Institute of International Law

Yearbook

Vol. 64, Part I

Session of Basel 1991

Preparatory work

Justitia et Pace

Editions A. Pedone - 13, rue Soufflot - Paris

Institut de Droit International

Annuaire

Vol. 64, Tome I

Session de Bâle 1991

Travaux préparatoires

Justitia et Pace

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Article V

1. Il est souhaitable que, dans le cas prévu à l'article IV, n° 1, soit accordé au possesseur de bonne foi de l'objet d'art revendiqué un droit au paiement d'une indemnité équitable ou un droit équivalent.

2. Aux effets du numéro précédent, on devrait entendre par acquéreur et possesseur de bonne foi celui qui, au moment de l'acquisition de l'objet, ignorait et n'était pas raisonnablement obligé de connaître le manque ou les vices du titre du disposant.

3. En cas de vol d'un objet d'art, le possesseur ne devrait pas être censé avoir fait l'acquisition de bonne foi.

Non-appearance before the International Court of Justice

La non-comparution devant la Cour International de Justice

(Fourth Commission) *

Preliminary Report

Gaetano Arangio-Ruiz (Rapporteur)

Main Writings Considered

GUYOMAR G. — Le défaut des parties à un différend devant les juridictions internationales (avec préface de L. Cavaré), Paris, 1960.

DUBUISSON. — La Cour Internationale de Justice, Paris, 1964.

EISEMANN *P.M.* — Les effets de la non-comparution devant la C.I.J., Annuaire Français de Droit International, XIX, 1973, pages 351-375.

GUYOMAR G. — Commentaire du Règlement de la C.I.J., Paris, 1973.

FAVOREU. — Les Ordonnances des 17 et 18 août, etc., Annuaire Français de Droit international, 1974, pages 291 ff.

FAVOREU L. — Les Arrêts de la C.I.J. relatifs à la compétence en matière de pêcheries, etc., Annuaire Français de Droit International, 1974, pages 253-285.

THIERRY H. — Les Arrêts du 20 décembre 1974 et les relations de la France avec la C.I.J., Annuaire Français de Droit International, 1974, pages 286-298.

BOLLECKER-STERN B. — L'Affaire des Essais Nucléaires Français, etc., Annuaire Français de Droit International, 1974, pages 299 ff.

* The Commission is composed of Messrs Arangio-Ruiz, *Rapporteur*, Amerasinghe, Bennouna, Brownlie, Diez de Velasco, Doehring, Gros, Jiménez de Aréchaga, McWhinney, Rosenne, Sir Ian Sinclair, Messrs Stevenson, Torres Bernárdez, Sir Francis Vallat, Messrs De Visscher, Yankov.

LAMBERTI ZANARDI P. — Forme nuove di contestazione della Competenza della C.I.G., etc., Studi in onore di Gaetano Morelli, (Il Processo internazionale), Comunicazioni e studi (Milano), XIV (1975), pages 439 ff., at page 461.

ROSENNE S.L. — The Reconceptualization of Objections in the I.C.J., Studi Morelli (cited above), pages 735 ff., at pages 749-750.

GROSS Leo. — The Dispute between Greece and Turkey, etc. American Journal of International Law, 71 (1977), pages 31 ff., esp. 54-59.

GUYOMAR G. — Commentaire du Règlement de la Cour Internationale de Justice adopté le 14 avril 1978, Paris, 1983.

STUYT A.M. — « Contre-mémoire » on « Livre Blanc » ? Nouvelles tendances à la C.I.J., Revue générale de droit international public, LXXXII (1978).

FITZMAURICE Sir Gerald. — The Problem of the "Non-appearing" Defendant Government, British Year Book of International Law, LI (1980), pages 94-121.

MOSLER H. — Nichtteilnahme einer Partei am Verfahren vor dem I.G., Festshrift Schlochauer, 1981, pages 439-456.

SINCLAIR Sir Ian. — Some Procedural Aspects of Recent International Litigation, International and Comparative Law Quarterly, XXX (1981), pages 338-357.

VON MANGOLDT. — Versäumnisverfahren in der Internationalen (Schieds-) Gerichtsbarkeit, etc., Festschrift Hermann Mosler, 1983, pages 503-528.

BOWETT D.V. — Contemporary Developments in legal techniques in the Settlement of Disputes, Hague Recueil, 180 (1983), pages 204-211 (and 201-203).

ELKIND J.B. — Non-Appearance before the I.C.J., Functional and Comparative Analysis, Nijhoff, Dordrecht, 1984 [1].

THIRLWAY H.W.A. — Non-Appearance before the International Court of Justice, Cambridge University Press, 1985 [1].

BRIGGS H.W. — *Nicaragua v. United States*, Jurisdiction and Admissibility, American Journal of International Law, 79 (1985), at page 378.

FRANCK Th.M. — Icy Day at the I.C.J., American Journal of International Law, 79 (1985), pages 379-384.

D'AMATO A. — Modifying U.S. Acceptance of the Compulsory Jurisdiction of the World Court, American Journal of International Law, 79 (1985), pages 385-405.

LEIGH M. — Comment in the "Judicial Decisions" section of the American Journal of International Law, 79 (1985), pages 442-446.

[1] Thanks to the initiative of the Secretary-General of the *Institut* and the courtesy of the Author, this work was made available in its manuscript form, in advance of publication, to the members of Commission 4 of the *Institut*.

Introductory

1. As generally agreed in the course of a preliminary meeting of Commission 4 held (on the suggestion of the Secretary-General and the Rapporteur) during the Cambridge session of the *Institut*, the problems with which Commission 4 is called to deal are essentially those raised by and in connection with the series of relatively recent instances of non-appearance (by the respondent State) registered at The Hague. These instances now include the Icelandic *Fisheries Jurisdiction* cases [2], the *Nuclear Tests* cases [3], the *Trial of Pakistani Prisoners of War* [4], the *Aegean Sea Continental Shelf* [5], the *United States Diplomatic and Consular Staff in Tehran* [6] and the *Military and Paramilitary Activities in and against Nicaragua* [7]. The essential facts, issues and procedural and substantive developments of the first five cases are summarized by Elkind and Thirlway in the valuable works cited in the bibliography [8]. For the *Military and Paramilitary Activities in and against Nicaragua* we refer mainly to the second 1985 number of the American Journal of International Law [9].

Of course, these are not the only cases relevant for the study of non-appearance in international judicial procedure [10]. However, it is in connection with them — considered individually and in their concentration in roughly fifteen years — that the conduct of the non-appearing State has been the object of discussion, within and without the Peace Palace, both from the point of view of its legality or moral reprehensibility and from the point of view of its repercussions upon the performance of the Court's task and upon

[2] *I.C.J. Reports*, 1972, 1973, 1974.
[3] *I.C.J. Reports*, 1973 and 1974.
[4] *I.C.J. Reports*, 1973.
[5] *I.C.J. Reports*, 1976 and 1978.
[6] *I.C.J. Reports*, 1979.
[7] *I.C.J. Reports*, 1985.
[8] Especially : ELKIND at pages 53-77 ; THIRLWAY at pages 1-20.
[9] Notably the Editorial Comments and Correspondence published in that Journal 79 (1985), at pages 373-446.
[10] Leaving out still the few Permanent Court instances, mention must be made of the *Corfu Channel* case, final phase (1949), *I.C.J. Reports*, 1949 ; the *Anglo-Iranian Oil Co.* case (1951), *I.C.J. Reports*, 1951 ; and of the *Nottebohm* case (1953), *I.C.J. Reports*, 1953.

the procedural and substantive positions of the parties. It is in connection with the experience made in those same cases that devices are being discussed that might eliminate or reduce any such undesirable repercussions [11].

It is from the debate elicited *(de lege lata* et *de lege ferenda)* by the above listed cases that the Commission should in my view start its investigation.

The present report will only deal, therefore, with :

(i) non-appearance by the respondent State in Court proceedings initiated by *unilateral application ;*

(ii) deliberate non-appearance accompanied by the respondent State's rejection of the Court's competence to deal with the matter.

Subject to any indication to the contrary from the Commission we shall *not* concern ourselves with :

(i) problems of non-appearance in cases brought before the Court by special agreement ;

(ii) the problems raised, even in the case of proceedings opened by unilateral application, by casual non-appearance due to factors other than the deliberate choice of the respondent State not to make an appearance at all or to cease participation at some stage.

2. The Rapporteur is not unaware of the high degree to which political factors must be taken into account in dealing with the legal problem of non-appearance before the Hague Court.

On one side there are, of course, some positive non-legal factors. We need hardly recall such factors as the real or alleged attachment of given States or governments to the rule of law and to " third party " settlement of disputes, or any State's wish to acquire or

[11] I refer to those expressions of dissatisfaction with the practice of non-appearance which have come so far *inter alios* from Fitzmaurice, O'Connell, Mosler, and Sinclair, on one side, and from Judge Gros, on the other side. The first group of writers are more or less severely critical of the respondent State's absence and of a Court " treatment " of non-appearance they consider to be more or less unjustly detrimental to the active party and to the good administration of justice. Judge Gros, for his part, seems to be dissatisfied, regarding two of the recent cases, with a Court " treatment " of non-appearance which he deemed to be unjustly detrimental to the absent State. From both sides, suggestions are being made, *de lege lata, de lege ferenda* or as a matter of Court policy, in order to eliminate or reduce what is rightly or wrongly considered to be an undesirable handling of non-appearance.

preserve a good " external image ", or a certain government's concern not to disappoint at home an internationally-minded and law-abiding public. Factors such as these — where present — would obviously tend to reduce a respondent State's temptation not to co-operate with the applicant party and with the Court.

On the negative side one must consider, first of all, the " natural " reluctance generally shown by the sovereign State to submit to the judicial function or to any other " third party " settlement procedure. Even where this negative factor has been overcome not only by the original or subsequent acquisition of membership in the United Nations and the consequent automatic participation in the so-called " judicial community " represented by the Statute of the Court [12] but also at the further stage of commitment which is represented by the acceptance of some measure of compulsory jurisdiction, it is not surprising that the " natural reluctance " manifests itself with greater weight as soon as an actual occasion for subjection to judicial power is created by the unilateral application of another member of the " judicial community ". It is equally obvious that the " natural reluctance " will tend to prevail more strongly as the substantive issue and its implications are rightly or wrongly deemed to be of a vital or sensitive nature for the respondent State. Further negative factors to be taken into account will be, in particular, the more or less justified opinion of the respondent government that its legal chances are objectively thin, the really or allegedly scarce confidence of that government on the Court's objectivity and integrity [13], the justified or unjustified persuasion that the dispute submitted to the Court is not covered by the respondent State's undertaking under Articles 36.1, 36.2 and 37 (or that such undertaking is utterly non-existent) or just the fear that to submit to the Court's judgment (on jurisdiction or on the merits) may create an undesirable precedent. It is presumably in the presence of one or more of such factors, possibly combined with an inherent or occasional (real or assumed) opposition within national public opinion, that the " natural reluctance " to stand international adjudication becomes so irresistible as to induce the respondent State's government to decide

[12] KELSEN, Hans, The Law of the United Nations, pages 79-83, 130-135, 489 pp.

[13] An example is mentioned by FRANCK, *Icy Day at the I.C.J.*, AJIL, 79 (1985), pages 379-380.

that under no circumstances would it be willing or able to submit to an adverse judgment. This may in turn induce that government to believe that by all means it must avoid any steps which might appear, at home or abroad, as a recognition that the Court was empowered to pronounce itself. And it is from this " double determination " that presumably may derive the more specific decision not to participate — or not to participate regularly — in the proceedings. The respondent State's government would thus seem to give the utmost emphasis to its disclaimer of any power of the Court to *ius dicere*, either on its jurisdiction or on the merits (and possibly on interim measures). Non-appearance becomes thus the most dramatic manifestation of a State's determination to reject the judicial process and to remain, at least in so far as the Hague Court is concerned, *iudex in re sua*.

Much as the above-mentioned factors are relevant in any study of non-appearance, the Rapporteur is inclined to believe that the Commission would be well advised to avoid getting involved in their discussion at the outset. They would be better considered at a later stage, and in any case after a certain degree of consensus were attained on the essential features of the legal *régime* of non-appearance in the Hague system. The Rapporteur himself shall briefly revert to some of the political aspects of the matter in the very tentative conclusions of the present paper.

3. The Rapporteur is inclined to believe that the most practical approach to the problem would be the following :

> *(i)* he should first try to identify the shortcomings that the *régime* of non-appearance (as used by States and applied by the Court) seems to reveal and the remedies suggested so far in order to eliminate or reduce those shortcomings ;
>
> *(ii)* secondly, the Rapporteur should try to summarize the essential features of the existing legal *régime* of non-appearance as they emerge from the Statute, from the nature of the Hague system and from the practice of the Court ;
>
> *(iii)* thirdly, and in the light of the features of the legal *régime* thus identified, the Rapporteur shall reconsider the above shortcomings and suggested remedies with a view to assessing the legal merits of the *doléances* made so far and the legality and effectiveness of suggested or conceivable remedies.

The three parts of the present paper correspond to the above points (i - iii).

Part one - " Doléances " and suggested remedies

I. *The main " doléances "*

4. *(a)* A number of commentators express disapproval, in the first place, of the fact of non-appearance *per se*. Not in conformity, according to Fitzmaurice, " with the attitude to the Court which a party to the Statute ought to adopt " and " misguided and regrettable " [14], the non-appearance of respondent would be more or less severely reprehensible — legally or morally — according to O'Connell [15], Mosler [16], Lachs [17], Rosenne [18].

Connected with the above condemnation is the further criticism — addressed to the Court itself — of what Fitzmaurice calls (with reference to a statement by O'Connell) " the perfunctory and inadequate language used by the Court in commenting on the ' non-appearance ' practice ". In O'Connell's view the Court should have gone beyond the mere expression of " regrets " for the respondent's absence [19].

(b) In the second place, it is noted that the absence of the respondent and the failure of the latter to develop its arguments (in due form and at the appropriate time according to the Court Rules and rulings) deprives the Court of " the assistance " it would

[14] FITZMAURICE, Separate Opinion in *Icelandic Fisheries Jurisdiction*, jurisdictional phase, I.C.J. Reports, 1973, page 79, paragraphs 21 and 22 ; and Sir Gerald's cited article, page 89 and *passim*.

[15] References and rich quotations in FITZMAURICE cited article, page 94.

[16] ...« so ist die Nichtteilnahme als dem Geist von UN-Satzung und Statut wiedersprechend »... (cited article at page 442).

[17] Separate Opinion in *United States Diplomatic and Consular Staff in Tehran*, I.C.J. Reports, 1980 at page 48.

[18] The International Court of Justice, II, page 528.

[19] Passage quoted by FITZMAURICE, cited article, at page 94 (under N°. 2).

obtain from "such arguments" or from any evidence adduced in support of them [20].

It is further alleged that similar difficulties and embarrassment are caused by non-appearance to the applicant State. In the words of O'Connell, quoted by Fitzmaurice, "the applicant is embarrassed because it must satisfy the Court that the claim is well-founded in fact and law, without the benefit of hearing the arguments that the respondent ought to have made in support of its asseverations. It has to imagine the arguments that might be passing through the mind of the Court, whether they are so passing or not."

"So, the applicant has to bring matters before the Court which ought properly to be brought before it by the respondent by way of preliminary objection; and the protection given by the Court to the respondent paradoxically erodes the protection to which the applicant is entitled under the Court's rules. The greater the protection to the respondent the more progressive is the shift in the balance in its favour".

"This puts the applicant in a difficult position, arising from the fact that it does not know how far it must proceed in argument in order to dispel objections or refute contentions that have not been publicly aired, but which may, or may not, be entertained by Members of the Court."

"An applicant put in such a position might even, in some circumstances, be denied justice. For its arguments might either go unnecessarily far, or not far enough. It might be seeking to counter arguments that had not been put, but which imagination could conjure up, convey an impression of defensiveness or want of conviction. Yet, if it does not counter arguments which actually do occur to the Court, it might not discharge the burden of proof sufficiently" [21].

Sir Ian Sinclair adds that the tendency of respondent Governments not to appear, inevitably suggests that Governments against whom proceedings are instituted before the Court "see no procedural disadvantage, and possibly some procedural advantage, in

[20] With my own addition in parenthesis, this is the language of O'CONNELL's *Nuclear Tests*, I.C.J. Reports, 1974, paragraph 15, as quoted and cited by FITZMAURICE, cited article, page 94.

[21] FITZMAURICE, cited article, page 95.

refusing to appear in the proceedings" [22]. Sir Ian is preoccupied in particular by the fact that "one seems to discern a tendency on the part of the... Court or an *ad hoc* arbitration tribunal to lean over backwards in order to take into account the interests of the non-appearing party, sometimes", as in some cases, "by re-interpreting the submissions of the appearing party or taking into account materials on which the appearing party has been given no opportunity to comment". He deprecates in particular that the Court "should dispose of proceedings regularly instituted by an applicant Government... by relying upon materials and arguments on which the appearing party has had no opportunity to comment" [23].

(c) Thirdly — and in contrast, in a sense, with some of the remarks summed up so far — commentators believe that the fact of not appearing is rendered even more reprehensible by the marked tendency, shown by non-appearing States in the relevant cases, to manifest themselves to the Court, directly or indirectly, by letters, messages or statements containing materials relevant to the issues of jurisdiction or merits. Such a practice of *extra ordinem* and *extra moenia* places the non-appearing State — as noted by Fitzmaurice — in almost as good a position as if it had actually appeared [24].

This might even seem to be an understatement. The practice in question presents actually the double advantage, for the non-appearing State, on one hand of making the respondent's defense easier in that its communications and manifestations are practically exempt from terms, conditions and deadlines normally imposed upon the parties by the Court Rules and rulings; on the other hand, of leaving open for the defendant — this is a point taken up separately under *(d)* below — the possibility to maintain that it does not recognise the legitimacy of the proceedings or their outcome [25]. Similar thoughts are expressed by O'Connell [26] and others [27].

A number of the same critics (but mainly O'Connell, Fitzmaurice

[22] SINCLAIR, at page 356.

[23] SINCLAIR, *ibidem*.

[24] FITZMAURICE, cited article.

[25] FITZMAURICE, I.C.J. Reports, 1973, p. 35; and Sir Gerald's article, page 91.

[26] As quoted in FITZMAURICE's article.

[27] THIRLWAY, Chapter 9.

and Sinclair) suggest that consideration by the Court (and by single judges) of the above-mentioned irregular communications or statements results in a "less than fair"[28] procedural (and possibly substantive) treatment of the active State to the detriment of the good administration of justice. According to Fitzmaurice in particular "the protection given by the Court in the name of Article 53 of the Statute to the absent State" erodes "the protection due to the appearing State"[29].

(d) Fourthly, a number of commentators deprecate that non-appearance, combined with certain aspects of *extra ordinem* communications, statements or publications emanating from the absentee, lends itself to the supposition that the absent State may be preparing the ground to maintain, in case of need, that it "does not recognize the legitimacy of the proceedings or their outcome"[30]: mainly that it does not consider to be bound by the provisions of the Articles of the Statute according to which the Court's judgments are binding upon the parties.

An intimation to such an effect is actually either explicitly put forward or implied in the attitude of the non-appearing State in a number if not all of the relevant cases.

Connected with this is the further *doléance*, rarely explicit but often implicit, that the undesirable consequences of the non-appearing State's attitude may extend, from the merely procedural difficulties created to the active State and the Court, to the very decisions that the Court is called to render by Article 53, either with regard to its jurisdiction or with regard to the merits. The threat of non compliance implied in the absent State's negative and positive conduct may, at least in theory, induce the Court unconsciously to adopt a more lenient course or to use a softer hand than otherwise it might be inclined to do[31].

[28] FITZMAURICE and SINCLAIR, cited articles, *passim*.

[29] FITZMAURICE, cited article, pages 116-118. Fitzmaurice speaks of the situation as contrary to "equality of arms" (p. 121).

[30] FITZMAURICE, *I.C.J. Reports*, 1973, page 35; and cited article, page 91.

[31] Such a thought might be prompted, for example, to the minds of some of the commentators, by the Court's statement (in the *Fisheries Jurisdiction* cases) that it had "acted with particular circumspection", and had "taken special care, being faced with the absence of the respondent State" (FITZMAURICE, cited article, at page 94).

One more criticism, emphasizing in a sense the *doléances* just listed, is that "the failure of the respondent to appear in cases before the Court has... become such a regular feature of proceedings as to be almost a pattern"[32].

This remark, recently confirmed by the withdrawal of the United States from the proceedings initiated by Nicaragua — in spite of, and in open argument against, the affirmative decision of the Court with regard to jurisdiction — appears to be particularly justified by the high degree of "sensitivity" of the matters involved in the relevant cases (but see *infra*, last part of paragraph 17).

5. A different outlook seems to emerge from the opinions formulated by Judge Gros in *Nuclear Tests* (prior to the manifestation of most of the opinions considered in the preceding paragraph). I refer notably to the Dissenting Opinion appended by that Judge to the Court's Order relating to interim measures in *Australia v. France* of 22 June 1973[33] and to the Separate Opinion appended to the Court's judgment on the merits of 20 December 1974[34].

Judge Gros' position seems to be quite different from the positions of scholars and judges catalogued in the preceding paragraph.

Unlike O'Connell, Mosler and Fitzmaurice, who condemn non-appearance of the respondent State and the latter's *extra ordinem* communications, Gros deems non-appearance to be irreprehensible and expressly legitimised by Article 53: and not just as a merely passive attitude of the respondent State's but as a form of contestation of the Court's jurisdiction[35]. Unlike those same writers and Sinclair, who believe that the Court would have shown a (reprehensible) tendency to lean in favour of the non-appearing State through an excess of zeal in meeting certain requirements of Article 53, Gros seems to think, on the contrary, that at least in the interim measures

[32] O'CONNELL, quoted by FITZMAURICE, cited article, page 94. It is in view of this trend that SINCLAIR warns the Court (at his page 356) of the necessity to reflect on the causes of the recent "rash of cases involving non-appearing respondent Governments."

[33] *I.C.J. Reports*, 1973, pages 115 ff.

[34] *I.C.J. Reports*, 1974, pages 276 ff.

[35] I refer particularly to Judge Gros' statement extensively quoted *infra*, paragraph 18.

phase of *Nuclear Tests*, the Court would have rather leant in a direction detrimental to the non-appearing State (and more advantageous to the applicant State). Such would have notably been the case when the Court did not apply *à la lettre*, in the *Nuclear Tests* interim measures phase, that part of the second paragraph of Article 53 which would enjoin the Court, before deciding, *fully* " to satisfy itself " that it has jurisdiction.

The eminent Judge's views on non-appearance will be recalled verbatim further on, *à propos* of the theory according to which a non-appearing State would not be a " party " to the Court's proceedings [36].

II. *Remedies Suggested So Far*

6. The attitudes of the cited writers is further clarified by the study — particularly relevant for our Commission's purposes — of the remedies they suggest in order to eliminate or reduce the malfunctions they denounce. Naturally, the remedies suggested vary in weight according to the degree of dissatisfaction felt by each commentator with the relatively recent practice of non-appearance.

The remedies suggested can be grouped in two classes according to whether they affect the general conduct of proceedings characterized by the non-appearance of the respondent or merely the treatment, in case of non-appearance, of the issue of the Court's competence to deal with the merits or with any other issue. For the sake of brevity we shall refer to the first group of remedies or " general remedies ", the other group being the " remedies affecting the jurisdictional question ".

A. *General Remedies*

7. Among the remedies suggested so far, the first in a logical order seems to be the adoption by the Court of a " sterner attitude " towards the non-appearing State. This is implied in Sir Gerald Fitzmaurice's dissatisfaction at what he calls " the Court's apparent

[36] *Infra* paragraph 18. I refer to Judge Gros' opinion that in issuing the interim measures Order in the *Australia* v. *France* case, the I.C.J. merely satisfied itself with an inadequate appreciation of the requirement of *compétence*.

complete lack of concern about a practice that strikes at the very foundations of its prestige and authority as court of law, or for the perfunctory and pedestrian character of the language used by the Court when referring to it, or for the Court's seeming want of any sense of outrage such as has been felt by many onlookers — not least at the attitude of the Court itself, almost bordering on the self-satisfied " [37]. The Court, according to Fitzmaurice, actually " condones " non-appearance [38]. It would seem, in brief, that the Hague Court should *condemn* non-appearance as a violation of the legal or moral obligation to appear that some commentators are inclined to infer from the Court's Statute or from the Charter of the United Nations [39].

A corollary of the above condemnation of non-appearance — and a preliminary to the further concrete steps suggested by Fitzmaurice and others — is Sir Gerald's suggestion that the Court " Declare the impugned State, for the purposes of Article 59 of the Statute, to be a 'party' in, and to, any proceedings brought against it by virtue of an instrument under which it has purported to accept the Court's jurisdiction, unless it appears before the Court to show cause why the instrument is invalid, no longer in force, or not applicable to the circumstances of the case. This would immediately remove the non-appearer's sheet-anchor, viz. that by virtue of its non-appearance it can maintain that it is not a party to the proceedings and consequently not bound by the judgment of the Court " [40].

[37] FITZMAURICE, cited article, pages 116-117. The implication seems to be that the Court should consider non-appearance as a wrongful act towards the applicant State and/or a contempt of Court.

Sir Gerald seems to wish to bring non-appearance back to that concept of *contemptio* of the tribunal's authority from which " contumacia ", the modern Italian term for non-appearance (but *not* the present regulation of non-appearance in the Italian codes of civil and criminal procedure), seems to derive.

[38] *Ibidem*, 117. Sir Gerald is obviously inspired by O'CONNELL's views cited *supra*.

[39] One may suppose that the suggested Court condemnation would also help, in the opinion of its advocates, in the problematic application of Article 94 of the UN Charter.

