to forward the provisional arrest file to the Seventh Criminal Court of El Callao [...], even in response to two urgent requests, so that it could take a decision on Wong Ho Wing's release in execution of the ruling of the Constitutional Court." He emphasized that this "serious omission [...] prevented the Seventh Criminal Court [...] from carrying out prompt judicial control for more than two years and eight month." He concluded that the Peruvian authorities had not ensured the effectiveness of the application for *habeas corpus* on behalf of Wong Ho Wing, in violation of Articles 7(6), 8(1), 25(1), 25(2)(a) and 25(2)(c) of the Convention, in relation to Article 1(1) of this instrument.

278. The State, with regard to the alleged violation of Article 7(6) of the Convention, denied that it had had "the intention not to provide the provisional arrest file to the courts in order to decide the release request filed following the judgment the Constitutional Court." It indicated that the

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<sup>354</sup> Note of the Ombudsman of September 4, 2014 (evidence file, folio 7293).

"Ministry, at the appropriate moment, complied with the judge's request and, after he had ruled on the request, he ordered that the respective file be returned to the Ministry." Added to this, it indicated that, "on March 10, 2014, the Seventh Criminal Court of El Callao, declared the release request admissible [...], and therefore annulled the provisional arrest warrant and ordered the coercive measure of an order to appear in court periodically [...] because the Executive Branch had not yet taken a final decision on the extradition request." Regarding the relationship of this to the alleged violation of Articles 25(1) and 25(2)(a), Peru stressed that the representative was referring to the violation of these provisions in the sense that "the jurisdictional authorities before whom he had filed three applications for *habeas corpus* had not decided them favorably," considering that "the State does not fail to comply with its obligation to administer justice [...] if this does not provide a result that satisfies the petitioner's claims." Also, it asked the Court "to set aside the claim to [...] include this in the analysis of the case, [...] because [the facts described] are outside the factual framework of the case delimited by the [Commission], since the latter has not questioned the specific situation of the [*habeas corpus*] or other release requests [...] (other than that [...] of October 18, 2011)."

## D.2) Considerations of the Court

279. First, the Court notes that the applications for *habeas corpus* filed on behalf of Wong Ho Wing do form part of the factual framework of this case (*supra* para. 35). In this regard, the Court reiterates that the representatives of the presumed victims may allege violations that differ from those described by the Commission in its Merits Report.

280. As can be seen, with regard to the applications for *habeas corpus*, the Commission argued the violation of Article 7(6), while the representative also argued the violation of Articles 8 and 25 of the Convention. The Court recalls that Articles 7(6) and 25 of the Convention refer to different spheres of protection. In this section, the Court will analyze whether the State gave Wong Ho Wing the possibility of appealing before a competent court "in order that the court may decide without delay on the lawfulness of his arrest or detention and order his release if the arrest or detention is unlawful," in accordance with Article 7(6) of the Convention. Given that Article 7(6) of the Convention has its own legal content and that the principle of practical effects (*effet utile*) crosscuts the due protection of all the rights recognized in this instrument, the Court finds it unnecessary to examine the alleged violation of Article 25 of the Convention.<sup>355</sup>

281. Furthermore, the Court has established that, under Article 7(6) of the Convention, the authority that should decide of the lawfulness of the arrest or detention is a judge or court. Thus, the Convention is safeguarding the fact that control of the deprivation of liberty should be judicial.<sup>356</sup> In addition, the Court has stated that it is not sufficient that remedies concerning the judicial control of detention exist formally in the law, but they must also be effective; that is, comply with the purpose of obtaining a prompt decision on the lawfulness of the arrest or detention.<sup>357</sup> Thus, this Court notes that the laws of Peru establish judicial remedies to control the lawfulness of the deprivation of liberty. Indeed, in this case, the representative filed four release requests and one request for a change in the provisional detention. He also filed six applications for *habeas corpus*. Not all of them have been decided in favor of his claims and only one of them resulted in effective control of the deprivation of liberty (in 2014, when the detention method was changed to house arrest owing to the time that had elapsed). However, this does not mean that

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<sup>355</sup> Cf. *Case of Anzualdo Castro v. Peru*, *supra*, para. 77, and *Case of Rochac Hernández et al. v. El Salvador. Merits, reparations and costs*. Judgment of October 14, 2014. Series C No. 285, para. 162.

<sup>356</sup> Cf. *Case of Chaparro Álvarez and Lapo Íñiguez v. Ecuador*, *supra*, para. 128, and *Case of Espinoza Gonzáles v. Peru*, *supra*, para. 135.

<sup>357</sup> Cf. *Case of Acosta Calderón v. Ecuador*, *supra*, para. 97, and *Case of Espinoza Gonzáles v. Peru*, *supra*, para. 135.



the remedies filed were ineffective. To determine this, the Court must examine the arguments and the processing of each of these remedies.

282. The arguments of the Commission and the representative include specific allegations about the release requests of October 5 and 18, 2011 (*supra* para. 104), as well as about the applications for *habeas corpus* filed on February 9, 2010, November 16, 2011, March 13, 2012, and April 26, 2013 (*supra* paras. 79, 88, 108 and 109). The Court will now examine the effectiveness of each of these requests and remedies. It will not examine the first two applications for *habeas corpus* that were filed, or the other release requests the effectiveness of which has not been questioned.

#### D.2.a) Habeas corpus of February 9, 2010

283. The Court notes that the application of February 9, 2010, was the third application for *habeas corpus* filed on behalf of Wong Ho Wing, and it was finally decided by the appeal based on constitutional injury admitted by the Constitutional Court on May 24, 2011 (*supra* paras. 79 and 81 to 83). In this regard, the Court notes that the alleged ineffectiveness of this application for *habeas corpus* refers to the supposed lack of effectiveness of the appeal based on constitutional injury, owing to the alleged failure to comply with the Constitutional Court's decision of May 24, 2011. These arguments have already been analyzed in the preceding section (*supra* paras. 260 to 263). Moreover, the Court reiterates that the Constitutional Court did not order Wong Ho Wing's release (*supra* para. 262).

#### D.2.b) Release request of October 5, 2011

284. The representative filed this request before the Permanent Criminal Chamber of the Supreme Court of Justice and, on October 10, 2011, the Chamber declared that the request should be "filed [...] before the corresponding court" (*supra* para. 104). The representative argued that this answer "mean[t] that the Peruvian State did not guarantee a simple and prompt remedy, in the terms of Article 25(1) of the Convention" (*supra* para. 277). In this regard, the Court notes that, although it is true that States must make adequate and effective remedies available to the persons under its jurisdiction, the presumed victims have the obligation to file such remedies or requests in keeping with the laws in force and before the authority with competence to decide them.<sup>358</sup> The representative has not argued that the Permanent Criminal Chamber was the competent court to decide this request. To the contrary, the evidence reveals that, following the decision of October 10, 2011, he filed another release request before the Seventh Criminal Court of El Callao (*supra* para. 104).

#### D.2.c) Release request of October 18, 2011, and habeas corpus of November 16, 2011

285. The Court notes that the request of October 18, 2011, was filed before the Seventh Criminal Court of El Callao (*supra* para. 104). The representative based his request on the Constitutional Court's order to refrain from extraditing Wong Ho Wing. In this regard, he indicated that "[j]udgments delivered by the constitutional judges have prevalence over those of the other courts and must be executed on pain of incurring responsibility. Thus, the judgment that orders [the State ...] to refrain from extraditing [Wong Ho Wing] requires immediate execution." Therefore, he indicated that, following the decision of the Constitutional Court, "there is no legal pretext or

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<sup>358</sup> Cf. *Case of Velásquez Rodríguez v. Honduras. Merits*, *supra*, para. 67, and *Case of Brewer Carías v. Venezuela. Preliminary objections*. Judgment of May 26, 2014. Series C No. 278, para. 87.

provision that permits an individual to remain deprived of liberty.” He also affirmed, in general, that preventive detention should not exceed a reasonable time.<sup>359</sup>

286. The evidence provided reveals that, initially, the judge was unable to decide the release request because the provisional arrest file was with the Ministry of Justice. Following several requests, the Ministry of Justice forwarded the file to the Seventh Criminal Court on November 25, 2011 (*supra* paras. 105 and 106). On December 1, 2011, this court answered the request indicating that, “noting from a review of the extradition file forwarded by the Ministry of Justice that the issue of a final decision is still pending [it decided that the release request should be presented] opportune and pursuant to the law”<sup>360</sup> (*supra* para. 107).

287. At the same time, on November 16, 2011, the representative filed a fourth application for *habeas corpus* against the judge’s decision to return the provisional arrest file to the Ministry of Justice before deciding the release request (*supra* para. 108). In this application for *habeas corpus*, the representative indicated that “if the Constitutional Court has declared extradition inadmissible, the provisional arrest in this same context has no validity because it is a subsidiary measure of the extradition process.”<sup>361</sup> On May 30, 2012, the Special Criminal Court declared the application for *habeas corpus* inadmissible. In this decision, the court referred to the different time limits for detention during a criminal proceeding established by law, and the ways in which these could be extended.<sup>362</sup> Nevertheless, it did not refer to the application of these provisions to the specific case. However, it did examine whether the proceedings had been conducted with due diligence and used this Court’s criteria to examine the reasonable time. In this regard, it indicated that: (a) no delay by the judicial authorities could be noted that would affect the reasonable time; (b) regarding the complexity of the case, it considered that Wong Ho Wing “was deprived of his liberty based on a request made by the People’s Republic of China, despite the [...] prohibition of his extradition [ordered by the Constitutional Court].” It also stressed that the extradition process had not concluded, because “the Executive Branch, in a duly motivated decision, must annul the extradition process,” and (c) regarding the procedural activity of the interested party, it indicated that “even though it cannot be observed that this has obstructed the proceedings, based on the preceding arguments, the constitutional application must be rejected.”<sup>363</sup>

288. This Court has established that the competent authority’s analysis of a judicial remedy contesting the lawfulness of deprivation of liberty cannot be reduced to a mere formality; rather

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<sup>359</sup> Cf. Request dated October 18, 2011 (evidence file, folios 306 and 310 to 312).

<sup>360</sup> Decision of the Seventh Criminal Court of El Callao of December 1, 2011 (evidence file, folio 6472).

<sup>361</sup> Application for *habeas corpus* of November 16, 2011 (evidence file, folio 326).

<sup>362</sup> In this regard, the decision indicated that “[a]rticle 137 of the Code of Criminal Procedure (currently in force) amended by article 2 of Legislative Decree No. 983, published on July 22, 2007, has established that ‘The detention shall not last more than nine months in the ordinary proceeding and eighteen months in the special proceeding, provided that the requirements established in article 135 of the Code of Criminal Procedure are met. In the case of proceedings for offenses of drug-trafficking, terrorism, spying and others of a complex nature against more than ten accused, that have harmed an equal number of persons or the State, the length of the detention shall be doubled. When the time limit has expired, without the delivery of a judgment in first instance, the immediate release of the accused shall be ordered, and the judge must establish the necessary measures to ensure his presence at the trial.’ [...] The said article also established that ‘When the circumstances are especially complex or result in a special prolongation of the investigation and the accused could evade prosecution, the detention may be extended for an equal length of time.’ And ‘When the offense has been committed by a criminal organization and the accused may evade prosecution or interfere with the probative activities, the detention may be extended for an equal length of time. The extension of the detention shall be decided by a duly founded order, issued by the judge on his own motion, or requested by the prosecutor and notified to the accused. An appeal is admissible against this order, to be decided by the Chamber, following the opinion of the Superior Prosecutor, within 72 hours.’” Decision of the 30th Special Criminal Court of Lima of May 30, 2012 (evidence file, folios 6445 and 6446).

<sup>363</sup> Decision of the 30th Special Criminal Court of Lima of May 30, 2012 (evidence file, folios 6447 and 6448).

the reasons cited by the applicant must be examined and referred to expressly, pursuant to the parameters established by the American Convention.<sup>364</sup>

289. When examining the request release, the Seventh Court failed to rule on the allegation that, following the Constitutional Court's judgment there was no reason for the detention of Wong Ho Wing. Furthermore, it failed to rule on the reasonableness of the time that he had been detained. The same omissions can be observed in the decision on the application for *habeas corpus* filed on November 16, 2011. In this regard, the Court notes that the examination of a reasonable time made in this decision did not analyze whether the detention of Wong Ho Wing was still necessary and proportionate. To the contrary, this decision was based on the fact that the extradition process had not yet concluded.

290. Based on the foregoing, this Court finds that the release request of October 18, 2011, and the application for *habeas corpus* filed on November 16, 2011, were not effective to carry out an adequate control of the presumed victim's detention. Consequently, the State violated Article 7(6) of the Convention, in relation to Article 1(1) of this instrument, to the detriment of Wong Ho Wing.

D.2.d) Failure to comply with a reasonable time when deciding these remedies

291. The Commission and the representative argued that a reasonable time had not been respected when deciding the release request of October 18, 2011, and the applications for *habeas corpus* of November 16, 2011, March 13, 2012, and April 26, 2013 (*supra* paras. 79, 88, 104, 108 and 109). In this regard, it should be underscored that the release request of October 18, 2011, was decided on December 1, 2011 (*supra* paras. 107 and 286).<sup>365</sup> The *habeas corpus* presented on November 16, 2011, was declared inadmissible on May 30, 2012 (*supra* paras. 108 and 287), and the *habeas corpus* presented on March 13, 2012, was still pending a decision on December 1, 2014, when the State's last report in this regard was forwarded.<sup>366</sup> Lastly, the *habeas corpus* presented on April 26, 2013, was declared inadmissible on October 24, 2014 (*supra* para. 109).

