

REPORT No. 78/13
CASE 12.794
MERITS
WONG HO WING
PERU

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July 18, 2013

I. SUMMARY

1. On March 27, 2009, the Inter-American Commission on Human Rights (hereinafter “the Inter-American Commission,” “the Commission” or “the IACHR”) received a petition that Luís Lamas Puccio (hereinafter “the petitioner”) filed on behalf of Wong Ho Wing¹ (hereinafter also “the alleged victim”), in which he asserted that the Republic of Peru (hereinafter “Peru”, “the State” or “the Peruvian State”) had violated rights recognized in the American Convention on Human Rights (hereinafter “the American Convention” or “the Convention”) in the context of the alleged victim’s arrest in Peru in October 2008, his detention since that time, and the process pursued to extradite him, all in response to a request from the People’s Republic of China. The extradition process has continued to evolve as this petition has moved through the proceedings with the Commission. At the present time the provisional measures ordered by the Inter-American Court of Human Rights are in effect. Those measures require that the Peruvian State refrain from extraditing Mr. Wong Ho Wing until such time as the Inter-American Commission issues its finding on the matter.

2. On November 1, 2010, the Commission issued admissibility report No. 151/10, in which it declared the petition admissible with respect to the rights established in articles 4, 5, 7, 8 and 25 of the American Convention, read in conjunction with the obligations established in Article 1(1) thereof.

3. The petitioner alleged a number of irregularities in the request seeking Mr. Wong Ho Wing’s extradition. Even so, the petitioner argued, the Peruvian State did not take prompt action to demand the guarantees necessary to ensure that the alleged victim would not be executed. He indicated that the State had failed to comply with the legal requirements with respect to extradition and asserted that the State’s clear intention was to extradite Mr. Wong Ho Wing to the People’s Republic of China. According to the petitioner, the process has taken a disproportionate period of time, thereby converting Mr. Wong Ho Wing’s “provisional arrest” into an arbitrary detention. In more recent communications, that petitioner underscored the fact that although the Constitutional Court issued a ruling in Mr. Wong Ho Wing’s favor, the State has employed a variety of tactics to avoid complying with the Court’s ruling.

4. The State, for its part, has taken differing positions throughout the history of this case with the Inter-American Commission. Initially, it maintained that while there were some problems, they were corrected as a result of the remedies invoked by the petitioner. Subsequently, the State observed that the Constitutional Court had issued a ruling wherein it ordered the Executive Branch to refrain from extraditing Mr. Wong Ho Wing. The State therefore requested that the record on the petition be closed on the grounds that the petition was without purpose and therefore “not properly before the

¹ In briefs received from the parties and excerpts from the court records that the IACHR received, the alleged victim is referred as Wong Ho Wing, “Huang Hai Yong”, “Huang Haiyong”, “Huang He Yong”, “Wong He Yong” and “Wuang He Yong”.

Commission.” Since then, following information concerning a series of challenges that the State authorities had filed to have the Constitutional Court’s ruling overturned, the State has been arguing that because an amendment was introduced into Chinese law, other mechanisms had to be explored so that the sense of the Constitutional Court’s ruling would reflect the amendment introduced into Chinese law. Throughout the processing of this case with the Commission, the State’s contention has been that there was no risk that Mr. Wong Ho Wing would face the death penalty in China.

5. After examining the positions of the parties, the Inter-American Commission concluded that the Peruvian State is responsible for violation of the rights to personal liberty, life, humane treatment, judicial guarantees and judicial protection, recognized in articles 7, 4, 5, 8 and 25 of the American Convention, read in conjunction with the obligations established in Article 1(1) thereof, to the detriment of Mr. Wong Ho Wing. Based on these findings, the Commission made the respective recommendations.

II. PROCESSING WITH THE COMMISSION

A. Processing of the petition

6. On March 27, 2009, the Commission received the original petition filed by Luis Lamas Puccio. The history of the petition -from the time it was presented to the decision on its admissibility- is recounted in detail in admissibility report No. 151/10, issued on November 1, 2010. In that report, the IACHR declared that the petition was admissible with respect to the possible violation of the rights recognized in articles 4, 5, 7, 8 and 25 of the American Convention, as they relate to the obligations established in Article 1(1) of that instrument.

7. The admissibility report was forwarded to the petitioner and to the State on November 9, 2010. The Commission availed itself of the opportunity to place itself at the disposal of the parties with a view to reaching a friendly settlement in the matter. It also requested that the petitioner present his observations on the merits within three months. The State presented additional information in communications received on November 3 and 10, December 2 and 15, 2010. The petitioner, for his part, filed another brief on November 4, 2011.

8. The petitioner filed his observations on the merits in a communication received on March 7, 2011. That information was forwarded to the State on March 10, 2011, which was given three months to present its observations. On March 16, 2011, the petitioner supplied additional information. On June 21, 2011, the Peruvian State requested an extension of the deadline for submitting its observations on the merits. On June 24, 2011, the Commission acceded to the State’s request, and so extended the State’s deadline until July 11, 2011. On July 12, 2011, the State requested another extension of the deadline for submitting its observations on the merits. On July 29, 2011, the Commission advised the State that under Article 37(2) of its Rules of Procedure, the requested extension could not be granted. In that same communication the IACHR informed the State that “it [would] continue to process the complaint, and hopes to be able to rely on the Peruvian Government’s timely participation”.

9. On August 4, 2011, the State presented a communication in which it asked the Commission to close the record on the petition claiming that, by virtue of a ruling from the Constitutional Court which had ordered the Executive Branch to refrain from extraditing Mr. Wong Ho Wing to the People’s Republic of China, the petition no longer had a purpose and was therefore not

properly before the inter-American system. On August 8, 2011, the Commission forwarded this communication to the petitioner and asked him to present his observations within one month.

10. On September 8, 2011, the petitioners presented their observations, which were forwarded to the State on October 3, 2011, with the request that it present its observations within one month. On October 7, 2011, the petitioner filed additional information, which was forwarded to the State on November 1, 2011. On November 22, 2011, the State presented additional information. The petitioner presented additional information on November 25, 2011. On February 1, 2012, the petitioner submitted still more information, which was forwarded to the Peruvian State on February 8, 2012. In this communication the IACHR asked the Peruvian State to provide specific information² based on the fact that the petitioner was asking the Commission to file another request with the Court seeking provisional measures (concerning the processing of the precautionary and provisional measures, see *infra* paragraphs 14 to 23).

11. On February 21, 2012, the Peruvian State presented its reply to this request for information; that reply was forwarded to the petitioner on February 22, 2012. On February 17, 2012, the petitioner submitted additional information, which was forwarded to the State on March 5, 2012. The petitioner presented additional information on February 27 and March 2, 5 and 14, 2012. On March 22, 2012, the additional information supplied by the petitioner on November 25, 2011, was sent to the State. On March 23, 2012, the additional information provided by the petitioner on March 2, 5 and 14, 2012, was forwarded to the State, which was asked to present its observations within one month.

12. On March 26, 2012, the Commission held a public hearing on the merits of the case. At that hearing the parties supplied updated information and made additional observations on the merits. On November 27, 2012 the petitioner submitted additional information. On December 5, 2012 the Commission transmitted the petitioner's information to the State. On April 3, 2013 the petitioner submitted additional information. On April 15, 2013 the Commission transmitted the petitioner's information to the State.

13. On April 27, 2013, the Peruvian State presented its observations. On May 1, 2013 the State submitted additional information. On May 20, 2013 the Commission transmitted the State's information to the petitioner. On June 25, 2013 the State submitted additional information. On June 26, 2013 the Commission transmitted the State's information to the petitioner.

B. Processing of precautionary and provisional measures

14. On January 21, 2009, the IACHR received a request seeking precautionary measures for Mr. Wong Ho Wing. Following a series of procedures and pursuant to Article 25 of its Rules of Procedure, on March 31, 2009 the IACHR granted precautionary measures for Mr. Wong Ho Wing and asked the Peruvian State to refrain from extraditing him until a decision had been issued on the individual petition filed on March 27, 2009, under Article 44 of the Convention. On a number of

² The questions which the IACHR put to the State in this communication were as follows: "1. How has the Constitutional Court's ruling of May 24, 2011, ordering the Executive Branch to refrain from extraditing Mr. Wong Ho Wing been reflected in the extradition proceedings and in his procedural status?; 2. If a final decision on the extradition request has not yet been taken, what is the procedure followed to adopt that decision and how long does it take?; and 3. What is the law that gives the State the authority to continue to hold Mr. Wong Ho Wing in its custody?"

occasions, both the State and the petitioner reported information on the precautionary measures' implementation.

15. On November 9, 2009, a communication was received from the petitioner in which he asked that the Commission file a request with the Inter-American Court seeking provisional measures. The petitioner repeated the same request on February 2, 2012, and pointed out that on January 27, 2010, the Supreme Court had issued a finding favorable to Mr. Wong Ho Wing's extradition to the People's Republic of China. On February 24, 2010, the IACHR requested provisional measures of the Inter-American Court, under Article 63(2) of the American Convention. On March 24, 2010, the President of the Court ordered the Peruvian State "to refrain from extraditing Mr. Wong Ho Wing as long as this request for provisional measures has not been resolved by the full Inter-American Court of Human Rights."³

16. On May 28, 2010, the Inter-American Court ordered provisional measures for Wong Ho Wing and ordered the State "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."⁴

17. In a communication dated November 11, 2010, the Commission informed the Inter-American Court of the adoption of admissibility report No. 151/10 and requested that the provisional measures remain in effect. On November 26, 2010, the Inter-American Court resolved to keep the provisional measures in effect until March 31, 2011. On February 25, 2011, the Inter-American Court held a hearing on the provisional measures' implementation and on March 4, 2011, again extended the period that they would remain in force, this time until July 15, 2011. On July 1, 2011, the Inter-American Court again extended the provisional measures so that they would remain in effect until December 15, 2011.

18. On August 4, 9 and 18, 2011, the State requested that the provisional measures be lifted, based on the ruling of the Constitutional Court which had ordered the Executive Branch to refrain from extraditing Mr. Wong Ho Wing. On September 8, 2011, after examining the information supplied by the State and given its commitment to strictly comply with the Constitutional Court's decision, the Commission informed the Court that it believed that the Peruvian State's request to have the provisional measures lifted was appropriate. Therefore, on October 10, 2011, the Inter-American Court ordered that the provisional measures be lifted and wrote the following:

Consequently, taking into account the decision of the Constitutional Court of Peru, the information forwarded by the parties, the State's request to lift the measures and the opinion of the Inter-American Commission (supra considering paragraphs **), the Inter-American Court of Human Rights finds that the requirements of extreme gravity, urgency and need to prevent irreparable damage to the integrity and life of the beneficiary have ceased to exist, so that it is admissible to lift these provisional measures.⁵

The Inter-American Court assesses positively the references made to the American Convention on Human Rights by the Constitutional Court of Peru in this provisional proceeding in relation to

³ http://www.corteidh.or.cr/docs/medidas/wong_se_01_ing.pdf.

⁴ http://www.corteidh.or.cr/docs/medidas/wong_se_02_ing.pdf.

⁵ http://www.corteidh.or.cr/docs/medidas/wong_se_06_ing.pdf.

compliance with the obligations of respect and guarantee established therein. Furthermore, notwithstanding the conclusion of these provisional measures, the Inter-American Court recalls that the States have the constant and permanent obligation to comply with their general obligations under Article 1(1) of the Convention to respect the rights and freedoms recognized therein and to guarantee their free and full exercise to all persons subject to their jurisdiction.⁶

19. On March 2, 2012, the Commission asked the Inter-American Court to again grant provisional measures for Mr. Wong Ho Wing. This request was based on information received concerning the reactivation of the extradition process, the Constitutional Court's decision notwithstanding. On April 27, 2012, the Court issued an order in which it requested information from the Peruvian State.⁷

20. On June 26, 2012, the Inter-American Court issued an order again granting provisional measures, as follows: "To require the State, as decided in this Order, to abstain from extraditing Wong Ho Wing, until December 14, 2012, to allow the Inter-American Commission on Human Rights to examine and rule on case No. 12,794."⁸

21. On February 13, 2013 the Court issued a Resolution extending the provisional measures. On April 1, 2013 the Commission requested the Court to extend the provisional measures in favor of Mr. Wong Ho Wing until July 31, 2013. This request was based on the fact that the Commission decided to defer the deliberation of the merits report for its 148 session, to be held between 8 and July 19, 2013, in order to have the arguments of the parties concerning the resolution issued by the Constitutional Court on March 12, 2013.

22. On May 22, 2013 the Court issued a Resolution in the following terms: "Request the State (...) to refrain from extraditing Mr. Wong Ho Wing until August 30, 2013, in order to allow the Commission (...) to examine and decide on case No. 12.794 ".

23. As of the date of approval of this report, the provisional measures ordered by the Court are still in effect.

⁶ http://www.corteidh.or.cr/docs/medidas/wong_se_06_ing.pdf

⁷ http://www.corteidh.or.cr/docs/medidas/wong_se_07_ing.pdf. Information was requested on the following points: a) The legal effects of the decision of March 14, 2012, of the Permanent Criminal Chamber of the Supreme Court of Justice in relation to the extradition procedure and whether, following this decision, according to domestic law, the only requirement pending is the decision of the Executive; b) The legal effects of said decision in relation to the rulings of the Constitutional Court ordering that Wong Ho Wing should not be extradited, and c) Whether, under domestic law, the ruling of the Constitutional Court and its clarification ordering that Wong Ho Wing must not be extradited are legally binding for the Executive and the other State authorities.

⁸ http://www.corteidh.or.cr/docs/medidas/wong_se_08_ing.pdf.

III. THE PARTIES' POSITIONS

A. The petitioner

24. The petitioner indicated that on October 27, 2008, Mr. Wong Ho Wing was arrested in Peru based on an arrest warrant issued by INTERPOL at the request of the court authorities of the People's Republic of China in a criminal case being prosecuted in that country for the crimes of money laundering, bribery, smuggling and customs fraud. The petitioner observed that the extradition request issued by the People's Republic of China contained a translation of Article 153 of the Chinese Penal Code, which defines the crimes of smuggling and customs fraud; however, it omitted the translation of Article 151 of that Code, which allows for the possibility of imposing a sentence of life in prison or the death penalty for the aggravated form of the crimes of smuggling and customs fraud.

25. According to the allegations, on January 20, 2009 the Second Transitory Criminal Chamber of the Supreme Court of Justice issued a finding to the effect that the request to extradite Mr. Wong Ho Wing met the requirements provided under Peruvian law regarding the crimes of customs tax evasion and smuggling. The petitioner stated that on January 26, 2009, the alleged victim's attorney filed a petition of *habeas corpus*, asserting that Mr. Wong Ho Wing's life and personal integrity were in jeopardy. The petitioner stated that as a result of this petition of *habeas corpus*, the Second Transitory Criminal Chamber of the Supreme Court was called upon to issue a new advisory decision.

26. The petitioner stated that on October 5, 2009, a new hearing was conducted before the Permanent Criminal Chamber of the Supreme Court of Justice. He asserted that on October 12, 2009 Mr. Wong Ho Wing filed a second petition of *habeas corpus* challenging the members of the Permanent Criminal Chamber. The information submitted indicates that this second petition was declared inadmissible on January 5, 2010, a decision that Mr. Wong Ho Wing had allegedly appealed.

27. According to the petitioner, on December 11, 2009, the Ambassador of the People's Republic of China in Peru sent an official communiqué to the President of the Permanent Criminal Chamber, reporting that the Supreme People's Court of China had issued a ruling stating that the Chinese Judicial Branch would not give the alleged victim the death penalty. He also stated that after new oral hearings were conducted before the Permanent Criminal Chamber, the latter adopted a second advisory decision on January 27, 2010, declaring that the extradition request was admissible in the case of the crimes of customs tax evasion and bribery to the detriment of the People's Republic of China.

28. The petitioner asserted that on February 9, 2010, Mr. Wong Ho Wing's attorney filed a third petition of *habeas corpus* against the President of the Republic, the Minister of Justice, and the Minister of Foreign Affairs, whose job it was to make the final decision regarding the alleged victim's extradition. According to the information submitted, that petition of *habeas corpus* was denied on February 25, 2010 by the 42nd Criminal Court of Lima; that decision was upheld on April 14, 2010 by the Third Criminal Chamber for Jailed Accused of Lima. During the merits phase of this case with the IACHR, the parties reported on the Constitutional Court's May 24, 2011 decision in which it granted the writ of *habeas corpus* and ordered the Executive Branch to refrain from extraditing Mr. Wong Ho Wing.

29. The petitioner pointed out that the Peruvian Government has refused to abide by the Constitutional Court's decision. He asserted that the refusal to comply with the decisions was the product of "close and well-orchestrated coordination between the Ministry of Justice and Human Rights

and the Judicial Branch to give the prosecutor's office in that ministry time to negotiate a new and unlawful revised version of the Constitutional Court's decision."

30. The petitioner asserted that in January 2011, five officials from the People's Republic of China visited Mr. Wong Ho Wing in the Sarita Colonia Prison. They allegedly asked him to "drop his legal actions and agree to extradition, and promised him that once back in China he would not face the death penalty and possibly might not face criminal prosecution; they stressed, however, that his extradition had to materialize."

31. Concerning the legal arguments, and specifically those regarding the **rights to life and to humane treatment**, the petitioner pointed out that under Article 4(2) of the Convention and Article 6(2) of the International Covenant on Civil and Political Rights, capital punishment may only be imposed in truly exceptional circumstances and only for the most serious crimes affecting the most cherished possession. He added that the case law of the Inter-American Court, like that of the United Nations Human Rights Committee (hereinafter, "the Human Rights Committee"), has, for purposes of application of the death penalty, defined "the most serious crimes" as those in which a human life has been arbitrarily taken. The petitioner underscored the fact that the alleged crimes of which Mr. Wong Ho Wing is accused in China cannot be regarded as so serious in nature that a human life is at stake. Therefore, the possibility of the death penalty is contrary to the standards of International human rights law.

32. The petitioner argued that the opinion issued by the Supreme Court favorable to Mr. Wong Ho Wing's extradition disregards the provisions of Article 517, paragraph 3, subparagraph (d) of the Peruvian Code of Criminal Procedure, which prohibits a grant of extradition when the *extraditatus* may face the death penalty or when the requesting State does not offer adequate guarantees that the death penalty will not be applied. The petitioner argued that it was the Supreme Court's responsibility to take proper stock of the fact that China is the country "with the highest number of convictions followed by execution in the world, and that these sentences are imposed without the guarantees of due process, and even in cases in which torture is used to exact self-incriminating confessions which the courts then accept as evidence." He added that statistics on death sentences are classified information in China, so that the Peruvian State would have no way to exercise any oversight to ensure that Mr. Wong Ho Wing was not executed once he was under the jurisdiction of his country of origin.

33. The petitioner mentioned urgent actions from Amnesty International which denounced the fact that the Chinese court authorities allegedly applied the death penalty after having requested extradition and after giving assurances that the persons whose extradition was being requested would not be executed. He argued that "the competent court authority did not file any request with the Ministry of Foreign Affairs [...] showing that it had made inquiries concerning the use of the death penalty in that country (...)." He maintained that given the reports of various nongovernmental organizations and United Nations committees denouncing the use of torture in criminal cases in China, the Peruvian State "should have also required a guarantee from the Chinese government that torture or cruel, inhuman or degrading treatment would not be used against him [the alleged victim]." The petitioner observed that to determine whether there is well-founded cause to believe that a person subject to extradition might be subjected to torture in the requesting state, the authorities must take into account all relevant considerations, including the existence of a persistent pattern of manifest, blatant or massive human rights violations.

34. The petitioner alleged that the behavior of the Chinese authorities in the request seeking Mr. Wong Ho Wing's extradition revealed that any commitment made at the diplomatic or jurisdictional level could not be trusted. He also pointed out that the Peruvian State never bothered to inquire about how reliable any commitments made regarding the application of the death penalty were. He added that even assuming that the assurances that the death penalty would not be applied were honored, "the context of persistent and manifest human rights violations in China and the behavior of the Chinese authorities in the extradition process allow one to reasonably conclude that Mr. Wing would be tortured or subjected to other cruel, inhuman or degrading treatment."

35. For all the foregoing reasons, the petitioner argued that the advisory decision of the Supreme Court favorable to Mr. Wong Ho Wing's extradition implies a failure to comply with the duty to prevent violation of the rights to life and to humane treatment, protected under articles 4 and 5 of the Convention. The petitioner contends that by agreeing to Mr. Wong Ho Wing's extradition the State "is indirectly applying the death penalty; although the State cannot apply the death penalty within its own jurisdiction, through extradition it is allowing a requesting State to apply the death penalty at its own discretion, in exercise of its sovereignty."

36. As for the **right to personal liberty**, the petitioner asserted that since October 27, 2008, Mr. Wong Ho Wing has been in custody in the Sarito Colonia Prison in Callao, under the "provisional arrest" provided for in Article 523 of the Code of Criminal Procedure. He pointed out that the alleged victim was held in custody solely for the purpose of an eventual extradition proceeding. In the petitioner's view, Mr. Wong Ho Wing's detention is "arbitrary, because it is excessive in terms of time and disproportionate." He observed that since the close of the advisory phase of the extradition process, the Executive Branch has not adopted a final decision pursuant to Article 514.1 of the Code of Criminal Procedure, and has arbitrarily deprived the alleged victim of his liberty, in violation of all the maximum time periods that an unconvicted person can be held under Peruvian domestic law. The petitioner underscored the fact that "the violations of due process attributable exclusively to the State in processing an extradition must not compromise the right to personal liberty." He also wrote that the "provisional arrest" measure was neither necessary nor proportional since at the time of his arrest, Mr. Wong Ho Wing was not a "fugitive"; instead, he was simply engaged in his entrepreneurial activities. The petitioner also pointed out that the alleged victim's deprivation of liberty was ordered under Article 521(1) of the Code of Criminal Procedure, which makes it the rule and not the exception.

37. The petitioner also indicated that despite the Constitutional Court's May 24, 2011 decision, Mr. Wong Ho Wing remained behind bars, without any legal justification, and despite repeated requests for his release filed with all the courts. Here, the petitioner observed that the Ministry of Justice and Peru's Judicial Branch were coordinating closely to prevent Mr. Wong Ho Wing's release by whatever means.

38. As for the **rights to judicial guarantees and to judicial protection**, the petitioner asserted that the conduct of the Peruvian judicial authorities in the advisory extradition process is allegedly riddled with irregularities intended to be helpful to the People's Republic of China. Among these, the petitioner highlighted the following:

39. The petitioner reiterated that the original extradition request omitted provisions of China's Criminal Code that allow the death penalty to be used for crimes of fraud when the money involved is in excess of a specified amount. He underscored the fact that the Chinese government offered no evidence or reasonable indicia that Mr. Wong Ho Wing bore criminal responsibility for the

crimes attributed to him. He also pointed out that Article 518 of the Peruvian Code of Criminal Procedure provides that “the request for extradition must contain the evidence necessary to establish sufficient indicia of the commission of the criminal act.” He added that in an opinion of October 1, 2009, the Office of the First Supreme Court Prosecutor recommended to the Second Permanent Criminal Chamber that the advisory decision it issued should not favor extradition. Among the reasons cited was the fact that the extradition request did not include any evidence suggesting that the *extraditatus* was guilty of the criminal acts attributed to himself.

40. The petitioner maintained that during the extradition process, the documents that the Chinese government presented as a guarantee that the death penalty would not be applied were not forwarded to Mr. Wong Ho Wing’s defense counsel, in violation of the adversarial principle. The petitioner also observed that those guarantees came to light only as a result of the documentation that the Peruvian State’s representation presented to the organs of the inter-American system during the processing of this case and the related precautionary and provisional measures.

41. The petitioner argued that the Second Permanent Criminal Chamber held extradition hearings on October 5 and December 9 and 21, 2009, despite the fact that Article 521 of the Code of Criminal Procedure provides that only one hearing shall be held, at the end of which an advisory decision is to be issued within five days. He added that under Supreme Decree No. 016-2006-JUS, which regulates “judicial and governmental conduct in the area of extradition and convict transfers,” it is up to the central authority, at the request of the jurisdictional body, to ask the requesting State to correct, clarify or complete the extradition request and documentation within a maximum of thirty days.

42. The petitioner argued that the State has an obligation to give adequate reasons for its decision, since the only factor considered in the process was the guarantee given by the People’s Republic of China that it would not apply the death penalty; other circumstances, such as the context in the requesting country, were not considered. In connection with the failure to state adequate reasons for the decision, the petitioner cited the January 27, 2010 decision of the Permanent Criminal Chamber of the Supreme Court. The petitioner argued that in a case in which a decision is made to extradite a person to a state in which he might eventually face the death penalty, adequate reasons related to the additional circumstances that must be considered are essential. The petitioner asserted that the “State has an ineluctable duty” to take the malicious conduct of the “Chinese officials” into consideration.

43. The petitioner also mentioned the delays in the process, especially the delay in deciding the petitions of *habeas corpus* filed. Here, the petitioner argued that the State violated the rights protected under articles 7(6) and 25 of the American Convention.

44. The petitioner pointed out that, considering how the judicial proceedings have been conducted thus far, even if Mr. Wong Ho Wing had been tried in Peru he would not have had the necessary judicial guarantees of “an impartial and independent judge presiding over a proper trial.” The petitioner mentioned that the Chinese authorities had donated vehicles to the Peruvian judicial branch. He also noted that all the judges who have presided over the proceedings in this case thus far have been provisional judges.

45. As for the State’s request that the record on the petition be closed on the grounds that the matter no longer had a purpose and was therefore not properly before the Commission, the petitioner objected by recounting the violations being alleged.

B. The State

46. Throughout the processing of this case with the Inter-American Commission, the State has asserted a variety of positions.

The State's position in its earliest communications during the admissibility phase

47. The State asserted that on October 27, 2008 INTERPOL agents arrested Mr. Wong Ho Wing, who was being sought internationally due to an arrest warrant issued by court authorities in China, in a criminal proceeding for the crimes of smuggling and customs fraud allegedly committed between August 1996 and May 1998 in the city of Hong Kong. It alleged that on the same date the Criminal Court of Callao ordered the provisional arrest of Mr. Wong Ho Wing, so that the People's Republic of China could submit an extradition request. The State indicated that on October 28, 2008 Mr. Wong Ho Wing made his preliminary statement to the Criminal Court of Callao in the presence of a defense attorney, a Chinese interpreter, and a representative from the Public Prosecutor's Office.

48. The State's narration of the facts was similar to that of the petitioner with respect to the judicial decisions that established the provisional arrest of Mr. Wong Ho Wing, the decisions adopted in the advisory proceeding on extradition, and the petitions of *habeas corpus* filed. The State indicated that before issuing the second advisory decision on January 27, 2010, the Permanent Criminal Chamber held extradition hearings on October 5 and December 9 and 21, 2009, in which the attorney for the alleged victim was allowed to speak and a translator was ordered appointed.

49. The State asserted that in the light of Article 515 of the Peruvian Code of Criminal Procedure, the ruling of the Supreme Court of Justice on January 27, 2010 is merely advisory in nature and initiated a political procedure in which the final decision must be taken by the Constitutional President of the Republic, with the vote of the Council of Ministers and a prior report from an Official Commission on Extradition and Convict Transfers.

50. With respect to guarantees not to impose the death penalty, the State indicated that Article 5 of the Extradition Treaty between the Republic of Peru and the People's Republic of China, signed on November 5, 2001, establishes that extradition will only be carried out if it is not contrary to the legal system of the party to which the request is made. The State indicated that Article 140 of the Political Constitution of Peru limits capital punishment to the crime of treason in cases of war and terrorism. It argued that "it is legally impossible to order the extradition of Mr. Wong Ho Wing to the People's Republic of China if that country does not grant sufficient guarantees that it will not impose the death penalty on the citizen in question." In addition, it attached a copy of the ruling of December 8, 2009 issued by the Supreme People's Court of the People's Republic of China, along with an official translation, in which that country's highest court establishes the following:

If extradition from Peru to China is applied, if Huang Haiyong or Wong Ho Wing is found guilty through prosecution in the Court, the Court will not order the Death Penalty (including the immediate execution of the Death Penalty and a temporary two-year stay thereof) for Huang Haiyong or Wong Ho Wing, even though by law his crime carries the death penalty.⁹

⁹ Annex 18. Communication from the State received on July 16, 2010, Resolution dated December 8, 2009 issued by the Supreme Court of the People's Republic of China.

51. The State indicated that in view of the guarantees provided by the Chinese government and Judicial Branch, the Permanent Criminal Chamber declared the requirements provided in constitutional law, procedural law, and in the bilateral extradition treaty between China and Peru to have been met. It transcribed excerpts of the advisory decision of January 27, 2010, which state the following:

The decision contained in the duly translated ruling of December 8, 2009 issued by the Supreme Court of the People's Republic should also be regarded as relevant, and is attached to this request [...]. Such a pledge reveals an unavoidable commitment on the part of the judicial authorities of the People's Republic of China **NOT TO IMPOSE THE DEATH PENALTY** on the extraditable individual should he be found criminally responsible" (bold face and upper case correspond to the original version).

The Peruvian State makes the requested surrender of the Chinese citizen contingent upon the commitment made by the competent authorities of the People's Republic of China not to impose the death penalty on him, should he be convicted; in addition, the Peruvian State must be informed of the verdict in the decision in respect of the *extraditurus* when it is handed down [...].

52. The State submitted a list of 40 Supreme Court rulings adopted in Peru over the last five years regarding extradition requests from various countries. It indicated that in all these cases the norms of the relevant conventions, the Constitution and the law established for the purpose or extradition were respected. With respect to the alleged violations of judicial guarantees and judicial protection, the State asserted that Mr. Wong Ho Wing was freely able to invoke all the remedies provided by domestic law, which were decided by competent judges within the context of due process.

53. The State asserted that the passive extradition process with respect to the alleged victim is suspended "because on May 28, 2010 the Inter-American Court of Human Rights decided to grant provisional measures in favor of the Chinese citizen Wong Ho Wing, pursuant to which the Peruvian State must refrain from extraditing him to the People's Republic of China until December 17, 2010."

The State's position between August 2011 and February 2012

54. On August 4, 2012 the Peruvian State presented a brief in this case, in which it reported on a decision delivered by the Constitutional Court on May 24, 2011, and the Constitutional Court's June 9, 2011 clarification of that ruling. The State explained that with this ruling, the petition of *habeas corpus* that Mr. Wong Ho Wing had filed was definitively decided. It stated that in this ruling, the Constitutional Court ordered the Peruvian State, as represented by the Executive Branch, to refrain from extraditing Mr. Wong Ho Wing to the People's Republic of China. It added that in its ruling, the Constitutional Court had urged the Peruvian State, as represented by the Executive Branch, to act in accordance with the provisions of Article 4(1) of the Extradition Treaty between Peru and the People's Republic of China.

55. The State argued that based on this information, "Mr. Wong Ho Wing's case is not properly before the Commission, as the State has now been prevented from extraditing Mr. Wong Ho Wing to the People's Republic of China; the petitioner has obtained protection from the threatened violations of his fundamental rights that he was alleging." The State made reference to the subsidiarity principle of the inter-American human rights system and took the occasion to expressly request that the record of the case be closed.

56. In these communications, the State indicated that Mr. Wong Ho Wing was still in custody since the extradition process had not yet been concluded, as the Executive Branch had not yet issued the Supreme Resolution “denying Mr. Wing’s extradition to the People’s Republic of China, in compliance with the decision of the Peruvian Constitutional Court.”

The State’s position since February 2012

57. Thereafter, following the Commission’s February 8, 2012 request for information triggered by the information supplied by the petitioner concerning a series of challenges and actions filed whose purpose was allegedly to prevent full observance of the Constitutional Court’s ruling, the State’s position, both in writing and in its comments during the public hearing held during the Commission’s 144th regular session, was as summarized below:

58. The State indicated that the Constitutional Court’s decision “is being scrupulously observed in the extradition process,” which continues to be conducted “in accordance with the law with a view to arriving at the proper decision.”

59. By a communication sent on February 21, 2012, the State advised that it was awaiting issuance of a new, complementary advisory decision by the judicial branch, specifically the Supreme Court, addressing a “new fact and other questions relating to the implications of the execution of the Constitutional Court’s judgment in relation to offenses that may or may not entail the risk of the death penalty, since the crime of smuggling of which Chinese citizen Wong Ho Wing is accused is not a capital offense.” The State pointed out that the “new fact” to which it is referring is the February 25, 2011 repeal of the death penalty in China for the crime of “customs tax evasion.”

60. The State added that the procedural rule governing the extradition process does not set deadlines for the duration of the process, although it stated that it had “every intention (...) to resolve the extradition process as expeditiously as possible.”

61. As for the legal grounds for continuing to hold Mr. Wong Ho Wing in custody, the State indicated that his arrest was due to the original provisional arrest warrant, which was properly justified and reasoned and in which consideration is given to the existing procedural danger, the personal circumstances of the person subject to extradition, the seriousness of the offenses of which he is accused, and other factors. It observed that because the extradition process has not yet been finalized, the corrective measures taken are still in place, although the petitioner may pursue whatever legal measures he deems appropriate to seek the release of Mr. Wong Ho Wing, such as provisional release, substituting his provisional arrest with a supervised release arrangement, and others.

