Detailed Contents

Chapter 1

THE OPTIONAL CONTENTIOUS JURISDICTION OF THE COURT

Extract from leading case

Ivcher Bronstein v Peru, Judgment on Competence, September 24, 1999, Series C No. 54.

(…)

25. The Commission submitted the application in the Ivcher Bronstein case on March 31, 1999. The Court forwarded note CDH-11,762/002 to the State on May 10, 1999, wherein it notified Peru of the application and sent it a copy of both the application and its attachments.

(…)

27. On May 17, 1999, Peru advised the Secretariat that it had received notification of the case on May 12, 1999. On June 8, it designated its agent and alternate agent and gave Peru's Embassy in San José, Costa Rica, as the address to which communications should be directed.

28. By note of July 16, 1999, received at the Secretariat of the Court on July 27 of that year, the General Secretariat of the OAS reported that on July 9, 1999, Peru had presented an instrument wherein it advised that it was withdrawing its declaration consenting to the optional clause in the American Convention recognizing the contentious jurisdiction of the Court.

It also sent a copy of the original of that instrument, dated Lima, July 8, 1999. There, the Minister of Foreign Affairs of Peru stated that by Legislative Resolution No. 27,152 of July 8, 1999, the Congress of the Republic had approved the withdrawal in the following terms:

> that in accordance with the American Convention on Human Rights, the Republic of Peru is withdrawing the declaration whereby it consents to the optional clause recognizing the contentious jurisdiction of the Inter-American Court of Human Rights, a declaration given by the Peruvian government at the time.
>
> This withdrawal of recognition of the Inter-American Court's contentious jurisdiction will take effect immediately and will apply to all cases in which Peru has not answered the application filed with the Court.

29. On August 4, 1999, the Minister and Counselor of the Embassy of Peru in Costa Rica appeared at the Secretariat of the Inter-American Court and stated that they were returning the application in the Ivcher Bronstein case and its appendices.

30. On January 21, 1981, Peru recognized the contentious jurisdiction of the Court as follows:

> [a]s prescribed in paragraph 1 of Article 62 of the American Convention, the Government of Peru hereby declares 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 the Convention.

This recognition of jurisdiction is for an unspecified period and on condition of reciprocity.

31. Exercising its jurisdiction, the Court took cognizance of the Ivcher Bronstein case on March 31, 1999, the date on which it formally received the corresponding application, filed in accordance with Articles 48, 50, and 51 of the Convention and Article 32 of the Court's Rules of Procedure.

B. Law

32. The Court must settle the question of Peru's purported withdrawal of its declaration recognizing the contentious jurisdiction of the Court and of its legal effects. The Inter-American Court, as with any court or tribunal, has the inherent authority to determine the scope of its own competence (*compétence de la compétence/Kompetenz-Kompetenz*).

33. The Court cannot abdicate this prerogative, as it is a duty that the Convention imposes upon it, requiring it to exercise its functions in accordance with Article 62(3) thereof.

34. The jurisdiction of the Court cannot be contingent upon events extraneous to its own actions. The instruments consenting to the optional clause concerning recognition of the Court's binding jurisdiction (Article 62(1) of the Convention) presuppose that the States submitting them accept the Court's right to settle any controversy relative to its jurisdiction. An objection or any other action taken by the State for the purpose of somehow affecting the Court's jurisdiction has no consequence whatever, as the Court retains the *compétence de la compétence*, as it is master of its own jurisdiction.

35. Interpreting the Convention in accordance with its object and purpose (cf., *infra* 39), the Court must act in a manner that preserves the integrity of the mechanism provided for in Article 62(1) of the Convention. That mechanism cannot be subordinated to any restrictions that the respondent State might add to the terms of its recognition of the Court's binding jurisdiction, as that would adversely affect the efficacy of the mechanism and could obstruct its future development.

36. Acceptance of the Court's binding jurisdiction is an ironclad clause to which there can be no limitations except those expressly provided for in Article 62(1) of the American Convention. Because the clause is so fundamental to the operation of the Convention's system of protection, it cannot be at the mercy of limitations not already stipulated but invoked by States Parties for internal reasons.

37. The States Parties to the Convention must guarantee compliance with its provisions and its effects (*effet utile*) within their own domestic laws. This principle applies not only to the substantive provisions of human rights treaties (in other words, the clauses on the protected rights), but also to the procedural provisions, such as the one concerning recognition of the Tribunal's contentious jurisdiction. That clause, essential to the efficacy of the mechanism of international protection, must be interpreted and applied in such a way that the guarantee that it establishes is truly practical and effective, given the special nature of human rights treaties (*cf. infra* 42 to 45) and their collective enforcement.

(. . .)

39. Article 62(1) of the American Convention stipulates that 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 any special agreement, the jurisdiction of the Court on all matters relating to the interpretation or application of this Convention.' There is no provision in the Convention that expressly permits the States Parties to withdraw their declaration of recognition of the Court's binding

jurisdiction. Nor does the instrument in which Peru recognizes the Court's jurisdiction, dated January 21, 1981, allow for that possibility.

40. An interpretation of the Convention done 'in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose' leads this Court to the view that a State Party to the American Convention can only release itself of its obligations under the Convention by following the provisions that the treaty itself stipulates. In the instant case, under the Convention, the only avenue the State has to disengage itself from the Court's binding contentious jurisdiction is to denounce the Convention as a whole (*cf. infra* 46, 50); if this happens, then the denunciation will only have effect if done in accordance with Article 78, which requires one year's advance notice.

(. . .)

46. The optional clause recognizing the contentious jurisdiction of the Inter-American Court is of particular importance to the operation of the system of protection embodied in the American Convention. When a State consents to that clause, it binds itself to the whole of the Convention and is fully committed to guaranteeing the international protection of human rights that the Convention embodies.

(. . .)

50. A State that recognized the binding jurisdiction of the Inter-American Court under Article 62(1) of the Convention is thenceforth bound by the Convention as a whole (*cf. supra* 40 and 46). The goal of preserving the integrity of the treaty obligations is from Article 44(1) of the Vienna Convention, which is based on the principle that the denunciation (or 'withdrawal' of recognition of a treaty's mechanism) can only be vis-à-vis the treaty as a whole, unless the treaty provides or the Parties thereto agree otherwise.

