OBSERVATIONS OF THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS CONCERNING THE RETURN OF THE APPLICATION IN THE CASE OF BARUCH IVCHER BRONSTEIN V. PERU (11.762) AND THE JURISDICTION OF THE INTER-AMERICAN COURT OF HUMAN RIGHTS

I. BACKGROUND

The present observations respond to the August 5, 1999 communication of the Inter-American Court of Human Rights (hereinafter "Honorable Court"), Ref: CDH-11.762/020, informing the Inter-American Commission on Human Rights (hereinafter "Commission") that the Republic of Peru (hereinafter "State" or "Peru") had returned the application and related documents filed in the case of Baruch Ivcher Bronstein. In that communication, the Honorable Court provided the Commission with a deadline of September 10, 1999 to file observations.

The case of Baruch Ivcher Bronstein was submitted to the Honorable Court on March 31, 1999, to address the actions of the Peruvian State in arbitrarily stripping Mr. Ivcher of his citizenship with the objective of depriving him of editorial control of Channel 2, "Frecuencia Latina," thereby restricting the freedom of expression he had been exercising to denounce human rights violations and corruption. As set forth in that application, these actions of the State constitute violations of Mr. Ivcher's rights to nationality, freedom of expression, property, and judicial protection and guarantees, recognized in Articles 20, 13, 21, 25 and 8 of the American Convention on Human Rights (hereinafter "American Convention"), thereby demonstrating the failure of the State to uphold its obligations to respect and ensure those guarantees under Article 1(1).

With its note of August 5, 1999, the Honorable Court transmitted copies of the following documents: the record of receipt of the returned documents issued by the Court's Secretariat, dated August 4, 1999; note N° 5-9-N/69, addressed by the Peruvian Embassy in Costa Rica to the Court, dated August 4, 1999; note RE(MIN) N° 6/25, dated August 2, 1999, addressed to the President of the Court and signed by Fernando de Trazegnies Granda, Minister of Foreign Relations, setting forth the State's basis for the return of the application; note N° 0353-99-JUS/DM from the Minister of Justice to the Minister of Foreign Relations of Peru, dated August 2, 1999; Legislative Resolution N° 27152 approving the State's "withdrawal"[1] from the contentious jurisdiction of the Court, dated July 8, 1999; the declaration signed by the Minister of Foreign Relations of Peru "withdrawing" the State's acceptance of that jurisdiction, dated July 8, 1999; and the record of deposit of the foregoing declaration issued by the OAS General Secretariat on July 9, 1999.

[1] Given that the validity and effects of the putative "withdrawal" are in question, the term is referred to in quotation marks throughout the present document.

The August 2, 1999 note addressed by the Foreign Ministry to the Honorable Court referred to above (Ref: RE(MIN) N° 6/25) briefly sets forth the considerations underlying the State's return of the application, which may be summarized as follows:

> On July 8, 1999, the Congress of the Republic of Peru approved the "withdrawal" of the State's acceptance of the compulsory jurisdiction of the Inter-American Court;
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> On July 9, 1999, the State presented to the General Secretariat of the OAS a declaration stating that it "withdraws" its declaration of acceptance of the contentious jurisdiction of the Court;
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> The State indicated that, as established in the foregoing documents, its "withdrawal" produces "immediate effects" as of the July 9, 1999 date of its deposit with the General Secretariat of the OAS, and applies to all cases in which it had not submitted its answer to applications initiated before the Court;
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> Consequently, the communication transmitted by the Court on May 10, 1999 notifying the State of the application in the case of Baruch Ivcher Bronstein (Ref. CDH-11.762/002) refers to a matter with respect to which the Court is not competent to exercise contentious jurisdiction.

The State thus considers the Honorable Court to have been deprived of jurisdiction by the acts of its legislature and Foreign Ministry of July 8 and 9, 1999 aimed at "withdrawing" the State's acceptance of the compulsory jurisdiction of the Honorable Court. In particular, the July 8, 1999 declaration filed with the General Secretariat of the OAS on July 9, 1999 indicates that "in accordance with the American Convention on Human Rights, the Republic of Peru withdraws the Declaration of recognition of the optional clause of acceptance, opportunely made by the Peruvian Government, of the contentious competence of the Inter-American Court of Human Rights."* This "withdrawal" will be of "immediate effect and apply to all cases in which Peru has not answered the application initiated before the Court." The State thus asserts that its action of "withdrawal" not only has immediate effect, but applies to cases previously filed with the Court with respect to which it has yet to answer.

II. INTRODUCTION

The present observations address the challenge to the jurisdiction of the Honorable Court posed by Peru in the case of Baruch Ivcher Bronstein. This challenge presents the Honorable Court with a case of first impression, as no State has ever attempted to

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* Translation of the Commission. Other translations of material presented by the State are, unless indicated, those of the Commission.

withdraw its acceptance of the compulsory jurisdiction of the Court while remaining a State Party to the Convention.

As a preliminary procedural matter, the Commission notes that the Honorable Court notified the State of Peru of the application in this case on May 10, 1999, Ref: CDH-11.762/002, further informing the State that it had two months from that date to present any preliminary exceptions, and four months to file its answer. The August 4, 1999 communication of the State returning the application appears to constitute neither one nor the other of these authorized procedures, as it was filed too late to be accepted as the former, and deals with issues of jurisdiction outside the ambit of the latter. While noting this, the Commission will nonetheless proceed to offer its observations on the communication and related documents, which raise questions of jurisdiction which must, to the extent they are to be evaluated, be addressed prior to the merits of the case.

To summarize the positions that will be developed below, first, the Commission considers that the "withdrawal" attempted by the State is invalid as a matter of law and consequently of no effect. The text of the Convention does not provide for the procedure effectuated by the State, and the attempted "withdrawal" is impermissible under the applicable legal regime. Second, even accepting that such a withdrawal were legally permissible, it would not in any case take immediate effect, as any such action would necessarily require a reasonable period of notification of one year prior to taking effect. Third, even if immediate withdrawal were legally possible, there exists no legal basis whatsoever by which such an act could retroactively deprive the Court of jurisdiction in a case with respect to which it was already seized. The act of filing the application institutes the proceedings before the Honorable Court; a State cannot evade that jurisdiction by declaring its withdrawal therefrom with retroactive effect on a pending case.

Because the issues raised in the present case can be answered most narrowly with reference to the third point concerning non-retroactivity, the Commission will begin its analysis there, before addressing the second point concerning immediacy. As these questions are nonetheless integrally related to the question of the validity of the act of "withdrawal" attempted by the State, the Commission will then address that broader issue.

III. THE INTER-AMERICAN COURT WAS VALIDLY SEIZED OF THE IVCHER CASE AT THE TIME PERU ATTEMPTED TO "WITHDRAW" ITS ACCEPTANCE OF THE COURT'S CONTENTIOUS JURISDICTION; SUCH AN ATTEMPT TO EVADE PROCEEDINGS ALREADY INITIATED IN A CONTENTIOUS CASE IS IMPERMISSIBLE AS A MATTER OF LAW AND OF NO LEGAL EFFECT

This first section of these observations will establish that the Inter-American Court of Human Rights is competent to exercise jurisdiction over the present case because it was validly seized of the matter as of the March 31, 1999 filing of the application. Within the inter-American human rights system, as well as before other relevant international tribunals, the act of filing an application "institutes the proceedings" in a contentious case. Once such a tribunal is thereby seized of the matter, no subsequent act by a State Party to

those proceedings can retroactively deprive it of jurisdiction. Accordingly, the July 9, 1999 presentation by Peru of its putative "withdrawal" can be of no legal effect insofar as the competence of the Honorable Court to exercise jurisdiction in this case is concerned.

A. Preliminary considerations with respect to the issue of jurisdiction

1. The nature and scope of contentious jurisdiction

Jurisdiction is the attribution of authority that enables a tribunal to issue a binding decision on the merits of a case brought before it.[2] Jurisdictional questions may be of fundamental importance, given that, as one authority has commented with respect to the International Court of Justice (hereinafter "ICJ"), "the question whether and to what extent the Court has jurisdiction is frequently of no less, if not of more, political importance that the decision on the merits."[3]

Pursuant to Article 62(3) of the American Convention, the jurisdiction of the Inter-American Court of Human Rights "shall comprise all cases concerning the interpretation and application of the provisions of the Convention that are submitted to it," provided the State Party concerned has recognized that competence. As indicated, the exercise of this jurisdiction is premised on the consent of the State concerned to be bound thereby. Pursuant to Article 62 of the Convention:

> 1. A State Party may, upon depositing its instrument of ratification or adherence to this Convention, or at any subsequent time, declare that it recognizes as binding, ipso facto, and not requiring special agreement, the jurisdiction of the Court on all matters relating to the interpretation or application of this Convention.
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> 2. Such declaration may be made unconditionally, on the condition of reciprocity, for a specified period, or for specific cases. It shall be presented to the Secretary General of the Organization, who shall transmit copies thereof to the other member states of the organization and to the Secretary of the Court.