292. The Court recalls that, in general, it has considered the following factors to determine whether the time is reasonable: (a) the complexity of the matter; (b) the procedural activity of the interested party; (c) the conduct of the judicial authorities, and (d) the effects on the legal situation of the person involved in the proceedings (*supra* para. 209). However, the State did not present any evidence or information to justify the duration of these proceedings. The Court considers that taking one month to decide a release request that, by law, should be decided in 48 hours,<sup>367</sup> and six months or more to decide the applications for *habeas corpus*, is clearly excessive.

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<sup>364</sup> Cf. *Case of López Álvarez v. Honduras*, *supra*, para. 96.

<sup>365</sup> During the proceeding, the judge and the representative of the presumed victim presented various requests for the Ministry of Justice to forward the provisional arrest file so that a decision could be taken; this was sent on November 25, 2011 (*supra* paras. 105, 106 and 286).

<sup>366</sup> Cf. The State's brief of December 1, 2014 (merits file, folio 1159). During this proceeding, on March 13, 2012, the application was declared "absolutely inadmissible." The decision was subsequently revoked on December 26, 2012. On April 29, 2013, the application was declared admissible (*supra* note 112). On August 4, 2014, the Public Attorney's Office presented its answering brief. Cf. Decision of the 41st Criminal Court of March 13, 2012 (evidence file, folios 8504 to 8507); Decision of the Second Special Criminal Chamber for Prisoners at Liberty of the Superior Court of Justice of Lima of December 26, 2012 (evidence file, folios 8508 to 8516), and Brief of the Public Attorney of the Judiciary of Peru of August 4, 2014 (evidence file, folio 8522).

<sup>367</sup> In this regard, the Procedural Code in force under Legislative Decree No. 638 of April 27, 1991, establishes: "Article 184. Once the release request has been presented by the detainee, the prosecutor shall draw up the interlocutory motion within 24 hours and shall forward this to the judge, notifying the other parties to the proceedings. Article 185. The judge shall take a decision within 24 hours of receiving the interlocutory motion, shall notify the parties to the proceedings, and shall advise the prosecutor of his decision. The decision may be appealed within two working days." Code of Criminal Procedure, promulgated by Legislative Decree No. 638 of April 27, 1991 (evidence file, folio 8624).

Therefore, this constitutes an additional violation of Article 7(6) of the Convention, in relation to Article 1(1) of this instrument, to the detriment of Wong Ho Wing.

### ***E. Alleged violation of the right to personal integrity of Wong Ho Wing***

293. According to the representative, Wong Ho Wing “has suffered harm to his mental and moral integrity owing to the arbitrary deprivation of his liberty [...], and this constitutes a violation of his right to personal integrity.” The State did not refer to this allegation by the representative, beyond contesting its inclusion in the factual framework of this case (*supra* para. 33).

294. In its case law, the Court has determined that, often, one of the inevitable consequences of deprivation of liberty is harm to the enjoyment of other human rights, such as the right to privacy and to family life, rather than merely the right to personal liberty.<sup>368</sup> However, this restriction of rights that results from the deprivation of liberty or is one of its collateral effects must be strictly limited because, under international law, any restriction of a human right can only be justified when it is necessary in a democratic society.<sup>369</sup> Although the Court has also stated that the restriction of the right to personal integrity, among others, is not justified based on the deprivation of liberty, and is prohibited by international law,<sup>370</sup> an examination of the judgments in the relevant cases heard by this Court reveals that, in those cases, the detention conditions were cruel, inhuman or degrading, and even caused death or injuries, frequently of a very serious nature, to a significant number of inmates.<sup>371</sup>

295. In this case, the representative based the alleged violation of the right to personal integrity of Wong Ho Wing on his arbitrary deprivation of liberty. The Court finds that these arguments refer to what the Court has called a collateral effect of the detention.<sup>372</sup> In addition, the Court recalls that the facts relating to the detention conditions of Wong Ho Wing in Peru are not part of this case (*supra* para. 36). Consequently, the Court finds that the State did not violate Article 5 of the American Convention, in relation to Article 1(1) of this instrument, to the detriment of Wong Ho Wing. Notwithstanding the foregoing, when ordering any reparations that are in order, the Court will take into account, insofar as pertinent, the harm caused to Wong Ho Wing owing to his detention.

## **XII REPARATIONS (Application of Article 63(1) of the American Convention)**

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<sup>368</sup> Cf. *Case of the Gómez Paquiyauri Brothers v. Peru. Merits, reparations and costs*. Judgment of July 8, 2004. Series C No. 110, para. 108, and *Case of Norín Catrimán et al. (Leaders, members and an activist of the Mapuche Indigenous People) v. Chile, supra*, para. 390.

<sup>369</sup> Cf. *Case of the “Juvenile Re-education Institute” v. Paraguay. Preliminary objections, merits, reparations and costs*. Judgment of September 2, 2004. Series C No. 112, para. 154, and *Case of Norín Catrimán et al. (Leaders, members and an activist of the Mapuche Indigenous People) v. Chile, supra*, para. 390.

<sup>370</sup> Cf. *Case of the “Juvenile Re-education Institute” v. Paraguay, supra*, para. 155, and *Case of Norín Catrimán et al. (Leaders, members and an activist of the Mapuche Indigenous People) v. Chile, supra*, para. 390.

<sup>371</sup> Cf. *Case of the “Juvenile Re-education Institute” v. Paraguay, supra*, para. 170, and *Case of Norín Catrimán et al. (Leaders, members and an activist of the Mapuche Indigenous People) v. Chile, supra*, para. 390.

<sup>372</sup> Cf. *Case of the “Juvenile Re-education Institute” v. Paraguay, supra*, para. 154, and *Case of Norín Catrimán et al. (Leaders, members and an activist of the Mapuche Indigenous People) v. Chile, supra*, para. 391.

296. Based on the provisions of Article 63(1) of the American Convention,<sup>373</sup> the Court has indicated that any violation of an international obligation that has caused harm entails the obligation to make adequate reparation, and that this provisions reflects a customary norm that is one of the basic principles of contemporary international law on State responsibility.<sup>374</sup>

297. The reparation of the harm caused by the violation of an international obligation requires, whenever possible, full restitution (*restitutio in integrum*), which consists in the re-establishment of the previous situation. If this is not feasible, as in most cases of human rights violations, the Court will determine measures that ensure the rights that have been violated and redress the consequences of the violations.<sup>375</sup> Therefore, the Court has found it necessary to award different measures of reparation in order to redress the harm integrally, so that in addition to pecuniary compensation, the measures of restitution and satisfaction, and also guarantees of non-repetition have special relevance for the harm caused.<sup>376</sup>

298. This Court has established that reparations must have a causal nexus to the facts of the case, the violations that have been declared, the harm proved, and the measures requested to repair this harm. The Court must observe the concurrence of these factors to rule appropriately and pursuant to law.<sup>377</sup>

299. Taking into consideration the violations declared in the preceding chapters, the Court will now examine the claims presented by the Commission and the representative, as well as the arguments of the State, in light of the criteria established in its case law concerning the nature and scope of the obligation to make reparation,<sup>378</sup> in order to establish measures to redress the harm caused to the victim.

### **A. Injured party**

300. The Court reiterates that, pursuant to Article 63(1) of the Convention, it considers the injured party to be anyone declared a victim of the violation of any right recognized therein. Therefore, this Court considers that Wong Ho Wing is the “injured party” and, in his capacity as victim of the violations declared in Chapters X and XI, he will be the beneficiary of the following measures ordered by the Court.

### **B. Measures of integral reparation: restitution and satisfaction**

#### **B.1) Restitution**

##### B.1.a) Extradition process

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<sup>373</sup> Article 63(1) of the Convention stipulates that: “[i]f the Court finds that there has been a violation of a right or freedom protected by this Convention, the Court shall rule that the injured party be ensured the enjoyment of his right or freedom that was violated. It shall also rule, if appropriate, that the consequences of the measure or situation that constituted the breach of such right or freedom be remedied and that fair compensation be paid to the injured party.”

<sup>374</sup> Cf. *Case of Velásquez Rodríguez v. Honduras. Reparations and costs*. Judgment of July 21, 1989. Series C No. 7, para. 25, and *Case of Cruz Sánchez et al. v. Peru*, *supra*, para. 451.

<sup>375</sup> Cf. *Case of Velásquez Rodríguez v. Honduras. Reparations and costs*, *supra*, para. 25, and *Case of Cruz Sánchez et al. v. Peru*, *supra*, para. 452.

<sup>376</sup> Cf. *Case of Cantoral Benavides v. Peru. Reparations and costs*. Judgment of December 3, 2001. Series C No. 88, paras. 79 to 81, and *Case of Cruz Sánchez et al. v. Peru*, *supra*, para. 452.

<sup>377</sup> Cf. *Case of Ticona Estrada v. Bolivia. Merits, reparations and costs*. Judgment of November 27, 2008. Series C No. 191, para. 110, and *Case of Cruz Sánchez et al. v. Peru*, *supra*, para. 453.

<sup>378</sup> Cf. *Case of Velásquez Rodríguez v. Honduras. Reparations and costs*, *supra*, paras. 25 to 27, and *Case of Cruz Sánchez et al. v. Peru*, *supra*, para. 454.

301. The Commission asked the Court to order the State “[t]o establish the measures necessary to ensure that the extradition process is brought to a conclusion as soon as possible, in accordance with the procedures set forth in the Peruvian Code of Criminal Procedure, denying the extradition request in strict compliance with the judgment of the Constitutional Court of May 24, 2011.” In addition, it asked that in compliance with this measure, the State ensure that none of its authorities implement mechanisms that would obstruct or delay execution of that judgment. The representative asked the Court to order the State to take a decision in the extradition process as soon as possible, “denying the extradition request.” He also asked that, in no circumstance, should Wong Ho Wing be extradited to the People’s Republic of China where his life and personal integrity were at risk and, as a result, the total disintegration of his immediate family.” The State advised that the extradition process was at the final stage, so that the Commission’s request would “be assessed by the corresponding entities, in accordance with the laws of Peru in force and the regular domestic procedures, based on the Court’s decision” in this case.

302. The Court recalls that it has concluded that the State has not acted with the necessary due diligence in the extradition process, which has resulted in the excessive duration of the extradition proceedings and of the deprivation of Wong Ho Wing’s liberty. This constitutes a violation of the guarantee of a reasonable time in the processing of the extradition proceedings and of his detention in violation of Articles 7(1), 7(5) and 8(1) of the Convention, in relation to Article 1(1) of this instrument, as decided in Chapters X and XI of this Judgment. Consequently, the Court finds that the State should take the final decision in the extradition process as soon as possible, taking into account paragraphs 193 to 223 of this Judgment.

303. In addition, bearing in mind the nature of the provisional measures ordered in this case, the Court considers that the State’s obligations under these measures is replaced by the measures ordered in this Judgment as of the date of its notification.

#### B.1.b) Review of the provisional arrest

304. The Commission asked that the Court order the State to review *ex officio* the provisional detention of Wong Ho Wing, taking into consideration his legal situation following the conclusion of the extradition proceedings. In particular, it asked that any judicial decision on the personal liberty of Wong Ho Wing should be made “in strict compliance with the principles of exceptionality, necessity and proportionality.” The representative requested the immediate release of Wong Ho Wing. The State asserted that, on March 10, 2014, the Seventh Criminal Court of El Callao had revoked the provisional arrest warrant and issued the measure of an order to appear in court periodically: house arrest, establishing a financial surety and the prohibition to leave the country. It argued that the court had taken into consideration the time Wong Ho Wing had spent in the Sarita Colonia Prison, and considered it appropriate to modify the measures; hence, the State considered that it had complied with the Commission’s request.

305. The Court recalls that Wong Ho Wing has been deprived of liberty since October 2008. Even though he has been kept under house arrest since March 2014, the Court reiterates its findings in this Judgment as regards the arbitrary nature of the detention, the excessive time taken to process the extradition proceedings, and the duration of the provisional arrest. The Court recalls that the purpose of the actual deprivation of liberty of Wong Ho Wing is his extradition. Therefore, taking into account the measure of reparation according to which the State must take a final decision in the extradition proceedings (*supra* para. 302), the Court orders the State to review, immediately, the deprivation of liberty of Wong Ho Wing, taking into account the standards established in Chapter XI of this Judgment. In addition, the State should take into consideration the time that he has remained deprived of his liberty to date and his actual situation and health care needs.

## **B.2) Satisfaction**

### **B.2.a) Publication and dissemination of the Judgment**

306. The representative asked that the Court order the publication of: (a) the official summary of this Judgment, once, in the official gazette; (b) the official summary of this Judgment, once, in a national newspaper with widespread circulation, and (c) the Judgment in its entirety, available for one year, on an official website. The State indicated that, if the Court so requests, it would not object to the publication of the Judgment.

307. The Court establishes, as it has in other cases,<sup>379</sup> that the State should publish, within six months of notification of this Judgment: (a) the official summary of this Judgment prepared by the Court, once, in the official gazette; (b) the official summary of this Judgment prepared by the Court, once, in a national newspaper with widespread circulation, and (c) the Judgment in its entirety, available for one year, on an official website.