[40] Cited article, at page 121.

A completion and in a sense a coronation of the remedies considered so far would be the most far-reaching — and admittedly the most daring — amongst Sir Gerald's suggestions. It is the idea that " (f) Finally throughout the proceedings resolve all border-line questions or questions of serious doubt in favour of the complainant State, unless the State impugned appears to show cause why not, and in proper form " [41]. It must be noted, however, that Sir Gerald himself admits that for the Court to go so far " is perhaps too much to expect " [42].

8. Of a different kind is Sir Ian Sinclair's suggestion. Preoccupied by the undue advantages accruing to the absent State by both its silence and irregular communications and statements, Sir Ian suggests that in cases of non-appearance the Court should play a more active role in order to bring about a better balance between the active and the absent party's interests. In order to achieve such a balance, the Court :

> *(i)* " should invite argument from the appearing party on issues which it may feel tempted to take into account *proprio motu* if it considers that those issues have not been canvassed, or have not been adequately canvassed, in the written or oral pleadings " ;
>
> *(ii)* " if necessary, should be prepared to re-open the oral hearings. " [43]

9. According to Leo Gross, who seems to find in the fear that the Court may apply the doctrine of *forum prorogatum* at least

[41] It is worth reporting, after this last point of his, Fitzmaurice's conclusion that " To follow a settled course on the above lines might not eradicate the practice of non-appearance : it should go far to deter it, or at least to render it of little point juridically. It would also help to redress the balance at present heavily tilted in favour of the non-appearer, and to restore to the complainant some measure of the equality of arms at present lacking because of the handicaps in the presentation of its case which the non-appearance and unorthodox procedure of the other party creates. Last, but not least, the Court, by doing all that lay within its power to discourage and draw the teeth of non-appearance, would have ceased to lay itself open to the justified reproach of treating casually a practice that constitutes a blot on administration of international justice and on its own authority and repute " (cited article's conclusion at pages 121-122).

[42] Cited article, page 121.

[43] SINCLAIR, cited article, pages 356-357.

one of the motives of some instances of non-appearance, a remedy to that possible motive could be the introduction in the Court Rules of an explicit provision " for a ' special appearance ' " confined to the purpose of formally objecting to the Court's jurisdiction. Such a provision should serve, in Gross's opinion [44], to dispel or reduce the fear of the unilaterally assigned respondent State of doing anything which might justify a Court finding of *forum prorogatum.* Gross suggests that one would thus introduce in international litigation an institution resembling the " special " or " conditional " appearance through which English and American law permit a foreign sovereign to present itself for the sole purpose of asserting its immunity from jurisdiction [45].

B. *Specific Remedies Concerning the Jurisdictional Issue*

10. The devices mentioned in the preceding section are not exhaustive of the remedies suggested so far.

According to Fitzmaurice, indeed, the Court should — " first and foremost " — give up what was indicated by it in the *Hostages* case as its " settled jurisprudence " on the requirement of Article 53.2 relating to jurisdiction [46]. The Court should notably abandon the interpretation it would seem to have adopted of the second paragraph of Article 53, namely of the phrase : " satisfy itself... that it has jurisdiction ". In applying this requirement the Court should distinguish, in Sir Gerald's own words, " between the case (call it class (A) case) where " a *prima facie* basis ' of jurisdiction ' is *totally non-existent,* and the case — class (B) — where it *does* exist but the State concerned *denies its validity or applicability* in the particular circumstance of the dispute before the Court " [47]. What the Court ought to do — Sir Gerald concludes — is :

> *(i)* " if no such *prima facie* basis *appears to exist at all* (class (A) cases), to *declare itself incompetent* ; while if

[44] *The dispute between Greece and Turkey,* etc. (*Aegean Case*), 71 (1977), AJIL, pages 54-59.

[45] Cited article, at page 58.

[46] This suggestion is made by Fitzmaurice at pages 113 and 115 ff. of his article, where he joins the remarks made by O'CONNELL in the fourth of the latter's passages reported by Sir Gerald at pages 95-96.

[47] Emphasis added by us.

(ii) — class (B) — such a basis *does appear to exist*, to inform the Government impleaded that *unless it appears before the Court to show cause why jurisdiction should nevertheless not be assumed, the Court will proceed to do so, and will go on to hear and decide the merits.*" [48]

The suggestion is taken up again by Fitzmaurice in his conclusions [49]. Sir Gerald specifies that in class (B) cases the Court would actually proceed "broadly" as it does "when dealing with requests for the indication of interim measures" [50]. He does see an obstacle to such a course but he points at the logical argument by which that obstacle could be circumvented. In his own words, "The only formal objection I can see to this course arises from the one word 'satisfy' in Article 53 of the Statute: the Court must 'satisfy itself... that it has jurisdiction'. But it is surely for the Court to decide what is going to satisfy it (this is indeed precisely the point the Court itself made in its citation from the *Corfu* case...), and although this would not justify any arbitrary or capricious determination... it would in my view be perfectly proper for the Court to declare itself satisfied on the basis: *(a)* of an instrument apparently valid and in force, purporting to confer jurisdiction upon it (for which its jurisprudence over the indication of interim measures of protection affords ample precedent...); *(b)* full opportunity for the impugned State to make objection; and *(c)* failure to do so by the receivable means, viz. those prescribed by the Statute and Rules. If any reinforcement of this view were needed, it could be found by holding that *in such circumstances the impugned State must be deemed to have conceded the jurisdictional point through not disputing it by the only method* the Court, consistently with its Rules, can recognize" [51].

As a possible prelude to the adoption of the course summed up in the preceding paragraph one could add Fitzmaurice's suggestion

[48] According to FITZMAURICE (note to the quoted passage at page 113) "Actually the Court did take a sort of first step in this direction in the *Hostages* case". He further refers the reader to page 114 of the subsequent part of his article. Emphasis in the passage quoted in the text is added.

[49] Pages 120-121.

[50] Page 112.

[51] Cited article, pages 120-121. Emphasis added.

(implicit in the criticism inspired by O'Connell's suffered embarrassment) that the Court take some "step" which — while *not* affecting necessarily the final outcome — might elicit some feeling of doubt and discomfort in the mind of the non-appearer — such as, for instance, a formal intimation... that (the Court) could *not take judicial cognizance of any communications objecting to its jurisdiction that were neither in the form, nor presented in the manner, prescribed by the Statute and Rules of Court*" [52].

It should be noted, however, that this suggestion does not seem to be renewed in that final part of Sir Gerald's often cited article in which he sets forth, "in *recapitulation and summary... what the* Court *can do*" [53].

11. A further device proposed by Fitzmaurice — a development, in a sense, of what he suggested with regard to the jurisdictional issue but deserving separate notation because it affects also the treatment of the merits — would be the following: "In any case of serious doubt as to the propriety, in the particular circumstances, of proceeding as described... above, automatically *join all preliminary issues to the merits without* allowing *any preliminary phase.* Although the deterrent effect would not be as great, it would still be considerable — for one of the objects of the non-appearer is to avoid all possibility of any examination of the merits — an object it might well achieve if it appeared and, in a preliminary phase, persuaded the Court then and there to decline jurisdiction or pronounce the claim inadmissible. Why not compel it to do so if it wants to achieve that object?" [54].

12. A different adjustment of the Court's practice concerning non-appearance would presumably be advocated, with regard at least to the possibility for the Court to indicate interim measures of protection, by Judge Gros.

From his Opinions referred to *supra*, paragraph 5, he would seem to suggest that when the Court is confronted with the non-appearance of the respondent State, it should immediately apply the

[52] FITZMAURICE, at page 117.

[53] The same, at pages 120-121 (emphasis added).

[54] FITZMAURICE, cited article, at page 121 (emphasis added).

second paragraph of Article 53. If we understand correctly, the Court should proceed forthwith to "satisfy itself" that it has jurisdiction. And only after satisfying itself that it has jurisdiction in the *fullest* sense (*infra*, paragraphs 27 and 32) would the Court be enabled to proceed, notably to indicate interim measures of protection. Indeed, until such verification were accomplished the non-appearing State would not even be, according to the eminent Judge, a "party" before the Court in a technical sense (*infra*, paragraphs 18 ff.).

13. The most practical approach to a summary evaluation of both *doléances* and remedies — as summed up so far — is to start by an assessment of the legal *régime* of non-appearance within the Hague Court's system. This will be done, as briefly as possible, in the following part of the present paper.

Following this, and on the basis of the essential legal features of the existing system, we shall be able to proceed, in Part Three, to a tentative evaluation of both the legal merits of the *doléances* and the lawfulness, as well as the feasibility and usefulness, of the suggested remedies.

We shall then sum up our tentative conclusions.

Part two - the regime of non-appearance in the Hague Court system

I. *Raison d'être of Article 53*

14. Subject to correction from the eminent members of Commission 4, the present writer is inclined to believe that Article 53 of the Statute — which probably sets forth principles which are inherent in the Court's system[55] — pursues two fundamental purposes.

[55] This view finds some support in the *travaux préparatoires* of Article 53, as emerging from the records of the *Comité Consultatif de Juristes* responsible for the draft Statute of the Permanent Court of Justice in 1920 (CPJI, CCJ, Procès-verbaux des Séances du Comité, 16 juin-24 juillet 1920, avec Annexes, La Haye, 1920). See especially, of these records, pages 590-591 and 640-641 (as well as the Hagerup Memorandum at page 607).

The Italian Member, Ricci-Busatti, voted notably against the adoption of Article 15 of the draft (corresponding to the present Article 53) in view of the fact that « l'article est *parfaitement inutile* si les mêmes preuves doivent être exigées lorsqu'il s'agit d'un jugement par contumace qu'ailleurs ; il propose la suppression de l'article » (at page 640). According to the more articulate explanation he had given at an earlier stage, "the Article was quite useless if the powers of the Court were to be exactly the same even in case of judgment by default. The inclusion of a special provision on this point would be justified only if the intention were to limit those powers in the interests of the plaintiff and in order to punish the other party for its negligence. But, as such a provision does not apply to international affairs, he proposed the suppression of the Article" (at page 590).

(a) First and foremost, Article 53 aims at ensuring that any State participating in the Court's system and accepting the Court's jurisdiction be not deprived of the right to obtain an adjudication of its claim by the choice of another State — whatever its reasons — not to appear or not to defend its case. By providing that the active State may, in such an occurrence, "call upon the Court to decide in favour of its claim", the first paragraph of Article 53 clearly intends to *ensure* that the non-appearing or inactive State does not create, by its choice, an obstacle to adjudication. The Court *must* proceed if the active State so wishes. It need hardly be added that an obvious but fundamental implication of the same (first) paragraph of Article 53 (confirmed, if need be, by the second paragraph itself) is that the judgment given by the Court in the respondent State's absence will be as binding on that State as if the latter had appeared and regularly participated in the proceedings. In other words, the non-appearing State remains fully subject to Article 59 of the Statute and all the related (explicit or implied) provisions qualifying the Court's judgments as binding (e.g. Article 36 and Article 38). The provision of Article 53 empowering the Court to *ius dicere* would be utterly pointless if such were not the case.

(b) At the same time, Article 53 is intented to ensure that in so doing, the Court does not make any decision in favour of the active State's claim and to the detriment of the absent State, unless such a decision is justified in procedure and substance. This is the purpose of the second paragraph of Article 53, when it enjoins the Court not to decide in favour of the active State's claim before *satisfying itself*, "not only that it has jurisdiction" (according to Articles 36 and 37) "but also that the claim is well founded in fact and law".

The combination of these aims constitutes the dual *raison d'être* of Article 53. And it is from that dual *raison d'être* — combined with the essential features of the Hague Court's system as they emerge from the letter, the logic, the history and the practice of the institution [56] — that one should try to answer the various questions raised by the non-appearance of the respondent State.

The practice of the Court relating to non-appearance essentially confirms, in our view, the *raison d'être* of Article 53 as summed up as well as the relationship between 53 and the Statute's provisions qualifying the Court's decisions as binding.

II. *Whether appearance is a matter of legal obligation* [57]

15. The first question to be dealt with concerns the legality of non-appearance.

The very fact that Article 53 not only refrains from any condemnation of the absent or inactive State's conduct but enjoins the Court, in paragraph 2, to satisfy *itself* as to jurisdiction and merits — absence or silence notwith standing — is, *à la rigueur*, sufficient to exclude that any such condemnation be implied in Article 53 [58].

16. The argument based upon the wording and the logic of Article 53 is confirmed by the nature of the Hague Court system.

By the fact of representing, from a number of points of view, a step forward from the pattern of classical arbitration, the very nature of the Court's system would seem to exclude any condemnation of non-appearance as unlawful. The permanent character of the adjudicating body and the possibility that proceedings before it be started by the unilateral initiative of one of the parties in dispute, exclude that the co-operation of both parties be indispensable — as

[56] Most notably Articles 36.6 and 59 of the Statute.

[57] Of an obligation « de se présenter devant la Cour » (pour les Etats) acceptant la compétence obligatoire, speaks DUBUISSON, pages 155, 197 (« *condamné* par défaut »). That same author seems to think otherwise (and more correctly) at page 223 : but the idea of « *sanction du défaut* » comes up again at page 259.

[58] This is confirmed by RICCI-BUSATTI's statement quoted *supra*, under paragraph 14. See also EISEMANN, cited article, at page 355.

in classical arbitration — for judicial settlement to be effectively pursued.

The substantial elements of analogy which the Hague Court's system presents in these respects — albeit not in others — with the jurisdictional systems of national law affords the conclusion that non-appearance (or inactivity) at the Hague is *as discretionary* and *as lawful* as non-appearance before a *national* jurisdiction : and the first paragraph of Article 53 seals this conclusion, precisely by expressly entitling the applicant State to demand a decision and empowering the Court to make one.

The Rapporteur feels that the attempts to draw a different conclusion from sources other than Article 53 and the Court Statute as a whole have not been successful.

The UN Charter provisions on peaceful settlement — from Article 2.3 to the whole of Chapter VI — do not help. From Articles 2.3 and 33.1, read in conjunction with 36.3, with the qualification of the Court as the principal judicial organ of the United Nations, and with the automatic participation of United Nations members to the Court's Statute, one could perhaps try (with some effort) to draw a kind of very general obligation of respect for, and use of, the Court [59].

However, even if one managed to demonstrate the existence of such an obligation, it could easily be retorted (in so far as appearance and activity before the Court are concerned) that that obligation is fully complied with by any State which has accepted the compulsory jurisdiction of the Court. Together with automatic subjection to Article 36.6 *(Kompetenz-Kompetenz)*, subjection to unilaterally initiated proceedings thus accepted, obviously includes the possibility or subjection to a judgment rendered *in absentia* or *silentio* on the basis of Article 53. On the other hand, this obviously *also* implies *freedom* to *choose* between putting or not putting up an appearance or a defence [60].

[59] *Infra*, paragraph 21.

[60] Similarly inadequate — in order to base an obligation to appear or " defend " one's case and justify a condemnation of failure to do so — would be recourse to Article 2.5 of the Charter (obligation " to give the United Nations every assistance in any action taken in accordance with the present Charter... "). As pointed out by BOWETT, *Contemporary Development*, at

A fortiori it would be inconceivable — under the Statute *or* the Charter — that a sanction of any kind were inflicted upon the non-appearing or inactive party.

17. More might theoretically be drawn — along a line of "condemnation" — from the instruments (other than the Statute or the Charter) upon which the substantive jurisdiction of the Court is founded [61]. It has already been demonstrated, however, that even if a strict obligation *to appear* were formulated in any one such instrument, there would still be Article 53 of the Statute :

(i) entitling the applicant to claim a decision ;

(ii) empowering the Court to make one, and

(iii) enjoining the Court to "satisfy itself", etc. :

the latter provision clearly excluding any detrimental consequences of failure to "appear or defend" other than those deriving from the mere fact of not taking full part in the proceedings [62].

Of course, the conclusion that non-appearance is lawful should not be understood to mean, either that it is not reprehensible from the *moral* point of view or that it is *legally* correct either in its *implications*, for example in the implied intention to disregard the Court's procedural or substantive decisions, or in any explicit statements of the non-appearing States concerning its attitude *towards the* Court (or its members) and the Court's *judgments*.

From any such points of view the *conduct* of the non-appearing State may well prove to be quite *reprehensible*, as a matter of international law and/or morality, according to the case (see also *infra*, paragraph 24).

page 205, in addition to the difficulty of "characterizing the Court's proceedings as "action" there would be "a contradiction with Article 53 which is also an "integral part" of the Charter."

[61] The main attempt in that direction, amply described by THIRLWAY, pages 72 ff. and summed up by BOWETT, *Contemporary Development*, page 205 f., was made by Sir Humphrey Waldock, in the *Fisheries Jurisdiction* cases.

[62] Substantially in that sense THIRLWAY, *ibidem* ; and BOWETT, 205-206.

III. *Non-appearance and "party" status*

18. It has been contended at least by one of the non-appearing respondent States — and authoritatively maintained by eminent members of the Court — that non-appearance would preclude the acquisition, by the absent State, of the status of a "party" in the proceedings before the Court.

According to the French Government's letter of 21 May 1973, such would have been the case of France in *Nuclear Tests* [63] : and the French Government's position has been considered to be correct by Judge Gros in the dissenting Opinion he appended to the Court's Order of interim measures issued by the Court in the *Nuclear Tests* case *(Australia v. France)* on 22 June 1973 [64]. Judge Morozov in his Separate Opinion in *Aegean Sea Continental Shelf* seems to place himself on a similar line [65].

In the words of Judge Gros, "A State either is or is not subject to a tribunal. If it is not, it cannot be treated as a "party" to a dispute, which would be non-justiciable. The position which the Court has taken is that a State which regards itself as not concerned in a case, which fails to appear, and affirms its refusal to accept the jurisdiction of the Court, cannot obtain from the Court anything more than a postponement of the consideration of its rights. *This is not what Article 53 says.* Failure to appear is a means of *denying jurisdiction* which is *recognized* in the procedure of the Court, and to oblige a State to defend its position otherwise than by failure to appear would be to *create an obligation not provided for in the Statute.* It has been argued that the *only way* of challenging the jurisdiction of the Court is to employ a preliminary objection. The way in which States challenge the Court's jurisdiction is not imposed upon them by a formalism which is unknown in the procedure of the Court ; when they consider that such jurisdiction *does not exist*, they may choose to keep out of what, for them, is an *unreal dispute.* Article 53 is the proof of this, and the Court must then satisfy itself of its own jurisdiction, and of the *reality of the dispute* brought

[63] According to the said letter (as quoted by Judge Gros, *I.C.J. Reports*, 1973, at page 118) the French Government « n'était pas partie à cette affaire ».

[64] *I.C.J. Reports*, 1973, pages 115 ff.

[65] *I.C.J. Reports*, 1976, page 21 ff.

before it [66]. A further important passage in the same Opinion is: "If it were a question of a State whose non-appearance was due to the *total absence* of the Court's jurisdiction, whether for want of a valid jurisdictional clause or by reason of the inadmissible character of the principal claim, the *immediate decision of lack of jurisdiction* in regard to the Application instituting proceedings itself *would be taken without delay;* the decision of the Court in the present case is that, despite the affirmation that a certain subject-matter has been formally excluded from the jurisdiction of the Court, and the fact that the State which made that affirmation considers itself to be outside the jurisdiction of the Court in regard to everything connected with that subject-matter, it is possible to indicate provisional measures without prejudging the rights of that State" [67].

The same view was maintained by Judge Gros (even more forcefully) in the Separate Opinion appended to the Court's judgement on the merits of the same case dated 20 Deecmber 1974. According to the English translation, the eminent Judge wrote: "To speak of two parties in proceedings in which one has failed to appear, and has on every occasion re-affirmed that it will not have anything to do with the proceedings is to *refuse to look facts in the face.* The fact is that when voluntary absence is *asserted* and openly *acknowledged* there is *no longer more than one party* in the proceedings. There is no justification for the *fiction* that, so long as the Court has *not recognized* its lack of jurisdiction, a State which is absent is *nevertheless a party* in the proceedings. In the present case, by its reasoned refusal to appear the Respondent has declared that, so far as it is concerned, *there are no proceedings,* and this it has repeated each time the Court has consulted it" [68].

The Rapporteur is inclined to submit that such contentions are acceptable, *neither* with regard to the phase following the Court's

[66] *I.C.J. Reports,* 1973, pages 115 ff., at page 118 (emphasis added).

[67] *Ibidem,* at page 120 (emphasis added). "It is a fact of international life — wrote a few lines earlier Judge Gros (at the same page 120) — that recourse to adjudication is not compulsory; the Court has to take care lest, by the indirect method of requests for provisional measures, such compulsion be introduced vis-à-vis States whose patent and proclaimed conviction is that they have not accepted any bond with the Court, whether in a general way or with regard to a specified subject-matter."

[68] *I.C.J. Reports,* 1973, at page 290 (emphasis added).

positive finding on its jurisdiction, *nor,* prior to such a finding, when the Court's jurisdiction has been (regularly or irregularly) challenged by the respondent State and is still *sub judice* under Article 36.6.

19. The idea that a non-appearing respondent State would not be a "party" in the proceedings "*until jurisdiction is affirmed*" [69] — *a fortiori* the idea that a non-appearing respondent would, by the simple fact of absence, *remain* a *non-party* even after a Court positive finding on jurisdiction [70] — is based presumably upon a particular construction of the general principle that subjection of a State to an international tribunal is based on that State's consent [71]. The idea in question seems notably to be based on a particular understanding of the frequently repeated statement that the *initiation* of proceedings before the Court is *subject* to the *existence* (or the ascertained or recognized existence) of the Court's power to decide on the merits of the relevant dispute or issue [72]. In turn, this construction of the Hague Court's system probably derives, in my opinion, from an unjustified analogy between subjection to the Hague Court system, on one side, and more or less ordinary, or classic, arbitration commitments, on the other side.

It is unquestionable that subjection to the Court's judicial power for any dispute or class of disputes — namely "substantive" jurisdiction — derives *not* from the Statute directly but from one or other of the instruments referred to in Articles 36 and 37. No dispute can indeed be validly considered on its merits by the Court unless there is *either* the notification of an *ad hoc* agreement or *compromis* expressing both parties' consent to submit that dispute to the Court under Article 36.1 or a unilateral request based *either* on a valid acceptance of "compulsory" jurisdiction under

[69] Which is also BOWETT's (page 206) reading of the French Government's and Judge Gros' contention considered in the preceding paragraph.

[70] Such idea being not suggested, if we understand correctly, by Judge Gros.

[71] On the ambiguity inherent, in a sense, in such a statement, ELKIND, at page 89.

[72] An ambiguity on this point seems to exist even in STARACE's outstanding monograph *La competenza della Corte internazionale di Giustisia in materia contenziosa,* Napoli, 1970, at page 22.

Article 36.2 or on a general treaty of judicial settlement or compromissory clause (36.1 again) conceived in such terms as to create an equally "compulsory" jurisdiction of the Court: the term "compulsory" to mean, in either case (36.2 or 36.1), that proceedings can be initiated by a *unilateral* application [73]. In other words, for no dispute is the Court directly empowered to *ius dicere* vis-à-vis any State by the rules of the Statute alone. A *further* consent — other than the consent that made that State a participant in the Court system — must have been given by the State through one of the instruments just recalled, such consent covering the relevant dispute.

Correct as this surely is with regard to the Court's power to *ius dicere* on the *merits* of any dispute [74], it would be mistaken to believe that with regard to any dispute on the merits of which the Court were *not* validly empowered to exercise its function, proceedings *could not be opened before the* Court with the consequent acquisition of "party status" by the respondent State [75]. With regard to the possibility of a unilateral initiation of the proceedings (with the consequent acquisition by respondent of "party status") the situation is less simple than it would appear if one took *à la lettre* the frequent, just recalled, statement that the initiation of proceedings is subject to the *existence* of the Court's principal or "substantive" jurisdiction. Correct in a sense, this statement does not mean — and should not be understood to mean — that the Court is not enabled to exercise *any* function (and to open proceedings), on the basis of a unilateral application, *before* the existence of a valid consent to compulsory jurisdiction (in the above-mentioned sense) had been admitted by the respondent State or *ascertained* by the Court.

[73] It need hardly be recalled that not all treaties and compromissory clauses contemplating judicial settlement envisage the possibility that proceedings be initiated by a unilateral request. Many such treaties or clauses require that actual submission to the Court of the dispute they contemplate be effected by *both* parties, namely by *compromis*.

[74] Except in so far as an issue on the merits may be of relevance in the exercise by the Court of functions *other* than the decision on the merits itself.

[75] *Supra*, in this same paragraph.

On the contrary, there are surely judicial functions which the Court is enabled to exercise vis-à-vis a State *prior* to — and *regardless* of — any finding of the *existence* of a *valid* consent subjecting that State to the Court's principal (or "substantive") jurisdiction. This is precisely the case of some of the judicial functions which — unlike those envisaged in Articles 36, paras 1-5 and 37 of the Statute — are directly conferred on the Court by the Statute. I refer, *inter alia*, to the functions contemplated in Article 36.6, which directly provides that "In the event of a dispute as to whether the Court has jurisdiction, the matter shall be settled by the decision of the Court", and in Article 41, which directly provides for the Court's power "to indicate, if it considers that circumstances so require, any provisional measures which have to be taken to preserve the respective rights of either party".

Both these provisions are generally classified, together with those of Articles 60 (Court's power to interpret its judgments), 61 (revision of judgments), 62 - 63 (third party's intervention) and 64 (power of the Court to decide on the expenses), not to mention Article 53 itself, as provisions covering "incidental" or "accessory" judicial functions. These are the functions directly conferred upon the Court by the Statute and not requiring, unlike the principal competence contemplated in Articles 36.1-5 and 37, any consent other than the general consent which is *inherent* in participation in the Statute. We actually wonder, however, whether Articles 36.6 and 41 — alone or together with other provisions among those listed — do not cover functions which are *more* than just "incidental" or "accessory".