62. The State presented information regarding an allegedly similar situation to the instant case in which a Chinese citizen was extradited from Canada and sentenced to life imprisonment for the crime of smuggling. In this regard, the State argued that China “has guaranteed the right to life and personal integrity of repatriated Chinese citizens for similar crimes to those charged to Mr. Wong Ho Wing”.

IV. FACTS ESTABLISHED

63. The Commission will determine the facts based on the evidence in the case file and information that is public knowledge, in the following order: i) the relevant laws pertaining to extradition in Peru; ii) the bilateral extradition treaty between Peru and the People's Republic of China; iii) the extradition process pursued against Mr. Wong Ho Wing and the legal remedies invoked in that process; and iv) information on the application of the death penalty and the use of torture and cruel, inhuman and degrading treatment in the People's Republic of China.

A. The relevant laws pertaining to extradition in Peru

64. Article 37 of the Peruvian Constitution provides that:

Only the Executive Branch may grant extradition, which it will determine following a report from the Supreme Court, in a decision taken in compliance with the laws and the treaties and based on the principle of reciprocity.

Extradition shall not be granted if it is deemed to have been sought for the purpose of persecuting or punishing the *extradituros* for reasons of religion, nationality, opinion or race.

Those being sought for political crimes or for related acts shall not be subject to extradition. Genocide, assassination and terrorism shall not be classified as political crimes or related acts.¹⁰

65. Section II of the Peruvian Code of Criminal Procedure (Legislative Decree No. 970) regulates extradition as follows:

ARTICLE 513 – When is extradition in order.-

1. A person on trial, accused or convicted of being the author of or accomplice to a crime and who is in another State, may be extradited to stand trial or to serve a sentence imposed in the convicted person's presence.
2. When, in the absence of a treaty, extradition is based on the principle of reciprocity, the Attorney General's Office and the Ministry of Foreign Affairs shall inform the Judicial Branch of the cases in which Peru has invoked the principle of reciprocity and those in which the foreign country involved in the extradition proceeding has agreed to the principle of reciprocity, and of those cases in which the foreign country has done likewise and Peru has considered the matter and given its consent.

ARTICLE 514 - The authorities involved-

1. The government is responsible for deciding on passive or active extradition through a Supreme Ruling issued with the agreement of the Council of Ministers, with a prior report from an Official Commission presided over by the Ministry of Justice and including the Ministry of Foreign Affairs.
2. The Government's decision shall require the involvement of the Criminal Chamber of the Supreme Court, which shall issue an advisory decision and then forward it, together with the relevant files, to the Ministry of Justice, with copy to the Attorney General's Office.

¹⁰ 1993 Peruvian Constitution, available [in Spanish] at the web portal of the Congress of the Republic of Peru: www.congreso.gob.pe/ntley/ConstitucionP.htm.

ARTICLE 515 - Nature of the Supreme Court's advisory decision

1. When the Criminal Chamber of the Supreme Court issues an advisory decision counseling against extradition, the Government must comply.
2. If the advisory decision is favorable to extradition, or believes that extradition should be requested of a foreign country, the Government may decide what course of action it deems appropriate.

ARTICLE 516 – Sphere of application.-

1. A person on trial for, accused or convicted of being the author of or accomplice to a crime committed in a foreign country and who is within the national territory, either as a resident, a tourist or in transit, may be extradited to be investigated or stand trial or to serve a sentence imposed in the convicted person's presence.
2. The granting of extradition is conditional on the existence of guarantees of the fair administration of justice in the requesting State and on whether the requesting State has had a prior request for extradition turned down by a third State on the grounds that it was politically motivated. The Attorney General's Office and the Ministry of Foreign Affairs may report on whether there are any questions or background on the requesting State in this regard.

ARTICLE 517 - Refusal to extradite.-

1. Extradition shall not be allowed if the act or omission does not constitute a crime both in the requesting State and in Peru and unless the penalty set under both bodies of law is imprisonment for one year or more. If extradition is sought for a number of crimes, only one of those crimes must satisfy this condition to allow extradition with respect to the other crimes named in the request.
2. Extradition shall not be allowed if any of the following conditions are present:
 - a) The requesting State has neither the jurisdiction nor the competence to prosecute the crime;
 - b) The person whose extradition is sought has already been acquitted, convicted, pardoned, or granted amnesty or any other equivalent clemency;
 - c) The statute of limitations for prosecuting or punishing the crime under Peru's domestic laws or the laws of the requesting State has expired, provided the latter does not exceed the statute of limitations under Peruvian law;
 - d) The person whose extradition is sought would face a special tribunal in the requesting State or the proceeding which said person would undergo does not meet the international standards for due process;
 - e) The crime is exclusively military in nature, is anti-religion, is based on politics or related thereto, is based on the practice of journalism or for expressing one's opinion. The fact that the victim of the punishable offense is a public servant shall not, by itself, be sufficient to classify the crime as political in nature. The fact that the person whose extradition is sought was a public servant shall not be sufficient to classify the offense as political in nature. Furthermore, acts of terrorism, crimes against humanity and those crimes with respect to which Peru has undertaken an international convention-based obligation to extradite or prosecute, shall not be classified as political crimes;
 - f) The crime can be prosecuted at the request of a party and if the offense constitutes a misdemeanor, and
 - g) The crime is tax-related, except when the crime is committed by filing a deliberately false tax declaration or through a deliberate omission calculated to conceal the proceeds of any other crime.
3. Nor shall extradition be ordered when:
 - a) The extradition request, which is based on a violation under ordinary criminal law, has been presented for the purpose of persecuting or punishing a individual based on race, religion,

nationality or political opinion or the *extraditurus* would be exposed to greater peril for one or more of these reasons;

- b) There are special reasons dictated by national sovereignty, security, public law and order or other essential interests of Peru that argue against the grant of extradition;
- c) The requesting State does not offer assurances that allowance will be made for the period the *extraditurus* was held in custody because of the extradition proceeding and any time that said person already served in connection with the case that prompted the extradition request;
- d) The crime for which extradition is sought carries the death penalty in the requesting State and the latter does not give assurances that the death penalty will not be applied.

ARTICLE 518 - Requirements that the extradition request must meet.-

1. The extradition request must contain the following:

- a) A description of the punishable act, with express reference to the date, place and circumstances surrounding its commission, the identity of the victim, and under what crime the punishable act is classified in law;
- b) An explanation of the basis for the requesting State's competence, demonstrating that the statute of limitations for prosecution and punishment of the crime(s) has not yet expired;
- c) Authenticated copies of the court decisions ordering prosecution and, where applicable, trial of the person whose extradition is being requested, or the final conviction handed down in said person's presence, and authenticated copies of the decision that ordered said person's arrest and/or declared him *in absentia* or in contempt. Also, authenticated copies of the decision in which issuance of the extradition request is ordered;
- d) The text of the criminal and procedural laws relevant to the case, as provided in the preceding paragraph;
- e) All known data identifying the person whose extradition is sought, such as name and surname, nicknames, nationality, date of birth, marital status, profession or occupation, distinguishing features, photographs and fingerprints, and any information available regarding said person's domicile or whereabouts within the national territory.

2. When the treaty that Peru signs with the requesting State so stipulates or when, in application of the principle of reciprocity, the domestic law of that State so requires for purposes of processing a passive extradition, which must be expressly stated in the extradition request, the latter must contain the necessary evidence establishing sufficient indicia of the commission of the criminal act and of the involvement of the person whose extradition is being sought.

3. If the extradition request has not been properly processed or is incomplete, the central authority, at the request of the jurisdictional organ and in coordination with the Ministry of Foreign Affairs, shall ask the requesting State to correct or complete the extradition request and the documentation.

[...]

ARTICLE 520 - Effects of the extradition granted.-

1. The *extraditurus* may not be tried for prior acts other than those that were the basis for granting said person's extradition, unless Peru gives its prior authorization. In that event, the requesting State must file an amplified extradition request; the Criminal Chamber of the Supreme Court, which shall consider that request and the corresponding supporting documents, shall issue an advisory decision and the Council of Ministers must approve the Supreme Resolution authorizing the amplified extradition request.

2. If the classification of the criminal act that was the grounds for extradition is subsequently changed in the requesting State while the extradition process is still ongoing, the change must also have the Peruvian Government's authorization, following the same procedure described in

the preceding paragraph, with the proviso that the extradition request may only be granted if the new classification of the criminal act makes it an extraditable offense.

3. The *extraditatus* may not be re-extradited to another State without Peru's prior consent. The procedure described in paragraph 1 shall be followed. However, the Peruvian Government's consent shall not be required if the extradited person waives that immunity in the presence of the Peruvian diplomatic or consular authority and on the advice of defense counsel; or, when the person being extradited has the opportunity to voluntarily leave the territory of the requesting State but does not do so within thirty days, or when he voluntarily returns to that territory after having left it.

4. If after being handed over to the requesting State or during the respective process, the person extradited escapes in order to return to Peru, he shall be detained through a direct request and again surrendered without any additional formalities.

5. The property –objects or documents- that are the effect or instrument of the crime and those that constitute the *corpus delicti* or evidence, shall be handed over to the requesting State once it has taken custody of the extradited person, even when said person disappears or dies, except when the rights of third parties are affected. This provision must appear in the Supreme Resolution that authorizes extradition.

ARTICLE 521 - Extradition procedure.-

1. Once the Attorney General's Office has received the extradition request, the judge presiding over the preparatory investigation shall issue the order for arrest for purposes of the extradition of the person whose extradition has been requested, if that person is not already in custody by virtue of a request seeking provisional arrest.

2. Once the person whose extradition has been requested is in custody and INTERPOL's local office has surrendered said person over to the courts, the judge presiding over the preparatory investigation shall summon the provincial prosecutor to be present when the person's statement is taken. He shall inform the person whose extradition has been requested of the reasons for his arrest and the details of the extradition request. The Judge shall also advise said person of his right to name his own defense counsel and, if unable to do so, to have a court-appointed attorney designated to represent him if he so desires; the person in custody may make whatever comment he wishes to make regarding the content of the extradition request, and may question the identity of the person whose extradition the foreign courts are seeking, or withhold his statement until the extradition oversight hearing. If the person in custody does not speak Spanish, an interpreter shall be appointed.

3. Immediately thereafter, within a period of no more than 15 days, the judge presiding over the preparatory investigation shall schedule a public hearing, issuing a summons for the person whose extradition is being requested, his defense counsel, the provincial prosecutor, the representative designated by the Embassy and the attorney that it appoints for the purpose. The participants may introduce evidence, challenge or support the evidence in the extradition case file, make the case for the procedural or material relevance or irrelevance of the case for extradition, or any arguments in support of their claims. The hearing begins with an itemization of the grounds for extradition, the contents of the extradition request, and of the documents and evidence attached thereto. Then, if he so desires, the person whose extradition is being sought may make a statement in that regard and be questioned by the parties. The parties will then make their arguments by turns; the accused shall be entitled to the final word. The record of the proceeding shall be immediately sent up to the Criminal Chamber of the Supreme Court.

4. Once the judge presiding over the preparatory investigation has sent the record of the proceedings to the Supreme Court Prosecutor and the other named participants, the Criminal Chamber of the Supreme Court shall set the date for the extradition hearing. The hearing shall be conducted with those in attendance who, following the established order, shall present oral reports. The first to present his report shall be the Prosecutor and the last shall be the attorney representing the person whose extradition is sought. If the latter attends the hearing, he shall

speak last. The Supreme Court shall issue an advisory decision within five days. Once notification is done, the decision shall immediately be referred to the Ministry of Justice, within three days.

5. If, after questioning the person whose extradition is sought, the judge presiding over the preparatory investigation determines that the individual is not the person whose extradition the foreign justice system is seeking, said judge shall immediately so declare, without prejudice to ordering that the correct person be arrested. Although such a finding may be announced even before the hearing is held, it shall put a halt to any further proceedings against the individual in custody. An appeal challenging the judge's finding may be filed with the Superior Criminal Chamber.

6. At any stage in the judicial proceeding, the person whose extradition is being sought may give his free and full consent to be extradited. In that event, the jurisdictional body shall consider the proceeding closed. The Criminal Chamber of the Supreme Court may, without holding any further proceedings, issue an advisory decision favorable to extradition, and refer the case files to the Ministry of Justice for the purposes the law prescribes.

ARTICLE 522 – Supreme Resolution and Execution.-

1. The Supreme Resolution issued by the Council of Ministers shall be reported to the Attorney General's Office and to the requesting State via diplomatic channels. In the communication, the requested State shall set forth the conditions for the grant of extradition. If the decision is to refuse extradition, the Attorney General's Office shall so inform INTERPOL.

2. Once a definitive decision has been made on the extradition request, no further extradition request shall be entertained from the same requesting State, based on the same facts, except if extradition is denied on procedural grounds. Another State with jurisdiction may seek the same person's extradition based on the same set of facts if the first State to apply for the person's extradition was refused on the grounds that it did not have competence to prosecute the crime that prompted the extradition request.

3. The requesting State must take custody of the person being extradited within thirty days of the official communication. The Attorney General's Office addresses a requesting State's request when the latter is unable to take custody within the prescribed time period and may grant the requesting State an additional ten days. Once that ten-day period has expired, the person whose extradition was sought shall be immediately released and the requesting State may not file another request for his extradition.

4. The costs of incarcerating and handing over the person whose extradition was sought, his international travel expenses and the costs of the documents and assets seized shall be borne by the requesting State.

5. If the person whose extradition was requested is ultimately acquitted, the requesting State is required to send Peru an authenticated copy of the verdict.

ARTICLE 523 – Provisional or pre-extradition arrest.-

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

- a) The central authority of the interested country has filed a formal request for his arrest;
- b) The person tries to enter the country while being pursued by the authority of a neighboring country;

2. In the situation described in subparagraph a) of the above paragraph, the formal request shall be sent to the Attorney General's Office, by way of either the central authority or INTERPOL. In urgent cases, a simple request filed by any means –telegraph, telephone, radio or e-mail- shall suffice. The formal request shall contain the following:

- a) The name of the person whose arrest is being requested, with the particulars of his personal identity and any details that might be useful in establishing his whereabouts in the country;
- b) The date and place of the commission of the crime and its criminal classification;

- c) If the person whose arrest is being requested is accused of committing a crime, an indication of the penalty for the crime he is accused of committing; if he has been convicted of a crime, a description of the penalty imposed;
- d) A reference to the existence of a court order for the subject's arrest or imprisonment, and whether he has been declared *in absentia* or in contempt;
- e) The commitment of the requesting State to file a formal request for extradition within thirty days of the date on which the arrest request is received. At the end of that 30-day period, if no formal request for extradition has been received, the person arrested shall be released immediately.
3. The Attorney General's Office shall refer the request to the competent judge for the preparatory investigation, and notify the appropriate Provincial Prosecutor.
4. The judge shall issue the provisional arrest warrant, provided the act reputed to be a crime is also a crime in Peru and when the offense is one punishable under the laws in both the requesting and requested States by deprivation of liberty for a maximum period of more than one year or by a more severe penalty. If the commission of a number of crimes is being claimed, only one of those crimes must satisfy this condition to allow the Peruvian authorities to proceed with respect to the other crimes. The Prosecutor shall be notified of the decision the judge issues, and the Attorney General's Office and INTERPOL's local office shall be so advised.
5. If the situation posited in subparagraph b) of paragraph 1) obtains, the Police posted at the border shall immediately surrender the detainee to the competent judge for the preparatory investigation in the place where the person was taken into custody, and the Provincial Prosecutor shall be informed. By the most rapid means possible, which may be telephone, fax or email, the judge shall advise the Attorney General's Office and the diplomatic or consular authority of the country that requested the search that the person being sought has been taken into custody. The diplomatic or consular official shall have two days in which to request that the person in question be kept under provisional arrest and shall include with his request the particulars specified in paragraph 2) of this article. If this is not done, the arrested person shall be immediately released.
6. Once the provisional arrest has been ordered, the judge presiding over the preparatory investigation shall, within twenty-four hours, give a hearing to the person placed under arrest and shall designate a court-appointed attorney to represent him if he does not appoint his own legal counsel. The arrest shall be lifted if the judge establishes that the conditions set forth in paragraph 4) of this article are not present and shall order in its place a supervised release arrangement under which the person whose arrest was requested shall not be permitted to leave the country. The arrest shall be terminated if it is established that the person being held under arrest is not the person being sought or if the thirty-day period allowed to file a formal request for extradition expires.
7. The person arrested and then released because the extradition request was not filed on time, may be detained again for the same crime, provided a formal extradition request is received.
8. At any time during the provisional arrest, the person under arrest may consent to be transferred to the requesting State. If that is the case, the procedure followed shall be the one set forth in paragraph 6) of Article 521.
9. The person under arrest may obtain provisional release upon expiration of the legal deadlines prescribed in the treaty or in the law that is the basis for the extradition request, or if the person whose extradition is sought meets the procedural conditions to qualify for provisional release. In the latter event, an order shall be issued to bar him from leaving the country and his passport shall be withheld, without prejudice to any other control measures that the judge may decide at his discretion. The procedure prescribed for the cessation of preventive imprisonment shall be followed.¹¹

¹¹ Legislative Decree No. 957 of July 22, 2004, Code of Criminal Procedure, available [in Spanish] at the web portal of the Congress of the Republic of Peru: www.congreso.gob.pe/ntley/Imagenes/DecretosLegislativos/00957.pdf.

B. The bilateral extradition treaty between Peru and the People's Republic of China

66. The bilateral extradition treaty between the People's Republic of China and Peru entered into force on November 5, 2001. The following are the relevant parts of that bilateral treaty:

Article 1

Obligation to extradite

Pursuant to the provisions of this Treaty and at the request of the other Contracting Party, each Contracting Party is obligated to extradite to the other, any persons within its respective territory whose extradition the other Contracting Party requests in order to criminally prosecute said person or enforce a sentence already imposed.

Article 2

Extraditable offenses

1. Extradition shall be granted only when the offense is one punishable under the laws in both Contracting Parties and meets any of the following conditions:

(a) when the extradition request is filed for purposes of prosecuting a person; when the penalty to be imposed is deprivation of liberty for more than one year or a more severe penalty; or

(b) when the extradition request is filed in order to enforce a sentence; when the person sought as of the date on which the extradition request is presented, has at least another six months to serve on his prison term.

2. To determine whether an act is a crime under the laws of both Parties for purposes of paragraph 1 of this article, it shall not matter whether the laws in the Contracting Parties place the offense within a different category of offenses or describe the offense by different terminology.

3. If the extradition request is for two or more acts that constitute crimes under the laws of both Contracting Parties and at least one meets meet the minimum penalty requirement stipulated in paragraph 1 of this article, the requested Contracting Party may grant extradition for all the acts in question.

Article 3

Mandatory bases for denying extradition

Extradition shall be denied if:

(a) the requested Contracting Party considers that the crime for which extradition is sought is a political crime, or the requested Contracting Party has granted asylum to the person whose extradition is sought;

(b) the requested Contracting Party has sufficient reason to believe that the extradition request was filed in order to persecute or punish the person whose extradition is sought based on his

race, sex, religion, nationality or political opinion, or that the situation of the person whose extradition is sought may be prejudiced by any of these considerations in the course of the judicial proceedings;

(c) the crime for which extradition is sought is a purely military crime under the laws of the requesting Contracting Party;

(d) under the laws of the requesting Contracting Party, the person whose extradition is sought enjoys immunity from prosecution or from enforcement of sentence for any reason, including the statute of limitations, clemency or amnesty;

(e) The requested Contracting Party has already issued a final judgment or has finalized proceedings against the person whose extradition is sought for the crime specified in the extradition request; or

(f) under the laws of the requesting Contracting Party, the extradition request concerns a case that can only be instituted on the basis of a complaint filed by the victims.

Article 4

Discretionary grounds for denying extradition

Extradition may be denied if:

(a) under its domestic laws, the requested Contracting Party has jurisdiction over the crime for which extradition is requested, and is in the process of conducting a case or intends to bring a case against the person being sought for that crime, or

(b) the requested Contracting Party considers that extradition would be incompatible with humanitarian considerations such as the age and/or state of health of the person whose is sought and other personal considerations.

Article 5

Condition precedent for extradition

Extradition shall only be carried out if it is not contrary to the requested Contracting Party's system of laws.

Article 6

Channels of communication

For purposes of the present Treaty, the Contracting Parties shall communicate with each other by way of their duly designated authorities, unless the present Treaty provides otherwise. Until those authorities are designated, the Contracting Parties shall communicate with each other through diplomatic channels.

Article 7

Extradition request and required documentation

1. The extradition request shall be in writing and shall include the following:

- (a) the name of the requesting authority;
- (b) the name, age, sex, nationality, identification papers, occupation and domicile or residence of the person whose extradition is sought and any other information that might be useful in establishing that person's identity and probable whereabouts; if possible, a physical description of the person, photographs and fingerprints;
- (c) a report summarizing the criminal acts and their consequences;
- (d) the texts of the legal provisions pertaining to criminal jurisdiction, the crime and the sentence that the crime can carry; and
- (e) texts of the pertinent legal provisions that describe every deadline for the process or for execution of the sentence.

2. In addition to the provisions contained in paragraph 1 of this article,

- (a) an extradition request whose purpose is to prosecute the person being sought shall include a copy of the arrest warrant issued by the competent authority of the requesting Contracting Party; or
- (b) an extradition request whose purpose is to enforce a sentence already imposed on the person whose extradition is being requested, shall also include a copy of the court's ruling and a description of what portion of his sentence has been served.

3. The extradition request and its supporting documents, duly signed and/or sealed, shall have their translations into the language of the requested Contracting Party attached.

4. The documents presented pursuant to paragraph 3) of this article shall not require any type of consular legalization.

Article 8

Additional information

If the requested Contracting Party deems that the information provided to support the extradition request is not sufficient, it may request that additional information be supplied within a period of thirty days. If the requesting Contracting Party explains the reasons to justify an extension, it may be granted an additional 15 days. If the requesting Contracting Party does not provide the additional information within that time period, it shall be deemed to have voluntarily renounced its extradition request. However, there is nothing to prevent the requesting Contracting Party from filing another extradition request for the same crime.

Article 9

Preventive detention

1. In an emergency case, the requesting Contracting Party may ask that the person being sought be taken into preventive custody before the formal extradition request is filed. That request shall be in writing and filed through the channels stipulated in Article 6 of this Treaty, the International Criminal Police Organization (ICPO-INTERPOL) or other channels that both Contracting Parties mutually agree upon.

2. The request for preventive detention shall include the content specified in paragraph 1 of Article 7 of this Treaty, a declaration attesting to the existence of the documents indicated in paragraph 2 of that article and a declaration indicating that the formal request for the person's extradition shall be sent promptly.

3. The requested Contracting Party shall move quickly to inform the requesting Contracting Party of the outcome of its request.

4. Preventive detention shall be terminated if the competent authority in the requested Contracting Party has not received a formal request for extradition within the sixty days following the date on which the person being sought was taken into custody. This time period may be extended by another thirty days when the requesting Contracting Party gives justifiable reasons.

5. Pursuant to paragraph 4 of this article, termination of preventive detention shall not affect the extradition of the person being sought if the requested Contracting Party subsequently receives the formal request for extradition.

Article 10

Decision on the extradition request

1. The requested Contracting Party shall process the extradition request in accordance with the procedures established in its domestic laws and shall promptly inform the requesting Contracting Party of its decision.

2. If the extradition request is denied either in whole or in part, the requested Contracting Party shall advise the requesting Contracting Party of the reasons for its refusal to grant full extradition.

Article 11

Surrender of the person whose extradition was requested

1. If the requested Contracting Party grants extradition, the Contracting Parties shall agree on the time and place for the surrender of the person sought and other relevant matters related to execution of the extradition. In the meantime, the requested Contracting Party shall inform the requesting Contracting Party of the amount of time that the person to be extradited was held in custody prior to being surrendered.

2. If the requesting Contracting Party does not take custody of the extradited person within the fifteen days following the date agreed for execution of the extradition, the requested Contracting Party shall immediately release said person and may deny any further extradition request from the requesting Contracting Party seeking the same person for the same crime, with the proviso stipulated in paragraph 3 of this article.

3. If, owing to unforeseen circumstances, the requested Contracting Party fails to surrender the person in its custody or the requesting Contracting Party fails to take custody of said person within the agreed upon period, the other Party shall be informed as soon as possible. The Contracting Parties may reach another agreement on the particulars of the surrender, and the provisions of paragraph 2 of this article shall be applied.

(...)

Article 15

Rule of specialty under international law

A person extradited under this Treaty may not be prosecuted or subjected to enforcement of sentence in the requesting Contracting Party for a crime that the extradited person committed before being surrendered and different from the crime for which he was extradited, nor may he be extradited to a third State, unless:

:

(a) the requested Contracting Party has given its prior consent. For purposes of that consent, the requested Contracting Party may request the documents and information mentioned in Article 7 and a statement from the extradited person regarding the crime in question;

(b) the person has not left the territory of the requesting Contracting Party within the thirty-day period that he was at liberty to do so. However, this thirty-day period shall not include the time during which that person failed to leave the territory of the requesting Contracting Party owing to unforeseen circumstances; or,

(c) the person has voluntarily returned to the territory of the requesting Contracting Party after having left it.

(...)

Article 18

Information on the outcome

The requesting Contracting Party shall promptly provide the requested Contracting Party with information on the criminal proceedings or the enforcement of the sentence imposed on the person extradited, or information concerning that person's re-extradition to a third State.

C. The extradition process pursued in the case of Mr. Wong Ho Wing and the remedies filed during the course of that process

67. Mr. Wong Ho Wing is a national of the People's Republic of China, where he faces criminal trial for the crimes of money laundering, bribery, smuggling and customs fraud, supposedly committed in Hong Kong between August 1996 and May 1998.¹² On October 27, 2008, Mr. Wong Ho Wing was taken into custody by agents of the Peruvian National Police at Jorge Chávez Airport in the Constitutional Province of Callao. At the time, Mr. Wong Ho Wing was being sought internationally by the Chinese court authorities.¹³ He was taken into custody as he was entering the airport, having deplaned from a flight from the United States.

¹² Annex 1. Communiqué No. 0529-2008-DIRINCRI-PNP-DIVREQ-DINO, dated October 27, 2008. Attachment to the State's Communication of November 10, 2011, received at the Commission that same day.

¹³ Annex 1. Communiqué No. 0529-2008-DIRINCRI-PNP-DIVREQ-DINO, dated October 27, 2008. Annex. INTERPOL Red Notice, Wanted Person, Control No. A-6346/6=2001. Attachment to the State's communication of November 10, 2011, received at the Commission that same day.

68. On October 27, 2008, Mr. Wong Ho Wing was transferred to the cells of the Callao Judicial Police and brought before the First Special Court of Callao.¹⁴ The following day, Mr. Wong Ho Wing gave his preliminary statement before that court, in the presence of his defense attorney and a Mandarin Chinese interpreter provided by the Callao Superior Court. The relevant part of the victim's statement reads as follows:

[...] I am asking the Peruvian authorities to afford me special consideration for the sake of protecting my rights. If I am returned to my country to face the charges against me, I could be executed or receive the death penalty. Given the situation, I am requesting that I be allowed to stand trial here in Peru.¹⁵

69. On October 28, 2008, the First Special Court of Callao ordered Mr. Wong Ho Wing's provisional arrest, pursuant to Article 523 of the Peruvian Code of Criminal Procedure.¹⁶ That same day, it ordered that he be taken to the Callao's Transitory Prison.¹⁷ The relevant part of the order for provisional arrest reads as follows:

[...] issuing a warrant for said person's provisional arrest is both reasonable and proportionate for the purpose of ensuring that the person in question, having been duly identified as the person sought by the judicial authorities of the People's Republic of China, remains in the country while the request for his extradition is processed. He has not yet accredited either his domicile or employment in the country. Furthermore, the crime of which he is accused is also a crime under our own laws under the heading of customs-related crimes – customs tax evasion, provided for and punishable under Article 4 of Law No. 28008 "Customs-related Crimes Act" [...] While it is true that the terminology used to describe the crime in Peru is not the same as the terminology used in the People's Republic of China, it is also true that the difference in terminology is in no sense an impediment under paragraph two of Article Two of the Extradition Treaty that our country signed with the People's Republic of China, which was ratified through Supreme Decree Number zero fifty-five two-RE of June thirteenth of the year two thousand two.¹⁸

70. On October 29, 2008, Mr. Wong Ho Wing's legal representatives filed an appeal to challenge his provisional arrest. They argued, *inter alia*, that the arguments made by the First Special Criminal Court of Callao concerning the absence of a domicile and known employment in Peru were untrue, as Mr. Wong Ho Wing proved that he had established himself and had economic interests in Peru. They introduced a certified copy from the Lima Registry Office documenting the registration of a business called *Inversiones Turísticas Maury SAC*, whose majority shareholder is Mr. Wong Ho Wing. Furthermore, his attorneys maintained that Mr. Wong Ho Wing uses the hotel he owns in Lima as his domicile when he is in Peru.¹⁹

¹⁴ Annex 3. Communiqué No. 2041-2008DIRINCRI-DIVPOJUD-DEPOJUD-C, of October 27, 2008, from the Chief of the Callao Judicial Police Department to the Judge of the First Criminal Court of Callao. Attachment to the State's communication of November 10, 2011, received at the Commission that same day.

¹⁵ Annex 4. Preliminary Statement that Wong Ho Wing made before Callao's First Special Court, case No. 2008-6370.. Attachment to the State's communication of November 10, 2011, received at the Commission that same day.

¹⁶ Annex 5. Provisional Arrest Warrant dated October 28, 2008, case No. 2008-06370-0-0701-PE-01. Attachment to the State's communication of November 10, 2011, received at the Commission that same day.

¹⁷ Annex 6. Communiqué No. 6370-2008 from Callao's First Special Criminal Court, dated October 28, 2008. Attachment to the State's communication of November 10, 2011, received at the Commission that same day.

¹⁸ Annex 5. Provisional Arrest Warrant dated October 28, 2008, case No. 2008-06370-0-0701-PE-01.

¹⁹ Annex 7. Appeal dated October 29, 2008. Attachment to the State's communication received at the IACHR on October 25, 2010.

71. On October 31, 2008, an order was issued in case 2008-06370-0-0701-JR-PE-1, concerning the appeal filed to challenge the warrant for Mr. Wong Ho Wing's provisional arrest. The court agreed to hear the appeal and an order was given to file the corresponding motion with the Superior Court's Criminal Chamber.

72. On November 3, 2008, Office No. 24 of the Ministry of Public Security of the People's Republic of China requested Mr. Wong Ho Wing's extradition. In that request, it stated that the crimes of which he was suspected –smuggling of ordinary merchandise, the crime of money laundering and the crime of bribery- were violations of the provisions of the Criminal Code of the People's Republic of China, specifically its articles 153, 154, 191, 389 and 390. The extradition request also stated that:

In order to punish the crime and preserve law and order, and pursuant to the articles of the Extradition Agreement concluded between the People's Republic of China and the Republic of Peru, this request is hereby directed to your country's institution of justice asking that the suspected criminal be held in custody and to apply for his extradition, so that he can be returned to China as soon as possible, and to ask that his assets in your country be frozen and confiscated, as they are the at the center of the case against him.²⁰

73. On November 5, 2008, the Embassy of the People's Republic of China sent a communication to the Office of the Director General of Legal Affairs of Peru's Ministry of Foreign Affairs, in which it requested that "the necessary arrangements be coordinated with the competent Peruvian authorities to ensure that the individual is under provisional arrest before the arrival of the Chinese mission to officially begin the extradition process."²¹

74. On November 13, 2008, the Embassy of the People's Republic of China sent a communication to the Office of the Director General of Legal Affairs of Peru's Ministry of Foreign Affairs in which it requested, "under the provisions of the Extradition Treaty between the People's Republic of China and the Republic of Peru, the extradition of suspect Wong Ho Wing for the crimes of smuggling, money laundering and bribery, so that he may be turned over to the judicial authorities in the People's Republic of China."²²

75. On November 14, 2008, the Office of the Director General of Legal Affairs at Peru's Ministry of Foreign Affairs received a memorandum from the Embassy of the People's Republic of China enclosing an extradition request from Office No. 24 of the Chinese Ministry of Security, written in Spanish and Mandarin. The relevant parts of that request read as follows:

In the period between August 1996 and May 1998, the smuggling ring headed by suspected criminals Huang Hai Yong, Pan Zi Niu (fugitive) and Shao Hi (female, fugitive) hatched the scheme and used the businesses under their management as a front (...) [and] he thus evaded Customs inspection and was able to import, duty free, 107.4 thousand tons of crude soybean oil to sell in the country and reap the proceeds of the transaction; the value came to 1.215 million yuan; the tax amounted to 7.17 hundred million yuan (...). Huang Hai Yong also bribed the customs officers

²⁰ Annex 8. Extradition request dated November 3, 2008. Attachment to the State's communication received at the IACHR on October 25, 2010.

²¹ Annex 9. Brief N.V. No. 033/2008 dated November 5, 2008.

²² Annex. 10. Brief N.V. No. 036/2008 dated November 13, 2008.

for his smuggled goods, and on August 20, 1998, sent overseas a total of 4.048 million United States dollars in three different transfers (in the meantime, 1.29 million US dollars were transferred to the city of Lima, Peru).

[...]