51. The American Convention is very clear that denunciation is of 'this Convention' (Article 78) as a whole, and not denunciation of or 'release' from parts or clauses thereof, since that would undermine the integrity of the whole. Applying the criteria of the Vienna Convention (Article 56(1)), it does not appear to have been the Parties' intention to allow this type of denunciation or release; nor can denunciation or release be inferred from the character of the American Convention as a human rights treaty.

52. Even supposing, for the sake of argument, that 'release' was possible—a hypothetical that this Court rejects—, it could not take effect immediately. Article 56(2) of the Vienna Convention stipulates that a State Party must give 'not less than 12 months' notice' of its intention to denounce or withdraw from a treaty. This is to protect the interests of the other Parties to the treaty. The international obligation in question, even when undertaken by means of a unilateral declaration, is binding for the State. The latter is thenceforth 'legally required to follow a course of conduct consistent with its declaration', and the other States Parties are authorized to demand that that obligation be honored.[1]

53. Despite the fact that it is optional, the declaration of recognition of the contentious jurisdiction of an international tribunal, once made, does not give the State the authority to change its content and scope at will at some later date: '. . . 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

[1] Footnote 7 in the original judgment: *Nuclear Tests* case (*Australia v France*), Judgment of December 20, 1974, *ICJ Reports* 1974, p. 268, para. 46; *Nuclear Tests* case (*New Zealand v France*), Judgment of December 20, 1974, *ICJ Reports* 1974, pp. 473 and 267, paras. 49 and 43, respectively.

contain no provision regarding the duration of their validity.'[2] Thus, in order for an optional clause to be unilaterally terminated, the pertinent rules of the law of treaties must be applied. Those rules clearly preclude any possibility of a termination or 'release' with 'immediate effect'.

54. For the foregoing reasons, the Court considers inadmissible Peru's purported withdrawal of the declaration recognizing the contentious jurisdiction of the Court effective immediately, as well as any consequences said withdrawal was intended to have, among them the return of the application, which is irrelevant.

[2] Footnote 8 in the original judgment: The Court cites the following case law: *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America), Jurisdiction and Admissibility*, Judgment of November 26, 1984, *ICJ Reports* 1984, p. 420, para. 63 and see p. 418, paras. 59 and 60.

Introduction

1.01 A bastion of State sovereignty if ever there was one, the existence of an optional clause of acceptance remains a pivotal element of the contentious jurisdiction of the Inter-American Court of Human Rights, an ironclad clause, as the Court itself calls it.[3] There is an obvious parallel between the Inter-American system and the one that prevailed in Strasbourg up until 1998, even though certain features distinguish it from the European Court and former European Commission. Not only does the Inter-American Commission not have, never has had, and does not plan to have a body similar to the Committee of Ministers, within the framework of the OAS, but it has no basis in a Convention, either, which raises problems when looking at individual applications.[4] What is more, the possibility for States to refuse the contentious jurisdiction of the Court is inherent to the Inter-American system, with the result that States are pathologically reluctant to recognize a truly *effective* court protection of human rights.

To see just how true this is, suffice it to look at the historical beginnings of this regional human rights protection. The Commission was created in 1959 for a temporary period and was highly political. As for the Inter-American Court itself, it only started functioning in 1980, eleven years after the adoption of the American Convention setting it up in 1969. At no time during the specialized conference held prior to its adoption was it suggested that the jurisdiction of the Inter-American Court should be binding, the main challenge being to actually create a court mechanism for the protection of human rights after so much persistent procrastination.[5] The fact that there were so many political regimes which were totally opposed to the values of human rights protection didn't help, and it was only in 1979 that the American Convention came into force, to the great relief

[3] IACHR, September 4, 1999, Competence, *Ivcher Bronstein v Peru*, Series C No. 54, para. 36.

[4] See Chapter 2.

[5] AHR Commission, *Conferencia especializada interamericana sobre derechos humanos, Actas y documentos*, San José, Costa Rica, November 7–22, 1969, Secretariat of the OAS, Washington, DC, 1978; similarly, E. Rey Caro, p. 1207.

of those who had drafted it and who feared that the project had failed. But even after this date the ratification process went far from smoothly and it came to a complete standstill in 1993. Since then no new country has signed up. The American Convention is a 'second class' system, with many forms of protection at different levels.[6]

1.02 In contrast to the Council of Europe system, ratification of the American Convention within the OAS is not a condition of membership, nor is it permanent, so a reform making the contentious jurisdiction of the Court binding is unlikely to happen in the short term. To compound the problems, the very composition of the Court—which only sits for four ordinary sessions per year—plus the lack of human and financial resources, must not be overlooked. The main reason for the difference between this system and the European one, however, lies in the fact that the American States are not ready to make court control fully operational. For them, State sovereignty clearly prevails and this highlights the weaknesses of the Court, which is obliged to recognize it. Although the Court has tried to keep members on board by allowing them to decide whether or not to accept its jurisdiction over human rights protection, it has not been totally successful, as the withdrawal of Trinidad and Tobago testifies, even if it is the only country to have effectively done so to date (see *infra*). Similarly, the current crisis over Honduras and the vote by the OAS to suspend membership raises a number of legal questions.

The complex political context of the creation of the Inter-American Court notwithstanding, an audacious case law has nevertheless been developed. This has been possible despite the strong opposition of certain States and despite the fact that the system has not succeeded in reaching a state of *universal*, or rather *totally regional* protection on the continent, an aim ardently defended by both judges and doctrine.[7] On more than one occasion the Court has had to interpret the limits of its own jurisdiction, which it has done using dynamic and progressive criteria, thus strengthening rather than weakening the system. This display of courage by both the Inter-American Court of Human Rights and the Commission—which have not always worked hand in hand[8]—has made it possible to delimit the freedom of action by a State and introduce a number of restrictions.

1.03 The case of *Ivcher Bronstein v Peru*[9] gave rise to a controversial judgment arising in Peru under the leadership of Fujimori—similar to the case of the *Constitutional Court*.[10] It is a perfect illustration of the tensions between the interests of the State and the requirements under treaties protecting human rights, when it comes to challenging the contentious jurisdiction of the Court. Mr. Ivcher Bronstein was a naturalized Peruvian citizen who owned a television channel. To begin with, he supported the Fujimori government but later on he became highly critical, and the channel brought to public notice the most glaring instances of corruption within the government in office, the main target being

[6] H. Faúndez Ledesma, *El sistema interamericano de protección de los derechos humanos. Aspectos institucionales y procesales*, IAIHR, 2004, 3rd edn., pp. 57ff.