## **B.3) Other measures requested**

308. In addition, the representative asked that: (i) the authorities of the Judiciary and of the Executive Branch who have intervened in this case be investigated; (ii) a public act to acknowledge international responsibility be held, and (iii) medical, psychological and psychosocial treatment be provided to Wong Ho Wing. For its part, the Commission asked that the Court order measures of non-repetition. The State objected to these measures.

309. This Court does not find it necessary to order these other measures requested by the representative and the Commission, considering that the delivery of this Judgment and the reparations ordered in it are sufficient and appropriate.

## **C. Compensation**

310. The Commission asked the Court to order that full reparation be made to Wong Ho Wing for the violations that were established.

311. The representative asked that the Court determine the consequential damages and the loss of earnings of Wong Ho Wing. In this regard, he indicated that, as a result of the arbitrary deprivation of his liberty for more than five years, the victim was unable to administer his businesses in the United States of America and, for this, he requested compensation of US\$3,212,713.55, which corresponded to the value of two restaurants and the loss of their leasing rates. He also requested that the determination of the pecuniary damage be carried out in the jurisdiction of the Peruvian State in application of domestic norms. Furthermore, he indicated that, before being deprived of his liberty, Wong Ho Wing earned approximately US\$ 10,000.00 a month from his business activities. Regarding the non-pecuniary damage, he asked that compensation be awarded for the suffering and affliction caused to the victim and asked the Court to determine the non-pecuniary damage taking into consideration the principle of *pretium doloris* of the victim, and establishing an amount, in equity.

312. The State reiterated that it had not violated the rights recognized in the American Convention, so that it had no obligation to make reparation. Nevertheless, it affirmed its opposition

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<sup>379</sup> Cf. *Case of Cantoral Benavides v. Peru. Reparations and costs*, *supra*, para. 79, and *Case of Cruz Sánchez et al. v. Peru*, *supra*, para. 466.

"to the elevated nature of the amounts requested, [and that] this type of claim sought to convert the Court into an economic entity, which was not in keeping with the object and purpose of its functions." It pointed out that the total requested by the representative amounted to a sum that "is evidently incompatible with the inter-American standards in effect under the inter-American system and any other supranational system for the protection of human rights as regards reparations in favor of a single person." It also argued that the representative had not provided any evidence of the business losses, that the elements included as pecuniary damage were not included among the facts of this case, and that it would have been necessary to prove their causal nexus with facts of the case.

313. In its case law, this Court has developed the concept of pecuniary damage and the situations in which it should be compensated and has established that pecuniary damage supposes "the loss of, or detriment to, the income of the victims, the expenses incurred as a result of the facts, and the consequences of a pecuniary nature that have a causal nexus with the facts of the case."<sup>380</sup> In addition, the Court has developed the concept of non-pecuniary damage and has established that this "may include the suffering and affliction caused to the direct victim and his family, the impairment of values that have great significance for the individual, and also the changes of a non-pecuniary nature, in the living conditions of the victim or his family."<sup>381</sup>

314. From the information provided, the Court notes that Wong Ho Wing and his wife indicated that the family was in the hotel business in Peru. Also, in his affidavit, Wong Ho Wing indicated that he had two restaurants and an importing company in the United States of America, and that these businesses ceased operations because a building burned down and he "was unable to administer the company."<sup>382</sup> In addition, his wife asserted that "his businesses in the United States closed down owing to his absence; [but t]he family business in Peru remains, although the situation is not good."<sup>383</sup> Nevertheless, the evidence provided only authenticates the registration of the limited liability company "*Inversiones Turísticas Maury SAC*," founded by the victim.<sup>384</sup>

315. Consequently, the Court notes that it does not have evidence authenticating the representative's calculation of pecuniary damage, or the income that Wong Ho Wing received before the events that resulted in the human rights violations declared in this case. However, the body of evidence reveals that Wong Ho Wing had several businesses before he was deprived of his liberty. Therefore, the Court finds it reasonable to consider that Wong Ho Wing suffered a loss of earnings during the time he remained detained.

316. Regarding the non-pecuniary damage, the Court notes that, in his affidavit, Wong Ho Wing stated that, while he was in prison, he "suffered immense emotional and physical devastation [...] as a result of the harsh environment of the prison, and also the constant fear that he would be extradited without any apparent reason." He also indicated that "if it was not for the fact that [he had] a family to maintain [...he] believe[d] that [... he] would have lost the will to live."<sup>385</sup> Also, expert witness Carmen Wurst referred to the fact that Wong Ho Wing was "subjected to numerous stress factors during the time he spent in prison, owing to the prison conditions, [and this] has

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<sup>380</sup> *Case of Bámaca Velásquez v. Guatemala. Reparations and costs.* Judgment of February 22, 2002. Series C No. 91, para. 43, and *Case of Argüelles et al. v. Argentina, supra*, para. 286.

<sup>381</sup> *Case of the "Street Children" (Villagrán Morales et al.). Reparations and costs.* Judgment of May 26, 2001. Series C No. 77, para. 84, and *Case of Argüelles et al. v. Argentina, supra*, para. 286.

<sup>382</sup> Affidavit made by Wong Ho Wing on August 18, 2014 (evidence file, folio 6852).

<sup>383</sup> Affidavit made by Kin Mui Chan on August 18, 2014 (evidence file, folios 6865 and 6866).

<sup>384</sup> Cf. Lima and Callao Registry Office. Registration of *Sociedades Anónimas Inversiones Turísticas Maury SAC*, of June 7, 1999 (evidence file, folio 6129).

<sup>385</sup> Affidavit made by Wong Ho Wing on August 18, 2014 (evidence file, folio 6851).



resulted in severe psychological effects and suffering," with depressive psychological tendencies, anxiety, dissociative disorder, and chronic anxiety among other symptoms. However, she indicated that "the symptoms have decreased slightly during his house arrest." In addition, regarding the risk of being extradited, she considered that this caused him sufferings, such as feeling a "permanent death threat [and he had encountered] situations of racial and personal abuse owing to the reactions of other prisoners to the possibility that he would be extradited."<sup>386</sup>

317. Based on the foregoing conclusions, the circumstances of this case, and the violations found, the Court considers it pertinent to establish, in equity, compensation for pecuniary and non-pecuniary damage in favor of Wong Ho Wing of US\$ 30,000.00 (thirty thousand United States dollars). This amount must be paid within the relevant time frame established by the Court (*infra* para. 323).

#### ***D. Costs and expenses***

318. The representative requested, for costs and expenses, the sum of US\$ 10,000.00 as honoraria based on the professional services contract signed by the representative of Wong Ho Wing and He Long Huang; as well as US\$ 6,651.44 for expenses related to the proceedings. With his final written arguments, the representative also forwarded vouchers for expenses incurred following the presentation of the motions and arguments brief. The State indicated that it was only in order to pay costs and expenses if receipts, travel vouchers, and other documents existed proving that the disbursements were made in relation to these proceedings. In particular, it argued that the need for, and the reasonableness, of the trips made by different persons, including the underage daughters of Wong Ho Wing, for the same event and on numerous occasions, referring to trips to Washington D.C, San José, and Lima.

319. The Court reiterates that, pursuant to its case law,<sup>387</sup> costs and expenses are part of the concept of reparation, insofar as the actions taken by the victims to obtain justice at both the domestic and the international level, involve expenditures that must be compensated when the international responsibility of the State has been declared in a sentence condemning it. The Court also recalls that the eventual reimbursement of costs and expenses is made based on the disbursements that have been duly proved before the Court.

320. The Court notes that the representative provided evidence corresponding to the expenses for: the professional services contract amounting to US\$10,000.00,<sup>388</sup> sending correspondence to the Inter-American Commission for US\$138.30,<sup>389</sup> payment of airfares for the family of Wong Ho Wing to take part in the hearing before the Court in February 2011 for US\$2,751.80,<sup>390</sup> accommodation in Washington, D.C. for his family and lawyer to take part in the hearing before the Inter-American Commission in October 2010 for US\$482.90,<sup>391</sup> payment of airfares for the family to participate in hearings before the Inter-American Commission in October 2010 and March 2012 for US\$1,982.80,<sup>392</sup> accommodation for Wong Ho Wing's brother to take part in a hearing

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<sup>386</sup> Expert opinion of Carmen Wurst provided by affidavit on August 18, 2014 (evidence file, folios 6885 and 6886).

<sup>387</sup> Cf. *Case of Velásquez Rodríguez v. Honduras. Reparations and costs*, *supra*, para. 42, and *Case of Cruz Sánchez et al. v. Peru*, *supra*, para. 488.

<sup>388</sup> Cf. Contract for professional services (evidence file, folios 6083 and 6084).

<sup>389</sup> Cf. Mailing correspondence to the Inter-American Commission (evidence file, folio 6201).

<sup>390</sup> Cf. Payment of airline tickets to Costa Rica for the immediate family of Wong Ho Wing to take part in the hearing before the Inter-American Court of Human Rights in February 2011 (evidence file, folios 6202 and 6203).

<sup>391</sup> Cf. Accommodation in Washington D.C. to participate in a hearing before the Inter-American Commission on Human Rights in October 2010 (evidence file, folios 6204 to 6209).

<sup>392</sup> Cf. Payment of airline tickets to Washington D.C. for Wong Ho Wing's family to take part in a hearing before the Inter-

before the Inter-American Commission for US\$429.60,<sup>393</sup> and payment of airfares for Wong Ho Wing's family between Los Angeles and Lima for US\$4,905.55.<sup>394</sup> Also, with his final written arguments, the representative provided evidence corresponding to the payment of legal advisory services in the amount of S/.12,500.00,<sup>395</sup> payment of US\$2,000.00 for a psychological opinion,<sup>396</sup> and payment of S/.1,875.00 for the professional fees of the lawyer María Eugenia Zegarra.<sup>397</sup>

321. In addition, the representative submitted the receipt for sending correspondence from Mercedes Wong Alza to Wong Ho Wing's wife and a certificate of a court surety bond. However, he failed to justify what this evidence related to;<sup>398</sup> hence the Court has insufficient evidence to determine whether these amounts correspond to disbursements related to the proceedings before the inter-American system.<sup>399</sup>

322. Consequently, the Court orders the State to pay the representative, Luis Lamas Puccio, the sum of US\$ 28,000.00 (twenty-eight thousand United States dollars) for costs and expenses.<sup>400</sup> This amount shall be paid directly to the representative within the respective time frame established by the Court (*infra* para. 323). During the stage of monitoring compliance with this Judgment, the Court may decide that the State should reimburse the victim or his representative any subsequent reasonable and duly authenticated expenses.<sup>401</sup>

### ***E. Method of complying with the payments ordered***

323. The State shall make the payments of the compensation for pecuniary and non-pecuniary damage and to reimburse costs and expenses established in this Judgment directly to the persons

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American Commission on Human Rights in March and October 2010 (evidence file, folios 6210 to 6214).

<sup>393</sup> Cf. Accommodation in Washington D.C. for Wong Ho Wing's brother to take part in a hearing before the Inter-American Commission in March 2012 (evidence file, folio 6217).

<sup>394</sup> Cf. Payment of airline tickets to Lima for Wong Ho Wing's family (evidence file, folios 6218 to 6221).

<sup>395</sup> Cf. Receipt No. 001047 for professional honoraria of the lawyer, Luis Alberto Lamas Puccio, dated October 3, 2014 (evidence file, folio 7110.2).

<sup>396</sup> Cf. Receipt No. 000707 for expert psychological opinion dated September 22, 2014 (evidence file, folio 7087).

<sup>397</sup> Cf. Receipt No. 001079 for professional honoraria dated October 1, 2014 (evidence file, folio 7075).

<sup>398</sup> Cf. DHL service for correspondence between Mercedes Esther Wong Alza and Kinmui Chan on May 19, 2014 (evidence file, folio 7071).

<sup>399</sup> In addition, the Court will not take into account the following evidence presented belatedly by the representative with the final written arguments: airfares in the name of Huang He dated May 22, 2010, from Lima to Los Angeles and June 6, 2010, from Los Angeles to Lima (evidence file, folio 7055); airfares in the name of Huang He dated May 23, 2010, from Los Angeles to Guangzhou, China, and June 4, 2010, from Guangzhou, China, to Los Angeles (evidence file, folio 7057); plane tickets in the name of Huang He Long dated May 25, 2011, to Lima, Peru, from Los Angeles (evidence file, folio 7058); plane ticket in the name of Huang He Long dated August 7, 2012, from Lima to Los Angeles and from Los Angeles to Lima; plane ticket in the name of Huang He Long dated June 18, 2013, from Lima to Los Angeles and from Los Angeles to Lima (evidence file, folio 7060); receipt for payment of October 29, 2008, to Rivera, Gervasi & Asociados for legal advisory services (evidence file, folio 7062); receipt dated December 28, 2010, for payment of professional honoraria of Luis Alberto Lamas Puccio for legal advisory services in 2010 (evidence file, folio 7063); receipt dated September 30, 2011, for payment of professional honoraria of Luis Alberto Lamas Puccio for legal advisory and defense services (evidence file, folio 7064); receipts for payments dated September 2 and October 2, 2013, to *Consortio Trial S.A.C.* for legal advisory services (evidence file, folios 7065-7066), and invoices for sending correspondence from Lima, Peru, to the Inter-American Commission dated January 6, 21 and 30, February 17 and 29, March 6 and November 24, 2012, and March 30 and September 3, 2013 (evidence file, folios 7077 to 7085).