The actions described above violated the provisions of the Criminal Code of the People's Republic of China, and should be punished. Under articles 153, 154, 191, 389 and 390 of the Criminal Code of the People's Republic of China (...), these acts were suspected of being the crimes of smuggling of ordinary merchandise, money laundering and bribery. In August 1998, the criminal escaped to the United States by way of Hong Kong. On March 16, 2001, the Office of the People's Prosecutor for the Wuhan Municipality in Hubei province approved the decision to arrest Huang Hai Yong on suspicion of smuggling ordinary merchandise (...). Under Article 88 of the Criminal Code of the People's Republic of China, there shall be no limitation on the period for prosecuting criminals who evade investigation once the state security organ has them under investigation or criminals who evade punishment once their case is docketed with the People's Court.

[...]

In order to punish the crime and preserve law and order, and pursuant to the articles of the Extradition Agreement concluded between the People's Republic of China and the Republic of Peru, this request is hereby directed to your country's institution of justice asking that the suspected criminal be held in custody and to apply for his extradition, so that he can be returned to China as soon as possible, and to ask that his assets in your country be frozen and confiscated, as they are the at the center of the case against him. This Office pledges its cooperation whenever a similar reciprocal request is forthcoming from your country and is within this office's purview.²³

76. Attached to the extradition request were copies of Mr. Wong Ho Wing's identification documents, an order for his arrest, records of financial transactions and movements, the total taxes he is alleged to have evaded, and excerpts from China's Criminal Code concerning the statute of limitations. Also attached to the request was a Spanish translation of articles 153, 154, 191, 389 and 390 of the Chinese Criminal Code, with the following text:

Criminal Code of the People's Republic of China, Article 153, paragraph 1: Whoever smuggles goods and articles and evades the taxes owed when they amount to not less than 500,000 yuan shall be sentenced to fixed-term imprisonment of not less than ten years or life imprisonment, and concurrently be sentenced to a fine of not less than the tax owed and not more than five times that sum or confiscation of his property. If the circumstances are especially serious, the offender shall be punished according to the provisions of the fourth paragraph of Article 151 of this Code.

[...]

Criminal Code of the People's Republic of China, Article 154: Acts of smuggling that are crimes under the following subparagraphs of this article shall be sentenced according to Article 153:

²³ Annex 8. Extradition Request issued by Office No. 24 of the Ministry of Public Security, dated November 3, 2008. Attachment to the State's communication of November 10, 2011, received at the Commission that same day.

3. Anyone who sells, duty-free and without customs' authorization, raw materials, finished and semi-finished products, and tools imported to work the supplied materials, assemble the pieces supplied and negotiate payment.

[...]

Article 191: Anyone who commits any of the following acts with full knowledge that theirs are ill-gotten proceeds from drug-related crimes, crimes committed by mafia-like groups, terrorist crimes, smuggling, embezzlement, bribery, the crime of sabotaging the financial order, financial swindles, and the crimes committed in perpetrating any of the following acts shall have his ill-gotten gains confiscated and be sentenced to fixed-term imprisonment of not less than five years, and concurrently or independently be sentenced to a fine of not less than 5% of the sum of money laundered and not more than 20% of the overall proceeds from money laundering. If the circumstances are serious, the offender shall be sentenced to fixed-term imprisonment of not less than five years and not more than ten years, and concurrently be sentenced to a fine of not less than 5% of the sum of money laundered and not more than 20% of that sum.

[...]

Criminal Code of the People's Republic of China, Article 389: Anyone who, in order to gain some illegal advantage, gives money or property to a state official, commits the crime of bribery.

Criminal Code of the People's Republic of China, Article 390: The crime of bribery carries a sentence of imprisonment or detention for not less than five years; crimes that cause great losses to the State carry a sentence of 5 to 10 years' imprisonment. Crimes that cause enormous losses are punishable by a sentence of imprisonment for more than ten years and up to life imprisonment; in such cases, the sentence may also call for confiscation of personal property.²⁴

77. On November 25, 2008, in case 2008-06370-o-0701-JR-PE-1 concerning the provisional arrest of Chinese citizen Wong Ho Wing, the Seventh Criminal Court of Callao scheduled the public hearing on Mr. Wong Ho Wing's extradition for December 10, 2008, at 10:00 a.m., in the Callao Prison, and that "the person whose extradition is being requested, his defense attorney, the representative from the Callao Provincial Prosecutor's Office and the head of the Unit for International Judicial Cooperation on Extradition, the representative designated by the Embassy of the People's Republic of China, and INTERPOL shall be so informed."²⁵

78. On December 3, 2008, Mr. Wong Ho Wing's attorneys filed a brief with Callao's Seventh Special Criminal Court in which they requested termination of his provisional arrest ordered on October 28 of that year. That request was based on the failure to notify the victim that the Chinese Government had, within the 30-day period stipulated in the pertinent procedural law, filed a request seeking his extradition.²⁶

²⁴ Annex 8. Extradition Request issued by Office No. 24 of the Ministry of Public Security and dated November 3, 2008, Annex 6 titled "Excerpts concerning the statute of limitations on appeals and punishment under the Criminal code of the People's Republic of China."

²⁵ Annex 11. Order setting the date for the Public Hearing on the Extradition of Mr. Wong Ho Wing. Attachment to the State's communication received at the IACHR on July 16, 2010.

²⁶ Annex 12. Brief filed with Callao's Seventh Special Criminal Court, Case No. 06370-2008, paragraphs 3 and 4. Attachment to the State's communication of November 10, 2011, received at the Commission that same day.

79. On December 11, 2008, Callao's First Transitory Mixed Superior Court Chamber issued a decision on the appeal that Mr. Wong Ho Wing filed to challenge the warrant for his provisional arrest. In its decision, the court upheld the warrant for Mr. Wong Ho Wing's provisional arrest. Summarizing, the court ruled as follows

That in the instant case, the Criminal Judge has ordered the provisional arrest of Mr. Wong Ho Wing for purposes of extradition, based on the premise set forth in subparagraph c) of paragraph one of Article 523 of the Code of Criminal Procedure, which states that a condition precedent to order provisional arrest is that the person to be extradited must be within the national territory and that the International Criminal Police Organization -INTERPOL- must have issued an urgent request for his provisional arrest. These requirements have been satisfied, as attested to by the 14-page memorandum from INTERPOL and the 15-page request filed by the People's Republic of China seeking his arrest (...) Another requirement that must be met in order to issue a provisional arrest warrant is set forth in paragraph four of the aforementioned article five hundred twenty-three, which is that the reputedly criminal act must also be a crime in Peru, a requirement that has been satisfied in the instant case since the smuggling for which appellant Wong Ho Wing is being sought is criminalized in our criminal laws as well.

(...) the appellant's arguments, contained in his 38-page appeal, offer no basis in fact or in law by which to settle the matter, since this Collegiate Body is not deciding whether passive extradition is or is not in order. That decision is the function of the corresponding Criminal Chamber of the Supreme Court. As for any procedural risk, this body is not called upon to examine a provisional arrest made for purposes of extradition; instead, its function is a criminal case instituted in our country for a given crime, which is not the appellant's case.²⁷

80. On January 20, 2009, the Second Transitory Criminal Chamber of the Supreme Court issued an advisory decision in which it concluded that the request seeking Mr. Wong Ho Wing's extradition met the requirements stipulated in Peru's laws with respect to the crimes of customs fraud and smuggling; it therefore held that the request was proper. In that decision, the Second Transitory Criminal Chamber of the Supreme Court wrote the following:

(...) That the judicial authorities of the People's Republic of China are accusing Chinese citizen Wong Ho Wing or Huang He Yong and his co-defendants Pan Zi Niu and Sha Hi (fugitives) of having committed customs fraud (...), having corrupted customs officials to pull off the customs fraud, and of having sent outside the country (China), the sum of 4.048 million United States dollars, in three separate transfers, on August 20, 1998 (...),

(...) That judging from the attached documents, it appears that in the present passive extradition request seeking Chinese citizen Wong Ho Wing or Huan Hoy Yong or Huang He Yong, the Government of the People's Republic of China has complied with the formal requirements of that Treaty (...)

(...) thereby complying with the extradition principle of dual criminality. It should be noted that the crimes in question have no political connotations and are not political in nature. **FOUR:** Therefore, inasmuch as the provisions of the aforementioned extradition treaty have been observed, the present request, as set forth in the preceding *consideranda* (...). Is deemed to be in order (...).

²⁷ Annex 13. Decision dated December 11, 2008, delivered by Callao's First Transitory Mixed Superior Court Chamber on the appeal filed in Case No 1870-2008-25, *consideranda* three and four. Attachment to the State's communication of November 10, 2011, received at the Commission that same day.

(...) However, in the case of the crime of money laundering, it is important to note that at the time the acts were committed in the requested country (...) money laundering was not a criminal offense under our substantive criminal law system. Therefore, the dual criminality requirement for extradition was not satisfied with respect to the crime of money laundering. Thus, the extradition request filed by the judicial authorities of the People's Republic of China must be declared out of order with respect to that crime.²⁸

81. On January 26, 2009, Mr. Wong Ho Wing filed a petition of *habeas corpus* alleging the "certain and imminent threat of violation of his rights to life and to personal integrity." In this petition, he made reference to a number of irregularities in the extradition process, among them "the fact that the Supreme Prosecutor was not present for the extradition hearing and his opinion regarding the legality or illegality of Mr. Wong Ho Wing's extradition was not produced." Also mentioned was the failure to promptly notify his attorney of the scheduled date of the extradition hearing. He also argued that Peru's extradition laws "will be irrelevant ... if the process to which the extradited person is subjected does not meet the international requirements of due process." He argued further that extradition should not be ordered when "the crime for which extradition is sought is a capital offense in the requesting State, and the latter does not offer assurances that the death penalty will not be applied." This petition of *habeas corpus* emphasized that under Article 152 of China's Criminal Code, the death penalty could be ordered for the crime at issue in this case; therefore, the "extradition request should be denied and not be given the hearing that it has received." He also stated that the extradition request failed to include the translation of Article 151 of China's Criminal Code, which states that the crime of which Mr. Wong Ho Wing is accused, is a capital offense.²⁹

82. On January 26, 2009, Lima's 56th Criminal Court decided to grant cert to the petition of *habeas corpus* for "an alleged violation of the fundamental guarantee of due process."³⁰

83. On February 2, 2009, the consul from the Embassy of the People's Republic of China, Cai Liquan, sent the Chair of the Commission on Extraditions and Convict Transfers a communication enclosing an "explanation of the penalty that *extraditurus* Wong Ho Wing would face."³¹ This "explanation" of how Mr. Wong Ho Wing would be sentenced states the following:

A. Given the nature of the crimes for which *extraditurus* Wong Ho Wing is sought and the provisions of the Criminal Code of the People's Republic of China, there is no possibility that he will face either life imprisonment or capital punishment.

²⁸ Annex 14. January 20, 2009 decision declaring the request for Mr. Wong Ho Wing's extradition in order. Attachment to the State's brief received at the IACHR on July 16, 2010.

²⁹ Annex 15. Petition of *habeas corpus* filed by Wong Ho Wing on January 26, 2009. Attachment to the State's brief received on May 15, 2009.

³⁰ Annex 16. Decision No. 01 (Ing. 003-2009 - HC), dated January 26, 2009. Attachment to the brief received from the State on May 15, 2009.

³¹ Annex 17. Brief from Office No. 24 of the Ministry of Public Security, dated February 2, 2009. Attachment to the State's communication of July 16, 2010.

B. The Chinese courts will enforce the penalties that apply in the case of *extraditurus* Wong Ho Wing, following the letter of the law and fully observing the Extradition Treaty between the governments of China and Peru.³²

84. On February 10, 2009, the Official Commission on Extraditions and Convict Transfers issued its Report on the Request for Passive Extradition of Chinese citizen Wong Ho Wing. It wrote the following:

(...) we believe that a translation of Article 151 of the Criminal Code of the People's Republic of China is necessary. Article 153, paragraph one, makes reference to Article 151, as shown in the translation at page 90 of the CJ.

It is true that under the extradition treaties that Peru has signed, extradition can be granted even in a case where the person being extradited may face the death penalty; however, in such cases, extradition is only permitted when assurances are given that the death penalty will not be applied or that the death penalty will not be enforced even if that is the sentence delivered by the courts of the requesting State.

Although the Treaty with the People's Republic of China does not contain an express clause concerning capital punishment, Article 5 of that Treaty provides that one of the conditions for extradition shall be as follows: "Extradition shall only be granted if it is not contrary to the requested State's laws."

(...)

The communication from the Inter-American Commission on Human Rights, received through a note from its Executive Secretary dated January 27, 2009, states that the crime would carry the death penalty. Inasmuch as the case file does not contain the requesting State's guarantee that the death penalty will not be applied, the Judicial Branch must first be asked to provide a copy of that guarantee if it was given; if no such guarantee was given, the Judicial Branch must be asked to render its opinion on the information reported by the Inter-American Commission on Human Rights (...).³³

85. On February 12, 2009, Lima's 56th Special Criminal Court issued an order for a temporary stay in processing the request seeking passive extradition of Mr. Wong Ho Wing, to allow the constitutional *habeas corpus* proceeding to run its course, since:

According to the record verifying the status of the extradition process (...) the extradition case is already with the Ministry of Justice's Commission on Extraditions and Convict Transfers and will soon be referred to the Council of Ministers, whereupon the *extraditurus* will be surrendered to the requesting country (...). This would all be carried out without having confirmed whether or not due process has been violated in processing this extradition request (...).³⁴

86. On April 2, 2009, Lima's 56th Special Criminal Court issued its decision on the petition of *habeas corpus* filed by Mr. Wong Ho Wing. The court did not uphold the due process arguments.³⁵ As

³² Annex 17. Brief from Office No. 24 of the Ministry of Public Security, dated February 2, 2009. Attachment to the State's communication of July 16, 2010.

³³ Annex 18. Report No. 19-2009/COE-TC, dated February 10, 2009. Attachment to the brief received from the State on October 25, 2010.

³⁴ Annex 19. Brief dated February 12, 2009. Attachment to the brief received from the State on May 15, 2009.

³⁵ Annex 20. Decision of April 2, 2009, delivered on the constitutional *habeas corpus* petition, 2940-2009 (003-09-HC). Attachment to the brief received from the State on May 15, 2009.

for the crime of which Mr. Wong Ho Wing was accused and the sentence it carried in the People's Republic of China, the court wrote the following:

(...) having carefully examined the petitioner's arguments on this aspect of the petition, we find that the decision delivered and being challenged does not state clearly and unequivocally that the petitioner cannot be extradited to stand trial for the crimes he is alleged to have committed, the ultimate punishment for which is death. He cannot be extradited because Peru has a law expressly prohibiting extradition in such cases, as we have established in previous case law. It is the undersigned's opinion, therefore, that the advisory decision of January 20, 2009 does not adequately explain this point.

Therefore, in the instant case, there is evidence of an infringement of that basic guarantee of the administration of justice; the content of that decision is in need of revision to make an even stronger case for this argument, so that the beneficiary's basic rights will not be violated in the extradition process, which is the very purpose that a well-reasoned decision is to serve in the regular court system.³⁶

87. Based on this ruling, Lima's 56th Special Criminal Court upheld in part the constitutional petition of *habeas corpus*, declared null and void the advisory decision that the Second Transitory Criminal Chamber of the Supreme Court delivered on January 20, 2009, and ordered that a new decision be issued. This court authority also declared the release request to be unfounded and out of order.³⁷

88. On April 8, 2009, Mr. Wong Ho Wing's defense counsel filed an appeal with Lima's 56th Special Criminal Court, challenging the April 2, 2009 decision. The following were among the arguments made in the petition:

The decision contains contradictions (...) on the one hand it upheld the petition of *habeas corpus*, declared the advisory decision that the Second Transitory Criminal Chamber of the Supreme Court delivered to be null and void, and ordered that the latter issue a new decision, as called for; on the other hand, however, it held that the petition was out of order with respect to the petitioner's application for release, when in fact the real purpose of *habeas corpus* is to protect the right to freedom, which is the very right that has been denied in this case.³⁸

89. On June 15, 2009, the Lima Superior Court's Second Special Criminal Chamber for Cases Involving Jailed Prisoners issued its decision on this petition in which it upheld the decision that Lima's 56th Special Criminal Court delivered on April 2, 2009.

90. On October 2, 2009, the National Human Rights Coordinator filed an *amicus* brief with the Permanent Criminal Chamber of the Supreme Court, in the extradition case being prosecuted against Mr. Wong Ho Wing. In that brief, the National Human Rights Coordinator underscored the "importance" of the case, which has "clear public content and is fundamental to the survival of the rule of law: she argued that democracy is built upon respect for human rights, the most cherished of which

³⁶ Annex 20. Decision of April 2, 2009, delivered on the constitutional habeas corpus petition, 2940-2009 (003-09-HC). Attachment to the brief received from the State on May 15, 2009.

³⁷ Annex 20. Decision of April 2, 2009, delivered on the constitutional habeas corpus petition, 2940-2009 (003-09-HC). Attachment to the brief received from the State on May 15, 2009.

³⁸ Annex 21. Appeal filed on April 8, 2009. Attachment to the brief received from the State on May 15, 2009.

is most certainly the right to life.” This brief recounted a number of reports done by Amnesty International in 2009, 2008 and 2007 on the practice and application of the death penalty in China.³⁹

91. On October 5, 2009, the Supreme Court’s Permanent Criminal Chamber issued an order in which it wrote the following:

The extradition request under consideration has the following problem: i) although the crime of which the *extraditurus* is charged carries the death penalty or life imprisonment in the People’s Republic of China, no affidavit is enclosed certifying either that assurances have been given that the *extraditurus* will not be executed if convicted, or that those assurances have been requested. (...) Therefore, given the nature of the request under consideration, THEY RETURNED THE REQUEST so that (...) the necessary correction could be made based on the court’s observation; once the requested action has been taken, a hearing date can be rescheduled (...).⁴⁰

92. On October 12, 2009, Mr. Luis Lamas Puccio filed a second preventive petition of *habeas corpus*, based on the October 5, 2009 ruling of the Supreme Court’s Permanent Criminal Chamber. In that second petition, he argued the following:

(...) The ruling of the Supreme Court’s Second Criminal Chamber points up a procedural problem, but does not address the merits, (...).

(...) it is self-evident that “the minimum guarantees have not been given” to ensure that this person will not be executed once he is taken back to China. The idea was always to catch the national authorities off guard by coming up with a legal provision that has nothing to do with the crime of which Mr. Wong Ho Wing is charged.⁴¹

93. That same day, Lima’s 53rd Criminal Court agreed to hear the *habeas corpus* petition and set October 16, 2009 as the date for taking the respondents’ statements.⁴²

94. On December 10, 2009, the Ambassador Extraordinaire and Plenipotentiary of the People’s Republic of China in the Republic of Peru sent a official communiqué to the President of the Supreme Court’s Permanent Criminal Chamber pledging that “Huang Huang Haiyong or Wong Ho Wing will not be executed if the extradition request made by the Government of the People’s Republic of China is granted.”⁴³

95. On December 11, 2009, the Ambassador Extraordinaire and Plenipotentiary of the People’s Republic of China in the Republic of Peru sent a communication to the President of the Supreme Court’s Permanent Criminal Chamber, which read as follows:

³⁹ Annex 22. Amicus Curiae from the National Human Rights Coordinator in extradition case 03-2009. Attachment to the communication received from the petitioner on February 2, 2010.

⁴⁰ Annex 23. Order dated October 5, 2009. Attachment to the petitioner’s October 11, 2009 communication.

⁴¹ Annex 24. Petition of preventive habeas corpus, dated October 12, 2009. Attachment to the communication received from the petitioner on October 13, 2009.

⁴² Annex 25. Order of October 12, 2009, Case file H.C. No 44215-09-CR.- Attachment to the State’s December 4, 2009 communication.

⁴³ Annex 26. Communication N.O. No. 200/2009. Attachment to the petitioner’s December 15, 2009 communication.

The Chinese Contracting Party officially informs the Peruvian Contracting Party that: The People's Supreme Court of the People's Republic of China has made the following decision: If extradition from Peru to China is granted, should Huang Haiyong or Wong Ho Wing be found guilty through prosecution in the Court, the Court will not order the Death Penalty (including immediate execution of the Death Penalty and a temporary two-year stay thereof) for Huang Haiyong or Wong Ho Wing, even if by law his crime carries the death penalty. The Chinese Contracting Party hopes for a prompt decision from the Peruvian Contracting Party to grant the extradition of Huang Haiyong or Wong Ho Wing from Peru to China.⁴⁴

96. On December 15, 2009, the Supreme Court's Permanent Criminal Chamber issued an order to the following effect:

The extradition hearing conducted on October 5, 2009, which appears at page 198 of the case file with this Chamber of the Supreme Court, was declared null and void; an order was given to inform the parties to the proceedings of the diplomatic notes so that they might properly exercise their rights of defense; December 21 of this year was the date set for the extradition hearing (...)⁴⁵

97. On December 21, 2009 the Supreme Court's Permanent Criminal Chamber issued an order in which it wrote that the translation of Article 151 of the Criminal Code of the People's Republic of China had allegedly not been requested; that translation was needed to "make a proper assessment of the lawfulness of the extradition request." It also pointed out that the decision sent by the People's Supreme Court of the People's Republic of China in which it "decided" that Mr. Wong Ho Wing would not be given the death penalty, was not enclosed. In this order, it commissioned the Office of the Clerk of the Permanent Criminal Court to take the necessary measures.⁴⁶

98. That same day, Judge Sócrates Mauro Zevallos Soto issued a separate vote in favor of issuing the advisory decision in the passive extradition process based on the following reasons:

- i) The hearings held on October 5, 2009 and December 9, 2009 have been declared null and void;
- ii) the complainant has an obligation to provide all the materials required under Article 518 of the most recent Code of Criminal Procedure; iii) it is the function of the judge presiding over the preparatory investigation to gather all the information required under paragraph three of Article 521 of that Code of Criminal Procedure; iv) No additional information need be obtained.⁴⁷

99. On December 29, 2009, the Ambassador Extraordinaire and Plenipotentiary of the People's Republic of China in the Republic of Peru sent a communication to the President of the Supreme Court's Permanent Criminal Chamber enclosing a copy and translation of the resolution issued by the People's Supreme Court of the People's Republic of China concerning the process seeking Mr. Wong Ho Wing's extradition. He also requested that the "Peruvian Contracting Party make its decision

⁴⁴ Annex 26. Communication N.O. No. 200/2009. Attachment to the petitioner's December 15, 2009.

⁴⁵ Annex 27. Order delivered on December 15, 2009 in Extradition Case No. 03-2009. Attachment to the communication received from the State on October 25, 2010.

⁴⁶ Annex 28. Order of December 21, 2009. Extradition Case No. 03-2009. Attachment to the petitioner's January 11, 2010 communication.

⁴⁷ Annex 28. Separate vote of Judge Sócrates Mauro Zevallos Soto, dated December 21, 2009. Attachment to the petitioner's January 11, 2010 communication.

as soon as possible concerning the extradition of the smuggling suspect Huang Haiyong or Wong Ho Wing from Peru to China.”⁴⁸

100. The December 8, 2009 “Decision Pledging Not to Sentence Huan Haiyong or Wong Ho Wing to the death penalty” delivered by the People’s Supreme Court of the People’s Republic of China, addressed to the Ministry of Public Security of the People’s Republic of China, states the following:

If extradition from Peru to China is granted, should Huang Haiyong or Wong Ho Wing be found guilty through prosecution in the Court, the Court will not order the Death Penalty (including immediate execution of the Death Penalty and a temporary two-year stay thereof) for Huang Haiyong or Wong Ho Wing, even if by law his crime carries the death penalty.⁴⁹

101. On January 5, 2010, Lima’s 53rd Criminal Court delivered its ruling in the constitutional *habeas corpus* petition filed by Luis Lamas Puccio on behalf of Wong Ho Wing, for the alleged violation of the right to life and the right to personal integrity, and against the justices on the Supreme Court’s Permanent Criminal Chamber. In that ruling, Lima’s 53rd Criminal Court wrote that:

(...) an important factor to consider is that the petitioner-plaintiff’s *habeas corpus* petition was filed to have the extradition request for Mr. Wong Ho Wing declared unfounded and out of order; that extradition request is now being heard by the Supreme Court’s Second Criminal Chamber (...)

Lima’s 56th Criminal Court has provided certified copies concerning the *habeas corpus* petition (...) which reveal that the *habeas corpus* petition now before this court has already been examined and reviewed by another court, which issued a ruling (...)

Furthermore, this constitutional petition of *habeas corpus*, which is arguing violation of constitutionally protected rights, cannot be used to limit the functions and/or authorities that the Organic Law of the Judicial Branch has conferred upon the judges; the violations it is claiming have not materialized since a competent authority, in exercise of his functions, has issued a duly substantiated decision (...) to accept the plaintiff’s argument would be to render meaningless, irrelevant, without force, power or effect the authority that judges have to exercise criminal action, thereby violating the rights and authorities of judges (...) the court concludes that the petitioner’s intent is to get an outside court to disrupt the normal development of the regular proceedings conducted (...) this petition must be declared out of order under article five of the Code of Constitutional Procedure.⁵⁰

102. On January 27, 2010, the Supreme Court’s Permanent Criminal Chamber issued a new advisory decision declaring the request to extradite Chinese citizen Wong Ho Wing to be in order. In that advisory decision, and after receiving the technical opinion regarding the legality or illegality of the request, the Chamber stated that the delays that occurred in processing the extradition request were due to the fact that the requesting State did not act promptly to provide “the documents necessary to be able to reach a decision on the request”, documents that were essential to prevent violation “of the supranational system pertaining to international agreements that govern observance and enforcement

⁴⁸ Annex 29. Communication N.O. No. 204/2009. Attachment to the State’s July 16, 2010 communication.

⁴⁹ Annex 30. Translation of the decision pledging not to sentence Mr. Huang Haiyong or Wong Ho Wing to the death penalty, dated December 8, 2009. Attachment to the brief received from the State on July 16, 2010.

⁵⁰ Annex 31. Ruling delivered on the petition of *habeas corpus* H.C. Case No 44215-09 (53rd J.P. Lima). Attachment to the communication received from the State on March 27, 2010.

of human rights and that are binding upon our country's domestic legal order." The Supreme Court's Permanent Criminal Chamber held that:

(...) in the present extradition request, the following formal requirements were satisfied: a) the requesting authority is identified, as indicated at page 77 of the extradition file; b) the person whose extradition was sought was identified as Chinese citizen Wong Ho Wing or Huang He Young, (...); c) the crimes of which he stands accused are summarized (...)

The crimes of which he is accused are also crimes under Peruvian law, such as customs fraud (...), and generic active bribery (...). Therefore, the dual criminality rule has thus been observed; in other words, the crimes of which Mr. Wong Ho Wing is accused are crimes under the laws of both States. In the People's Republic of China, these offenses carry penalties of imprisonment for more than one year, as shown by the translated articles of the Criminal Code of the People's Republic of China (...).

While the laws of the requesting country consider alternative penalties, (...) the death penalty could be applied (...). The possibility that capital punishment would be applied is contrary to Peru's extradition law, since our domestic laws expressly prohibit the death penalty.

(...) However, another important factor to consider is the duly translated decision (...) issued by the People's Supreme Court of the People's Republic of China, (...) which formally declares that "[i]f extradition from Peru to China is granted, should Huang Haiyong or Wong Ho Wing be found guilty through prosecution in the Court, the Court will not order the Death Penalty (including immediate execution of the Death Penalty and a temporary two-year stay thereof) for Huang Haiyong or Wong Ho Wing, even if by law his crime carries the death penalty."

That pledge bespeaks the steadfast commitment of the judicial authorities in the People's Republic of China **NOT TO IMPOSE THE DEATH PENALTY** on the person whose extradition is sought should he be found guilty of the crimes charged. Therefore, there is no real risk that the person whose extradition is sought will face the death penalty or similar punishment in the requesting State. Furthermore, with that guarantee, should the Peruvian authorities consider extradition to be in order, they would not be violating their commitments under the American Convention on Human Rights, the Protocol for the Abolition of the Death Penalty, the Inter-American Convention against Torture and the International Covenant on Civil and Political Rights.

(...) Furthermore, although a request seeking precautionary measures for the *extraditatus* has been filed with the Inter-Commission on Human Rights, according to what Special Supranational Public Prosecutor Delia Muñoz Muñoz reported, (...) that request is under analysis at the Inter-American Commission on Human Rights and its admissibility has not yet been decided; similarly, the provisional measures requested from the Inter-American Court of Human Rights to order the Peruvian State to refrain from surrendering the *extraditatus* to the Chinese State, is still being processed – in other words, no order has as yet been issued by a competent authority instructing the Peruvian State to refrain from complying with the terms of the Extradition Treaty it signed with the People's Republic of China.

(...) As for the issue of money laundering, from August 1996 to May 1998, the period during which the illicit acts were alleged to have been committed in the requesting State, money laundering was only a crime in the requested State with respect to the proceeds from illegal drug trafficking. Therefore, the rule of dual criminality is not satisfied in the case of money

laundering; hence, the request for extradition presented by the court authorities of the People's Republic of China in connection with that crime must be deemed out of order.⁵¹

103. On that same day, Judge Sócrates Mauro Zevallos Soto issued his separate vote on the advisory decision in which he wrote that the request should be declared "OUT OF ORDER on all points." He also wrote that the proposed extradition "does not meet the formal requirements that our domestic laws prescribe."⁵²

104. On February 3, 2010, the President of the Supreme Court sent a communiqué to the Minister of Justice informing him of the contents of the advisory decision that the Supreme Court had issued on January 27, 2010.⁵³

105. On February 4, 2010, Luis Lamas Puccio filed an appeal to challenge the January 5, 2010 decision declaring the petition of *habeas corpus* out of order.⁵⁴

106. On February 5, 2010, the Permanent Criminal Chamber issued an order to the effect that "because this is the vacation period, the Magistrates Counselors and Justices of this Supreme Court cannot be called upon to serve in this collegiate body;" therefore, acting in accordance with Article 146 of the Organic Law of the Judicial Branch, the Permanent Criminal Chamber tapped the most senior members serving on the Lima Superior Court bench to serve on the Supreme Court.⁵⁵

107. On February 9, 2010, Luis Lamas Puccio filed another petition of *habeas corpus* against the "certain and imminent threat of violation of Wong Ho Wing's rights to life and to personal integrity." The respondents named in the petition were the President of the Republic, Alan García Pérez, Minister of Justice Aurelio Pastor Valdivieso, and Minister of Foreign Affairs José Antonio García Belaunde. In his petition of *habeas corpus*, Luis Lamas Puccio asserted the following:

As for the "Commitment not to apply the death penalty", presented by the Ambassador of the People's Republic of China, through the respective exchange of diplomatic notes, the letter was addressed to the Office of the President of the Supreme Court's Permanent Criminal Chamber (...) as early as December 10, 2009. In other words, just forty-four days after the Judge of Callao's Seventh Criminal Court sent notification to the Ambassador of the People's Republic of China. This reveals a blatantly illegal intent on the part of the Supreme Court's Permanent Criminal Chamber, which was to endeavor to advance the Chinese government's interests in every respect. The omission had to be corrected within a maximum of *thirty days* (...). Two months and ten days after it was done, the "extradition hearing" was nullified so as to be able to get the "Commitment not to apply the death penalty," presented by the Chinese ambassador, introduced into the extradition process;

⁵¹ Annex 32. Advisory decision issued by the Supreme Court's Permanent Criminal Chamber on January 27, 2010, Extradition No. 03-2009. Attachment to the communication received from the State on March 27, 2010.

⁵² Annex 32. Separate Vote of Judge Sócrates Mauro Zevallos Soto on the Advisory Decision issued by the Supreme Court's Permanent Criminal Chamber on January 27, 2010, Extradition No. 03-2009. Attachment to the communication received from the State on March 27,

⁵³ Annex 33. Communiqué No. 806-2010-SG-CS-PJ dated February 3, 2010.

⁵⁴ Annex 34. Appeal filed to challenge the decision delivered on the petition of *habeas corpus*. H..C. Case No 44215-09 (53rd J.P. Lima). Attachment to the communication received from the State on March 27, 2010.

⁵⁵ Annex 35. February 5, 2010 order issued in Extradition Case 03-2009. Attachment to the brief received from the petitioner on February 19, 2010.

(...) granting passive extradition and sending Chinese citizen WONG HO WING back to the People's Republic of China (...) would endanger his very life and personal integrity, since materially speaking the Peruvian authorities would have no way to exercise any oversight to ensure that Mr. Wong Ho Wing was not executed once he was under the jurisdiction of his country of origin; he gave several reasons, among them the fact that not even the international authorities themselves have any access to the Chinese prison system, which has been discredited and is deemed untrustworthy, as attested to by repeated human rights reports on the number of persons executed every year in that country (...).⁵⁶

108. On February 9, 2010, Lima's 42nd Special Criminal Court agreed to hear the constitutional petition of *habeas corpus*.⁵⁷ On February 19, 2010, Mr. Luis Lamas Puccio asked the Administrative Secretary of the Supreme Court to give him an authenticated copy of Communiqué No. 806-2010-SG-CS-PJ, through which the file for Extradition Case No. 03-2009 is sent to the Ministry of Justice for the appropriate purposes.⁵⁸

109. On February 21, 2010, Mr. Luis Lamas Puccio filed a request with Lima's 42nd Special Criminal Court asking it to issue its ruling on the petition of *habeas corpus*. He argued that there was a risk that the Council of Ministers might issue a supreme resolution on Mr. Wong Ho Wing's passive extradition and in the process disregard what the IACHR had instructed in its precautionary measure.⁵⁹

110. On February 25, 2010, Lima's 42nd Special Criminal Court issued a ruling on the petition of *habeas corpus*, declaring it out of order. The Court's reasoning was as follows:

(...) Having examined the records of the proceedings, it is clear that in general, the facts that the petitioner recounts do not suggest that the respondents herein named (...) might engage in acts that could violate the constitutional rights of Mr. Wong Ho Wing (the rights to life and to personal integrity); what Lamas Puccio does in this petition is to question the way in which the extradition process has been conducted.