The terms of Article 62, according to which States Parties to the Convention elect whether to accept the contentious jurisdiction of the Inter-American Court, replicate and

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[2] "Jurisdiction is the power to examine and decide civil, criminal or other matters according to the law in force, more specifically, the power vested in the judges to administer justice." ["*Jurisdicción es la potestad de conocer y fallar en asuntos civiles, criminales o de otra naturaleza, según las disposiciones legales o, más concretamente, la potestad de la que se haya investido a los jueces para administrar justicia.*"] Cabanellas, Guillermo, *Diccionario Enciclopédico de Derecho Usual*, 16 ed. Tomo V (1981), p. 48.

[3] Sir Gerald Fitzmaurice, *The Law and Procedure of the International Court of Justice*, (Vol. II, 1986), at p. 434.

were drawn from those of Article 46 of the European Convention on Human Rights, providing States the option of accepting the compulsory jurisdiction of the European Court of Human Rights (prior to the entry into force of the unitary regime under Protocol 11).[4] Those terms were drawn in turn from Article 36 of the Statute of the International Court of Justice,[5] which themselves replicate Article 36 of the Statute of the Permanent Court of Justice. As the respective *travaux préparatoires* indicate, these terms, known as "optional clauses" were adopted due to the lack of consensus during the drafting of these instruments in favor of including automatic compulsory jurisdiction.[6] The formulation of the respective optional clauses providing for submission to jurisdiction *ipso facto* and without requiring special agreement are virtually identical.[7]

Within the inter-American human rights system, acceptance of such jurisdiction constitutes a voluntary act on the part of the State concerned, and signifies its notification to the other States and actors of the system that it is prepared to submit to the binding authority of the Honorable Court pursuant to the stated terms. Accordingly, the Honorable Court has indicated that:

> In contentious cases the exercise of the Court's jurisdiction ordinarily depends upon a preliminary and basic question, involving the State's acceptance of or consent to such jurisdiction. If the consent has been given, the States which participate in the proceedings become, technically speaking, parties to the proceedings and are bound to comply with the resulting decision....[8]

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[4] Pursuant to the entry into force of Protocol 11, membership in the Council of Europe is now predicated on ratification of the European Convention on Human Rights and acceptance of the obligatory jurisdiction of the European Court of Human Rights. This linking of membership in the Council with adherence to jurisdiction, and the consequent undertaking to comply with judgments issued, is the culmination of almost 50 years of gradual legitimization of the European human rights system, and provides a model for other regions of the world.

[5] *See, e.g.*, Council of Europe, *Collected Edition of the "Travaux Préparatoires" of the European Convention on Human Rights* (Vol. IV 1977) at p. 266.

[6] *See, e.g.*, Council of Europe, *supra*, pp. 118-26, 158, 178, 212; IACHR, "Comparative Study of the Draft Convention on Human Rights prepared by the Inter-American Council of Jurists and those Presented by Uruguay and Chile to the Second Special Inter-American Conference," OEA/Ser.L/V/II. 15, Doc. 3 Rev. 2, 17 Jan. 1967, at p. 34 (comparing multiple alternatives); IACHR, Opinion Prepared by the IACHR on the Draft Convention, Part Two, OEA/Ser.L/V/II.16, Doc. 8 Rev., 24 April 1967, at p. 14 (proposing standard formulation of optional clause for purpose of unification).

[7] It may be noted that the *travaux préparatoires* of the American Convention indicate that this common formulation of the optional clause was adopted without protracted discussion. *See*, for example, OAS General Secretariat, *Conferencia Especializada Interamericana sobre Derechos Humanos*, OEA/Ser.K/XVI/1.2, at p. 377.

[8] IACtHR, *Restrictions to the Death Penalty* (Arts. 4(2) and 4(4) American Convention on Human Rights), Advisory Opinion OC-3/83 of Sept. 8, 1983, Ser. A No. 3, para. 36.

As indicated, the acceptance of contentious jurisdiction carries with it the obligation to adhere to decisions rendered pursuant thereto. As established in Article 68(1) of the American Convention, States which accept contentious jurisdiction "undertake to comply with the judgments of the Court in any case to which they are parties."

As the Honorable Court has indicated since the very initiation of its contentious case practice, "[t]he broad terms employed by the Convention show that the Court exercises full jurisdiction over all issues relevant to a case."[9] It is not only authorized to determine whether there has been a violation of a protected right and adopt the corresponding measures, it "is likewise empowered to interpret the procedural rules that justify its hearing a case."[10]

The competence of an international tribunal necessarily extends to all disputes concerning the existence and scope of its jurisdiction.[11] Once such a tribunal is seized of a matter, it alone is competent to make those jurisdictional determinations. "[E]very international tribunal and every organ with jurisdictional competences has the *inherent power* to determine the scope or extent of its own competence (Kompetenz-Kompetenz / compétence de la compétence)."[12] Indeed, the principle that an international tribunal is the master of its own jurisdiction can be described as a fundamental principle of international law. As characterized with respect to the ICJ:

> it is the Court that determines its rules of procedure, and not the States that appear before it. Parties coming before the Court must accept the Court's rules of procedure and must submit to them, for the act of submission to the Court's jurisdiction implies a submission to the Court's procedural rules, and to the principle that the Court, and not the parties, is the master of its own procedure.[13]

In this regard, where the jurisdiction or competence of the court concerned is disputed by the State, the question will, in principle, be resolved at the preliminary

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[9] IACtHR, *Velásquez Rodríguez Case*, Preliminary Objections, Judgment of June 26, 1987, Ser. C No. 1, para. 29; *Fairén Garbi and Solís Corrales Case*, Preliminary Objections, Judgment of June 26, 1987, Ser. C No. 2, para. 34; *Godínez Cruz Case*, Preliminary Objections, Judgment of June 26, 1987, Ser. C No. 3, para. 32.

[10] *Id.*

[11] *See generally*, ICJ, *Nottebohm Case* (Liechtenstein v. Guatemala), *I.C.J. Reports 1953*, pp. 122-23.

[12] IACtHR, *Reports of the Inter-American Commission on Human Rights* (Art. 51 American Convention), Advisory Opinion OC-15/97, Ser. A No. 15, Concurring Opinion of Judge A.A. Cançado, at para. 5.

[13] ICJ, *Case concerning Fisheries Jurisdiction* (Spain v. Canada), Decision of Dec. 4, 1998 on Jurisdiction, available at web site http://www.icj-cij.org, Dissenting Opinion of Vice-President Weeramantry.

exceptions stage of the proceedings. It "is a basic rule of international law and a principle of international relations that a State is not obliged to give an account of itself on issues of merits before an international tribunal which lacks jurisdiction or whose jurisdiction has not yet been established."[14] The State concerned may challenge the competence of the court concerned to consider the matter, or may challenge the admissibility of the specific case. "For this purpose a special procedure – the preliminary objection procedure – exists."[15]

2. Peru deposited its declaration accepting the contentious jurisdiction of the Honorable Court, and became so bound, on January 21, 1981

Peru ratified the American Convention on Human Rights on July 28, 1978. Pursuant to Article 74(2), the Convention had entered into force with respect to Parties thereto on July 18, 1978.

On January 21, 1981, Peru presented to the OAS General Secretariat its declaration, dated October 20, 1980, recognizing the jurisdiction of the Inter-American Court of Human Rights pursuant to the terms of Article 62 of the Convention. In accordance with the terms of Article 62(1), the State indicated that it recognized that jurisdiction as binding, and not requiring special agreement, with respect to all cases relating to the interpretation or application of the Convention. The declaration further expressed: "This recognition of competence is made for an indefinite time and under the condition of reciprocity."

Thus, as of January 21, 1981, Peru signified its intention to be bound by the contentious jurisdiction of the Court and to comply with judgments issued pursuant thereto. Of the conditions permitted pursuant to the terms of Article 62(2), the State invoked only that of reciprocity.

B. The case of Baruch Ivcher Bronstein was properly submitted to the Honorable Court, and proceedings were instituted as of the filing of the application on March 31, 1999

1. All requirements set forth in the Convention for submission of the case to the Honorable Court were met

The Convention sets forth the requirements which must be met for a case to be properly submitted before the Honorable Court. Pursuant to Article 62(3) of the Convention, the contentious jurisdiction of the Honorable Court comprises all cases concerning the interpretation and application of that treaty, provided that the State Party concerned recognizes or has recognized that competence. Additionally, Article 61(1)

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[14] Shabtai Rosenne. *The World Court, What It Is and How It Works*, Martinus Nijhoff, 5th ed. Rev. 1995, at p. 99.

[15] *Id.*

provides that only States Parties and the Commission have standing to submit a case for binding adjudication. Further, Article 61(2) specifies that the procedures set forth in Articles 48, concerning the processing of the petition, and 50, concerning the issuance of the Commission's findings and conclusions to the State concerned, must have been completed. Article 51(1) provides that, once the report described in Article 50 has been transmitted to the State concerned, the case may be submitted to the Honorable Court within three months of the date of transmission.