<sup>400</sup> The amounts presented in Peruvian new soles were converted to United States dollars using the bank exchange rate in force at the time of the payment receipt. Cf. Ministry of Economy and Finance of Peru, [http://www.mef.gob.pe/contenidos/tipo\\_cambio/tipo\\_cambio.php](http://www.mef.gob.pe/contenidos/tipo_cambio/tipo_cambio.php)

<sup>401</sup> Cf. *Case of Ibsen Cárdenas e Ibsen Peña v. Bolivia. Merits, reparations and costs.* Judgment of September 1, 2010. Series C No. 217, para. 291, and *Case of Rodríguez Vera et al. (The Disappeared of the Palace of Justice) v. Colombia, supra*, para. 608.

indicated herein, within one year of notification of this Judgment, without prejudice to making full payment before this.

324. If the beneficiaries are deceased or die before they receive the respective amount, this will be delivered directly to their heirs, pursuant to the applicable domestic law.

325. The State must comply with the monetary obligations by payment in United States dollars or the equivalent in national currency, using the exchange rate in force on the New York Stock Exchange (United States of America), the day before the payment to make the calculation.

326. If, for reasons that can be attributed to the beneficiary of the compensation or his heirs, it is not possible to pay the amounts established within the time frame indicated, the State shall deposit these amounts in his favor in an account or certificate of deposit in a solvent Peruvian financial institution, in United States dollars, and in the most favorable financial terms permitted by the State's banking practice and law. If the corresponding compensation is not claimed, after 10 years the amounts shall be returned to the State with the interest accrued.

327. The amounts allocated in this Judgment as compensation for pecuniary and non-pecuniary damage and to reimburse costs and expenses shall be delivered to the persons indicated integrally, in accordance with this Judgment, without any deductions arising from possible taxes or charges.

328. If the State shall incur in arrears, it shall pay interest on the amount owed corresponding to bank interest on arrears in the Republic of Peru.

### **XIII OPERATIVE PARAGRAPHS**

329. Therefore,

#### **THE COURT**

#### **DECIDES,**

By five votes to one,

1. To reject the preliminary objection filed by the State concerning the exhaustion of domestic remedies, in the terms of paragraphs 21 to 30 of this Judgment.

Judge Vio Grossi dissenting.

#### **DECLARES,**

By five votes to one, that:

2. As described in paragraphs 124 to 188, it would not be legally possible at this time to impose the death penalty, and it has not been proved that the extradition would expose Wong Ho Wing to a real, foreseeable and personal risk of being subject to treatment contrary to his personal integrity; thus, if he is extradited, the State would not be responsible for violating its obligation to ensure his rights to life and to personal integrity recognized in Articles 4 and 5 of the Convention,

in relation to Article 1(1) of this instrument, or the obligation of non-refoulement established in Article 13(4) of the Inter-American Convention to Prevent and Punish Torture.

Judge Vio Grossi dissenting.

By three votes in favor and three against, and the deciding vote of the President, that:

3. The State is responsible for the violation of the guarantee of a reasonable time, established in Article 8(1) of the American Convention in relation to Article 1(1) thereof, to the detriment of Wong Ho Wing, in the terms of paragraphs 207 to 223.

Judges F. Caldas, Pérez Pérez and Vio Grossi dissenting.

By five votes to one, that:

4. The State is responsible for the violation of the right to personal liberty, recognized in Article 7(1), 7(3), 7(5) and 7(6) of the American Convention in relation to Article 1(1) thereof, to the detriment of Wong Ho Wing, in the terms of paragraphs 247 to 255, 267 to 275 and 279 to 292.

Judge Vio Grossi dissenting.

By five votes to one, that:

5. The State is not responsible for the violation of the right to be heard and of the right of defense, established in Article 8(1) of the American Convention, in relation to Article 1(1) thereof, to the detriment of Wong Ho Wing, in accordance with paragraphs 227 to 234.

Judge Vio Grossi dissenting.

By, that:

6. The State is not responsible for the violation of Article 7(2) of the Convention, in relation to Article 1(1) of this instrument, to the detriment of Wong Ho Wing, in the terms of paragraphs 259 to 262.

Judges Pérez Pérez and Vio Grossi dissenting.

By five votes to one, that:

7. The State is not responsible for the violation of the right to personal integrity, recognized in Article 5 of the American Convention, in relation to Article 1(1) of this instrument, to the detriment of Wong Ho Wing, in the terms of paragraphs 294 and 295.

Judge Vio Grossi dissenting.

By five votes to one, that:

8. It is not necessary to issue a ruling on the alleged failure to comply with the right to judicial protection recognized in Article 25 of the Convention in relation to the alleged failure to comply with the decision of the Constitutional Court, in the terms of paragraphs 193 to 206.

Judge Vio Grossi dissenting.

By four votes to two, that:

9. It is not necessary to issue a ruling on the alleged failure to comply with the obligation to adopt domestic legal provisions, recognized in Article 2 of the Convention, in relation to the arbitrary nature of the detention of Wong Ho Wing, in the terms of paragraph 256.

Judges Pérez Pérez and Vio Grossi dissent.

**AND ESTABLISHES,**

By five votes to one, that:

10. This Judgment constitutes *per se* a form of reparation.

Judge Vio Grossi dissenting.

By five votes to one, that:

11. The State must take the final decision in the extradition process in the case of Wong Ho Wing as soon as possible, as established in paragraph 302.

Judge Vio Grossi dissenting.

By five votes to one, that:

12. The provisional measures ordered in this case are annulled, insofar as they are replaced by the measures of reparation ordered in this Judgment as of the date of its notification, as established in paragraph 303.

Judge Vio Grossi dissenting.

By four votes to two, that:

13. The State must immediately review the deprivation of liberty of Wong Ho Wing, as established in paragraph 305.

Judges Pérez Pérez and Vio Grossi dissenting.

By five votes to one, that:

14. The State must make the publications indicated in paragraph 307 of this Judgment, within six months of its notification.

Judge Vio Grossi dissenting.

By five votes to one, that:

15. The State must pay the amounts established in paragraphs 317 and 322 of this Judgment, as compensation for pecuniary and non-pecuniary damage and to reimburse costs and expenses, in the terms of these paragraphs and of paragraphs 323 to 328.

Judge Vio Grossi dissenting.

By five votes to one, that:

16. The State must, within one year of notification of this Judgment, provide the Court with a report on the measures taken to comply with it.

Judge Vio Grossi dissenting.

By five votes to one, that:

17. The Court will monitor full compliance with this Judgment, in exercise of its authority and in fulfillment of its obligations under the American Convention on Human Rights, and will consider this case concluded when the State has complied fully with all its provisions.

Judge Vio Grossi dissenting.

Judge Alberto Pérez Pérez advised the Court of his Partially Dissenting Opinion, which accompanies this judgment. Judge Eduardo Vio Grossi advised the Court of his Dissenting Opinion, which accompanies this judgment.

Done, at San José, Costa Rica, on June 30, 2015, in the Spanish language.

Judgment of the Inter-American Court of Human Rights. Case of Wong Ho Wing v. Peru. Preliminary objection, merits, reparations and costs.

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

**PARTIALLY DISSENTING OPINION OF JUDGE ALBERTO PÉREZ PÉREZ**

**INTER-AMERICAN COURT OF HUMAN RIGHTS**

**CASE OF WONG HO WING v. PERU**

**JUDGMENT OF JUNE 30, 2015**

***(Preliminary objection, merits, reparations and costs)***

1. I have issued a negative vote in relation to the following operative paragraphs of the judgment in the case of *Wong Ho Wing v. Peru*:

*Operative paragraph 3:*

"The State is responsible for the violation of the guarantee of a reasonable time, established in Article 8(1) of the American Convention, in relation to Article 1(1) thereof, to the detriment of Wong Ho Wing, in the terms of paragraphs 207 to 223."

*Operative paragraph 6:*

"The State is not responsible for the violation of Article 7(2) of the Convention, in relation to Article 1(1) of this instrument, to the detriment of Wong Ho Wing, in the terms of paragraphs 259 to 262."

*Operative paragraph 9:*

"It is not necessary to issue a ruling on the alleged failure to comply with the obligation to adopt domestic legal provisions, recognized in Article 2 of the Convention, in relation to the arbitrary nature of the detention of Wong Ho Wing, in the terms of paragraph 256."

*Operative paragraph 13:*

"The State must immediately review the deprivation of liberty of Wong Ho Wing, as established in paragraph 305."

2. I will now explain the reasons for these negative votes.

*Non-violation of the right to a reasonable time*

3. According to the judgment (para. 220, and also para. 223), the right to a reasonable time (Art. 8(1) of the Convention) was violated owing to the "delay in the final settlement of the extradition process, which can be attributed to the actions of the State authorities." However, as of May 2010, this Court had ordered numerous provisional measures in favor of Wong Ho Wing<sup>1</sup> in which it had required the State to

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<sup>1</sup> On February 24, 2010, the Inter-American Commission, during the proceedings before this organ, asked the Court to adopt provisional measures in favor of Wong Ho Wing. The measures were granted for the first time in May 2010. Following orders of November 26, 2010, and March 4 and July 1, 2011, extending their effects, they were lifted in October 2011, after the decision of the Peruvian Constitutional Court of May 24 that year ordering the Executive Branch to refrain from extraditing Wong Ho Wing. Nevertheless, on June 26, 2012, the Inter-American Court again granted provisional measures in favor of Wong Ho Wing due to "the State's



*"refrain from extraditing Wong Ho Wing until the organs of the inter-American human rights system had examined and ruled on the [case]." That ruling has been made today by this Judgment; thus, up until this time, there has been no delay in adopting the final decision on the extradition, and the time frame for adopting this decision has not yet commenced.* Abstract considerations regarding delays in extradition proceedings, the eventual possibility that these may be attributed to the State, and elements that may make these delays unreasonable are interesting, but are entirely inapplicable to this case.

4. Furthermore, the analysis of the requirement concerning the complexity of the matter, which concluded with the mere recognition that "the case is complex," does not accord with the extreme complexity of the case owing to the alternatives resulting from the determination of whether or not the offense for which extradition to the People's Republic of China could be granted was or is punished by the death penalty, and to the difficulties in obtaining an accurate translation from Chinese (paras. 60 to 93 of the Judgment).

#### *Violation of Article 7(2) of the Convention*

5. According to the Judgment (paras. 259 to 262), the State did not violate Article 7(2) of the Convention, which establishes that: "No one shall be deprived of his physical liberty except for the reasons and under the conditions established beforehand by the Constitution of the State Party concerned or by a law established pursuant thereto." The Judgment does not refer to any legal or constitutional provision that authorizes this deprivation of liberty. First, article 2.24 (f) of the Constitution (cited in para. 240 of the Judgment) contains no reference to an extradition request as a legitimate reason for deprivation of liberty. Second, both the legal provision cited in para. 241 (article 523 of the Peruvian Code of Criminal Procedure) and the Extradition Treaty between China and Peru (article 9, cited in para. 239) refer to a different situation to that of this case: to what Peru's domestic laws call "provisional or pre-extradition arrest" and the treaty calls "preventive detention" requested "before the presentation of the extradition request," which should cease when "30 days have passed without the formal submission of the extradition request" (article 523.6 of the Peruvian Code of Criminal Procedure) or "if the competent authority of the Requested Party has not received the formal extradition request within 60 days of the detention of the person sought," which "may be extended for a further 30 days when the Requesting Party provides reasons that justify this" (article 9.4 of the Extradition Treaty between China and Peru).

6. Consequently, there were no legal or constitutional grounds for the deprivation of liberty. For it to have been lawful, a legislative norm would have to have existed establishing the conditions for deprivation of liberty in the case of an extradition request. Thus, Article 7(2) of the Convention was violated.

#### *Non-compliance with Article 2 of the Convention*

7. The considerations in the previous section reveal that the Peruvian State failed to comply with its obligation to adopt domestic legal provisions, inasmuch as its practice

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uncertainty" about the possibility of extraditing him, based on presumed "new facts." These measures were maintained by orders dated December 6, 2012, February 13, May 22 and August 22, 2013, and January 29 and March 31, 2014. In both May 2010 and June 2012, the provisional measures were *ordered to allow the inter-American system to examine and rule on this case, as well as to prevent thwarting compliance with an eventual decision by its organs. Based on the orders of January and March 2014, the measures remain in force*" (italics added).

in relation to extradition includes the deprivation of liberty of the person whose extradition is requested, without establishing the conditions in which this detention can be implemented, or the conditions of the deprivation of liberty, or its duration, or the possibility of securing the person using means other than deprivation of liberty or less harmful than this (such as the house arrest to which Wong Ho Wing is currently subject).

*Inexistence of the obligation to make an immediate review of the deprivation of liberty of Wong Ho Wing*

8. Lastly, I understand that the Peruvian State's obligation is not to "immediately review the deprivation of liberty of Wong Ho Wing," but rather to make a prompt final decision on the extradition request. If it is denied, Wong Ho Wing will be released automatically; if it is granted, Wong Ho Wing must be handed over to the Chinese authorities.