(...) However, the constitutional *habeas corpus* process does not involve the taking of evidence; therefore, this constitutional proceeding does not afford the plaintiff an opportunity to show how his rights have been affected by the problems that, in his view, have arisen as his passive extradition was being processed; perhaps his claim should have been heard in the ordinary jurisdiction.

(...) Another aspect that deserves mention is the fact that in issuing its finding on the question of extradition, what the Supreme Court does is prepare a Technical Legal Report on the Legality or Illegality of an extradition, as provided in article 37 of the Peruvian Constitution; only the Executive Branch has the authority to grant extradition. While its decision follows on the heels of the Supreme Court's report, this does not alter the fact that the person whose extradition is

⁵⁶ Annex 36. Petition of habeas corpus dated February 9, 2010. Attachment to the communication received from the State on March 27, 2010.

⁵⁷ Annex 37. February 9, 2010 order issued by Lima's 42nd Criminal Court, H.C. No 05-10. Attachment to the communication received from the State on March 27, 2010.

⁵⁸ Annex 38. Brief dated February 19, 2010, signed by Luis Lamas Puccio. Attachment to the brief received from the petitioner on February 19, 2010.

⁵⁹ Annex 39. Brief dated February 21, 2010, signed by Luis Lamas Puccio. Attachment to the brief received from the petitioner on February 22, 2010.

being sought is in an utterly defenseless position since it is the Executive Branch that issues the final decision on extradition. Through his legal defense, the person whose extradition is being sought can employ the mechanisms he is authorized to use to further his cause. Indeed this is his right under the Peruvian Constitution. Article two –paragraph twenty-three- provides that “Every Person has a right to legitimate self-defense.

(..) As previously mentioned, the extradition process must follow the established parameters and procedures. Once the Supreme Court’s Second Permanent Criminal Chamber has issued its report, the Executive Branch must still issue its final decision. The Executive Branch is the only authority that can grant extradition. Therefore, the person whose extradition is being sought must be ready to exercise his right of defense. Then, too (...), the judicial authorities of the People’s Republic of China have undertaken a steadfast commitment not to order the death penalty; in the final analysis there is no imminent risk that granting extradition would imperil Mr. Wong Ho Wing’s life and personal integrity.⁶⁰

111. Mr. Luis Lamas Puccio appealed this ruling and, on April 14, 2010, the Lima Superior Court’s Third Criminal Chamber for Proceedings involving Jailed Prisoners, issued Decision No. 300 in which it, too, declared the petition of *habeas corpus* to be out of order. The following were among the reasons cited by the Court for denying the petition:

17.- A reading of the constitutional petition under review in this proceeding shows that although the petitioner challenges the Supreme Court’s processing of the extradition request and its decision on the matter, the respondents he named in his petition are the Constitutional President of the Republic –Alan García Pérez- and Peru’s Minister of Justice José Antonio García Belaúnde, claiming they violated his constitutional rights to life and personal integrity. However, he does not name as respondents the justices on the Supreme Court’s Permanent Criminal Chamber, who were the authorities who signed the decision of January 26, 2010. That being the case, this court is not being called upon to issue any finding with respect to the conduct of those justices. However, they did issue their advisory decision expressing the view that the Chinese Government’s extradition request should go forward, considering the commitment undertaken NOT TO IMPOSE THE DEATH PENALTY on the individual whose extradition is being sought should he be found guilty (argument 7).

(...) in processing the extradition of Mr. Wong Ho Wing, the Supreme Court’s Permanent Criminal Chamber issued an advisory decision on January 28, 2010 in which the majority agree that the extradition request is in order, which means that if the normal procedures established under our legal system are followed, the next step will be that the Executive Branch issues its decision, which it has not yet done.

19.- The Executive Branch will have to take the political decision to either grant or deny extradition. Its decision cannot be deemed arbitrary or illegal; instead, it is a legal mandate. There is nothing to suggest that the respondents named in this petition are acting in a manner contrary to the law. This matter has not even been debated in the Council of Ministers, as the case is still with the Ministry of Justice’s Commission on Extraditions.

(...) Their concern to ensure that the *extraditatus* does not face the death penalty has been amply demonstrated. That concern is underscored in the decision taken by the Supreme Court’s Permanent Criminal Chamber, a fact that the Executive Branch will surely take into account.

⁶⁰ Annex 40. Decision delivered in the Constitutional Habeas Corpus Proceeding No. 05-10. Attachment to the brief received from the State on July 16, 2010.

Therefore, this petition is not viable because it fails to show any unlawful conduct or violations of due process on the part of the respondents.

21.- Because the respondents have not engaged in any violations or threats in processing the request filed by Office No. 24 of the Ministry of Public Security of the People's Republic of China seeking passive extradition of Chinese citizen Wong Ho Wing (in English) and/or Huan Hai Yong or Huang He Yong (in Chinese), much less any objective or concrete violation of the law or right involved, the petition must be denied (...)”⁶¹.

112. Mr. Lamas Puccio filed a remedy seeking protection against violation of a fundamental rights [*Agravio Constitucional*] to challenge this decision.

113. At the same time, on August 5, 2010 Mr. Lamas Puccio filed a brief with the Supreme Court's Permanent Criminal Chamber in which he requested Mr. Wong Ho Wing's provisional release. He also asked that a supervised release system be set up requiring Mr. Wong Ho Wing to check in briefly with the court and to bar him from leaving the country. The arguments made to support these requests included the following:

(...) over the course of the proceedings conducted in connection with his extradition, the *extraditurus'* original circumstances have changed considerably, which suggests that he will not abuse the freedom he is granted by attempting to flee or failing to comply with the obligations imposed upon him. The *extraditurus* has established roots in our country which at the outset were not so clear, especially given the circumstances surrounding his provisional arrest. It is reasonable to assume that the danger that the evidence suggested is nowhere near as great, so the circumstances that at the time led to his detention no longer obtain.

(...) we have been compelled to file a complaint with the INTER-AMERICAN COMMISSION ON HUMAN RIGHTS OF THE ORGANIZATION OF AMERICAN STATES, headquartered in Washington, D.C., to denounce the Government of Peru. In the meantime, the extradition process moves forward and the Supreme Court's two decisions ordering his extradition imply serious violations of the commitments that the Government of Peru undertook when it signed the American Convention on Human Rights (...)

(...) this request is for provisional release, the purpose being to temporarily release a person from his detention until his legal situation is settled. The provisions of the ninth paragraph of Article 523 of the Code of Criminal Procedure apply, not just because of the prison time he has endured since his arrest in October 2008, but also because he meets the conditions that must be met to make him eligible for a measure of this kind (...).⁶²

114. In processing this application for provisional release, on September 21, 2010 Luis Antonio Alvarado Villajuan, Public Prosecutor with the Ministry of Justice, and Delia Muñoz Muñoz, Special Supranational Public Prosecutor, filed a brief with the Supreme Court's Permanent Criminal Chamber to request the “Nullity of the Procedural Act” and asked to be permitted to intervene in the proceeding to hear the motion for provisional release.⁶³

⁶¹ Annex 41. Decision No. 300, Case 11-10 HC of April 14, 2010. Attachment to the brief received from the petition on May 3, 2010.

⁶² Annex 42. Brief arguing the petition for provisional release, which Mr. Luis Lamas Puccio filed on August 5, 2010 with the Supreme Court's First Criminal Chamber. Attachment to the State's October 25, 2010 communication.

⁶³ Annex 43. Brief filed requesting the nullity of the hearing and its rescheduling. Attachment to the State's October 25, 2010 communication.

115. On September 23, 2010, the Supreme Court's Permanent Criminal Chamber dismissed the prosecutors' request on the grounds that it was not the function of the State Public Prosecutor's Office to intervene in proceedings to hear motions for provisional release.⁶⁴

116. On September 24, 2010, the representative of the People's Republic of China, Moisés Aguirre Lucero, appeared before the President of the Supreme Court's Permanent Criminal Chamber in the extradition process being prosecuted against Mr. Wong Ho Wing. He was there to request the "Nullity of the Hearing on the Case" and to ask that the case hearing be rescheduled. His arguments were basically as follows:

2. In my capacity as a principal in the present case, I should have been notified to be present for the hearing in the case. Nevertheless, the Honorable Chamber over which you preside did not send a summons to the People's Republic of China to be present for and intervene in the hearing. (...)
5. Only today did I learn of the decision that this Honorable Chamber delivered on September 23, 2010 (...)
6. Contrary to what was stated in the aforementioned decision, the People's Republic of China which I represent did not intervene in the hearing because, as I said, it was NEVER notified, despite the fact that it is an accredited party to the case and acknowledged as such by the Honorable Chamber over which you preside. (...)
10. Under Peruvian law, any persons –including States- who are parties to a case are entitled to defend their interests, especially if we are recognized parties to the case in question. (...)
11. (...) Article 14(3) of the Peruvian Constitution provides that no person shall be denied the right of defense.⁶⁵

117. On September 27, 2010, the supranational prosecutor and other prosecutor from the Ministry of Justice filed a brief with the President of the Supreme Court's Permanent Criminal Chamber in which they filed an appeal to challenge the September 23, 2010 decision. In that brief, they wrote the following:

1. (...) the Supreme Court has indicated that the Executive Branch does not have any legitimate interest as it is not party to the present case; it is called upon to intervene only in the final decision, once the judicial phase of the extradition process has been completed, as provided in articles 514 and 522, paragraph 4, of the Code of Criminal Procedure.
2. On those grounds THE PUBLIC PROSECUTOR'S OFFICE IN THE MINISTRY OF JUSTICE AND THE OFFICE OF THE SPECIAL SUPRANATIONAL PROSECUTOR HAVE BEEN DENIED ANY ROLE IN PROCESSING THE APPLICATION FOR PROVISIONAL RELEASE FILED BY MR. WONG HO WING, thereby violating the rights to due process and effective judicial protection with respect to the Ministry of Justice's right of defense as a third party with a legitimate interest. (...)
4. Mr. Wong Ho Wing has requested provisional release in lieu of detention. The Public Prosecutor's Office in the Ministry of Justice and the Office of the Supranational Prosecutor, whose role is to defend the interests of the State –in this case, the Executive Branch-, should not

⁶⁴ Annex 44. September 23, 2010 decision in Extradition Case No. 03-2009. Attachment to the State's October 25, 2010 communication.

⁶⁵ Annex 45. Brief requesting the nullity of the hearing in case No. 03-2009, presented on September 24, 2010. Attachment to the State's October 25, 2010 brief.

be left without any means to defend those interest and to exercise our legitimate right of defense. **WE THEREFORE REQUEST THAT WE BE INCLUDED AS NECESSARY JOINT LITIGANTS IN THE PRESENT CASE**, pursuant to Article 93 of the Code of Civil Procedure, a secondary source of law in proceedings of this type.

7. (...) it is imperative that the **MINISTRY OF JUSTICE'S PUBLIC PROSECUTOR'S OFFICE AND THE OFFICE OF THE SUPRANATIONAL PROSECUTOR** be added as **NECESSARY JOINT LITIGANT** as they have a legitimate interest in presenting our side and exercising our unconditional **RIGHT OF DEFENSE** recognized in Article 139(14) of our 1993 Constitution, as it is self evident that if the arrest warrant is changed to an order for Mr. Wong Ho Wing's release, it could, given the risk of flight, render moot or illusory both his eventual extradition and the administration of justice in the requesting State, which in this case is the People's Republic of China. (...)."⁶⁶

118. On September 27, 2010, the representative of the People's Republic of China, Moisés Aguirre Lucero, filed a brief with the Supreme Court's Permanent Chamber in which he requested the "ABSOLUTE NULLITY OF ALL SUPREME COURT PROCEEDINGS IN CONNECTION WITH THE PRECAUTIONARY MEASURE," on the grounds that the Supreme Court did not have jurisdiction to issue any pronouncement on a subject unrelated to the Extradition Process, such as the request to change the order for provisional arrest to an order for release.⁶⁷

119. On September 10, 2010, Judges César San Martín Castro, Pedro Saldarriaga and Príncipe Trujillo, justices on the Supreme Court's Permanent Criminal Chamber, voted in favor of the provisional release requested by Mr. Wong Ho Wing. On the other hand, Messrs. José Luis Lecaros Cornejo, Jorge Bayardo Calderón Castillo and Santa María Morillo voted to declare the request for provisional release to be out of order. Given the tie among the members of the Supreme Court, on October 13, 2010 Mr. José Antonio Neyra Flores cast his vote, joining Messrs. Lecaros Cornejo, Calderón Castillo and Santa María Morillo in declaring the request seeking Mr. Wong Ho Wing's provisional release to be out of order. On October 19, 2010, the Permanent Criminal Chamber issued an order, the pertinent parts of which read as follows:

(...) In the incidental proceedings conducted in the case concerning Mr. Wong Ho Wing's passive extradition, the justice who cast the deciding vote, Dr. Neyra Flores, has performed that function; he has joined Supreme Court Justices Lecaros Cornejo, Calderón Castillo and Santa María Morillo in voting to declare that the provisional release requested by *extraditurus* Wong Ho Wing is out of order (...).⁶⁸

120. On September 28, 2010, Mr. Luis Lamas filed a brief with the Office of the Chair of the Ministry of Justice's Official Commission on Extraditions and Convict Transfers, in which he requested a copy of report No. 066-2010/COE-TC, dated July 9, 2009, which was part of the case file on passive extradition No. 03-2009 against Wong Ho Wing.⁶⁹ Then, on September 29, 2009, the Ministry of Justice's Office of the National Director of Justice sent report No. 34-2010-DNJ/DICAJ, issued that same

⁶⁶ Annex 46. Brief presented with the Appeal filed to challenge the September 23, 2010 decision, presented on September 27, 2010. Attachment to the communication received from the State on October 25, 2010.

⁶⁷ Annex 47. Brief requesting Absolute Nullity, presented in Extradition Case No. 03-2009. Attachment to the State's October 25, 2010 communication.

⁶⁸ Annex 48. Order of October 19, 2010, issued by the Permanent Criminal Chamber in Extradition Case No. 03-2009. Attachment to the communication received from the State on October 25, 2010.

⁶⁹ Annex 49. Brief requesting a copy of report No. 066-2010, dated September 28, 2010. Attachment to the communication received from the State on November 11, 2010.

day by the Office of the Director for Coordination with the Administration of Justice, in which it wrote that under the Transparency and Access to Public Information Act:

[t]he right of access to public information cannot be exercised with respect to information prepared or obtained by the legal advisors or attorneys for organs of Government and which, if made public, might reveal the strategy to be followed in handling or defending an administrative-law or court case, or any other type of information protected by the professional confidentiality that an attorney must have with his or her client until the process concludes.

3. (...) inasmuch as no final decision has as yet been made on the question of Mr. Wong Ho Wing's extradition under Article 514 of the Code of Criminal Procedure, the applicable law would be Article 17(4) of Law No. 27806, the Access to Public Information Act, under the terms of which the right of access to public information cannot be exercised until the process has concluded."⁷⁰

121. On May 24, 2011, the Constitutional Court delivered its ruling on the remedy exercised by Mr. Lamas Puccio seeking protection against violation of a constitutionally-protected right, in which he challenged the ruling declaring his April 14, 2010 petition of *habeas corpus* to be out of order. The Constitutional Court's ruling ordered the Executive Branch to refrain from extraditing Mr. Wong Ho Wing to the People's Republic of China:

(...) the Court finds that the People's Republic of China did not provide necessary and sufficient guarantees that Mr. Wong Ho Wing's right to life would be protected. As stated in the Report of the United Nations Human Rights Council, public opinion is one of the factors that China considers when deciding whether to apply the death penalty.

Another factor to consider is that in the instant case, Mr. Wong Ho Wing's extradition would not be in order, since the principle of reciprocity is not present because the crimes for which his extradition is sought are not capital offenses in Peru.

Therefore, the Peruvian State must act on its obligation to bring Mr. Wong Ho Wing to trial, as prescribed in Article 4(a) of the Extradition Treaty between the Republic of Peru and the People's Republic of China.

11. The foregoing notwithstanding, some comment is in order concerning Letter N.O. No. 023 2011, dated April 6, 2011, which reports that the Eighth Amendment of the Criminal Code of the People's Republic of China has been approved, which introduces changes in that Criminal Code with regard to the crime of smuggling common merchandise. There is nothing in the case file *sub judice* indicating that the change to the Criminal Code of the People's Republic of China has been officially reported to the Peruvian State via diplomatic channels. Nor is there any mention of whether the Constitution of the People's Republic of China recognizes the retroactivity of criminal law when it works in the accused' favor.

This Court, therefore, finds that the letter in question cannot be understood and interpreted as a guarantee that the death penalty will not be applied in the case of the *extraditurus*.⁷¹

122. Justices Álvarez Miranda and Vergara Gotelli cast separate votes indicating that the petition should be declared unfounded on the grounds that it failed to show the existence of the

⁷⁰ Annex 50. State Report No. 299-2010-JUS/PPES, received at the IACHR on November 11, 2010.

⁷¹ Annex 51. Decision delivered in Case No. 02278-2010-PHC/TC, dated May 24, 2011. Attachment to the State's communication of July 12, 2011.

requisite “certain and imminent threat, since there was no certainty as to what decision the Peruvian Government would make regarding the *extraditurus*’ fate; the petitioner’s claim that the Government of the People’s Republic of China will not comply with the commitment undertaken in the decision of December 8, 2009, pledging to the Peruvian Government that it would not apply the death penalty with respect to the *extraditurus*, cannot be deemed a certainty.”⁷² For his part, Justice Calle Hayen issued a separate vote where he wrote that the petition should be deemed unfounded because the “certainty and imminence” requirements had not been met since, in the January 27, 2010 decision of the Supreme Court’s Permanent Criminal Chamber, the latter held that there was no real risk that the death penalty would be applied. Justice Calle Hayen also wrote that on April 7, 2011, the Peruvian State was informed of the approval of the legal amendment abolishing the death penalty in the case of the crime of smuggling ordinary merchandise.⁷³

123. After a request from the Executive Branch, filed on June 2 and 8, 2011 seeking a clarification, on June 9, 2011 the Constitutional Court declared the requests for clarification to be well-founded. In response to these requests, the Constitutional Court ordered correction of the following material errors:

1.1 Pursuant to arguments 7 and 11 of this clarification ruling, arguments Nos. 9 and 10 of STC 2278-2010-PHC/TC are hereby corrected and shall read as follows:

‘9. (...) Because the case file does not contain any diplomatic assurance that the People’s Republic of China may have offered to the Peruvian State, it has not been proven that real protection of the right to life has been guaranteed.

Furthermore, it is *communis opinio* that the mere risk that the death penalty might be enforced in the requesting State prevents the requested State from authorizing extradition. In effect, in the Case of Yin Fong Kwok v. Australia, dated October 23, 2009, the United Nations Human Rights Committee wrote 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.

10. Bearing in mind that no diplomatic guarantees appear in the Case File, this Court deems that it has not been proven that the Honorable People’s Republic of China has granted necessary and sufficient guarantees to protect Mr. Wong Ho Wing’s right to life.

Therefore, the Peruvian State must comply with its obligation to bring Mr. Wong Ho Wing to trial, pursuant to Article 3 of the Criminal Code.”

1.2 Point 2 of the operative part of the judgment shall read as follows:

‘2. To urge the Peruvian State, as represented by the Executive Branch, to act in accordance with Article 3 of the Criminal Code.”⁷⁴

⁷² Annex 51. Separate vote of Justices Álvarez Miranda and Vergara Gotelli. Attachment to the State’s communication of July 12, 2011.

⁷³ Annex 51. Separate vote of Justice Calle Hayen. Attachment to the State’s communication of July 12, 2011.

⁷⁴ Annex 52. Decision of the Constitutional Court, dated June 9, 2011. Attachment to the State’s communication dated August 3, 2011.

124. On October 10, 2011, the Peruvian Supreme Court's Permanent Criminal Chamber issued an order in which it replied to a petition brought by defendant Wong Ho Wing, in which he requested "immediate and unconditional release." In that order the Permanent Criminal Chamber held that it was not competent to decide the petitioner's request, and therefore declared that:

- I) The defense attorney for Mr. WONG HO WING should assert his claim before the proper court;
- II) Copies of the present decision are hereby ordered SENT to the Ministry of Justice for the appropriate purposes.⁷⁵

125. On October 18, 2011, Mr. Luis Lamas Puccio requested Mr. Wong Ho Wing's immediate and unconditional release, "without any of the restrictions that the procedural laws on the subject prescribe (...) and that an order be given to return to him his passport (...) by virtue of the fact that in a ruling dated May 24 of this year, the Constitutional Court upheld the corresponding petition of *habeas corpus* and also ordered the Peruvian State, as represented by the Executive Branch, to refrain from extraditing Mr. Wong Ho Wing to the People's Republic of China."⁷⁶

126. On October 24, 2010, the Ombudsman's Office sent a communiqué to Dr. Juan Jiménez Mayor, Vice Minister of Justice, informing him of a request to intervene, filed by Mr. Luis Lamas Puccio for the purpose of ensuring Mr. Wong Ho Wing's right to physical liberty. It also requested a report on the objective reasons why the responsible public officials had allegedly not replied to a communiqué from Callao's Seventh Court requesting the respective documentation and had not sent the file on the provisional arrest.⁷⁷

127. On November 2, 2011, a communication from Callao's Seventh Criminal Court was presented to the Ministry of Justice of Peru in which the Court again requested the case file for provisional arrest No. 6370-2008-25 "as soon as possible", to enable it to reach its decision on Mr. Wong Ho Wing's October 18, 2011 application for release.⁷⁸

128. On November 3, 2011, Mr. Luis Lamas Puccio presented a brief addressed to Minister of Justice Francisco Eguiguren, in which he requested that the case file for provisional arrest No. 6370-2008-25 be made available and sent, "as soon as possible", to Callao's Seventh Criminal Court, as it has been unable to act on an application for release "because your ministry has had that case file in its possession since 2010."⁷⁹

129. On November 8, 2011, Mr. Luis Lamas Puccio filed a brief with Callao's Seventh Criminal Court in which he requested that the Minister of Justice of Peru, Dr. Francisco José Eguiguren P., be

⁷⁵ Annex 53. Order of October 10, 2011. Attachment to the communication received from the petitioner on December 1, 2011.

⁷⁶ Annex 54. Application for Mr. Wong Ho Wing's immediate release, dated October 5, 2011. Attachment to the communication received from the petitioner on December 1, 2011.

⁷⁷ Annex 55. Communiqué No. 124-2011-DP/ADHPD of November 24, 2011. Attachment to the brief received from the petitioner on February 1, 2012.

⁷⁸ Annex 56. Communiqué No. 2008-6370-RDM. Attachment to the communication received from the petitioner on December 1, 2011.

⁷⁹ Annex 57. Brief of November 3, 2011. Attachment to the communication received from the petitioner on December 1, 2011.

ordered to provide the case file on the provisional arrest, advising him that should he fail to hand over said case file, he would be denounced for the crime of contempt of authority and abuse of power.⁸⁰

130. On November 16, 2011, Mr. Wong Ho Wing's representative filed a petition of *habeas corpus* against the Minister of Justice and the Seventh Criminal Court for Jailed Prisoners of the Callao Superior Court, in order to request the "immediate release" of Mr. Wong Ho Ling and the return of his passport, and to ask that any order restricting his freedom of movement be lifted.⁸¹

131. On November 21, 2011, Mr. Lamas Puccio asked the Ombudsman's Office to intervene to protect his client's right to freedom, as his continued incarceration was a violation of human rights and because the Minister of Justice and the Seventh Criminal Court for Jailed Prisoners of the Callao Superior Court had withheld the case file on his provisional arrest.⁸²

132. On November 25, 2011, the Public Prosecutor in Charge of Judicial Affairs, which is under the Public Prosecutor's Office in the Ministry of Justice, filed a brief with the 42nd Special Criminal Court of the Lima Superior Court in which she requested clarifications regarding enforcement of the May 24, 2011 decision. The relevant parts of her request are as follows:

(...) if it is to be in compliance with the ruling handed down, the Peruvian State cannot settle the matter of extradition either way, the implication being that the person whose extradition is being sought is at risk of facing the death penalty. It is abundantly clear that the Court has determined that in the case of the crime of fraud or smuggling, that risk is real, which means that the Peruvian State cannot extradite the person sought for that crime.

9. The foregoing notwithstanding, having looked at the alternatives for how to proceed with the extradition process, the Ministry of Justice realizes that the reasoning set out in the preceding paragraph applies only with respect to the possibility of extradition for the crime of fraud or smuggling, and not with respect to the crime of bribery, where there is no possibility that the death penalty will be applied.

10. While it is true that the ruling does make draw distinctions between the crimes whose penalties necessitated the ruling in order protect the *extraditatus*, it is also true that it does not explicitly state that the crime that does not pose a real risk of capital punishment deserves the same treatment as the other crime. It would be unreasonable to assume that was the case, since the reasoning that applies to one case does not apply to the other. This situation has to be addressed and must not be taken lightly. On the contrary, this issue requires very deliberate examination because, *inter alia*, the Peruvian State has concluded an Extradition Treaty with the People's Republic of China that it has an obligation to honor. The Peruvian State cannot possibly maintain that the death penalty is a real risk in any extradition to the Chinese State, since to do so would obviously devoid an existing bilateral treaty of any and all content.

11. Given this state of affairs, the Ministry of Justice is of the view that while the ruling that we are enforcing requires that extradition be denied for a crime that is a capital offense, the Council

⁸⁰ Annex 58. Brief of November 8, 2011. Attachment to the communication received from the petitioner on December 1, 2011.

⁸¹ Annex 59. Habeas Corpus petition dated November 16, 2011. Attachment to the communication received from the petitioner on December 1, 2011.

⁸² Annex 60. Brief of November 17, 2011. Attachment to the communication received from the petitioner on December 1, 2011.

of Ministers can still evaluate whether extradition can be granted with respect to the crime that does not pose this risk; obviously, if that is the case, then the Peruvian State would be in compliance with the Constitutional Court's ruling.⁸³

133. On November 28, 2011, the Ministry of Justice's Office of the Public Prosecutor sent a communication to Lima's Thirtieth Criminal Court. On instructions from the Minister of Justice, the communication contained information pertaining to Mr. Wong Ho Wing's extradition. It stated the following in that regard:

1.- The provisional arrest that triggered the present *habeas corpus* was filed in connection with an extradition process, which has not culminated. It will only close with the Peruvian State's sovereign decision, expressed through the Supreme Resolution that decides whether or not the request for extradition will be granted.

2.- Because, as explained above, the extradition process is not yet finished, no one can claim to know, or claim to foresee or suggest what decision the Peruvian State will take on the extradition request.

(...)

A.- Even that ruling is powerless to prevent the Executive Power's sovereign decision, precisely because of the principle of separation of powers; although the Council of Ministers is required to take the Court's decision into account, that decision is not determinative and does not end the extradition process or dictate the content of the final decision.

B.- Compliance with the Constitutional Court's ruling is not incompatible with the possibility that the Executive Branch might evaluate the extradition request and eventually decide to grant it, provided there is no risk that the death penalty will be enforced.⁸⁴

134. On December 1, 2011, the representative of the Ministry of Justice, Pablo Martín Morán Mejía, filed a brief with the Ombudsman's Office in which he recounted the objective reasons why officials in the Ministry of Justice had not yet reached a decision on the request received from the Seventh Criminal Court of the Callao Superior Court and had not yet provided the case file on Mr. Wong Ho Wing's provisional arrest. The brief also stated that any evaluation of the reasonableness of the length of the extradition process would have to take into account the procedural activity that Mr. Wong Ho Wing's defense necessitated, and any "case lodged with institutions having supranational jurisdiction." The following was stated in connection with the request to provide the case file:

4.1. Just as the Ministry of Justice was finalizing the necessary details to accommodate the request to provide the case file on the provisional arrest (the first communiqué) by sending the requested case file, it received the second communiqué, in which the court sent us the proceedings on the request seeking release (which was the reason for the request made in the first communiqué).

4.2. Noting that a new and peculiar situation had presented itself, since extradition case No. 03-2009 had not yet been decided by the Executive Branch, and the Provisional Arrest Warrant of October 28, 2008 is part of the 229-page court record, which in turn is part of the administrative proceedings, and considering that the Callao court had sent us the court records on the request for the *extraditatus'* release, the view was that the court communications had to be referred to the General Office of Legal Advisory Services for it to consider and give its opinion on the proper

⁸³ Annex 61. November 25, 2011 brief in Case File 05748-2010-0-1801-JR-PE-42. Attachment to the brief received from the petitioner on February 1, 2012.

⁸⁴ Annex 62. Communiqué No. 2381-2011/JUS-PPMJ, dated November 28, 2011. Attachment to the brief received from the petitioner on February 1, 2012.

course of action to follow in order to address the request in a manner compatible with the laws governing administrative proceedings and the ensuing responsibilities.”⁸⁵

135. On February 9, 2012, the Ministry of Justice and Human Rights sent Communiqué No. 116-2012-JUS-DM, to the Chief Justice of the Supreme Court, in reference to the proceeding in which Mr. Wong Ho Wing’s passive extradition was under consideration. The pertinent parts of that communication read as follows:

(...) given the new fact reported in Communiqué No. 92-2012-SG-CS-PJ from your office, dated 06.01.2012, (...) enclosing Verbal Note No. 122/2011 from the Embassy of the People’s Republic of China, in which it reports that the Eighth Amendment of that country’s Criminal Code took effect on 01.05.2011; the new Criminal Code abolishes the death penalty for the crime of smuggling common merchandise, which is a crime that citizen Wong Ho Wing is alleged to have committed.

Given these circumstances, the Judicial Branch must issue a complementary advisory decision addressing this new fact and other questions relating to the implications of the execution of the Constitutional Court’s judgment in relation to offenses that may or may not entail the risk that citizen Wong Ho Wing will face the death penalty, which is the new fact at issue.

The Case File on Passive Extradition No. 03-2009 involving Chinese citizen Wong Ho Wing is hereby remitted for that purpose (...)⁸⁶.

136. On February 20, 2012, the Lima Superior Court’s Criminal Chamber for Cases involving Jailed Prisoners, with other members of the judiciary serving on its bench to substitute for vacationing judges, delivered a decision in which it made reference to the appeal from the Ministry of Justice’s Prosecutor for Judicial Affairs, challenging the November 30, 2011 decision that dismissed the request seeking clarification of the implications of the Constitutional Court’s decision. This judicial authority based its decision on the following:

The court observes that the complainant seeks to rely on new facts that have come to light, so that the *extraditurus* may be extradited without risk to his life; it must be noted here that under the provisions of Article 4 of the Organic Law on the Judicial Branch, the content of a judgment cannot be changed except in the case of the exceptions allowed by law, such as verdicts delivered in family law (...) that provision can only be interpreted literally, which is the only possible interpretation for judgments that have become final and have been executed. Therefore, no “new fact” that is alleged to have come to light can be reviewed, especially when we consider that the law does not allow final judgments to be revisited. On that procedural basis alone, the request from the Prosecutor’s Office is out of order and therefore must be denied. We also have to consider the principle that holds that “what is directly prohibited by law cannot be accomplished by indirect means,” which would mean that interpretation cannot be used to either “narrow” or “amplify” the implications of a judgment that has become *res judicata*. The conclusion, then, is that the request from the Prosecutor’s Office is incompatible. Therefore, in application of Article four of the Organic Law of the Judicial Branch, the superior court judges serving on this collegiate bench

⁸⁵ Annex 63. Communiqué No.1119-2011-JUS/DNJ of November 30, 2011. Attachment to the brief received from the petitioner on February 1, 2012.

⁸⁶ Annex 64. Communiqué No. 116-2012-JUS-DM, of February 9, 2012. Attachment to the communication received from the petitioner on March 13, 2012.