20. To begin with the most important Article 36.6, it endows the Court with *Kompetenz-Kompetenz*, namely with the competence to judge over the *existence* and *validity* of the title or titles of jurisdiction relied upon by the applicant State or States. By so providing, Article 36.6 directly subjects to the Court's judicial power not just disputes over jurisdiction between States bound by *valid* titles of compulsory jurisdiction but *virtually* — in so far as jurisdictional issues are concerned — *all the States participating in the Statute*. To put it bluntly, on the mere strength *of the Statute*, any State participating in that instrument is entitled, whether it is *or not* in

possession of a valid title of compulsory jurisdiction (namely of a legally perfect jurisdictional link), unilaterally to initiate proceedings before the Court *vis-à-vis* another State participating in the Statute. Such other State is thus *automatically* subject to the Court's power to settle *the issue of jurisdiction* (or admissibility).

The consequence for our present purposes is that however strongly a respondent State may feel that a valid jurisdictional link does not exist, it is *not* entitled to contest the judicial function *(Kompetenz-Kompetenz)* provided for by Article 36.6. Any State participating in the Hague Court system is bound *ipso facto* — namely by virtue of the mere legal situation represented by such participation — to submit to any decision rendered by the Court on the question whether the latter is possessed or not of jurisdiction with regard to a dispute of which the tribunal has been (unilaterally) seized by another participating State.

21. The well-known — but occasionally forgotten or unmentionned — truth is that, notwithstanding the 1920 failure to establish that *general* compulsory jurisdiction which had not passed the test of the consent of States in 1907, *some* steps *were taken* in that direction in 1920. And those steps brought international adjudication, in so far as the Hague Court system was concerned, into a stage decidedly more advanced than the stage reached in 1907 by the establishment of the so-called Permanent Court of Arbitration.

First of all, there was the really permanent character of the judicial body. By itself, in addition to other well-known implications, this step forward eliminated, in so far as the Court's system was concerned, any of those well-known obstacles to adjudication that otherwise derived and derive from the necessity of setting up the tribunal and by the resistance to, or "boycott" of, such operation on the part of the State unwilling or less willing to submit to a tribunal [76]. Thanks to the solid basis represented by the permanent

[76] Within the framework of arbitration — Permanent Court of Arbitration included — this was and still is a major bottleneck on the way to the effective use of arbitral procedure. The devices by which this obstacle could be (and is occasionally) circumvented are very well known.

character of the judicial body they were setting up in 1920, the authors of the Statute were in a position *further* to provide :

> *(i)* on the one hand for that relatively modest substitute for a generalized compulsory jurisdiction which is the mechanism of the *so-called "optional clause"* — plus the further possibility of creating distinct *areas of compulsory jurisdiction* by general treaties or compromissory clauses — and
>
> *(ii)* on the other hand for such an important mechanism as the Court's *Kompetenz-Kompetenz* (Article 36.6) and for the Court's power to indicate *interim measures* of protection (Article 41).

22. As recalled earlier, Article 36.6 is generally referred to, together with the other provisions listed under paragraph 34, as covering an "incidental" or "accessory" function [77]: and this is perfectly correct in the sense that the power of the Court to determine its jurisdiction over a given matter is *instrumental*, in case of dispute, to the existence (and exercise) of the Court's power to adjudicate the merits. "Incidental" and "accessory" are not really the accurate terms, however, to characterize the *rôle* that the Court performs when it is called by the Statute to decide on its competence. That *rôle* is neither an "incident" nor an "accessory" to the Court's jurisdiction on the merits.

The truth seems to be that *Kompetenz-Kompetenz* exists even in the instances where — as has often been found to be the case by the Court itself — jurisdiction on the merits were determined *not to exist*. It follows that the competence attributed by Article 36.6 is neither "incidental" nor "accessory" in a proper sense. Really incidental or accessory are perhaps such judicial powers as those

[77] FITZMAURICE, Separate Opinion in the case of *Northern Cameroons* (Preliminary exception phase), *I.C.J. Reports*, 1963, p. 103 f; BRIGGS, La compétence incidente de la Cour internationale de justice, etc., Revue générale, 1960, pages 217 ff.; SHIHATA, The Power of the International Court to determine its own Jurisdiction, The Hague, 1965, p. 169 f.; ABI-SAAB, Les exceptions préliminaires dans la procédure de la Cour internationale, Paris, 1967, p. 84 ss.; STARACE, La Competenza della Corte internazionale di Giustizia, p. 250.

Fitzmaurice, in the cited article (British Year Book, 1958) more felicitously states (*à propos* of interim measures) that "incidental" jurisdiction "does not depend on any direct consent... but *is an inherent* part of the standing powers of the Court under its Statute (at page 107: emphasis added). This more appropriate term is also used by Sinclair, cited work, at page 341.

set forth in Articles 60 (disputes over the interpretation of a judgment given by the Court), 62 - 63 (third State's intervention), 63 (counterclaims or set-off). The function directly conferred on the Court by such provisions is strictly " incidental " or, better, " accessory ", in that its concrete existence and exercise is legal only on the condition that the Court has performed or is performing its function *on the merits* of the *case* with regard to *which* the relevant additional function is to be exercised.

However, the judicial function envisaged in Article 36.6 and called *Kompetenz-Kompetenz* is not subject to any condition of the kind [78]. It exists *per se* and operates on its own, regardless of what may be the result of its exercise by the Court and regardless *(a fortiori)* of the opinion entertained or professed by the respondent State's foreign office and its legal experts.

This is easily explained by the features of the Hague Court system recalled in the previous paragraph. No compulsory jurisdiction, and no proceedings capable of being instituted by a unilateral application are normally conceivable unless the (permanent) body before which such proceedings are to be carried out is endowed with *Kompetenz-Kompetenz* in the *full* sense of the term. The only exception would be the case, relatively frequent in arbitration, where a separate existing body were entrusted with the task of settling (on the unilateral request of either party) any dispute over " justiciability " or jurisdiction [79]. It is perhaps worth noting, by way of incident, that in so far an international body possesses *Kompetenz-Kompetenz* in the " full sense of the term " as it is enabled to settle *any* issue of jurisdiction, including the question of the presence or absence of jurisdiction (the *an*) and not just the question of the *extent* of jurisdiction *(quantum)* [80].

[78] Conditions will of course be that the applicant is a *State*, that it *participates* in the system, that it *invokes* a title of compulsory jurisdiction which is *not obviously* a moot title.

[79] Or, more precisely, of an obligation to arbitrate.

[80] An ambiguity frequently conceals itself behind the statement that *Kompetenz-Kompetenz* of arbitral tribunals is nowadays — and would have been for some time — a matter covered by a general (customary) rule of international law. Applied to that most ordinary and frequent model of arbitral undertaking in which the initiation of proceedings is subject to the *conclusion of a special agreement* (and the setting up of the tribunal) that statement only means that the tribunal is empowered to interpret (once set up) its mandate *as described* in the *compromis*. This is far less than what, in a more advanced model of arbitral commitment, may be decided by a body entrusted with the task (a far more penetrating task) to decide whether the dispute is justiciable *at all* under a given arbitration treaty or clause.

In the first case, it is only the question, however much it may matter in certain instances, of *delimiting* the *area* or *object* of a dispute. In the second case, it is the *very* question whether *that dispute* (whatever its precisely delimited extent or object) is covered by the parties' arbitration agreement.

Article 36.6 decidedly covers *both kinds of issues*: which is probably not the case with the unwritten rule generally acknowledged by the doctrine of international arbitration.

In brief, Article 36.6 is not just an *accessory* of compulsory jurisdiction and of the consequent right to apply unilaterally for international justice. It is an essential condition or prerequisite of the existence of *any* measure — large or small, general or particular — of effectively compulsory jurisdiction. " Inherent " is a more correct characterization of a function directly attributed by the Statute.

23. Similar considerations apply to that other judicial function — among those *directly* provided for in the Statute — which is attributed to the Court with regard to interim measures of protection (article 41).

By empowering the Court " to indicate, if it considers that circumstances so require, any provisional measures which ought to be taken to preserve the respective rights of either party ", article 41 entitles any applicant State to seek interim measures of protection *pending*, either the Court decision on the merits (if jurisdiction thereon is not contested), or the settlement by the Court — in the exercise of *Kompetenz-Kompetenz* — of the question of jurisdiction. Article 41 thus entitles any participating State invoking a manifestly not invalid jurisdictional link, to obtain, if the circumstances considered by the Court so require, an order indicating interim measures of protection.

Again we are confronted here with one of the Court's functions characterized as " incidental " or " accessory " jurisdiction. Correct as this qualification surely is in the sense that the only possible aim of interim measures of protection is to preserve the rights of

the parties *pending* judgment on the merits, the circumstances or conditions under which an order for interim measures can be issued by the Court suggest that these terms are rather ambiguous. "Inherent" would again be a more accurate qualification of the Court's power under Article 41.

24. The whole system of the Hague Court seems thus to indicate that although the respondent State is free to choose whether to appear before the tribunal, its negative choice does not affect in any measure the acquisition, by that State, of the condition or status of a party before the Court.

It follows, of course, that the non-appearing respondent State is fully bound by any decisions of the Court (Articles 36.6, 38.1, 59, etc.).

Indeed, it is on the basis of the line of conduct that the non-appearing respondent State will adopt, at the appropriate time, *vis-à-vis* any decision emanating from the Court under Article 53 — an indication of provisional measures, a positive decision on jurisdiction, or a totally or partially adverse judgment on the merits — that the respondent State's willingness to comply with its "statutory" obligations will ultimately be tested. It will be *at that stage* (provisional, incidental or final) that the non-appearing State's *respect* or *disregard* for the "rule of international law" will conclusively manifest itself. That will be, in a sense, *le moment de la vérité*. Up to that moment, however, the conduct of the non-appearing State would not be totally irreprehensible if it were to include — as in some cases it seems clearly to have included — express or implied *a priori* rejection of any submission to the judicial powers that the Court is exercising [81].

IV. *The "Time Element" in Non-appearance*

25. The next question relates to the stage of the Court's proceedings at which Article 53, or any equivalent rules inherent in the system, may come into play in order to regulate the duties of the tribunal and the respective positions of the parties.

[81] See also *supra*, paragraph 17 (last part).

At first sight, the views of writers (and of the members of the Court who expressed themselves on the subject) vary considerably. Professor Bowett identifies five theoretical possibilities, a number of which are attributable to given writers or groups of writers [82].

"*(i)* Default only occurs at the end of the final oral hearing (because the Party could appear at any stage prior to this...); *(ii)* Default occurs at the stage where no counter-memorial is filed on the merits...; *(iii)* Default occurs only when the Court has affirmed its jurisdiction on the merits (since the non-appearing State is not a party prior to that stage), but not at the stage of an application for interim measures of protection...; *(iv)* Default can occur at any stage at which a decision is required of the Court, in response to a "claim" by an appearing Party.

At one extreme one finds the most restrictive solution, according to which the Non-Appearance procedure would only be applicable in the phase of the merits, notably at that almost conclusive stage of that phase which is marked by the conclusion of the oral hearings. The opposite extreme is the solution according to which the procedure would be applicable, to use Bowett's own words, "at any stage" of the proceedings "at which a decision is required of the Court, in response to a claim "by an appearing party" [83].

It is our tentative opinion that the differences amongst writers with regard to these alternatives are generally more apparent than real. The only question on which a substantial difference does emerge is the question whether the interim measures phase, assuming (as we are inclined to assume) that it *is* covered by the Non-Appearance procedure, is subject to a strictly *literal* interpretation of the second paragraph of Article 53 or to a "reasoned" or "adapted" interpretation of that provision [84]. I refer in particular to the degree of assurance that the Court would have to reach under Article 53.2 — in order to be enabled to indicate interim measures *in absentia* of the respondent State — with regard to the existence of its jurisdiction.

[82] BOWETT's cited work.

[83] BOWETT, cited work, at pages 207-208.

[84] This point will be discussed *infra*, paragraph 32.

26. Of course, everybody agrees that Article 53 (or what we consider to be its inherent equivalent) applies if the respondent State [85] fails to appear or to defend its case in the phase of the merits. If jurisdiction had previously been questioned, the Court would have complied already (regardless of the injunction of Article 53.2) with that part of the condition for continued treatment and decision which consists in satisfying itself that it has jurisdiction. Otherwise, the Court would have to comply with that requirement.

In either case the Court will have to keep in mind, by all means, that a question of jurisdiction, in the sense of the exact definition of the dispute and of the Court's power to resolve it, can arise at any time prior to the decision on the merits. Indeed, if the parties formally engaged in proceedings find a deadline in the Rules, no such limit would be conceivable for the Court in complying with its task of satisfying itself that it has jurisdiction. With regard to any further issue concerning the delimitation of the object or area of the dispute arising " spontaneously " in the minds of the judges or raised — *extra moenia* or *extra ordinem* — by the absent respondent, the Court would still have to " satisfy " itself (in the sense of Article 53.2) that it has jurisdiction before getting to the decision of the case as requested by the active party.

27. A number of writers maintain that the non-appearance procedure is not applicable before the phase of the merits. This view is held, *inter alios*, by Rosenne [86], Lamberti Zanardi [87], Guyomar [88], Judges Bengzon and Jiménez de Aréchaga [89], Eisemann [90] and

[85] We keep confining our discourse to the case of default following a *unilateral* application to the Court (*supra*, paragraph 2).

[86] *The Reconceptualization of Objections*, etc., *Studi Morelli*, pp. 735 ff., at pages 749-750. The relevant passage is quoted *supra*.

[87] *Forme nuove di contestazione della competenza*, etc., *Studi Morelli*, pp. 439 ff., at page 461.

[88] *Commentaire du Règlement de la Cour internationale de Justice*, 1973, page 192.

[89] Dissenting Opinion in the *Icelandic Fisheries Jurisdiction* cases, *I.C.J. Reports*, 1972, pages 184 ff.

[90] Cited article, pages 356-358 (Eisemann).

Favoreu [91]. These writers seem to exclude the applicability of Article 53 in the interim measures phase or in the phase dealing with jurisdiction or admissibility.

Different views are held, if we understand them all correctly, by Judge Gros [92] and by Mosler [93], von Mangoldt [94], Fitzmaurice [95], Sinclair [96] and Thirlway [97]. According to these writers the non-appearance procedure, notably Article 53, applies — with or without some adaptation — both in the interim measures and in the so-called jurisdictional phase. There are, however, important differences between some of these writers and others [98].

[91] *Les ordonnances des 17 et 18 août*, etc., Annuaire Français de Droit international, 1974, pages 291 ff., esp. 319-322.

[92] Quoted by EISEMANN, page 360, for the interim measures phase (Essais nucléaires).

[93] Cited article, page 441, cited by Thirlway, pp. 59.

[94] Cited article, at page 519.

[95] Cited article, at page 89.

[96] Pages 340 ff., esp. 344. According to Sinclair from " the sequence of the relevant provisions of the Statute... it is clear that Article 53 is concerned... with the *jurisdictional* and merits stages of any proceedings. " According to Sir Ian, Article 53 does not apply, on the contrary, in the interim measures stage (*ibidem*). But he refers presumably only to the second paragraph of Article 53.

[97] Cited work, pages 35 ff., esp. 43-45.

[98] With regard to both the " restrictive " and the " liberal " trends it should be noted that the opinions of single authors are rendered somewhat obscure (at least to the present writer) by the very factors that make the whole subject of international judicial " default " or " non-appearance " more problematic than the more or less analogous occurrences of national judicial procedure.

One of these is the fact that — as Ricci-Busatti stressed during the labours of the advisory Committee of Jurists — the essential core of provisions like those inscribed in Article 53, is so much an inherent feature of any system of compulsory jurisdiction (albeit " optional ") that no statement of non-applicability *of Article 53* is by itself *exhaustive* of the issue (whether the Court is empowered to proceed *in absentia* at a given stage *and* under what conditions).

To say that Article 53 does *not* apply in a given phase might not mean, for example, that in case of failure to appear or to defend its case on the part of respondent, the Court should *not* proceed in its function or that it should not be bound to proceed — as a Court must in any case proceed — with all the necessary (procedural and substantive) care.

Secondly, Article 53 is, so to speak — and rightly so — a double-edged provision. On one hand it entitles the applicant State to seek and obtain a

judicial answer to its claim. On the other hand it subordinates a positive answer to the claim to some — rather obvious — conditions. On one hand it protects the right of the applicant State to seek "justice" and the duty of the Court to perform its function. On the other hand it protects the absent party from injustice.

To say, therefore: "Article 53 does not apply" means what, exactly? Does it mean that the Court is *not* empowered to proceed *in absentia*, thus applying neither paragraph 1 nor, obviously, paragraph 2 of Article 53? — or does it mean that the Court can proceed *in absentia* but may disregard all or part of the conditions set forth in the second paragraph of Article 53?

An example is Sir Ian Sinclair's statement: "it would appear, notwithstanding the views expressed by Judge Gros in the *Nuclear Tests* case (views which do not appear to be shared by other members of the Court), that Article 53 of the Statute is not applicable at the interim measures stage of any proceedings before the Court, but only at the later jurisdictional and merits stages" (SINCLAIR, at page 344). Similarly, Guyomar, page 185, admits that interim measures can be granted *in absentia* while not requiring the conditions of Article 53.2. She presumably does so because she considers "full satisfaction" on competence not necessary at a stage and for purposes which do not prejudge the merits. Clearly, what Guyomar and our eminent *Confrère* mean — we have no doubt — is that at the interim measures stage the Court is as empowered to go ahead — non-appearance notwithstanding — in conformity with the provision of paragraph 1 of Article 53 just as it is so empowered to do in the jurisdictional and merits stages. The only difference would be — we assume — that the second paragraph of Article 53 *would* apply *mutatis mutandis* (particularly with regard to the question of jurisdiction).

A similar ambiguity seems at times to affect the affirmative view about the applicability of Article 53. When Judge Gros contended that Article 53 *must be applied immediately* at the interim measures stage in the *Icelandic Fisheries Jurisdiction* cases, his main concern seemed to be that the Court could consider the request for interim measures, *provided* it applied Article 53.2 *à la lettre*, namely only after satisfying itself that it had jurisdiction, *as thoroughly as* it must so satisfy itself, before deciding on the merits.

Partly *in re ipsa* — namely in the contrasting exigencies with which the drafters of Article 53 were rightly concerned — some of these ambiguities derive from more or less justified analogies drawn by some authors with the *régime* of non-appearance in municipal systems as they stand in our time or as they stood in earlier stages of development of the "institution" of default. (Some differences between the problem of jurisdiction in international law and in municipal law are pointed out, *inter multos*, by AGO, Eccezioni "non exclusivamente preliminari", in *Studi Morelli* cited above, pages 1-16; and AMMOUN, in the same *Studi* at page 22).

In order to escape such ambiguities one should perhaps try to avoid referring to "Article 53" or to "default" (or "default procedure") but refer rather to paragraph 1 and/or 2 of Article 53 *distinctly* or — always *distinctly* —

28. The arguments raised — or theoretically opposable — against the application of Article 53 to the jurisdictional (preliminary) phase or the interim measures phase seem to be, roughly, the following:

(i) the wording of Article 53.1 and 53.2 is such that it looks, *prima facie*, applicable only in the phase of the merits [99].

Prima facie, Article 53 would indeed seem to refer just to the active party's principal claim. First of all, it is a matter of *one* claim, in the singular, in both the first and the second paragraph. Secondly, the terms by which paragraph 2 indicates the requirements to which a decision in favour of the active party's claim is subject, would seem to contemplate, always at first sight, neither the jurisdictional phase nor the phase of interim measures. By enjoining the Court to "satisfy itself, not only that it has jurisdiction in accordance with Articles 36 and 37, but also that the claim is well founded in fact and law" the second paragraph of Article 53 seems to cover only the phase of the merits of the *principal* claim. It seems to leave out, at first sight, any other phase. Satisfaction as to jurisdiction would seem to be considered only as a condition for the decision on the merits to which the following sentence would seem in its turn exclusively to refer. No explicit reference is made to the case of non-appearance (or inactivity) during the (usually preliminary) jurisdictional phase.

As regards the interim measures phase, equally absent in the express terms of both paragraphs, it would seem at first sight to be excluded from the scope of the provision by the requirement concerning jurisdiction. Expressed as it is in terms of "satisfaction" — at first sight *full* satisfaction — that requirement would seem to go far beyond the possible or probable presence — or the non

to one and/or the other of the two elements of an "inherent" I.C.J. default procedure which are represented (as indicated *supra*) by the duty-right of the Court to proceed, in case of default, in the performance of its task (Article 53.1), on one side, and by the conditions of exercise of such a duty-right (as set forth expressly in the second paragraph of Article 53), on the other side.

In order to avoid ambiguity, the present paper proceeds on the basis of these distinctions (see paragraphs 31 and 32).

[99] In the course of which, it should be noted, questions of competence may well arise.

manifest absence — of jurisdiction which is generally required as a sufficient basis for Court's action under Article 41 of the Statute.

(ii) A second (and for some writers perhaps additional) argument excluding the operation of Article 53 in the phase of the Court's proceedings devoted to jurisdiction or interim measures, is that only in the phase of the merits would the respondent (State) acquire that full cognizance of the object, nature and dimensions of the applicant State's claim : a cognizance in the absence of which the respondent would not be able to make its positive or negative choice whether to appear or to defend its case. Such a knowledge could only be assumed to become available, according to one of the variations of this doctrine (Judges Bengzon and Jiménez de Aréchaga), during the stage of the merits phase which follows the submission of the first written memorial of the applicant and precedes the date at which the respondent State itself should deposit sown counter-memorial [100].

(iii) A further argument is that at least a part of the ICJ's practice — together with that of some States [101] — seems to assume that Article 53 applies not in the preliminary phase but only in the phase of the merits.

(iv) A different argument to the same effect is raised, if we understand them correctly, by the writers who assume that no default is conceivable until the respondent State omits the performance of some procedural act which it is expected or required to accomplish in order to defend its case. This is the position, for example, of Rosenne and Lamberti Zanardi [102].

(v) A further argument — raised, if we understand correctly, by Eisemann (who refers to Guyomar) — is that no default would be conceivable before a positive finding on the Court's jurisdiction.

None of these positions, however, seems to be acceptable.

[100] Judges Bengzon and Jiménez de Aréchaga, cited Dissenting Opinion.

[101] For example (according to ELKIND, cited work, pages 51-52), Liechtenstein in the *Nottebohm* case.

[102] ROSENNE, cited article in *Studi Morelli*, at page 750.

29. One may well agree that a considered evaluation, by the respondent State, of the question whether to appear (or to defend) — as well as a considered evaluation of the question whether to " defend " itself in regular form and terms — can only be made at the stage following the submission of the written memorial of the applicant. One might even contend that the most appropriate time may have to be placed even later, notably at the time when the other party sets forth its final conclusions.

There remains the fact that in the cases of non-appearance which are most relevant for our present purposes the choice not to appear has been made by the respondent State at a much earlier stage. It is clear, in addition, that although that choice was presumably determined, in some measure, also by considerations related to the precise dimensions of the principal claim put forward by the active party and the precise legal arguments adduced in support thereof, the reading of the same cases shows that the non-appearing State's decision was made on the basis of the subject matter, the object and the *presumable chances* of the applicant State's claim as set forth in the *requête*.

The relevant cases also show that one of the very first concerns of the non-appearing State is to contest, by more or less irregular communications (to the Court, to governments, to lawyers, to the information media and to the public at large) the Court's jurisdiction in the case *at all*, including, in particular, the Court's competence to take action — *le cas échéant* — with regard to any request for interim measures of protection. Whichever may thus be the further occasions for a decision not to appear or not to be active (or to be active in forms and terms other than the forms and terms envisaged in the Statute or the Rules or prescribed by the Court) at later stages of the proceedings [103], experience has shown abundantly that there *are* problems of non-appearance (or of lack of, or irregular, defence) at all the stages of proceedings before the Court. Most notably there have been problems at the jurisdictional and at the interim measures stages.

[103] No doubt, such occasions may present themselves at any time before a final judgment on the merits in which an appearance or a defence may be possible. See, however, *supra*, paragraph 22.

The question unavoidably arises, therefore, as to what should be done in case of non-appearance at one or the other — or both — of the stages which precede the phase of the merits.

30. The fact that the wording of Article 53 *seems* not to cover non-appearance in the jurisdictional and interim measures phases is not sufficient to exclude that the provisions of that Article — or any equivalent inherent rules or principles — come into play in either of these phases. Those provisions would actually apply, possibly *mutatis mutandis*, even if it were demonstrated — as it might well be — that the drafters of Article 53 did not think, at the time of their labours, of non-appearance or failure to defend in the jurisdictional or interim measures phases. Indeed, one would still have to consider, whatever the gaps in the drafting, or in the original conception of Article 53, that the principles embodied in that Article were so inherent or essential in the Court's system — as rightly pointed out by Ricci-Busatti [104] — that they would apply even if Article 53 had not been inscribed into the Statute : and this both by way of analogy and in view of the absurd consequences that would follow from the non-application of Article 53.

It is suggested that the Commission consider separately these phases with regard to paragraph 1 and paragraph 2 of Article 53.

31. Not to apply the *first* paragraph of Article 53 in case of non-appearance in the jurisdictional phase would mean not to let the Court perform its function whenever the respondent State, instead of appearing with a regular plea to the Court's jurisdiction, decided not to appear or not to defend in due form its negative stand on jurisdiction. It would mean that simply by not appearing a State could evade the *Kompetenz-Kompetenz* conferred upon the Court by Article 36.6 of the Statute. This would purport, in its turn, to defeating — by mere absence, silence or lack of a formal objection to jurisdiction — the provision of the Statute failing which the system of compulsory jurisdiction would not work. To put it bluntly, there would be no *measure* of compulsory jurisdiction left, *at all.*

[104] *Supra,* under paragraph 14 (footnote).

