

**ORDER OF THE
INTER-AMERICAN COURT OF HUMAN RIGHTS
OF MAY 28, 2010**

**REQUEST FOR PROVISIONAL MEASURES SUBMITTED BY
THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS
WITH REGARD TO THE REPUBLIC OF PERU**

MATTER OF WONG HO WING

HAVING SEEN:

1. The brief of the Inter-American Commission on Human Rights (hereinafter "the Inter-American Commission" or "the Commission") of February 24, 2010, and its attachments, in which the Commission submitted to the Inter-American Court of Human Rights (hereinafter "the Inter-American Court" or "the Court") a request for provisional measures, in accordance with Article 63(2) of the American Convention on Human Rights (hereinafter "the American Convention" or "the Convention") and Article 27 of the Rules of Procedure of the Court¹ (hereinafter "the Rules of Procedure"), with the intention that the Court order the Republic of Peru (hereinafter "Peru" or "the State") to abstain from extraditing Wong Ho Wing (hereinafter "Mr. Wing") to the People's Republic of China (hereinafter "China" or the "requesting State") until the organs of the inter-American system (hereinafter, "inter-American system") have issued a final decision on the petition lodged with the Inter-American Commission under Article 44 of the Convention.
2. The note of February 26, 2010, in which the Secretariat of the Court (hereinafter "the Secretariat"), on the instructions of the acting President² of the Court in this matter (hereinafter "the acting President"), asked the State to forward, by March 3, 2010, at the latest: (i) any observations it considered pertinent on this request for provisional measures; (ii) a copy, duly translated into Spanish, of the decision of December 8, 2009, issued by the People's Supreme Court of the People's Republic of China (hereinafter "the People's Supreme Court of China"), and (iii) any other documentation it deemed pertinent so that the Court would have all the necessary information to consider the Inter-American Commission's request. It also asked the Commission to forward, by the same date, the said decision of the People's Supreme Court of China, as well as its observations on the implications of the said decision in relation to its request for provisional measures.

¹ Rules of procedure approved at the Court's eighty-fifth regular session held from November 16 to 28, 2009.

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

3. The brief of March 1, 2010, in which the State requested an extension of the time limit for presenting the additional information and the observations requested by the acting President in relation to the request for provisional measures.

4. The brief of March 3, 2010, in which the Inter-American Commission forwarded the observations requested by the acting President and advised that it did not have the decision he had requested (*supra* having seen paragraph 2).

5. The note of March 3, 2010, in which the Secretariat, on the instructions of the acting President, granted the extension requested by the State until March 8, 2010. Furthermore, it informed Peru that, on that date, it should also forward its observations on the Commission's brief of March 3, 2010.

6. The brief of March 5, 2010, in which the Commission presented additional information regarding the request.

7. The brief of March 8, 2010, and its attachments received the following day, in which Peru forwarded the requested observations and documents (*supra* having seen paragraphs 2, 3 and 5).

8. The note of March 24, 2010, with which the Secretariat forwarded to the parties the briefs of the Inter-American Commission and the State of March 5 and 8, 2010, respectively, together with their corresponding attachments.

9. The alleged facts on which the request for provisional measures presented by the Commission are based, namely:

(a) On January 20, 2009, the Supreme Court of Justice of Peru (hereinafter the "Supreme Court" or "CSJP") declared admissible an extradition request made by China against Mr. Wing, a Chinese citizen, who had been detained since October 27, 2008. This request was based on the alleged perpetration of the offenses of smuggling, customs tax evasion and bribery, under the laws in force in China. As a result of this decision, on January 21, 2009, Mr. Wing sent the Commission a request for precautionary measures, alleging that, if they were considered aggravated, the offenses of smuggling and customs tax evasion for which China was trying to extradite him could be punished by life imprisonment or even the death penalty;

(b) Mr. Wing's representative alleged that the extradition process had not complied with the legal requirements and that there were irregularities with regard to the time limits, the extradition hearing, and the participation of the defense counsel and the Public Prosecutor's office. He also mentioned aspects related to the incomplete or incorrect translations on which the CSJP decision was founded. Regarding the merits, he stated that, under Peru's law on criminal procedure, the Supreme Court should declare the extradition irreceivable because the grounds for denying extradition include: (i) that the minimum requirements of due process of law have not been guaranteed, and (ii) that the death penalty could be applied, and that guarantees have not be given that it will not be imposed;

(c) On January 27, 2009, the Commission asked the State for information on the reported situation. In its response of February 2, 2009, Peru indicated that Mr. Wing's life was not in imminent danger, because the extradition process was still being processed and that, in the absence of guarantees that the death penalty would not be imposed, the State would abstain from granting the extradition. Then, on February 6,