RESOLVE TO CONFIRM: the decision of November 30, 2011, an authenticated copy of which appears in the record at pages 297 to 298; it resolves to dismiss the petition that the Ministry of Justice's Office of the Public Prosecutor for Judicial Affairs submitted concerning the possibility of an extradition outside the framework that the Constitutional Court has established in its judgment, which has already become final."⁸⁷

137. On March 6, 2012, the Supreme Court's Permanent Criminal Chamber issued an order on extradition case No. 03-2009, in which it set the date for the passive extradition hearing concerning Chinese citizen Wong Ho Wing, "it order to issue its decision on the Ministry of Justice's request that a complementary advisory decision be issued."⁸⁸

138. On March 13, 2012, Mr. Luis Lamas Puccio filed a petition of *habeas corpus* to challenge the decisions delivered by the Supreme Court's Permanent Criminal Chamber in extradition case No. 03-2009, which ordered that a new, complementary advisory decision be issued and that a new extradition hearing be held. He also requested that the nullity of the aforementioned decisions be ordered.⁸⁹

139. On March 14, 2012, the Lima Supreme Court's Permanent Criminal Chamber issued a decision on the request from the Ministry of Justice and Human Rights concerning the issuance of a complementary advisory decision, based on a new fact related to the proceedings being conducted in connection with the passive extradition of Mr. Wong Ho Wing. The members of that Chamber deemed that "an additional public hearing on the passive extradition would serve no purpose" and that "issuance of the new advisory decision or complementary advisory decision" that the Ministry of Justice was seeking, "was unfounded and would therefore serve no purpose" since it is the Executive Branch that makes the decision that the law requires." That March 14, 2012 decision reads, in part, as follows:

(...) In this set of legal circumstances there are a total of two final pronouncements, one that is advisory in nature (and comes from the Judicial Branch) and another that is binding in nature (and comes from the Constitutional Court) and with which the Executive Branch must comply, as the law prescribes (article 113 of the Code of Constitutional Procedure).⁹⁰

140. On March 12, 2013 the Constitutional Court issued a resolution that declared inadmissible the constitutional remedy requested by the Public Prosecutor so that this body "could define the scope" of its judgment issued on May 24, 2011. The Constitutional Court ruled as follows:

The intended purpose is that (...) with the pretext of "specify" one end of its judgment, "modify" the ruling. (...) In this sense, according to the contents of both the judgment and the resolution of clarification issued by the Constitutional Court, it should be noted that in those decisions was not made an individual or separate analysis of the crimes imputed to the accused, not only because it did not correspond to be elucidated (...) but also because the relevant issue was to determine

⁸⁷ Annex 65. Decision of February 20, 2010. Attachment to the communication received from the petitioner on March 8, 2012.

⁸⁸ Annex 66. March 6, 2012 order. Attachment to the communication received from the petitioner on March 13, 2012.

⁸⁹ Annex 67. Habeas Corpus petition dated March 13, 2012. Attachment to the communication received from the petitioner on March 19, 2012.

⁹⁰ Annex 68. March 14, 2012 decision, received at the IACHR on April 13, 2012.

whether the right to life of the accused in the habeas corpus was threatened or not in case the request for extradition proceed⁹¹.

141. The information available indicates that as of the date of issuance of this report, Mr. Wong Ho Wing is still being deprived of his liberty, and the Executive Branch has not yet produced the supreme resolution pertaining to the extradition request.

D. Public relevant information to the analysis of an extradition request from the People's Republic of China

142. In this section the Commission will consider the information published by the United Nations committees and thematic rapporteurships, its Office of the High Commissioner for Human Rights and nongovernmental organizations.

1. Regarding death penalty

143. In its 2008 concluding comments on China, the CAT regretted that the specific figures on the death penalty are not made public.⁹² It highlighted the lack of comprehensive and disaggregated data on the complaints, investigations, trials and convictions in death penalty cases,⁹³ a concern shared by the Committee for the Elimination of Racial Discrimination in its 2001 observations on China.⁹⁴ In a compilation done in 2009 for the universal periodic review on China, the Office of the United Nations High Commissioner for Human Rights expressed concern at the fact that China did not publish statistics on the application of the death penalty in China.⁹⁵

144. On this same subject, former Special Rapporteur Manfred Nowak noted that the lack of official statistics on the application of the death penalty contributes to the perception of secrecy.⁹⁶ For his part, the former Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Philip Alston, observed that for a Government to insist on a principled defence of the death penalty but to refuse to divulge to its own population the extent to which, and the reasons for which, it is being applied is unacceptable.⁹⁷

⁹¹ Annex 69. Resolution of the Constitutional Court of March 12, 2013.

⁹² UN, Committee against Torture, Concluding observations, China. CAT/C/CHN/CO/4, December 12, 2008, paragraph 34, available at: <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G08/457/10/PDF/G0845710.pdf?OpenElement>

⁹³ UN, Committee against Torture, Concluding observations, China. CAT/C/CHN/CO/4, December 12, 2008, paragraph 17, available at: <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G08/457/10/PDF/G0845710.pdf?OpenElement>

⁹⁴ UN, Committee against Torture, Concluding observations, China. A/56/18, August 9, 2001, paragraph 250, disponible en: <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G01/446/43/PDF/G0144643.pdf?OpenElement>

⁹⁵ UN, Office of the High Commission for Human Rights, Compilation prepared by the Office of the High Commission for Human Rights, in accordance with paragraph 15(b) of the annex to Human Rights Council Resolution 5/1. China. A/HRC/WG.6/4/CHN/2, January 6, 2009, paragraph 16, available at: http://lib.ohchr.org/HRBodies/UPR/Documents/Session4/CN/A_HRC_WG6_4_CHN_2_E.pdf

⁹⁶ UN 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, paragraph 69, available at: <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G06/117/50/PDF/G0611750.pdf?OpenElement>

⁹⁷ UN, Special Rapporteur on extrajudicial, summary or arbitrary executions, Philip Alston.. Civil and Political Rights, Including the Questions of Disappearances and Summary Executions. E/CN.4/2005/7, December 22, 2004, paragraph 59, available at: <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G05/101/34/PDF/G0510134.pdf?OpenElement>

145. He also wrote that refusal to provide statistics on the death penalty is incompatible with human rights standards in various respects.⁹⁸ This is because such secrecy i) undermines many of the safeguards which might operate to prevent errors or abuses and to ensure fair and just procedures at all stages; ii) denies the human dignity of those sentenced, many of whom are still eligible to appeal, and iii) denies the rights of family members to know the fate of their closest relatives.⁹⁹

146. Another factor to consider is the type of crimes that carry the death penalty. Former Special Rapporteur Manfred Nowak observed with concern the high number of crimes for which the death penalty can be applied.¹⁰⁰ Here he indicated that Chinese law provides for the death penalty for a wide range of offences that do not reach the international standard of “the most serious crimes”¹⁰¹ including economic and other non-violent crimes.¹⁰² Former Special Rapporteur Asma Jahangir observed that a growing number of people have allegedly been sentenced to death for corruption, embezzlement, bribery and other non-lethal crimes.¹⁰³ The Office of the United Nations High Commissioner for Human Rights recommended to China that the scope of the death penalty should be reduced.¹⁰⁴

147. It is precisely within the framework of this case that the Commission has received information regarding the alleged derogatory of the death penalty in the People’s Republic of China for an array of economic crimes, during the month of February, 2011. This topic will be referred to in the analysis of the law applicable to the present case.

148. For its part, the CAT expressed concern over the detention conditions of convicted prisons awaiting execution.¹⁰⁵ It specifically brought attention to the fact that such persons tend to be

⁹⁸ UN, Special Rapporteur on extrajudicial, summary or arbitrary executions, Philip Alston.. Civil and Political Rights, Including the Questions of Disappearances and Summary Executions. E/CN.4/2005/7, December 22, 2004, paragraph 57, available at: <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G05/101/34/PDF/G0510134.pdf?OpenElement>

⁹⁹ UN, Special Rapporteur on extrajudicial, summary or arbitrary executions, Philip Alston.. Civil and Political Rights, Including the Questions of Disappearances and Summary Executions. E/CN.4/2005/7, December 22, 2004, paragraph 57, available at: <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G05/101/34/PDF/G0510134.pdf?OpenElement>

¹⁰⁰ UN 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, paragraph 69, available at: <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G06/117/50/PDF/G0611750.pdf?OpenElement>

¹⁰¹ UN 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, note no. 72, available at: <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G06/117/50/PDF/G0611750.pdf?OpenElement>

¹⁰² UN 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, recommendation r), available at: <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G06/117/50/PDF/G0611750.pdf?OpenElement>

¹⁰³ UN, Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Report Civil and Political Rights, including questions of: disappearances and summary executions. E/CN.4/2002/74, January 9, 2002, paragraph 101, available at: [http://www.unhcr.ch/huridocda/huridoca.nsf/\(Symbol\)/E.CN.4.2002.74.En?Opendocument](http://www.unhcr.ch/huridocda/huridoca.nsf/(Symbol)/E.CN.4.2002.74.En?Opendocument)

¹⁰⁴ UN, Office of the High Commission for Human Rights, Compilation prepared by the Office of the High Commission for Human Rights, in accordance with paragraph 15(b) of the annex to Human Rights Council Resolution 5/1. China. A/HRC/WG.6/4/CHN/2, January 6, 2009, paragraph 16, available at: http://lib.ohchr.org/HRBodies/UPR/Documents/Session4/CN/A_HRC_WG6_4_CHN_2_E.pdf

¹⁰⁵ UN, Committee against Torture, Concluding observations, China. CAT/C/CHN/CO/4, December 12, 2008, paragraph 34, available at: <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G08/457/10/PDF/G0845710.pdf?OpenElement>

shackled 24 hours a day, which amounts to cruel, inhuman and degrading treatment.¹⁰⁶ During his visits to several prisons in China, former Special Rapporteur Manfred Nowak observed that those sentenced to death are handcuffed and shackled with leg irons, which in his view was an inhuman and degrading practice as it is an additional form of punishment.¹⁰⁷ The CAT also observed that it has reports of organs being removed from people on death row without their giving their free and informed consent.¹⁰⁸

149. Within United Nations, this remains a troubling picture to this day. In her opening address at the XXI Session of the Human Rights Council in 2012, the United Nations High Commissioner for Human Rights expressed concern over the recent executions of persons sentenced to the death penalty in China.¹⁰⁹

150. Additionally, non-governmental organizations have approach to this issue. In that sense, both Human Rights Watch¹¹⁰ and Amnesty International¹¹¹ indicate that the statistics on the application of the death penalty are classified as a State secret. Nevertheless, Human Rights Watch estimated that between five and eight thousand are executed every year.¹¹² This would put China at the top of the list of countries that most use the death penalty.¹¹³

151. In the context of the universal periodic review on China done in 2009, the nongovernmental organizations reported that by classifying the statistics on the death penalty as a State secret, China prevents them from monitoring the true extent of the use of the death penalty.¹¹⁴ They

¹⁰⁶ UN, Committee against Torture, Concluding observations, China. CAT/C/CHN/CO/4, December 12, 2008, paragraph 34, available at: <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G08/457/10/PDF/G0845710.pdf?OpenElement>

¹⁰⁷ UN 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, paragraph 68, available at: <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G06/117/50/PDF/G0611750.pdf?OpenElement>

¹⁰⁸ UN, Committee against Torture, Concluding observations, China. CAT/C/CHN/CO/4, December 12, 2008, paragraph 34, available at: <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G08/457/10/PDF/G0845710.pdf?OpenElement>

¹⁰⁹ UN, Opening Statement by Ms. Navi Pillay, United Nations High Commissioner for Human Rights to the Human Rights Council 21st Session, September 10, 2012, available at: <http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=12486&LangID=e>

¹¹⁰ Human Rights Watch, Promises Unfulfilled: An assessment of China's National Human Rights Action Plan, 2011, p. 24, available at: <http://www.hrw.org/sites/default/files/reports/china0111webwcover.pdf>

¹¹¹ Amnesty International, Death Sentences and executions 2011, 2010, p. 8, available at: <http://www.amnesty.org/en/library/asset/ACT50/001/2012/en/241a8301-05b4-41c0-bfd9-2fe72899cda4/act500012012en.pdf>.

¹¹² Human Rights Watch, World Report 2012, 2011 Events. China, p. 3, available at: http://www.hrw.org/sites/default/files/related_material/china_2012_0.pdf

¹¹³ Human Rights Watch, Promises Unfulfilled: An assembly of China's National Human Rights Action Plan, 2011, p. 25, available at: <http://www.hrw.org/sites/default/files/reports/china0111webwcover.pdf>

¹¹⁴ UN, Office of the High Commission for Human Rights, Compilation prepared by the Office of the High Commission for Human Rights, in accordance with paragraph 15(b) of the annex to Human Rights Council Resolution 5/1. China. A/HRC/WG.6/4/CHN/2, January 6, 2009, paragraph 13, available at: http://lib.ohchr.org/HRBodies/UPR/Documents/Session4/CN/A_HRC_WG6_4_CHN_2_E.pdf

also contend that the vague concept of State Secret is used extensively and arbitrarily to deny access to legal representation, access to case files and to hold trials in camera.¹¹⁵

152. Amnesty International also observed that death penalty cases tend to be flawed with irregularities such as 1) the lack of prompt access to lawyers; ii) a lack of presumption of innocence; iii) political interference in the judiciary, and iv) the failure to exclude evidence extracted through torture.¹¹⁶ Likewise, other nongovernmental organizations reported that 1) death row prisoners are prevented from having their farewell visits with families; ii) the appeals process in death penalty cases is closed to outside observers, and iii) the death penalty is still being administered for non-violent crimes.¹¹⁷

153. Finally, Amnesty International underscored the fact that Chinese authorities have been active abroad, seeking detention and deportation of Chinese citizens who have fled the country, including some who have requested asylum in other countries or whose refugee status has been recognized.¹¹⁸ It also observed that those who have been returned to China from abroad are in great danger of becoming victims of torture and cruel, inhuman or degrading treatment.¹¹⁹

2. Regarding the possible application of torture, cruel and inhumane treatment and other aspects of due process

154. The United Nations Committee against Torture (CAT), in its final comments on China in 2008,¹²⁰ and the former Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak, on his 2005 visit to China,¹²¹ addressed the problems with the laws and regulations on the subject of torture, particularly the fact that they do not make reference to some of the basic elements constituting torture.

155. Former Special Rapporteur Manfred Nowak confirmed that the following are among the various methods of torture used in China: i) beatings with sticks and batons; ii) the use of electric shock

¹¹⁵ UN, Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Follow-up to the recommendations made by the Special Rapporteur. China. A/HRC/13/39/Add.6, February 26, 2010, p. 43, available at: http://www2.ohchr.org/english/bodies/hrcouncil/docs/13session/A.HRC.13.39.Add%206_EFS.pdf

¹¹⁶ Amnesty International, The Death Penalty in Asia in 2008, available at: <http://www.amnesty.org/en/death-penalty/death-sentences-and-executions-in-2008/asia>

¹¹⁷ UN, Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Follow-up to the recommendations made by the Special Rapporteur. China. A/HRC/13/39/Add.6, February 26, 2010, p. 45, available at: http://www2.ohchr.org/english/bodies/hrcouncil/docs/13session/A.HRC.13.39.Add%206_EFS.pdf

¹¹⁸ Amnesty International. People's Republic of China, Briefing for the Committee against Torture in advance of their consideration of China's fourth periodic report, 3-21 November 2008, p. 12, available at: http://www2.ohchr.org/english/bodies/cat/docs/ngos/AI_China_41.pdf

¹¹⁹ Amnesty International. People's Republic of China, Briefing for the Committee against Torture in advance of their consideration of China's fourth periodic report, 3-21 November 2008, p. 12, available at: http://www2.ohchr.org/english/bodies/cat/docs/ngos/AI_China_41.pdf

¹²⁰ UN, Committee against Torture, Concluding observations, China. CAT/C/CHN/CO/4, December 12, 2008, paragraph 32, available at: <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G08/457/10/PDF/G0845710.pdf?OpenElement>

¹²¹ UN 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, paragraph 17, available at: <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G06/117/50/PDF/G0611750.pdf?OpenElement>

and cigarette burns; iii) hooding/blindfolding; iv) guard-instructed or permitted beatings by fellow prisoners; v) use of handcuffs or ankle fetters for extended periods; vi) submersion in pits of water or sewage; vii) exposure to conditions of extreme heat or cold; viii) being forced to maintain uncomfortable positions; ix) deprivation of sleep, food or water; x) prolonged solitary confinement; xi) denial of medical treatment and medication; xii) hard labour and others.¹²²

156. Furthermore, in a 2002 report the former Special Rapporteur on extrajudicial, summary or arbitrary executions, Asma Jahangir, expressed particular alarm over reports describing a large number of cases in which detainees had died as a result of severe ill-treatment, neglect or lack of medical attention in China.¹²³ The CAT also voiced its concern over the detention conditions in China and the many deaths possibly associated with torture or ill-treatment.¹²⁴ Former Special Rapporteur Manfred Nowak also observed that Chinese law contains no provisions establishing prisoners' rights to independent medical examinations.¹²⁵

157. Another troubling matter is the use of confessions coerced under torture. Former Special Rapporteur Manfred Nowak commented that the rules of evidence create incentives for interrogators to obtain confessions through torture.¹²⁶ Here, the CAT underscored the continued allegations of routine and widespread use of torture and ill-treatment of suspects in police custody, especially to extract confessions or information to be used in criminal proceedings.¹²⁷ The CAT pointed out that confessions continue to be used as evidence, which only encourages the practice of the detainee torture and mistreatment.¹²⁸

158. Similarly, former Special Rapporteur Manfred Nowak commented that in China, the use of confessions extracted through torture as evidence before the courts is not explicitly prohibited, as required by Article 15 of the Convention against Torture and Other Cruel, Inhuman or Degrading

¹²² UN 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, paragraph 45, available at: <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G06/117/50/PDF/G0611750.pdf?OpenElement>

¹²³ UN, Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Report Civil and Political Rights, including questions of: disappearances and summary executions. E/CN.4/2002/74, January 9, 2002, paragraph 34, available at: [http://www.unhcr.ch/huridocda/huridoca.nsf/\(Symbol\)/E.CN.4.2002.74.En?Opendocument](http://www.unhcr.ch/huridocda/huridoca.nsf/(Symbol)/E.CN.4.2002.74.En?Opendocument)

¹²⁴ UN, Committee against Torture, Concluding observations, China. CAT/C/CHN/CO/4, December 12, 2008, paragraph 17, available at: <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G08/457/10/PDF/G0845710.pdf?OpenElement>

¹²⁵ UN 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, paragraph 26, available at: <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G06/117/50/PDF/G0611750.pdf?OpenElement>

¹²⁶ UN 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, paragraph 73, available at: <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G06/117/50/PDF/G0611750.pdf?OpenElement>

¹²⁷ UN, Committee against Torture, Concluding observations, China. CAT/C/CHN/CO/4, December 12, 2008, paragraph 11, available at: <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G08/457/10/PDF/G0845710.pdf?OpenElement>

¹²⁸ UN, Committee against Torture, Concluding observations, China. CAT/C/CHN/CO/4, December 12, 2008, paragraph 11, available at: <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G08/457/10/PDF/G0845710.pdf?OpenElement>

Treatment or Punishment.¹²⁹ In his 2000 report on the follow-up of the visit to China, he again expressed concern over the use of torture-induced confessions in juridical proceedings.¹³⁰

159. The CAT, for its part, was troubled by the failure to investigate any episode related to acts of torture¹³¹ and noted that that allegations of torture and/or ill-treatment committed by law enforcement personnel are seldom investigated and prosecuted.¹³² The Committee also observed that some instances of torture involving acts which are considered as “relatively minor offences” can lead to only disciplinary or administrative punishment.¹³³ This was a concern shared by former Special Rapporteur Manfred Nowak who spoke of the lack of investigation, prosecution and punishment of perpetrators of torture.¹³⁴

160. The failure to investigate is compounded because there are no complaint mechanisms or independent monitoring mechanism.¹³⁵ The CAT pointed out that China does not have an effective mechanism for investigating allegations of torture as required by the Convention.¹³⁶ Furthermore, the domestic laws do not offer any process similar to that of *habeas corpus* or any other legal recourse that would serve as a means for imprisoned persons to file a claim alleging torture or cruel, inhuman or degrading treatment.¹³⁷

161. Former Special Rapporteur Manfred Nowak also noted that most suspects are interrogated without lawyers,¹³⁸ which, in the CAT’s view, is a fundamental legal safeguard to prevent

¹²⁹ UN 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, paragraph 37, available at: <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G06/117/50/PDF/G0611750.pdf?OpenElement>

¹³⁰ UN, Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Follow-up to the recommendations made by the Special Rapporteur. China. A/HRC/13/39/Add.6, February 26, 2010, paragraph 19, available at: http://www2.ohchr.org/english/bodies/hrcouncil/docs/13session/A.HRC.13.39.Add%206_EFS.pdf

¹³¹ UN, Committee against Torture, Concluding observations, China. CAT/C/CHN/CO/4, December 12, 2008, paragraph 17, available at: <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G08/457/10/PDF/G0845710.pdf?OpenElement>

¹³² UN, Committee against Torture, Concluding observations, China. CAT/C/CHN/CO/4, December 12, 2008, paragraph 31, available at: <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G08/457/10/PDF/G0845710.pdf?OpenElement>

¹³³ UN, Committee against Torture, Concluding observations, China. CAT/C/CHN/CO/4, December 12, 2008, paragraph 33, available at: <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G08/457/10/PDF/G0845710.pdf?OpenElement>

¹³⁴ UN, Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Follow-up to the recommendations made by the Special Rapporteur. China. A/HRC/13/39/Add.6, February 26, 2010, paragraph 19, available at: http://www2.ohchr.org/english/bodies/hrcouncil/docs/13session/A.HRC.13.39.Add%206_EFS.pdf

¹³⁵ UN, Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Follow-up to the recommendations made by the Special Rapporteur. China. A/HRC/13/39/Add.6, February 26, 2010, paragraph 19, available at: http://www2.ohchr.org/english/bodies/hrcouncil/docs/13session/A.HRC.13.39.Add%206_EFS.pdf

¹³⁶ UN, Committee against Torture, Concluding observations, China. CAT/C/CHN/CO/4, December 12, 2008, paragraph 20, available at: <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G08/457/10/PDF/G0845710.pdf?OpenElement>

¹³⁷ UN 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, paragraph 27, available at: <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G06/117/50/PDF/G0611750.pdf?OpenElement>

¹³⁸ UN 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, paragraph 55, available at: <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G06/117/50/PDF/G0611750.pdf?OpenElement>

torture.¹³⁹ In his 2010 report on the follow-up to the visit to China, the former Special Rapporteur observed with concern that the intimidation, repression and harassment of lawyers who take on 'sensitive' cases continue¹⁴⁰ and that several lawyers have been detained and convicted on arbitrary grounds.¹⁴¹ He also pointed out that two of the many factors contributing to the continuing practice of torture in China are 1) the absence of a legal culture based on the presumption of innocence, including the absence of an effective right to remain silent¹⁴² and ii) the institutional weakness and lack of Independence of the judiciary.¹⁴³

162. Finally, the CAT underscored the absence of comprehensive or disaggregated data on 1) complaints, investigations, prosecutions and convictions of cases of torture and ill-treatment by law enforcement personnel, and ii) detention conditions and the health of imprisoned persons.¹⁴⁴ The CAT was deeply concerned by the way in which the 1988 Law on the Preservation of State Secrets in the People's Republic of China is used, as it undermines the availability of information about torture, criminal justice and related issues.¹⁴⁵

163. On its part, in 2011 Human Rights Watch published a thematic report on the practice of torture and cruel, inhuman and degrading treatment in China that examined the objectives established in China's first National Human Rights Action Plan. In that report, it observed that the practice of torture continues to be an "endemic problem [...] and widespread."¹⁴⁶

164. In the observations it presented to the CAT in 2008, Amnesty International commented that the Chinese authorities have failed to bring definitions under Chinese law into line with the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. It does not provide a catchall category of personnel and thus potentially excludes from prosecution individuals

¹³⁹ UN, Committee against Torture, Concluding observations, China. CAT/C/CHN/CO/4, December 12, 2008, paragraph 16, available at: <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G08/457/10/PDF/G0845710.pdf?OpenElement>

¹⁴⁰ UN, Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Follow-up to the recommendations made by the Special Rapporteur. China. A/HRC/13/39/Add.6, February 26, 2010, paragraph 21, available at: http://www2.ohchr.org/english/bodies/hrcouncil/docs/13session/A.HRC.13.39.Add%206_EFS.pdf

¹⁴¹ UN, Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Follow-up to the recommendations made by the Special Rapporteur. China. A/HRC/13/39/Add.6, February 26, 2010, paragraph 21, available at: http://www2.ohchr.org/english/bodies/hrcouncil/docs/13session/A.HRC.13.39.Add%206_EFS.pdf

¹⁴² UN 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, paragraph 73, available at: <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G06/117/50/PDF/G0611750.pdf?OpenElement>

¹⁴³ UN 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, paragraph 75, available at: <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G06/117/50/PDF/G0611750.pdf?OpenElement>

¹⁴⁴ UN, Committee against Torture, Concluding observations, China. CAT/C/CHN/CO/4, December 12, 2008, paragraph 17, available at: <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G08/457/10/PDF/G0845710.pdf?OpenElement>

¹⁴⁵ UN, Committee against Torture, Concluding observations, China. CAT/C/CHN/CO/4, December 12, 2008, paragraph 16, available at: <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G08/457/10/PDF/G0845710.pdf?OpenElement>

¹⁴⁶ Human Rights Watch, Promises Unfulfilled: an assessment of China's National Human Rights Action Plan, 2011, pp. 15 and 17, available at: <http://www.hrw.org/sites/default/files/reports/china0111webwcover.pdf>

who might be in a position to inflict torture or other ill-treatment.¹⁴⁷ In a 2012 brief to the former Special Rapporteur Manfred Nowak, several nongovernmental organizations reported that by including only a list of situations that amount to torture and ill-treatment, other torture methods risk to fall outside the law.¹⁴⁸

165. Furthermore, as a number of nongovernmental organizations observed even in the context of the universal periodic review of China in 2009,¹⁴⁹ the use of evidence obtained through torture continues to be admissible and is still being used in judicial proceedings.¹⁵⁰ In its January 2012 world report, Human Rights Watch pointed out that judicial proceedings are disproportionately based on the defendants' torture-induced confessions.¹⁵¹ Amnesty International has also said that China's domestic laws do not explicitly prohibit the use of confessions obtained by torture or cruel, inhuman or degrading treatment.¹⁵²

166. As for detention conditions and judicial guarantees as part of due process, Human Rights Watch reported a series of deaths among detainees from unnatural causes, mainly mistreatment and beatings by security forces.¹⁵³ It underscored that the police dominate the criminal justice system,¹⁵⁴ and that latter does not enjoy either autonomy or independence vis-à-vis the government.¹⁵⁵ The result is police and prosecutorial interference that obstructs an effective legal defense, particularly in politically sensitive cases.¹⁵⁶

¹⁴⁷ Amnesty International. People's Republic of China, Briefing for the Committee against Torture in advance of their consideration of China's fourth periodic report, 3-21 November 2008, p. 1, available at: http://www2.ohchr.org/english/bodies/cat/docs/ngos/AI_China_41.pdf

¹⁴⁸ UN, Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Follow-up to the recommendations made by the Special Rapporteur. 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

¹⁴⁹ 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. China. A/HRC/WG.6/4/CHN/2, January 6, 2009, paragraph 15, available at: http://lib.ohchr.org/HRBodies/UPR/Documents/Session4/CN/A_HRC_WG6_4_CHN_2_E.pdf

¹⁵⁰ UN, Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Follow-up to the recommendations made by the Special Rapporteur. China. A/HRC/13/39/Add.6, February 26, 2010, page 41, available at: http://www2.ohchr.org/english/bodies/hrcouncil/docs/13session/A.HRC.13.39.Add%206_EFS.pdf

¹⁵¹ Human Rights Watch, World Report 2012, 2011 Events. China, p. 2, available at: http://www.hrw.org/sites/default/files/related_material/china_2012_0.pdf

¹⁵² Amnesty International. People's Republic of China, Briefing for the Committee against Torture in advance of their consideration of China's fourth periodic report, 3-21 November 2008, p. 16, available at: http://www2.ohchr.org/english/bodies/cat/docs/ngos/AI_China_41.pdf

¹⁵³ Human Rights Watch, Promises Unfulfilled: An assessment of China's National Human Rights Action Plan, 2011, p. 16, available at: <http://www.hrw.org/sites/default/files/reports/china0111webwcover.pdf>

¹⁵⁴ Human Rights Watch, World Report 2012. 2011 Events. China, p. 2, available at: http://www.hrw.org/sites/default/files/related_material/china_2012_0.pdf

¹⁵⁵ Human Rights Watch, Promises Unfulfilled: An assessment of China's National Human Rights Action Plan, 2011, pp. 26-27, available at: <http://www.hrw.org/sites/default/files/reports/china0111webwcover.pdf>

¹⁵⁶ Human Rights Watch, Promises Unfulfilled: An assessment of China's National Human Rights Action Plan, 2011, pp. 26-27, available at: <http://www.hrw.org/sites/default/files/reports/china0111webwcover.pdf>

167. Amnesty International also pointed out that “[d]etainees’ access to their families and legal representatives is limited, discretionary and conditional.”¹⁵⁷ Other nongovernmental organizations maintained that there is no right to access a lawyer before the initial interrogation¹⁵⁸ and that the repression and harassment of lawyers who take on “sensitive” cases has increased, many of whom lose their licenses to practice law, are targeted, detained and even convicted of various crimes.¹⁵⁹

168. Compounding the problem is the fact that the courts ignore complaints of persons on trial being tortured.¹⁶⁰ Nongovernmental organizations observed that [p]erpetrators of torture are rarely suspended, indicted or held legally accountable.¹⁶¹ In practice, the punishment against perpetrators of torture is very light in comparison to the gravity of the crime.¹⁶² They also report that police retain full control over the recordings of interrogations and in cases where torture has been used the tapes tend to go missing.¹⁶³

IV. THE LAW

A. Preliminary observations

169. Before going into the legal issues in this report, the Commission must begin by observing that it regards extradition as an important tool in combating impunity and as a means through which States are able to collaborate on the question of justice. The Inter-American Court, for its part, has repeatedly written about the importance of extradition,¹⁶⁴ observing that “[i]t is in the interests of

¹⁵⁷ Amnesty International. People's Republic of China, Briefing for the Committee against Torture in advance of their consideration of China's fourth periodic report, 3-21 November 2008, p. 4, available at: http://www2.ohchr.org/english/bodies/cat/docs/ngos/AI_China_41.pdf

¹⁵⁸ UN, Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Follow-up to the recommendations made by the Special Rapporteur. China. A/HRC/13/39/Add.6, February 26, 2010, page 41, available at: http://www2.ohchr.org/english/bodies/hrcouncil/docs/13session/A.HRC.13.39.Add%206_EFS.pdf

¹⁵⁹ UN, Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Follow-up to the recommendations made by the Special Rapporteur. China. A/HRC/13/39/Add.6, February 26, 2010, pp. 43-44, available at: http://www2.ohchr.org/english/bodies/hrcouncil/docs/13session/A.HRC.13.39.Add%206_EFS.pdf

¹⁶⁰ UN, Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Follow-up to the recommendations made by the Special Rapporteur. China. A/HRC/13/39/Add.6, February 26, 2010, p. 42, available at: http://www2.ohchr.org/english/bodies/hrcouncil/docs/13session/A.HRC.13.39.Add%206_EFS.pdf

¹⁶¹ UN, Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Follow-up to the recommendations made by the Special Rapporteur. China. A/HRC/13/39/Add.6, February 26, 2010, p. 39, available at: http://www2.ohchr.org/english/bodies/hrcouncil/docs/13session/A.HRC.13.39.Add%206_EFS.pdf

¹⁶² UN, Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Follow-up to the recommendations made by the Special Rapporteur. 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

¹⁶³ UN, Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Follow-up to the recommendations made by the Special Rapporteur. China. A/HRC/13/39/Add.6, February 26, 2010, p. 41, available at: http://www2.ohchr.org/english/bodies/hrcouncil/docs/13session/A.HRC.13.39.Add%206_EFS.pdf

¹⁶⁴ I/A Court H.R. Case of Goiburú et al. v. Paraguay. Merits, Reparations and Costs. Judgment of September 22, 2006. Series C No. 153, Paragraph 132; Case of La Cantuta v. Peru. Merits, Reparations and Costs. Judgment of November 29, 2006. Series C No. 162, paragraphs 159 and 160; Case of the Ituango Massacres v. Colombia. Supervision of Compliance with the Judgment. Order of the Inter-American Court of Human Rights, July 7, 2009, Consideranda 19, and Case of the Mapiripán Massacre v. Colombia. Supervision of Compliance with the Judgment. Order of the Inter-American Court of Human Rights. July 8, 2009, Consideranda 40 and 41.

the community of Nations that individuals who have been accused of specific offenses be brought to justice.”¹⁶⁵

170. Nevertheless, extradition as such and the procedure leading up to extradition, is a State act in which, because of its very nature, the international responsibility of a State can be engaged if the extradition is not done in accordance with the State’s obligations under the American Convention. As the Court wrote in the Order for provisional measures in this matter, “the States’ international obligations concerning human rights and the requirements of due process must be observed in extradition processes.”¹⁶⁶

171. As for the scope of the review that follows, the Commission must clarify that it is not up to the Commission to determine whether Mr. Wong Ho Wing’s extradition to the People’s Republic of China is called for. The Commission’s analysis will be confined to examining whether, between the time it received the request for Mr. Won Ho Wing’s extradition and the present, the Peruvian State complied with its international obligations to respect and ensure the rights to life, to humane treatment, to personal liberty, to due process guarantees and judicial protection recognized in the American Convention.

B. Analysis of the facts, based on the American Convention

172. Given the facts established in this report and the positions taken by the parties, the Inter-American Commission will now examine the law in the following order: 1) the right to personal liberty (Article 7 of the American Convention); 2) the rights to life, to humane treatment, the right of *non-refoulement* and the right to judicial protection (articles 4, 5 and 25 of the American Convention; and 3) the right to judicial guarantees (articles 8(1) and 8(2) of the American Convention).