Not to apply in the jurisdictional phase the *second* paragraph of Article 53 would mean, in turn not to extend, to the treatment of the jurisdictional issue, the requirements specified in that paragraph in order to safeguard the interest of the absent State in the proper application of the law to the jurisdictional issue.

Both paragraphs of Article 53 should naturally be applied in the phase in question *cum grano salis.* They would have to be adapted to the nature of the particular function the Court is to perform in the jurisdictional phase.

Thus, the " claim " which the Court would be enabled to decide upon by virtue of Article 53.1 would obviously not be the principal claim on the merits. The claim will be either that the Court proceed, in the absence of any plea to jurisdiction, to deal with procedural maters instrumental to the consideration of the merits, or, in the presence of a regular or irregular plea to jurisdiction, that the Court decide on such a plea under Article 36.6, further to move, *le cas échéant,* to the subsequent phase.

On the basis of paragraph 2 of Article 53 the Court would be enjoined — as regards the jurisdictional phase — to meet two requirements. One requirement will be that the Court " satisfy itself " that it is empowered, in the case at hand, to *act under Article 36.6,* namely that there is a *dispute* or *contestation* concerning its jurisdiction and calling for the exercise of *Kompetenz-Kompetenz.* The second requirement will be that the Court " satisfy itself " that the applicant's claim that *the Court declare itself competent* is well founded in law with regard to the substantive dispute *de qua agitur.* It will be the question whether (*ratione personae, materiae, temporis* and *loci*) the application is admissible and justiciable before the Court.

32. Similar considerations apply to non-appearance in the *interim measures phase.*

Not to apply in such a phase the first paragraph of Article 53 would mean to deny the applicant State the right to seek — and, *le cas échéant,* obtain — an indication of interim measures to which (subject to a positive finding by the Court) any State is entitled by virtue of the Statute itself. Provided that the minimum conditions for interim measures are met, no State participating in the Court's

Statute can lawfully be denied such a right merely by reason of the fact that the respondent State failed to appear or regularly to defend its case (against the indication of measures). Nor can any State party to the Statute get rid of its automatic, direct, subjection to Article 41, by mere non-appearance or *fin de non recevoir.*

Not to apply the second paragraph of Article 53 would be in its turn equally unjustified. Surely the Court must determine — under that paragraph — both whether it *is* empowered to decide on interim measures under Article 41 *and* whether the request for such measures *is* justified by the nature of the case and the circumstances.

It will again be only reasonable, on the other hand, that both requirements be met by the Court *cum grano salis* or *mutatis mutandis.* Both requirements must be met, in plainer words, *to the extent* and to the *depth* necessary to ensure an objective settlement of the issues of competence and substance involved in the consideration of a *requête* for interim measures of protection.

It is obvious, therefore, that the requirement of jurisdiction should be met *only* in the measure *(extent* and *depth)* necessary for the Court to achieve the relatively reduced degree of reliability of the positive finding of jurisdiction normally required for the Court to exercise its function under Article 41. There cannot therefore be any question of ascertaining jurisdiction in the measure *(extent* and *depth)* in which such a determination is necessary for the Court to feel empowered to deal *with the merits.* Article 53 being applicable within the limits of the analogy, a finding by the Court that its competence on the merits is "possible", "probable" or "not manifestly inexistent" — according to the doctrine normally applied — would have, by all means, to suffice. Of the *prima facie* existence or non-existence of jurisdiction on the merits — not more — the Court would have to "satisfy itself" *for the purposes* of an examination of the *requête* for interim measures.

To ask for more than that would frustrate the very purpose of Article 41 and to deprive the applicant State of a right it derives *directly* from the Statute.

V. *Summing up : The Essential Features of the Hague Court Regime of Non-Appearance*

33. As summarized in paragraphs 14 - 32, the study of the Hague Court system seems clearly to indicate that the regime of non-appearance before that tribunal is so structured as to satisfy, at one and the same time, three equally vital exigencies. The first exigency is to ensure the right of any respondent State freely to choose whether or not to appear and whether or not to defend its case. The second exigency is to ensure the right of the applicant State to obtain adjudication, with regard to the merits, to jurisdiction or interim measures (as the case may be) notwithstanding the respondent State's choice not to appear, not to defend or to defend in irregular fashion. The third exigency is to ensure that the Court discharge its function — notwithstanding the respondent State's absence, silence or irregular conduct — in such a fashion as not only to "satisfy itself" with regard to jurisdiction and merits but also to ensure the "equality of arms" between the present and the absent party.

Obviously interrelated, these exigencies are met by equally interrelated devices :

> *(i)* Freedom to choose whether to appear is ensured at one and the same time by the absence of any sanction against the non-appearing State and by the Court's duty under Article 53.2 to "satisfy itself" with regard to jurisdiction and merits.
>
> *(ii)* The second exigency, i.e. the right of the applicant State to obtain adjudication,[105] is met by the combined effect of the provision enabling (and enjoining) the Court to proceed *in absentia,* on the one hand, and by the fact that non-appearance affects *neither* the *party status* of the absent respondent State nor the *obligation* of that same State *to comply with the Court's* judgment.[106]
>
> *(iii)* The exigency of a fair trial is met, on one hand, by the duties placed upon the Court by Article 53.2 (namely to "satisfy itself", etc.), on the other hand — as regards, in particular, "equality of arms" — by the various norms, surely inherent in the system and set forth in the Court Rules, ensuring (as well as in national legal systems) that in no circumstances a party be placed at a disadvantage *vis-à-vis* the other by any inequality of treatment in the conduct of the proceedings.

[105] Subject, of course, to a positive finding on jurisdiction.
[106] Under the provisions of Articles 36.6, 59, 38.1 and 36 of the Statute.

It is on the basis of such fundamental features of the system that a brief, tentative assessment could now be made of the legality, feasibility and usefulness of the main remedies suggested so far or conceivable.

Part three — Conceivable remedies in the light of the law of non-appearance

I. *Introduction*

34. In the light of the features of the law of non-appearance tentatively summarized in the previous Section, an attempt can now be made to test the foundation of the *doléances* listed in Part One and the legality, practicability and usefulness of the suggested remedies. This will be done in the following paragraphs with a view to eliciting comment from the eminent members of Commission 4.

For the sake of brevity, I shall take up the matter from the side of the suggested remedies, consideration of each remedy implying discussion of the *doléances* it is intended to meet.

For an orderly discussion I take up the various suggested remedies under two headings :

(i) remedies affecting the treatment of preliminary issues only ;

(ii) remedies affecting both preliminary issues and merits.

II. *Remedies affecting especially the question of jurisdiction*

35. Serious obstacles would prevent, in our view, the adoption by the Court of that suggestion by Fitzmaurice which would touch upon the Court's " settled jurisprudence " on the requirement of Article 53.2 relating to jurisdiction (and, I would add, admissibility). I refer to the suggestion that in cases of non-appearance other than those where the Court judges that no *prima facie* basis of jurisdiction does exist, the Court should inform the " impleaded " Government that unless it appears to show why jurisdiction could not be assumed, the Court will proceed to do so and will go on to hear and decide the merits.

Briefly, such a practice by the Court would amount, we submit, to a manifest disregard of both the express requirement of Article 53.2 and of the principle that the Court is not empowered to decide on the merits of a case unless it possesses *jurisdiction* (and not just a *semblance* of jurisdiction).

The Rapporteur would feel unable, in any case, to concur with the opinion that the only " formal objection " would arise from the word " satisfy " in Article 53.2. The objection is not just a formal one : and it seems, in any case, to be insurmountable in so far as the determination of jurisdiction is concerned.

36. An entirely different matter seems to be the determination of jurisdiction for the limited and provisional purposes of the indication of interim measures of protection.

In this respect the phrase " satisfy " itself of Article 53.2 can only mean, in case of non-appearance, that the Court should " satisfy " itself as to jurisdiction in the same sense, normally within the same *prima facie* limits within which it normally " satisfies " itself that it has jurisdiction for the purpose of deciding about interim measures [107]. On the other hand, no analogy could reasonably be established between the determination of jurisdiction for such a limited and provisional purpose, on one side, and the assessment of jurisdiction for the purpose of a decision on the merits, on the other side. Sir Gerald himself does not draw any such analogy.

37. Of not great use would probably be the introduction of that " special " or " conditional appearance " which is suggested by Leo Gross with a view to allowing the respondent State to escape an application of the *forum prorogatum* doctrine. Correct as it may be with regard to particular cases, the view that non-appearance could be motivated in any substantial measure by fear of unjustified application of the *forum prorogatum* doctrine, does not seem to be a realistic one.

In the first place, the regular appearance of a respondent State accompanied by the submission of an objection to jurisdiction or admissibility, can hardly expose the appearing State to an inter-

[107] This has been explained *supra*, paragraph 32.

pretation of its conduct as an implied consent to the Court's jurisdiction. Thirlway argues this point persuasively [108].

Secondly — as stated at the outset of the present paper — the negative attitude of the respondent State with regard to appearance seems rather due to the intent (I would say determination) *not to submit in any way* — and even to the detriment of the State's international image — to the Court's action, either under Article 36.6 (Kompetenz-Kompetenz) or on the merits, or, for that matter, on interim measures, *and* to the legal consequence of such action which is the binding effect of Court decisions on jurisdiction or merits.

It is not, therefore, a matter of lack of *confidence* in the Court's equanimity or correctness in dealing with the jurisdictional issue — or, for that matter, with the merits, or with an application for interim measures [109]. To put it bluntly, it amounts to *backing-up* — with regard to a given case — from any commitment that may exist for the State to submit to the Court's competence, either on the merits or on the jurisdictional or interim measures issues. On a choice not to appear so motivated nothing could be gained by offering to the respondent State the possibility of a "special" or "conditional appearance" [110].

38. It is less easy to express an opinion on the two remedies conceived by Fitzmaurice, either as a *prelude*, or as an *alternative*, to the adoption of the severe course on jurisdiction discussed in the preceding paragraph.

(i) The "prelude" would be the "intimation" to the non-appearing State that the Court could not take cognizance of *extra ordinem* or otherwise non regular objections to its jurisdiction. Such an intimation would practically condemn as invalid any *extra ordinem* communications relating to the jurisdictional issue.

(ii) The alternative would be, in any case of serious doubt as to the propriety of reducing the assessment on jurisdiction to a *prima facie* evaluation, "automatically to join all preliminary issues to the merits without allowing any preliminary phase". This might help induce the respondent State to feel that a decision not to appear

[108] At pages 161 ff.

[109] Compare SINCLAIR, cited article.

[110] See also THIRLWAY, esp. at page 165.

would not serve the purpose of avoiding (preventing) that examination by the Court of the merits of the case which is probably the main preoccupation of non-appearing respondent States.

(i) The suggestion concerning *extra moenia* or *extra ordinem* communications — namely, suggestion (i) in the preceding paragraph — touches upon one of the crucial features of the practice of non-appearance in the cases we are concerned with. It is indeed a feature involving a twofold, puzzling contradiction.

Firstly, there is a contradiction, normally absent in default before national tribunals, between the choice of the respondent State not to appear, on one side, and the issuing of a more or less continuous set of "irregular" communications, often addressed directly to the Court, on the other side.

Secondly, there is a contradiction between the interest of the applicant State that the absentee does not defend its case at all — or defends it only in a regular fashion — and the interest of that same State to learn as much as possible about the legal arguments upon which the respondent State's procedural or substantive position might or could be defended.

Notwithstanding such contrasting exigencies, it would be surely in the best interest of the active State, as well as in conformity with the good administration of justice, that the respondent State set forth its defences through the regular channels and within the time limits indicated by Statute, Rules and Court rulings. From this general point of view it might appear therefore desirable that the non-appearing respondent be invited by the Court not to use *extra ordinem* or *extra moenia* communications and to produce its defences by appearing and acting in a regular fashion. However, it is doubtful whetter difficulties would be reduced (they might actually increase) and whetter a really useful purpose would be served by the Court's "intimation" that "it could not take cognizance" of *extra ordinem* objections to its jurisdiction. In itself lawful, such an "intimation":

> *(a)* might prevent, if complied with by the non-appearing party, precisely that knowledge of the respondent State's arguments, the absence of which has been rightly pointed out as a cause of "embarrassment" both to the active State and to the Court;
>
> *(b)* would not serve a useful purpose (while jeopardizing the Court's prestige) in that it would in fact be impossible for the

Court in case of non-compliance, to enforce an "intimation" the violation of which would *in fact* bring about the "cognizance" refused in principle by the "intimation."

(ii) As for the idea of joining all preliminary issues to the merits, thus frustrating the non-appearing or inactive State's goal to prevent — temporarily or absolutely — any consideration of the merits, it seems to us to meet two objections.

As a matter of law, it seems to be not quite in conformity with Article 53 (or any equivalent inherent rule). The intent clearly behind that provision is to ensure that the procedural and substantive treatment of the non-appearing State's position be as fair as if that State were present. To join to the merits any procedural issue that would not be so treated if the interested party had appeared could be considered legally unfair.

Secondly, and as a matter of expediency, the suggested measure would inevitably be looked upon as inspired by a punitive intent *vis-à-vis* the non-appearing State. As such, the measure would be incompatible with the lawfulness of non-appearance.

III. *Remedies affecting preliminaries as well as merits*

39. The lawfulness of non-appearance and procedural inaction excludes, in our view, that the Court could feel authorized or obliged to take any formal step, in case of original or supervening non-appearance or inaction, to condemn the behaviour of an absent State. *Qui suo iure utitur, neminem laedit.*

In qualifying absence or inaction as innocent we do not exclude that it may cause embarrassment to the Court, to the applicant State or both. O'Connell is right, in our opinion, when he stresses this point. On the other hand, a lawful conduct cannot lawfully be condemned just as a matter of embarrassment. The Court, in a sense, is there *also* — as Article 53 implies — to be... embarrassed by absence or inaction of one of the parties. As for the applicant State, it knew of the possibility of non-appearance — and of Article 53 — when it became a party to the Statute and eventually put itself in the condition of being entitled to submit to the Court a unilateral *requête.*

For the Court it is — with respect — a *risque du métier.* For the applicant State it is a fact of life.

This does not mean that the Court or the applicant are not entitled — and the Court perhaps under an obligation — to express regret — as occasionally the Court has done. Nor does it mean — this is what matters most — that lawful ways and means to overcome or reduce embarrassment could not be found. It *does* mean, however, that neither *ex officio* nor on a complaint from the active party should the Court be legally obliged or justified in labelling the absent or inactive party's choice as less than lawful. In the measure in which Sir Gerald's complaint that the Court actually "condoned" non-appearance implied that in his opinion the Court should have *condemned,* we would not be able to agree with that eminent jurist. Non-appearance, or procedural inaction, is not a violation of an international obligation. It is neither a matter of "contempt of Court" [111] nor a tort to the detriment of the applicant State. Remedies other than condemnation should be sought for any "embarrassment".

40. As a matter of law, no serious obstacle can be seen instead (apart from the expression of "regrets") to a statement of the Court's "declaring" the impugned State, as suggested by Fitzmaurice, "to be a party in, and to, the proceedings". To the acceptance of this suggestion we would only add a few elementary qualifications.

Fist, it might be *perhaps superfluous* for the Court to say what is, in our view, quite obvious. The respondent State is inevitably a party in the sense explained [112]. That it *is* a party follows from the Court's action on the case in spite of non-appearance or inactivity.

Second, it would not be sufficient to demand that the Court declare the non-appearing State to be a "party" — as Sir Gerald seems to intimate — only on the condition that proceedings were brought against it by virtue of a valid instrument of compulsory jurisdiction [113]. Of course, the absent respondent would cease to be a party once the Court were to find that the instrument is invalid,

[111] See, however, *supra,* paragraphs 17 (last part) and 24.
[112] *Supra,* paragraphs 18-23.
[113] *Supra,* paragraphs 20-22.

no longer in force or not applicable. It should be clear, however — *pace* the eminent Judge cited earlier — that the respondent State *becomes* a party as soon as proceedings are opened and it *remains* a party until the proceedings continue. But the question is almost... pointless. The Court's opinion that the respondent *is* a party can easily be induced from the manner in which the Court carries out its function with regard to the case. And the non-appearing State would certainly not fail to consult a lawyer.

It should, of course, be recommended, on the other hand, that the Court take a firm and explicit stand on the question — namely on the question whether the respondent is a party — *whenever* the respondent were to intimate that such were not the case.

41. Practicable as well as lawful seem to be other remedies aimed at avoiding or reducing the embarrassment caused to the Court and to the active party by the non-appearing State's conduct. I refer *both* to the embarrassment deriving from a non-appearing State's *silence* over its arguments (on jurisdiction and/or the merits) and/or from that State's sending or issuing *extra moenia* or *extra ordinem* statements or communications. I refer to the remedies broadly indicated by Sir Ian Sinclair as intended to correct what he calls the tendency of the Court " to lean over backwards " in the interests of the non-appearing party. As already indicated, the Court should, in order to achieve a more equitable balance between the present party's and the absent party's interests :

> *(i)* " invite argument from the appearing party on issues which it may feel tempted to take into account *proprio motu* if it considers that those issues have not been canvassed, or have been inadequately canvassed ", and
>
> *(ii)* " if necessary re-open the oral hearings. " [114]

In the first place, the adoption of Sinclair's suggestions would meet no objection from the point of view of lawfulness. In addition to being compatible with the legal régime of Non-Appearance as described in the preceding Section (notably with the lawfulness of the choice not to appear or not to defend) they consist of measures

[114] SINCLAIR, as quoted *supra*, paragraph 8. We join, with regard to these devices, THIRLWAY's positive evaluation (cited work, at page 175).

falling surely within the Court's power to regulate the proceedings as provided for by Article 48 of the Statute and specified in Articles 44 ff. of the Rules.

(ii) Secondly, the devices in question might well obviate, without reducing in any measure the safeguards of the absent or silent State's legitimate interests, most, if not all, of the lamented *inconvénients* of which the administration of justice and the active State might suffer from non-appearance as experienced so far.

Whenever the absence or silence of the non-appearing respondent were deemed by the Court to cause unjust embarrassment to the active State or to the Court itself (thus hindering or deviating the proper course of international adjudication), the Court would use, for example, its powers under relevant articles of the Rules. Such might have been the case, for example, in *Icelandic Fisheries Jurisdiction* and in *Aegean Sea Continental* Shelf.

If, on the contrary, the Court were to think that the nature and timing of *extra moenia* or *extra ordinem* statements or communications from the non-appearing State might determine — as a matter of procedure or as a matter of merits, in law or in fact — a situation of disadvantage for the active State or of undue advantage for the non-appearing (or formally inactive) State, the Court could easily devise ways and means to re-establish that balance of procedural chances between the parties which must be preserved in international as well as national litigation. A measure to that effect would have been perhaps indicated, if the *doléances* of some commentators proved to be justified, in order fully to satisfy that exigency, in *Trial of Pakistani Prisoners of War*, following the last minute communication submitted by the non-appearing respondent. The active State's agent would not have faced the ordeal of preparing a last minute reply.

42. Again impracticable, as a matter of law (as well as morally) would be in our opinion the further suggestion that, throughout the proceedings the Court " resolve all borderline questions of serious doubt in favour of the complainant State, unless the State impugned appears to show cause why not, and in proper form ".

Considering that questions of " serious doubt " may well involve

also the merits, this suggestion is even more objectionable — legally and morally — than the one discussed in paragraph 35.

The Court would again engage itself on a line manifestly contrary both to the express provision of Article 53.2 and to any inherent equivalent principle.

IV. *Tentative Conclusions*

43. The Rapporteur is reluctant to indicate any conclusions on such elusive problems as those raised by the practice of respondent States not to appear before the Court and to defend their case by *extra ordinem* communications. One feels merely able to indicate, very tentatively, two lines of endeavour that Commission 4, and eventually the *Institut*, might wish to pursue in this delicate matter.

The lines of endeavour concern the message to be respectfully addressed to the Court and the message to be addressed to those difficult customers which are the governments of sovereign States.

The utmost prudence, however, would be required.

44. The main difficulty, in devising ways and means to discourage non-appearance and eliminate, or reduce, its undesirable features, derives from the fact that, notwithstanding the progressive development that the Hague Court system represents over the 1907 situation [115], that system is still dependent, in so far as compulsory jurisdiction is concerned, on the *willingness* of States to accept it: such willingness depending, in its turn, on convenience. It need hardly be added that an equally serious weakness of international adjudication (and the Hague Court system in the first place) is the *practical lack* (Article 94 of the United Nations Charter notwithstanding) of an effective machinery to *enforce compliance* with international judgments. It follows that any significant steps which were to be taken — as a matter of choice within the sphere of the Court's procedural powers or as a matter of modification of the existing *régime* — in order to reduce the liberty of choice of the respondent State between appearance and non-appearance is by far more problematic than any comparable attempt within the framework

[115] *Supra*, paragraphs 19 ff. and 33.

of municipal legal systems [116]. Indeed, any "tightening" aimed at reducing that liberty of choice is subject not only to the *test of legality* — *i.e.* of conformity with *lex lata* (in particular with the principle that non-appearance is legally unobjectionable) but also to the test of the *possible reactions* of the governments of sovereign States.

Among the States participating in the Hague Court Statute, and among United Nations Members in the first place, one can roughly identify, from the point of view of our problem — particularly from the point of view of the degree of "exposure" to those *requêtes* of other States which may trigger a decision not to appear — two or three groups or classes of States. At one end one finds that greater number of States which, by not having ever accepted any measure of compulsory jurisdiction (under Article 36.2 or 36.1) are the least "exposed" to a unilateral *requête*. The only serious hypothesis in which a State in this situation might find itself summoned before the Court by a unilateral application is that of a fellow member of the so-called "judicial community" relying either on the erroneous belief that a "jurisdictional link" exists, or on the possibility of application of the *forum prorogatum* doctrine. These are dangers that can be faced with relatively small difficulty. At the opposite end of the *spectrum* one finds the States which *have* accepted compulsory jurisdiction in such wide terms — *ratione materiae, temporis*, etc. — as to fall into the small circle of the *most* exposed to unilateral *requêtes*. In a "middle" or "intermediate" class one could place those parties to the Statute whose acceptance of compulsory jurisdiction is either particularly restricted *ratione materiae, temporis* or otherwise — for example by some self-judging reservation — or particularly doubtful from the point of view of the validity of the relevant legal instrument. However relative, this distinction can help perhaps better to measure the difficulty of introducing any substantial remedies to the practice of non-appearance.

To be sure, any participant in the Court Statute (*i.e.* any member of Kelsens's "judicial community" is in principle as exposed to unilateral *requêtes* as any other. This was stressed *supra* (para-

[116] Within which, it should be noted, non-appearance is, for a number of reasons, by far less embarrassing for courts or plaintiffs.

graphs 19 ff.). It is obvious, however, that the "exposure" is the lowest for the first and more numerous class of parties to the Statute, the highest for the second class; and medium, so to speak, for the "intermediate" class of States.

As regards in particular the more numerous class of the "unqualified" members of the community — the States not accepting *any* measure of substantive compulsory jurisdiction — they do not have much reason to resort to such a hard form of challenge of the Court's jurisdiction as a non-appearance or an otherwise irregular "resistance" to the judicial process. They could well rely on a Court finding of lack of jurisdiction and on their own ability to avoid the trap of *forum prorogatum.* The situation is clearly different for those States which, having accepted, in one form or another, *some* measure of compulsory jurisdiction may be, at one time, *prima facie* amenable before the Court by an application; and less certain to be able to rely on a negative finding of the Court under Article 36.6.

45. The impact of any too severe remedies against non-appearance and related shortcomings would vary accordingly. The States of the first and more numerous group would have no difficulty with *any degree* of "severity" simply because they would feel either unaffected or quite marginally affected. Besides, there is little that they could do against any "severe" *policy* that the Court were theoretically to adopt. Their only "reaction" could be, in theory, to abandon the system altogether. But no State could seriously contemplate renouncing participation in the "judicial community", such a step involving nothing less than withdrawal from United Nations membership. There is thus pretty much that the "unqualified" members of the "judicial community" might be able to *stand* in terms of obstacles to non-appearance or "irregular defence".

Quite different would obviously be the situation with regard to the States of the opposite (and intermediate) class. Faced with excessively severe or just severe remedies, these States — particularly the more "engaged" ones — might easily be tempted, either to "*contract out*" of compulsory jurisdiction altogether or to adopt more or less substantial restrictions. They might have greater recourse, for instance, to selfjudging reservations. Similarly negative consequences would derive in the attitude of the presumably not

numerous States which may be contemplating an acceptance of the so-called "optional clause" for the future.

46. From the point of view of what the Court could do, the Rapporteur would thus be inclined to exclude *in limine* any extreme remedies intended either to punish the non-appearing State or to make its procedural... navigation difficult.

This applies surely to Fitzmaurice's suggestion, either that the Court decide *any* borderline issues (merits, jurisdiction or admissibility) against the non-appearing respondent State, or that the Court assume jurisdiction on the merits whenever, in case of *prima facie* existence of jurisdiction the respondent State did not accede to the Court's invitation to come and prove in regular fashion lack of jurisdiction. Incompatible *de lege lata* with the liberty not to appear and with the conditions set forth in terms of duties of the Court, by Article 53.2, for any decision in favour of the applicant, the adoption of any such courses does not even recommend itself *de lege ferenda.* Were any such courses introduced, *ex hypothesi,* as part of the *law* of the Court, they would not only discourage any new acceptances of the Court's compulsory jurisdiction but surely induce the relatively few committed governments to review, if not to withdraw, their declarations of acceptance at present in force [117].