2009, Mr. Wing informed the Commission that he had filed an application for *habeas corpus* against the Supreme Court's decision of January 20, 2009. On the same date, Peru submitted additional information consisting in a letter of February 2, 2009, sent by a Chinese consular officer in Peru, in which the latter indicated that there was no possibility that life imprisonment or the death penalty would be imposed on Mr. Wing. In addition, the State asked the Commission to reject the precautionary measure as a result of the said application for *habeas corpus* and of the suspensive effect with which it was granted. On February 10, 2009, Mr. Wing stated, with regard to the communication from Peru, that the guarantee presented by China was not very credible, because a note from a consular officer did not bind the State and that, based on the seriousness of the accusations against him, the offense could indeed be punished with the death penalty;

(d) On March 27, 2009, Mr. Wing lodged a petition with the Inter-American Commission. On March 31, 2009, this organ granted precautionary measures in favor of Mr. Wing, based on the information that, in some circumstances, the offense of smuggling or customs tax evasion for which the extradition was requested, could result in the death penalty. On the same date, the Commission began processing petition P-366-09 and, applying the regulatory provision that permits reducing the time frames in exceptional situations, requested the State to submit its response within one month. The petition related to the State's alleged failure to comply with its international obligations, owing to the presumed irregularities in the processing of extradition in Peru, because the requirements of due process had not been complied with and neither had the guarantees that the death penalty would not be applied in case of extradition, as required by domestic law;

(e) On May 1, 2009, the State informed the Commission that the judicial authority had declared that the application for *habeas corpus* was partly founded and that the ruling of the CSJP of January 20, 2009, was null and void; hence, the said court would have to issue a new ruling;

(f) On January 27, 2010, the Supreme Court decided, *inter alia*, to declare that the request for extradition based on customs tax evasion and bribery was admissible, because the requirements of form and content had been fulfilled. In this regard, the Peruvian State conditioned the handing over of the requested Chinese citizen to the commitment by the competent Chinese authorities not to sentence him to death. The CSJP considered relevant the decision of the People's Supreme Court of China dated December 8, 2009, affirming that, should Mr. Wing be extradited, this punishment would not be imposed on him, and it concluded that there was no real danger that the death penalty would be applied. Moreover, it indicated that, although the Inter-American Commission had requested precautionary measures, the Inter-American Court had not issued an order for provisional measures. Consequently, the CSJP considered that "there is no order from a competent authority that obliges the State [...] to abstain from complying with the terms of the extradition treaty concluded with the People's Republic of China," and

(g) Mr. Wing advised that an application for preventive *habeas corpus* had been filed against the authorities of the Executive Branch who would make the final decision about his extradition process, so that they would abstain from taking a decision contrary to the rights of the possible beneficiary. This remedy was declared inadmissible and the decision was notified to the possible beneficiary on March 2, 2010.

10. The arguments of the Commission to justify its request for provisional measures, indicating, among other matters that:

- (a) The information in the case file allows it to be inferred that, if the offense of smuggling or customs tax evasion is of a serious nature, the applicable punishment is life imprisonment or the death penalty. Consequently, this request seeks to preserve the purpose of the petition submitted to the Commission and to ensure the effectiveness of the final decision it issues under the inter-American proceedings. Although the State has mentioned the existence of supposed guarantees that the death penalty will not be imposed, this could be a relevant issue in an eventual decision on merits that this request seeks to safeguard. Furthermore, although the possible beneficiary has not yet been sentenced to death, his extradition would subject him to the jurisdiction of a State that is outside the jurisdiction of the organs of the inter-American system;
- (b) Furthermore, there is *prima facie* evidence that could reveal irregularities and violations of due process in the extradition process, such as the fact that Mr. Wing's representative did not have access to the complete case file and the consequent difficulties for the exercise of his defense and for the presentation of relevant information that could be taken into account in the decision. Similarly, also in keeping with the standard of *prima facie* evaluation, the Commission mentioned that the representative had submitted arguments that could indicate that the Chinese authorities have not maintained a consistent position concerning the likelihood of the death penalty being imposed on the possible beneficiary. At first, these authorities stated that, owing to the nature of the offenses supposedly committed by Mr. Wing, there was no possibility that he would be sentenced to the death penalty or life imprisonment. However, the second note issued by the Chinese Embassy, which referred to the decision of the People's Supreme Court, indicated that "[the said court] will not hand down a death sentence [...], even if his crime would merit the death penalty by law";
- (c) The Chinese authorities did not attach to the initial extradition request the part of the criminal law that would allow the death penalty to be imposed. Also, the Commission emphasized the representative's arguments about the summary nature of the criminal proceedings that lead to the application of the death penalty in China, as well as the different declarations by international organizations, including the Committee against Torture, concerning the 1988 Law on the Preservation of State Secrets in the People's Republic of China, which prevents access to information on criminal justice and the application of the death penalty. Hence, the Commission affirmed that there is little possibility that the Peruvian State could exercise any type of control or require information with regard to what, in China, is considered a "State secret";
- (d) Despite the existence of precautionary measures in this matter, the extradition has been declared admissible, *inter alia*, based on the consideration that, to date, there has been no official decision that binds the Peruvian State and that prevents it from complying with the extradition treaty concluded with China. This shows that, despite the precautionary measures, the State continues to advance the extradition process, and the only aspect pending is the Government's decision which, according to the available information, could be issued at any time and give rise to Mr. Wing's immediate extradition. Consequently, the Commission indicated that an order for provisional measures was the most appropriate way to avoid this situation and to

guarantee the effectiveness of the eventual decisions on the merits of the petition adopted by the organs of the inter-American system, and