Alberto Pérez Pérez  
Judge

Pablo Saavedra Alessandri  
Secretary

**SEPARATE DISSENTING OPINION OF JUDGE EDUARDO VIO GROSSI**  
**INTER-AMERICAN COURT OF HUMAN RIGHTS**  
**CASE OF WONG HO WING v. PERU**  
**JUDGMENT OF JUNE 30, 2015**  
**(Preliminary objection, merits, reparations and costs)**

**INTRODUCTION**

This dissenting opinion<sup>1</sup> to the Judgment indicated above<sup>2</sup> is issued because the Judgment rejected the preliminary objection concerning failure to comply with the rule of prior exhaustion of domestic remedies filed by the Republic of Peru.<sup>3</sup> The grounds for this dissent relate to the moment at which this rule should be complied with. The Judgment takes the view that this should be, at the latest, when the Inter-American Commission on Human Rights<sup>4</sup> takes a decision on the admissibility of the petition or communication<sup>5</sup> that has given rise to the corresponding case;<sup>6</sup> to the contrary, in this opinion, I maintain that this rule should be complied with at the time the petition is lodged, and this should be verified by the Commission both when this occurs and when deciding on the petition's admissibility. In other words, while the Judgment considers that compliance with this rule is a requirement for the admissibility of the petition, in this opinion, I consider that compliance with the rule is a requirement for its presentation and, consequently, to enable it to be processed.

Bearing in mind the provisions of Article 65(2) of the Court's Rules of Procedure, this opinion refers only and exclusively to the reasons why the undersigned considers that the Judgment should have admitted the preliminary objection concerning the lack of prior exhaustion of domestic remedies filed by the State and, consequently, must refrain from commenting on the merits of the case. Therefore, this opinion is limited to the operative paragraph on this point adopted in the Judgment.

Nevertheless, I wish to record that the undersigned, as in other cases,<sup>7</sup> has participated in both the deliberation and the voting by the Court with regard to each operative

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<sup>1</sup> Article 66(2) of the American Convention on Human Rights (hereinafter "the Convention"): "[i]f the judgment does not represent in whole or in part the unanimous opinion of the judges, any judge shall be entitled to have his dissenting or separate opinion attached to the judgment."

Article 24(3) of the Statute of the Inter-American Court of Human Rights (hereinafter "the Court"): "[t]he decisions, judgments and opinions of the Court shall be delivered in public session, and the parties shall be given written notification thereof. In addition, the decisions, judgments and opinions shall be published, along with judges' individual votes and opinions and with such other data or background information that the Court may deem appropriate."

Article 65(2) of the Court's Rules of Procedure: "[a]ny judge who has taken part in the consideration of a case is entitled to append a separate concurring or dissenting opinion to the judgment. These opinions shall be submitted within a time frame to be established by the President so that the other judges may take cognizance thereof before notice of the judgment is served. The opinions shall only refer to the issues covered in the judgment."

<sup>2</sup> Hereinafter "the Judgment,"

<sup>3</sup> Hereinafter "the State."

<sup>4</sup> Hereinafter "the Commission."

<sup>5</sup> Hereinafter "the petition."

<sup>6</sup> Cf. para. 26 of the Judgment.

<sup>7</sup> Dissenting opinion of Judge Eduardo Vio Grossi, *Case of Cruz Sánchez et al. v. Peru. Preliminary objections, merits, reparations and costs*. Judgment of April 17, 2015. Series C No. 292, and Dissenting

paragraph of the Judgment and has done so, however, without issuing a separate opinion on them.

Consequently, and pursuant to the provision of Article 65(2) of the Rules of Procedure that, if a separate concurring or dissenting opinion is issued, it should include the reasoning; then, to the contrary, if no separate opinion is issued, there is no obligation to provide the reasons for the positive or negative vote. Thus, considering that this opinion relates solely and exclusively to the operative paragraph adopted in the Judgment with regard to the said preliminary objection, the undersigned is not obliged to explain the reasons why he voted negatively with regard to the other paragraphs of the Judgment; namely, the operative paragraphs.

By adopting this course of action, the undersigned has proceeded in keeping with the principles of liberty and independence that should govern the actions of a judge, guaranteed by the Convention and the Court's Statute and Rules of Procedure, which impose no restriction as regards the reason he considers it appropriate to vote according to his conscience or, in particular, by not prohibiting him from explaining, if he so wishes, why he has proceeded in this way.

In addition, it should be borne in mind that this opinion is consistent; moreover, it diverges from the approach taken in the Judgment which simultaneously decided the preliminary objection and the merits of the matter, without first making a formal determination of whether the objection related to the merits and, if it considered that this connection existed, deciding to deal with both matters together. Conversely, the present opinion is based on the fact that the preliminary objection filed by the State regarding failure to comply with the rule of prior exhaustion of domestic remedies is not related to the merits of the case and, consequently, was essentially a preliminary matter that, as such, deserved to be decided before and separately from the merits, so that it could not be considered that the decision on the objection might be influenced, even indirectly, by the merits.

The reasons why the undersigned does not agree with the decision taken in this case concerning the objection filed by the State based on failure to exhaust domestic remedies are explained below, taking into account the applicable provision of the Convention, the facts of the case as they relate to this provision and, lastly, the part of the Judgment that refers to this objection.

## **I. PROVISION OF THE CONVENTION CONCERNING THE RULE OF PRIOR EXHAUSTION OF DOMESTIC REMEDIES**

In the first part of this opinion, the undersigned will reiterate and complement some of the general comments made above<sup>8</sup> on the said rule and the procedure that should be followed in this regard; in other words, with regard to the petition, its study and initial processing by the Commission, the State's response to the petition, its admissibility, and the ruling that corresponds to the Court, to conclude with the consequences of considering the rule of prior exhaustion of domestic remedies to be a requirement of admissibility rather than of the petition.

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opinion of Judge Eduardo Vio Grossi, *Case of Díaz Peña v. Venezuela. Preliminary objection, merits, reparations and costs*. Judgment of June 26, 2012. Series C No. 244.

<sup>8</sup> Dissenting opinion of Judge Eduardo Vio Grossi, *Case of Cruz Sánchez et al. v. Peru. Preliminary objections, merits, reparations and costs*. Judgment of April 17, 2015. Series C No. 292.

## A. General comments

Article 46 of the Convention recognizes the rule of prior exhaustion of domestic remedies and stipulates that:

*"1. Admission by the Commission of a petition or communication lodged in accordance with Articles 44 or 45 shall be subject to the following requirements:*

*a. that the remedies under domestic law have been pursued and exhausted in accordance with generally recognized principles of international law;*

*b. that the petition or communication is lodged within a period of six months from the date on which the party alleging violation of his rights was notified of the final judgment;*

*c. that the subject of the petition or communication is not pending in another international proceeding for settlement; and*

*d. that, in the case of Article 44, the petition contains the name, nationality, profession, domicile, and signature of the person or persons or of the legal representative of the entity lodging the petition.*

*2. The provisions of paragraphs 1.a and 1.b of this article shall not be applicable when:*

*a. the domestic legislation of the state concerned does not afford due process of law for the protection of the right or rights that have allegedly been violated;*

*b. the party alleging violation of his rights has been denied access to the remedies under domestic law or has been prevented from exhausting them; or*

*c. there has been unwarranted delay in rendering a final judgment under the aforementioned remedies."*

As a preliminary observation, it should be noted that this provision is *sui generis*, exclusive to the Convention. For example, it does not appear in the same terms in the Convention for the Protection of Human Rights and Fundamental Freedoms or European Convention on Human Rights,<sup>9</sup> Article 35 of which refers to the requirement of prior exhaustion of domestic remedies more generally and, also, does not include the specific exceptions established in Article 46(2) of the American Convention.<sup>10</sup>

Furthermore, it should also be emphasized that the European Convention establishes that this requirement must be met prior to litigating before the European Court of Human Rights – a judicial body – while, in the case of the American Convention, it must

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<sup>9</sup> Nor is it established in the Statute or the Rules of Procedure of the International Court of Justice. Hence, in that sphere, it is only of a jurisprudential nature.

<sup>10</sup> "Admissibility criteria. 1. The Court may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognised rules of international law, and within a period of six months from the date on which the final decision was taken. 2. The Court shall not deal with any application submitted under Article 34 that (a) is anonymous; or (b) is substantially the same as a matter that has already been examined by the Court or has already been submitted to another procedure of international investigation or settlement and contains no relevant new information. 3. The Court shall declare inadmissible any individual application submitted under Article 34 if it considers that: (a) the application is incompatible with the provisions of the Convention or the Protocols thereto, manifestly ill-founded, or an abuse of the right of individual application; or (b) the applicant has not suffered a significant disadvantage, unless respect for human rights as defined in the Convention and the Protocols thereto requires an examination of the application on the merits and provided that no case may be rejected on this ground which has not been duly considered by a domestic tribunal. 4. The Court shall reject any application which it considers inadmissible under this Article. It may do so at any stage of the proceedings."

be met prior to lodging the petition before the Commission – a non-judicial body it should be noted. And this is relevant insofar as “[t]he main function of the Commission shall be to promote respect for and defense of human rights”<sup>11</sup> and, in exercise of this function, “to take action on petitions and other communications pursuant to its authority under the provisions of Articles 44 through 51 of this Convention,”<sup>12</sup> including submission of the respective case to the Court.<sup>13</sup>

Thus, the Commission should promote and defend human rights and can even act as a plaintiff before the Court and, accordingly, does not necessarily share the impartiality that must characterize a judicial body. Consequently, Article 46(1)(a) of the Convention is also conceived as a limit to the actions of the Commission which may become a party in the consequent litigation that this non-judicial body has itself originated. Hence, the intention of this provision is to prevent the Commission from acting before the requirement or rule that it establishes has been duly complied with in a timely manner; in other words, from proceeding with the matter even though the domestic remedies have not been exhausted.

And it is in the same spirit that the said Article 46(2) of the Convention specifically establishes the cases in which the rule of prior exhaustion of domestic remedies is not applicable; namely, inexistence of due process of law to exercise the domestic remedies, impossibility of exercising them, and delay in deciding them. Thus, this norm does not establish any other exceptions than those indicated; therefore, it is not admissible to cite, or even admit, an exception that is not established in the said article, because, if it were, this could strip the general rule established in Article 46(1)(a) of the Convention of any meaning or practical effects and, above all, it would leave its application to the discretion and, perhaps, the arbitrariness of the Commission.

As a second general comment, it is worth calling attention to the reference made in Article 46(1)(a) of the Convention to the circumstance “that the remedies under domestic law have been pursued and exhausted in accordance with generally recognized principles of international law.” The allusion to such principles signifies that they are not the ones subsequently established in paragraph 2 of this article because, if they were, this allusion would not have been necessary. Accordingly, it is included in order to recall that the rule of prior exhaustion of domestic remedies is established by principles of international law, even prior to or irrespective of the provisions of any treaty, in this case the Convention, and that these principles involve other rules, such as the rule indicating that any objection that relates to the merits of the case in question is not strictly preliminary and must be decided when deciding on the merits.

Third, attention should be called to the fact that, with regard to the provision transcribed above, the Judgment indicates that “[t]he Court recalls that the rule of prior exhaustion of domestic remedies was conceived in the interests of the State, because it seeks to exempt it from responding before an international organ for acts it is accused of before it has had the occasion to remedy them by its own means.”<sup>14</sup>

The foregoing appears to signify that the Court would follow the thesis according to which the said rule, since it is conceived in the interests of the State, without

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<sup>11</sup> Article 41 of the Convention, first phrase.

<sup>12</sup> Article 41(f) of the Convention.

<sup>13</sup> Articles 51 and 61(1) of the Convention.

<sup>14</sup> Para. 27 of the Judgment.

considering the attitude of the petitioner, would mean that the State's international responsibility for the violation of an obligation established by the Convention would be engaged from the time at which one of its organs committed an internationally wrongful act, even though it had not had the opportunity to redress this internationally wrongful act.

Now, whether this or any other thesis is followed, in the practice, the ultimate intention of the said rule is to enable the State to establish, as soon as possible, the effective exercise of, and respect for, the human rights that have been violated. This is the object and purpose of the Convention<sup>15</sup> and, consequently, should happen as soon as practicable in everyone's interests, making the intervention of the inter-American jurisdiction unnecessary.<sup>16</sup>

This means that, in situations in which it has been argued in the respective sphere of the domestic jurisdiction that the State has not complied with its undertakings as regards respecting and ensuring the free and full exercise of human rights, it is possible to claim the intervention of the international jurisdictional body and not before, so that, if admissible, the State is ordered to comply with the international obligations it has violated, to guarantee that it will not violate them again, and to make reparation for all the consequences of such violations.<sup>17</sup>

Therefore, this rule is also a mechanism to encourage the State to comply with its human rights obligations without waiting for the inter-American system to order it to do so as a result of litigation. Thus, its practical effect is that the State re-establish respect for human rights as soon as possible and, to that end, it could be said that this rule has been established also and, above all, to benefit the victim of human rights violations.<sup>18</sup>

Based on the above, it can be concluded that this rule has been established in the Convention as an essential component of the whole inter-American system for the promotion and protection of human rights, by stressing that, as indicated in the second paragraph of its Preamble, the *"international protection [...] reforc[es] or complement[s] the protection provided by the domestic law of the American States."*<sup>19</sup>

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<sup>15</sup> Art. 1(1) of the Convention: "[t]he States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition."

<sup>16</sup> Art. 33 of the Convention: "[t]he following organs shall have competence with respect to matters relating to the fulfillment of the commitments made by the States Parties to this Convention: (a) the Inter-American Commission de Human rights, referred to as the Commission, and (b) the Inter-American Court of Human Rights, referred to as the Court".

<sup>17</sup> Art. 63(1) of the Convention: "[i]f the Court finds that there has been a violation of a right or freedom protected by this Convention, the Court shall rule that the injured party be ensured the enjoyment of his right or freedom that was violated. It shall also rule, if appropriate, that the consequences of the measure or situation that constituted the breach of such right or freedom be remedied and that fair compensation be paid to the injured party."