The foregoing requirements were fully met in the case of Baruch Ivcher Bronstein, by which the Commission seeks a ruling of the Honorable Court with respect to violations of rights protected under Articles 8, 13, 20, 21 and 25 of the Convention, and the undertakings set forth in Article 1(1). As noted above, Peru accepted the compulsory jurisdiction of the Honorable Court on January 21, 1981. The Commission processed the petition pursuant to the specifications of Article 48, before issuing its findings and conclusions as provided for in Article 50. The resulting Report N° 94/98, containing the Commission's recommendations designed to repair the violations established, was transmitted to the State of Peru on December 18, 1998. The State having failed to submit information demonstrating compliance with the recommendations within the time provided, the Commission decided the case should be submitted to the Honorable Court. On March 17, 1999, the State requested an extension of 14 days in which to submit information concerning compliance with the recommendations, expressly acknowledging that this would suspend the three-month period referred to in Article 51(1) to submit the case to the Court. The request was accepted on those terms, with the extension to expire on March 31, 1999. Pursuant to the Commission's determination that the State had failed to implement the recommendations issued, it filed the application with the Honorable Court on March 31, 1999.[16]

By a note of May 10, 1999, Ref: CDH-11.762/002, the Honorable Court addressed the State of Peru, pursuant to its Rules of Procedure, to notify it that the Application had been filed and to transmit to the latter that document and its annexes. Further, the Honorable Court informed the State that it had one month to name its agent and alternate agent, two months to submit any preliminary exceptions, and four months to respond to the application. By a second note of the same date, Ref: CDH-11.762/003, pursuant to its Rules, the Court informed the State that it had 30 days following the appointment of its agent to name an *ad hoc* judge if it wished to do so.

Among the actions taken by the State in response to that notification, by a note dated June 7, 1999, it designated its Agent, Dr. Mario Cavagnaro Basile, and its alternate agent, Dr. Sergio Tapia Tapia. Subsequently, by a note of June 11, 1999, ref. N° 5-9/63, the State requested and received clarification from the Honorable Court (Ref: CDH/S-015) as to the date by which it could appoint an ad hoc judge. It was only on August 4, 1999,

[16] The application was received the same day. *See* acknowledgment of receipt by the Honorable Court, dated April 7, 1999, Ref: CDH-S/259.

that the State transmitted its communication to the Honorable Court returning the application and related documents pursuant to its putative July 9, 1999 "withdrawal" of acceptance of the Court's compulsory jurisdiction. Finally, by a note of August 9, 1999, ref. N° 5-9-N/71, the State notified the Court that it was withdrawing the designation of its Agent and Alternate Agent.

2. Contentious proceedings in the Ivcher case were instituted with the filing of the application on March 31, 1999

The filing of the application is the key event which initiates proceedings before the Inter-American Court of Human Rights, as well as before other international tribunals such as the ICJ or the European Court of Human Rights. Article 32 of the Rules of the Inter-American Court provides for the "Institution of the Proceedings," stipulating that "[f]or a case to be referred to the Court under Article 61(1) of the Convention, the application shall be filed with the Secretariat of the Court in each of the working languages." Pursuant to Article 34 of those Rules the President may request that any deficiencies in an application be corrected. Article 35 stipulates that "the Secretary shall give notice of the application to" the relevant parties, including the respondent State.

Similarly, in the context of a request to the Honorable Court for an advisory opinion, it is the filing of the request which initiates the proceedings:

> Once set in motion the advisory proceedings, and notified the consultation to all member States and main organs of the Organization of American States (OAS), and being the Court already seized of the petition, there is no way to seek to deprive the Court of its competence, not even by "withdrawal" of the original request. .... The Court is already seized of the subject-matter of the petition, and is master of its own jurisdiction.[17]

In the context of the inter-State practice of the ICJ, Article 40(2) of its Statute refers to the respective naming of agents "[w]hen proceedings are initiated by means of an application." It is the filing of that application which makes it possible to determine if the elements necessary to confer jurisdiction are present. "'When a case is submitted to the Court, it is always possible to ascertain what are, at the moment, the reciprocal obligations of the Parties in accordance with their respective Declaration.' It is almost an implication of this dictum that it is not possible to make that ascertainment other than at the moment when a case is submitted to the Court...."[18] Under the practice of the European Court,

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[17] *See* IACtHR, *Advisory Opinion OC-15/97*, *supra*, Concurring Opinion of Judge A.A. Cançado Trindade, para. 7.

[18] ICJ, *Military and Paramilitary Activities in and against Nicaragua* (Nicaragua v. United States of America) Jurisdiction and Admissibility, *I.C.J. Reports 1984*, Separate Opinion of Judge Jennings, at p. 547 (citing *Right of Passage over Indian Territory* case, *I.C.J. Reports 1957*, p. 143).

prior to the changes effected by the entry into force of Protocol 11, pursuant to Rule 32 of Court "A" and Rule 33 of Court "B," proceedings were instituted with the filing of the application by the Commission or by the State having a right to do so under Article 48.

It is necessarily as of the date of filing that the elements necessary to confer jurisdiction must be presented. Once those elements have been presented, the Court is seized of the case by application. In the jurisdictional phase of the *Nottebohm Case*, the ICJ distinguished between the concepts of "seisin" and "jurisdiction," the former depending on the execution of the proper procedural steps for bringing the dispute before the ICJ, as prescribed by its Statute and Rules, as compared to its competence to hear and determine it.[19] Without the measure of procedural competence that only valid and regular seisin can confer, the tribunal would be unable to determine its substantive jurisdiction.[20] Once a court is validly seized of a matter, it alone has the competence to determine the existence and scope of its jurisdiction.

C. Once the Honorable Court became seized of this case, applicable law does not permit Peru to evade that jurisdiction by any subsequent act purporting to have retroactive effect

The Honorable Court became seized of the case of Baruch Ivcher Bronstein with the filing of the Commission's application on March 31, 1999. Pursuant to that seizure, the Honorable Court alone has the competence to determine the existence and extent of its jurisdiction. As will be set forth below, it is a long settled rule of international law that, once an international tribunal is seized of jurisdiction in a particular matter, no subsequent unilateral act of a State can displace that jurisdiction.

Peru cannot effectively "withdraw" from the jurisdiction of the Honorable Court with respect to a contentious case once proceedings have been initiated

When the State of Peru deposited its declaration accepting the contentious jurisdiction of the Honorable Court in 1981, it did so according to the terms of Article 62(1), expressly indicating that its submission to jurisdiction required no special agreement. According to the terms of its putative "withdrawal," which do not conform to the terms of Article 62, the State seeks to rest jurisdiction from the Honorable Court in matters, such as the case of Baruch Ivcher Bronstein, with respect to which the latter was already duly seized, depending on whether the State had decided to file an answer to the application. In other words, Peru seeks to retroactively condition the Court's exercise of its validly conferred jurisdiction on its own subsequent conduct.

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[19] Fitzmaurice, *supra*, at p. 440.

[20] See *id.*

As set forth above, the critical date with reference to which the jurisdiction of an international tribunal is to be determined is the date of its effective seizure of a matter. If the tribunal has jurisdiction on that date, this cannot be affected by subsequent events or acts of the parties.[21] It is a long settled question that such subsequent acts, including the expiration or attempted withdrawal of a declaration of acceptance of contentious jurisdiction under an optional clause during proceedings already initiated, will have no effect on the exercise of that jurisdiction.[22]

For example, in the *Nottebohm Case* before the ICJ, Guatemala had argued that the expiration of its declaration (by reason of the period for which it had been subscribed) one month after an application was filed by Liechtenstein divested the Court of any jurisdiction it may have had at the time of filing. In other words, Guatemala contended that the Court must not only have jurisdiction when first seized of the dispute, but throughout the proceedings. That contention was unanimously rejected:

> At the time when the Application was filed, the Declarations of Guatemala and Liechtenstein were both in force. The regularity of the seising of the Court by this Application has not been disputed. The subsequent lapse of the Declaration of Guatemala, by reason of the expiry of the period for which it was subscribed, cannot invalidate the Application if the latter was regular; consequently, the lapse of the Declaration cannot deprive the Court of the jurisdiction which resulted from the combined applications of Article 36 of the Statute and the two declarations.[23]

This rule is confirmed in, *inter alia*, the *Losinger Co. Case* (1936), the *Anglo-Iranian Oil Co. Case* (1952) and the *Right of Passage Case* (1957).[24] In each of those cases "the declarations of the respondent either expired (the first case) or were denounced (the other two cases) during the proceedings, this fact having no effect on the Court's jurisdiction."[25]

This settled rule and practice flows directly from the language, object and purpose of an optional clause providing for the acceptance of contentious jurisdiction *ipso facto* without special agreement – such as that contained in Article 62 of the American

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[21] *Id.* at p. 444.

[22] Ibrahim Shihata, *The Power of the International Court to Determine its own Jurisdiction* (1965), at p. 164 (citing, *inter alia*, decision of ICJ on jurisdiction in the *Nottebohm Case*).

[23] ICJ, *Nottebohm Case*, *supra*, at pp. 122-23.

[24] In the *Right of Passage Case* the World Court cited its decision in the *Nottebohm Case* in reaffirming: "It is a rule of law generally accepted, as well as one acted upon in the past by the Court, that, once the Court has been validly seized of a dispute, unilateral action by the respondent State in terminating its Declaration, in whole or in part, cannot divest the Court of jurisdiction." *Case Concerning Right of Passage Over Indian Territory* (Portugal v. India), Preliminary Objections, Decision of Nov. 26, 1957, *I.C.J. Reports 1957*.

[25] Shihata, *supra*.