(e) In its opinion, "while discussions exist on the possible application of the death penalty to Mr. [...] Wing under the jurisdiction of a State over which the organs of the inter-American system have no competence whatsoever, it is admissible, provisionally, to adopt a position that allows his life and personal integrity to be preserved, because any other decision could result in irreparable damage." Hence, it considered that the requirements of Article 63(2) of the American Convention for the admissibility of this request had been satisfied.

11. The State's observations in relation to this request for provisional measures, among which it affirmed:

(a) In this case, a situation of extreme gravity and urgency to avoid irreparable damage does not exist, because the extradition process is still being processed before the Peruvian authorities. In this regard, the decision of the Criminal Chamber of the Supreme Court declaring the extradition admissible is of a consultative nature, because it is the Government that decides on the extradition by means of a supreme decision issued by the Council of Ministers, once the Official Commission on Extraditions and Transfer of Convicted Persons, composed of the Ministries of Justice and Foreign Affairs, have issued a final report. Consequently, this is a political process and it is not anticipated that the extradition is imminent;

(b) Peruvian law establishes that, in cases of crimes punishable by the death penalty in the requesting State, the only way in which passive extradition could proceed is if the requesting State offers guarantees that this punishment will not be applied. Hence, an extradition request will be rejected if it is requested for the perpetration of a crime for which the death penalty is established and the requesting State does not guarantee that this punishment will not be applied. In the instant case, in a decision of December 8, 2009, the People's Supreme Court of China undertook not to impose the death penalty on Sr. Wing, if he is extradited; and there are also two notes from diplomatic representatives, one from the Consul and the other from the Ambassador, giving the same guarantee. Consequently, in the Peruvian State's opinion, it has adequate and reiterated guarantees that the possible beneficiary will not be sentenced to death;

(c) The guarantees of due process established in the Convention have been respected at all times during the extradition process. Mr. Wing has used the mechanisms established by Peru's domestic laws for the protection of his rights by filing several remedies, some of which were decided in his favor. Moreover, among other procedural guarantees, he has had legal counsel and a translator, and access to the case files. In this regard, it underscored that, two applications for *habeas corpus* filed by Mr. Wing are still being processed. Also, he can still file an appeal against the declaration of the inadmissibility of the third application for *habeas corpus* that he filed on February 9, 2010. Consequently, Mr. Wing has been completely free to exercise the mechanisms of constitutional protection provided by the *habeas corpus* proceedings before the national jurisdiction in order to reclaim his rights that were allegedly violated, and

(d) The legal grounds cited by the Commission do not include any reference to the alleged violation of provisions of the conventions of the inter-American or any other system, but merely formulate observations and opinions about inter-State relations

and conducts. Consequently, Peru asks the Court to reject this request for provisional measures.

12. The Order of the acting President of March 24, 2010, in which he decided, *inter alia*:

1. To require the State, in accordance with the provisions in the fourth to seventh considering paragraphs, to abstain from extraditing Wong Ho Wing until this request for provisional measures has been decided by the Inter-American Court of Human Rights in plenary.

2. To order that this matter be examined by the Inter-American Court of Human Rights in plenary during its eighty-seventh regular session to be held at the seat of the Court from May 17 to 28, 2010.

13. The brief of April 27, 2010, and its attachments, in which Peru asked that the acting President "allow the Peruvian State to take the floor at the hearing [to be] held by the Court in plenary during its eighty-seventh regular session."

14. The note of May 3, 2010, in which, since no public hearing has been convened in the instant case, the Secretariat asked the State to formally clarify its request to the Court, so that the Court could consider it.

15. The brief of May 6, 2010, in which the State "withdr[ew] [its request] to take the floor" in response to the Secretariat's call for clarification.