[7] On this point, note all the efforts made to reinforce the system of protection, and in particular the impassioned speeches made before the General Assembly by the presidents, including Judges Antonio Augusto Cançado Trindade and Sergio García Ramírez, who forcefully denounced the dearth of budgetary means.

[8] On this point see Chapter 22, and the changing relationship between the two organs, in J. Allain, *A Century of International Adjudication: The Rule of Law and its Limits,* The Hague, T.M.C. Asser Press, 2000, esp. pp. 93ff.

[9] IACHR, September 4, 1999, Competence, *Ivcher Bronstein v Peru*, Series C No. 54.

[10] IACHR, September 24, 1999, Competence, *Constitutional Court v Peru*, Series C No. 55.

Vice-President Vladimiro Montesinos. The government reacted immediately by deleting from the official register all traces of Mr. Bronstein's naturalization. The problem was that the right to own a television channel was reserved to Peruvian nationals, and so the loss of his nationality led to his losing his freedom of expression. In order to avoid being condemned by the Court, the Peruvian government decided to withdraw from the optional jurisdiction of the Court during the proceedings.

1.04 The American Convention guarantees maximum respect for the place of the State through Article 62(1), a classical acceptance clause of the Court's contentious jurisdiction. The article provides that: '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.' With this very broad formula the right of withdrawal is a necessary consequence of the freedom of action of a state to commit itself through an international treaty. Part I examines the formulation of the optional clause of the American Convention on Human Rights and sees how it works; it will show that this clause is not unlike similar clauses governing access to international jurisdictions, with which it shares the same basic characteristics. Part II analyses the limits of the optional clause and, in particular, looks at what the Convention does and does not say. Part III shows how the Court has limited the discretionary powers originally laid down in the Convention; it exercises control over both the right of withdrawal and the scope of its own jurisdiction, which puts it in a position to react to the hesitations and reluctance of the different States.

I. The limits of the optional clause

A. Common characteristics

1.05 The principle underpinning the optional clause contained in Article 62(1) of the American Convention seems to be one of total freedom: a State is limited neither in time nor in form, since it can choose whatever formulation it deems the most appropriate in order to accept the binding jurisdiction of an international body. It can decide to accept the jurisdiction at the moment of ratifying the Convention, or at any subsequent time, as has been the case for many States which have chosen to accept the contentious jurisdiction of the Court up to twenty years after ratifying the American Convention, like the Dominican Republic, for instance.[11] The type of instrument used is not important either; under the standard rules of international law, acceptance of jurisdiction can be incorporated in the instrument of ratification or can be added separately.

The wording of the content of this instrument also seems to be unregulated. The most common format states that contentious jurisdiction is accepted for 'an indefinite period of time and on condition of reciprocity', but the State can limit this jurisdiction by specifying the moment when the effects of the acceptance come into force and recalling the principle of non-retroactivity, for example, as Mexico, Guatemala, Nicaragua, Paraguay, El Salvador, Argentina, and Chile did. Chile stipulated in its instrument that 'recognition of the

[11] See Tables of judgments and advisory opinions by country, Appendices II.1 and II.2.

competence and jurisdiction of the Commission applies to events subsequent to the date of deposit of this Instrument of Ratification or, in any case, to events which began subsequent to March 11, 1990'.[12] The aim was clear: Chile, alongside other States that did not wish to revive political tensions due to the darkest errors of the past, wanted to avoid a highly predictable avalanche of applications claiming human rights violations during the dictatorship. But as we shall see, the Court was extremely rigorous in the way it interpreted temporal limitations under the Convention and what should be excluded *rationae temporis* from its jurisdiction.

These preliminary remarks concerning Article 62(1) suggest that it is indeed a 'standard formula', the terms of which are clearly an echo of those used in Article 36(2) of the Statute of the International Court of Justice which stipulates that: 'The states parties to the present Statute may at any time declare that they recognize as compulsory ipso facto and without special agreement, in relation to any other state accepting the same obligation, the jurisdiction of the Court in all legal disputes concerning: (a) the interpretation of a treaty; (b) any question of international law; (c) the existence of any fact which, if established, would constitute a breach of an international obligation; (d) the nature or extent of the reparation to be made for the breach of an international obligation.' The way it is drafted is also an attempt to find a 'general acceptance', though in the case of the Court it has not really been successful.[13]

1.06 If we push this analysis a little further, however, we find that similarities with general international law stop here. The Inter-American Court has asked itself this very question and has pointed out that 'international settlement of human rights cases (entrusted to tribunals like the Inter-American and European Courts of Human Rights) cannot be compared to the peaceful settlement of international disputes involving purely interstate litigation (entrusted to a tribunal like the International Court of Justice). Since, as is widely accepted, the contexts are fundamentally different, States cannot expect to have the same amount of discretion in the former as they have traditionally had in the latter'.[14] Treaties for the protection of human rights therefore have essential features which are specific and which must be used to guide the Court, in particular concerning the way it addresses the optional clause of acceptance of its jurisdiction.

B. Exclusive characteristics

1.07 Human rights conventions are international conventions and, as such, are bound by the rules of interpretation laid down in the Vienna Convention on the Law of Treaties, 1969. The Inter-American Court has underlined this a number of times, stating that the 'traditional' rules of interpretation of international law are fully applicable.[15] The Court has also pointed out the importance of Article 31(1) of the Vienna Convention, which stipulates that 'a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object

[12] Instrument deposited with the General Secretariat of the Organization of American States on August 21, 1990.

[13] E. Rey Caro, p. 1204.

[14] IACHR, Competence, *Ivcher Bronstein*, para. 48.

[15] IACHR, September 24, 1982, Advisory Opinion OC-1/82 *'Other treaties' subject to the consultative jurisdiction of the Court (Art. 64 American Convention on Human Rights)*, Series A No. 1, para. 33; IACHR, October 1, 1999, Interpretation of the judgment on reparations, *Blake v Guatemala*, Series C No. 57, para. 21.

and purpose'.[16] These rules are therefore clearly applicable to the interpretation of the optional clause of Article 62(1) of the American Convention on Human Rights.

Although these methods of interpretation are similar to those of public international law,[17] the American Convention has its own specific features, for two reasons: the fact that it is a human rights treaty and the way it differs from the regional reference system it borrowed from, namely the European system.