1. Right to personal liberty (Article 7 of the American Convention)

173. The pertinent parts of Article 7 of the American Convention read as follows:

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 constitution of the State Party concerned or by a law established pursuant thereto.
3. No one shall be subject to arbitrary arrest or imprisonment.

[...]

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.

¹⁶⁵ I/A Court H.R., Order for provisional measures. Matter of Won Ho Wing, May 28, 2010. Consideranda

16.

¹⁶⁶ I/A Court H.R., Order for provisional measures. Matter of Won Ho Wing, May 28, 2010. Consideranda 16.

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.

[...]

174. Article 1(1) of the American Convention provides that:

1. 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.

175. The Commission's examination of the established facts in light of the right to personal liberty will be in the following order: i) General considerations on the right to personal liberty; ii) the practice of "provisional arrest" in the context of an extradition process, under the American Convention; iii) and analysis of the facts in the present case..

1.1 General considerations on the right to personal liberty

176. The Inter-American Court has written that "Article 7 of the Convention contains two distinct types of regulations: one general, the other specific. The general one is contained in the first subparagraph: '[e]very person has the right to personal liberty and security'; while the specific one is composed of a series of guarantees that protect the right not to be deprived of liberty unlawfully (Art. 7(2)) or in an arbitrary manner (Art. 7(3)), to be informed of the reasons for the detention and the charges brought against him (Art. 7(4)), to judicial control of the deprivation of liberty and the reasonable length of time of the remand in custody (Art. 7(5)), to contest the lawfulness of the arrest (Art. 7(6)), and not to be detained for debt (Art. 7(7))."¹⁶⁷

177. It has also observed that any violation of subparagraphs 2 to 7 of Article 7 of the Convention necessarily entails the violation of Article 7(1) thereof, because the failure to respect the guarantees of the person deprived of liberty leads to the lack of protection of that person's right to liberty.¹⁶⁸

178. As for the prohibition against arbitrary detention or arrest, the Inter-American Court has held that no one shall be arbitrarily arrested or imprisoned for reasons and methods which –though qualified as legal- may be deemed to be incompatible with respect for the fundamental rights of the

¹⁶⁷ I/A Court H.R. Case of Chaparro Álvarez and Lapo Íñiguez. v. Ecuador. Preliminary Objections, Merits, Reparations and Costs. Judgment of 21 de noviembre de 2007. Series C No. 170. Paragraph 51.

¹⁶⁸ I/A Court H.R. Case of Chaparro Álvarez and Lapo Íñiguez. v. Ecuador. Preliminary Objections, Merits, Reparations and Costs. Judgment of 21 de noviembre de 2007. Series C No. 170. Paragraph 54.

individual, because such reasons or methods are deemed to be, among other things, unreasonable, unforeseeable, or disproportionate.¹⁶⁹

179. The Court has established the following criteria for determining whether a deprivation of liberty is or is not arbitrary:

it is not sufficient that every reason for deprivation or restriction of the right to liberty is established by law; this law and its application must respect the requirements listed below, to ensure that this measure is not arbitrary: (i) that the purpose of the measures that deprive or restrict liberty is compatible with the Convention. It is worth indicating that the Court has recognized that ensuring that the accused does not prevent the proceedings from being conducted or evade the judicial system is a legitimate purpose;¹⁷⁰ (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, among all possible measures, there is no less burdensome one in relation to the right involved, that would be as suitable to achieve the proposed objective. Hence, the Court has indicated that the right to personal liberty supposes that any limitation of this right must be exceptional,¹⁷¹ and (iv) that the measures are strictly proportionate,¹⁷² so that the sacrifice inherent in the restriction of the right to liberty is not exaggerated or excessive compared to the advantages obtained from this restriction and the achievement of the purpose sought. Any restriction of liberty that is not based on a justification that will allow an assessment of whether it is adapted to the conditions set out above will be arbitrary and will thus violate Article 7(3) of the Convention.¹⁷³

180. For its part, Article 7(5) of the Convention refers to the period of time an unconvicted person can be held in custody. Concerning this provision of Article 7, the Inter-American Court has held that the Convention is violated when a person whose criminal culpability has not been established is held for an excessive and therefore disproportionate period of time. According to the Court's case law, this is tantamount to anticipating the sentence.¹⁷⁴

181. Concerning the question of whether the practice of preventive detention is compatible with the guarantee of presumption of innocence, the Court has summed up a number of earlier provisions by writing that:

¹⁶⁹ I/A Court H.R., Case of García Asto and Ramírez Rojas. Judgment of November 25, 2005. Series C No. 137, paragraph 105; Case of Acosta Calderón. Judgment of June 24, 2005. Series C No. 129, paragraph 57; Case of Tibi. Judgment of September 7, 2004. Series C No. 114, paragraph 98; and Case of the Gómez Paquiyaui Brothers. Judgment of July 8, 2004. Series C No. 110, paragraph 83.

¹⁷⁰ I/A Court H.R., Case of Servellón García et al. Judgment of September 21, 2006. Series C No. 152, paragraph 111.

¹⁷¹ I/A Court H.R. Case of Palamara Iribarne v. Chile. Merits, Reparations, and Costs. Judgment of November 22, 2005. Series C No. 135, paragraph 197; I/A Court H.R., García Asto and Ramírez Rojas v. Peru. Preliminary objection, Merits, Reparations, and Costs. Judgment of November 25, 2005. Series C No. 137, paragraph 106.

¹⁷² I/A Court H.R. 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. 228.

¹⁷³ I/A Court H.R. Case of Chaparro Álvarez and Lapo Íñiguez. v. Ecuador. Preliminary Objections, Merits, Reparations and Costs. Judgment of November 21, 2007. Series C No. 170. Paragraph.93.

¹⁷⁴ I/A Court H.R., Case of López Álvarez. Judgment of February 1, 2006. Series C No. 141, paragraph 69; Case of Acosta Calderón. Judgment of June 24, 2005. Series C No. 129, paragraph 111; Case of Tibi, Judgment of September 7, 2004. Series C No. 114, paragraph. 180; and Case of Suárez Rosero. Judgment of November 12, 1997. Series C No. 35, paragraph 77.

the principle of presumption of innocence constitutes a foundation for judicial guarantees. The obligation of the State to not restrict the detainee's liberty beyond the limits strictly necessary to ensure that he will not impede the efficient development of the investigations and that he will not evade justice derives from that established in Article 8(2) of the Convention. In this sense, the preventive detention is a cautionary measure and not a punitive one. This concept is laid down in multiple instruments of international human rights law. The International Covenant on Civil and Political Rights provides that preventive detention should not be the normal practice in relation to persons who are to stand trial (Article 9(3)). It would constitute a violation to the Convention to keep a person whose criminal responsibility has not been established detained for a disproportionate period of time. This would be tantamount to anticipating a sentence, which is at odds with universally recognized general principles of law.¹⁷⁵

182. Finally, in the case of Article 7(6) of the Convention, the Inter-American Court has held that this particular provision has "its own legal content, which consists of the protection of personal or physical freedom, by means of a judicial decree ordering the appropriate authorities to bring the detained person before a judge so that the lawfulness of the detention may be determined and, if appropriate, the release of the detainee be ordered."¹⁷⁶ The Court has also written that the right established in Article 7(6) of the American Convention is not observed merely by the formal existence of the remedies it governs. "Those remedies must be effective, since their purpose, in the terms of Article 7(6), is to obtain without delay a decision "on the lawfulness of [his] arrest or detention," and, should they be unlawful, to obtain, also without delay, an "order [for] his release".¹⁷⁷ The Inter-American Court has had previous occasion to write that delay in settling a petition for a writ of *habeas corpus* implies that that remedy is ineffective and thus a violation of Article 7(6) of the Convention.¹⁷⁸

1.2 Provisional arrest in the context of an extradition process under the American Convention

183. Having summarized the relevant provisions of Article 7 of the American Convention, the IACHR must now determine how those standards apply to the practice of provisional arrest in an extradition process. Within the ambit of the Inter-American System of Human Rights, there is wide jurisprudence on the right to personal liberty¹⁷⁹, including detailed standards on immigration

¹⁷⁵ I/A Court H.R., Case of Acosta Calderón. Judgment of June 24, 2005. Series C No. 129, paragraph 111; Case of Tibi. Judgment of September 7, 2004. Series C No. 114, paragraph 180; and Case of Suárez Rosero. Judgment of November 12, 1997. Series C No. 35, paragraph 77.

¹⁷⁶ I/A Court H.R., Case of Velez Loo v. Panama. Merits, Reparations and Costs. Judgment of November 23, 2010. Series C No. 218, paragraph 124. Cf. Habeas corpus in Emergency Situations (Arts. 27(2), 25(1) and 7(6) American Convention on Human Rights). Advisory Opinion OC-8/87 of January 30, 1987. Series A No. 8, paragraph 33.

¹⁷⁷ I/A Court H.R., Case of Suárez Rosero. Judgment of November 12, 1997. Series C No. 35, paragraph 63.

¹⁷⁸ See I/A Court H.R. Case of Suárez Rosero.

¹⁷⁹ See. IACHR. Case Tibi Vs. Ecuador. Preliminary Objections, Merits, Reparations and Costs. Judgment of 7 September 2004. Series C No. 114; Case Acosta Calderon Vs. Ecuador. Merits, Reparations and Costs. Judgment of 24 June 2005. Series C No. 129; Case García Asto and Ramírez Rojas Vs. Peru. Preliminary Objections, Merits, Reparations and Costs. Judgment of 25 November 2005. Series C No. 137; Case Barreto Leiva Vs. Venezuela. Merits, Reparations and Costs. Judgement of 17 November 2009. Series C No. 206.

detention¹⁸⁰. In order to have additional elements to assess the figure of provisional detention for extradition, the Commission summarizes the record of the European Court on this issue.

184. In the case of *Garabayev v. Russia* the European Court wrote that for a detention with a view to extradition to be “lawful” under Article 5 § 1 (f) of the European Convention, it must conform to the procedural and substantive requirements laid down by a pre-existing law. The European Court added that a detention of this type must be “in conformity with the purpose of Article 5, namely to protect individuals from arbitrariness.”¹⁸¹ In the same judgment, the European Court also examined whether the applicant had been brought promptly before a judge and the availability of judicial review of the detention prior to extradition, based on articles 5 § 3 and 5 § 4 of the European Convention.¹⁸²

185. In the case of *Quinn v. France*, the European Court examined whether the applicant’s protracted detention while extradition proceedings were ongoing was lawful, and specifically challenged the delay in the proceedings while he was being held in custody. In that specific case, the European Court made reference to the standard of “due diligence” in extradition proceedings, as follows:

It is clear from the wording of both the French and the English versions of Article 5 para. 1 (f) (art. 5-1-f) that deprivation of liberty under this sub-paragraph 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 (...) ¹⁸³.

The Court notes nevertheless that the applicant’s detention with a view to extradition was unusually long. He was detained in connection with the extradition proceedings from 4 August 1989 to 10 July 1991, almost two years (...).¹⁸⁴

The Court notes that, at the different stages of the extradition proceedings, there were delays of sufficient length to render the total duration of those proceedings excessive: the first decision on the merits, a preliminary decision, was given on 2 November 1989, three months after the applicant had been placed in detention pending extradition, and the extradition order was not made until 24 January 1991, ten months after the Indictment Division’s favourable opinion (see paragraphs 22 and 25 above). The remedies of which Mr Quinn availed himself over this period (three appeals on points of law against the decisions dismissing applications for release and one appeal on points of law against the Indictment Division’s opinion - see paragraphs 20 and 23

¹⁸⁰ See. IACHR. Case Velez Loo Vs. Panama. Preliminary Objections, Merits, Reparations and Costs. Judgment of 23 November 2010. Series C No. 218.

¹⁸¹ European Court of Human Rights. Case of *Garabayev v. Russia*. Application No. 38411/02. Judgment of June 7, 2007. Para. 87. Quoting. European Court of Human Rights. Case of *Chahal v. the United Kingdom*. Judgment of November 15, 1996, Reports 1996-V, p. 1864, 118. *Garabayev v. Russia*. Application No. 38411/02. Judgement of June 7, 2007. Para. 87.

¹⁸² European Court of Human Rights. Case of *Garabayev v. Russia*. Application No. 38411/02. Judgment of June 7, 2007. Para. 87. Quoting. European Court of Human Rights. Case of *Chahal v. the United Kingdom*. Judgment of November 15, 1996, Reports 1996-V, p. 1864, 118. *Garabayev v. Russia*. Application No. 38411/02. Judgement of June 7, 2007. Paragraphs 92 – 98, and 99-102.

¹⁸³ European Court of Human Rights. Case of *Quinn v. France*. Application No. 18580/91. Judgement of March 22, 1995. Para. 48.

¹⁸⁴ European Court of Human Rights. Case of *Quinn v. France*. Application No. 18580/91. Judgement of March 22, 1995. Para. 48.

above) did not significantly delay the proceedings.¹⁸⁵

186. In the *Mathloom v. Greece* decision, which the European Court recently delivered, it evaluated whether the detention of a person facing deportation was in keeping with the right to personal liberty protected under Article 5 of the European Convention.¹⁸⁶ The Court pointed out that under Article 5 § 1 (f) of European Convention, deprivation of liberty may be justified to ensure the continuation of the deportation. However, the European Court observed that Greek legislation governing the detention of persons whose deportation had been ordered by the courts did not lay down a maximum period and therefore did not satisfy the foreseeability requirement under Article 5 § 1 of the European Convention. It also concluded that Mr. Mathloom's detention for two years and three months was an unreasonable period of detention given the purposes that the detention with a view to deportation was to serve, especially since the deportation proceeding had been declared unfounded.¹⁸⁷ Lastly, the European Court established that the five months and twelve days that passed between the time the request for Mr. Mathloom's release was filed and the date on which the Greek court authorities lifted the order for his detention, was excessive given the circumstances of the case and therefore declared that Article 5 § 4 of the European Convention had been violated.¹⁸⁸

187. The European Convention contains an express provision on detention under these circumstances (see Article 5 § 1 (f)). In other words, unlike the American Convention, the European Convention expressly allows for a person's detention or arrest with a view to his or her deportation. The difference between the two conventions notwithstanding, for the Inter-American Commission Article 7 of the American Convention does not draw distinctions based on the purpose of the detention and applies to any situation in which the right to personal liberty is restricted. The specific standards that the European Court's case law has developed on the question of detention or arrest with a view to an extradition, can be considered in an analysis to determine whether that deprivation of liberty does or does not constitute a violation of the American Convention in the inter-American system.

188. Based on these observations, the IACHR concludes that a provisional arrest in the context of an extradition process must be done in accordance with Article 7 of the American Convention. Hence, it must be done according to pre-existing law, shall not be arbitrary, must be for procedural reasons, may not be for an excessive period of time, and must be done under the supervision of a court; the person deprived of his or her liberty shall be entitled to recourse to a competent court, in order that the court may decide without delay on the lawfulness of the arrest or detention and order his or her release if the reasons for the arrest or detention no longer exist. In determining whether a detention or arrest with a view to extradition has been for an excessive period of time, consideration must be given to whether the extradition proceedings that justified the arrest or detention have been conducted with the necessary due diligence and whether the detained or arrested person can foresee or

¹⁸⁵ European Court of Human Rights. Case of Quinn v. France. Application No. 18580/91. Judgement of March 22, 1995. Para. 48.

¹⁸⁶ European Court of Human Rights. Case of Mathloom v. Greece. Application No. 48883/07. Judgement of April 24, 2012.

¹⁸⁷ European Court of Human Rights. Case of Mathloom v. Greece. Application No. 48883/07. Judgment of April 24, 2012. Paras. 70 y 71.

¹⁸⁸ European Court of Human Rights. Case of Mathloom v. Greece. Application No. 48883/07. Judgement of April 24, 2012. Para. 79.

anticipate how long he or she will be deprived of liberty. All these conditions will be examined in the following section in light of the facts that the IACHR takes as proven in this case.

1.3 An examination of the facts in this case

189. Taking account of the parties' allegations, the Commission will begin by examining whether the original warrant for Mr. Wong Ho Wing's provisional arrest was or was not an arbitrary detention under Article 7(3) of the Convention. The Commission will then examine the duration of Mr. Wong Ho Wing's detention, in light of Article 7(5) of the Convention, and then turn its attention to the question of whether the appeals and other remedies that Mr. Wong Ho Wing invoked to secure his freedom met the requirements of Article 7(6) of the Convention.

An analysis of whether the original provisional arrest warrant was arbitrary

190. As for the first point, i.e., the warrant for the alleged victim's provisional arrest, the Commission notes that Mr. Wong Ho Wing was detained on October 27, 2008, and the next day his provisional arrest was ordered. From the facts established, the Commission notes that the reason cited for this measure was the necessity "of ensuring that the person in question [...] remains in the country while the request for his extradition is processed [as he] has not yet accredited either his domicile or employment in the country." Mr. Wong Ho Wing filed an appeal, specifically arguing that he had accredited the fact that he had established himself in Peru and give evidence of his financial investments in the country. This appeal was decided on December 11, 2008, when the court confirmed the warrant for his provisional arrest, arguing that the legal requirements for issuing a provisional arrest warrant had been met, which is that his presence within the national territory had been established and the crime for which his extradition was sought was also a crime in Peru. As the facts established in this case show, in the decision upholding the warrant for Mr. Wong Ho Wing's provisional arrest, Callao's First Transitory Mixed Superior Court Chamber expressly stated 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 for purposes of extradition." The information available indicates that with that ruling the warrant issued for Mr. Wong Ho Wing's provisional arrest became final and, based on such criteria, the detention continues up to date.

191. The Commission appreciates that what this judicial authority is attempting to do, is to draw a distinction between the concept of preventive detention and the concept of a provisional arrest with a view to a person's extradition. The reasoning in this decision is that a provisional arrest can be ordered merely by establishing that the person located is the person whose extradition is being sought, and by establishing that the crime for which extradition is sought is also a punishable offense in the requested State.

192. The Commission reiterates that while preventive detention and provisional arrest with a view to extradition are parts of different processes and the domestic laws that govern them may differ according to the distinctive features of the processes of which they are part, in both cases an individual's personal liberty is curtailed even before he or she is convicted of any crime; therefore, under the American Convention, preventive detention and provisional arrest must be governed by the same principles described above. Summarizing the key elements of the case law cited, a provisional arrest with a view to extradition must be the exception and not the rule; it must be for purely procedural ends that must be examined on a case-by-case basis; it must also be determined whether other, less onerous means can be used to achieve the same ends.

193. The Commission does not share the view that “procedural risk” is an irrelevant consideration when determining whether provisional arrest is in order. The Commission understands that the specific procedural ends or procedural risks in a criminal case already underway may be different in the context of a request for extradition. With a request for extradition, the “flight risk” or “risk of procedural obstruction” must be weighed not as a function of a criminal case, but as a function of the purpose for which the process was conceived, i.e., extradition. Thus, in order to be compatible with the American Convention, a provisional arrest with a view to extradition must pursue the procedural end of making it possible for extradition to eventually happen. The court authority who orders provisional arrest must explain why the same end could not be accomplished without placing the person in question under provisional arrest or by other means less restrictive than deprivation of liberty. The Commission notes that Peru’s own Code of Criminal Procedure contemplates alternatives such as barring the person from leaving the country or withholding said person’s passport (see Article 523(9) of that Code, *supra*, *Facts established*).

194. Based on the foregoing, the Commission considers that the provisional arrest warrant issued by Callao’s First Transitory Mixed Superior Court Chamber on December 11, 2008, in its decision on the appeal filed challenging the provisional arrest with a view to extradition was arbitrary under Article 7(3) of the American Convention.

Analysis of the duration of the provisional arrest

195. On the matter of the duration of the provisional arrest, the Commission observes that Mr. Wong Ho Wing has been deprived of liberty under a provisional arrest from October 27, 2008 to the present; in other words, four years and nine months. By the standards described above, in particular the precedents established by the European Court on the question of detention with a view to extradition, when examining the question of whether the duration of the detention was excessive and thus a violation of the Convention, the Commission’s considerations will be the diligence applied in the extradition process that prompted the deprivation of liberty and the concept of foreseeability.

196. As for whether the extradition process that prompted the deprivation of liberty has been conducted with “due diligence”, the Commission finds first that four years and nine months taken to settle an extradition process is, *prima facie*, problematic and requires a sufficient explanation from the State of the reasons why a final decision has been so long in coming. These considerations are examined in the sections on the procurement of diplomatic assurances and the guarantee of a reasonable time. As indicated in those sections, the State was responsible for omissions and irregularities with respect to the procurement of diplomatic assurances (*infra paragraphs 252 - 289*) that affected the duration of the process and, as a result, the personal liberty of Mr. Wong Ho Wing. As to the guarantee of a reasonable time, the Commission does not find any justification for the delay based on the factors considered when examining the guarantee of a reasonable time (*infra párrs. 297 - 302*).

197. The Commission also observes that since the Second Transitory Criminal Chamber of the Supreme Court of Justice issued an advisory resolution; under the applicable Peruvian laws, this decision triggered the second stage of the process, which is the responsibility of the Executive Branch. In response, the petitioner filed a petition of *habeas corpus* against authorities in the Executive Branch. The May 24, 2011 ruling that the Constitutional Court issued on this petition was in the petitioner’s favor, and ordered the authorities in the executive branch to abstain from extraditing Mr. Wong Ho Wing to the People’s Republic of China. As will be examined later in this report, a series of mechanisms

was set in motion whose effect was to obstruct observance of this court ruling. But the only relevant decision for purposes of this analysis is the definitive court ruling issued on May 24, 2011. That court ruling was not the advisory resolution, but the final ruling issued on the petition of *habeas corpus* in which the Executive Branch is ordered to stop the extradition process. Even so, two years and two months later, that court ruling not to extradite Mr. Wong Ho Wing has not been enforced.

198. The available information indicates that Mr. Wong Ho Wing is still being deprived of his liberty without legal justification, relegated to a kind of legal limbo since the purpose of his arrest, to assure his eventual extradition, ceased to exist two and half years ago as a result of the Constitutional Court's order prohibiting his extradition. Even though that binding court ruling eliminates extradition, the information available indicates that no measures have been taken to bring a legal case in Peru concerning the alleged crimes for which Mr. Wong Ho Wing's extradition to the People's Republic of China was sought. Were that the case, under the American Convention and the standards described earlier, a court order for his preventive detention would have to be issued.

199. Thus, the Commission considers that this legal limbo to which Mr. Wong Ho Wing's right to personal liberty has been relegated is another abuse under Article 7(3) of the American Convention, and has allowed the victim to be deprived of his liberty for an excessive period of time, in violation of Convention Article 7(5).

200. Finally, as for the element of foreseeability that the European Court has examined in cases of this kind, the Commission observes that even through the applicable legal provisions stipulate a number of time periods for deprivation of liberty, they are referring to the period prior to formalization of the request for extradition (see *supra Facts established*, for example Article 9(4) of the Bilateral Extradition Treaty between Peru and the People's Republic of China, and Article 523(6) of the Peruvian Code of Criminal Procedure). As for the procedure for taking a decision on the extradition request *per se*, the available information indicates that there is no maximum time period that a person can be deprived of his or her liberty while that procedure is in process; nor is there any time frame within which the proceeding must be completed. Article 523(9) of the Code of Criminal Procedure states that a "person under arrest may obtain provisional release upon expiration of the legal deadlines prescribed in the treaty or in the law that is the basis for the extradition request, or if the person whose extradition is sought meets the procedural conditions to qualify for provisional release (...)." The Commission notes that the applicable bilateral treaty does not establish a maximum legal time period for the provisional arrest while the extradition request is being decided. The Commission has no information on the legal deadlines referenced in this article. In the IACHR's view, the absence of a specific maximum time period for a provisional arrest with a view to extradition, combined with the previous considerations, are incompatible with the principle of foreseeability and, in practice, have allowed the excessive duration of Mr. Wong Ho Wing's deprivation of liberty.

Analysis of the remedies filed by Mr. Wong Ho Wing for his personal liberty

201. According to the facts established, in addition to the appeal challenging the initial warrant for his provisional arrest, which was decided in the December 11, 2008 ruling examined earlier in this report, Mr. Wong Ho Wing has been filing a series of remedies to challenge his deprivation of liberty.

202. Thus, on August 5, 2010, Mr. Wong Ho Wing's legal representative filed a brief with the Supreme Court's Permanent Criminal Chamber in which he requested that Mr. Wong Ho Wing be granted provisional release. On January 26, 2009, Mr. Wong Ho Wing filed a petition of *habeas corpus*; the ruling on that petition, delivered on October 19, 2010, was not in his favor.

203. Despite the earlier analysis of the arbitrary nature of the provisional arrest ordered in this case, the Commission finds no reason to consider that this remedy was a violation of Article 7(6) of the American Convention in terms of access to a remedy that promptly settles the question of the legality of the detention.

204. In the wake of the Constitutional Court's May 24, 2011 decision, on October 18, 2011 Mr. Wong Ho Wing's legal representative sought his immediate release based on the order in that ruling to stop extradition. From the facts established, the decision on this release request came up against several problems, caused by the fact that the provisional arrest file was in the possession of the Ministry of Justice. After a request filed by the Ombudsperson's Office and various briefs from Mr. Wong Ho Wing's legal representative, including a petition of *habeas corpus*, on December 1, 2011 the Ministry of Justice sent a brief to the Ombudsperson's Office indicating that the provisional arrest file was part of the extradition file and was therefore already in the hands of the Executive Branch, which was a "new and peculiar" situation. The Commission does not have any information as to how this request for Mr. Wong Ho Wing's release by virtue of the Constitutional Court's ruling was resolved.

205. The decision on this petition, which was challenging the fact that Mr. Wong Ho Wing was still being deprived of his liberty despite the ruling by the Constitutional Court, was obstructed because the case file was in the hands of the Executive Branch, together with the extradition file. The Commission finds no explanation that would justify the fact that in the two months between October 18, 2011 and December 1, 2011, the Peruvian authorities were unable to orchestrate the transfer of a file and enforce the decision on this remedy "without delay". Furthermore, the IACHR does not know whether or not the situation was ultimately resolved. However, the information available indicates that as of this date Mr. Wong Ho Wing has not yet obtained a court ruling that, from the remedies filed by his legal representative, decides the question of the legality of his detention subsequent to the May 24, 2011 ruling of the Constitutional Court. The Commission considers that these facts constitute a violation of the right recognized in Article 7(6) of the American Convention.

206. Based on the foregoing considerations, the Commission concludes that the State of Peru violated the right to personal liberty recognized in articles 7(1), 7(3), 7(5) and 7(6) of the American Convention, read in conjunction with the obligations undertaken in Article 1(1) thereof, to the detriment of Mr. Wong Ho Wing.

207. Finally, the Commission observes that the violations declared in this section do not, in practice, have anything to do with the duration of the proceedings with the IACHR. Quite the contrary, Mr. Wong Ho Wing's provisional arrest was deemed arbitrary precisely because it served no procedural

purpose –which might have been a valid justification had case-specific reasons been cited. As for the duration of the provisional arrest, it was deemed excessive because, *inter alia*, it was one year and seven months before the extradition process was declared terminated pursuant to the Constitutional Court’s May 24, 2011 decision. Finally, on the question of the effectiveness of the remedies, the Commission’s analysis focused on the delay in deciding the remedies filed. The Commission must again make the point that the declared violations of the rights recognized in articles 7(3), 7(5) and 7(6) of the Convention have nothing to do with the proceedings before the Inter-American Commission, but rather the Peruvian State’s failure to comply with the rules that apply where those provisions are concerned.

2. Rights to life, humane treatment and judicial protection (articles 4, 5 and 25 of the American Convention)

208. The relevant parts of Article 4 of the American Convention read as follows:

1. 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.

(...)

209. The relevant parts of Article 5 of the American Convention provide 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.

210. The pertinent paragraph of Article 25 of the American Convention states that

2. The States Parties undertake:

(...)

c. to ensure that the competent authorities shall enforce such remedies when granted.

211. Article 1(1) of the American Convention reads as follows:

1. 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.

212. The Inter-American Court has described the right to life as fundamental, because all other rights depend upon the observance of the right to life.¹⁸⁹ Because the right to life is so vital, “States have the obligation to ensure the creation of the conditions necessary so that this right may be fully enjoyed and exercised.”¹⁹⁰ The Court has written that the Convention takes special care to protect the right to personal integrity by, *inter alia*, prohibiting torture and cruel, inhuman and degrading treatment and by stipulating that these rights may not be suspended in states of emergency.”¹⁹¹

213. As for the two rights –the right to life and the right to personal integrity- the Court has written that their importance presumes that no person shall be deprived of his life arbitrarily (negative obligation), but also requires the States to take all necessary measures to protect and preserve them (positive obligation), in compliance with their general obligation under Article 1(1) of the Convention.¹⁹²

214. As to what the general obligation to respect and ensure means in each specific case, the Court has written that the general obligation is a “function of the particular needs for protection of the subject of law, either owing to his personal situation or to the specific situation in which he finds himself.”¹⁹³ In the respective section of this report, the Commission will examine the specific scope of the obligations to respect and ensure the rights to life and to humane treatment in the context of an extradition proceeding.

215. The Commission will examine the facts taken as established as a function of these provisions, in the following order: i) considerations concerning the death penalty, the principle of *non-refoulement* and the attribution of responsibility to the States in extradition or deportation proceedings; ii) specific implications of receiving and weighing diplomatic or other assurances that the death penalty will not be enforced and torture or cruel, inhuman or degrading treatment will not be used, and iii) analysis of the facts of the instant case.

¹⁸⁹ I/A Court H.R., Case of Vera Vera v. Ecuador. Preliminary Objections, Merits, Reparations and Costs. Judgment of May 19, 2011, paragraph 39. Citing, Case of the “Street Children” (Villagrán Morales et al.) v. Guatemala. Merits. Judgment of November 19, 1999. Series C No. 63, Paragraph 144; Case of Zambrano Vélez et al. v. Ecuador. Merits, Reparations and Costs. Judgment of July 4, 2007. Series C No. 166, Paragraph 78, and Case of the Xákmok Kásek. Indigenous Community v. Paraguay, supra note 21, Paragraph 186.

¹⁹⁰ I/A Court H.R., Case of Vera Vera v. Ecuador. Preliminary Objections, Merits, Reparations and Costs. Judgment of May 19, 2011, paragraph 39. Citing, Case of the “Street Children” (Villagrán Morales et al.) v. Guatemala. Merits. Judgment of November 19, 1999. Series C No. 63, Paragraph 144; Case of González et al. (Cotton Field) v. Mexico, supra note 21, paragraph 245, and Case of the Xákmok Kásek. Indigenous Community v. Paraguay, supra note 21, Paragraph 187.

¹⁹¹ I/A Court H.R., Case of Vera Vera v. Ecuador. Preliminary Objections, Merits, Reparations and Costs. Judgment of May 19, 2011, paragraph 40. Citing Articles 5 and 27 of the American Convention. See also, “Juvenile Re-education Institute” v. Paraguay. Preliminary Objections, Merits, Reparations and Costs. Judgment of September 2, 2004. Series C No. 112, Paragraph 157.

¹⁹² I/A Court H.R., Case of Vera Vera v. Ecuador. Preliminary Objections, Merits, Reparations and Costs. Judgment of May 19, 2011, paragraph 41. Citing, Case of the “Street Children” (Villagrán Morales et al.) v. Guatemala, supra note 29, paragraph 139; Case of González et al. (Cotton Field) v. Mexico, supra note 21, paragraph 245, and Case of the Xákmok Kásek Indigenous Community v. Paraguay, supra note 21, paragraph 187.

¹⁹³ Cf. Case of the Pueblo Bello Massacre v. Colombia. . Merits, Reparations and Costs. Judgment of January 31, 2006. Series C No. 140, Paragraph 111; Case of González et al. (“Cotton Field”) v. Mexico, supra note 21, paragraph 243, and Case of Vélez Loor v. Panama, supra note 3, paragraph 98.

2.1 Considerations concerning the death penalty, the principle of *non-refoulement* and the attribution of responsibility to the States in extradition or deportation proceedings

216. The European Court, the Human Rights Committee, the Committee against Torture and other bodies have amassed considerable case law on the subject of the possible international responsibility of a State as a consequence of its conduct in an extradition process or any other process that involves the return of a person to another country. One group of cases concerns the application of the death penalty, precisely in the context of extradition requests. Another group of cases concerns the alleged risk of torture or cruel, inhuman and degrading treatment and the principle of *non-refoulement*. The IACHR will now discuss the principles that these cases have engendered and that are relevant to the decision in the present matter, in which the petitioner has argued that the death penalty is a real risk, as is the use of torture or cruel, inhuman or degrading treatment.

Concerning the death penalty and the attribution of responsibility to States for a person's deportation or extradition

217. On the question of the death penalty, the Commission must begin by pointing out that the American Convention does not prohibit the use of the death penalty in the States that still have it. However, it does establish a number of restrictions and express prohibitions where the death penalty is concerned.