16. The brief of May 10, 2010, with which the State forwarded the communication of the Embassy of the People's Republic of China in Peru of May 5, 2010, and its attachments, in which it indicated "the commitment of the Chinese Government not to sentence to death the Chinese citizen Wong Ho Yong or Huang He Yong" and forwarded various documents issued by the Ambassador Extraordinary and Plenipotentiary of the Republic of China in Peru and the Embassy's Chargé d'Affaires, "to be formally incorporated into the case file." These documents included the communication of April 22, 2010, addressed to the acting President, in which the requesting State indicated that "if he is declared guilty of the offense for which he would be prosecuted in the People's Republic of China, the death penalty would not be imposed on any grounds." Furthermore, in the same brief of May 10, the Peruvian State forwarded a communication from the Ministry of Foreign Affairs of April 26, 2010, addressed to the Ambassador of China in Peru, indicating that "owing to the current status of the procedure initiated by the said Chinese citizen before the [Commission], and because the Peruvian State scrupulously respects its international commitments with regard to human rights, it is incumbent on Peru to await the final ruling by this organ before adopting a final decision in the case."

17. The note of May 13, 2010, in which the Secretariat granted the Commission until May 18, 2010, to forward its observations on the documents provided by the State in this matter (*supra* having seen paragraph 16).

18. The brief of May 18, 2010, with which the State forwarded a "copy of the views of the United Nations Human Rights Committee concerning Communication No. 470/1991 submitted by Joseph Kindler against the State of Canada".

19. The brief of May 18, 2010, with which the Commission forwarded its observations on the information provided by the State with its brief of May 10, 2010.

CONSIDERING THAT:

1. Peru ratified the American Convention on July 28, 1978, and, pursuant to Article 62 thereof, accepted the compulsory jurisdiction of the Court on January 21, 1981.
2. Article 63(2) of the Convention establishes that “[i]n cases of extreme gravity and urgency, and when necessary to avoid irreparable damage to persons, the Court shall adopt such provisional measures as it deems pertinent, in matters it has under consideration. With respect to a case not yet submitted to the Court, it may act at the request of the Commission.”
3. Article 27 of the Rules of Procedure establishes, *inter alia*, that:
 1. At any stage of the proceedings involving cases of extreme gravity and urgency, and when necessary to avoid irreparable damage to persons, the Court may, at the request of a party or on its own motion, order such provisional measures as it deems pertinent, pursuant to Article 63(2) of the Convention.
 2. With respect to matters not yet submitted to it, the Court may act at the request of the Commission.

[...]
5. The Court, or if the Court is not sitting, the President, upon considering that it is possible and necessary, may require the State, the Commission, or the representatives of the beneficiaries to provide information on a request for provisional measures before deciding on the measure requested.
4. The Court has indicated that provisional measures have two dimensions: one preventive and the other protective.³ The preventive dimension of provisional measures falls within the framework of international litigations. In this regard, these measures have the object and purpose of preserving rights that are possibly at risk until the dispute has been decided. They are ordered to ensure the integrity and effectiveness of the decision on merits, thereby preventing any harm to the rights in litigation, a situation that could invalidate the final decision or impair its effectiveness. Thus, provisional measures allow the State concerned to comply with the final decision and, if applicable, proceed to make the reparations ordered.⁴ Regarding the protective dimension of provisional measures, this Court has indicated that provisional measures result in a real jurisdictional guarantee of a preventive nature, because they protect human rights, inasmuch as they seek to avoid irreparable damage to persons.⁵

³ Cf. *Case of Herrera Ulloa v. Costa Rica (“La Nación” Newspaper)*. Provisional measures with regard to Costa Rica. Order of the Inter-American Court of Human Rights of September 7, 2001, fourth considering paragraph; *Matter of Belfort Istúriz et al.* Request for provisional measures with regard to Venezuela. Order of the Inter-American Court of Human Rights of April 14, 2010, sixth considering paragraph, and *Matter of Giraldo Cardona et al.* Provisional measures with regard to Colombia. Order of the Inter-American Court of Human Rights of February 2, 2010, third considering paragraph.

⁴ Cf. *Case of Carpio Nicolle et al.* Provisional measures with regard to Guatemala. Order of the Inter-American Court of Human Rights of July 6, 2009, fourteenth considering paragraph; *Matter of Belfort Istúriz et al.*, *supra* note 3, sixth considering paragraph, and *Matter of Giraldo Cardona et al.*, *supra* note 3, third considering paragraph.

⁵ Cf. *Case of Herrera Ulloa v. Costa Rica (“La Nación” Newspaper)*, *supra* note 3, fourth considering paragraph; *Matter of Belfort Istúriz et al.*, *supra* note 3, sixth considering paragraph, and *Matter of Giraldo Cardona et al.*, *supra* note 3, third considering paragraph.