1.08 As far as the first category of specific features is concerned, it is the very object and purpose of the treaty which differentiates it from international treaties.[18] Whereas the aim of the latter is to find a balance between the interests of sovereign states, the former are not there to 'regulate the relations between equals' but to bear 'always in mind the pressing needs of protection of the victims, and requiring, in this way, the humanization of the postulates of classic Public International Law'.[19] The Inter-American Court has always argued that the obligations under the Convention are objective and independent of any criteria based exclusively on the principle of reciprocity,[20] a position which converges with European case law[21] and with the case law of the International Court of Justice in its famous advisory opinion on the *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* of May 28, 1951.[22]

Despite the fact that Article 62(1) of the American Convention is directly inspired by the system of optional acceptance of the former Article 46 of the European Convention on Human Rights, the formula that was finally chosen differs somewhat, the text of the American Convention on Human Rights being more 'liberal'.[23] The defunct European Commission also had a role that differed from that of the Inter-American Commission. Above and beyond the more 'political' attributes of the European Commission on Human Rights, it had automatic jurisdiction for cases between States, but acceptance of its jurisdiction was required for individual applications. The Inter-American Commission has adopted the opposite approach, and acceptance of its jurisdiction is only a condition for applications filed by one of the Member States against another one, while individual applications are considered as a sort of *actio popularis*.[24] Lastly, the European Court was never asked to decide on the pertinence of the declarations of acceptance of its contentious jurisdiction as such, and the *Loizidou* case, which deals with this very question, concerns the reservations expressed by the Turkish government.[25]

[16] IACHR, *Ivcher Bronstein*, para. 38.

[17] H. Gros Espiell, 'La interpretación de tratados en el derecho internacional y la especificidad de los tratados de derechos humanos', Drnas de Climent, Zlata (comps): *Estudios de derecho internacional en homenaje al profesor Ernesto J. Rey Caro*, Vol. 1, 2002, pp. 747–76.

[18] As explained by J. Cardona Llorens, p. 317.

[19] Separate Concurring Opinion of Judge A.A. Cançado Trindade on the judgment of the IACHR, January 22, 1999, Reparations and Costs, *Blake v Guatemala*, Series C No. 48, paras. 5ff.; J. Cardona Llorens, p. 318.

[20] IACHR, September 24, 1982, Advisory Opinion OC-2/82, *The effect of reservations on the entry into force of the American Convention on Human Rights (Arts. 74 and 75)*, Series A No. 2, para. 29.

[21] ECHR, January 26, 1989, *Soering v UK,* Series A No. 161, para. 87.

[22] See Chapter 3.

[23] E. Rey Caro, p. 1207.

[24] See Chapter 2.

[25] ECHR, March 23, 1995, *Loizidou v Turkey,* Series A No. 310; J. Dhommeaux, 'Le contrôle des réserves et des déclarations à la Convention européenne des droits de l'homme et au Pacte international relatif aux droits civils et politiques', Flauss, Jean-François and De Salvia, Michel (eds.), *La Convention européenne des droits de l'homme: développements récents et nouveaux défis,* Proceedings of the one-day conference of November 30, 1996, organized at the Institut des Hautes Études Européennes of Strasbourg in memory of Marc André Eissen, Brussels, Bruylant, 1997, pp. 13–37.

1.09 The way Article 62(1) of the American Convention has been drafted has a definite impact on the degree of freedom of action enjoyed by a State when it formally accepts the contentious jurisdiction of the Court. Some instruments of acceptance state expressly that the interpretation of the Court must be compatible with the domestic law of the State, as was the case with Bolivia, for instance, or El Salvador.[26] The Inter-American Court had to decide on this question in three cases, *Hilaire, Constantine et al.* and *Benjamin et al.*, where Trinidad and Tobago maintained that, given the 'reservations' contained in the instrument of acceptance, the Court had no jurisdiction to hear the cases. The instrument in question stated that Trinidad and Tobago only accepted the jurisdiction of the Court if it was compatible with the norms laid down in its Constitution. The Court pointed out that such an assertion meant that its contentious function was completely subordinated to the domestic law of the State, which 'would lead to a situation in which the Court would have the State's Constitution as its first point of reference, and the American Convention only as a subsidiary parameter', which is of course totally unacceptable.[27] In so saying, the Inter-American Court declared that such a restriction was not valid, since it would render illusory the object and purpose of the American Convention by allowing the State absolute freedom to decide when it would accept—and, more to the point, when it would reject—the jurisdiction of the Court. In all three cases the Inter-American Court dismissed the preliminary objections of the government and affirmed that it had jurisdiction to examine and process the instant cases.

Other States added reservations and declarations of interpretation to their instruments of acceptance so as to limit the scope of certain rights (such as the right to property in Chile and the rights of foreigners in Mexico). The Court has not had to consider this question directly but has done so indirectly when analysing the reservations in Advisory Opinion No. 2[28] and when examining a number of contentious cases. The Inter-American Court affirmed the need for 'objective' criteria to verify the reservations, based on the object and purpose of the treaty, and with reference to European case law and that of the International Court.[29] In particular, the Court deemed that 'it is necessary to distinguish between "reservations to the Convention" and "acceptance of the jurisdiction of the Court". The latter is a unilateral act of each State, governed by the terms of the American Convention as a whole and, therefore, not subject to reservations. Although some doctrine refers to "reservations" to the acceptance of the jurisdiction of an international court, in reality, this refers to limitations in the acceptance of the jurisdiction and not, technically, to reservations to a multilateral treaty.'[30]

[26] 'The government recognizes the jurisdiction of the Court provided that it is compatible with the provisions of the Constitution […]', Instrument of acceptance of the contentious jurisdiction of the Court deposited by El Salvador on June 6, 1995.

[27] IACHR, September 1, 2001, Preliminary Objections, *Hilaire v Trinidad and Tobago*, Series C No. 80, para. 93; IACHR, September 1, 2001, Preliminary Objections, *Benjamin et al. v Trinidad and Tobago*, Series C No. 81, para. 84; IACHR, September 1, 2001, Preliminary Objections, *Constantine et al. v Trinidad and Tobago*, Series C No. 82, para. 84.

[28] IACHR, September 24, 1982, *The effects of reservations on the entry into force of the American Convention on Human Rights (Arts. 74 and 75)*, Series A No. 2, para. 82.

[29] See Chapter 3.

[30] IACHR, September 7, 2001, Preliminary Objections, *Cantos v Argentina*, Series C No. 85, para. 34.