Convention or Article 36 of the Statute of the ICJ. One of the essential rationales of such clauses is to make it possible, through such acceptance of jurisdiction without the need for a further special agreement, for the court concerned to be seized of a matter by means of an application -- "the dispute being concretized in the application."[26] It was pursuant to precisely these terms that Peru accepted the contentious jurisdiction of the Honorable Court, *ipso facto* and not requiring special agreement, thus providing for the Court to be seized of a matter by application, as in the case of Baruch Ivcher Bronstein.

As noted above, it is, moreover, a fundamental principle of law that, once seized of a case, a tribunal is the master of its own jurisdiction. The existence or scope of such jurisdiction cannot, as Peru contends, then be made to depend on the subsequent conduct of a party. This would make the operation and efficacy of the contentious case system under the American Convention contingent upon the vicissitudes of the State's conduct, frustrating the system's very object and purpose, as well as the due expectations of the other Parties and actors affected by that system.

IV. INDEPENDENT OF THE QUESTION OF ITS VALIDITY, THE "WITHDRAWAL" ATTEMPTED BY PERU WOULD NOT IN ANY CASE PRODUCE THE "IMMEDIATE EFFECTS" THE STATE ASSERTS

The Commission considers that the question of jurisdiction in the case of Baruch Ivcher Bronstein can be narrowly and readily addressed based on the considerations set forth above that, once the Honorable Court was seized of the case as of its March 31, 1999 filing, no subsequent unilateral act of the State of Peru could deprive it of jurisdiction. To that extent, the question of the validity and effects of the putative "withdrawal" of the State may be largely irrelevant to the determination of jurisdiction in the present case.

Nonetheless, given that the Court has requested the Commission's observations on the return of the application in this case in the context of that putative "withdrawal," the Commission will proceed to consider the "immediate effects" which the State attributes to its declaration, before addressing the overall validity of the "withdrawal" itself. In this regard, the Commission considers that, even assuming that such a "withdrawal" were valid -- which section V of these observations demonstrates is not the case -- it would not in any event enter into force until a reasonable notification period of one year had elapsed.

The Commission wishes to draw attention to the fact that the State has presented its putative "withdrawal" as "in accordance with the American Convention," that is to say, within the Conventional framework as a whole. It follows that the effects of such "withdrawal" must be assessed pursuant to the rules of interpretation applicable according to general international law as well as the particular rules either expressly or implicitly provided for in the American Convention.

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[26] Shabtai Rosenne, *The Law and Practice of the International Court*, 2nd ed. 1985, at p. 411.

The Convention contemplates a specific rule of interpretation in Article 29(a). This rule requires that none of the provisions of the treaty should be interpreted as "permitting any State Party, group, or person to suppress the enjoyment or exercise of the rights and freedoms recognized in this Convention or to restrict them to a greater extent than is provided for herein." This rule, which cannot itself be read restrictively, not only excludes any interpretation that could result in the suppression of the substantive guarantees enshrined in the Convention but also covers any interpretation that could suppress or restrict the procedural means to realize such guarantees.

Consequently, the effects of Peru's putative "withdrawal" must be consistent with a non-restrictive interpretation of the rules governing the enforcement of the rights and guarantees protected under the Convention. Such rules include those relating, in general, to the expression of consent to be bound by the treaty and, in particular, by the jurisdiction of the Court. Additionally, the effects of the putative "withdrawal" must not be interpreted so as flout general principles of law such as non-retroactivity and good faith informing any mechanism for the administration of justice. The Commission considers that the interpretation asserted by the State would result in the suppression of the right to access the mechanism for judicial enforcement provided by the Convention in violation of the aforementioned rules and principles and should therefore be rejected.

Accordingly, the present section of these observations sets forth the Commission's view that, under any theory of law which might be asserted as a basis for the putative "withdrawal" of jurisdictional acceptance by Peru – whether invoking general principles of law, drawing an analogy to Article 78 of the Convention, or construing provisions of treaty law -- a reasonable period of one year of advance notice would be required before the "withdrawal" would become effective. Further, as will be explained, the Commission considers that the effect on the temporal scope of the jurisdiction of the Honorable Court would be the same under any of these approaches.

A. Pursuant to general principles of law, including *inter alia*, the principles of nonretroactivity and good faith, the "withdrawal" of acceptance by Peru cannot have the "immediate" effects asserted by the State

The return of the Commission's application and other documents relating to the Ivcher case appear to confirm Peru's intention to give immediate and retroactive effect to its putative "withdrawal" from the Honorable Court's contentious jurisdiction. The Commission has presented its views, *supra*, on the Honorable Court's jurisdiction to examine this particular case, and such reasoning is valid and applicable with respect to other cases submitted for adjudication before the date of the putative withdrawal.

In addition, the Commission submits that, even assuming its legal validity, a putative "withdrawal" of this or any other kind could never affect claims of violation already introduced into the Convention enforcement process against States Parties that had accepted the compulsory jurisdiction of the Honorable Court. The position of the State regarding the far reaching effects of its putative "withdrawal" not only violates basic

principles of nonretroactivity and good faith, but also disregards the principles that inform the structure, functioning and effectiveness of the adjudication system created by the American Convention.

Although the mechanism for acceptance of the jurisdiction of the Honorable Court as spelled out in Article 62(2) was inspired by that established for the judicial settlement of inter-State disputes by the ICJ Statute, it cannot be disassociated from the particular process of adjudication envisaged in the American Convention. The symbiotic nature of this jurisdictional process, incorporating the participation of both the Commission and the Court, has been enshrined in the Convention and its interpretation by the Honorable Court, and is grounded on general principles of law such as good faith and legal certainty.

The examination of claims regarding the alleged violation of the States Parties' undertakings is first instituted before the Commission, either by a petitioner or by the victim himself/herself.[27] Once the proceedings for the examination of a case have been instituted before the Commission, the procedure established in Articles 48 to 50 -- involving submissions by the parties and the decision by the Commission on matters relating to jurisdiction and merits -- must be pursued and exhausted.[28] As the Honorable Court has indicated, the Commission has conciliatory functions that must be made available to the parties before adopting a decision regarding the possible violation of the Convention. Once such a decision is adopted, only those claims raised and decided upon by the Commission can be submitted for final binding adjudication. The Convention also makes provision for the extension of the Honorable Court's jurisdiction to cases which are still being examined pursuant to Articles 48 to 50, in the form of the adoption of provisional measures to avoid irreparable damage to persons in situations of extreme gravity and urgency arising in relation to cases not yet submitted to its jurisdiction. In fact, the expedient and effective exercise of this function has become one of the defining

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[27] The Honorable Court established in the *Matter of Viviana Gallardo et al.* that the Convention gives the Commission attributes connected with the functions that pertain to the Court, that by their nature must be completed before the latter begins to hear a particular matter. The Honorable Court considered that the treaty not only authorizes the Commission to receive individual complaints, but also entrusts it with the initial phase of the investigations into the allegations. The Commission is the entity to which victims of violations of human rights and other persons referred to in Article 44 can resort directly in order to present their complaints and allegations. The Convention provides liberal *locus standi* -- the wisdom of which has been confirmed by long practice -- to file petitions with the Commission in order to secure access to all persons under the jurisdiction of the States Parties whose rights have been allegedly affected. The decision to eventually submit a matter to the Court remains, however, with the Commission. Therefore the process before the Commission is the channel through which the Convention gives the individual the possibility to activate the system for the protection of human rights. IACtHR, *In the Matter of Viviana Gallardo et al,* Decision of November 13, 1981, No 101/81, Ser. A, paras. 22-23.

[28] It must be noted that, in order for a case to be examined by the Court, it must first be found admissible by the Commission. A decision to declare a case inadmissible at this stage bars the possibility that the matter may eventually be submitted to the Court for determination.

features of the jurisdiction of the Court *vis-à-vis* other international organs for the protection of human rights.

The Commission notes that underlying these conventional rules are a number of general principles of law supporting the rationale of an organic and integrated jurisdiction within the Inter-American system. On the one hand, petitioners and/or victims subject to the jurisdiction of States Parties filing an acceptance under Article 62 have a legitimate expectation of instituting a process that may well result in a determination of international responsibility and a decision on reparations by the Honorable Court. On the other hand, once a claim of violation is brought before the Commission, States Parties that have accepted the Honorable Court's jurisdiction are aware of the fact that the latter is competent to order the adoption of provisional measures when necessary, and may eventually adjudicate the matter as a whole. In fact, the Commission's intention to refer a particular case to the Court may be expressed at any time during the processing of the matter, or in its decision thereon pursuant to Articles 50(1) and (2). It follows that, in order to secure its effectiveness, the functioning of the system of protection under the Convention must be interpreted so as to ensure respect for the principles of good faith and legal certainty.

The Commission believes that the withdrawal of an unconditional acceptance of the compulsory jurisdiction of the Honorable Court does not immediately affect the integrated jurisdiction of the Commission and Court to examine future claims of violation of the Convention. Even assuming that it were possible to interpret the system of protection envisaged in the American Convention so as to allow for the withdrawal of an unconditional acceptance of jurisdiction, such withdrawal could never enter into effect instantaneously. This interpretation flows from the general principles of law that inform the requirement of due compliance with international obligations in general.