5. This request for provisional measures does not arise from a case before the Court, but rather in the context of petition P-366-09, which the Inter-American Commission has been processing since March 27, 2009, and which is currently at the admissibility stage. Consequently, examination of both the protective and the preventive dimensions of provisional measures is in order. Nevertheless, the Court recalls that for both the protective and the preventive dimension, the three requisites stipulated in Article 63(2) of the Convention must be fulfilled, in order to grant the provisional measures requested; namely (i) "extreme gravity"; (ii) "urgency," and (iii) that they seek to "avoid irreparable damage to persons." These three conditions co-exist and must be present in any situation in which the Court is asked to intervene.⁶

6. Regarding the gravity, for the purposes of the adoption of provisional measures, the Convention requires that this be extreme; in other words that the gravity is of the utmost and most intense degree. The urgent nature implies that the risk or threat involved is imminent, and requires an immediate response to remedy it. Lastly, as regards the damage, there must be a reasonable probability that this will occur; moreover, it should not refer to juridical rights or interests that can be repaired.⁷

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

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8. Under international law, in cases in which the possible application of the death penalty is debated, the organs of protection analyze the way in which the States conduct extradition procedures in light of their treaty-based obligations,⁸ including an examination of the guarantees given to the State requested to extradite an individual. In the instant matter, in addition to denying the existence of violations of due process, Peru has provided two

⁶ Cf. *Case of Carpio Nicolle et al.*, *supra* note 4, fourteenth considering paragraph; *Matter of Belfort Istúriz et al.*, *supra* note 3, seventh considering paragraph, and *Matter of Eloisa Barrios et al.* Provisional measures with regard to Venezuela. Order of the Inter-American Court of Human Rights of February 4, 2010, second considering paragraph.

⁷ Cf. *Matters of the Monagas Detention Center ("La Pica")*, *the Capital Region Penitentiary Center Yare I and Yare II (Yare Prison)*, *the Central Occidental Region Penitentiary Center (Uribana Prison)*, and *the Capital Detention Center El Rodeo I and El Rodeo II*. Provisional measures with regard to Venezuela. Order of the Inter-American Court of Human Rights of November 24, 2009, third considering paragraph, and *Matter of Belfort Istúriz et al.*, *supra* note 3, eighth considering paragraph.

⁸ Cf. U.N. Human Rights Committee, *inter alia*, *Cox v. Canada*, Communication No. 539/1993, U.N. Doc. CCPR/C/52/D/539/1993, 31 October 1994, para. 10.3, and *Charles Chitat Ng v. Canada*, Communication No. 469/1991, U.N. Doc. CCPR/C/49/D/469/1991, 5 November 1993, para. 6.1. See also: European Court of Human Rights, *inter alia*, *Al-Saadoon and Mufdhi v. the United Kingdom*, Application No. 61498/08, Judgment of 2 March 2010, para. 128, and *Soering v. the United Kingdom*, Application No. 161, Judgment of 7 July 1989, para. 85 to 91.

diplomatic guarantees,⁹ a judicial guarantee,¹⁰ and also a diplomatic note addressed directly by the requesting State to this Court,¹¹ according to all of which, Mr. Wing can be extradited without any risk that the death penalty will be applied. The Court assesses positively the existence of the said guarantees and does not doubt the good faith of the States of Peru and the People's Republic of China with regard to the said documents.

9. Nevertheless, the Court considers that the analysis of the guarantees received by Peru is a question of merits, which is related to compliance with the State's international obligation derived from Articles 4 and 1(1) of the Convention, not to subject anyone to the risk of the application of the death penalty via extradition. Furthermore, it is related to the formalities of due process that domestic law ensures in the extradition process.¹² Hence, assessment of the pertinence and appropriateness of the said guarantees, as well as of the alleged violations of the rights established in Articles 8 and 25 of the American Convention, corresponds to the examination of the merits of the case, which the Inter-American must eventually make in the petition lodged before it, and not by means of this provisional measures procedure.

10. As its consistent case law indicates, when presented with a request for provisional measures, the Court cannot examine the merits of any arguments other than those strictly related to the extreme gravity, urgency and need to avoid irreparable damage to persons. Any other matter can only be submitted to the Court's consideration in a contentious case.¹³ In this regard, the adoption of provisional measures cannot and must not entail a ruling on the merits of the request, but only admits the possibility that a decision in this regard could eventually be delivered.¹⁴

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11. On previous occasions, this Court considered it necessary to adopt provisional measures in situation in which the application of the death penalty was being debated, in

⁹ Cf. Note of February 2, 2009, issued by the Consul of the Embassy of the People's Republic of China in the Republic of Peru, and notes of December 10 and 11, 2009, issued by the Ambassador Extraordinary and Plenipotentiary of the People's Republic of China in the Republic of Peru (File of request for provisional measures, Brief of March 8, 2010, with the State's observations, attachments 33 and 27, respectively).

¹⁰ Cf. Order of December 8, 2009, issued by the People's Supreme Court of the People's Republic of China (File of request for provisional measures, Brief of March 8, 2010, with the State's observations, attachment 27).

¹¹ Cf. Letter N.O. No. 020/2010 of April 22, 2010, addressed to the acting president of the Court by the Chargé d'Affaires of the Embassy of the People's Republic of China in the Republic of Peru (File of request for provisional measures, Brief of the State of May 10, 2010, attachment 3).