<sup>18</sup> Hereinafter "the victim."

<sup>19</sup> Segundo paragraph of the Preamble of the Convention: "[r]ecognizing that the essential rights of man are not derived from one's being a national of a certain state, but are based upon attributes of the human personality, and that they therefore justify international protection in the form of a convention reinforcing or complementing the protection provided by the domestic law of the American States"

Perhaps it is Article 25(1) of the Convention that best expresses the subsidiary nature of the inter-American human rights system, when it indicates that: "[e]veryone has the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights recognized by the constitution or laws of the State concerned or by this Convention, even though such violation may have been committed by persons acting in the course of their official duties."

And this relates to the international juridical structure that, fundamentally, is still based on the principle of sovereignty, which, in the case of the inter-American system, is embodied in Articles 1(1)<sup>20</sup> and 3(b)<sup>21</sup> of the Charter of the Organization of American States. Consequently, and in keeping with the principle of public law that one can only do what the law expressly authorizes, the provisions of the Convention that establish restrictions to State sovereignty must be interpreted and applied taking this reality into account.

Thus, the rule of prior exhaustion of domestic remedies is also an expression of the exercise of State sovereignty and of the need to give the State the preferential opportunity to take action with regard to the presumed human rights violations. Moreover, this has acquired greater relevance nowadays, when all the States Parties to the Convention abide by the democratic rule of law; that is, they endorse democracy.<sup>22</sup>

Consequently, based on the foregoing it can be inferred that compliance with the requirement establish in Article 46(1)(a) of the Convention, transcribed above, must take place before the petition is lodged before the Commission.

## **B. The petition**

The first comment that should be made concerning the petition initiating the procedure before the Commission that may conclude before the Court is that compliance with the rule of prior exhaustion of domestic remedies is, essentially, an obligation of the presumed victim or the petitioner. It is the latter who must comply with the requirement of prior exhaustion of domestic remedies; in other words, to be able to allege a violation before the inter-American jurisdictional body,<sup>23</sup> the petitioner must previously do so before the corresponding domestic jurisdictional bodies. Otherwise, this would evidently prevent the prompt and timely achievement of the above-mentioned practical effects. Thus, rather than a benefit granted to the State, this rule is a requirement or obligation that must be met by the presumed victim or the petitioner.

This is why Article 28(h) of the Rules of Procedure of the Commission in force at the time the petition was lodged<sup>24</sup> (hereinafter "the Commission's Rules of Procedure")

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<sup>20</sup> "The American States establish by this Charter the international organization that they have developed to achieve an order of peace and justice, to promote their solidarity, to strengthen their collaboration, and to defend their sovereignty, their territorial integrity, and their independence. Within the United Nations, the Organization of American States is a regional agency."

<sup>21</sup> "The American States reaffirm the following principles: [...] b) International order consists essentially of respect for the personality, sovereignty, and independence of States, and the faithful fulfillment of obligations derived from treaties and other sources of international law."

<sup>22</sup> The Inter-American Democratic Charter adopted at the twenty-eighth special session of the General Assembly of the Organization of American States by a resolution dated September 11, 2001.

<sup>23</sup> Article 44 of the Convention: "[a]ny person or group of persons, or any nongovernmental entity legally recognized in one or more member states of the Organization, may lodge petitions with the Commission containing denunciations or complaints of violation of this Convention by a State Party."

Article 61(1) of the Convention: "[o]nly the States Parties and the Commission shall have the right to submit a case to the Court."

<sup>24</sup> Approved by the Commission at its 109th special session held from December 4 to 8, 2000, and amended at its 116<sup>th</sup> regular period of sessions held from October 7 to 25, 2002, at its 118<sup>th</sup> regular period of sessions held from October 6 to 24, 2003, at its 126<sup>th</sup> regular period of sessions held from October 16 to 27, 2006, and at its 132<sup>nd</sup> regular period of sessions held from July 17 to 25, 2008.



stipulates that the petition must contain information on "[a]ny steps taken to exhaust domestic remedies, or the impossibility of doing so." It should be noted that, by referring to the said Rules of Procedure, attention is being drawn to how the Commission itself, by approving this legal instrument, has interpreted the provisions of the Convention and, in particular in this case, its Article 46(1)(a).

Clearly for the same reason, Article 31(3) of the Commission's Rules of Procedure refers to the situation in which *"the petitioner contends that he or she is unable to prove compliance with the requirement indicated in this article."* In other words, this provision indicates that the specific exceptions to the rule of prior exhaustion of domestic remedies are established in favor of the presumed victim or the petitioner. Consequently, it is the petitioner and no one else, not even the Commission, who may argue or assert some of the exceptions to the said rule and, evidently, this can only be done when the petition is drawn up.

The second comment regarding the petition relates to the fact that Article 46(1) of the Convention refers to it as *"lodged,"* which means that it should be considered just as it was submitted and if, at that time, it meets the requirements set out in this provision, it should be admitted. Accordingly, it is at that moment – the moment of its submission – when it should have complied with the requirement concerning the prior exhaustion of domestic remedies established in Article 46(1)(a) of the Convention and, only if this is so, the petition *"lodged"* may be *"admitted"* by the Commission.

Similarly, Article 46(1)(b) of the Convention is based on the same concept since it establishes that, for the petition to be admitted, it must have been *"lodged within a period of six months from the date on which the party alleging violation of his rights was notified of the final judgment."* Undoubtedly, it should be understood that this should be the judgment handed down on the last remedy that was filed, with no other remedies that may be filed. In other words, the time frame indicated for lodging the petition is calculated from the date of notification of the final decision of the domestic authorities or courts on the remedies that have been filed before them and, consequently, these may have resulted in the State's international responsibility, which evidently implies that they must have been exhausted when the petition was *"lodged."*

Meanwhile, Article 26(1) of the Commission's Rules of Procedure stipulates that the initial processing is carried out of the petitions *"that fulfill all the requirements set forth,"* and such petitions must indicate, as established by the above-mentioned Article 28(h), the *"steps taken to exhaust domestic remedies, or the impossibility of doing so,"* and if they do not meet this requirement, *"the Commission[, as established in Articles 26(2) and 29(1)(b) of these Rules of Procedure,] may request the petitioner or his or her representative to fulfill them."* Moreover, according to the said Article 46(1)(b) of the Convention, the Commission should consider, only those petitions *"lodged within a period of six months from the date"* of notification of the decision that exhausted the domestic remedies.

Based on all the above, it can be concluded that, ultimately, compliance with the said rule of prior exhaustion of domestic remedies constitutes a requirement that the petition must meet in order to be *"lodged."*

### **C. Study and initial processing by the Commission**

However, in addition to benefitting both the State and the presumed victim or the petitioner and representing an obligation for the latter, the rule of prior exhaustion of domestic remedies also entails an obligation for the Commission. Indeed, according to Article 26(1) of the Commission's Rules of Procedure, "*[t]he Executive Secretariat of the Commission shall be responsible for the study and initial processing of petitions lodged before the Commission that fulfill all the requirements set forth in the Statute and in Article 28 of these Rules of Procedure.*" Meanwhile, and as already indicated, Articles 26(2) and 29(1)(b) of the text add that "*[i]f a petition or communication does not meet the requirements set forth in these Rules of Procedure, the Executive Secretariat may request the petitioner or his or her representative to fulfill them.*"

Furthermore, Article 29(1) of those Rules of Procedure establishes that, "*[t]he Commission, acting initially through the Executive Secretariat, shall receive and carry out the initial processing of the petitions presented*" and adds that the Commission must register each petition and "*record the date of receipt on the petition itself and acknowledge receipt to the petitioner.*" Lastly, according to Article 30(1) of this instrument, "*[t]he Commission, through its Executive Secretariat, shall process the petitions that meet the requirements set forth in Article 28 of these Rules of Procedure.*"

Consequently, the steps taken by the Executive Secretariat, acting on behalf of the Commission, as regards the petition that has been "*lodged*" are not limited merely to verifying whether it includes the required information; rather it must carry out the "*study and initial processing*" of the petition, provided that it "*fulfill[s] all the requirements set forth,*" including, evidently, the most important, namely, that "*the remedies under domestic law have been pursued and exhausted in accordance with generally recognized principles of international law.*" Thus, the Commission, acting through its Executive Secretariat, must carry out an initial control of conventionality of the petition, ensuring that it meets the requirements established in the Convention in order to be considered "*lodged.*"

Reasonably, the foregoing infers that the domestic remedies must have been exhausted before the petition is lodged before the Commission because, to the contrary, the logic and need for the "*study and initial processing*" by the Commission's Executive Secretariat cannot be understood, or the reason why the petitioner may be requested to complete it, or why the petitioner should indicate the steps taken to exhaust domestic remedies; furthermore, the time frame indicated for its presentation would be meaningless.

Lastly, bearing in mind that the Commission's function consists in studying the petition, requesting its completion, and processing it, it must be concluded that all of this must be carried out in keeping with the terms in which the petition has been "*lodged.*" Thus, it can be affirmed that, just as "*it is not the task of the Court, or of the Commission, to identify ex officio the domestic remedies that remain to be exhausted, so that it is not incumbent on the international organs to rectify the lack of precision of the State's arguments,*"<sup>25</sup> it is not their task to rectify the petition or accord it a broader scope than the one it expresses and requires. Thus, the Commission must abide by what is requested of it.

This thesis is supported by the provisions established for the situation in which it is not necessary, or it is impossible, to exhaust such remedies previously. In this regard,

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<sup>25</sup> Case of Cruz Sánchez et al. v. Peru. Preliminary objections, merits, reparations and costs. Judgment of April 17, 2015. Series C No. 292, para. 49.

Article 32(2) of the Commission's Rules of Procedure indicate that "*[i]n those cases in which the exceptions to the requirement of prior exhaustion of domestic remedies are applicable, the petition shall be presented within a reasonable period of time, as determined by the Commission. For this purpose, the Commission shall consider the date on which the alleged violation of rights occurred and the circumstances of each case.*" In other words, under that alternative, the Commission must also consider the date on which the alleged violation occurred, which obviously must have happened prior to the submission of the petition.

Consequently, the Commission's function when a petition is lodged confirms that the requirement of prior exhaustion of domestic remedies must be met before it acts.

#### **D. Response or observations of the State**

Article 30(1) and (2) of the Commission's Rules of Procedure indicate that "*[t]he Commission, through its Executive Secretariat, [...] shall forward the relevant parts of the petition to the State in question.*"

Evidently, the relevant parts forwarded to the State must include, as indicated in Article 28(h) of these Rules of Procedure, information on "*[a]ny steps taken to exhaust domestic remedies, or the impossibility of doing so as provided in Article 31 of these Rules of Procedure.*" And Article 30(3) cited above adds that "*[t]he State shall submit its response within two months from the date the request is transmitted*"; a response that, evidently, must contain the preliminary objection of absence of prior exhaustion of domestic remedies by the presumed victim or the petitioner, if the State wishes to file this objection.

Moreover, similarly, Article 31(3) of the Commission's Rules of Procedure stipulates that "*[w]hen the petitioner contends that he or she is unable to prove compliance with the requirement indicated in this article, it shall be up to the State concerned to demonstrate to the Commission that the remedies under domestic law have not been previously exhausted, unless that is clearly evident from the record.*"

In other words, if the petitioner alleges in his petition that he is unable to prove that he has previously exhausted the domestic remedies, the State may contest this allegation, in which case it must prove that they have not been exhausted, provided that this is not evident from the case file. It is in relation to this possibility that the Court's assertion that, "*[w]hen arguing the failure to exhaust domestic remedies, the State must specify the domestic remedies that remain to be exhausted, and prove that these remedies were available, adequate, appropriate and effective,*"<sup>26</sup> should be understood.

Nevertheless, it should be recalled that, logically, also in the case – which is not expressly considered in the Commission's Rules of Procedure – that the petitioner indicates in his petition that he has previously exhausted the domestic remedies (that is, he has met the requirements of Article 46(1)(a) of the Convention), the State may file the objection that this has not occurred.

Thus, it is clear that compliance with the rule of prior exhaustion of domestic remedies or the impossibility of complying with it must be indicated in the petition, because, otherwise, the State could not respond to this. In other words, it is only if the petition

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<sup>26</sup> *Case of Cruz Sánchez et al. v. Peru. Preliminary objections, merits, reparations and costs. Judgment of April 17, 2015. Series C No. 292, para. 49.*

indicates that this rule has been complied with or that it is impossible to do so, that the State may argue that it has not been complied with and, in this case, it must prove the availability, adequacy, appropriateness and effectiveness of the domestic remedies that were not exhausted, all of which shows, once again, that this requirement must have been met previously; that is, before drawing up the petition the relevant parts of which are forwarded to the State precisely so that it may respond to them.

Furthermore, Article 30(5) and (6) of the Commission's Rules of Procedure point in the same direction. Indeed, they establish that "*[p]rior to deciding upon the admissibility of the petition, the Commission may invite the parties to submit additional observations, either in writing or in a hearing, as provided for in Chapter VI of the [...] Rules of Procedure,*" which leaves no margin of doubt that the said "*additional observations*" must relate to the petition, as it was "*lodged*" and not constitute a new petition or modify the original one, unless, as is logical, this entails its withdrawal.

Consequently, it is undeniable that this response by the State logically and necessarily must relate to the petition that was "*lodged*" before the Commission, and that it is at that moment, and not afterwards, that the legal proceedings, or the adversarial proceedings, as regards the exhaustion of domestic remedies are instituted.