One should equally exclude, this is even more obvious, that the Hague Court lend itself to any policies of inducement or blandishment towards non-appearing States which were aimed at persuading them to give up their negative attitude and eventually to comply with an adverse judgment.

47. Considering certain *unique* features of international litigation, notably the obvious difficulty for an international tribunal to verify the *facts* of the case in the territory or *vis-à-vis* the organs of the non-appearing State, some *réprobation* of the respondent State's non-appearance would seem, on the contrary, to be indicated.

One can only doubt the effectiveness of any kind of pronouncement issuing from the Court to that effect.

[117] Interesting but discouraging forecasts in D'AMATO, Modifying U.S. Acceptance of the Compulsory Jurisdiction of the World Court, American Journal of International Law, 79 (1985), pages 385-405.

48. Lawful, indispensable and presumably not ineffective would be instead any steps that the Court were to take in order to maintain or re-establish "equality of arms" between the parties. Jeopardized by the choice of the respondent State's not to appear and eventually endangered, either by that State's silence or by its irregular *(extra moenia* or *extra ordinem)* communications to the Court and to the public at large, that equality is too essential a feature of any judicial process worthy of the name for the Court to leave it unprotected in any phase of the proceedings and under any circumstances. It is difficult, however, to indicate in a general way which devices should be put to use by the Court in order to secure respect for and compliance with that fundamental principle. A general reference can only be made to the Court Rules indicated in paragraph 41 above.

The matter should be relatively simple whenever, as in one of the cases mentioned by one of the cited commentators, the absent State submits last minute papers or materials (concerning the facts or the law) to which the active party would find it difficult or impossible to respond within the time limits prescribed by the Court. It is quite obvious what the Court should do in such cases under its relevant Rules.

In other instances, however, the difficulties might be more serious. The problem of *extra moenia* or *extra ordinem* communications, for example, is very difficult to resolve. In principle, any "irregular communications" should be placed and maintained "out of order". In practice, they are not only difficult to be so treated — and consequently ignored — by the Court and its members. They might even appear, on the contrary, to be indispensable for the sake of the accomplishment of the Court's and the applicant State's respective "jobs". To the Court they may be indispensable for it to "satisfy itself" (as provided by Article 53.2) as to jurisdiction or the merits of the case. To the applicant's counsel they may be indispensable for them to be able to devise, *en connaissance de cause,* the most appropriate defences of fact or law.

The Court will be bound to proceed, with regard to such problems, on a case by case basis, keeping in mind precisely the general principle of "equality of arms" and chances between present and absent party.

49. Once the Court had made it clear that the "equality of arms" would be maintained in all respects and under any circumstances, a considerable step would presumably have been achieved in curbing the practice of non-appearance and its most unjust or undesirable effects. It is possible, nevertheless, that "recourse to non-appearance" would still remain a tempting choice for reasons *other* than the more or less substantial advantages that the respondent State may except to draw either as a matter of embarrassment to the applicant and to the Court or as a real or expected reducing effect upon the Court's severity with regard to the question of jurisdiction or the merits. It is indeed probable that in a number of the relevant cases, if not all, the respondent State's decision not to appear was motivated not only or not so much by the said (presumable) advantages but also, or even mainly, by the interrelated considerations :

> *(i)* that national public opinion would disapprove of an appearance that might rightly or wrongly appear as a positive disposition of the Government with regard to the acceptance of adjudication in a sensitive concrete case ; and
>
> *(ii)* that non-appearance would facilitate, or at least render less difficult at home or abroad, in case of an unfavourable outcome for the respondent State's case, the Government's refusal to comply with the judgement : non-appearance being, as noted earlier, [118] the most manifest and drastic rejection, in the name of that State's sovereignty, of both jurisdiction on the merits and *Kompetenz-Kompetenz* of the Court.

49. With regard to such considerations the Commission might wish not to overlook the *rôle* that the academic community (the international community of scholars), notably the *Institut,* might play in persuading Governments that non-appearance would *not necessarily* operate, once the procedural and related advantages were eliminated, in the sense that the respondent State's decision-makers may hope, either with respect to the public's reaction at home or with respect to international opinion and the community of States.

An enlightened public opinion may well not react negatively to an appearance. As a most recent case indicates, not only a number

[118] Paragraph 24.

of international lawyers but important sections of national opinion and some of the mass media may take a more or less severe but in any case critical attitude towards the Government's decision not to appear or discontinue participation in the proceedings. As for non-compliance with the Court's decision, no evidence is available to show that the fact that the judgement had been arrived at in the succumbing party's absence would render that party's refusal to comply less condemnable. For the reasons explained in paragraphs 17, 24 and 33 it is surely not so in law. As regards the moral aspect, refusal to comply with substantive decisions which the succumbent respondent State felt rightly or wrongly more or less unjustified as a matter of law or fact might well appear, however condemnable *in any case*, less reprehensible than a negative *a priori* rejection of any jurisdiction or any *Kompetenz-Kompetenz* of the tribunal.

Further and lastly, the attention of Governments might usefully be called — whether really effective remedies were found or not in order to ensure "equality of arms" between absent and present party — to the Fact that the respondent State's non-appearance might well be procedurally or substantively detrimental, as a consequence of lacking or irregular defence, to the very case — procedural or substantive — of the absent State itself. To determine whether the respondent State's appearance in any one of the relevant cases would have worked, in some measure, to the advantage of that State would hardly be feasible. One cannot exclude, however, that in one or more cases an appearance might have led to a more advantageous or less disadvantageous decision (of procedure or substance) for the respondent State. This is another point on which Commission 4 might find it not useless to express itself.

Questionnaire

1. Do you think that the study of the Commission should be confined to the difficulties or alleged difficulties which have arisen in the relatively recent cases of non-appearance of the respondent State summoned before the Court by a unilateral application ?

2. If your answer to the preceding question is a negative one, in what sense would you wish the Commission's task to be extended ?

3. Do you consider appearance before the Court (in case of proceedings instituted by a unilateral application) as a matter of legal obligation or of discretionary choice on the part of the respondent State ?

4. Which consequences would you draw from your answer to the preceding question ?

5. Is the non-appearing respondent State to be considered a party to Court proceedings instituted by unilateral application ?

6. What consequences would follow, in your opinion, from an affirmative or from a negative answer to the preceding question ?

7. At which stage or stages (phase or phases) of the I.C.J. proceedings does the non-appearance procedure (paragraphs 1 and 2 of article 53 of the Statute) apply ?

8. What consequences would derive from your answer to the preceding question with regard to :

(i) the so-called "jurisdictional phase" ; and

(ii) the so-called "interim measures phase" ?

9. Do you think that the non-appearing respondent State (summoned before the Court by a unilateral *requête*) is fully subject, as a State participating in the Court's Statute, to the Court's judicial powers as set forth in the Statute, particularly as regards :

(i) Article 36.6

(ii) Articles 36.1 and 36.2

(iii) Article 41

(iv) Articles 59 and 38.1 ?

10. In particular, which is, in your opinion, the legal situation of a respondent State which, after appearing *ab initio* and defending its case in a preliminary phase, ceases participation in the proceedings, following an affirmative decision rendered by the Court, under Article 36.6, on its jurisdiction on the merits ?

11. Do you consider that the recent practice of non-appearance has given rise to the *inconvénients* lamented by a number of commentators ?

12. Do you see any further difficulties or *inconvénients* ?

13. Which remedies, among those suggested so far by commentators, do you consider desirable and possible ?

14. Do you see any further remedies ?

(Gaetano ARANGIO-RUIZ)

Questionnaire

1. Estimez-vous que l'étude de la Commission devrait être limitée aux difficultés (réelles ou prétendues) qui se sont manifestées dans les cas relativement récents de non-comparution de l'Etat défendeur devant la Cour moyennant une requête unilatérale ?

2. Si votre réponse à la question précédente est négative, dans quel sens estimez-vous que la tâche de la Commission devrait être élargie ?

3. Estimez-vous que la comparution devant la Cour (dans le cas de procédure ouverte par requête unilatérale) forme l'objet d'une obligation ou pensez-vous qu'il s'agit d'un choix discrétionnaire de l'Etat défendeur ?

4. Quelles conséquences tireriez-vous de votre réponse à la question précédente ?

5. Estimez-vous que l'Etat cité, qui refuse de comparaître, doit être considéré comme étant « partie » au procès institué devant la Cour par la requête ?

6. Quelles seraient, dans votre opinion, les conséquences d'une réponse affirmative ou d'une réponse négative à la question précédente ?

7. A quel stade ou quels stades du procès devant la Cour estimez-vous applicable la procédure envisagée pour la non-comparution aux paragraphes 1 et 2 de l'article 53 ?

8. Quelles conséquences découleraient de votre réponse à la question précédente en ce qui concerne :

(i) la phase dite « juridictionnelle » ;

(ii) la phase dite « des mesures conservatoires » ?

9. Estimez-vous que l'Etat absent (cité devant la Cour par *requête*) est pleinement soumis, en tant qu'Etat participant au Statut de la Cour, aux pouvoir de la Cour indiqués dans ce Statut :

(i) à l'article 36.6

(ii) aux articles 36.1 et 36.2

(iii) à l'article 41

(iv) aux articles 59 et 38.1 ?

10. En particulier, quel est le statut juridique de l'Etat défendeur qui, après avoir participé au procès *ab initio*, cesse d'y participer à la suite d'une décision affirmative rendue par la Cour, en vertu de l'Article 36.6. au sujet de sa propre compétence ?

11. Estimez-vous que la pratique récente de non-comparution a donné lieu aux inconvénients dénoncés par un certain nombre de juristes ?

12. Voyez-vous d'autres inconvénients ?

13. Quels remèdes, parmi ceux qui ont été suggérés jusqu'ici, vous paraissent désirables et possibles ?

14. En voyez-vous d'autres ?

(Gaetano ARANGIO-RUIZ)

Annex

Observations of the Members of the Fourth Commission on Questionnaire and Preliminary Report.

1. *Observations of Mr E. McWhinney*

(a) Letter of August 7, 1985

I have just received the *Preliminary Report* of the Fourth Commission, and I am writing immediately to congratulate you on a most thorough canvassing of the relevant background literature available in a number of different legal systems, and for the interesting alternative hypotheses that you have been able to offer from all this material. The Questionnaire accompanying your Preliminary Report has succeeded in reducing the alternative positions to some succinct and searching questions. Though no time limit is suggested for responses to the Questionnaire I believe you would find it helpful and useful to have some written statements available to you for the Helsinki reunion, and I am therefore replying, in this spirit, and setting forth, *seriatim*, some at least preliminary reactions to the individual questions.

Q1. The present Court is developing its own informed jurisprudence on this question, on a case-by-case, and to some extent trial-and-error basis, and prime attention should therefore be given by the Commission to empirically-based study and analysis of that case-law, the particular claims advanced by or on behalf of the States concerned (whether appearing or non-appearing) ; those States' particular methods of communicating their views if they should choose not to appear formally ; and the actual dispositions made by the Court in such situations, at both the *preliminary* and also the *merits* stages. It should always be remembered that the International Court of Justice, like any other constitutional institution, is capable of organic growth and development to meet new societal problems and new societal needs not expressly provided for or, indeed, hardly envisaged, by those who drafted the original Court statute ; and the Court's own jurisprudence is the best evidence of such incremental change in the law and practice of the Court.

Q2. Not applicable.

Q3. I take it that a State that has accepted the compulsory jurisdiction of the Court under Article 36(2), and even (hypothetically, at least) a State that has agreed to refer a particular case to the Court's jurisdiction under Article 36(2), retains the right at all times to choose, as a tactical-legal decision, to appear or not to appear before the Court.

Q4. The decisions of the Court under Article 53 of the Court Statute are not, however, foreclosed or constrained, one way or another, by a decision of the respondent State not to appear before the Court. Such respondent State's conduct, in this regard, merely constitutes one element among a number of elements that are relevant to the Court's decisions under Article 53.

Q5. In the light of the answer to Question 4, it hardly seems necessary or useful, or even relevant, to try to determine in the abstract whether or not the non-appearing respondent State is to be considered a "party" to Court proceedings instituted by unilateral application.

Q6. My tentative conclusion (subject to verification or correction by the empirical record of the actual case-law), is that it has made no difference, and that the results have been the same.

Q7. The Court jurisprudence, as I interpret it, indicates that the Court has applied the "bootstrap" approach to jurisdiction and assumed the facts of jurisdiction so far as necessary at the *interim* stage for purposes of decreeing provisional measures, pending any final decision on the merits. (As a purely abstract, *a priori* question, one might have assumed that the Article 53(1) and (2) would only be relevant at the final, *merits* stage of the Court proceedings).

Q8. As a matter of law-in-action, the Court jurisprudence does seem to have provided operational answers to both sub-questions *(a)* and *(b)*.

Q9. As to sub-questions *(i)*, *(ii)*, *(iii)*, and *(iv)*, why not ?

Q10. Does the respondent State's legal situation differ from what it would have been if it had chosen to continue through to the end ? The differences, if any, would appear to be political-psychological, and not legal.

Q11. The juridical weight of the « inconvénients » signalled by the various commentators whom you cite is not yet clearly established.

Qs. 12, 13, 14. The answers to these, — the prescriptive enquiries — in the Questionnaire seem to call for some larger, theoretical framework, involving taking of positions on some of the main philosophical antinomies of contemporary International Law. I have examined the contemporary trend away from the older, positivistic, law-as-command conceptions, to newer, Law-as-Fact approaches, in the context of the two *Nuclear Tests* cases, in my monograph, *The World Court and the Contemporary International Law-Making Process* (1979, p. 34 *et seq.*). I do not think the Commission will be in a position to make critical evaluations of the competing viewpoints of the various doctrinal authorities whom you cite or to respond meaningfully to the invitation in your last few questions for operational remedies for the future without the benefit of some such, more comprehensive intellectual examination of the future of the Court, of third party disputes settlement, and of International Law problem-solving as a whole.

(b) Letter of November 18, 1985

You will already have received my letter of August 7, 1985, written following on receipt of your *Preliminary Report* and containing responses, *seriatim*, to the detailed questions raised in the Provisional Report. Since writing that letter, I have had the advantage of discussing the Report with you in person in Helsinki, and also of hearing the views of our colleagues on the Commission, and of reading the observations by Judge Gros under date August 3, 1985.

I share, as no doubt also do you and the other members of our Commission, the sentiment voiced by Judge Gros (citing Madame Bastid on the occasion of her entry with the *Institut de France* in December, 1972) that one should be aware of the life of the law. Every common lawyer, here, will be reminded of Holmes' rightly celebrated dictum that the life of the law has not been logic, but experience.

I take it that we are all agreed, after our Commission meeting, that there is great merit in our *confrère* Rosenne's suggestion (advanced also in my letter of August 7, 1985, already referred to) that we should look at the specific examples of Non-Appearance from the Court's docket, and try to draw conclusions, on an empirical basis, as to the effects of such State conduct in the particular case. The empirical data could be provided by the Court's own express acknowledgment of the effect of such conduct ; or the absence of any such Court express acknowledgment, one way or another : or possibly (to the extent available), comments after the event by Members of the Court actually taking part in the case. I see no difficulty, in this regard, in accepting Judge Gros' further comment that Non-Appearance of a State has legal implications not merely for that State and for other States party to the cause, but also for the Court itself *qua* international institution.

I will, in the light of our Commission's discussion in Helsinki, take the liberty of repeating, in writing, some observations that I made then. First, (in the light of Common Law jurisprudence and legal history), any party to a case has the right, within its own full discretion and political judgment, to opt whether to appear or not to appear ; and also the right, in the course of the proceedings and after having already entered an appearance, to terminate that appearance. *Second*, Non-Appearance by a State party to a case has no effect upon the Court's jurisdiction and actual exercise of jurisdiction, which is to be determined by the Court independently and on other, different legal considerations. *Third*, the actual effect of Non-Appearance is a concrete fact, to be determined empirically, on a case-by-case basis, in terms of the Court's behaviour to the different parties, those appearing and those not appearing. *Fourth*, on the basis, at least, of the two *Nuclear Tests* cases (which are canvassed in some detail in my monograph, *The World Court and the Contemporary International Law-Making Process* (1979), p. 34 *et seq.*) one might venture the suggestion that the Non-Appearing party may even gain by the

Non-Appearance : it might be argued that the Court, in the desire to render justice and to do full honour to the principle *audi alteram partem*, went to some special pains to compensate for the absence of direct presentation by the Non-Appearing party of its legal arguments and their supporting factual record.

I would suggest that you treat this letter as a formal *Addendum* to my letter of August 7, 1985, to be published with it. I take the opportunity, again, of congratulating you on an excellent *Preliminary Report*, and I also want to thank you for the intellectual concern and dedication that you have brought to the reunion of our Commission in Helsinki.

(c) Letter of 11 December 1989

I am writing in follow-up to the discussion at our Commission meeting in Santiago de Compostela on 7 September 1989.

I take the liberty of directing attention, once again, to my *communication* of 7 *August 1985* containing responses *seriatim* to the questions posed in the very erudite Preliminary Report that you had then submitted in time for the *Institut's* Reunion in Helsinki in 1985 ; and also to the *addendum* to my communication of 7 August 1985, submitted to you, under date *18 November 1985* and referring, in particular, to Judge Gros' views. Copies of these two communications, of 7 August 1985 and of 18 November 1985, are enclosed with the present letter, for your convenience.

Some further comments seem appropriate in the light of our valuable discussions in Santiago de Compostela on 7 September 1989 :

(i) The magisterial review by our *confrère* Jiménez de Aréchaga of the actual *jurisprudence* of the Court involving situations of Non-Appearance, — whether for both Preliminary and substantive stages (as in most of the cases), or else at a subsequent stage only (as with the U.S. in *Nicaragua*), tends to suggest that, with the single exception perhaps of *Nicaragua*, the Non-Appearing party has not suffered, one way or another, by the Non-Appearance.

(ii) Our *confrère* Doehring seems right in suggesting that the main practical disadvantage to a Non-Appearing party may lie in the fact-finding phase (perhaps, again, the example of the U.S. in *Nicaragua*). Bearing in mind the normal obligation, (in terms of Comparative, Municipal Law), *contra proferentem*, that the burden of proof of contested facts lies upon the party alleging them, the Court would seem to have some obligation, in cases of Non-Appearance, to conduct its own investigations as to the underlying facts of any conflict-situation, if necessary by utilising the concept of Judicial Notice.

(iii) On the issue whether there is a legal duty to Appear, I agree with our *confrère* Rosenne's position, as I understand it, that there is no such duty, and that the decision whether or not to Appear is a political, or political-tactical one, with the ultimate sanction, if any, for Non-Appearance being the potential effects upon the carrying-forward and conduct of one's case. (In *Nicaragua*, the U.S. made the tactical decision to walk out of the case, at the half-way stage, and clearly did not help itself in terms of the final results of the case, politically as well as legally).

With my compliments, again, on your excellent Preliminary Report and on the succeeding Memorandum that you presented to our Commission Reunion in Santiago de Compostela, and with very best wishes.

2. *Observations of Mr S. Rosenne*

25 November 1985

1. I have read with very great interest your preliminary report on Non-appearance before the International Court of Justice. Let me start by saying that it gives me great pleasure to congratulate you on your impressive introduction to our study of this delicate topic. In particular, I have noted with especial interest elements of political realism alongside legal and moral idealism peeping through. This stands in marked contrast to some of the recent literature on the topic, which I find excessively sterile precisely because it feigns ignorance of the political factors and steeps itself in subtle technicalities. Yet always, non-appearance (of which I do not think there has yet been a true case with the *possible* exception of the third phase of *Corfu Channel*), meaning no active participation in the proceedings (an expression which itself requires qualification) must be regarded as a deliberately conceived litigation strategy, based on a combination of the legal assessment of the responsible legal advisers and the political assessment (involving both domestic and external elements) which it is the policy-makers' right and duty to make, and in full knowledge of the consequences. There is no possible question of legality or of moral reprehensibility in such a litigation strategy (nothing on p. 528 of my *Law and Practice* justifies the inclusion of a reference to it in para. *4(a)* of your Preliminary Report). I have close familiarity with more than one of the alleged cases of non-appearance listed by you in paragraph 1 of your preliminary report. In not one of them, to the best of my understanding, was the so-called non-appearance a whimsical matter, or was the decision taken lightly. In every case with which I am familiar, there were profound political reasons (and domestic controversy) which sometimes tipped the scale against legal advice.

Therefore, before I answer your questions, I find it necessary to make some preliminary observations, and to pose some questions myself.

2. In the first place, allow me to restate my own published views as developed in my series of writings (covering a period of nearly thirty years) on the Court *seriatim* :

(a) In my first book, *The International Court of Justice* (1957), I wrote (at p. 413) :

The failure of one party to appear or to defend its case does not entail the consequence, that the Court is unable to act. A contingency precisely of this kind is envisaged in Article 53 of the Statute, by which, in such circumstances, the other party may call upon the Court to decide in favour of its claim. However, on the Court is imposed the duty of satisfying itself not only that it has jurisdiction, but also that the claim is well founded in fact and in law. ...These cases show the strictness of the conception of " default " in international practice, and the relative, not the absolute, quality of the rights of the appearing party whose substantive rights, it may be said, are not affected by the default, but who is thereby merely placed in a certain procedural position, defined by Article 53 of the Statute.

(b) In the re-edition of that book under the name *The Law and Practice of the International Court*, vol. II, p. 590 (1965, reprinted in one volume without change of pagination, 1985), I simply repeated the foregoing unaltered.

(c) In *The World Court, What it is and how it works* (3rd ed., 1973) I started to deepen my views, writing (p. 111) :

Must a State Appear ?

It would have been pointless to have gone to the trouble of setting up an International Court and then to have opened the way to the complete frustration of its work by not closing this gap. Accordingly, the Statute lays down that whenever one of the parties does not appear before the Court, or fails to defend its case, the other party may call upon the Court to decide in favour of its claim. But before doing so, the Court must satisfy itself both that it has jurisdiction in accordance with the provisions of the Statute, and that the claim is well founded in fact and in law. Instances of this are naturally rare, because States will not lightly risk the possibility that judgment will be given against them. It should be noted, however, that this procedure for giving judgment by default only applies if the Court is satisfed that it has jurisdiction, and if the defaulting party has been duly notified of the hearing.

(d) In my " Reconceptualization " article, after the modern problem had first appeared, I wrote (at p. 749.) :

[U]npalatable though this may be, Article 53 of the Statute confers a right on a party not to appear (although this in itself cannot be regarded as constituting a challenge to the jurisdiction of the Court). In that event, the other party is granted certain rights, and the Court is placed under the duty

to satisfy itself that it has jurisdiction. In this sense, Article 53 does not so much " reinforce " a general duty imposed on the Court as itself impose a special duty on the Court in a defined set of circumstances. But here too there is a time element which is constitutive of the defined circumstances, the non-appearance from which that special duty arises. The non-appearance of a party cannot be deduced from its conduct and attitude, however powerfully expressed, taken *per se,* but only when taken in a time context. Until the time-limit fixed for the relevant pleading has come and gone, the non-appearance is imperfect or inchoate. There is here a close parallel if not an identity between the time element constitutive of the preliminariness of an objection and the time element constitutive of a non-appearance. In both instances, the relevant time is the time-limit fixed objectively for the party's first pleading *on the merits.* In international litigation before the International Court the Statute, over fifty years of practice and jurisprudence and, it is submitted, general legal principle confer this right on a respondent Government which cannot be obliged to take its final *political* decision — a decision producing concrete consequences in terms of the litigation and what would follow from it — whether or not to appear before the Court until the time arrives, in the same way that it cannot be obliged to take a stance on a question of jurisdiction (or admissibility) before that time arrives. Criticism of the respondent Government in the [*Fisheries Jurisdiction* (jurisdiction of the Court) cases], that notwithstanding its rights under the Statute it had failed to observe provisions of the Rules governing preliminary objections, is therefore hardly germane, for it is difficult to understand why a respondent should be criticised for not doing something which at the time it was not obliged to do. By the same token, a respondent Government, granted the lack of formalism characteristic of international litigation, cannot force a quasi-preliminary objection procedure on the other party or on the Court, simply because it considers, on the basis of the application alone, that there is no ground for the exercise of jurisdiction or that the application is inadmissible.

3. Basic criticisms of that last view as expressed in some recent literature leave me unimpressed, since they overlook the pregnant words " imperfect or inchoate " (although I think now that some modification may be needed, as will appear later). In truth I find the inexplicable attitude of the Court in *Military and Paramilitary Activities in and against Nicaragua* (jurisdiction *and admissibility* [my emphasis]) justification for my fundamental thesis. For what did the Court do in that case, which up to that point had been proceeding " normally " ? In full knowledge of what the different issues of jurisdiction and admissibility were, for they had all been raised, albeit in summary fashion, in the provisional measures phase and in the attempted intervention of El Salvador, the Court, in its judgment of 26 November 1984, proceeded quite arbitrarily to draw a false analogy with the preliminary objection procedure and to apply Article 79 of the Rules so as to decide that one of the central issues, which could be classified as one of jurisdiction or as one of

admissibility, was found in the circumstances of the case not to possess a preliminary character, and it was therefore postponed. However, the Court did not do this according to the procedure prescribed by Article 79 of the Rules, which requires the *decision* in a "dispute" as to whether the Court has jurisdiction to be given in the form of a judgment, and after the proceedings which Article 79 contemplates, assumed to mean in the operative clause of *that* judgment, written loud and clear. The decision was buried within the confines of the "reasons in point of law" of 113 paragraphs of another kind of judgment altogether. This may be contrasted with the precedent in the operative paragraph 3 of the decision of 14 March 1978 in the *Anglo-French Continental Shelf* arbitration, 18 RIAA 271 at p. 330. By what logic can any court, let alone the International Court of Justice, reach a decision that it will first decide questions of jurisdiction and admissibility, and then, after putting the parties to considerable trouble and difficulty in doing that, proceed to duck an issue which existed all the time, and do so on the ambivalent ground that this issue did not possess, in the circumstances of the case, an exclusively preliminary character?