¹² Code of Criminal Procedure of Peru. Article 517. Rejection of extradition.

[...] 3. Neither shall extradition be ordered when: [...] (d) the crime for which the extradition is requested is punishable by the death penalty in the requesting State and the latter has not provided guarantees that it will not be applicable.

Cf. Brief of March 8, 2010, with the State's observations (File of request for provisional measures, folio 131).

¹³ Cf. *Case of James et al.* Provisional measures with regard to Trinidad and Tobago. Order of the Inter-American Court of August 29, 1998, sixth considering paragraph; *Matter of Belfort Istúriz et al.*, *supra* note 3, ninth considering paragraph, and *Matter of Eloisa Barrios et al.*, *supra* note 6, third considering paragraph.

¹⁴ Cf. *Case of James et al.* Provisional measures with regard to Trinidad and Tobago. Order of the President of the Inter-American Court of Human Rights of May 27, 1998, sixth considering paragraph, and *Case of James et al.* Provisional measures with regard to Trinidad and Tobago. Order of the President of the Inter-American Court of Human Rights of June 29, 1998, sixth considering paragraph.

order to guarantee the useful effect of the eventual decision that had to be adopted.¹⁵ Similarly, under the universal system and under the European system for the protection of human rights, other organs of international law have ordered provisional or interim measures in cases of extradition that involve, *inter alia*, the possibility of imposing the death penalty or a risk for personal integrity, owing to their eminently preventive function to prevent possible human rights violations,¹⁶ to preserve the purpose of the litigation, and the procedural equality between the parties.¹⁷ Moreover, the International Court of Justice has ordered provisional measures to prevent the imposition of the death penalty in cases it has been examining until it has handed down the final decision.¹⁸

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

13. Regarding the requisite of urgency, the Court observes that, on January 27, 2010, the Supreme Court of Justice of Peru decided to declare that the extradition of Mr. Wing was admissible. Following this decision, the extradition process is in its final stage and the only matter pending, apart from possible appeals, is the decision of the Government, by means of a supreme decision issued with the agreement of the Council of Ministers, following the report of the Official Commission presided by the Ministry of Justice and composed of the Ministry of Foreign Affairs¹⁹ (*supra* having seen paragraphs 10(d) and 11(a)). Thus, Mr. Wing could be extradited at any time.

¹⁵ Cf. *Hilaire, Benjamin, Constantine et al. v. Trinidad and Tobago*. Judgment of June 21, 2002, para. 148; *Case of Raxcacó et al.* Provisional measures. Order of the Inter-American Court of Human Rights of August 30, 2004, sixth and seventh considering paragraphs; *Case of Raxcacó et al.* Provisional measures. Order of the Inter-American Court of Human Rights of November 21, 2007, thirteenth considering paragraph, and *Case of Boyce et al.* Provisional measures with regard to Barbados. Order of the Inter-American Court of Human Rights of November 24, 2004, tenth considering paragraph.

¹⁶ Cf. U.N. Human Rights Committee, *inter alia*, *Tolipkhuzhaev v. Uzbekistan*, Communication No. 1280/2004, U.N. Doc. CCPR/C/96/D/1280/2004, 22 July 2009, para. 6.4; *Idiev v. Tajikistan*. Communication No. 1276/2004, U.N. Doc. CCPR/C/95/D/1276/2004, 31 March 2009, para. 7.4, and *Piandiong, Morallos and Bulan v. Philippines*. Communication No. 869/1999, U.N. Doc. CCPR/C/70/D/869/1999, 19 October 2000, para. 5.4. See also, European Court of Human Rights, *inter alia*, *Al-Saadoon and Mufdhi v. the United Kingdom*, *supra* note 8, para. 123, and *Mamatkulov and Askarov v. Turkey [GC]*, Applications nos. 46827/99 and 46951/99, Judgment of 4 February 2005, paras. 108 to 127.

¹⁷ Cf. European Court of Human Rights. *Case of Mamatkulov and Askarov v. Turkey*, *supra* note 16, paras. 102 and 108, and U.N. Human Rights Committee, *Case of Tolipkhuzhaev v. Uzbekistan*, *supra* note 16, para. 6.2.

¹⁸ Cf. International Court of Justice, *Case concerning the Vienna Convention on Consular Relations (Paraguay v. United States of America)*. Order of 9 April 1998 (Request for the Indication of Provisional Measures), para. 41.I; *LaGrand Case (Germany v. United States of America)*. Order of 3 March 1999 (Request for the Indication of Provisional Measures), para. 29.I.a; and *Case concerning Avena and Other Mexican Nationals (Mexico v. United States of America)*. Order of 5 February 2003 (Request for the Indication of Provisional Measures), para. 59.I.a.