And, for the same reason, it is at that moment that the domestic remedies must have been exhausted or that the petitioner indicates the impossibility of exhausting them. To affirm that those remedies could be exhausted after the petition has been "*lodged*" and, consequently, notified to the State, would affect the essential procedural balance and would leave the State defenseless, because it could not file the pertinent preliminary objection in time and in due form.

It is in this context that the criterion "*consistently affirmed [by the Court that] an objection to the jurisdiction of the Court based on the supposed failure to exhaust domestic remedies must be filed at the appropriate procedural opportunity; that is, during the admissibility stage of the proceedings before the Commission*"<sup>27</sup> should be understood.

## **E. Admissibility of the petition**

The preceding consideration is also evident from Article 31(1) of the Commission's Rules of Procedure, which establishes that "*[i]n order to decide on the admissibility of a matter, the Commission shall verify whether the remedies of the domestic legal system have been pursued and exhausted in accordance with the generally recognized principles of international law.*"

This provision requires the Commission to "*verify,*" that is, to confirm [Note: *verificar-comprobar*<sup>28</sup> in the Spanish text], the filing and exhaustion of the domestic remedies, in order to "*decide*" on admissibility. And, this is logical, because that decision could be not to admit the petition because such remedies have not been exhausted. This means that, in order to take a decision on the admissibility of the petition, the Commission must verify whether the rule of prior exhaustion of domestic remedies has been complied with and, if not, the corresponding decision would be to declare the petition inadmissible. The essential requisite that enables the Commission to decide on the

<sup>27</sup> *Case of Cruz Sánchez et al. v. Peru. Preliminary objections, merits, reparations and costs.* Judgment of April 17, 2015. Series C No. 292, para. 49.

<sup>28</sup> *Diccionario de la Lengua Española, Real Academia Española*, 23<sup>rd</sup> edition, October 2014.

admissibility of the petition is, thus, the verification it must make that the petition has complied with the rule of prior exhaustion of domestic remedies, and not merely that this rule has been complied with.

In addition, it should be noted that, although it is logical that the preliminary objection of prior failure to exhaust domestic remedies should be filed during the procedure on the admissibility of the petition – which extends from the date the petition is received and processed by the Commission, through its Executive Secretariat, until the moment at which the Commission rules on its admissibility – this does not mean that it should be at this latter moment (that is, at the end of this procedure) when the said requirement should have been met. It only means that, at that moment, the Commission must rule on or rather “*verify*”<sup>29</sup> whether it was met when the petition was lodged.

This is evident if it is considered that Article 36(1) of the Commission’s Rules of Procedure establishes that “*[o]nce it has considered the positions of the parties, the Commission shall make a decision on the admissibility of the matter.*”

Hence, it is indisputable that the moment at which the Commission rules on the admissibility of the petition is distinct from the moment when it is lodged or completed. This is clear when it is recalled that the Commission’s Rules of Procedure establish an “*initial processing*”<sup>30</sup> of the petition, that the petition must be “*register[ed]*,”<sup>31</sup> and that the “*relevant parts*”<sup>32</sup> must be forwarded to the State. It is only after the State has submitted its observations that the Commission determines the admissibility of the petition and, to this end, “*shall verify*,”<sup>33</sup> that is, confirm, that the corresponding requirements have been met – including those relating to the prior exhaustion of domestic remedies – and, consequently, “*shall decide*” on admissibility or inadmissibility.

In short, the Commission’s Rules of Procedure do not establish that it is when the Commission decides on the admissibility of the petition that the domestic remedies should have been exhausted. Rather, to the contrary, they indicate that it is when the Commission “*shall verify*” whether such remedies were filed and exhausted in a timely manner or whether this was unnecessary and, on this basis, “*shall decide*” – in other words, make a second control of conventionality of the petition, checking it against the provisions of the Convention as regards the requirements that should have been met – and, thus, it may either be admitted or rejected.

## **F. The Court’s ruling**

Lastly, in relation to the Court’s function as regards compliance with the requirements that the petition must meet, it should be recalled that, according to Article 61(2) of the Convention, “*[i]n order for the Court to hear a case, it is necessary that the procedures set forth in Articles 48 and 50 shall have been completed.*”

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29 Article 31(1) of the Commission’s Rules of Procedure.

30 Article 29 of the Commission’s Rules of Procedure.

31 *Idem*.

32 Article 30(2) of the Commission’s Rules of Procedure.

33 Article 31(1) of the Commission’s Rules of Procedure.

Thus, the Court must verify that the requirement of prior exhaustion of domestic remedies has been duly complied with before the Commission. As the Court has asserted, "*in matters that it is hearing, the Court has the authority to carry out a control of the legality of the Commission's actions,*"<sup>34</sup> and that it "*has the authority to review whether the Commission has complied with the statutory and regulatory provisions, as well as those of the Convention.*"<sup>35</sup>

And it could not be otherwise, because if it were not so, the Commission would be accorded the broadest possible authority to take an exclusive and final decision on the admission or rejection of a petition, which would clearly mean that this power would be discretionary and could even be arbitrary, undermining the jurisdiction of the Court, because, in this hypothesis, the Court would have no alternative but merely to be an entity that confirms or observes, without even ratifying, the actions of the Commission, and there can be no doubt that this is not in keeping with the letter and spirit of the said Article 61(2) of the Convention.

**G. Consequences of considering the rule of prior exhaustion of domestic remedies as a requirement for the admissibility of the petition and not a requirement of the petition itself**

In addition to the above considerations, it should be reiterated that if it were not compulsory to have exhausted the domestic remedies before lodging the petition, it would be permissible that, at least for some time – that is, between the moment at which the petition is lodged and the moment at which the decision is taken on its admissibility (which in many situations may be considered extremely lengthy) – the same case could be dealt with simultaneously by both the domestic jurisdiction and the international jurisdiction. This would evidently render the statement in the second paragraph of the Preamble meaningless, and even the rule of prior exhaustion of domestic remedies as a whole. In other words, in this situation, the inter-American jurisdiction would not reinforce or be complementary to the domestic jurisdiction, but rather would substitute it or, at least, could be used to bring pressure to bear on the latter and, clearly, this is not what the Convention seeks.

Moreover, it might constitute an incentive, which could be considered perverse, to lodge petitions before the Commission when the said requirement has not been met in the hope that it can be complied with before the Commission decides on their admissibility and, evidently, this was not anticipated or sought by the Convention.

In addition, this begs the question of whether the "*study and initial processing*" of the petition is required, if it could be lodged without having previously exhausted the domestic remedies. Indeed, if this requirement was only compulsory when deciding on the admissibility of the petition, it is legitimate to question why it would be necessary to make an initial study of the petition and, furthermore, what would be the reason for and the practical effect of the Convention making a distinction between the moment of the lodging of the petition and the moment of its admissibility. Likewise, if it is considered that the said requirement or rule must be complied with when the decision on the admissibility of the petition is taken and not when it is lodged, it is logical to question the meaning of the petition itself.

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34 *Case of Cruz Sánchez et al. v. Peru. Preliminary objections, merits, reparations and costs. Judgment of April 17, 2015, para. 37.*

35 *Case of Cruz Sánchez et al. v. Peru. Preliminary objections, merits, reparations and costs. Judgment of April 17, 2015, para. 75.*

It should also be noted that, if the criterion that this compliance should have taken place at the time the petition is lodged or completed is not respected and, to the contrary, the thesis is adopted that compliance is determined when the Commission decides on the admissibility of the petition, this would result in situations of evident injustice or arbitrariness, insofar as the moment of this compliance would ultimately depend not on the victim or the petitioner, but on the Commission's ruling when deciding on the admissibility or inadmissibility of the petition. Thus, the requirement would evidently not be the same in all cases, or known with due anticipation.

## **II. THE FACTS RELATING TO THE OBJECTION OF PRIOR FAILURE TO EXHAUST DOMESTIC REMEDIES**

Based on the norms that have been mentioned, the relevant facts relating to the objection of non-compliance with the rule of prior exhaustion of domestic remedies are as follows.

### **A. Those set out in the petition**

*The petition of March 27, 2009, indicated that "[i]n this case, the petitioner ha[d] duly exhausted the ordinary remedies of the domestic jurisdiction because, as established in the third and fourth paragraphs of article 521 of the Code of Criminal Procedure, in extradition proceedings, there is a single entity that decides a request of this nature[.] In other words, the jurisdictional extradition proceedings had concluded with the final judgment delivered by the Second Transitory Criminal Chamber of the Supreme Court of Justice which declared that the extradition request was admissible."*

As revealed by the above, the petitioner expressly indicated that, prior to the petition, he had exhausted the remedies established in the domestic jurisdiction, and did not make any mention of the situations indicated in Article 46(2) of the Convention in which it is unnecessary to apply the requirement under Article 46(1)(a) of this instrument. In other words, the situations in which it is not necessary to have previously exhausted the domestic remedies in order to lodge a petition before the Commission.

### **B. Those contained in the State's response or observations**

Meanwhile, in its observations on this petition presented on April 29, 2009, the State indicated that *"Wong Ho Wing ha[d] not complied with exhausting the remedies of the domestic jurisdiction; thus, this party ask[ed] the Inter-American Commission to declare the inadmissibility of this petition pursuant to Article 46 of the American Convention on Human Rights, because the 56<sup>th</sup> Criminal Court of Lima decided to declare that the application for habeas corpus was well-founded in part and that the decision issued by the Second Transitory Criminal Chamber of the Supreme Court of Justice on January 20, 2009, was null, and that the Chamber should issue a new decision"* and that *"[t]his habeas corpus proceeding was still being processed."*

The note added that *"[i]n addition, the extradition proceedings with regard to Wong Ho Wing have not concluded because, pursuant to article 515 of the new Code of Criminal Procedure, it is the Peruvian Government that takes the final decision on the extradition by means of a Supreme Decision issued with the agreement of the Council of Ministers, following a report of the Official Commission on Extraditions and Prisoner Transfers."*

In this regard, the note ends by indicating that: “[i]n a decision of February 12, 2009, the 56<sup>th</sup> Criminal Court of Lima ordered the temporary suspension of the extradition procedure against the Chinese citizen, Wong Ho Wing, until the habeas corpus proceeding had concluded.”<sup>36</sup>

Thus, the State cited three reasons to support its position on the inadmissibility of the petition; namely, the ongoing processing when the petition was lodged of an application for *habeas corpus* filed by the petitioner himself; the processing of the extradition procedure, also at that time, and, lastly, the suspension of the procedure by a court order.

### **C. Those relating to the Admissibility Report**

The Admissibility Report of November 1, 2010, indicates that “*the presumed victim first argued the failure to comply with the legal and constitutional requirements for admission of the extradition request throughout the advisory proceeding decided in the final instance by the Supreme Court of Justice on January 27, 2010*”; [s]econd, he submitted two applications for habeas corpus against the members of the Second Transitory Criminal Chamber and of the Permanent Criminal Chamber of the aforementioned Supreme Court, pointing to alleged defects in the advisory proceeding and an alleged inadequate evaluation of the guarantees provided by the Government of the People’s Republic of China concerning the non-application of the death penalty,” and added that “[i]n addition, the presumed victim filed a preventive application for habeas corpus against the President of the Republic and the Council of Ministers, which has been pending a final decision on constitutional injury from the Constitutional Court since July 14, 2010.”

The Admissibility Report also adds that “[b]ased on the foregoing considerations, the [Commission] consider[ed] that the presumed victim [had] exhausted the available remedies under domestic law aimed at rectifying the alleged irregularities in the advisory proceeding in which the final decision was taken by the Permanent Criminal Chamber of the Supreme Court of Justice on January 27, 2010.” Thus, the Commission concluded that, “[c]onsequently, the requirement established in Article 46(1)(a) of the American Convention has been met.”

First, attention should be drawn to the fact that the Admissibility Report refers to facts and/or judicial actions that took place after the petition had been lodged and to the corresponding observations of the State as grounds for the decision to admit the petition. In other words, it follows its consistent practice of determining whether the domestic remedies had been exhausted prior to this report, and not whether they had been exhausted prior to the petition.<sup>37</sup>

It should also be pointed out that, in order to found the decision issued in this report, the Commission does not refer to the provisional measures that, on May 28, 2010, had ordered the State to refrain from extraditing Wong Ho Wing until December 17, 2010, to allow the Inter-American Commission on Human Rights to examine and decide on petition P-366-09 lodged before that organ on March 27, 2009. In other words, the report does not consider that the possible extradition of Wong Ho Wing, and therefore

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36 See also paras. 18 and 22 of the Judgment.

37 Cf. para. 19 of the Judgment.



the corresponding proceedings, had been suspended on the orders of the Court at the request of the Commission itself.

### III. CONSIDERATIONS ON THE JUDGMENT

The Judgment refers to two of the arguments made by the State with regard to its preliminary objection. One consists in the fact that, when the initial petition was lodged, the domestic remedies had not been exhausted, and the other to the fact that, when deciding on admissibility, the Commission did not take into account that other applications for *habeas corpus* filed by the representative were being processed.<sup>38</sup> This opinion is only concerned with the first argument, regarding which the Judgment gives four reasons to reject the preliminary objection filed by the State based on the petitioner's failure to comply with the obligation to exhaust the domestic remedies before lodging the petition.