Declarations of acceptance of jurisdiction establish a series of multilateral engagements with other States accepting the same obligation. Some of the declarations deposited with the OAS Secretary General expressly refer to this aspect in accepting the Court's jurisdiction to examine inter-State complaints. However, the defining feature of such declarations is the acceptance of contentious jurisdiction to adjudicate claims submitted by individuals after they have been declared admissible and examined by the Commission. The States Parties thereby assume the obligation to abide by the jurisdiction of the Court and comply with its judgment. The creation and performance of these legal obligations must be governed by the principle of good faith.

"Trust and confidence are inherent in international cooperation ... just as the very rule of *pacta sunt servanda* in the law of treaties is based on good faith, so also is the binding character of an international obligation assumed by unilateral declaration."[29] When the parties concerned take cognizance of unilateral declarations they must be able to place

[29] ICJ, *Nuclear Tests Cases, I.C.J. Reports 1974*, para. 49.

confidence in them and are thus entitled to require that the obligation undertaken be respected.[30] The Commission submits that, even if tested under the more general framework of the rules applicable to international disputes between States, the "withdrawal" of such a declaration would not affect the integrated jurisdiction of the Commission and the Court in the way asserted by the State.

International practice indicates that there is no rule supporting a right of immediate termination of declarations with indefinite duration.[31] Therefore the Commission considers that, even assuming the validity of the "withdrawal," the principles governing the effects of acceptance of jurisdiction suggest that such a declaration could not be deemed to become effective until a reasonable time has lapsed. Under this reasoning, the State would remain bound to abide by the contentious jurisdiction and judgments of the Court during that reasonable period.

The rule in the Convention governing its denunciation provides a reasonable parameter for determining the date as of which the withdrawal of an unqualified acceptance under an optional clause could affect the Court's temporal jurisdiction over presumed violations of the treaty. The temporal effect of Peru's putative "withdrawal" could never release the State from its obligations pursuant to the optional clause under Article 62 within a shorter period than that provided for the denunciation of the Convention *in toto* under Article 78. Therefore the Commission considers that the putative "withdrawal" should in no case be deemed to enter into effect before the period of 12 months from the date of its effective notification.

It is also the Commission's view that Peru remains bound by the Court's compulsory jurisdiction with respect to any act or omission that may constitute a violation of the Convention that took place prior to the entry into force of its "withdrawal."[32] When Peru

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[30] *Id.*

[31] *See Military and Paramilitary Activities in and against Nicaragua, supra,* Opinion of the Court, para. 63.

[32] The position of the Commission with respect to the conclusion of the temporal jurisdiction of the Honorable Court is consistent with the principles the latter has applied to sustain jurisdiction over acts that have occurred subsequent to the initiation of that jurisdiction, for example, in the cases of *Genie* and *Blake*. These cases reaffirm that the Honorable Court may exercise its adjudicatory authority over any act, omission or effect allegedly in violation of a protected right which occurs subsequent to the entry into force of acceptance of jurisdiction by the State concerned. Accordingly, it is the act which is the essential trigger for jurisdiction. As long as that act, omission or effect takes place within the ambit of the Honorable Court's temporal jurisdiction, the Court is competent to examine it. *See generally, Genie Lacayo Case,* Merits, Judgment of January 29, 1997, Ser. C No. 30, paras. 76-81 (examining judicial proceedings arising as a result of killing by State agents, not itself directly at issue, as from the approximate date of the State's acceptance of jurisdiction forward to their conclusion). *See also, Blake Case,* Preliminary Exceptions, Sentence of July 2, 1996, Ser. C No. 27, paras. 34-40, affirming the jurisdiction of the Honorable Court to examine "effects and actions subsequent to" the acceptance of jurisdiction by the State, *id.* para. 40; Merits, Sentence of January 24, 1998, Ser. C No. 36,

accepted the jurisdiction of the Court on January 21, 1981, it consented to the Court's compulsory jurisdiction to interpret and apply the Convention pursuant to the mechanisms provided for thereunder in relation to any acts carried out by the State subsequent to that acceptance date. Pursuant to that act of acceptance, the Court's supervisory jurisdiction became an intrinsic component of the guarantee of Convention-based rights and freedoms for individuals in Peru.

The Commission considers that, in accordance with principles of legal certainty, juridical security and good faith, the jurisdiction of the Court should be viewed as remaining in force until the expiry of the notification period pursuant to which the State's putative "withdrawal" would be deemed to take effect. The principles underlying this approach are reflected in Article 78(2) of the Convention, which provides that a State remains bound by its obligations under the treaty with respect to acts taken by the State prior to the effective date of a denunciation of the Convention by that State. The Commission believes these principles should apply with equal force to a withdrawal from the jurisdiction of the Court. To hold otherwise would be to permit Peru, by means of a "withdrawal," to bar the Court from interpreting and applying the Convention to acts perpetrated at a time when the State was bound by the Court's jurisdiction. This would, in effect, permit Peru to retroactively immunize its conduct from scrutiny by the Court. Such a result would undermine the effective enforcement of rights and freedoms in Peru, and to this extent contravene the object and purpose of Convention. Further, it would create an anomalous situation: a State choosing to denounce the Convention would remain bound by its Convention obligations with respect to acts committed prior to the effective date of denunciation, including obligations relating to the Honorable Court's jurisdiction, while a State choosing to withdraw from the jurisdiction of the Court would be permitted to evade its obligations with respect thereto in regard to acts committed prior to that withdrawal.

B. Under the Convention regime, the valid denunciation of undertakings provided for in Article 78 requires a reasonable period of advance notification of one year

Article 78 of the Convention speaks to the right of a State Party to denounce the Convention as a whole pursuant to certain stipulations, including that notice be given one year in advance. This is the only provision of the Convention to speak to the question of denunciation. As noted above, pursuant to Article 78(2), such denunciation has no effect on the obligations of the State concerned with respect to any act that may constitute a violation of its undertakings prior to the entry into force of that denunciation. Were Article 78 deemed to set forth a normative regime applicable by analogy to other types of denunciation under the Convention, and assuming such denunciations were permissible, the one-year period of notification would necessarily apply to any such denunciation.

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paras. 53-67, reaffirming that the disappearance of Nicholas Blake initiated a continuing situation, which produced facts and effects subsequent to the recognition of jurisdiction by the State, thereby authorizing examination of those facts and effects by the Court, *id.*, para. 67.

Accordingly, were Peru's putative "withdrawal" of its acceptance of jurisdiction deemed to fall within the ambit of State action permissible under the general principles of Article 78, it would not in any case take effect until July 9, 2000. Moreover, Peru would continue to be bound by all its obligations with respect to the jurisdiction of the Court in relation to any act potentially constituting a violation of its undertakings prior to the entry into force of its "withdrawal." This includes its obligation under Article 68 of the Convention to comply with judgments rendered pursuant to that jurisdiction.

The objective of a notification period such as that under consideration is to place those parties whose interests may be affected on reasonable notice. Pursuant to the presentation of a withdrawal of acceptance, those individuals subject to the control of the State concerned, as well as other States Parties, the Commission and the Honorable Court itself would be placed on notice that the compulsory jurisdiction of the latter would cease to apply to acts occurring after the entry into force of that withdrawal.

Assuming the validity of such a withdrawal, the State concerned would necessarily continue to be bound, without interruption, by all obligations under the Convention apart from those with respect to the compulsory jurisdiction of the Court. Accordingly, petitions complaining of alleged violations would continue to be filed with the Commission under the terms and subject to the requirements of the Convention. With respect to the effective date of termination of the compulsory jurisdiction of the Honorable Court, the following considerations would apply. The Honorable Court would continue to be competent to exercise jurisdiction with respect to any act that took place while the State remained subject to that jurisdiction, including during the one-year period of notification of withdrawal. The Commission would continue to be obliged to consider the possibility of submitting cases falling within that temporal limit to the Court – assuming, *inter alia*, that the requirements of admissibility were met, the procedures under Articles 48 and 50 had been completed, and that this alternative would be most favorable to the protection of human rights.

As will be explained in section V, however, the Commission considers that the plain meaning, as well as the object and purpose of Article 78 within the context of the Convention indicate that the putative "withdrawal" of Peru's acceptance of jurisdiction would not fall within the ambit of action authorized thereunder.

C. The alternative reference to the regime of international treaty law would impose the same reasonable period of one year of advance notification

While the immediate effect of certain actions may be expressly provided for in particular treaty provisions, such effect may not be assumed in the absence of the manifestation of the intention of the parties. In the context of its inter-State case practice, and assuming that the withdrawal of an acceptance under Article 36 of its Statute may be valid, the ICJ has established that:

> the right of immediate termination of declarations with indefinite duration is far from established. It appears from the requirements of good faith that they should be treated, by analogy, according to the law of treaties, which requires a reasonable time for withdrawal from or termination of treaties that contain no provision regarding the duration of their validity.[33]

More specifically, Article 56(2) of the Vienna Convention on the Law of Treaties (hereinafter "VCLT") provides that the State Party concerned "shall give not less than twelve months' notice of its intention to denounce or withdraw." In other words, Article 56(2) establishes a general default period of reasonable notice where denunciation or withdrawal is not expressly provided for, but is nonetheless legally permissible. The objective of the disposition is to ensure that, where such action takes place outside the express terms of the instrument, there is, in the inter-State context, "sufficient time left for discussion and negotiation before the notice takes effect."[34]

For reasons that will be discussed in section V, *infra*, the Commission considers that neither the analogy to Article 78 of the Convention, nor to the inter-State practice of the ICJ supplies the answer to the larger question of the validity of the "withdrawal" attempted by Peru. The foregoing considerations simply draw attention to the point that, even assuming that action were deemed permissible, the principles of good faith, juridical security and the stability of the Convention case system as a whole would require a minimum period of reasonable notice.