4. But I return to "imperfect or inchoate." *Anglo-Iranian Oil Co.*, and *Nottebohm* are two significant examples of a non-appearing State appearing in a later phase (and in effect winning its case). If mere non-participation in any phase of a case before the merits (including a provisional measures phase the precise procedural status of which may be *sui generis*) is sufficient to bring Article 53 of the Statute into play once and for all, then in both those cases the Court would probably have done better to have applied that Article, or at least to have explained why it was not applying it. But no responsible writer would criticize the Court for allowing the two respondent States to enter the proceedings later. Therefore I modify my view as to the terminal date for non-appearance so that it should refer to the opening of the oral proceedings (or some equivalent) in a given phase. Indeed, since when is a State involved in litigation not to be allowed to defer a final and hence irrevocable decision on its attitude towards the litigation or any phase until the last possible moment? And if it is legitimate to move from non-appearance to appearance, why not from appearance to non-appearance if the State finds that it has good reason for doing so? But if it has appeared in an earlier phase, great caution and careful analysis of its pleadings is required before asserting that Article 53 of the Statute applies to a later phase. The main issues may have already been pleaded! It is indeed noteworthy that at the hearing of 12 September 1985 in the *Nicaragua* case, Nicaragua proceeded immediately to call its witnesses. CR 85/19, p. 19. The legal issues had already been pleaded.

5. I would now like to pose — and answer — my own questions:

(1) Is there anything in the Charter — note I do not mention the Statute because it is an integral part of the Charter — which could in any way have contributed to the situation in which so many States have decided as a matter

of litigation strategy and of high policy to avail themselves of their rights under Article 53 of the Statute? My answer to that question is a definite affirmative. I point directly to Article 7 of the Charter, which establishes the Court as a principal organ of the United Nations, and the automatic participation in the Statute of all members of the United Nations. I know that in 1945 this was hailed as a great advance over the ambivalent status of the Permanent Court in relation to the League of Nations. But in retrospect, was it? Who was to know then how the United Nations was to evolve? How over-politicized *all* its organs and agencies would become? How it would never fill the expected role as a centre for harmonizing the actions of nations (Charter, Article 1, paragraph 4) and instead become a centre for confrontation? Who was then to foresee that a major role in such fundamental matters as the election of the Members of the Court, or the Court's finances, or the amendment of the Statute, or requesting advisory opinions, would be played not by States attached to the very conception of international adjudication, but by a political majority which sees the Court simply as one more United Nations forum in which it can hope to attain some immediate political objective, and possibly a transient one at that? There is no gainsaying that there is mistrust in all other principal organs of the United Nations. Justified or not, this is a political fact and one, but not the only one, of the manifestations of that political fact is a widespread anxiety that the Court is not necessarily the most appropriate organ for deciding disputes between States, especially when a political dispute is dressed up as a legal dispute without its really being a legal dispute.

6. (2) I next point to Article 36, paragraph 2, of the Statute, which is a part of the Charter, and by extension, to compromissory clauses allowing the unilateral institution of proceedings without adequate forewarning. Again I know that in 1920, the possibility of unilateral arraignment of a State before the Court was hailed as a great advance. But have these expectations been realised? Is unilateral arraignment without adequate diplomatic airing of the issues beforehand good diplomacy or good political handling of a difficult situation? One of the earliest cases of this character (although under Article 36, paragraph 1, of the Statute) was *Mavrommatis*, which was also the first case in which preliminary objections made their appearance. Most of the cases of so-called non-appearance have been cases of unilateral arraignment without there having been serious underlying diplomatic endeavour (when this was possible) to see if recourse to the Court, whether in form unilateral or not, could constitute an acceptable way out of some political difficulty. They have all been accompanied with major challenges to the Court's jurisdiction (a phenomenon which explains the tendency of some writers to view non-appearance in itself as a challenge to the jurisdiction of the Court, which it is obviously not).

7. Against this background I am profoundly disturbed at the developments which have taken place in regard to provisional measures of protection, the

apparently low threshold jurisdiction evolved by the Court to deal with these cases, the abnormality of the procedure which the Court has been employing since the *Fisheries Jurisdiction* cases to deal with questions of jurisdiction and admissibility which come to light in this early stage of a case, and the tie between Article 41 of the Statute and the polarized Security Council. The existence of that tie places the Court squarely in the political arena whenever it indicates, or is called upon to indicate, provisional measures of protection, and by an extension places the whole of the Court's handling of this type of case in the political sphere. Here again, the *Nicaragua* case seems to provide a good example of an abusive or vexatious invocation of Court procedures, on the one hand, and the excessive politicization of the handling of the case on the other, since a careful look at the application and at the request for the indication of provisional measures will disclose a close resemblance to a draft resolution put forward a few days earlier by the applicant Government in the Security Council, but not adopted by the Security Council. In that connection, certain statements appearing in various opinions made in that case criticising the handling of the case by the President of the time — something as far as I know unprecedented — are hardly likely to inspire confidence in the Court as an institution for the settlement of disputes between States in the political atmosphere of United Nations organs.

8. In brief, before dealing with possible legal aspects of non-appearance, an examination should be made of the political ambience which has led States to adopt what is, I have little doubt of this, a difficult and unpopular attitude for them.

9. The next fundamental question to be asked is: What is really meant by non-appearance? I notice that in the 1978 version of Article 74, paragraph 3, of the Rules of Court, "The Court shall receive and take into account any observations that may be presented to it before the closure of the oral proceedings." By Article 79, paragraph 1, "*Any* [my emphasis] objection by the respondent" is to be filed at a certain time — any objection, and not merely a preliminary objection. No form is prescribed for "any" objection, only for a "preliminary objection." In my view, any "observations" or any "objections" are enough to constitute an appearance in the phase in which they were made, with the possibility that they would also have a forward thrust, and I have never been able to understand why anyone should think otherwise, especially as the Court has, sooner or later, taken all those kinds of "observations" and "objections" into account in reaching its decision on its jurisdiction or (what is more problematical) on the admissibility of the claim, and perhaps on the claim itself. International litigation is not so formalistic that it must conceive of non-appearance only in terms of a State not sending its views to the Court in a certain form, or in not having an "agent" present at a meeting, for instance under Article 31 of the Rules of Court. That is why I emphasize the date of the opening of the oral proceedings in a phase as the terminal date for establishing non-appearance. The question therefore arises whether, except in *Corfu Channel*, recourse by the Court to Article 53 has been justified. It is also to be noted that most of the jurisdictional issues which arose in the kind of case with which we are dealing related more to the existence or subsistence of the title of jurisdiction, and not so much to the interpretation of the dispute in terms of the title of jurisdiction. This means that it was technically possible, though not necessarily desirable, to have *that* kind of jurisdictional issue argued without reference to the facts or the law on the merits, despite important precedents to the contrary (*Nottebohm*, and now *U.S. Diplomatic and Consular Staff in Tehran*). *Nicaragua* is, I believe, the first case in which some of the jurisdictional questions and certainly the admissibility questions could not possibly be separated from the facts of the merits. The pleadings of 1984 were clear enough, and the Court should have been aware of this from the provisional measures phase and from subsequent procedural incidents. Difficulties of dealing with admissibility issues in this way were apparent already in *Nuclear Tests*, and it is difficult to comprehend why the Court in *Nicaragua*, in the light of that experience, did not hesitate more when directing the parties to plead to admissibility before requiring the applicant to set forth its version of the facts and giving the respondent the opportunity to put its version on the record. Has the principle *Narra mihi facta* also been forgotten, along with *Reus in excipiendo actor est*?

10. I would also add here that since, as I see it, a State, like any person involved in civil litigation within a State (here is one of the few analogies between international litigation and domestic litigation), has the right to refrain from taking an active part in the proceedings, there is no need for a *legal* value judgment if it so decides, and expressions of regret that it has chosen such a course are misplaced. They seem to have distorted the whole treatment of the problem, certainly in the literature (and in individual opinions), and possibly by the Court itself, although personally I find little to criticize in the final results reached by the Court hitherto, even if I cannot subscribe to all its reasoning.

11. There is another aspect which I approach with considerable diffidence. That is the relationship between what the Court, and (in my view mistakenly) much *doctrine*, is inclined to see as "non-appearance" and the participation in the proceedings of a Member of the Court possessing the nationality of one of the parties, whether the "active" party or not, but more especially when his country is not the "active" one (Why the adjective "active"? It requires "activity" — sometimes a great deal of activity — for a Government to decide to avail itself of its right under Article 53 of the Statute!). I have encountered a non-legal aspect of this problem which has troubled me ever since. I know of a case in which for its own political reasons, in fact quite convincing ones, a Government felt unable to be represented in any of the Court proceedings — incidentally a country which in principle holds the Court in high esteem. It wanted, for its own political reasons, to demonstrate that

it was not "boycotting" the Court, and for that reason, amongst others, it would have liked to have appointed a judge *ad hoc*. To its very great surprise, none of the eminent jurists whom it approached, and whose presence on the Bench in the quality of judge *ad hoc* would have greatly enhanced the general standing of the Court, was willing to undertake that assignment unless the Government were to change its policy and litigation strategy, something it was unable to do. If you take a sentimental approach, this is understandable. But is there not here a confusion between the legal and the non-legal aspects? A Government's decision to avail itself of its rights under Article 53 of the Statute cannot, in my conception, really justify a refusal to accept such an invitation, leaving aside any question of the moral requirements of international co-operation and mutual assistance towards a Government finding itself in difficulties which it cannot solve itself. I have always held the view, and consistently expressed it in my writings on the Court, that regardless of any abstract legal theory, the presence on the Bench of the national judge and the equalizing judge *ad hoc* (unless *both* sides agree to waive) is not merely highly desirable, but is in fact essential for the proper working of the International Court of Justice in the current international community. I personally have often regretted that international lawyers are not obliged to take something like a hippocratic oath, or to find themselves in some other way as "officers of the court" to take widespread conception of the Anglo-American common law (which my country is happy to have inherited). I would regard it as an obligation of an international lawyer to international law and to the International Court not to decline an invitation from a Government, exercising its rights under the Statute, to serve as its chosen judge *ad hoc*, simply because he disagreed with its litigation strategy.

At all events, I think this a practical matter on which our Commission might pronounce itself.

12. Attention should be paid to the following. As far as I am aware, there has never been a case in which a State has failed to appear or to defend its case without finding some way to bring to the attention of the Court its observations and objections, on both law and fact (I avoid at this stage differentiating between objections to the jurisdiction and objections to the admissibility, although this may become of importance). The question which therefore arises is, What is the relationship between the non-appearance (if such it is to be called in these circumstances) and the observations and objections? The fact is that despite an eclectic recourse to Article 53 (carefully avoided in *Nuclear Tests*) coupled with expressions of "regret" — perhaps mistaken — that a State has exercised its rights under Article 53, the Court has never yet been faced with the situation in which the named respondent has manifested an attitude of complete disinterest towards anything the Court might be doing in relation to the case, or has refrained from replying to the communications sent to it by the Court in pursuance of duties imposed by the Statute. In all the cases of "non-appearance" the Court's

communications have received an answer, transmitted through official channels, sufficient for the Court and the other party to comprehend what the State's attitude towards that particular communication was, and its reasons. Indeed, it is noteworthy that in none of the cases mentioned in paragraph 1 of your preliminary report did either the Court or the "active" party have any real difficulty in knowing what the "absent" party's position was, in pleading against it, and in deciding the dispute, complaints to the contrary notwithstanding.

13. The evolution of this new litigation strategy, a perfectly legitimate one foreseen by the Statute, is certainly an innovation which has taken the legal profession, both practitioners and the academic side, by surprise and has produced a strongly emotional reaction. But should it have done so? And a further question arises: Is this a real legal problem which we are facing, one really appropriate for treatment in viable terms by our Institute? Is it not a question more appropriate for a company of political scientists? Can the Institute do anything practical and worthwhile — for I would not regard an expression of a pious wish as commensurate with the dignity of either the Court or of our Institute?

I have very grave doubts. The literature seems to me to be criss-crossed with red herrings bearing little or no relation to the factors which have produced the present situation. These developments are attributable above all to the failure of the system of unilateral arraignment of a State before the Court, under either of the first two paragraphs of Article 36 of the Statute, to become an appropriate and politically acceptable method for the settlement of international disputes, and the widespread mistrust in the efficacy of international judicial procedures for the settlement of international disputes in the absence of the agreement of all the parties concerned to employ them. In such a situation, no ingenious legal or legalistic palliatives can be of any possible value, and can only increase the general malaise surrounding all international legal processes today, including the International Court of Justice.

14. Finally, I note that in all the cases you mention in your paragraph 1, the tension generated by the unilateral arraignment was aggravated by the immediate, in fact simultaneous, request for an indication of provisional measures, and in one case by the simultaneous recourse of the applicant State to both the Security Council and the Court for the same relief. If our Commission is to continue its examination of the problem of "non-appearance", should it not probe further into the question whether there is any connection, or any relevance, in coincidences of that character for the topic we are charged to examine?

15. But enough. Let me now try and answer, in a preliminary way (for I am open to persuasion), your questions.

1. The answer is obviously No, for the reasons given above.

2. An outline is given above, and no doubt more could be added.

3. Discretionary choice, as in all civil litigation. Although, as you have mentioned in paragraph 4*(a)* of your preliminary report, I have written (*Law and Practice*, vol. II, p. 528) that litigating States are *in principle* (my emphasis here) under a duty to co-operate with the Court and hence with each other in the conduct of the case, and have quoted in that connection Article 2, paragraph 5, of the Charter, surely that *lex generalis* has to be read together with the *lex specialis* of Article 53 ?

4. The consequences are those laid down in the Charter of the United Nations (as supplemented, in the concrete case, by any provisions appearing in the title of jurisdiction). Since this is a Charter matter, it is given to all the inherent fluidity and opportunism which characterizes the application of the Charter.

5. Yes, if the Court has jurisdiction and the claim is admissible. But does the question have any *real* significance ? As far as the Court is concerned the question is a purely technical one to which the Statute and Rule provides an answer, while if the question is asked in relation to Article 94 of the Charter, it is irrelevant to the political opportunism which prevails in the Security Council.

6. The answer to question 4 is equally applicable here, whether the answer to question 5 is affirmative or negative.

7. My view remains basically as stated in my "Reconceptualization" article, as modified here. I would therefore add this qualification. There is "appearance" if any kind of written observations or objections, however summary, are filed. If it is reasonably clear that observations or objections of this character represent the final political determination of the State concerned, the Court can easily deal with the procedural situation by the simple expedient of fixing short time limits for the written proceedings in that or the next phase, with liberty to apply for a prolongation, as was done in *U.S. Diplomatic and Consular Staff in Tehran* case, I.C.J. Reports, 1979, p. 23. (Parenthetically I would emphasize that the principle of the equality of States requires that initially the same time-limits should be fixed for both parties. Inequality of time-limits in the initial order in a phase does not seem to be compatible with Article 1, paragraph 2, and Article 2, paragraph 1, of the Charter to which the Statute of the Court is annexed. Compare the order fixing time-limits in the *Nicaragua* case, I.C.J. Reports, 1985, p. 3.) I do not think that the sitting of an agent behind a nameplate in the Great Hall of Justice (and not in the public gallery) is the only conceivable form of "appearance". There is nothing in the Statute, or in its preparatory works, to justify such a conclusion. Yet that is what the literature seems to be doing.

8. *(i)* I do not fully understand this question. I share the view that the procedure introduced in *Fisheries Jurisdiction* is open to criticism in that the *Court* created a "jurisdictional phase" artificially and before the cases were really ripe for that through the filing of the first pleadings on the merits by the applicants, and the disclosure then of a dispute as to whether the Court has jurisdiction. *Reus in excipiendo actor est* has not lost any of its vitality, and it requires that the interested party, not the Court, create the "jurisdictional phase", whether dealing with jurisdiction in the strict sense, or with admissibility. Matters have been made much worse by the recent additions of questions of admissibility to this artificially created "jurisdictional phase", and the confusion has become worse confounded after the Court has applied its controversial Article 79 of the Rules in a situation which bears no analogy at all to the hypothesis of the Rule.

8. *(ii)* I think the Court has gone too far in adopting a fairly low threshold requirement for jurisdiction in most recent provisional measures cases, and this has aggravated the problem we are examining. A similar mistake was made in the provisional measures phase of *Anglo-Iranian Oil Co.* and I am not sure that the Court has ever really recovered from that, especially after the Security Council acted in the way it did — and probably saved the Court from sheer disaster by so doing !

9. *(i)* Yes.

9. *(ii)* I am not clear what are the "Court's judicial powers" set forth in the two provisions mentioned. Those provisions simply indicate the methods by which jurisdiction can be conferred on the Court in a concrete case. That means jurisdiction over the *merits*.

9. *(iii)* Only if the case is properly constituted and the Court is faced with a reasonably arguable dispute as to whether it has jurisdiction, so as to bring Article 36, paragraph 6, of the Statute into play, with a reasonable expectation that after argument and proper judicial examination it will find that it has jurisdiction or that the case is admissible. Much of the current difficulties seem to descend from a curious concept of prima facie jurisdiction which has found its way into the provisional measures phase of recent cases. It seems to me to be inconsistent for the Court in the same breath to indicate provisional measures and to direct that the first pleadings should address the questions of jurisdiction and admissibility.

9. *(iv)* I do not understand this question.

10. As I have the impression that this question might refer to a pending case, I think it should be deferred for the time being. You may wish to reformulate it after the Court has dealt with the next phase of that case.

11. No, since it is a step envisaged in the Statute. In many respects it may have given rise to more *inconvénients* for the "non-appearing" State !

12. No.

13. None, with the possible exception of Sir Ian Sinclair's suggestions in paragraph 8 of your Preliminary Report. We are facing a political situation, to the creation of which the Court may have contributed (unwittingly), and only a political remedy would be viable. I would even warn against hasty adoption of abstract— procedural "cures" and strained reinterpretations of the constituent instruments.

14. Yes. Revise Article 7 of the Charter and remove from it the reference to the International Court of Justice, with consequential amendments to Articles 92 and 93 of the Charter and Article 8 of the Statute, the removal of the Annex from the Charter, and the removal of the reference to the Security Council from Article 41 of the Statute (note that no such provision was found necessary in article 290 or Annex VI, article 25, of the United Nations Convention on the Law of the Sea — provisions which are stronger than Article 41 of the Statute of the International Court). But these remedies, involving as they do amendment to the Charter, are not practical politics at the present juncture, so there is no point in pursuing them.

Let me repeat my hope that our work should not end with a mere expression of pious wishes having no contact with reality.

3. *Observations de M. A. Gros*

a) Lettre du 3 août 1985

.....

2. J'ai lu le rapport provisoire, reçu le 29 juillet, et ma conclusion de cette lecture est que je suis amené à me désolidariser de la méthode adoptée autant que des conclusions présentées. Je n'ai donc pas l'intention de demander des modifications, l'approche même du sujet ne correspondant pas à ce qui, selon moi, devait être l'étude du défaut. Il me paraît par contre que je dois à mes confrères, membres de la Commission, une brève explication des raisons de mon complet dissentiment.

3. Le problème qu'on a voulu traiter dans cette 4e Commission, la non-comparution d'un Etat devant la Cour, ne met pas seulement en cause des attitudes de gouvernements de deux Etats, mais aussi l'attitude de la Cour telle que les Etats intéressés, i.e., sollicités de comparaître, la voient dans les faits et la comprennent. Il y a donc trois dimensions dans l'étude de la non-comparution et celle de la vision que se fait, dans chaque cas qui s'est présenté et se présentera l'Etat non-comparant, de la haute juridiction, est la donnée essentielle puisque c'est l'explication de son refus de comparaître. Il est trop facile d'exclure cette dimension en même temps que l'examen des

circonstances de chaque affaire de défaut, de se restreindre aux six dernières, sans les expliquer d'ailleurs, et de les grouper comme s'il y avait une sorte d'épidémie récente et passagère qu'on pouvait systématiser aussi aisément qu'on les confondait dans une même réprobation. La Cour redit souvent que chaque procès est « unique ». Ce serait une bonne chose de s'en rendre compte aussi dans les cas de défaut. Un résumé des circonstances de *toutes* les affaires devrait être fait, si d'ailleurs la discussion générale d'un rapport de la 4e Commission par l'Institut doit prendre un sens pour nos confrères sans exception et leur permettre de se prononcer.

4. La tendance à critiquer systématiquement l'Etat qui refuse d'être jugé doit avoir plus qu'une justification morale. Il faut se souvenir des sages paroles de Madame Bastid, le 1er décembre 1972, recevant son épée de Membre de l'Institut de France : il faut « sentir la vie du droit » pour pouvoir l'enseigner (Compte rendu p. 30-31), *a fortiori*, dirai-je, pour le dicter aux Etats. Rien dans le rapport préliminaire n'indique qu'il y ait eu une réflexion sur les décisions de chaque Etat sur leur refus de comparaître ; contrairement à ce qui est dit page 20, dernière ligne du dernier paragraphe, la pratique ne met pas la responsabilité du défaut sur un ministre et/ou un juriste, elle montre dans chaque cas qu'il s'agit d'une décision prise au niveau le plus élevé de l'Etat. En plus d'une vision inexacte des faits, ceci montre l'inefficacité certaine des procédés de contrainte examinés par le rapport. Faut-il rappeler que la tentative doctrinale orchestrée pour faire revivre et appliquer l'Acte Général d'arbitrage a abouti à des dénonciations de ce traité ? Rien ne permet de dire que tel défaut est illicite ; c'est à la Cour de décider de sa compétence et du fond de la demande pour chaque affaire, sans pression doctrinale anticipée ou concomitante. Pour citer deux exemples de la nécessité de « sentir la vie du droit », je rappellerai que les circonstances du refus de l'Irlande et celles du refus de la France, dans la même année, sont entièrement différentes. Et je ne puis comprendre qu'on rejette le tout, sans l'examiner, peut-être sans le connaître, comme c'est, semble-t-il, le cas pour l'attitude du Gouvernement de la République française dans l'année 1974, telle que la montrent une question à l'Assemblée Nationale et la réponse fort claire du Ministre des Affaires Etrangères, fondée en partie sur la violation du secret des décisions de la Cour en juin 1973. Il y aurait autant à dire sur chaque affaire.

5. La raison profonde pour laquelle je ne puis accepter le rapport provisoire dans sa conception même est que rien n'est mis dans la balance en ce qui concerne cette dimension essentielle, primordiale et qui crée le défaut, l'opinion de certains Etats sur la juridiction de la Cour, dont l'expression ne se fait pas quotidiennement certes mais qui est acquise, même si elle n'éclate qu'à propos d'un défaut. Ce n'est pourtant pas la première fois que l'Institut examine la Cour et si le sujet proposé à la 4e Commission impose un nouvel examen, la réflexion est ancienne sur ce point et il est curieux qu'on l'omette.

6. Le Président Charles De Visscher, dans son rapport spécial pour le Livre du Centenaire — 1973 (p. 146-147) s'est exprimé sans ambages, s'appuyant sur une formule décisive de Max Huber. Le rapport spécial de Sir Gerald Fitzmaurice dans le même Livre exprime les vues de notre confrère et Président de l'Institut dans leur fermeté coutumière, qu'il s'agisse de l'inadmissible « double standard » (p. 230 à 236), de la « nouvelle communauté mondiale » (p. 244-245-248, paragraphe 52), des hésitations devant la justice internationale (p. 279-280-284-285 à 290). Je n'ajouterai qu'un nom à cette abondante littérature sur ce sujet que le rapport a choisi d'ignorer, celui du Président de la session d'Helsinki, le Professeur Paul Reuter, dans les quinze dernières lignes de la page 396 du Livre du Centenaire qui contiennent de fort justes observations sur le rapport de dépendance entre la Cour et l'Assemblée Générale ainsi que sur le fâcheux effet d'une telle dépendance pour des Etats.

7. Pour conclure, je souhaite reprendre une phrase de Max Huber, citée par Sir Gerald Fitzmaurice (*op. cit.*, p. 280) : « Il s'agit donc ici d'une question d'ordre politique, plus exactement de psychologie politique » ; et Sir Gerald écrivait que cette vue de la vie pratique en ce qui concerne l'hésitation ou le refus d'aller devant le juge, rejoignant celle de Charles De Visscher, était aussi la sienne (*cf.* la fin du paragraphe 83, p. 280).

8. Tout a donc été dit et bien dit, avant nous. Encore ne faudrait-il pas tenter de faire l'inverse et de présenter comme des remèdes à une « hésitation » (ceci est une litote) devant le juge ce qui serait cautère sur une jambe de bois, ce que dit avec plus d'élégance Sir Gerald à la fin de ce paragraphe 83.

9. Je souhaite que les observations qui précèdent soient tenues par mes confrères de la Commission pour ce qu'elles sont : un intérêt certain pour le sujet à traiter et un désaccord complet avec la méthode suivie comme avec les recommandations proposées. Le véritable problème reste à étudier et traiter.

b) **Lettre du 2 mars 1986**

.....