¹⁹ Code of Criminal Procedure of Peru. Article 514. Authorities who intervene. Cf. Brief of March 8, 2010, with the State's observations (File of request for provisional measures, folio 141).

14. The Court considers that the requisite of the irreparable nature of the damage has been complied with, in its protective dimension, because of the risk of harm to the right to life owing to the possibility of an irremediable measure such as the death penalty. Indeed, the possible application of the death penalty entails the most extreme and irreversible situation. Regarding the preventive dimension, Mr. Wing's extradition would thwart compliance with an eventual decision of the organs of the system concerning the existence of a violation of Article 8 and 25 of the Convention. Indeed, if the examination of the petition lodged with the Commission leads to the conclusion that the alleged flaws in the extradition process truly existed, the damage caused could not be remedied. Thus, the right of petition embodied in Article 44 of the Convention would be affected irreversibly.

15. Based on the foregoing considerations, to ensure that the Inter-American Commission can fulfill its mandate under the Convention, the Court finds it pertinent to admit the request for provisional measures until December 17, 2010, in order to allow that organ to examine petition P-366-09. Notwithstanding the above, the Court deems it necessary to mention that the Inter-American Commission has been analyzing the petition for more than thirteen months and, despite the urgent processing accorded, it has not ruled on admissibility. The Court underscores that the Commission's delay in adopting a decision would, on the one hand, delay the extradition procedure that has been underway for 19 months and, on the other, extend the uncertainty of the legal situation of Mr. Wing, who is deprived of his liberty. Furthermore, since the Inter-American Commission's request for provisional measures is based on the requisite of urgency, the Court considers it important that the greatest celerity should prevail in the proceedings before the Inter-American Commission to decide on the petition. Clearly, it would be inconsistent if the urgency that the Commission argued to request provisional measures did not entail urgent consideration of the merits of the petition. Based on the above, if the Commission has not reached a decision on the merits of the petition, when the time accorded for the adoption of these provisional measures expires, it can be presumed that the alleged urgency is no longer applicable.

16. In addition, the Court emphasizes, as it has in previous cases although in other contexts, the importance of the mechanism of extradition and the obligation that States collaborate with each other in this regard.²⁰ It is in the interests of the community of Nations that individuals who have been accused of specific offenses be brought to justice. Hence, the States' international obligations concerning human rights and the requirements of due process must be observed in extradition processes, while this juridical mechanism cannot be used as a path to impunity.

17. By adopting provisional measures, the Court is guaranteeing exclusively that the Inter-American Commission can comply with its mandate under the Convention. In light of the above, the Commission must act with due celerity and rule on the petition filed in this matter to ensure that the system of individual petitions and any delay in their processing does not obstruct the administration of justice.

18. Lastly, while the matter is being decided by the organs of the inter-American system, Peru may take the necessary measures with regard to Mr. Wing to ensure that his eventual

²⁰ Cf. *Goiburu et al. v. Paraguay. Merits, reparations and costs*. Judgment of September 22, 2006. Series C No. 153, para. 132; *La Cantuta v. Peru. Merits, reparations and costs*. Judgment of November 29, 2006. Series C No. 162, paras. 159 and 160; *Ituango Massacre v. Colombia. Monitoring compliance with judgment*. Order of the Inter-American Court of Human Rights of July 7, 2009, Nineteenth considering paragraph, and *Mapiripán Massacre v. Colombia. Monitoring compliance with judgment*. Order of the Inter-American Court of Human Rights of July 8, 2009, fortieth and forty-first considering paragraphs.

extradition and the corresponding administration of justice in the requesting State are not rendered null or illusory.

THEREFORE:

THE INTER-AMERICAN COURT OF HUMAN RIGHTS,

pursuant to the authority conferred by Article 63(2) of the American Convention and Article 27 of its Rules of Procedure,

DECIDES:

1. To require the State, in accordance with the provisions of this order, to abstain from extraditing Mr. Wong Ho Wing until December 17, 2010, so as to allow the Inter-American Commission on Human Rights to examine and rule on petition P-366-09 lodged before the Commission on March 27, 2009.
2. To request the Secretariat to notify this Order to the Inter-American Commission on Human Rights and to the Republic of Peru.

Judge Eduardo Vio Grossi informed the Court of his concurring opinions, which accompanies this order.

Leonardo A. Franco
Acting President

Manuel E. Ventura Robles

Margarette May Macaulay

Rhadys Abreu Blondet

Alberto Pérez Pérez

Eduardo Vio Grossi

Pablo Saavedra Alessandri
Secretary

So ordered,

Leonardo A. Franco
Acting President

Pablo Saavedra Alessandri
Secretary

CONCURRING OPINION OF JUDGE EDUARDO VIO GROSSI.