218. For the last 15 years, the Commission has developed a clear approach to its treatment of cases involving application of the death penalty, which are subject to a higher standard of strict and more rigorous scrutiny. The Commission has written that cases involving the death penalty require more rigorous scrutiny because:

The right to life is widely-recognized as the supreme right of the human being, and the *conditio sine qua non* to the enjoyment of all other rights. The Commission therefore considers that it has an enhanced obligation to ensure that any deprivation of life which may occur through the application of the death penalty comply strictly with the requirements of the applicable inter-American human rights instruments, including the American Declaration. This "heightened scrutiny test" is consistent with the restrictive approach taken by other international human rights authorities to the imposition of the death penalty.¹⁹⁴

219. For its part, the Inter-American Court has summarized the restrictions established in the American Convention as follows:

Thus, three types of limitations can be seen to be applicable to States Parties which have not abolished the death penalty. First, the imposition or application of this sanction is subject to certain procedural requirements whose compliance must be strictly observed and reviewed. Second, the application of the death penalty must be limited to the most serious common crimes not related to political offenses. Finally, certain considerations involving the person of the defendant, which may bar the imposition or application of the death penalty, must be taken into

¹⁹⁴ IACHR, Report No 90/09, Case 12.644, Admissibility and Merits (Publication), Medellín, Ramírez Cárdenas and Leal García, Paragraph 122.

account.¹⁹⁵

220. In addition to these limitations, Article 4 of the American Convention provides for the gradual restriction of the death penalty where it states that in countries that have not abolished the death penalty, it shall not be extended to crimes to which it does not presently apply. In countries that have abolished it, the death penalty cannot be reinstated.

221. As for the international responsibility that might be engaged by subjecting a person to the risk of the death penalty through deportation or extradition, the Commission would point to the current thinking of the United Nations Human Rights Committee in its interpretation of Article 6 of the International Covenant on Civil and Political Rights. The language of the part of that article that is relevant to the case at hand is similar to the language of the American Convention.¹⁹⁶

222. In 2003, in the case of *Roger Judge v. Canada*, the Human Rights Committee modified its previous case law on the subject,¹⁹⁷ indicating that a review of its previous case law was warranted as the case involved the question of whether one of the most fundamental rights—the right to life—was violated. The Committee noted that there had been notable factual and legal developments and changes in international opinion in respect of the issue. In discussing the ten years that had passed since its previous jurisprudence on the subject, the Human Rights Committee wrote that

since that time there has been a broadening international consensus in favour of abolition of the death penalty, and in states which have retained the death penalty, a broadening consensus not to carry it out [...] The Committee considers that the Covenant should be interpreted as a living instrument and the rights protected under it should be applied in context and in the light of present-day conditions.¹⁹⁸

223. In that same case, the Committee wrote the following concerning Article 6 of the International Covenant on Civil and Political Rights:

States parties that have abolished the death penalty have an obligation under this paragraph to so protect in all circumstances.[...] 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

¹⁹⁵ I/A Court H.R., *Restrictions to the Death Penalty* (Arts. 4(2) and 4(4) American Convention on Human Rights). Advisory Opinion OC-3/83, September 8, 1983. Series A No. 3, paragraph 55. e

¹⁹⁶ See analysis of the text of Article 6 of the International Covenant on Civil and Political Rights in: Human Rights Committee. *Case of Roger Judge v. Canada*. Communication 829/1998. CCPR/C/78/D/829/1998 (2003). October 20, 2003. Paragraph 10.4.

¹⁹⁷ See, for example, Human Rights Committee. *Case of Kindler v. Canada*. Here, the Human Rights Committee wrote that Article 6(2) of the Covenant did not prohibit the death penalty for the most serious crimes. The Committee's interpretation in that case was that "Canada itself did not impose the death penalty on Mr. Kindler, but extradited him to the United States, where he faced capital punishment. If Mr. Kindler had been exposed, through extradition from Canada, to a real risk of a violation of article 6, paragraph 2, in the United States, that would have entailed a violation by Canada of its obligations under article 6, paragraph 1." As for the guarantees, the Committee wrote that "the obligations arising under article 6, paragraph 1, did not require Canada to refuse the author's extradition" or to seek assurances, but rather that the requested State at least would consider seeking assurances.

¹⁹⁸ Human Rights Committee, *Case of Roger Judge v. Canada*. Communication 829/1998. CCPR/C/78/D/829/1998 (2003). October 20, 2003. Para. 10.3.

reasonably anticipated that they will be sentenced to death, without ensuring that the death sentence would not be carried out.¹⁹⁹

(...)

For these reasons, the Committee considers that Canada, as a State party which has abolished the death penalty, irrespective of whether it has not yet ratified the Second Optional Protocol to the Covenant Aiming at the Abolition of the Death Penalty, violated the author's right to life under article 6, paragraph 1, by deporting him to the United States, where he is under sentence of death, without ensuring that the death penalty would not be carried out. The Committee recognizes that Canada did not itself impose the death penalty on the author. But by deporting him to a country where he was under sentence of death, Canada established the crucial link in the causal chain that would make possible the execution of the author.²⁰⁰

224. Taking account of the underlying principles supporting this decision, the Commission finds that under Article 4 of the American Convention, States parties that have permanently abolished the death penalty can be held responsible for a violation of the right to life if they extradite a person to a country where he or she may face the death penalty, without first getting the necessary assurances that the death penalty will be neither imposed nor applied. The corollary here is that under Article 4 of the American Convention, States that have not permanently abolished the death penalty are obliged to ensure that the crimes for which the death penalty is applied are the most serious of crimes and that under no circumstance will the death penalty be applied in respect of crimes for which it has already been abolished. In any case, the death penalty may only be applied if all the procedural guarantees have been strictly observed.

225. In the case of Peru, the Commission notes that at the time Peruvian State ratified the American Convention in 1978, the 1933 Constitution was in force, Article 54 of which read as follows: "The death penalty shall be applied for the crime of treason and homicide, and for all those crimes for which the law prescribes capital punishment." Article 235 of the 1979 Constitution provided that: "Capital punishment does not exist except in the case of treason in the context of foreign war." The Constitution in force at the present time is the 1993 Constitution, Article 140 of which provides that: "The death penalty can only be applied for the crimes of treason in time of war and terrorism, under the laws and treaties binding upon Peru as a State Party." This clause of the Constitution notwithstanding, the Commission notes that under the legal provisions criminalizing treason and terrorism, the maximum penalty is life imprisonment and not the death penalty. The Commission notes, therefore, that it is not altogether clear whether the death penalty can be applied to anyone in the Peruvian State.

226. Nevertheless, the fact is that the crimes for which capital punishment is possible in Peru are not at issue in this case; more specifically, in the case of the crimes mentioned in the extradition request presented by the People's Republic of China, it is abundantly clear that the death penalty is not allowed for such crimes in Peru.

227. Hence, in the context of an extradition request, the Peruvian State has an obligation to refrain from taking measures incompatible with the obligations that the right to life imposes upon it,

¹⁹⁹ Human Rights Committee, Case of Roger Judge v. Canada. Communication 829/1998. CCPR/C/78/D/829/1998 (2003). October 20, 2003, paragraph 10.4.

²⁰⁰ Human Rights Committee. Case of Judge v. Canada. Communication 829/1998. CCPR/C/78/D/829/1998 (2003). October 20, 2003. Paragraph 10.6.

obligations that also extend to foreign nationals within its jurisdiction. In the specific case of Peru, this obligation is even more evident not only because of the text of Article 4 of the American Convention as interpreted in the preceding paragraphs, but also as a consequence of its own extradition laws which expressly require assurances that the death penalty will not be applied (see *supra*. Facts established. The laws on the subject of extradition in Peru, Article 517(3)(d) of the Code of Criminal Procedure).

Concerning the risk of torture or cruel, inhuman or degrading treatment, the principle of non-refoulement and the attribution of responsibility to States for a person's deportation or extradition

228. The petitioner indicated in his Communications that in China there is a risk of application of torture and inhumane and degrading treatment. The State did not respond to such argument.

229. The principle of *non-refoulement* is a far-reaching principle within the inter-American human rights system, under the provisions of the American Convention and the Inter-American Convention to Prevent and Punish Torture. In the American Convention, the principle of *non-refoulement* is a corollary of the absolute ban on torture, established in Article 5; it is also provided for in Article 22(8), under which no person may be extradited if his or her right to life or personal integrity is in danger of being violated because of his or her race, nationality, religion, social status or political opinion. For its part, Article 13(4) of the Inter-American Convention to Prevent and Punish Torture expressly recognizes the principle of non-refoulement, where it provides 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.

230. As it pertains to the instant case, the principle of *non-refoulement* based on the risk of torture or cruel, inhuman or degrading treatment is understood to be an absolute ban on the expulsion, return, extradition, or transfer, by whatever means, of a person to a country, whether or not it is said person's country of origin, where he or she may face such violations.

231. The interpretation by the United Nations Committee against Torture is that "the test of article 3 of the Convention is absolute. Whenever substantial grounds exist for believing that an individual would be in danger of being subjected to torture upon expulsion to another State, the State party is under obligation not to return the person concerned to that State. The nature of the activities in which the person concerned engaged cannot be a material consideration when making a determination under article 3 of the Convention,"²⁰¹ nor can his immigration status. Also, the principle of *non-refoulement* refers not just to the country in which the person faces the risk of real danger of torture; it extends to any other country where he or she would face the real risk of being expelled or returned to the country in which he or she would be subjected to torture or in which he or she can be subjected to torture.²⁰²

²⁰¹ See, UN Committee Against Torture (CAT), Gorki Ernesto Tapia Paez v. Sweden, CAT/C/18/D/39/1996, 28 April 1997, Paragraph 14.5; and UN Committee Against Torture (CAT), Case of Seid Mortesa Aemei v Switzerland, 29 May 1997, Communication No 34/1995, CAT/C/18/D/34/199, Paragraph 9.8.

²⁰² See, UN Committee Against Torture (CAT), Balabou Mutombo v. Switzerland, CAT/C/12/D/013/1993, 27 April 1994, paragraph 10.

232. The principle of *non-refoulement* because of the risk of torture or cruel, inhuman or degrading treatment has been explicitly recognized in human rights instruments,²⁰³ and in interpretations of the scope of the obligations arising from the general ban on torture or cruel, inhuman or degrading treatment established in international instruments in terms analogous to Article 5 of the American Convention. The European Court and the Human Rights Committee have interpreted the prohibition of torture or cruel, inhuman or degrading treatment established in Article 3 of the European Convention on Human Rights and in Article 7 of the International Covenant on Civil and Political Rights as preventing the return of individuals who, if returned, would face a real risk of being subjected to torture or cruel, inhuman or degrading treatment.

233. As for the international responsibility engaged in such cases, either through extradition or deportation, in the case of *Garabayev v. Russia*, the European Court summarized its case law on the subject dating back to the case of *Soering v. the United Kingdom*, as follows:

It is the settled case-law of the Court that extradition by a Contracting State may give rise to an issue under Article 3, and hence engage the responsibility of that State under the Convention, where substantial grounds have been shown for believing that the person in question would, if extradited, face a real risk of being subjected to treatment contrary to Article 3 in the receiving country. 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 (see *Soering v. the United Kingdom*, judgment of 7 July 1989, Series A no. 161, pp. 35-36, §§ 89-91; *Vilvarajah and Others v. the United Kingdom*, 30 October 1991, Series A no. 215, p. 36, § 107; and *H.L.R. v. France*, 29 April 1997, Reports 1997-III, p. 758, § 37).²⁰⁴

In determining whether it has been shown that the applicant runs a real risk, if expelled, of suffering treatment proscribed by Article 3, the Court will assess the issue in the light of all the material placed before it, or, if necessary, material obtained *proprio motu*. The Court must be satisfied that the assessment made by the authorities of the Contracting State is adequate and sufficiently supported by domestic materials as well as by materials originating from other, reliable and objective sources. 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 (see *Vilvarajah and Others v. the United Kingdom*, cited above, p. 36, § 107).²⁰⁵

234. The European Court, therefore, wrote that in line with its case-law, the Court needs to establish whether there existed a real risk of ill-treatment in case of extradition and whether this risk

²⁰³ See, Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Article 3; Inter-American Convention to Prevent and Punish Torture, Article 13, fourth paragraph.

²⁰⁴ European Court of Human Rights. Case of *Garabayev v. Russia*. Application No. 38411/02. Judgment of June 7, 2007. Final January 30, 2008. Para. 73.

²⁰⁵ European Court of Human Rights. Case of *Garabayev v. Russia*. Application No. 38411/02. Judgment of June 7, 2007. Final January 30, 2008. Para. 74.

was assessed prior to taking the decision on extradition, with reference to the facts which were known or ought to have been known at the time of the extradition.²⁰⁶

235. Summarizing, in this section, the Commission establishes that the absolute prohibition against torture and other cruel, inhuman or degrading treatment, stipulated in Article 5 of the American Convention, means that a State's international responsibility may be engaged if it returns a persons under its jurisdiction, whether by deportation or extradition, to a country where there is a real risk that he or she may suffer torture or cruel, inhuman or degrading treatment. The specific obligations that emanate from this principle will be itemized in the following chapter of this report. Because of the nature and analysis of the guarantees given by the People's Republic of China in the present case, they are a key part of the discussion concerning the Peruvian State's possible responsibility. The following are the main principles established by the European Court's case law on this subject.

2.2 Specific implications of receiving and weighing diplomatic or other assurances that the death penalty will not be enforced and torture or cruel, inhuman or degrading treatment will not be used

236. There are no precedents in the inter-American sphere that specifically concern the receiving and weighing of diplomatic or other assurances that the death penalty, torture or cruel, inhuman or degrading treatment will not be applied. The European Court has ample case law on this subject, both regarding the assurances on non-enforcement of the death penalty and regarding assurances that acts of torture or cruel, inhuman or degrading treatment will not be committed.

237. The Inter-American Commission understands that the various types of assurances may differ in terms of their features, or the elements used to measure the adequacy of those assurances may vary, because it is one thing to give assurances regarding a practice that is legal in the State requesting extradition (the death penalty), but another thing to give assurances with respect to a practice that is prohibited by international consensus and that is not legal in the requesting State (torture or cruel, inhuman or degrading treatment).

238. This distinction was drawn by the Supreme Court of Canada in the case of *Manickavasagam Suresh v. The Minister of Citizenship and Immigration and the Attorney General of Canada* in the following terms:

A distinction may be drawn between assurances given by a state that it will not apply the death penalty (through a legal process) and assurances by a state that it will not resort to torture (an illegal process). We would signal the difficulty in relying too heavily on assurances by a state that it will refrain from torture in the future when it has engaged in illegal torture or allowed others to do so on its territory in the past. This difficulty becomes acute in cases where torture is inflicted not only with the collusion but through the impotence of the state in controlling the behaviour of its officials. Hence the need to distinguish between assurances regarding the death penalty and assurances regarding torture. The former are easier to monitor and generally more reliable than the latter.²⁰⁷

²⁰⁶ European Court of Human Rights. Case of Garabayev v. Russia. Application No. 38411/02. Judgment of June 7, 2007. Final January 3x0, 2008. Para. 77 and 79. Quoting. Case of Mamatkulov and Askarov v. Turkey, nos. 46827/99 and 46951/99, 67-69, ECHR 2005-I.

²⁰⁷ Supreme Court of Canada. *Manickavasagam Suresh v. The Minister of Citizenship and Immigration and the Attorney General of Canada* (Suresh v. Canada), 2002, SCC 1. File No. 27790, January 11, 2002. Para. 124.

239. The Commission agrees, in principle, with this distinction. However, the distinction notwithstanding, the assurances that the death penalty will not be applied must still be analyzed on a case-by-case basis and must meet certain specific criteria to be deemed reliable. In cases such as the one at hand, in which arguments have been made concerning the use of summary, secret and arbitrary execution, with no access to information or any real prospects of monitoring in the requesting State, and on the use of torture and cruel, inhuman and degrading treatment, the Commission is of the view that the analysis done must take account of the standards that other international courts and bodies have established as being relevant in such cases. Those standards are summarized below.

240. On the issue of the assurances that the death penalty will not be applied, in the case of *Harkins and Edwards v. the United Kingdom*, the European Court reiterated the standard which holds that the diplomatic assurances must be clear, sufficient and unequivocal to remove any threat that the petitioners might be sentenced to death if extradited. The European Court declared this particular case inadmissible because it found that the assurances given by the United States met those requirements. The European Court wrote that the United States has a long history of respect for democracy, human rights and the rule of law.²⁰⁸ In the words of the European Court, in this case, citing *Ahmad and others v. United Kingdom*:

the Court recalls its finding in *Ahmad and others v. the United Kingdom* [...] 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.²⁰⁹ The Court also recalls the particular importance it has previously attached to prosecutorial assurances in respect of the death penalty.²¹⁰

For these reasons, the Court considers that the assurances provided by the Government of the United States, the prosecution in Florida and Judge (...) are clear and unequivocal.²¹¹

241. The question of diplomatic or other assurances has been addressed at greater length in cases related to the non-application of torture or cruel, inhuman or degrading treatment. Thus, while in *Saadi v. Italy*, the European Court did not delve into the issue of diplomatic assurances, it did address issues related to the determination of the risk as the first step in analysis, the burden of proof in this regard, and a case-by-case determination. The European Court also established important guidelines for evaluating the situation in a country, including the type of evidence to be considered.

²⁰⁸ European Court of Human Rights. *Harkins and Edwards v. the United Kingdom*. Judgment 17 January 2012.

²⁰⁹ European Court of Human Rights. *Harkins and Edwards v. the United Kingdom*. Judgment 17 January 2012, paragraph 85.

²¹⁰ European Court of Human Rights. *Harkins and Edwards v. United Kingdom*. Judgment 17 January 2012. Para 85. Citing (*Nivette v. France* (dec.), no. 44190/08, 14 December 2000).

²¹¹ European Court of Human Rights. *Harkins and Edwards v. the United Kingdom*. Judgment 17 January 2012. Para 86.

242. Thus, in this case the European Court wrote that “[i]t is in principle for the applicant to adduce evidence capable of proving that there are substantial grounds for believing that, if the measure complained of were to be implemented, he would be exposed to a real risk of being subjected to treatment contrary to Article 3.”²¹² Where such evidence is adduced, it is for the Government to dispel any doubts about it.²¹³

243. With specific reference to the situation in the receiving State, the European Court, citing its precedent in *Vilvarajah and Others vs. the United Kingdom*, wrote that “in order to determine whether there is a risk of ill-treatment, the Court must examine the foreseeable consequences of sending the applicant to the receiving country, bearing in mind the general situation there and his personal circumstances (see *Vilvarajah and Others*, cited above, § 108 *in fine*).”²¹⁴ As for the documentation that is relevant in making this determination, in *Saadi v. Italy* the European Court summarized its findings in earlier cases, as follows:

(...) as regards the general situation in a particular country, the Court has often attached importance to the information contained in recent reports from independent international human rights protection associations such as Amnesty International, or governmental sources, including the US Department of State (see, for example, *Chahal*, cited above, §§ 99-100; *Muslim v. Turkey*, no. 053566/99, § 67, 26 April 2005; *Said v. the Netherlands*, no.2345.02, § 54, ECHR 2005-VI; and *Al-Moayad v. Germany* (dec.), no. 35865/03, §§ 65-66, 20 February 2007). At the same time, it has held that the mere possibility of ill-treatment on account of an unsettled situation in the receiving country does not in itself give rise to a breach of Article 3 (see *Vilvarajah and Others*, cited above, § 111, and *Fatgan Katani and Others v. Germany* (dec.), no. 67679/01, 31 May 2001) and that, where the sources available to it describe a general situation, an applicant’s specific allegations in a particular case require corroboration by other evidence (see *Mamatkulov and Askarov*, cited above, § 73, and *Muslim*, cited above, § 68).²¹⁵

244. As regards the time when the assessment must be done to determine whether or not a real risk exists, in *Chahal v. the United Kingdom* and *Venkadajalasarma v. the Netherlands* the European Court held that “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.” However, if [the individual] has not yet been expelled, the relevant time was that of the proceedings before the Court.²¹⁶ In *Mamatkulo and Askaro v. Turkey*, the Court wrote that “[t]his situation typically arises when deportation or extradition is delayed as a result of an indication by the Court of an interim measure under Rule 39 of the Rules of Court. Such an indication means more often than not that the Court does not yet have before it all the relevant evidence it requires to determine whether there is a real risk of treatment proscribed by Article 3 in the country of destination.”²¹⁷ Therefore, while it is true that historical facts are of interest to the extent that they shed light on the current situation or the manner in which that situation is likely unfolding, the present circumstances are decisive.

²¹² European Court of Human Rights. *Saadi v. Italy*. 28 February 2008. Para 129. Citing *N. v Finlandia*, no. 38885/02, § 167, 26 July 2005.

²¹³ European Court of Human Rights. *Saadi v. Italy*. 28 February 2008. Para 129.

²¹⁴ European Court of Human Rights. *Saadi v. Italy*. 28 February 2008. Para 130.

²¹⁵ European Court of Human Rights. *Saadi v. Italy*. 28 February 2008. Para 131.

²¹⁶ European Court of Human Rights. *Chahal v. the United Kingdom*. Paragraphs 85 and 86; and *Venkadajalasarma vs. The Netherlands*. 17 February 2004. Para. 63

²¹⁷ European Court of Human Rights. *Matatkulov and Askarov v. Turkey*. Para. 69.

245. As previously noted, in *Saadi v. Italy*, the European Court did not elaborate on how the diplomatic assurances should be assessed, as it has in so many other cases cited below. In *Saadi v. Italy*, the Court repeated what it had said in *Chahal v. the United Kingdom*, to the effect that what has to be examined is whether such assurances provide, “in their practical application, a sufficient guarantee.”²¹⁸ The basic point that the European Court established in this case is that “[t]he weight to be given to assurances from the receiving State depends, in each case, on the circumstances prevailing at the material time.”²¹⁹

246. Therefore, the risk in the receiving or requesting State must be assessed, including the scope and practical application of the assurances offered, on a case-by-case basis.

247. The European Court has held that in determining what the practical application of the assurances will be and the weight they should be assigned, the first question that has to be answered is whether the general human rights situation in the receiving State precludes the acceptance of assurances, no matter what the circumstances. However, only in exceptional cases can the general situation in a country be the only reason for refusing to assign any weight to the assurances offered.²²⁰

248. The analysis that the European Court usually does is based on two main elements: the quality of the assurances offered and the determination of whether, given the practices in the receiving State, those assurances can be deemed reliable. This Court has taken up a considerable number of cases that have enabled it to develop a series of factors that are relevant when examining these two main elements. The European Court recently summarized those factors in *Othman (Abu Qatada) v. the United Kingdom*.²²¹ Of the factors cited, the Commission would single out the following, with their respective case history:

- (i) Whether the terms of the assurances have been disclosed to the Court.²²²
- (ii) Whether the assurances are specific or are general and vague.²²³
- (iii) Who has given the assurances and whether that person can bind the receiving State.²²⁴

²¹⁸ European Court of Human Rights. *Saadi v. Italy*. 28 February 2008. Para 148. Citing *Chahal v. the United Kingdom*. Para. 105.

²¹⁹ European Court of Human Rights. *Saadi v. Italy*. 28 February 2008. Para 148. Citing *Chahal v. the United Kingdom*. Para. 105.

²²⁰ European Court of Human Rights. *Gafarov v. Russia*. Application no. 25404/09, para. 138, 21 October 2010; *Sultanov v. Russia*, Application no. 15303/09, para. 73, 4 November 2010; *Yuldashev v. Russia* No. 1248/09, para. 85, 8 July 2010.

²²¹ ECHR. *Case of Othman (Abu Qatada) v. The United Kingdom*. Application no. 8139/09. Judgment of 17 January 2012. Final 9 May 2012. Para. 189.

²²² ECHR. *Ryabikin v. Russia*, no. 8320/04, p. 119, 19 June 2008); *Case of Muminov v. Russia*, no. 42502/06, p. 97, 11 December 2008). Cited in: ECHR. *Case of Othman (Abu Qatada) v. The United Kingdom*. Application no. 8139/09. Judgment of 17 January 2012. Final 9 May 2012. Para. 189.

²²³ ECHR. *Klein v. Russia*, no. 24268/08, p. 55, 1 April 2010; *Khaydarov v. Russia*, no. 21055/09, P. 111, 20 May 2010. Cited in: ECHR. *Case of Othman (Abu Qatada) v. The United Kingdom*. Application no. 8139/09. Judgment of 17 January 2012. Final 9 May 2012. Para. 189.

²²⁴ ECHR. *Shamayev and Others v. Georgia and Russia*, no. 36378/02, p. 344); *Abu Salem v. Portugal*, no. 26844/04, 9 May 2006; *Garayev v. Azerbaijan*, no. 53688/08, p. 74, 10 June 2010; *Baysakov and Others v. Ukraine*, no. 54131/08, p. 51, 18 February 2010; *Soldatenko v. Ukraine*, no. 2440/07, p. 73, 23 October 2008. Cited in ECHR. *Case of Othman (Abu Qatada) v. The United Kingdom*. Application no. 8139/09. Judgment of 17 January 2012. Final 9 May 2012. Para. 189.

- (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.²²⁵
- (v) Whether the assurances concern treatment which is legal or illegal in the receiving State.²²⁶
- (vi) Whether they have been given by a Contracting State.²²⁷
- (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.²²⁸
- (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.²²⁹
- (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.²³⁰
- (x) Whether the reliability of the assurances has been examined by the domestic courts of the sending/Contracting State.²³¹

249. As for the consideration given to context and the weight that must be assigned to it even if assurances have been offered, in *Agiza v. Sweden* the United Nations Committee against Torture wrote that the rendition of the petitioner from Sweden upon the written assurances presented by the Egyptian Government representative was in violation of Article 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. The assurances in that case stated that the petitioner would not be subjected to torture or any other inhuman treatment, that he would not be sentenced to death or executed, and that the Swedish Embassy could monitor his trial and visit him before and after his conviction. Nevertheless, the Committee learned that the Swedish authorities knew or should have known the risk of torture facing the petitioner in Egypt. The Committee pointed out that "[t]he procurement of diplomatic assurances, which, moreover, provided no mechanism for their enforcement, did not suffice to protect against this manifest risk."²³²

²²⁵ ECHR. *Chahal v. the United Kingdom*. p. 105-107. Cited in. ECHR. Case of *Othman (Abu Qatada) v. The United Kingdom*. Application no. 8139/09. Judgment of 17 January 2012. Final 9 May 2012. Para. 189.

²²⁶ ECHR. *Cipriani v. Italy*, no. 221142/07, 30 March 2010; *Youb Saoudi v. Spain*, no. 22871/06, 18 September 2006; *Ismaili v. Germany*, no. 58128/00, 15 March 2001; *Nivette v. France*, no. 44190/98. Cited in. ECHR. Case of *Othman (Abu Qatada) v. The United Kingdom*. Application no. 8139/09. Judgment of 17 January 2012. Final 9 May 2012. Para. 189.

²²⁷ ECHR. *Chentiev and Ibragimov v. Slovakia*, nos. 21022/08 and 51946/08, 14 September 2010; *Gasayev v. Spain* (no. 48514/06, 17 February 2009). Cited in. ECHR. Case of *Othman (Abu Qatada) v. The United Kingdom*. Application no. 8139/09. Judgment of 17 January 2012. Final 9 May 2012. Para. 189.

²²⁸ ECHR. *Babar Ahmad and Others*, p. 107 and 108; *Al-Moayad v. Germany*, no. 35865/03, p. 68, 20 February 2007. Cited in. ECHR. Case of *Othman (Abu Qatada) v. The United Kingdom*. Application no. 8139/09. Judgment of 17 January 2012. Final 9 May 2012. Para. 189.

²²⁹ ECHR. *Chentiev and Ibragimov v. Slovakia*, nos. 21022/08 and 51946/08, 14 September 2010; *Gasayev v. Spain* (no. 48514/06, 17 February 2009). Cited in. ECHR. Case of *Othman (Abu Qatada) v. The United Kingdom*. Application no. 8139/09. Judgment of 17 January 2012. Final 9 May 2012. Para. 189.

²³⁰ ECHR. *Koktysh v. Ukraine*, no. 43707/07, p. 63, 10 December 2009). Cited in. ECHR. Case of *Othman (Abu Qatada) v. The United Kingdom*. Application no. 8139/09. Judgment of 17 January 2012. Final 9 May 2012. Para. 189.

²³¹ ECHR. *Al-Moayad v. Germany*, no. 35865/03, p. 66-69, 20 February 2007. Cited in. ECHR. Case of *Othman (Abu Qatada) v. The United Kingdom*. Application no. 8139/09. Judgment of 17 January 2012. Final 9 May 2012. Para. 189.

²³² Committee against Torture, *Algiza v. Sweden*, paragraph 13.4.

250. Comparative law offers important precedents regarding the assessment of diplomatic assurances. Thus, for example in the case of *Manickavasagam Suresh v. The Minister of Citizenship and Immigration and the Attorney General of Canada*, previously cited, the Canadian Supreme Court wrote the following:

In evaluating assurances by a foreign government, the Minister may also wish to take into account the human rights record of the government giving the assurances, the government's record in complying with its assurances, and the capacity of the government to fulfill the assurances, particularly where there is doubt about the government's ability to control its security forces. (...) ²³³

The Minister must provide written reasons for her decision. These reasons must articulate and rationally sustain a finding that there are no substantial grounds to believe that the individual (...) will be subjected to torture, execution or other cruel or unusual treatment, so long as the person under consideration has raised those arguments. (...) In addition, the reasons must also emanate from the person making the decision, in this case the Minister, rather than take the form of advice or suggestion... ²³⁴

251. These standards regarding the characteristics, scope and content of the diplomatic or other assurances to ensure that the death penalty or torture or cruel, inhuman or degrading treatment will be neither imposed nor applied are the framework that must be used to determine whether a State complied with its obligation to request assurances and then properly assess those assurances for their sufficiency, clarity and reliability. In that analysis, it will have to examine, in addition to the State's assurances, the conduct of the State under whose jurisdiction the person sought in the request is found and then assess those assurances. This analysis will be done in the following chapter, based on the facts that the Commission has deemed established in this case.

2.3 Analysis of the facts of the case

252. Under articles 514 and 515 of Peru's Code of Criminal Procedure, which build upon Article 37 of the Constitution, the final decision on extradition is taken by the government in a supreme resolution issued with the agreement of the Council of Ministers following a report by an official commission chaired by the Ministry of Justice and composed of the Minister of Foreign Affairs. The Government's decision will require the involvement of the Criminal Chamber of the Supreme Court, which will issue an advisory resolution. When the Criminal Chamber of the Supreme Court issues an advisory resolution counseling against extradition, the Government must comply. If, however, the advisory resolution is favorable to extradition, the Government is free to decide whether or not to grant extradition.

253. The Commission notes first that irrespective of how a State chooses to regulate extradition –whether it be by a court decision and left to the discretion of the Executive Branch, with or without the involvement of the Judicial Branch- the relevant factor for purposes of international responsibility is that extradition is an action taken by a State that can affect rights established in the

²³³ Supreme Court of Canada. *Manickavasagam Suresh v. The Minister of Citizenship and Immigration and the Attorney General of Canada* (Suresh v. Canada), 2002, SCC 1. File No. 27790, January 11, 2002. Para. 125.

²³⁴ Supreme Court of Canada. *Manickavasagam Suresh v. The Minister of Citizenship and Immigration and the Attorney General of Canada* (Suresh v. Canada), 2002, SCC 1. File No. 27790, January 11, 2002. Para. 126.

American Convention, specifically the rights to life and to humane treatment. Therefore, no matter what the domestic laws provide, international human rights law establishes the minimum safeguards that States must guarantee to ensure extradition does not create situations in which the exercise of those rights is in peril. All those safeguards were described in the preceding sections.

254. The obligation to demand assurances that the death penalty will not be enforced derives not just from the American Convention, as a corollary to the duty to guarantee the right to life in the terms described above, but also from Peru's own domestic laws, whose extradition regulations make those assurances mandatory.

255. Thus, while Article 1 of the Bilateral Extradition Treaty between Peru and the People's Republic of China establishes the obligation to extradite, Article 5 of that treaty states that "[e]xtradition shall only be carried out if it is not contrary to the requested Contracting Party's system of laws."

256. Article 516 of the Peruvian Code of Criminal Procedure provides that "[t]he granting of extradition is conditional on the existence of guarantees of the fair administration of justice." Specifically, Article 517(3) of that Code establishes the conditions under which extradition shall not be ordered; subparagraph (d) states the following: "The crime for which extradition is sought carries the death penalty in the requesting State and the latter does not give assurances that the death penalty will not be applied."

257. As for the documentation that, under Peru's domestic laws and the bilateral extradition treaty, must accompany the request for extradition, Article 518 of the Peruvian Code of Criminal Procedure provides that an extradition request must contain "(a) (...) the crime (under which) the punishable act is classified in law. (...) (d) The text of the criminal and procedural laws relevant to the case, as provided in the preceding paragraph (...)." Article 7 (d) of the Bilateral Extradition Treaty between Peru and the People's Republic of China lists among the "required documentation" the "texts of the legal provisions pertaining to criminal jurisdiction, the crime and the sentence that the crime can carry." Subparagraph 3 of that article provides that "[t]he extradition request and its supporting documents (...) shall have their translations into the language of the requested Contracting Party attached."

258. From the foregoing it follows that under its own domestic laws, the Peruvian State had an obligation to demand sufficient assurances of proper administration of justice, and assurances that the death penalty would not be applied. Under Peru's own domestic laws, the extradition request had to meet a number of minimum requirements. It was vital that the Peruvian State demand strict compliance with these requirements because of the need to observe the laws in extradition processes, and also because a number of these requirements concern the information and documentation needed to properly weigh the assurances offered by the requesting State.