Je vous remercie des indications que vous avez bien voulu me donner dans votre lettre expresse du 9 février (reçue le 17) tant sur la réunion de la 4e Commission à Helsinki en août 1985, dont je n'avais eu aucun écho, que sur votre pronostic quant à l'avenir des travaux. Il me semble, à vous lire, que vous comptez sur l'effet de la décision de la Cour dans l'affaire Nicaragua/Etats-Unis ; or vous ne mentionnez pas le retrait par le Président Reagan de l'acceptation de la juridiction de la Cour, le 7 octobre 1985, ni surtout la déclaration du Conseiller juridique du Département d'Etat, M.A. Sofaer devant la Commission des Affaires étrangères du Sénat, le 4 décembre 1985 (Bullletin du Département d'Etat), qui expose en neuf pages les vues du Gouvernement

des Etats-Unis sur l'affaire et sur la Cour elle-même. Il est donc possible depuis plusieurs mois de voir quel a été l'effet de la saisine de la Cour et des moyens portés devant la Cour sur la décision d'abandon de la procédure d'abord, sur la décision d'abandon de la Cour ensuite.

Je ne crois pas inutile de faire distribuer aux membres de la 4e Commission les textes cités ci-dessus du Président des Etats-Unis et du Conseiller juridique qui sont déjà dans le domaine public.

.....

4. *Observations of Mr E. Jiménez de Aréchaga*

.....

Allow me to congratulate you on your excellent preliminary report to Commission 4 of the Institut on "Non-appearance before the International Court of Justice". You have covered, in a lucid and well documented report, all the aspects of this important subject.

The answers to your questionnaire follow :

1. Yes, We should leave out of the study, as you do, those cases such as the Antarctica and Aerial Incidents, where unilateral applications were made, but without invoking any title of jurisdiction. These situations were dealt with by the Court in Article 38, paragraph 5 of the new Rules. However, this exception should be added to those referred in paragraph 1 in fine of the Preliminary report.

2. Non applicable.

3. This question should, it seems to me, avoid the dichotomy, the rigid choice of appearance being either a legal obligation or a discretionary right. Appearance, in municipal law, as in the I.C.J. regime, might well be a "tertium genus", neither a duty, nor a right, but an "onus" comparable to the "onus probandi", a "condition to suceed in the litigation". That was the teaching of Chiovenda and his followers in the prestigious Italian school.

4. The main consequence to be drawn from the preceding answer is that, since there is clearly no duty to appear, the unavoidable corollary of the rigid dichotomy would be to assert the existence of a right not to appear. This in turn, would lead to proclaim the "lawfulness" of default, a pronouncement which, if emanating from the Institut, would encourage further boycotts, thus offseting any improvements or remedies that may be recommended. Besides, to proclaim the "lawfulness" of non-appearance may be wrong from a fundamental point of view of law, since behind this attitude there is an implied assertion that the subjective view of the defaulting State as to the Court's absence of jurisdiction, should prevail over any judgment the Court

may reach on the issue. Such an attitude is incompatible with the engagement accepted in the statute to the effect that the Court is the one competent to determine its own jurisidiction, according to the basic judicial principle that no party may act as "iudex in re sua".

On the other hand, you are right in rejecting any form of condemnation or additional sanctions against a State for not appearing, as suggested by Fitzmaurice, since, as you rightly point out, that would constitute an infringement of Article 53.

Thus, the position to take seems to be a neutral one, neither asserting the existence of a duty or of a right, nor pronouncing on the alleged "lawfulness" of default.

5. Yes, as very well explained in your Report.

6. We should examine the different situations that result from the affirmative answer to the preceding question.

A first situation is that of a State that fails to appear because it is convinced that the Court lacks jurisdiction: such a conviction may be confirmed by a judgment of the Court declining jurisdiction, as happened in the Aegean Sea cases. Or the Court may declare the case moot in the light of subsequent developments, as in the Nuclear Test cases. In both cases the decision of the Court removing the case from the list puts an end to the problem.

A different situation is that of a State which persists in defaulting, or ceases to appear, after a positive finding of jurisdiction by the Court. It then becomes a party to the case on the merits within the meaning of article 59 of the Statute and 94 of the UN Charter. In that case the defaulting State is bound by the judgment and must comply with it, being exposed to enforcement under Article 94 of the Charter, unless it could obtain the relief which Iceland derived from subsequent developments in the Law of the Sea.

7. At all stages or phases, provides the Applicant *calls upon* the Court to apply Article 53, as required by the text of this provision. This is the reason why in the Icelandic case a joint dissent filed with Judge Bengzon contended that Article 53 had not yet become applicable.

8. Provided such a request or call is made by the Applicant, the Court may pronounce under Article 53 *(i)* on the claim of the Applicant that the Court has jurisdiction and *(ii)* on the claim for interim measures, in this case on the basis of a provisional finding of jurisdiction, as the Court does in the normal requests of interim measures.

9. Yes, as regards all the articles menitoned.

10. The legal situation of this State is that it will be bound by the judgment delivered by the Court. No doubt, a State, as a practical matter, can

refuse to comply with a binding judgment, as it may refuse to comply with any other international obligation.

This is a political act attended by political consequences lying beyond the province of the judicial process: only time will tell whether such a violation of a clearly established obligation will succeed or not as a practical matter. It did not in the Iranian hostages case. At the time of writing, it remains to be seen what will occur in the Nicaraguan case.

11. The way the Court has dealt with cases of non-appearance is the correct one. Since the Court must satisfy itself as to its jurisdiction, it is bound to consider all possible objections, including those raised by the non-appearing State in "extra-ordinem" communications.

12. No. Your Report covers the most serious difficulties.

13. Those suggested by Sir I. Sinclair seem to be appropriate. Unfortunately, they were not followed in the Nuclear Test cases.

14. Perhaps an express pronouncement by the Court as to the binding force of its judgment and a declaration that the defaulting State is a party to the case within the meaning of article 59 of the statute and 94 of the Charter.

5. *Observations of Mr K. Doehring*

15 November 1985

.....

During our last session at Helsinki, the members of the 4th Commission have been requested to send their answers on the questionnaire forming the last of your excellent and detailed preliminary report. My answers are the following:

To 1. No.

To 2. The study of the Commission should comprise all dogmatical problems emanating from every imaginable case of non-appearance before the Court. It should deal with all legal consequences of those situations in a more abstract sense and not only focus on concrete cases having occurred until now. Only this method can offer broad perspectives with regard to future tasks of the international judiciary.

To 3. In my view, there exists only a legal obligation to recognize the jurisdiction of the Court if recognition has been expressed, but not a legal obligation to appear before the Court. The non-appearing State is burdened by certain disadvantages which must be clearly defined, and it is our task to demonstrate the burdening conditions.

To 4. The Court has to perform the process under the normal rules of procedure provided for that situation.

To 5. The non-appearing State must be considered as a party to the Court proceedings, if all other legal requirements are accomplished in an objective sense.

To 6. If one would consider the non-appearing State not to be a party to the Court proceedings, a unilateral and perhaps abusive denial of the jurisdiction of the Court would be permitted in spite of an objective evaluation of the existing rules.

To 7. Since Article 53, paragraph 2 of the Statute obliges the Court to decide on its jurisdiction, it seems to be correct to apply the whole of Article 53 with regard even to the beginning of the whole procedure.

To 8. The consequences deriving from my answer to question 7 are that no differentiation between the mentioned phases is required.

To 9. As I mentioned above, the non-appearing State is fully subject to the Court's judicial power. All provisions enumerated in question 9 should be applicable.

To 10. If the respondent State does not appear at all, i.e. even not in the preliminary phase and if, under my view, it is from the beginning of the procedure subject to the Court's judicial power, it would be inconsequent to accept any differentiation indicated by question 10.

To 11. No.

To 12. No.

To 13. The available remedies are exhaustively contained in Article 53 of the Statute. This provision is based on the procedural rule that the Court has to deal with the case ex officio, i.e. the Court is not forced to execute the application of the claiming State, but it can exercise its own discretionary power. Furthermore, it is clearly stated through this provision that the Court has to investigate ex officio its jurisdiction as well as the conclusiveness of the claim.

To 14. I do not see any necessity for further remedies, since under this system there exists an objective burden of proof. If the respondent State is not willing to co-operate in discovering those facts which would favour its own position, it may be that it is then exposed to a certain disadvantage. But this situation does not free the Court from exercising its own duty to clear up the situation under an objective view. Mostly, the non-appearing State will bring itself in a bad position, so that its own behaviour is sanctioned by its own misconduct.

6. *Observations of Mr W. Briggs*

3 December 1985

Recalling the meeting in Helsinki of Commission 4 on "Non-appearance before the International Court of Justice" and after re-reading your Preliminary Report, I submit the observations which follow.

1. By becoming a party to the Statute of the International Court of Justice, a State consents to its provisions, including the provision of Article 36, paragraph 6, that:

> "6. In the event of a dispute as to whether the Court has jurisdiction, the matter shall be settled by the decision of the Court."

2. The normal expectation where a State is charged before the Court with a violation of international law would be for that State to appear before the Court and contest the charge or to dispute the Court's jurisdiction.

3. However, Article 53 of the Court's Statute provides:

> "1. Whenever one of the parties does not appear before the Court, or fails to defend its case, the other party may call upon the Court to decide in favour of its claim."
>
> "2. The Court must, before doing so, satisfy itself, not only that it has jurisdiction in accordance with Articles 36 and 37, but also that the claim is well founded in fact and law."

4. Article 53 thus deals with the possibility that, contrary to normal expectations, a State may not appear to defend its case.

5. While recognizing such a factual possibility, there is no basis for the assertion that Article 53 "confers a legal right" of non-appearance on a State party to the Statute.

6. Nor can the absence from the Statute of any explicit legal penalty for non-appearance properly be regarded as "conferring" such a "right."

7. Moreover, no appeal can be made before the Court to any "extra-statutory right" of non-appearance like the United States attempted to claim in *Nicaragua* v. *United States* (*I.C.J. Rep.*, 1984, paragraph 53) as "an inherent extra-statutory right to modify declarations in any manner not inconsistent with the Statute at any time until the date of filing an Application." Such a plea overlooks the fact that the Court and States parties to cases before it operate according to the Statute, not in an extra-statutory world.

8. While thus recognizing the possibility of non-appearance, paragraph 1 of Article 53 nevertheless confers on the other party a legal right to call upon the Court to decide in favour of its claim even if one of the parties to the case does not appear before it.

9. The second paragraph of Article 53 imposes on the Court the normal judicial obligation to satisfy itself before deciding the case that the Court has jurisdiction (in accordance with Articles 36 and 37 of the Statute) and that the claim is well-founded in fact and law.

10. A decision by the Court that it has jurisdiction in accordance with Articles 36 and 37 of the Statute is clearly distinct from any subsequent decision the Court may make on the merits of the case. Whether the case is well founded in fact and law is not decided at this point.

11. A decision of the Court on the issue of jurisdiction is admittedly a "decision" within the meaning of Article 59 of the Statute which provides:

> 59. "The decision of the Court has no binding force except between the parties and in respect of that particular case,"

and is therefore legally binding on the parties, as further provided in Article 60 of the Statute and Article 94 of the United Nations Charter.

12. The very words of Article 53 that "whenever one of the parties does not appear before the Court" indicate with clarity that a non-appearing State is nevertheless a "party" to the case (and thus a "party" within the meaning of Article 59).

13. It follows that the question on which so much time is wasted — viz., whether or not the non-appearing State has a legal obligation to appear — is less relevant than — and diverts attention from — the actual provisions of the Statute with regard to non-appearance — provisions authorizing the Court nevertheless to adjudicate the claim.

14. The provision "whenever one of the parties does not appear before the Court" can be applicable to the consideration of provisional measures under Article 41 of the Statute as well as to decisions on jurisdiction or on the merits, although the requirement of the second paragraph of Article 53 that the Court must "satisfy itself" on substantive jurisdiction and on the merits of the case does not require decisions on these issues prior to the indication of provisional measures. To hold otherwise would be destructive of the concept of provisional measures.

15. As a party to the Statute, the non-appearing State is thus fully subject to Articles 36, 38, 41, 53 and 59, *inter alia*, including the Court's "incidental jurisdiction" directly derived from other articles of the Statute. (See Briggs, "The Incidental Jurisdiction of the International Court of Justice, as Compulsory Jurisdiction," in *Völkerrecht und Rechtliches Weltbild — Festschrift für Alfred Verdross* (1969), 87-95; French translation in RGDIP, 1960).

16. More difficult has been the question of the attitude which the Court should take with regard to irregular procedures and communications.

17. The Statute and Rules of the Court to which a party to the Statute is subject are not merely admonitions of desirable behaviour, but are requisites

for the orderly administration of justice of which the Court must be the guardian.

18. Where a party to the Statute deliberately refrains from complying with the Statute and Rules and instead challenges the Court's jurisdiction or the admissibility of the claim by irregular communications and procedures, is the Court justified in disregarding these communications because of their irregularity?

19. The repeated reluctance of the Court to hold a non-appearing State to the Rules has led to the serious criticism that the Court has leaned over backwards to favour non-appearing parties, even to the detriment of the appearing party. This attitude of the Court may well be based upon a misdirected concern over whether non-appearance is a right or whether any penalty attaches to non-appearance.

20. In a very real sense, however, Article 53 provides its own sanction: the Court is explicitly authorized to proceed to a decision despite non-appearance. The risk incurred for non-appearance is thus written into the Statute and it may serve little purpose to debate whether this is a "legal penalty" for non-appearance.

21. Returning now to the question of the attitude of the Court towards irregular procedures and communications, the fact that the Court must "satisfy itself" on its jurisdiction and on the merits of the claim suggests that the contents of irregular communications cannot be ignored without careful examination.

22. A pragmatic solution which involves no infringement of the impartial treatment required (*audi et altera pars*) might be that when the Court receives an irregular communication not in accordance with the Statute or Rules:

(1) it should be communicated in full to the Judges and to the other party and frankly characterized for what it is: an irregular procedure or communication;

(2) the Court, while studying its contents, need not refer to the communication officially in its Judgment and Orders;

(3) while this may still leave the other party at a disadvantage as to points not raised or developed by the non-appearing party, the Court has the authority under its Statute to open proceedings for further argument.

These observations give my views on questions raised in your questionnaire and thought-provoking Preliminary Report.

Please accept my warm congratulations on your election to the International Law Commission. The Commission will be better.

Final Report

Introduction

1. The nearly continuous series of cases of respondent State non-appearance which have occurred in proceedings before the International Court of Justice between 1972 and 1985[1], calls attention to a number of legal and para-legal issues to some of which only

[1] I refer mainly to the *Icelandic Fisheries Jurisdiction* cases (*I.C.J. Reports*, 1972, pages 12 ff.; 181-183 (United Kingdom v. Iceland); 30 ff.; 188-190 (Federal Republic of Germany v. Iceland); 1973, pages 3 ff., esp. 7 ff.; 93-94; 302-305 (U.K. v. Iceland); 49 ff., esp. 54 ff.; 96-97; 313-316 (F.R.G. v. Iceland); 1974, pages 3 ff., esp. 8 ff. (U.K. v. Iceland); 175 f., esp. 180 ff. (F.R.G. v. Iceland)); the *Nuclear Tests* cases (*I.C.J. Reports*, 1973, pages 99 ff., esp. 101; 320-321; 338-339 (Australia v. France); 135 ff., esp. 137; 324-325; 341-342 (New Zealand v. France); 1974, 253 ff., esp. 257; 530-531 (Australia v. France); 457 ff., esp. 461; 535-536 (New Zealand v. France)); *Trial of Pakistani Prisoners of War* (*I.C.J. Reports*, 1973, pages 328-331; 344-345); *Aegean Sea Continental Shelf* (*I.C.J. Reports*, 1976, pages 3 ff., esp. 6; 1977, pages 3-4; 1978, pages 3 ff., esp. 7-8, 44); *United States Diplomatic and Consular Staff in Tehran* (*I.C.J. Reports*, 1979, page 3 ff.; 23-24; 1980, pages 3 ff., esp. 9, 10, 18); and *Military and Paramilitary Activities in and against Nicaragua* (*I.C.J. Reports*, 1984, pages 169 ff., esp. 186-187; 209-210; 215-217; 392 ff.; 1985, pages 3-4; 1986, pages 14 ff., esp. 23-26).

Surely, these are not the only instances of non-appearance before the Hague Court. Apart from occurrences of the kind before the Permanent Court (on which see ELKIND, *Non-Appearance before the I.C.J.*, pages 31 ff.), relevant cases are, for example, *Corfù Channel* (*Damages*) (*I.C.J. Reports*, 1949, pages 26 and 144 ff., esp. 248); *Anglo-Iranian Oil Co.* (*I.C.J. Reports*, 1951, pages 89 ff., esp. 93); and *Nottebohm* (I.C.J. Reports, 1953, pages 111 ff., esp. 115-117; 122-123) (for *Monetary Gold*, see ELKIND, *Non-Appearance before the I.C.J.*, page 41). Much as those cases are also of interest, however, it is in the thinking elicited by *Icelandic Fisheries* and by the successive instances of non-appearance that the issues we refer to acquire a high degree of interest: an interest which has increased considerably since the "withdrawal" of the United States from the Court proceedings following the Court's positive finding on its jurisdiction in 1984.

marginal thought — if any — had been given by the scholars who dealt with the subject of non-appearance prior to 1972[2].

Notwithstanding their obvious interrelations, two distinct sets of problematic issues emerge from the evoked practice.

[2] On non-appearance before international tribunals: ROSENNE, S.L., *The International Court of Justice*, Leyden, 1957; FITZMAURICE, sir Gerald, *The Law and Procedure of the International Court of Justice*, 1951-4: *Questions of Jurisdiction, Competence and Procedure, British Year Book of International Law*, XXXIV (1958), pages 1-161; GUYOMAR, G., *Le défaut des parties à un différend devant les juridictions internationales* (avec préface de L. Cavaré), Paris, 1960; BRIGGS, H.W., *La compétence incidente de la Cour internationale de Justice en tant que compétence obligatoire, Revue Générale de Droit International Public*, LXIV (1960), pages 217-229; DUBISSON, M., *La Cour Internationale de Justice*, Paris, 1964; ROSENNE, S.L., *The Law and Practice of the International Court*, Leyden, 1965; SHIHATA, I.F.I., *The power of the International Court to determine its own jurisdiction*, The Hague, 1965; ABI-SAAB, G., *Les exceptions préliminaires dans la procédure la Cour Internationale*, Paris, 1967; STARACE, V., *La competenza della Corte Internazionale di Giustizia in materia contenziosa*, Napoli, 1970; DE LACHARRIERE, G., *Commentaires sur la position juridique de la France à l'égard de la licéité de ses expériences nucléaires, Annuaire Français de Droit International*, XIX (1973), pages 253 ff.; EISEMANN, P.-M., *Les effets de la non-comparution devant la C.I.J., Annuaire Français de Droit International*, XIX (1973), pages 351-375; GUYOMAR, G., *Commentaire du Règlement de la C.I.J.*, Paris, 1973; COT, J.-P., *Affaires des essais nucléaires* (*Australie c/France et Nouvelle Zélande c/France*). *Demandes en indication des mesures conservatoires. Ordonnances du 22 Juin 1973, Annuaire Français de Droit International*, XIX (1973), pages 252-271; ROSENNE, S.L., *The World Court, What it is and how it works*, 3rd ed., 1973; THIERRY, H., *Les Arrêts du 20 décembre 1974 et les relations de la France avec la Cour Internationale de Justice, Annuaire Français de Droit International*, XX (1974), pages 286-298; FAVOREU, L., *Les Affaires de la compétence en matière de pêcheries* (*Royaume-Uni c/Islande et Allemagne Fédérale c/Islande*), *Annuaire Français de Droit International*, XX, (1974), pages 253-285; BOLLECKER-STERN, B., *L'Affaire des Essais Nucléaires Français devant la Cour Internationale de Justice, Annuaire Français de Droit International*, XX (1974), pages 299-333; LAMBERTI ZANARDI, P., *Forme nuove di contestazione della competenza della Corte Internazionale di Giustizia e potere della Corte di aprire d'ufficio un procedimento sulla competenza, Studi in onore di Gaetano Morelli* (*Il Processo internazionale*) *Comunicazioni e Studi* (Milano), XIV (1975), pages 439-477; ROSENNE, S.L., *The Reconceptualization of Objections in the I.C.J., Studi Morelli* (cited above), pages 735-761; AGO, R., *Eccezioni « non esclusivamente preliminari », Studi Morelli* (cited above), pages 1-16; AMMOUN, F., *La jonction des exceptions préliminaires au fond en droit international public, Studi Morelli* (cited above), pages 17-39; SUR, S.,

Les Affaires des Essais Nucléaires, Revue Générale de Droit International Public, LXXIX (1975), pages 972-1027 ; RUBIN, A., *The International Legal Effects of Unilateral Declarations, American Journal of International Law,* BE (1977), pages 1-30 ; GROSS, L., *The Dispute between Greece and Turkey concerning the Continental Shelf in the Aegean, American Journal of International Law,* 71 (1977), pages 31-59 ; STUYT, A.M., *« Contre-mémoire » ou « Livre Blanc » ? Nouvelles tendances à la C.I.J., Revue Générale de Droit International Public,* LXXXII (1978) ; MCWHINNEY, E., *The World Court and the Contemporary International Law-Making Process,* 1979 ; FITZMAURICE, Sir Gerald, *The Problem of the "Non-appearing" Defendant Government, British Year Book of International Law,* LI (1980), pages 89-121 ; MOSLER, H., *Nichtteilnahme einer Partei am Verfahren vor dem IG, Festschrift Schlochauer,* 1981, pages 439-456 ; SINCLAIR, Sir Ian, *Some Procedural Aspects of Recent International Litigation, International and Comparative Law Quarterly,* XXX (1981), pages 338-357 ; GUYOMAR, G., *Commentaire du Règlement de la Cour Internationale de Justice adopté le 14 avril 1978,* Paris, 1983 ; VON MANGOLDT, H., *Versäumnisverfahren in der Internationalen (Schieds-) Gerichtsbarkeit und souverane Gleichheit, Festschrift Mosler,* 1983, pages 503-528 ; BOWETT, D.V., *Contemporary Developments in legal techniques in the Settlement of Disputes, Hague Recueil,* 180 (1983), pages 204-211 ; ELKIND, J.B., *Non-Appearance before the I.C.J., Functional and Comparative Analysis,* Dordrecht, 1984 ; MOYNIHAN, D.P., *International Law and International Order,* Syracuse Journal of International Law and Commerce, 1984, pp. 1-8 ; THIRLWAY, H.W.A., *Non-Appearance before the International Court of Justice,* Cambridge, 1985 ; MCWHINNEY, E., *Acceptance, and Withdrawal or Denial, of World Court Jurisdiction : some Recent Trends as to Jurisdiction,* Israel Law Review, 1985, pp. 148-166 ; University of Virginia, Papers and Proceedings of a Workshop Sponsored by The Center for Law and National Security at Charlottesville, Virginia on August 16 and 17, 1985 : *the United States and the Compulsory Jurisdiction of the International Court of Justice* ; BRIGGS, H.W., *Nicaragua v. United States, Jurisdiction and Admissibility, American Journal of International Law,* 79 (1985), at page 378 ; ASIL, *Should the United States reconsider its acceptance of World Court Jurisdiction ?,* Proceedings (American Society of International Law, 79th Meeting), 1985, pp. 95-109 ; FRANCK, Th.M., *Icy Day at the I.C.J., American Journal of International Law,* 79 (1985), pages 379-384 ; D'AMATO, A., *Modifying U.S. Acceptance of the Compulsory Jurisdiction of World Court, American Journal of International Law,* 79 (1985), pages 385-405 ; LEIGH, M., *Comment* in the *"Judicial Decisions"* Section of the *American Journal of International Law,* 79 (1985), pages 442-446 ; U.S. State Department, *U.S. Terminates Acceptance of I.C.J. Compulsory Jurisdiction,* 86, Department of State Bulletin (January 1986), pp. 67-71 ; REISMAN, W.M., *Has the International Court Exceeded its Jurisdiction ?,* 80 AJIL (1986), pp. 128-134 ; FRANCK, Th.M., *The U.S. should Accept, by a new Declaration, the General Compulsory Jurisdiction of the World Court,* 80 AJIL (1986), pp. 331-336 ; BRIGGS, H.W., *The International Court lives up to its Name,* 81 AJIL (1987), pp. 78-86 ; ARANGIO-RUIZ, G., *Notes on Non-Appearance before the International Court of Justice, in* [Le Droit international à l'heure de sa codification], Etudes en l'honneur de Roberto Ago, Milano, 1987, vol. III, pages 3 ff. ; HIGHET, K., *Between a Rock and a Hard Place : the United States, the International Court, and the Nicaragua Case,* 21 (4), International lawyer, 1987, pp. 1083-1101 ; MAIER, H.G. (editor), *Appraisals of the I.C.J.'s decision : Nicaragua v. United States (merits),* 81 AJIL (1987), pp. 77-183 ; HIGHET, K., *Evidence, the Court, and the Nicaragua Case,* 81 AJIL (1987), pp. 1-56.

2. The first set of issues arise from the repercussions of non-appearance *per se* and of the actions and attitudes taken during the proceedings by the non-appearing respondent State on the proper administration of justice, particularly on the functioning of such fundamental principles of adjudication as those of *contradictoire* and " equality of arms " between the Parties.

It has been written for example that the practice of respondent States not to appear caused embarrassment to the Court and to the applicant State. The respondent's absence and failure to develop its argument would deprive the tribunal of the « assistance » it would obtain from such arguments and from any evidence adduced in support of them [3]. Similar difficulties would be caused to the applicant State. It must satisfy the Court that its claim is well-founded in fact and law without the benefit of hearing the respondent State's arguments. It " has to imagine the arguments that might be passing through the mind of the Court, whether they are so passing or not " [4].