Even if treaty law is not applied directly and rigidly to such declarations of acceptance of the Honorable Court's jurisdiction, divining their intent and meaning requires reference to the basic principles underlying that regime, particularly insofar as that interpretation is applied in the context of rights and duties under the American Convention. For example, in considering the principle of good faith and juridical security in the context of the presentation of individual cases before the Honorable Court, it will be noted that the State concerned will generally be on notice of the possibility of that submission in advance of filing. The objectives of the system of adherence to jurisdiction *ipso facto* and not requiring special agreement (in contrast to that allowing acceptance by special agreement) would essentially be negated were the State concerned able to select whether to continue to be bound vis-à-vis each particular case by invoking its immediate withdrawal from jurisdiction. Moreover, in contrast to the inter-State practice of tribunals such as the ICJ, the contentious jurisdiction of the Honorable Court has to date been exclusively concerned with the protection of the rights of individuals. The question of reasonable notice in this regard goes to the stability and preservation of the expectations of individuals, other States Parties and the organs of supervision.

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[33] *Military and Paramilitary Activities in and against Nicaragua*, *supra*, para. 63.

[34] Sinclair, *supra*, at 188, *citing United Nations Conference on the Law of Treaties, Official Records, First Session* (A/Conf.39/11), 59th meeting (Vallat).

It is for the foregoing reasons, among others, that the right to denounce the Convention as a whole – expressly contemplated in Article 78 – cannot be exercised absent the one year notification period, and has no effect on a State's obligations with respect to any act committed up to the expiry of that period. The State concerned necessarily continues to be bound by its undertakings, and by the full jurisdiction of the organs of supervision in relation to any act committed up to the effective date. Were the putative "withdrawal" of Peru deemed to apply so as to divest the Honorable Court of jurisdiction with immediate effect, this would give rise to an anomaly with respect to the regime established in Article 78, and would enable the State to circumvent fundamental safeguards which apply to any valid denunciation under the terms of that Article.

V. THE PUTATIVE "WITHDRAWAL" BY PERU OF ITS ACCEPTANCE OF THE JURISDICTION OF THE HONORABLE COURT IS INCOMPATIBLE WITH THE TERMS OF THE AMERICAN CONVENTION, AND INVALID AS A MATTER OF LAW, AND OF NO EFFECT

As noted in the introduction of these observations, the challenge to the jurisdiction of the Honorable Court posed by Peru's return of the application filed in the case of Baruch Ivcher Bronstein pursuant to its putative "withdrawal" from that jurisdiction raises certain questions of first impression. The question of the effect of a unilateral termination of an unconditional acceptance of jurisdiction under an optional clause has only rarely arisen in the practice of international tribunals. Accordingly, it has largely been relegated to the realm of theory,[35] with no settled answer having been brought forth.

To summarize the positions that will be set forth in this section, the Commission considers that the norms of the inter-American human rights system, as well as those of international law, indicate that the "withdrawal" attempted by Peru should be deemed invalid as a matter of law and of no effect. Our regional system provides only one procedure enabling a Party to terminate, denounce or withdraw from its Convention-based undertakings, namely that set forth in Article 78 to denounce the treaty as a whole, subject to applicable requirements. The text contemplates no alternative procedure. Interpreting this text under the rules of international human rights law and in accordance with the object and purpose of the Convention, the Commission finds no legal basis to support the putative "withdrawal" by Peru of its unconditional acceptance of jurisdiction. The drafters of the Convention established a unitary system of rights and undertakings on the multilateral plane, not a series of inter-State relationships of an essentially contractual and reciprocal nature. While unilateral withdrawal from obligations entered into unconditionally in the realm of inter-State relations of the latter category may be permissible under certain circumstances, as the following analysis will set forth, such an action finds no legal basis in the distinct regime of human rights law, and is incompatible with the object and purpose of the Convention.

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[35] Rosenne, *The Law and Practice of the International Court*, *supra*, at p. 417.

A. The putative "withdrawal" by Peru of its acceptance of the Honorable Court's jurisdiction is not expressly provided for in the Convention

As noted above, pursuant to Article 62(1) of the Convention, a State Party may elect at any time to accept the compulsory jurisdiction of the Honorable Court "on all matters relating to the interpretation or application of this Convention." Pursuant to Article 62(2), the State concerned may further elect to do so "unconditionally, on the condition of reciprocity, for a specified period, or for specific cases." The reference to reciprocity applies only to the possibility of inter-State cases, which is not at issue.

In the present case, while Peru accepted the jurisdiction of the Honorable Court pursuant to the permissible condition of reciprocity, it invoked no condition of temporal application, stating only that its recognition was made for an indefinite period. Nor did Peru attempt to reserve a right to denounce its recognition at a future time. While a State Party has full liberty to invoke the permissible conditions set forth in Article 62(2) when accepting jurisdiction, that provision provides no procedure for withdrawing an acceptance of jurisdiction made absent such invocation.

Article 78 is the sole provision of the Convention which speaks to the possibility of termination, denunciation or withdrawal from undertakings contracted thereunder. Under Article 78(1), a State Party may denounce the treaty as a whole, pursuant to a one-year period of advance notification. Pursuant to Article 78(2), such denunciation has no effect on the obligations of that State in relation its acts committed up to the expiration of that period of notice. The documents submitted by Peru indicate that its attempted "withdrawal" relates, in its view, only to the jurisdiction of the Honorable Court, and not to the Convention as a whole. The State cites no textual basis for its action, nor does the Commission consider that one can be established.

B. The putative "withdrawal" of acceptance by Peru finds no legal basis in the applicable regime of international human rights law

1. International human rights law, by its nature, has specialized attributes and has developed corresponding canons of construction

The international law of human rights has one overriding objective, the protection of individual rights and liberties. In light of that objective, this legal regime has specialized attributes which are at times distinct from those of other branches of international law. As the Honorable Court has characterized:

> modern human rights treaties in general, and the American Convention in particular, are not multilateral treaties of the traditional type concluded to accomplish the reciprocal exchange of rights for the mutual benefit of the contracting States. Their object and purpose is the protection of the basic rights of individual human beings irrespective of their nationality, both against the State of their nationality and all other contracting states. In

> concluding these human rights treaties, the States can be deemed to submit themselves to a legal order within which they, for the common good, assume various obligations, not in relation to other States, but toward all individuals within their jurisdiction.[36]

"The distinct character of these treaties," the Honorable Court noted, had been recognized by the European Commission on Human Rights and the ICJ, among other bodies, as well as having found expression in the Vienna Convention itself.[37]

The European Commission had affirmed in the first years of its practice that "the purpose of the High Contracting Parties in concluding the Convention was not to concede each other reciprocal rights and obligations in pursuance of their individual national interests but to realize the aims and ideals of the Council of Europe" and in this way "to establish a common public order of the free democracies of Europe with the objective of safeguarding their common heritage of political traditions, ideals, freedom and the rule of law."[38] The European Court of Human Rights has similarly established that: "[u]nlike international treaties of the classic kind, the Convention comprises more than mere reciprocal engagements between contracting States. It creates, over and above a network of mutual, bilateral undertakings, objective obligations which, in the words of the preamble, benefit from a `collective enforcement.'" [39]

The ICJ, for its part, had long ago established that, under international human rights treaties, States contracted obligations to the international community as a whole. With respect to the Genocide Convention, the ICJ indicated that:

> its object on one hand is to safeguard the very existence of certain human groups and on the other to confirm and endorse the most elementary principles of morality. In such a convention, the contracting States don't have any interests of their own; they merely have, one and all, a common interest, namely the accomplishment of these high purposes which are the *raison d'etre* of the convention. Consequently, ... one cannot speak of

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[36] IACtHR, *The Effect of Reservations on the Entry into Force of the American Convention* (Arts. 74 and 75), Advisory Opinion OC-2/82 of Sept. 24, 1982, Ser. A No. 2, at para. 29.

[37] *Id.*, at paras. 29-30, *citing*, Eur. Comm. H.R., Austria v. Italy, App. No. 788/60, *4 Eur. Yearbook of H.R.* 116, at 140 (1961); ICJ, *Opinion on Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* (1951 I.C.J. 15); and, with respect to the Vienna Convention, citing generally, E. Schwelb, "The Law of Treaties and Human Rights," *16 Archiv des Volkerrechts 1* (1973), reprinted in *Toward World Order and Human Dignity* at 262 (W.M. Reisman & B. Weston, eds. 1976).

[38] Eur. Comm. H.R., *Austria v. Italy*, Appl. 788/60, Decision on Admissibility, *Yearbook*, 1961, at p. 138.