II. The limits of the right of withdrawal

1.10 The optional clause is thus the first pillar in the protection of State sovereignty, the second—and inevitable—pillar being the right of withdrawal. However, the texts do not cover all questions concerning the limits and interpretation of this 'right' that States have to withdraw from the system of protection.

1.11 There are two ways in which a State can 'withdraw' from the Inter-American system, and more precisely from the contentious function of the Court. The first and most natural way is when a State denounces the American Convention, which has been explicitly allowed for. The second, withdrawal from the declaration of acceptance as such, seems possible, even though the Convention remains silent on this point.

A. What the Convention says

1.12 Both the American Convention on Human Rights (Article 78) and the European Convention on Human Rights (Article 58) provide a means to denounce it, in almost identical terms. Article 78 of the American Convention reads as follows: '1. The States Parties may denounce this Convention at the expiration of a five-year period from the date of its entry into force and by means of notice given one year in advance. Notice of the denunciation shall be addressed to the Secretary General of the Organization, who shall inform the other States Parties. 2. Such a denunciation shall not have the effect of releasing the State Party concerned from the obligations contained in this Convention with respect to any act that may constitute a violation of those obligations and that has been taken by that state prior to the effective date of denunciation.' As we can see, there are two time conditions. The first forbids a State from denouncing the Convention within the first five years, although it is not clear whether the five years run from the entry into force of the Convention itself, or from the date on which the instrument of ratification was deposited by the State in question. The second time limit concerns the notice that must be given, i.e. one year. The reason for this is obvious—to protect the rights of the parties concerned by this denunciation,[31] as the State which denounces the Convention is obliged to respect it and also the commitments entailed under it until the end of the year.

Despite the similarities between the two texts, there is a major difference which lies in the *subsidiary* effects that denouncing the European Convention would have on the States Parties. If a State denounces the European Convention it automatically leaves the Council of Europe (similarly, if it leaves the Council of Europe it automatically denounces the Convention), whereas in the Inter-American system, the Pact of San José is totally independent of membership of the OAS.

1.13 In the European context this question has remained largely academic, the exception being Greece under the Colonels which on December 12, 1969 used the possibility offered under Article 58.[32] In the American context, however, the question has arisen: on May 26, 1998 (date the denunciation was notified), Trinidad and Tobago denounced the American Convention, after the Commission and the Court had repeatedly condemned

[31] IACHR, *Ivcher Bronstein*, paras. 52–3.
[32] F. Sudre, *Droit européen et international des droits de l'homme,* Paris, PUF, 2006, 8th edn., p. 76.

them for systematically carrying out the death penalty.[33] The argument put forward by the government was cynical to the extreme: they were denouncing the American Convention in order to avoid cruel, inhuman, and degrading punishment such as that of sending people to 'death row'. Having asserted that the Convention was incompatible with its domestic law, Trinidad and Tobago refused to wait for the end of proceedings before the Inter-American organs, saying that this would have taken too long and would thus have inflicted a 'cruel punishment' on those sentenced to death, which was contrary to their Constitution. The State used this humanitarian argument to plead, more than once, that the Court did not have jurisdiction. Trinidad and Tobago claimed that it had introduced 'conditions' with its declaration of acceptance so as to be released from all international liability, and since these conditions were systematically rejected by the Inter-American Court as being invalid, the government deemed that its acceptance of the contentious jurisdiction of the Court was vitiated from the outset and was therefore null and void. The IACHR pointed out the danger of such arguments for the system of protection and repeatedly dismissed the preliminary objections raised by Trinidad and Tobago, whether based on Article 78 or on Article 62(1) of the American Convention. It should be noted, however, that contrary to the executive, the internal judicial body, the Privy Council, did accept the jurisdiction of the Court.[34]

Neither the European Convention on Human Rights (prior to Protocol No. 11), nor the American Convention on Human Rights contains a rule governing the withdrawal of declarations of acceptance of the contentious jurisdiction of the Court, which leaves the very existence of such a possibility open to doubt. This is not the case before the ICJ, where several States have withdrawn their acceptance, sometimes during the proceedings.

B. What the Convention does not say

1.14 Although the American Convention is silent as to how to deal with declarations of acceptance of jurisdiction, the question has been examined by international courts in areas other than that of human rights. The International Court of Justice has produced sound arguments defending the need to respect the freedom of action of States, by promoting a highly developed voluntary approach to the law. The ICJ has maintained that '[I]t is for each State, in formulating its declaration, to decide upon the limits it places upon its acceptance of the jurisdiction of the Court: "This jurisdiction only exists within the limits within which it has been accepted".[35] Conditions or reservations thus do not by their terms derogate from a wider acceptance already given. [...] There is thus no reason to interpret them restrictively. All elements in a declaration under Article 36, paragraph 2 of the Statute which, read together, comprise the acceptance by the declarant State of the Court's jurisdiction, are to be interpreted as a unity, applying the same legal principles of interpretation throughout.'[36] The Court also underlined the necessity of applying rules with respect to unilateral acts, which without any doubt include declarations of acceptance of jurisdiction. This analysis is supported by doctrine. E. Rey Caro considers that the

[33] See Chapter 12.
[34] N. Parassram, pp. 847–90.
[35] Phosphates in Morocco, Judgment, 1938, PCIJ, Series A/B No. 74, p. 23.
[36] ICJ, December 4, 1998, *Fisheries Jurisdiction case (Spain v Canada)*, para. 44.

declaration is clearly a distinct and separate element of the treaty as such, which entails that neither withdrawal from jurisdiction nor the conditions of acceptance stipulated by the States follows from the denunciation of the treaty. Moreover, all declarations must be notified to the other parties to the American Convention, which could challenge their validity and prevent them from entering into force, at least in part.[37] Several States did indeed add at the end of their declarations the fact that they reserved the right to withdraw their acceptance of the contentious jurisdiction at any time (declarations from Colombia, Ecuador, El Salvador, and Mexico). Lastly, if the declaration were considered to be an 'irrevocable' unilateral act, the States would not have signed in the first place.[38]

However, a number of arguments can be made against this interpretation. First, and as the Court itself has said: 'A unilateral juridical act carried out in the context of purely interstate relations [. . .] can hardly be compared with a unilateral juridical act carried out within the framework of treaty law, such as acceptance of an optional clause recognizing the binding jurisdiction of an international court. That acceptance is determined and shaped by the treaty itself and, in particular, through fulfilment of its object and purpose.'[39] Second, the Court has also said that the general system governing reservations under the Vienna Convention 1969 cannot be applied fully to the Convention, and since '[. . .] reservations expressly authorized by Article 75, that is, reservations compatible with the object and purpose of the Convention, do not require acceptance by the States Parties, the Court is of the opinion that the instruments of ratification or adherence containing them enter into force, pursuant to Article 74, as of the moment of their deposit'.[40] In any event, declarations of acceptance do not fall within the system of reservations (see the *Cantos* case referred to above). Third, the doctrine of *effet utile* requires that, if the Convention remains silent on this point, it is the interpretation which is the most favourable to the rights of persons which must prevail.