The first reason is stated as follows: "[a]s the State mentioned, the decisions that, according to the Commission, exhausted the domestic remedies were adopted after the initial petition had been lodged. However, the Court notes that, by requiring that *"admission by the Commission of a petition or communication [...] shall be subject to" the said exhaustion (underlining added), Article 46 of the American Convention, should be interpreted in the sense that exhaustion of the remedies is required when deciding on the admissibility of the petition and not when this is lodged.*"<sup>39</sup>

Thus, the Judgment is aligned with the Court's invariable position that the requirement of prior exhaustion of domestic remedies must be met at the time the Commission takes a decision on the admissibility of the petition and not when the latter is lodged; a position that, as indicated in Part I of this document – and especially in its sections B, C and D – this opinion does not share, above all, because it runs counter to the express provisions of Article 46(1)(a): by disregarding the qualifying term of "*lodged*" attributed to the petition in order to indicate that it is with regard to the petition as lodged that the admissibility or inadmissibility should be declared; by not weighing the State's observations and the fact that these could only refer to the petition as lodged, which established the adversarial proceedings on the matter, and regarding which the Commission should take a decision and, lastly, by not considering that, in order to decide on admissibility, the Commission should "*verify*," – that is, confirm – that the requirement of prior exhaustion of domestic remedies has been met, which, undoubtedly and consequently, should have occurred before that moment.

It should also be noted that the Judgment appears to contain a contradiction because, when setting out the Court's second reason for rejecting the preliminary objection in question, it affirms that: "*[o]nce the petition has been forwarded to the State, the admissibility stage starts and, consequently, the adversarial proceedings on whether the petition meets the admissibility requirements, including the requirement of exhaustion of domestic remedies,*" and that "*it is when examining admissibility that the Commission decides whether or not the petition complies with this requirement, or whether any of the exceptions established in the Convention are applicable.*"<sup>40</sup> This appears to suggest that the Judgment follows the thesis set out in this opinion; namely, that it is on the adversarial

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38 Cf. para. 23 of the Judgment.

39 Para. 25 of the Judgment.

40 Para. 26 of the Judgment.

proceedings established or constituted by the petition and the corresponding observations of the State that the Commission's decision on the admissibility or inadmissibility of the "lodged" petition should be based.

However, this is not so. The second reason indicated in the Judgment to reject the said preliminary objection is that *"the Commission's Rules of Procedure make a distinction between the time at which the initial processing is carried out, when it only examines whether the petition includes information on 'any steps taken to exhaust domestic remedies, or the impossibility of doing so,' and the moment when it decides on admissibility, when it determines whether such remedies were exhausted, or applies an exception to this requirement."*<sup>41</sup> Thus, the Judgment appears to lessen the obligation contained in Article 28(h) of the Commission's Rules of Procedure or to place the emphasis on the fact that the petition must include "information," rather than that this information must be specifically on "any steps taken to exhaust domestic remedies, or the impossibility of doing so." In other words, it appears that, according to the Judgment, it is sufficient that a general mention is made of some information on such steps in order to meet the requirement to consider the petition, and not that the steps taken up until that time – that is, up until the lodging of the petition - to exhaust such remedies are indicated clearly and specifically.

To the contrary, this opinion affirms that the obligation established in Article 28(h) is not merely that of providing "information" that steps were taken, but rather to provide specific "information" on "any steps taken to exhaust domestic remedies, or the impossibility of doing so." Hence, the obligation consists in describing the steps specifically taken which mean that the said remedies have already been exhausted or indicating the impossibility of exhausting them. This obligation does not consist, consequently, in providing general information that steps were taken, but in providing specific information on the steps that were taken and that prove that either the domestic remedies were exhausted, or that it was impossible to do this.

The third reason cited by the Judgment to reject the objection in question is indicated as follows: *"[t]he Court recalls that the rule of prior exhaustion of domestic remedies was conceived in the interests of the State, because it seeks to exempt it from responding before an international organ for acts it is accused of before it has had the occasion to remedy them by its own means. Nevertheless, the subsidiary nature of the inter-American system is not affected by the fact that the analysis of compliance with the requirement of exhaustion of domestic remedies is made based on the situation when a decision is taken on a petition's admissibility. To the contrary, if any domestic remedy is pending, the State has the opportunity to resolve the situation alleged during the admissibility stage."*<sup>42</sup>

With this assertion, the Judgment forgets that compliance with the rule of prior exhaustion of domestic remedies is basically an obligation that, even though it may benefit the State or be in its interests, is essentially required of the petitioner; in other words, it is the petitioner who must comply with it. The Judgment, to the contrary, seems to understand that this rule is a State obligation, because it indicates that, if any remedy is pending, the State can resolve or rectify the situation. However, with this phrase, the Court is also providing an incentive for lodging petitions before the Commission even if domestic remedies have not been exhausted, because these can be exhausted later; thus making it

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41 Para. 26 of the Judgment.

42 Para. 27 of the Judgment.

possible for the domestic jurisdiction to co-exist with the inter-American jurisdiction in the same case.

In addition, the Judgment appears to disregard the fact that it is not for the State to exhaust the remedies, but rather, when appropriate, it corresponds to the State to decide the situation alleged in the remedies that the petitioner has filed in its jurisdiction and, if the petitioner has not filed any remedies or if they are pending, it is not incumbent on the State to provide any solution, because its international responsibility has not yet been engaged.

The fourth reason cited by the Judgment for not admitting the objection in question is as follows: "*[i]n addition, the Court considers that it would be contrary to the principle of procedural economy if petitions were not admitted based on the fact that, at the time of the initial presentation, domestic remedies had not been exhausted and if, when the admissibility of these remedies was analyzed, they have been exhausted. The European Court of Human Rights [...] has ruled similarly in some cases, as has the International Court of Justice in relation to access to its jurisdiction.*"<sup>43</sup>

With the reference to procedural economy, the Judgment provides more direct encouragement. Hence, it is necessary to reiterate the assertion made previously in this opinion that, if it was not compulsory to have exhausted domestic remedies before lodging the petition, it would be permissible that, at least for a time, the same case could be examined simultaneously by the domestic jurisdiction and the international jurisdiction, and this could constitute a perverse incentive to lodge petitions before the Commission even when the said requirement has not been met, in the hope that it can be complied with before the Commission takes a decision on their admissibility. Evidently, that possibility was not envisaged or sought by the Convention.

Furthermore, regarding the references to precedents in the case of the European Court of Human Rights and the International Court of Justice made by the Judgment in support of this decision,<sup>44</sup> it is sufficient to point out that neither the European Convention of Human Rights nor the Rules of Procedure of the International Court of Justice contain a provision such as that of Article 46(1)(a) of the Convention. In addition, both these bodies are courts rather than a non-judicial entity, as in the case of the Commission, before which compliance with the requirement in question must be substantiated. This means that, in the European case, the rule is that, before resorting to the European Court of Human Rights the remedies of the domestic jurisdiction must be exhausted. This is the general rule, admitting the exception only if this exhaustion is achieved shortly after the presentation of the case. And, in the case of the International Court of Justice, the cases referred to relate to recognition of that court's jurisdiction and not to the filing of a preliminary objection concerning the prior exhaustion of domestic remedies. Consequently, the cases referred to do not represent precedents.

## CONCLUSION

In short and as pointed out previously, as Article 46(1)(a) of the Convention clearly states and based on the congruent understanding of Articles 26(1) and 2, 28(h), 30(1),(2) and (3), 31 and 32 of the Commission's Rules of Procedure, which interpret the said article of the Convention, it can be concluded, unequivocally, that compliance

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43 Para. 28 of the Judgment.

44 Idem.

with the rule of prior exhaustion of domestic remedies must have occurred at the time the petition is lodged before the Commission, taking into consideration, also, any observations made by the State when responding to the relevant parts of the petition forwarded to it.

However, this was not considered to be so in the Judgment, which, to the contrary, indicates that the decision on the objection filed by the State based on the petitioner's failure to comply with this rule was taken by verifying that this requirement had been met when the Commission took a decision on the petition's admissibility. Hence, the ruling infringes the provisions of Article 46(1)(a) of the Convention and the said regulatory provisions.

The undersigned also dissents from the Judgment because, the *"reinforcing or complementing"* nature of the Convention that inspires the inter-American system of human rights as a whole is nullified, encouraging the lodging of cases before the system without the domestic remedies having been exhausted previously, which will result in such cases being examined simultaneously by the domestic jurisdiction and the inter-American jurisdiction.

Proceeding in this way not only makes the rule of prior exhaustion of domestic remedies meaningless and inapplicable, but is also contrary to the Court's affirmation that it *"must safeguard the just balance between the protection of human rights, the ultimate purpose of the system, and the legal certainty and procedural balance that ensure the stability and reliability of the international protection."*<sup>45</sup>

Consequently, it is in this sense that the undersigned shares the assertion of the Court itself as regards *"the tolerance of 'evident violations of the procedural rules established by the Convention itself [and, it should be added, by the Rules of Procedure of the Court and of the Commission,] would entail the loss of authority and credibility essential for the organs responsible for administering the system for the protection of human rights."*<sup>46</sup> And this is so, because it is precisely these rules that guarantee the impartiality and independence of the Court when imparting justice in cases relating to human rights.

Strict compliance with the rule of prior exhaustion of domestic remedies is not, therefore, a mere legal formality. Rather, respect for this rule strengthens and enhances the inter-American human rights system, because it guarantees the principles of legal certainty, procedural balance and complementarity that sustain the system, leaving no margin or, at least, the smallest margin possible, for the perception that the Court's rulings do not respond, strictly and exclusively, to considerations of justice – beyond the explicable discrepancies that they may elicit, particularly from those who consider them adverse.

Considering that its case law is binding only for the State that has undertaken to comply with the *"judgment of the Court"* in the case to which it is a party,<sup>47</sup> and that, for the other States Parties to the Convention it is only a subsidiary source of public

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45 Case of Cruz Sánchez et al. v. Peru. Preliminary objections, merits, reparations and costs. Judgment of April 17, 2015. Series C No. 292, para. 37.

46 Case of Díaz Peña v. Venezuela. Preliminary objection, merits, reparations and costs. Judgment of June 26, 2012. Series C 244, para. 43.

47 Article 68 of the Convention: <sup>1</sup> The States Parties to the Convention undertake to comply with the judgment of the Court in any case to which they are parties. <sup>2</sup> That part of a judgment that stipulates compensatory damages may be executed in the country concerned in accordance with domestic procedure governing the execution of judgments against the State."

international law, in other words, a "*subsidiary means for the determination of rules of law*,"<sup>48</sup> this dissenting opinion is evidently issued in the hope that it contributes to the reflection on the rule of prior exhaustion of domestic remedies and, thus, leads to the Court's case law in this regard adopting the criteria described above in the near future.

Moreover, this opinion evidently takes into account, as also did another opinion,<sup>49</sup> of the fact that one of the particular imperatives faced by a tribunal such as the Inter-American Court is that of acting with full awareness that, as an autonomous and independent entity, there is no superior authority that controls it, which means that, true to the important role assigned to it, it must strictly respect the limits of this role, and remain and evolve in the sphere inherent to a jurisdictional entity.

Without doubt, acting as indicated above is the best contribution that the Court can make to the development and consolidation of the inter-American system of human rights – a requirement *sine qua non* for the proper safeguard of those rights – an institutional framework within which it is incumbent on the Commission to promote respect for and to defend those rights,<sup>50</sup> on the Court to interpret and apply the Convention in the cases that are submitted to it,<sup>51</sup> and on the States to amend the Convention if they consider this necessary.<sup>52</sup> The development and strength of this system is rooted in compliance by each of them with their specific roles.

Eduardo Vio Grossi  
Judge

Pablo Saavedra Alessandri  
Secretary

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<sup>48</sup> Article 38 of the Statute of the International Court of Justice: "1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply: a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting states; b) international custom, as evidence of a general practice accepted as law; c) the general principles of law recognized by civilized nations; d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law. 2. This provision shall not prejudice the power of the Court to decide a case *ex aequo et bono*, if the parties agree thereto."

Article 59 of this Statute: "[t]he decision of the Court has no binding force except between the parties and in respect of that particular case".

<sup>49</sup> Record of complaint submitted to the Court on August 17, 2011, by Judge Eduardo Vio Grossi and Dissenting opinion of this judge, *Case of Barbani Duarte et al. v. Uruguay. Merits, reparations and costs. Judgment of October 13, 2011. Series C No. 234.*

<sup>50</sup> First phrase of Article 41 of the Convention: "[t]he main function of the Commission shall be to promote respect for and defense of human rights."

<sup>51</sup> Article 62(3) of the Convention: "[t]he jurisdiction of the Court shall comprise all cases concerning the interpretation and application of the provisions of this Convention that are submitted to it, provided that the States Parties to the case recognize or have recognized such jurisdiction, whether by special declaration pursuant to the preceding paragraphs, or by a special agreement."

<sup>52</sup> Article 76 of the Convention: "1. Proposals to amend this Convention may be submitted to the General Assembly for the action it deems appropriate by any State Party directly, and by the Commission or the Court through the Secretary General. 2. Amendments shall enter into force for the States ratifying them on the date when two-thirds of the States Parties to this Convention have deposited their respective instruments of ratification. With respect to the other States Parties, the amendments shall enter into force on the dates on which they deposit their respective instruments of ratification."

Article 39 of the Vienna Convention on the Law of Treaties: "General rule regarding the amendment of treaties. A treaty may be amended by agreement between the parties. The rules laid down in Part II apply to such an agreement except in so far as the treaty may otherwise provide."