I concur with the Order of the Inter-American Court of Human Rights (ICourtHR) of this date on the request for provisional measures submitted by the Inter-American Commission on Human Rights (IACHR) with regard to the Republic of Peru, in the matter of Wong Ho Wing. Nevertheless, I find it necessary to make the following additional observations:

1. It should be recalled that, since provisional measures are admissible in cases of extreme gravity and urgency and when necessary to avoid irreparable damage to persons – in other words, in exceptional circumstances, which are inherently dynamic and changing – the relevant powers of the CourtIDH are not preclusive. This implies, on the one hand, that if the Court does not grant them, they can be requested again and, on the other, that if it does grant them, there is no legal impediment for the Court to modify them subsequently, *ex officio*, or at the request of the party, based on new information concerning the modification or extinction of the above-mentioned requisites.
2. Regarding the preventive aspect in the instant matter – consisting in the risk that if the extradition is granted the death penalty will be applied to the person extradited – the above signifies, for example, that, at some time in the future should the measures decreed in this Order be annulled, the requested State could provide enhanced guarantees in relation to the requesting State's undertaking that, if the extradition is granted, it will respect the right to life and, in view of the observations that follow, to due process of the individual in question, in the terms of the Pact of San José, even though it is not a party thereto.
3. With regard to the protective effect in this matter – relating to the fact that if the extradition is granted, the inter-American system would not be able to exercise its powers with regard to the said individual, because he would be in a country that is not subject to its jurisdiction – it is appropriate to note that the ICourtHR itself must assess, *prima facie*, the grounds both for the petition lodged with the IACHR and for the requisites of the provisional measures requested concerning a matter that has not yet been submitted to its consideration, to enable it to determine the conjunction of all the requisites for such measures to be admissible. Consequently, the Court is not bound by what the IACHR could have decided in this regard because, if this were so, in the final analysis, it would be the IACHR rather than the CourtIDH that would decide on the adoption of such measures.
4. In summary, if it were sought to limit the Court's said powers with regard to provisional measures in cases such as this one, on the grounds that, when deciding to adopt such measures, it would not have competence to rule on the merits of the petition lodged with the IACHR - namely, the violation of the rights to life and to due process – this would mean that the CourtIDH would not have autonomy to determine and to assess, in exercise of its exclusive authority, the conjunction of the requisites for ordering the said measures, because, in the end, it would have no alternative but to find that the mere request of the IACHR was sufficient and, consequently, to order the measures requested, which would evidently circumvent the letter and spirit of the provisions of Article 63(2) of the Pact of San José.
5. On another subject, I should add that provisional measures are, essentially, of an extraordinary nature, because they are admissible only and exclusively in cases of extreme

gravity and urgency and when necessary to avoid irreparable damage to persons. This implies, among other matters, that they should not be intended to replace the normal procedure for processing the individual petitions they refer to before the IACtHR, or to remedy or compensate their defects or those that occur during the procedure; also that, should such measures be granted, it is important that they be granted on a temporary basis and, for the same reason, that the final decision on the petitions should, similarly, be urgent.

6. Moreover, it is relevant to indicate that provisional measures also have a restricted nature, in particular, as regards their effects. In other words, to the extent possible, it should be ensured that they do not entail consequences that are unwanted and additional to the said preventive and protective nature, such as those that could occur in this case if the measures were used to facilitate actions or measures in the requested State designed to delay or even evade the action of the courts with regard to offenses unrelated to human rights, such as, in the case of the said requested extradition, the offenses of customs tax evasion and fraud, because if this happened, the inter-American system for the protection of human rights could be used or perceived as a mechanism to encourage, to obtain or to ensure impunity, an objective that is entirely alien to the system and which would discredit it; a risk that it is necessary, consequently, to try and avoid, notwithstanding the specific need to ensure also that the extradition is not used to avoid compliance with human rights obligations.
7. In short, it is admissible to interpret and apply provisional measures as part of the proceedings conducted before the CourtIDH and, in general, of the international legal system. This means that their objectives of prevention and protection with regard to human rights must be pursued while, at the same time, endeavoring to safeguard other juridical rights protected by international law such as, in this case, in keeping with the above and as an example, the right of both the petitioner or beneficiary and the requested State, within the proceedings in which such measures are ordered, to justice being dispensed in a timely manner and the said extradition process not being delayed unduly.
8. Consequently, the obligation to protect the right to life of the person whose extradition has been requested, and the obligation to prevent the impunity from which this person could benefit if he were not extradited should not be considered mutually exclusive in this case. In other words, it should not be considered that, by ordering provisional measures, a choice has been made between the application of the Pact of San José or the application of the extradition treaty between Peru and the People's Republic of China; but rather, that they have been ordered interpreting the two treaties congruently.
9. In conclusion, the undersigned recognizes that the above observations with regard to provisional measures are specifically reflected in the time limit established for the duration of the provisional measures ordered.

Eduardo Vio Grossi
Judge

Pablo Saavedra Alessandri
Secretary