1.15 Since the American Convention does not provide a definitive answer, the Court was obliged to make a decision in the case of the 'false retreat' of the Fujimori government. It decided to define clear limits to the freedom of action of States as laid down in the Convention, and to extend these limits to all areas falling within its jurisdiction.

III. Court control

1.16 After the judgments in the cases of *Loayza Tamayo*,[41] *Castillo Páez*,[42] and *Castillo Petruzzi*,[43] and given the fact that several cases against Peru were pending before the Court, the government of President Fujimori wanted to avoid further condemnations of their anti-terrorist policy and systematic recourse to forced disappearance. In the framework of the

[37] E. Rey Caro, pp. 1209–10.
[38] Ibid. pp. 1211–12.
[39] IACHR, *Ivcher Bronstein*, para. 49.
[40] IACHR, September 24, 1982, *The effect of reservations on the entry into force of the American Convention on Human Rights (Arts. 74 and 75),* Advisory Opinion, Series A No. 2, para. 37.
[41] IACHR, September 17, 1997, Series C No. 33.
[42] IACHR, November 3, 1997, Series C No. 34.
[43] IACHR, May 30, 1999, Series C No. 52.

cases of *Ivcher Bronstein* and *Constitutional Court*, they made a submission based on the optional character of the declaration of acceptance of the jurisdiction of the Court precisely in order to exclude it. The Court confirmed once more the '*compétence de la compétence*'[44] (or *Kompetenz-Kompetenz*), and developed an argument which, although it can be discussed, really does limit the capacity of a State to withdraw acceptance.

A. The *compétence de la compétence*

1.17 The fact that the Court is master of its own jurisdiction was confirmed long before the Peruvian cases. Right from the first three Honduran cases, the Court confirmed that once it has been seized 'it exercises full jurisdiction over all issues relevant to a case'. It has 'the power to examine and review all actions and decisions of the Commission', including earlier reports and conclusions.[45] This power is inherent to all Courts and they cannot refuse to exercise it, since it is an obligation under Article 62(3) of the Convention;[46] moreover, 'the jurisdiction of the Court cannot be contingent upon events extraneous to its own actions'.[47]

1.18 The reasons for such a power are twofold. The first is that it is necessary to guarantee 'legal certainty', so that the Court is not subject to the whims of the States and, as A.A. Cançado Trindade has pointed out,[48] the ICJ itself has confirmed its jurisdiction 'to decide on the meaning and scope of the unilateral declarations of the States in the *Nuclear tests* cases (*Australia v France* and *New Zealand v France*), and then in the *Frontier dispute* (*Burkina Faso/Republic of Mali*) case'. The second is that acceptance of the Court's jurisdiction presupposes observance of the rules laid down in Article 62(1) of the American Convention, and therefore acceptance of the jurisdiction of the Court for all questions of procedure.

Once the question of its jurisdiction had been settled, the Court had to respond to the submission of the government that the latter could withdraw acceptance of this jurisdiction at any time, with 'immediate effect', even if the Court had already begun to examine the case, and assuming the Peruvian representatives had not yet replied to the allegations of the Inter-American Commission of Human Rights. Although Peru's withdrawal turned out to be a 'false retreat', with Fujimori fleeing the country and Paniagua—who took over as head of the interim government—declaring that they would respect all their international obligations and that the withdrawal of January 12, 2000 was without effect, nevertheless a major question remained. How would all this affect the exercise of the contentious jurisdiction of the Court?

B. The impossibility of a 'partial' withdrawal

1.19 The Court's position was based on two different arguments. First it contended that the special character of the Convention and the fact that it remains silent on this point are proof of the bad faith of the State of Peru. It then went on to dismiss the possibility of a 'partial' withdrawal, i.e. an exclusive unilateral withdrawal of the declaration of acceptance of the optional clause, but this position is debatable.

[44] In French in the original.
[45] IACHR, June 26, 1987, *Velásquez Rodríguez v Honduras*, Series C No. 1, para. 29.
[46] IACHR, *Ivcher Bronstein*, Competence, paras. 32–3; *Constitutional Court*, Competence, paras. 31–2.
[47] IACHR, *Ivcher Bronstein*, para. 34.
[48] *Las cláusulas pétreas de la protección*…, p. 39.

If the object and purpose of the American Convention, as a treaty protecting human rights, is to achieve *effective* protection (see *supra*), then this requires a strict interpretation of any provisions restricting those rights.[49] The fact that the American Convention remains silent about withdrawal from the Court's jurisdiction has led the Court to state that such withdrawal is impossible, otherwise it would have been expressly mentioned in Article 62. The Court bases this argument on the need to protect the Convention as a whole, and cites Article 44 of the Vienna Convention which bans partial denunciation of a treaty unless the parties agree. Judge A.A. Cançado Trindade fully supports this position and has pointed out that all doctrine, including that of the European Court, speaks of 'partial denunciation' and not of 'partial withdrawal'.[50] In addition, the Court speaks about the need to respect good faith, i.e. that even if the possibility of unilateral withdrawal were accepted, this must be done in accordance with certain rules, in particular concerning notice given. The fact that the interests of the other States Parties must be protected means that a withdrawal should not be allowed to take effect immediately but only after one year has elapsed.[51]

1.20 The arguments put forward by the Court can be criticized on several levels. The first is that one of the strands of the argument is based on the notion of the 'wholeness' of the treaty. But as Professor Rey Caro points out (p. 1212) it would not only be more logical to consider the optional clause as a separate and distinct element of the Convention but also more appropriate. After all, if the Inter-American system is *à la carte*, so to speak, whereby States are free to ratify the Convention but at the same time reject the jurisdiction of the Court—which is therefore optional—then why would a State not be allowed to withdraw its acceptance without having to denounce the whole of the Convention? Would it not be preferable, and also less paradoxical, to be allowed to continue to be part of the Convention as a member of the group of States that have never accepted the jurisdiction of the Court?[52] This would avoid the absurd situation whereby a State which withdraws its acceptance finds itself obliged to ratify the Convention again.