[39] Eur. Ct. H.R., *Ireland v. United Kingdom*, Judgment of 18 Jan. 1978, Ser. A Vol. 25, para. 239.

> individual advantages or disadvantages to States, or of the maintenance of a perfect contractual balance between rights and duties. The high ideals which inspired the Convention provide, by virtue of the common will of the parties, the foundation and measure of all its provisions.[40]

Given the nature of these treaties, in particular their object and purpose and the intention of the States concerned in becoming Parties, corresponding specialized cannons of construction have necessarily developed with respect to their interpretation – again sometimes distinct from those of other branches of international law. With respect to interpretation generally, the overriding principle is necessarily that of efficacy. As stated by the Honorable Court:

> [t]he object and purpose of the America Convention is the effective protection of human rights. The Convention must, therefore, be interpreted so as to give it its full meaning and to enable the system for the protection of human rights entrusted to the Commission and the Court to attain its "appropriate effects."[41]

Similarly, the European Court has indicated on many occasions that "the object and purpose of the [European] Convention as an instrument for the protection of individual human beings require that its provisions be interpreted and applied so as to make its safeguards practical and effective."[42]

The standards of interpretation applicable in the law of human rights differ from those of classical interr ational law most especially with respect to the non-reciprocal nature of human rights treaties. To cite an example, the Honorable Court has noted that paragraph 20(2) of the VCLT is inapplicable to the construction of reservations under the American Convention because the object and purpose of the instrument is not the exchange of reciprocal rights.[43] To cite another example, the European Commission of Human Rights has established that "the general principle of reciprocity in international law and the rule, stated in Article 21, para. 1" of the VCLT, relating to bilateral relations under a multilateral treaty "do not apply to the obligations under the European Convention on Human Rights, which are `essentially of an objective character" being designed to protect the rights of individuals as against the act of any Party, rather than "to create subjective and reciprocal rights for the High Contracting Parties themselves."[44] This finding is

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[40] ICJ, *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, ICJ Reports 1951*, at pp. 23-4.

[41] IACtHR, *Velásquez Rodríguez Case*, Preliminary Objections, *supra*, para. 30.

[42] Eur. Ct. H.R., *Soering v. United Kingdom*, Judgment of 7 July 1989, Ser. A Vol. 61.

[43] *Advisory Opinion OC-2/82*, *supra*, para. 27..

[44] *France, Norway, Denmark, Sweden and the Netherlands v. Turkey*, Apps. 9940-9944 Decision of 6 Dec. 1983 on Admissibility, 35 D&R 143, at para. 39.

particularly noteworthy for having been taken in the context of deciding the admissibility of an inter-State denunciation of human rights violations. The European Commission further noted in this regard that a Party acting as a complainant in such an instance "is not to be regarded as exercising a right of action for the purpose of enforcing its own rights, but rather as bringing before the Commission an alleged violation of the public order of Europe."[46]

One might also note relevant instances of interpretation in the practice of the UN Human Rights Committee, for example, the considerations set forth in its General Comment 24 on issues relating to reservations under the ICCPR. Taking into account the fundamental distinctions referred to above, the Committee indicated that "[a]lthough treaties that are mere exchanges of obligations between States allow them to reserve inter se application of rules of general international law, it is otherwise in human rights treaties, which are for the benefit of persons within their jurisdiction."[48] Pursuant to its analysis, the Committee indicated that reservations incompatible with the object and purpose of the Covenant, including those purporting to limit or thwart its own supervisory role within that system, would be unacceptable.[47]

The decisions issued in two recent cases concerning the application and interpretation of reservations to the acceptance of jurisdiction under optional clauses illustrate how such distinctions in legal regimes apply in practice. In the *Case concerning Fisheries Jurisdiction* (Spain v. Canada), concerning a subject matter reservation contained in a modified declaration of acceptance submitted by the respondent, the ICJ established that, within the inter-State context, a State could freely modify its declaration of acceptance, and even impose limitations more ample than those contemplated in its prior declaration. Such limitations formed an integral part of the State's acceptance of ICJ jurisdiction, and could not be severed therefrom.[48] It is noteworthy that two of the judges expressly indicated that certain findings might have been different under the distinct regime of human rights law. In his separate opinion, President Schwebel noted that a reservation might be severable from a declaration of acceptance of jurisdiction "in respect of certain human rights conventions."[49] In his dissent, Judge Bedjaoui referred more specifically to the possibility that a reservation incompatible with the provisions of the European Convention on Human Rights could be severed from a declaration of acceptance of the

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[45] *Id.*, para. 40.

[46] United Nations Human Rights Committee, General Comment No. 24, *reprinted in Compilation of General Comments and General Recommendations adopted by Human Rights Treaty Bodies*, HRI/GEN/1/Rev.3, 15 Aug. 1997, at para. 8.

[47] *See id.* paras. 10-11.

[48] *See generally, Case concerning Fisheries Jurisdiction, supra*, paras. 39-54.

[49] *Id.*, Separate Opinion of President Schwebel, para. 10.

jurisdiction of the European Court without invalidating it, and cited the *Loizidou case* as authority on point.[50]

The case of *Loizidou v. Turkey* before the European Court of Human Rights provides a marked contrast to that of the *Fisheries Jurisdiction* case. In *Loizidou*, the European Court initiated its analysis of a reservation purporting to subject Turkey's acceptance of the compulsory jurisdiction of that Court to a territorial restriction by recalling that human rights treaties create "objective obligations" over and above the exchange of "mere reciprocal engagements between States."[51] Accordingly, while a State was free to invoke the conditions specified in Article 46 of the European Convention at the time of its acceptance of jurisdiction, the applicable legal regime provided no basis for the imposition of restrictions not provided for therein.[52] Because the limitation attempted by the respondent State was incompatible with the object and purpose of the Convention regime, the Court deemed it severed from the State's declaration of acceptance.[53]

2. The putative "withdrawal" of Peru from the jurisdiction of the Honorable Court must be construed in light of this legal regime and its canons of construction

The election of a State Party to accept the compulsory jurisdiction of the Honorable Court is not simply an offer to other States Parties to participate in and be bound by a mechanism for the judicial resolution of inter-State disputes. Rather, it is an undertaking to partake in and be bound by the jurisdictional enforcement component of the regional human rights system. In this regard, the qualification of the act of acceptance under the optional clause of the American Convention is distinct from that under the optional clause of the ICJ. Rather, it is comparable to that of acceptance of jurisdiction under the optional clause of Article 46 of the European Convention prior to the changes effectuated pursuant to the entry into force of Protocol 11.

In the same way that the acceptance of jurisdiction in the inter-American human rights system does not simply "establish a consensual bond and the potential for a jurisdictional link with other States,"[54] as it is characterized in the practice of the ICJ, neither is withdrawal of that acceptance merely the dissolution of that "consensual bond." Consequently, while the withdrawal of an offer to enter into such a consensual bond may be revocable due to the nature of the relationship and interests involved, a distinct set of considerations applies within the inter-American human rights regime. Within the inter-

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[50] *Id.*, Dissenting Opinion of Judge Bedjaoui.

[51] Eur. Ct. H.R., *Loizidou v. Turkey*, App. No. 15318/89, Decision of 23 March 1995, Ser. A No. 310, at para. 70; *see also*, para. 68 (distinguishing practice of the ICJ).

[52] *Id.*, paras. 75-89.

[53] *Id.*

[54] *Case concerning Fisheries Jurisdiction*, *supra*, para. 46.

American system, the attempted withdrawal of an unconditional acceptance of jurisdiction pursuant to Article 62 seeks to revoke an action which, once taken, became a Convention based undertaking to respect the jurisdiction of the Honorable Court "on all matters relating to the interpretation or application of this Convention," and to be bound by decisions rendered thereunder. The obligations arising as a result of that jurisdiction have as their ultimate objective the protection of individual rights, and as such, do not simply flow from State to State, but from the State concerned to the regional community and other States Parties generally, and to the individuals subject to its jurisdiction specifically. In this respect, the putative "withdrawal" of acceptance by the State is more analogous to a partial denunciation of its Convention undertakings.

Under treaty law, Article 42(2) of the VCLT ensures juridical security by providing that the termination or denunciation of a treaty "may take place only as a result of the application of the provisions of the treaty or of the present Convention." Where an instrument contains no provision whatsoever regarding denunciation or withdrawal, Article 56(1) of the VCLT provides that it shall be subject to neither, unless it can be "established that the parties intended to admit" that possibility, or that may "be implied by the nature of the treaty." It was pursuant to this context that the United Nations Human Rights Committee issued its General Comment No. 26, establishing that the International Covenant on Civil and Political Rights "did not contain any provision regarding its termination and does not provide for denunciation or withdrawal." Consequently, "international law does not permit a state which has ratified or acceded or succeeded to the Covenant to denounce it or withdraw from it." Soon after the issuance of that Comment, upon receiving a "notification of withdrawal" from the Covenant by the Democratic People's Republic of Korea, the UN Secretary General expressed that such a "withdrawal" was not possible due to the "absence of a withdrawal provision in the Covenant and the inapplicability to the Covenant of the general provisions of international law permitting unilateral withdrawal from treaties, including the provisions codified in the 1969 Vienna Convention on the Law of Treaties."