259. Given the evolution of the events in this case, particularly the various advisory resolutions issued and habeas corpus rulings delivered, the Commission will now do its analysis based on the above standards and as a function of the obligation to provide judicial protection and comply with court rulings. The analysis will be in three sections: (i) analysis of the state authorities' actions between the time the extradition request was filed in November 2008 and issuance of the first advisory resolution on January 20, 2009; (ii) analysis of the state authorities' actions between the time the first petition of *habeas corpus* was filed and the second advisory resolution was issued on January 27, 2010;

and (iii) analysis of the state authorities' actions between the time the Constitutional Court delivered its May 24, 2011 ruling and its noncompliance to this day.

2.3.1 Analysis of the state authorities' actions between the time the extradition request was filed in November 2008 and issuance of the first advisory resolution on January 20, 2009

260. Since the day he gave his statement on October 28, 2008 –the day following his arrest– Mr. Wong Ho Wing has claimed that in his country he might face the death penalty and therefore asks to be tried in Peru. On November 3 and 14, 2008, a request was received seeking extradition for the crimes of crimes of smuggling, customs tax evasion and bribery; the extradition request indicated which articles of the Criminal Code of the People's Republic of China had allegedly been violated, which were articles 153, 154, 191, 389 and 390. As observed in the section on facts established, the Spanish translation of these provisions was not only poor, but also made a clear and unequivocal understanding of the law difficult.

261. Apart from the translation problems, the legal provisions were not set out in order and were incomplete. This is an important consideration in this analysis, since only the full text would reveal whether these violations carried the death penalty. It was the People's Republic of China that failed to provide the full text. Thus, the transcription of Article 153 of the Code of Criminal Procedure indicated that the crime of smuggling carried a sentence of more than ten years or life imprisonment; it added that in very serious cases, Article 151(4) of the Code of Criminal Procedure would apply. As was later discovered in the inter-American proceedings on this case, this paragraph allows for the possibility of imposing the death penalty. However, this particular provision was not among those that accompanied the extradition request.

262. The Peruvian State processed the extradition request without demanding a clear and complete copy of the applicable provisions, an essential step to ensure that the death penalty would not be applied. It is worth noting that under Article 518 of the Peruvian Code of Criminal Procedure and the Bilateral Extradition Treaty, Peru had a certain period of time in which to ask the requesting State to correct or complete the extradition request and the documentation. However, the Peruvian authorities did not do this.

263. Apart from the applicable laws, at that point in time no specific assurances were demanded that the death penalty would not be applied. Without any assurances, and despite the indicia that the request was incomplete and riddled with translation problems, the internal extradition process moved forward; on January 20, 2009, the Criminal Chamber of the Supreme Court issued an advisory resolution in which it indicated that the request met Peru's legal requirements. The analysis focused on the purely formal requirements of the Bilateral Treaty and on the question of the similarity of legal provisions. The advisory resolution made no reference to the fact that the documentation provided was incomplete or to the fact that no assurances had been offered. Indeed, nowhere in the resolution is any reference made to the possibility that the death penalty might be applied.

264. The Commission observes that even if only in an advisory capacity, judicial oversight of proceedings of this type is essential to ensure compliance with the State's legal, constitutional and international obligations. In the case of the Peruvian State, the Criminal Chamber of the Supreme Court had a significant role to play in determining whether all laws were being observed; if its opinion in an extradition case was not in favor of extradition, that opinion was binding on the Executive Branch.

265. From the observations made thus far, it is clear that from the time the Peruvian State received the extradition request to the time when the Supreme Court issued its advisory resolution on January 20, 2009, the Peruvian State was in non-compliance with its obligation to ensure Mr. Wong Ho Wing's right to life, because it failed to demand assurances that the death penalty would not be applied.

2.3.2. Analysis of the state authorities' actions between the time the first petition of *habeas corpus* was filed and the second advisory resolution issued on January 27, 2010

266. Following the Supreme Court's advisory resolution of January 20, 2009, Mr. Wong Ho Wing filed his first petition of *habeas corpus* against the authorities in the Executive Branch who would decide the matter of his extradition. In it he alleged threats to his life and personal integrity.

267. On February 2, 2009, by which time the *habeas corpus* petition had been filed and the Inter-American Commission was already seized of the matter, the Consul from the Embassy of the People's Republic of China sent an explanation of the punishment that Wong Ho Wing would face; he said there was no possibility that either the death penalty or life imprisonment would be applied. On February 10, 2009, the Commission on Extraditions and Convict Transfers issued a report on the extradition request, alluding to a communication from the IACHR and stating that a translation of Article 151 of the Criminal Code had to be requested, as well as assurances that the death penalty would not be applied.

268. On April 2, 2009, Lima's 56th Special Criminal Court upheld the petition of *habeas corpus*, and declared the advisory resolution null and void inasmuch as it did not state clearly and unequivocally that the petitioner could not be extradited to stand trial for the crimes he was alleged to have committed, the ultimate punishment for which was death.

269. With the Commission's precautionary measures already in force, between December 10 and 11, 2009, one year after Mr. Wong Ho Wing's arrest, the first "assurances" were received that the People's Republic of China would not apply the death penalty. One was presented by the diplomatic authorities, while the other indicated that the People's Supreme Court of the People's Republic of China had decided that if Wong Ho Wing was found guilty "through the Court's proceedings", it would not sentence him to death, even though that was the penalty that the law prescribed.

270. Based on that resolution, on January 27, 2010 the Supreme Court's Permanent Criminal Chamber issued a new advisory resolution favoring extradition. The Chamber regarded the decision of the People's Supreme Court of the People's Republic of China as an "ineluctable commitment" which showed that there was "no risk whatever" that the death penalty would be applied in China.

271. Here, the Commission must evaluate whether, given the circumstances of this specific case and based on the standards described above regarding diplomatic assurances, the Peruvian State acted in keeping with its obligation to guarantee the right to life in the procurement of and weight attached to the assurances given by the People's Supreme Court of the People's Republic of China.

272. The first matter that the Commission observes is that the Supreme Court's January 27, 2010 advisory resolution, like that of January 20, 2009 already examined, makes no mention at all of the two considerations that, under the case law of the European Court on this subject, are basic to any analysis of and weight attached to assurances of this kind, namely the context and the prospects for monitoring the criminal proceedings that will be conducted in the requesting State and the eventual

enforcement of the sentence. These two considerations have thus been absent from the analysis done by the authorities who, under the Constitution and the laws, are charged with issuing an opinion on and deciding extradition requests, namely the Judicial Branch in its advisory role, and the Executive Branch.

273. As described in the section on established facts, the context of the human rights situation in the People's Republic of China is a matter of public knowledge and mainly concerns the following: (i) the widespread use of torture and cruel, inhuman and degrading treatment in that country, a problem that time and time again has been a matter of the utmost concern to the United Nations monitoring bodies and to civil society; and (ii) the high incidence of the application of the death penalty in China and the lack of access to official information on the use of the death penalty because it is regarded as a State secret.

274. This contextual information required that the State be especially diligent about obtaining assurances and determining what weight to attach to them, both because of its obligation to guarantee the right to life of persons within its jurisdiction and because of the absolute ban prohibiting torture and the corollary obligation of *non-refoulement* if the person being returned would face such a risk.

275. As for the possibility that the death penalty might be enforced and at the insistence of the Inter-American Commission through its requests for information and the precautionary measures it granted, the State took precautionary measures that were insufficient. The assurances that the People's Supreme Court of the People's Republic of China gave are narrow and individualized assurances that are inadequate given the risk that application of the death penalty would pose; they offer no prospects for monitoring in the future and do not put to rest the questions raised by the fact that in China the death penalty is regarded as a State secret. Moreover, and taking account of another factor that the European Court weighs in such cases, the assurance does not come with any information concerning the jurisdiction that the People's Supreme Court of the People's Republic of China would actually have in the specific criminal case prosecuted against Mr. Wong Ho Wing, or how much control the People's Supreme Court might exercise over proceedings in other courts in the country.

276. Even though the assurance given by the People's Republic of China was insufficient by the applicable international standards and there was no discussion whatever of the issue of "context", the Peruvian Supreme Court proceeded to describe the assurance as an "ineluctable commitment" and to assert that there was "no danger whatever" that the death penalty would be applied.

277. As for the possibility that Mr. Wong Ho Wing might become the victim of torture or cruel, inhuman or degrading treatment, no such assurance was requested or given. The discussions focused around the death penalty and altogether ignored context-related considerations that were public knowledge and had to do with the use of torture. As a result, the necessary assurances that torture would not be used were not procured, nor were effective prospects for monitoring.

278. Based on its information and observations, the Commission concludes that between the time the first petition of *habeas corpus* was filed and a new advisory resolution was issued on December 27, 2010, the Peruvian State continued to fail its duty to guarantee Mr. Wong Ho Wing's right to life and right to humane treatment.

2.3.3 Analysis of the state authorities' actions between the time the Constitutional Court delivered its May 24, 2011 ruling and its noncompliance to this day

279. As indicated under the facts established, subsequent to the January 27, 2010 issuance of the new advisory resolution, on February 9, 2010 Mr. Wong Ho Wing's defense counsel filed another petition of *habeas corpus*. In this petition, Mr. Wong Ho Wing's counsel repeated the contextual arguments concerning the risk to Mr. Wong Ho Wing's life and the integrity of his person, and the absence of any information on the real prospects for Peru to monitor the sentence imposed. His defense counsel provided a number of reports prepared by international organizations to support his arguments. However, this petition was also denied. With that, Mr. Wong Ho Wing's counsel filed a constitutional remedy that led to the Constitutional Court's May 24, 2011 ruling, described in detail in the section on established facts.

280. According to the information of the file, in its ruling the Constitutional Court ordered the Executive Branch to abstain from extraditing Mr. Wong Ho Wing to the People's Republic of China because the necessary assurances sufficient to protect his right to life were lacking. In the reasoning of its decision, the Constitutional Court made reference to the context-related information. This was the first time that a State authority took the context in the People's Republic of China into consideration.

281. As for the scope of the right to judicial protection, in Article 25(2) the American Convention makes reference to the enforcement of judicial decisions as a component of that right. Recently, in the case of *Furlan and Family v. Argentina*, the Court synthesized the rules that apply to enforcement of court rulings and it went to particular pains to probe the link between effective mechanisms to ensure the substantive right that the court ruling sought to protect and the enforcement of that ruling. In the Court's words:

(...) under the terms of Article 25 of the Convention, it is possible to identify two specific responsibilities of the State. The first is that States have the obligation to incorporate in their legislation and ensure due application of effective remedies before the competent authorities, which protect all persons subject to their jurisdiction from acts that violate their fundamental rights or which lead to the determination of the latter's rights and obligations. The second is that States must provide effective mechanisms to ensure that the decisions or judgments delivered by such competent authorities are executed²³⁵ so that the declared or recognized rights are protected effectively. The process should lead to the materialization of the protection of the right recognized in the judicial ruling, through proper enforcement of this ruling.²³⁶ Therefore, "the full effectiveness of judgments depends on their implementation," since a judgment which has enforceable authority gives rise to certainty as to the right or dispute under discussion in the particular case, and therefore its binding force is one of the effects thereof. The contrary would imply the denial of this right.²³⁷

²³⁵ Furlan. 209. Citing. Cf. Case of Suárez Rosero v. Ecuador. Merits. Judgment of November 12, 1997. Series C No. 35, para. 65 and Case of Cabrera García and Montiel Flores v. Mexico. Preliminary Objection, Merits, Reparations and Costs. Judgment of November 26, 2010. Series C No. 220, para. 142.

²³⁶ Furlan 209. Citing. Cf. Case of Baena Ricardo et al v. Panama. Jurisdiction. Judgment of November 28, 2003. Series C No. 104, para. 73, and Case of Abrill Alosilla et al. v. Peru. Merits, Reparations and Costs. Judgment of March 4, 2011. Series C No. 223, para. 75.

²³⁷ Furlan 209. Citing Case of Mejía Idrovo v. Ecuador, para. 104, Case of Baena Ricardo et al v. Panama. Jurisdiction, para. 82, and Case of Acevedo Buendía et. al ("Discharged and Retired Employees of the Comptroller") v. Peru, para. 72.

282. Citing the European Court, the Inter-American Court wrote that in order to achieve the full effectiveness of a judgment, its implementation should be complete, perfect, comprehensive,²³⁸ and without delay.²³⁹ Of particular relevance to this case, in the case of *Mejía Idrovo v. Ecuador*, the Court made reference to possible interference by other branches of government to prevent execution of a court ruling. The Court wrote that:

the provisions governing the independence of the judicial order must be made in an appropriate way so as to ensure the timely execution of the judgments without any interference by other branches of Government²⁴⁰ and guarantee the binding and obligatory nature of the decisions of last resort.²⁴¹ The Court considers that in a system based on the principle of rule of law, all public authorities, within the framework of their jurisdiction, must take heed of judicial decisions and promote their execution without hindering the purpose and scope of the decision or unduly delaying its implementation.²⁴²

283. The order of Peru's Constitutional Court, the State's highest judicial authority in matters of constitutional law, issued a restraining order to the authorities in the Executive Branch who at the time and to this day had the obligation to issue a final ruling on the extradition request. The Constitutional Court's decision, which the Executive Branch was bound to comply with, required that the final decision in the extradition process had to be to deny extradition. The Constitutional Court's ruling even mentioned the possibility that the Peruvian State might itself prosecute and judge Mr. Wong Ho Wing.

284. Despite all this and although Mr. Wong Ho Wing is still being deprived of his liberty (a matter examined in the first section of this legal analysis), the Executive Branch has failed to put a

²³⁸ Furlan 2010. Citing Cf. Case of *Mejía Idrovo v. Ecuador*, para. 105, citing ECHR Case of *Matheus v. France*, (No. 62740/01), Judgment of March 31, 2005, para. 58. According to the principles proposed by the Consultative Council of European Judges (CCJE), a Consultative Body of the Committee of Ministers of the Council of Europe on matters concerning the independence, impartiality and professional capacity of judges, "enforcement of judicial decisions should be fair, swift, effective and proportionate" (Cf. Opinion no. 13 (2010) On the role of judges in the enforcement of judicial decisions. Available at:

[https://wcd.coe.int/wcd/ViewDoc.jsp?Ref=CCJE\(2010\)2&Language=lanEnglish&Ver=original&BackColorInternet=D BDCF2&BackColorIntranet=FDC864&BackColorLogged=FDC864](https://wcd.coe.int/wcd/ViewDoc.jsp?Ref=CCJE(2010)2&Language=lanEnglish&Ver=original&BackColorInternet=D BDCF2&BackColorIntranet=FDC864&BackColorLogged=FDC864).

²³⁹ Furlan 210. Citing CF Case of *Mejía Idrovo v. Ecuador*, para. 105, citing ECHR, Case of *Cocchiarella v. Italy* (No. 64886/01), G.C., Judgment of March 29, 2006, para. 89, and Case of *Gaglione et al. v. Italy*, (No. 45867/07), Judgment of December 21, 2010, para. 34. In light of the ECHR's established case law, a delay in the execution of judicial decisions may constitute a violation of the right to be heard within a reasonable time, as established by Article 6, para. 1 of the European Convention on Human Rights since the "[e]xecution of a judgment given by any court must therefore be regarded as an integral part of the trial for the purposes of Article 6". See also, ECHR, Case of *Hornsby v. Greece*, (No. 18357/91), Judgment of March 19, 1997, para. 40, and Case of *Jasiūnienė v. Lithuania*, (No. 41510/98), Judgment of March 6, 2003. Final, June 6, 2003, para. 27.

²⁴⁰ Cf. Case of *Mejía Idrovo v. Ecuador*, para. 106. Cf. Advisory Opinion No. 13 (2010) On the role of judges in the enforcement of judicial decisions, Conclusions, F), See also ECHR, Case of *Matheus v. France*, paras. 58 and subsq.

²⁴¹ Cf. Case of *Mejía Idrovo v. Ecuador*, para. 106. This means that compliance is mandatory, and that if they are not obeyed voluntarily, may be enforced coercively.

²⁴² Furlan 211. Citing Cf. Case of *Mejía Idrovo v. Ecuador*, para. 106. The European Court has established in the case of *Inmobiliare Saffi v. Italy* that: "While it may be accepted that Contracting States may [...] intervene in proceedings for the enforcement of a judicial decision, the consequence of such intervention should not be that execution is prevented, invalidated or unduly delayed or, still less, that the substance of the decision is undermined". Cf. ECHR, Case of *Inmobiliare Saffi v. Italy*, para. 74.

definitive end to the extradition process, in defiance of the Constitutional Court's ruling. Rather than take the measures required to comply with the court ruling, the Executive Branch launched a series of measures to reverse the Constitutional Court's decision by turning to various court authorities seeking "interpretations" and "clarifications" of the sense of the ruling. As observed in the section on established facts, in briefs dated November 25, 2011 and November 28, 2011, the Prosecutors Offices under the Executive Branch filed briefs with the Judicial Branch to make the case for how Mr. Wong Ho Wing could be extradited without violating the Constitutional Court's ruling. In response, a number of judicial authorities ruled that the meaning of a definitive judgment cannot be changed. The enforcement process ended up in the Constitutional Court yet again, which on March 12, 2013 ruled that any clarification of its previous judgment was out of order and declared that the Executive Branch was looking for a way to change the sense of the judgment.

285. Another measure taken by the Executive Branch to delay enforcement of the Constitutional Court's ruling was a January 9, 2012 request to the Supreme Court seeking an additional advisory resolution in light of a supposed "new fact," which was that death penalty for smuggling in China had been struck down. This request was denied on March 14, 2012. In its ruling the Supreme Court was emphatic in pointing out that the Constitutional Court's ruling was definitive and that the extradition process was now in the hands of the Executive Branch.

286. It is worth noting that the Peruvian State has been justifying the use of these delaying tactics by claiming that a ruling is needed from the Judicial Branch to interpret the Constitutional Court's judgment and establish its scope. The supposed "new fact" on which the State's request is based is the repeal of the death penalty for one of the crimes for which Mr. Wong Ho Wing's extradition was sought.

287. The first point that the Commission must make clear is that the so-called "new fact" was not a new fact at all. The Peruvian State learned of the repeal of the death penalty for the crime of smuggling on the very day it happened, which was February 25, 2011. This can be corroborated by listening to the audio of the hearing that the Inter-American Court held that day in connection with the provisional measures, where the Peruvian State was represented and brought that information to the attention of the Court and all parties in attendance, including the Inter-American Commission. Three months later, on May 24, 2011, the Constitutional Court issued a definitive ruling on the petition of *habeas corpus*; in that ruling it ordered the Executive Branch to abstain from extraditing Mr. Wong Ho Wing. It is worth noting that this *habeas corpus* petition had been filed and prosecuted against various authorities in the Executive Branch, including the President of the Republic, in whose hands the final extradition decision lie. Thus, the Commission cannot buy into the argument that the Constitutional Court was unaware that the death penalty for smuggling had supposedly been repealed in China. In any event, it was the obligation of the authority against whom the preventive *habeas corpus* petition was brought to protect the alleged victim's rights to life and personal integrity, to bring to the attention of the Constitutional Court any information that would be relevant for purposes of adopting a decision, given the obligations to ensure those rights.

288. A second issue has to do with the content of the Constitutional Court's judgment, which did not rely entirely on how the law in China classified the crimes and the possible application of the death penalty. A reading of that ruling shows that the Constitutional Court took other considerations into account that led it to the conclusion that Mr. Wong Ho Wing should not be extradited. Salient among these were the context-related considerations about the use of the death penalty and complaints of torture in the People's Republic of China. Those considerations are entirely unrelated to the supposed "new fact" that the Peruvian State claimed necessitated a reinterpretation of the

Constitutional Court's ruling. Of the various remedies to which Peru's Executive Branch resorted for a re-interpretation, not one made the claim that the Constitutional Court relied on something beyond the question of whether the crime carried the death penalty, when in fact this issue was never considered or examined by any of the authorities who intervened in the extradition process, except for the Constitutional Court whose ruling in favor of the victim the Executive Branch would have everyone disregard.

289. As indicated in this section, the Commission concludes that to this day, the Peruvian State is still in noncompliance with its obligation to ensure Mr. Wong Ho Wing's right to life and right to humane treatment. In the period between May 24, 2011 and the date of approval of this report, the State has violated the right to judicial protection, specifically the provision contained in Article 25(2)(c) of the American Convention concerning enforcement of court rulings.

2.3.4 Conclusion

290. The Commission concludes that the Peruvian State has processed an extradition request with out taking into consideration that the requesting State committed serious omissions and irregularities in its original request; and has an international reputation for application of the death penalty and complaints of the use of torture. Without asserting that it is *per se* impossible to grant extradition under those circumstances, the Commission must make the point that the Peruvian State had an obligation to be especially diligent and serious in processing the request, so as to clear up any questions that these special circumstances could create and thereby comply with its duty to protect the life and personal integrity of a person under its jurisdiction.

291. In the instant case, the State has been taking isolated measures only insofar as those measures have enabled it to make arguments to the Inter-American Court claiming that the provisional measures sought by the IACHR were out of order. However, from the Peruvian State's first to last communications to the Commission and to the Court, it has emphasized the argument that Mr. Wong Ho Wing's life and personal integrity have never been at any risk. Yet, based on the foregoing analysis of the various phases of the extradition process, the Commission concludes that the additional measures taken by the State to make its case to the Inter-American Court on the matter of provisional measures, have been limited to procuring individualized assurances concerning the person of Mr. Wong Ho Wing, in connection with his criminal prosecution and the crimes for which his extradition is sought. To this day, the State has not asked the People's Republic of China for an explanation of its original omissions which, to any rational onlooker, suggest an intention to cover up the most important information that these requests seek: whether or not the death penalty is applicable. The IACHR does not know whether the Peruvian State asked the People's Republic of China for that information, or whether China had supplied that information satisfactorily. What is more, as previously observed, this issue has to do with the question of whether, by law, the death penalty can be imposed and, in one way or another, goes to all the other contextual elements, possible unlawful or secret practices, or real prospects for monitoring and effective follow-up, among other aspects. Thus far, the Peruvian State has focused its efforts on getting a reinterpretation of the Constitutional Court's ruling and has demonstrated no concern at all for these issues.

292. The Peruvian State's international obligations to respect Mr. Wong Ho Wing's right to life and right to personal integrity were not the only grounds it could have cited to refuse extradition in his case. Under Peru's own domestic laws, its Constitution and its Bilateral Treaty with China, Peru had the option to prosecute Mr. Wong Ho Wing itself –which was a course of action suggested by the

Constitutional Court- or it could have refused extradition on the grounds that it was in violation of the laws in effect in Peru, the requested party. Therefore, the Peruvian State's argument that it undertook an obligation to extradite in its Bilateral Extradition Treaty is not applicable, when international human rights law, Peru's domestic laws and the bilateral treaty make extradition conditional upon various substantive and procedural aspects.

293. Given these considerations, the Commission concludes that the Peruvian State failed to comply with its obligation to ensure the right to life and the right to humane treatment, and its obligation to enforce court rulings that have become *res judicata*. The failure to comply with these obligations has resulted in violations of the procedural dimension of the rights established in articles 4 and 5 of the American Convention, and the right established in Article 25(2)(c) of the Convention, read in conjunction with the obligations established in Article 1(1) thereof, to the detriment of Mr. Wong Ho Wing.

294. Finally, regarding the information submitted by the State in its last communication related to extraditions executed by other States to China, the Commission considers that it does not affect the entirety of the foregoing analysis due to the fact that Commission is not called to evaluate the viability, in an abstract sense, that a State executes extraditions to China. The analysis of the instant report focused on the answer given by the Peruvian State to a concrete extradition request and if this answer fulfill or not its obligations to guarantee the right to life and personal integrity, as well as its own domestic law.

3. Right to a fair trial (Article 8 of the American Convention)

295. The relevant parts of Article 8 of the American Convention read as follows:

1. 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.
2. Every person accused of a criminal offense has the right to be presumed innocent so long as his guilt has not been proven according to law. During the proceedings, every person is entitled, with full equality, to the following minimum guarantees:

(...)

- b. prior notification in detail to the accused of the charges against him;
- c. adequate time and means for the preparation of his defense;

296. Article 1(1) of the American Convention provides that:

1. 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..

3.1. As for the guarantee of a “reasonable time”

297. In this analysis, the Commission will consider the four elements that the case law has established to determine the reasonableness of the length of time of the proceeding: a) the complexity of the matter; b) the procedural activity of the interested party; c) the conduct of the judicial authorities,²⁴³ and d) adverse effect of the duration of proceedings on the judicial situation of the interested party.²⁴⁴

298. The Commission’s first observation is that with regard to the legal time frame within which an extradition process must be carried out, Peruvian law establishes only certain time periods for the first phase of the process, i.e., the phase during which the extradition question is before the courts. Thus, Article 521 of the Peruvian Code of Criminal Procedure indicates that once the person whose extradition has been requested is taken into custody and his statement taken, the Preliminary Examining Judge has up to 15 days to schedule a public hearing. After that hearing, the case file must be immediately referred to the Criminal Chamber of the Supreme Court, which must set the date for the extradition hearing. After that hearing, the law provides that the Supreme Court shall issue an advisory resolution within five (5) days, and that within the next three (3) days it is to refer the resolution to the Ministry of Justice. Article 522 of the Code of Criminal Procedure does not establish a time frame for the Executive Branch’s phase of the extradition process.

299. The Commission observes that the legal deadlines for the advisory process were not satisfied in this case; it also considers that the absence of any legal time frame for the Executive Branch’s final decision enabled the delay of more than four and a half years between the time the extradition request was received and the present. This same provision has allowed the Executive Branch to keep Mr. Wong Ho Wing under arrest to this day, in a kind of legal limbo, despite the Constitutional Court’s ruling in his favor, which has not been assigned the importance it is due in the extradition process.

300. As for the complexity of the matter, the Commission considers that while the extradition request in this case may have had a certain degree of complexity because of the context-related situation that made it incumbent upon the requested State to ask for adequate assurances from the requesting State, the analysis recounted in this report makes it plain that the delay was not caused by either the complexity of the case or any diligence in procuring assurances. Quite the contrary, since many of the needed assurances have not been obtained to this day.

301. As for the procedural activity of the interested parties, the Commission observes that the domestic authorities with jurisdiction to settle the present matter have long delayed the issuance of the final decision in the extradition process; instead, for the last two years they have focused their efforts on filing requests with the courts seeking clarification. Furthermore, since the time of the Constitutional Court’s most recent decision in this matter, which was on March 12, 2013, in which it reiterated that a re-interpretation of its original ruling was out of order, another four months have

²⁴³ Furlan. 152. 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 Díaz Peña v. Venezuela. Preliminary Objection, Merits, Reparations and Costs. Judgment of June 26, 2012. Series C No. 244, para. 49.

²⁴⁴ Furlan. 152. 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 Díaz Peña v. Venezuela, para. 49.

passed and the Executive Branch has still not closed the extradition process. As for the procedural activity on the part of Mr. Wong Ho Wing's defense counsel, the Commission considers that the petitions of *habeas corpus* they have filed are among the measures the victim in this case has taken in defense of his rights.

302. Finally, this case is one in which the legal situation of the person affected by the delay is particularly relevant. As previously explained, the delay in the final resolution of the extradition process to comply with the Constitutional Court's ruling, is why Mr. Wong Ho Wing is still being deprived of his liberty after more than four and a half years, without ever being criminally prosecuted but still being held under provisional arrest for what has become an excessive period of time. This is a particularly grave situation since, after issuance of the Constitutional Court's ruling prohibiting the victim's extradition, his continued detention has no legal grounds and the procedural end supposedly being sought by his arrest is now meaningless.

3.2. As for the right to a hearing and to information and means to prepare his defense

303. The Commission notes that under Article 521 of the Code of Criminal Procedure, once the person is in custody, a statement is to be taken from him, he is to be advised beforehand of the reasons for his arrest and of the details of the extradition request. It also provides that the person shall be informed of his right to an attorney of his choosing or to have a court-appointed attorney to represent him. This provision also states that the person in custody may make whatever comment he wishes regarding the content of the extradition request, and may question the identity of the person whose extradition the foreign courts are seeking, or withhold his statement until the extradition oversight hearing. It also provides that if the person in custody does not speak Spanish, an interpreter shall be appointed.

304. Paragraph 3 of that article provides for an initial public hearing, with a prior summons and the participation of the person sought in extradition and his defense counsel. It also states that he may make the arguments that he deems relevant, introduce evidence or challenge the evidence in the extradition case file.

305. Paragraph 4 of Article 521 provides for an "extradition hearing" before the Criminal Chamber of the Supreme Court (which is the body that issues the advisory resolution) in which the person whose extradition is sought and his defense counsel may participate.

306. Based on the facts established in this case, the Commission observes that Article 521 of the Code of Criminal Procedure establishes some of the guarantees of due process for the person whose extradition is sought. Specifically, this article stipulates that once the person is in custody, "the judge presiding over the preparatory investigation [...] shall inform the person whose extradition has been requested of the reasons for his arrest and the details of the extradition request. The Judge shall also advise said person of his right to name his own defense counsel and, if unable to do so, to have a court-appointed attorney designated to represent him. If he so desires; the person in custody may make whatever comment he wishes to make regarding the content of the extradition request, and may question the identity of the person whose extradition the foreign courts are seeking, or withhold his statement until the extradition oversight hearing. If the person in custody does not speak Spanish, an interpreter shall be appointed." This provision also states that a public hearing shall be convened, in which the defense attorney representing the requested person shall participate; it also allows for the introduction of evidence, and challenges to or support of the evidence in the case file.

307. The information available indicates that this procedure is only required in the first stage of the extradition process, which is conducted before the courts. That stage ends with issuance of the Advisory Resolution. Nothing in the law suggests that the person whose extradition is sought or his legal representative may participate in the decision-making stage, which is in the hands of the Executive Branch.

308. The provisions of the Peruvian Code of Criminal Procedure that regulate the extradition process, which were cited in the section on facts established, do not provide for any procedure that would ensure some form of participation for the person whose extradition is sought, so that the person might express his views on his extradition and/or take specific measures to assert the rights that he believes will be violated if his extradition is ordered. Nothing in the applicable provisions requires that the person in question be advised of any developments related to the extradition request.

309. Having examined the available records of the proceedings, the Commission observes that through his legal representative, Mr. Wong Ho Wing filed briefs during the process and has availed himself of a number of remedies. Nevertheless, the petitioner has alleged to the Commission that the State has violated his rights to due process, as he has not had access to basic documents pertaining to the extradition request, such as the request itself, or to the assurances offered by the People's Republic of China and their content. The petitioner alleges that those documents have come his way as a result of the defense that the State mounted in the proceedings before the organs of the inter-American system. As the established facts show, at various times in the process Mr. Wong Ho Wing's legal representative has filed requests for information on the documents pertaining to the extradition process.

310. The petitioner's argument regarding the lack of timely information on the extradition process and the respective documents, is a negative argument, i.e., it involves an alleged omission by the State that cannot be proved. That being the case, it is up to the State, which has all the means to do so, to show otherwise.

311. On the burden of proving negative allegations, in the case of *Chaparro Álvarez and Lapo Iñiguez v. Ecuador* the Court wrote the following:

In the instant case, the victim has no available means of proving this fact. His allegation is of a negative nature, and indicates the inexistence of a fact. The State declares that the information about the reasons for the arrest was provided. This is an allegation of a positive nature and, thus, susceptible of proof.²⁴⁵

312. The Peruvian State has not provided the complete file of the extradition process or of the various remedies attempted in the domestic courts. Nor has it presented any documentation indicating that it did in fact make available to Mr. Wong Ho Wing and his legal representative the information needed to exercise his right to a hearing or to file adequate and timely remedies in the context of a process in which his rights might have been at stake. Thus, the Peruvian State failed to satisfy the burden of proof that was its burden under the circumstances.

²⁴⁵ I/A Court H.R., *Chaparro-Álvarez and Lapo-Iñiguez. v. Ecuador Case*. Preliminary Objections, Merits, Reparations and Costs. Judgment of November 21, 2007. Series C No. 170. Para. 73.

313. Given the foregoing considerations, the Commission concludes that the State of Peru violated the rights to judicial guarantees and judicial protection, recognized in articles 8(1), 8(2)(b) and (c) and 25(1) of the American Convention, read in conjunction with the obligations undertaken in Article 1(1) thereof, to the detriment of Mr. Wong Ho Wing.

V. CONCLUSIONS

314. Based on this analysis, the Commission concludes that the State of Peru is responsible for violation of the rights to personal liberty, life, humane treatment, a fair trial and judicial protection, recognized in articles 7, 4, 5, 8 and 25 of the American Convention, read in conjunction with the obligations undertaken in Article 1(1) thereof, to the detriment of Mr. Wong Ho Wing.

VI. RECOMMENDATIONS

315. Based on this analysis and the conclusions reached in this report, the Inter-American Commission is recommending to the Peruvian State that it

1. 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 May 24, 2011 ruling. In furtherance of this recommendation the State must ensure that none of its authorities put into practice mechanisms that would obstruct or delay enforcement of that ruling.

2. Order an *ex officio* review of Mr. 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, effected in accordance with the terms of the recommendation made above. In particular, any court decision pertaining to the personal liberty of Mr. Wong Ho Wing must be made in strict compliance with the principles of exceptionality, necessity, and proportionality in the terms described in this report.

3. Make full reparations to Mr. Wong Ho Wing for the violations established in this merits report.

4. 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 procured and weighed in accordance with the standards set out in the present report on the merits.