The second criticism is on more shaky ground but can be used to support the first one. Introducing compulsory advance notice before withdrawal can take effect seems to suggest that unilateral withdrawal—at least in practice—is possible. H. Trigoudja and I. Panoussis have their doubts on the matter, even though they agree with the general interpretation developed by the IACHR.[53] In any event, this dictum concerning notice given would not apply to the possibility of specifying the conditions of acceptance of the Court's jurisdiction beyond those strictly laid down in the Convention. Article 62(1) has not allowed for this since it provides an exhaustive list of conditions, which means that no other conditions can be added.[54] Lastly, the fact that Article 62(2) of the Convention

[49] IACHR, *Constitutional Court*, para. 40.

[50] At p. 52, quoting Professor Flauss, op. cit.

[51] IACHR, *Ivcher Bronstein*, paras. 52–3.

[52] Today, three States are in this situation: Jamaica, the Dominican Republic, and Grenada.

[53] *La Cour interaméricaine des droits de l'homme, Analyse de la jurisprudence consultative et contentieuse*, Brussels, Bruylant, 2003, pp. 74–5.

[54] Separate opinion common to the three judgments, A.A. Cançado Trindade, IACHR, September 1, 2001, *Hilaire, Constantine et al.* and *Benjamin et al. v Trinidad and Tobago*, Preliminary Objections, Series C Nos. 80, 81, and 82, paras. 22 and 23; similarly, Judge Salgado Pesantes in paras. 4, 6, and 7 of his separate opinion.

authorizes declarations for a limited time period seems to confirm the possibility of a withdrawal which would, in fact, be the same thing as a temporary acceptance of the contentious jurisdiction of the Court.

1.21 Even though the reasoning of the Court in *Ivcher Bronstein* is debatable, the conclusion it reached is the only one possible. Peru had given no advance notice and had thus released itself from its obligations with no respect for the classical rules governing unilateral acts. Moreover, it had announced its withdrawal once proceedings before the Court had begun, as the government had not challenged the Court's jurisdiction when the application was received. Last but not least, even if the State had respected all its conditions it would still have been found liable as, when the facts occurred, it was bound by its acceptance. Consequently, the Court also has control over the duration of effect of the Convention.

C. Control over the duration of the effect of the Convention

1.22 Exceptions *rationae temporis*, the aim of which is to escape the jurisdiction of the Court because the State was not bound by the Convention at the time the facts occurred, can be based on one of two arguments: either the principle of non-retroactivity (no jurisdiction *ex ante*) or a future time limit (no jurisdiction *ex post*). Even if it is pure conjecture, one could well imagine the case where a State bound itself to accept the optional clause for a limited time period only, with the resulting difficulty of trying to 'divide' State liability into that vis-à-vis the Inter-American Commission of Human Rights and that vis-à-vis the Inter-American Court of Human Rights.

1.23 The principle of non-retroactivity is a classical principle of the law of treaties. The very essence of the respect of State acceptance of a treaty is to allow the State to commit itself solely after a given date, which means that the treaty has no effect before that date, unless otherwise agreed. The Convention is no exception to this general rule, contained in Article 28 of the Vienna Convention, and on no account may the jurisdiction of the Court extend beyond the date the ratification instrument is deposited. Article 62(2) of the American Convention guarantees this: 'Such declaration may be made unconditionally, on the condition of reciprocity, for a specified period, or for specific cases.' Although this principle can be understood as being essential to legal certainty, the Inter-American Court has had to decide in certain cases on the time limit of the facts at issue and on whether or not they fall within the declaration of acceptance of the contentious jurisdiction of the Court. In order to do so, the Court applies a test to determine the existence of facts or 'continuing or recurrent offences', which are the only ones that can come under its jurisdiction (1); they must be distinguished from 'instantaneous' offences (2) and it is thus the nature of the facts which determines the scope of its jurisdiction *rationae temporis*.

1. 'Continuing' offences

1.24 The Court had to address this question when it had to examine the first—historic—Honduran cases and the systematic recourse of the Honduran government to forced disappearance. The Court stated that '[T]he forced disappearance of human beings is a multiple and continuous violation of many rights under the Convention that the States Parties are obligated to respect and guarantee. [...] The practice of disappearances, in addition to directly violating many provisions of the Convention, such as those noted above, constitutes a radical breach of the treaty in that it shows a crass abandonment of the values which emanate from the

concept of human dignity and of the most basic principles of the Inter-American system and the Convention',[55] a position that it was to confirm.[56] Later case law clarified this further, stating that whereas it agreed that events occurring *prior* to acceptance of the optional clause were outside the jurisdiction of the Court, by the same token those occurring *after acceptance* or *continuing at the time of acceptance* fell squarely within its jurisdiction. In other words, it was not a breach of the principle of non-retroactivity to recognize its jurisdiction *rationae temporis* and to examine events which, although they had begun before the instrument of acceptance had been deposited, continued after that date, as is the case of forced disappearance.[57]

1.25 However sound these arguments may seem they have nevertheless given rise to several questions. The first is the complexity of trying to determine at what precise moment an offence no longer has repercussions over time. Sometimes it is difficult to decide whether an offence is continuing or instantaneous, and it is the Court which has to decide, not an easy task. The Court has even been driven, in the same case, to divide its analysis of alleged violations of the Convention into two distinct elements, namely extrajudicial executions (which are instantaneous offences) and forced disappearances (which are continuing offences), as it did in the *Heliodoro Portugal* case. Here it was unable to establish jurisdiction for the extrajudicial execution of the victim since, on the basis of the evidence available, death was presumed to have occurred at least ten years prior to May 9, 1990, the date Panama officially accepted the jurisdiction of the Court (para. 31), and hence ten years after his extrajudicial detention. The Court therefore accepted the first preliminary objection raised by the State. However, since the remains of Mr. Heliodoro Portugal were discovered some time in August 2000, the Court was able to declare that the disappearance of the victim, which was known to have occurred on May 14, 1970, continued up until August 2000, in other words after the date on which Panama officially recognized the jurisdiction of the Court. It therefore rejected Panama's preliminary objection on this point and declared that it had jurisdiction to decide on the forced disappearance of the victim (para. 35) under Article 7 of the Convention (Right to Personal Liberty) (para. 37). The second question revolves around the existence of instruments of acceptance of the Court's jurisdiction to which particularly restrictive time conditions have been attached. Some see these conditions as a cynical way of remaining immune from legal proceedings, which is more a political analysis than a legal one. The question can of course be discussed but, whatever one's position, the Court is a judicial body and can only act within the limits of its jurisdiction.