With respect to the possibility of partial denunciation (separability), Article 44 of the VCLT provides that the right of a party to denounce or withdraw may only be exercised with respect to the treaty as a whole, unless the text provides otherwise or the parties so agree. In other words, if the separability of the provisions for the purposes of denunciation was not contemplated by the Parties, the presumption will be against it.[55] This presumption serves to protect the integrity of the instrument, in light of the intention of Parties. As will be explained in the following section, the Commission considers that this presumption cannot be overcome with respect to the putative "withdrawal" of Peru in light of the object and purpose of the Convention. Regardless of how that "withdrawal" is characterized under the applicable legal regime, the Commission submits that it is contrary to the object and purpose of the American Convention, and consequently of no effect.

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[55] *See generally*, Sir Ian Sinclair, *The Vienna Convention on the Law of Treaties* (2nd ed. 1984), p. 166.

3. The putative "withdrawal" of acceptance is contrary to the object and purpose of the American Convention

The American Convention was adopted, as set forth in the preamble, pursuant to the intention of the drafters to "consolidate in this hemisphere, within a framework of democratic institutions, a system of personal liberty and social justice based on respect for the essential rights of man." The application and interpretation of its provisions must take as their point of departure the need to make its protections practical and effective:

> The Convention has a purpose –the international protection of the basic rights of human beings-- and to achieve this end it establishes a system that sets out the limits and conditions by which the States Parties have consented to respond on the international plane to charges of violations of human rights. This Court, consequently, has the responsibility to guarantee the international protection established by the Convention within the integrity of the system agreed upon by the States. This conclusion, in turn, requires that the Convention be interpreted in favor of the individual, who is the object of international protection, as long as such an interpretation does not result in a modification of the system.[56]

In considering the object and purpose of the Convention, note must be taken of its design. The inter-American human rights system is intended to bring about the progressive engagement of member States with the system of undertakings and the corresponding enforcement mechanisms provided. All member States are bound by the jurisdiction of the Commission through the OAS Charter and American Declaration. That jurisdiction is automatic, and may be terminated only through withdrawal from the OAS system. Member States may elect to enhance their engagement by becoming a Party to the American Convention, and may elect at that time whether to attach reservations consistent with the treaty. Parties may further enhance that commitment by agreeing to accept the compulsory jurisdiction of the Honorable Court, and may elect at that time to do so conditionally or unconditionally. A Party may thus elect to enter the Convention system, and elect to become subject to the Honorable Court's jurisdiction. Once a State accepts that jurisdiction unconditionally, it must be deemed to be so bound. The Convention makes no provision for the progressive dimunition of Party undertakings, such as the partial denunciation of obligations thereunder.

The case system, in particular, plays a role of special importance in the inter-American human rights system:

> the [American] Convention, unlike other international human rights treaties, including the European Convention [as originally configured], confers on private parties the right to file a petition with the Commission against any

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[56] IACtHR, *In the Matter of Viviana Gallardo, supra*, para. 16.

> State as soon as it has ratified the Convention. .... This structure indicates the overriding importance the Convention attaches to the commitments of the States Parties vis-a-vis individuals, which can be readily implemented without the intervention of any other State.[57]

The Honorable Court, in turn, plays a crucial role within that system geared to protect the essential rights of individuals. From the moment a State accepts the compulsory jurisdiction of the Honorable Court, the protections available to individuals subject to its control are amplified. Thenceforth, the rights of those individuals will be subject to binding judicial supervision and control by the Honorable Court.

A State's acceptance of the compulsory jurisdiction of the Honorable Court makes it possible for the latter to play its full role as the jurisdictional organ of supervision within the enforcement system of the Convention. While the decision to accept that competence is exclusively contingent on the consent of the State concerned, the terms of the acceptance itself are prescribed in Article 62(2) of the Convention. Pursuant to the terms of Article 62(2), the State may elect to accept that jurisdiction subject to the conditions expressed, or unconditionally. The plain meaning of those terms is to enable the State to exercise all options provided for at the time of its acceptance. Those options that are not exercised, must be deemed to be waived. The terms and options provided for in Article 62(2) would otherwise be deprived of their plain meaning and purpose. The Commission considers that the intention of the State of Peru when it accepted the jurisdiction of the Court, invoking only the condition of reciprocity, was to become bound without temporal limitation. The validity of that acceptance has never been challenged, and the intention expressed must prevail.

Acceptance of the compulsory jurisdiction of the Honorable Court by a State has a profound effect on the interests and expectations of persons subject to that State's jurisdiction, as well as on other States Parties, and the enforcement mechanisms of the Commission and the Court. Had the drafters of the Convention contemplated that such acceptance of jurisdiction, once made without condition, could then be withdrawn at will -- having in mind the far-reaching consequences of such an act -- the Commission considers that such an action would have been provided for in the text – which it clearly is not.

To the extent a State accepting compulsory jurisdiction wishes to condition that undertaking according to the terms of Article 62(2), the nature and scope of its acceptance are thenceforth clear to all affected parties, including individuals, other States Parties and the Commission and Court. Were States able thereafter to add restrictions not provided for or revoke acceptance at will, not only would the expectations and interests of those parties be affected, but the juridical certainty and stability of the system of compulsory jurisdiction as a whole would be jeopardized. The enforcement system requires predictability and uniformity of undertakings and stability in the enforcement system. States Parties may not

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[57] IACtHR, *Advisory Opinion OC-2/82, supra*, para. 32.

be permitted, in light of the object and purpose of that system, to act unilaterally so as to establish their own regimes of undertaking and enforcement. This would threaten the effectiveness of the enforcement machinery as an integral part of the regional human rights system.

These considerations are reflected in over 20 years of State practice in the inter-American human rights system. The only prior instance of denunciation under the Convention regime is that of Trinidad and Tobago, which invoked its right to denounce the Convention as a whole pursuant to the terms of Article 78. No State has ever attempted the withdrawal of an unconditional acceptance of Court jurisdiction.

VI. CONCLUSION

The Commission considers that the Honorable Court became competent to exercise its contentious jurisdiction with respect to the case of Baruch Ivcher Bronstein when it was seized of the matter through the filing of the March 31, 1999 application. Neither the July 9, 1999 presentation by Peru of its putative "withdrawal" of acceptance of that jurisdiction, nor its subsequent return of the application and related documents on August 4, 1999 can have any effect on the exercise of that jurisdiction in this case. As set forth in section III of these observations, it is a long-settled and well-founded rule that a State cannot, by a subsequent unilateral act, deprive an international tribunal of jurisdiction once it is validly seized of jurisdiction. The position proffered by the State, to the effect that its "withdrawal" applies so as to retroactively divest the Honorable Court of jurisdiction with respect to any case where it has not submitted its answer, finds no basis in law.

The present observations address two additional points which, while they may not be essential to affirming jurisdiction in the present case, respond to issues raised by Peru's putative "withdrawal" and accompanying documentation. With respect to the first of these, Peru having indicated that its "withdrawal" applies with immediate effect, the Commission finds that even assuming the validity of the "withdrawal" for the sake of argument, it would not apply in any event absent a one-year period of advance notification. Such a period would be required pursuant to any of the theories that could be advanced to support the validity of the "withdrawal," and would, moreover, be necessary as a matter of juridical security and stability.

The final, and broadest point addressed in these observations concerns the validity and effect of Peru's putative "withdrawal" of acceptance of jurisdiction. The Commission considers that this "withdrawal" finds no basis in the text of the Convention, or the applicable legal regime as a whole. To the contrary, the Commission finds that the terms of the "withdrawal" are incompatible with the object and purpose of the Convention, and would, if accepted, threaten the integrity and stability of the regional enforcement system.

While the chief importance of the compulsory jurisdiction of the ICJ has been characterized as promoting "the idea that judicial settlement of international disputes is

both possible and desirable," and facilitating agreement as to the relevant terms of reference,"[58] the paramount contribution of the Honorable Court clearly lies elsewhere:

> The Court is, first and foremost, an autonomous judicial institution with jurisdiction both to decide any contentious case concerning the interpretation and application of the Convention as well as to ensure to the victim of a violation of the rights and freedoms guaranteed by the Convention the protection of those rights. .... Because of the binding character of its decisions in contentious cases ..., the Court also is the Convention organ having the broadest enforcement powers designed to ensure the effective application of the Convention.[59]

The Court plays a crucial role within an enforcement system designed first and foremost to protect the rights of individuals. The integrity of that system would clearly be undermined were States, once having freely and unconditionally consented to certain undertakings, able to act unilaterally to establish their own separate regimes of obligation.

VI. PETITION

On the basis of the foregoing analysis and conclusions, the Commission respectfully requests that the Honorable Court:

1. Determine that the return by the State of Peru of the application and related documents in the case of Baruch Ivcher Bronstein is of no legal effect, and continue to exercise jurisdiction over this case;

2. Convoke a hearing on the merits of the case at the earliest procedural opportunity.

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[58] Rosenne, *The Law and Practice of the World Court, supra*, at p. 419.

[59] IACtHR, *"Other Treaties" Subject to the Advisory Jurisdiction of the Court* (Art. 64 American Convention on Human Rights), Advisory Opinion OC-1/82 of Sept. 24, 1982, Ser. A No. 1, at para. 22.