1.26 The case of the *Serrano Cruz Sisters* could be considered a 'landmark decision' on this point, even if Judge Cançado Trindade considers it to be 'a step backwards'.[58] El Salvador

[55] IACHR, July 29, 1988, *Velásquez Rodríguez v Honduras*, Series C No. 4, paras. 155 and 158.

[56] *Godínez Cruz v Honduras*, January 20, 1989, Series C No. 5, paras. 163 and 166, and *Blake v Guatemala*, para. 35.

[57] IACHR, August 12, 2008, Preliminary Objections, Merits, Reparations and Costs, *Heliodoro Portugal v Panama*, Series C No. 186, paras. 24–5.

[58] IACHR, November 23, 2004, Preliminary Objections, *Serrano Cruz Sisters v El Salvador*, Series C No. 118, dissenting opinion, para. 17.

had accepted the contentious jurisdiction of the Court in the period immediately following the peace process which brought an end to years of civil war, but exclusively for matters that had begun after June 6, 1995 (date of the declaration of acceptance). In the first case that was brought against this country, the Inter-American Court had to analyse the scope of the freedom of action of the State in order to decide whether to exclude from its jurisdiction the case of the forced disappearance of the children Ernestina and Erlinda Serrano Cruz during the internal armed conflict that lasted from 1980 to 1992. The Court declared that '[in] the instant case, the temporal limitation to recognition of the Court's jurisdiction established by El Salvador is based on the authority granted by Article 62 of the Convention to States Parties deciding to recognize the contentious jurisdiction of the Court, to establish a temporal limitation to this jurisdiction. Therefore, this limitation is valid, because it is compatible with the said provision'.[59] The Court observed that whereas, in the cases against Trinidad and Tobago, the temporal limitation introduced by the State was too general and subjective, in the instant case it is precise and does not require interpretation on the part of the State. Since the temporal limitation is compatible with the Convention, the Court accepted the time exception *rationae temporis* and did not examine those facts, the occurrence of which had been decided before the jurisdiction of the Court had been accepted. This included the alleged violation of Article 4 (Right to Life), Article 5 (Right to Humane Treatment), and Article 7 (Right to Personal Liberty) of the American Convention. The Inter-American Court therefore excluded the forced disappearance of the two sisters from the analysis. It should be added that the Court based its arguments on the jurisprudence of the Human Rights Committee in the cases against Chile for facts that had occurred under the Pinochet regime. But this parallel could be considered irrelevant. Although it is true that Chile had introduced temporal limitations when accepting the jurisdiction of the Committee, the lack of jurisdiction by reason of temporal limitations in the cases cited by the Court concerned summary executions and not forced disappearances. It is a question of facts which are not continuous over time and the Committee did no more than just to confirm the complete respect of the classical principle of non-retroactivity.[60]

Despite this conclusion concerning the temporal analysis of forced disappearances, the Court considers that the violations alleged under Articles 8 and 25 of the Convention, i.e. the issue of the respect of the right to a fair trial, cannot be considered as being part of the situation of forced disappearance. The absence of an effective investigation is a fact that occurred after El Salvador had recognized the Court's contentious jurisdiction. Judicial proceedings 'constitute independent facts' and as such cannot be excluded from the jurisdiction of the Court.[61]

1.27 Not only did the Court decide to limit its jurisdiction in the instant case, despite the existence of a 'continuing' offence, but it was also obliged to accept the exceptions *rationae temporis* in the case of 'instantaneous' offences.

[59] IACHR *Serrano Cruz Sisters v El Salvador*, para. 73.

[60] Human Rights Committee, July 28, 1999, *Acuña Inostroza et al. v Chile*, Report No. 717/1996; July 26, 1999, *Menanteau Aceituno and Carrasco Vásquez v Chile*, Report No. 746/1997; July 26, 1999, *Pérez Vargas v Chile*, Report No. 718/1996.

[61] IACHR, *Serrano Cruz Sisters*, para. 84.

2. 'Instantaneous' offences

1.28 In *Martín del Campo Dodd v Mexico*, which was heard before the *Serrano Cruz Sisters* case, the Inter-American Court handed down a judgment concerning torture, and in so doing moved away from its earlier case law by changing the way it considered the temporal question, combined with its contentious jurisdiction. The applicant was accused of having killed his sister and her husband and was sentenced to fifty years in prison. In his defence he claimed that he had confessed under torture. Both his detention and his trial occurred before 1998, the year Mexico recognized the Court's contentious jurisdiction. Mexico had expressly excluded all retrospective effect, even though it had not been as precise and exclusive as the government of El Salvador had been. In the instant case, the Court decided that torture was 'an instantaneous offence [. . .] the perpetration thereof not extending over time'.[62] Even though the Court condemned the acts of torture in moral terms, and recalled the international obligations that States should respect in the matter, it could but recognize that it was legally impossible to consider torture as a continuing offence, an observation which it confirmed in *Heliodoro Portugal*.[63] Despite these considerations, however, in another case the Court held that, in matters of reparations, torture can damage the victim's 'personal and vocational development expectations', which would seem to suggest the existence of consequences that go beyond the perpetration of the act of torture itself: '[. . .] it is proven that the specific sort of torture the victim underwent not only left him physical scars, but has also permanently lowered his self-esteem, and his ability to have and enjoy intimate relations of affection.'[64]

1.29 As for the right to a fair trial, the judgment of the Inter-American Court was different from the one it reached in the case of the *Serrano Cruz Sisters*. It pointed out that here the question was to decide whether the State of Mexico had respected all legal guarantees during the proceedings against the applicant. In *Serrano Cruz* there had been no effective investigation and the Court insisted on the fact that in *Martín del Campo Dodd* the most recent court decision had been handed down before the Mexican government had recognized the contentious jurisdiction of the Court. Since the applicant had been detained and imprisoned as the result of the trial, which could not be examined by the Court, the latter declared that it had no jurisdiction and that it totally and fully accepted the preliminary objection put forward by the Mexican government.

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