Secondly — and in contrast, in a sense, with the remarks summed up so far — commentators denounce the marked tendency, shown by non-appearing States in the revelant cases, to manifest themselves to the Court, directly or indirectly, by letters, messages or statements containing materials relevant to the issues of jurisdiction or merits. Such a practice of *extra ordinem* (and *extra moenia*) communications places the non-appearing State — as noted

[3] O'CONNELL, *Aegean Sea Continental Shelf case, I.C.J. Pleadings,* pages 316-346, as quoted and cited by FITZMAURICE, *The Problem of the "Non-appearing" Defendant Government,* page 94.

[4] O'CONNELL pleading, *Aegean Sea, I.C.J. Pleadings,* pages 316-346 (as quoted by FITZMAURICE, cited article, pages 94-95).

by Fitzmaurice — in almost as good a position as if it had actually appeared [5].

Thirdly, a number of commentators condemn non-appearance. According to Fitzmaurice, it would not be in conformity "with the attitude to the Court which a party to the Statute ought to adopt" and "it would be misguided and regrettable" [6]. The non-appearance of the respondent would be more or less severely reprehensible — legally or morally — according to O'Connell [7], Mosler [8], Lachs [9], Rosenne [10]. Connected with the condemnation is the criticism — addressed to the Court itself — of what Fitzmaurice calls (with reference to a statement by O'Connell) "the perfunctory and inadequate language used by the Court in commenting on the 'non-appearance' practice" [11].

More or less severe remedies have been suggested, as we shall see, in order to try to discourage the practice of non-appearance,

[5] FITZMAURICE, cited article, page 95, quoting O'Connell. Indeed, the practice in question presents the significant advantage, for the non-appearing State, of making the judicial defence of its case easier, in that its communications are practically exempt from terms, conditions and deadlines normally imposed upon the parties by the Court Rules and rulings: and some of the same critics suggest that consideration by the Court (and by single judges) of the absent State's irregular communications or statements results in a "less than fair"... procedural (and possibly substantive) treatment of the active State to the detriment of the good administration of justice. According to Fitzmaurice in particular "the protection given by the Court in the name of Article 53 of the Statute to the absent State "erodes" the protection due to the appearing State" (FITZMAURICE, cited article, page 118 (quoting O'Connell), 116 and 121, where the lamented situation is described as contrary to "equality of arms"; see also SINCLAIR, cited article, at pages 340, 348-353).

[6] FITZMAURICE, Separate Opinion, *in Icelandic Fisheries Jurisdiction*, jurisdictional phase, *I.C.J. Reports*, 1973, page 79, paragraphs 21 and 22, and Sir Gerald's cited article, page 89 and *passim*.

[7] References and quotations in FITZMAURICE, cited article, pages 94-96.

[8] *Nichtteilnahme einer Partei*: « ...so ist die Nichtteilnahme als dem Geist von UN-Satzung und Statut wiedersprechend... ».

[9] Separate Opinion *in U.S. Diplomatic and Consular Staff in Tehran, I.C.J. Reports*, 1980, at page 48.

[10] *The Law and Practice of the International Court*, II, p. 528.

[11] FITZMAURICE, *The Problem of the "Non-appearing" Defendant Government*, page 94.

reduce undue advantages for the absent State and to maintain a strict "equality of arms" between the parties [12].

3. The other set of problems we have in mind are those deriving from the more or less overt implications of non-appearance in the instances in question, particularly from the respondent State's conduct during the proceedings and following their conclusion. The cases evoked at the outset show that the non-appearing respondent States have made it pretty clear, by the terms of their subsequent statements and communications, that they considered the Court not enabled to entertain the case with regard, either to preliminary issues (including the indication of provisional

[12] *Infra*, paragraphs 11-13. A different outlook seems to emerge from the opinions formulated by Judge Gros *in Nuclear Tests* (prior to most of the comments considered in the preceding paragraph). I refer notably to the Dissenting Opinion appended by that Judge to the Court's Order relating to interim measures *in Australia v. France* of 22 June 1973 (*I.C.J. Reports*, 1973, pages 115 ff.) and to the Separate Opinion appended to the Court's judgment on the merits of 20 December 1974 (*I.C.J. Reports*, 1974, pages 276 ff.).

Unlike the writers who condenm non-appearance of the respondent State and the latter's *extra ordinem* communications, Gros deems non-appearance to be irreprehensible and expressly legitimised by Article 53: and not just as a merely passive attitude of the respondent State's but as a form of contestation of the Court's jurisdiction. I refer particularly to Judge Gros' statement extensively quoted *infra*, footnote 27 and commented *infra*, para. 10 bis. What's more, unlike the scholars who believe that the Court would have shown a tendency to lean in favour of the non-appearing State (by an excess of zeal in meeting certain requirements of Article 53), Gros seems to think, on the contrary, that at least in the interim measures phase of *Nuclear Tests*, the Court would have rather leant in a direction detrimental to the non-appearing State and more advantageous to the applicant. Such would have notably been the case when the Court did not apply *à la lettre*, in the *Nuclear Tests* interim measures phase, that part of the second paragraph of Article 53 which would enjoin the Court, before deciding, *fully* "to satisfy itself" that it has jurisdiction.

Judge Gros' views seem to be related to the theory — to be considered in due course (especially paragraph 10 bis) — according to which a non-appearing State would not be a "party" to the Court's proceedings. *Infra*, footnote 27, I refer to Judge Gros' opinion that in issuing the interim measures Order in the *Australia v. France* case, the I.C.J. satisfied itself with an inadequate appreciation of the requirement of jurisdiction.

measures) or to the merits ; and that any adverse decision — if not any decision — of the Court would have little or no chance of being complied with by the respondent. Attitudes such as these raise very serious issues relating to the effectiveness of the Court's decisions (notably under Articles 36.6, 59, 41 of the Statute), to the quality of such decisions, to the Court's role and prestige, to the prospects of compulsory adjudication under any instruments contemplating the possibility of unilateral initiative of a State before the Court and ultimately — considering the importance of effective compulsory adjudication for the settlement of legal disputes — to the very prospects of the rule of law in international relations : problems distinct from, although interrelated with, the strictly procedural issues mentioned in the preceding paragraph [13].

Connected with this aspect of the non-appearing State's attitude is the preoccupation of commentators, rarely explicit but often implicit, that the undesirable consequences of the non-appearing State's conduct may extend, from the merely procedural difficulties created for the active State and for the Court, to the very content of the decisions that the Court is called to render under Article 53, either with regard to jurisdiction or with regard to the merits. The threat of non compliance implied in the absent State's negative and positive conduct may indeed, at least in theory, induce the Court consciously or unconsciously to adopt a more lenient course or to

[13] These implications of non-appearance did not escape the attention of even the earliest among the commentators of the practice of non-appearance following 1972. One of these, in particular, noted, *à propos* of *Icelandic Fisheries Jurisdiction,* that there were aspects of the absent State's utterings, that lent themselves to the "supposition" that that State might be preparing the ground to maintain, in case of need, that it did not "recognize the legitimacy of the proceedings or their outcome" (FITZMAURICE, Dissenting Opinion, *I.C.J. Reports,* 1973, p. 35 and cited article, page 9). Indeed, at least a number of the cases of the series probably lend themselves to more than just a supposition of that kind (*infra,* 14 ff.). Suffice it to recall here that in the latest of the cases the respondent State not only contested, at the time of "withdrawing" from the proceedings, the legitimacy ("in law and in fact") of the Court's positive finding on jurisdiction but confirmed subsequently its attitude by openly refusing to comply with the judgment on the merits and by vigorously defending that conduct before the Security Council and the General Assembly of the United Nations (*infra,* pargraphs 14 ff.).

use a softer hand towards the respondent than otherwise it might be inclined to do [14].

4. Within the limits suggested by the occasion we intend to address ourselves, in the present Report, to both sets of problems indicated in the preceding paragraphs. In so doing we find support in the approval, express or implied, of all the Members of the Commission, except one. According to our Confrère Stevenson's (attached) comments to the draft of the present Report, he believes that to deal with matters such as those we include in the "second set" of questions would imply an extension of the Commission's mandate to topics other than Non-Appearance.

It is obvious, in any case, that any serious, albeit brief and tentative discussion of either set of problems presupposes the assumption of a relatively precise definition of the non-appearing respondent State's legal situation under Article 53 of the Court's Statute. A brief recapitulation of that situation is rendered indis-

[14] Such a thought might be prompted, for example, to the minds of some of the commentators, by the Court's statement (in the *Fisheries Jurisdiction* cases) that it had "acted with particular circumspection" and had "taken special care", being faced with the absence of the respondent State : *I.C.J. Reports,* 1974, pages 10 (U.K. v. Iceland) and 181 (F.R.G. v. Iceland).

The concern of scholars with regard to the aspects of non-appearance now under consideration is emphasized by the preoccupation that "the failure of the respondent to appear in cases before the Court has... become such a regular feature of proceedings as to be almost a pattern". (O'CONNELL, quoted by FITZMAURICE, cited article, page 94). It is in view of this trend that SINCLAIR warns the Court (*Some procedural Aspects,* page 356) of the necessity to reflect on the causes of the recent "rash of cases involving non-appearing respondent Governments". The importance of the problems raised is further confirmed by the resolution of January 25, 1985 of the American Society of International Law expressing "concern" over the "developments of the Nicaragua litigation" following the Court's decision of November 25, 1984 and announcing the formation of a Panel to study and report on future State practice of the US and other countries "relating to the acceptance of the jurisdiction" of the I.C.J. and the "adjudication of international disputes" (ASIL *Newsletter* for Jan-Feb-March 1985).

Fitzmaurice in particular expresses the fear that the practice of non-appearance may lead to disrepute the "whole system" of the Court's compulsory jurisdiction and eventually "obliterate" it (*The Problem of the "Non-appearing" Defendant Government,* page 106).

pensable by some of the legal positions taken so far by commentators. On one side are the views of the scholars who deem non-appearance to be more or less severely reprehensible — morally or even legally [15] — and criticize the "perfunctory and inadequate language used by the Court in commenting on the non-appearance practice" [16]. On the other side there is — in addition to the implied or express contentions of non-appearing respondents — the idea that non-appearance is not only irreprehensible but a form of contestation of the Court's jurisdiction, such idea to combine with the doctrine that the non-appearing State would not even be a "party" to the Court's proceedings [17].

Were it only to dissipate any uncertainty with regard to such opposing views, a succint *excursus* seems to be inevitable into the regime of non-appearance in the Hague Court system. This *excursus* is contained in Part One of the present paper.

4 *bis*. The present Report thus consists of four parts and some conclusions. Part One sums up "The Régime of Non-Appearance in The Hague Court System" (paras. 6-10 *bis*); Part Two discusses "Conceivable Remedies for Procedural Difficulties in the Light of the Law of Non-Appearance" (paras. 11-13 *bis*); Part Three deals with "Non-Appearance and the Repudiation of the Court's Statutory Functions" (paras. 14-17); Part Four considers "The Repudiation's Motivations. Possible Relevance thereof" (paras. 18-21). The tentative "Conclusions" (paras. 22-28) set forth the Rapporteur's views with regard to the action the Institute might wish to take with regard to the matters considered in Parts Two and Four.

[15] FITZMAURICE, Separate Opinion in *Icelandic Fisheries Jurisdiction*, jurisdictional phase, *I.C.J. Reports*, 1973, page 79, paragraphs 21 and 22; and Sir Gerald's cited article, page 89 and *passim*; O'CONNELL, references and rich quotations in FITZMAURICE cited article, pages 94-96; MOSLER, « ...so ist die Nichtteilnahme als dem Geist von UN-Satzung und Statut wiedersprechend »... (cited article at page 442); LACHS, Separate Opinion in *United States Diplomatic and Consular Staff in Tehran, I.C.J. Reports*, 1980, at page 48; ROSENNE, *The Law and Practice of the International Court*, II, page 528.

[16] O'CONNELL, passage quoted by FITZMAURICE, cited article, at page 94 (under No. 2).

[17] I refer to Judge Gros' statement quoted *infra*, footnote 27 and commented *infra*, paragraph 10 bis.

Part one. — *The Régime of Non-Appearance in the Hague Court System.*

5. It is apparent that Article 53 of the Statute, which probably sets forth principles which are inherent in the Court's system [18], pursues two fundamental purposes.

a) First and foremost, Article 53 aims at ensuring that any State participating in the Court's system and accepting the Court's jurisdiction be not deprived of the right to obtain an adjudication of its claim by the mere choice of another State — whatever its reasons — not to appear or not to defend its case. By providing that the active State may, in such an occurrence, "call upon the Court to decide in favour of its claim", the first paragraph of Article 53 clearly intends to *ensure* that the non-appearing State does not create, by its choice, an obstacle to adjudication. The Court *must* proceed if the active State so wishes. It need hardly be added that an obvious but fundamental implication of the same (first) paragraph of Article 53 (confirmed, if need be, by the second paragraph itself) is that the judgment given by the Court in the respondent State's absence will be as binding on that State as if the latter had appeared and regularly participated in the proceedings. In other words, the non-appearing State remains fully subject to Article 59

[18] This view finds some support in the *travaux préparatoires* of Article 53, as emerging from the records of the *Comité Consultatif de Juristes* responsible for the draft Statute of the Permanent Court of Justice in 1920 (CPJI, CCJ, Procès-verbaux des Séances du Comité, 16 juin-24 juillet 1920, avec Annexes, La Haye, 1920). See especially, of these records, pages 590-591 and 640-641 (as well as the Hagerup Memorandum at page 607).

The Italian Member, Ricci-Busatti, voted notably against the adoption of Article 15 of the draft (corresponding to the present Article 53) in view of the fact that « l'article est *parfaitement inutile* si les mêmes preuves doivent être exigées lorsqu'il s'agit d'un jugement par contumace qu'ailleurs; il propose la suppression de l'article » (at page 640). According to the more articulate explanation he had given at an earlier stage, "the Article was quite useless if the powers of the Court were to be exactly the same even in case of judgment by default. The inclusion of a special provision on this point would be justified only if the intention were to limit those powers in the interests of the plaintiff and in order to punish the other party for its negligence. But, as such a provision does not apply to international affairs, he proposed the suppression of the Article" (at page 590).

of the Statute and all the related (explicit or implied) provisions qualifying the Court's judgments as binding (e.g. Article 36 and Article 38). The provision of Article 53 empowering the Court to *ius dicere* would be utterly pointless if such were not the case.

b) At the same time, Article 53 is intended to ensure that in so doing the Court does not make any decision in favour of the active State's claim and to the detriment of the absent State, unless such a decision is justified in procedure and substance. This is the purpose of the second paragraph of Article 53, when it enjoins the Court not to decide in favour of the active State's claim before *satisfying itself*, " not only that it has jurisdiction " (according to Articles 36 and 37) " but also that the claim is well founded in fact and law ".

The combination of these aims constitutes the dual *raison d'être* of Article 53. And it is from that dual *raison d'être* — combined with the essential features of the Hague Court's system as they emerge from the letter, the logic, the history and the practice of the institution [19] — that one should try to answer the various questions raised by the non-appearance of the respondent State.

The practice of the Court relating to non-appearance essentially confirms, in our view, the *raison d'être* of Article 53 (as summed up) as well as the relationship between Article 53 and the Statute's provisions qualifying the Court's decisions as binding.

6. The first question to be dealt with concerns the legality of non-appearance [20].

The very fact that Article 53 not only refrains from any condemnation of the absent or inactive State's conduct but enjoins the Court, in paragraph 2, to satisfy *itself* as to jurisdiction and merits — absence or silence notwithstanding — is, *à la rigueur*, sufficient to exclude that any such condemnation be implied in Article 53 [21].

[19] Most notably Articles 36.6 and 59 of the Statute.

[20] Of an obligation « de se présenter devant la Cour (pour les Etats) acceptant la compétence obligatoire » speaks DUBISSON, *La Cour Internationale de Justice*, pages 155, 197 (« *condamné par défaut* »). That same author seems to think otherwise (and more correctly) at page 222 ; but the idea of « *sanction* du défaut » comes up again at page 259.

[21] This is confirmed by RICCI-BUSATTI's statement quoted *supra*, footnote 18. See also EISEMANN, cited article, at page 355.

The argument based upon the wording and the logic of Article 53 is confirmed by the nature of the Hague Court system.

By the fact of representing, from a number of points of view, a step forward from the pattern of classical arbitration, the very nature of the Court's system would seem to exclude any condemnation of non-appearance as unlawful. The permanent character of the adjudicating body and the possibility that proceedings before it be started by the unilateral initiative of one of the parties in dispute, exclude that the co-operation of both parties be indispensable — as in classical arbitration — for judicial settlement to be effectively pursued.

The substantial elements of analogy which the Hague Court's system presents in these respects — albeit not in others — with the jurisdictional systems of national law affords the conclusion that non-appearance (or inactivity) at the Hague is as discretionary and as lawful as non appearance before a national jurisdiction : and the first paragraph of Article 53 seals this conclusion, precisely by expressly entitling the applicant State to demand a decision and empowering the Court to make one.

We feel that the attempts to draw a different conclusion from sources other than Article 53 and the Court Statute as a whole have not been successful. The UN Charter provisions on peaceful settlement — from Article 2.3 to the whole of Chapter VI — do not help. From Article 2.3 and 33.1, read in conjunction with 36.3, with the qualification of the Court as the principal judicial organ of the United Nations, and with the automatic participation of United Nations members in the Court's Statute, one could perhaps try (with some effort) to draw a kind of very general obligation of respect for, and use of, the Court. However, even if one managed to demonstrate the existence of such an obligation, it could easily be retorted (in so far as appearance and activity before the Court are concerned) that that obligation is fully complied with by any State which has accepted the compulsory jurisdiction of the Court. Together with automatic, statutory subjection to Article 36.6 *(Kompetenz-Kompetenz)*, subjection to unilaterally initiated proceedings thus accepted, obviously includes the possibility of subjection to a judgment rendered *in absentia* or *silentio* on the basis of Article 53. On the other hand, this obviously *also* implies, in the presence of

Article 53, freedom to choose between putting or not putting up an appearance or a defence [22].

A fortiori it would be inconceivable — under the Statute *or* the Charter — that a sanction of any kind were inflicted upon the non-appearing or inactive party.

7. More might theoretically be drawn — along a line of "condemnation" — from the instruments (other than the Statute or the Charter) upon which the substantive jurisdiction of the Court is founded [23]. It has already been demonstrated, however, that even if a strict obligation *to appear* were formulated in any one such instrument, there would still be Article 53 of the Statute: *(i)* entitling the applicant to claim a decision; *(ii)* empowering and requiring the Court to meet such a claim; and *(iii)* enjoining the Court to "satisfy itself", etc.: the latter provision clearly excluding any detrimental consequences of failure to "appear or defend" other than those deriving from the mere fact of not taking full part in the proceedings [24].

Of course, the conclusion that non-appearance is lawful should not be understood to mean, either that it is not reprehensible from the *moral* point of view or that it is *legally* correct in the *implications* we shall see.

8. It has been contended at least by one of the non-appearing respondent States that non-appearance would preclude the acquisi-

[22] Similarly inadequate — in order to base an obligation to appear or "defend" one's case and justify a condemnation of failure to do so — would be recourse to Article 2.5 of the Charter (obligation "to give the United Nations every assistance in any action it takes in accordance with the present Charter...". As pointed out by BOWETT, *Contemporary Developments*, at page 205, in addition to the difficulty of "characterizing the Court's proceedings as 'action' there would be 'a contradiction' with Article 53 which is also an 'integral part' of the Charter".

[23] The main attempt in that direction, amply described by THIRLWAY, *Non-appearance*, pages 72 ff. and summed up by BOWETT, *Contemporary Developments*, page 205 f., was made by Sir Humphrey Waldock, in the *Fisheries Jurisdiction cases, I.C.J. Reports*, 1974, pages 105-125 and 227-233.

[24] Essentially in that sense THIRLWAY, *ibidem*; and BOWETT, *Contemporary Developments*, pages 205-206.

tion, by the absent State, of the status of a "party" in the proceedings before the Court.

a) According to the French Government's letter of 21 May 1973, such would have been the case of France in *Nuclear Tests* [25]: and the French Government's position has been considered to be correct by Judge Gros in the Dissenting Opinion he appended to the Order of interim measures issued by the Court in the *Nuclear Tests* case *(Australia v. France)* on 22 June 1973 [26]. Judge Morozov in his Separate Opinion in *Aegean Sea Continental Shelf* seems to place himself on a similar line [27].

[25] According to the said letter (as quoted by Judge Gros, *I.C.J. Reports*, 1973, at page 118) the French Government « n'était pas partie à cette affaire ».

[26] *I.C.J. Reports*, 1973, pages 115 ff.

[27] *I.C.J. Reports*, 1976, page 21 ff. In the words of Judge Gros, "(a) State either is or is not subject to a tribunal. If it is not, it cannot be treated as a "party" to a dispute, which would be non-justiciable. The position which the Court has taken is that a State which regards itself as not concerned in a case, which fails to appear, and affirms its refusal to accept the jurisdiction of the Court, cannot obtain from the Court anything more than a postponement of the consideration of its rights. *This is not what Article 53 says.* Failure to appear is a means of *denying jurisdiction* which is *recognized* in the procedure of the Court, and to oblige a State to defend its position otherwise than by failure to appear would be to *create an obligation not provided for in the Statute.* It has been argued that the *only way* of challenging the jurisdiction of the Court is to employ a preliminary objection. The way in which States challenge the Court's jurisdiction is not imposed upon them by a formalism which is unknown in the procedure of the Court; when they consider that such jurisdiction *does not exist*, they may choose to keep out of what, for them, is an *unreal dispute.* Article 53 is the proof of this, and the Court must then satisfy itself of its own jurisdiction, and of the *reality of the dispute*, brought before it" (*I.C.J. Reports*, 1973, pages 115 ff., at page 118 (emphasis added)). A further important passage in the same Opinion is: "(i)f it were a question of a State whose non-appearance was due to the *total absence* of the Court's jurisdiction, whether for want of a valid jurisdictional clause or by reason of the inadmissible character of the principal claim, the *immediate decision of lack of jurisdiction* in regard to the Application instituting proceedings itself *would be taken without delay*; the decision of the Court in the present case is that, despite the affirmation that a certain subject-matter has been formally excluded from the jurisdiction of the Court, and the fact that the State which made that affirmation considers itself to be outside the jurisdiction of the Court in regard to everything connected with that subject-matter, it is possible to indicate provisional measures

We submit that such contentions are acceptable, *neither* with regard to the phase following the Court's positive finding on its jurisdiction, *nor*, prior to such a finding, when the Court's jurisdiction has been (regularly or irregularly) challenged by the respondent State and is still *sub judice* under Article 36.6.

b) Ihe idea that a non-appearing respondent State would not be a " party " in the proceedings " *until jurisdiction is affirmed* " [28] — *a fortiori* the idea that a non-appearing respondent would, by the simple fact of absence, *remain* a *non-party* even after a Courts positive finding on jurisdiction [29] — is based presumably upon a particular construction of the general principle that subjection of a State to an international tribunal is based on that State's consent [30]. The idea in question seems notably to be based on a particular understanding of the frequently repeated statement that the *initiation* of proceed-

without prejudging the rights of that State ". *Ibidem*, at page 120 (emphasis added). " It is a fact of international life — wrote a few lines earlier Judge Gros (at the same page 120) — that recourse to adjudication is not compulsory ; the Court has to take care lest, by the indirect method of requests for provisional measures, such compulsion be introduced vis-à-vis States whose patent and proclaimed conviction is that they have not accepted any bond with the Court, whether in a general way or with regard to a specified subject-matter ".

The same view was maintained by Judge Gros (even more forcefully) in the Separate Opinion appended to the Court's judgement on the merits of the same case, dated 20 December 1974. According to the English translation, the said Judge wrote : " (t)o speak of two parties in proceedings in which one has failed to appear, and has on every occasion re-affirmed that it will not have anything to do with the proceedings is to *refuse to look facts in the face.* The fact is that when voluntary absence is asserted and openly *acknowledged* there is *no longer more than one party* in the proceedings. There is no justification for the *fiction* that, so long as the Court has *not recognized* its lack of jurisdiction, a State which is absent is *nevertheless a party* in the proceedings... In the present case, by its reasoned refusal to appear the Respondent has declared that, so far as it is concerned, *there are no proceedings,* and this it has repeated each time the Court has consulted it " : *I.C.J. Reports,* 1973, at page 290 (emphasis added). Comment *infra,* paragraph 10 bis.

[28] Which is also BOWETT's (page 206) reading of the French Government's and Judge Gros' contention considered in the preceding footnote.

[29] Such idea being not suggested, if we understand correctly, by Judge Gros.

[30] On the ambiguity inherent, in a sense, in such statement, ELKIND, *Non-appearance,* at page 89.

ings before the Court is *subject* to the *existence* (or the ascertained or recognized existence) of the Court's power to decide on the merits of the relevant dispute or issue [31]. In turn, this construction of the Hague Court's system probably derives, in my opinion, from an unjustified analogy between subjection to the Hague Court system, on one side, and more or less ordinary, or classic, arbitration commitments, on the other.

It is unquestionable that subjection to the Court's judicial power for any dispute or class of disputes — namely " substantive " jurisdiction — derives *not* from the Statute directly but from one or other of the instruments referred to in Articles 36 and 37. No dispute can indeed be validly considered on its merits by the Court unless there is *either* the notification of an *ad hoc* agreement or *compromis* expressing both parties' consent to submit that dispute to the Court under Article 36.1 or a unilateral request based *either* on a valid acceptance of " compulsory " jurisdiction under Article 36.2 *or* on a general treaty of judicial settlement or compromissory clause (36.1 again) conceived in such terms as to create an equally " compulsory " jurisdiction of the Court : the term " compulsory " to mean, in either case (36.2 or 36.1), that proceedings can be initiated by a *unilateral* application [32]. In other words, for no dispute is the Court directly empowered to *ius dicere* vis-à-vis any State by the rules of the Statute alone. A *further* consent — other than the consent that made that State a participant in the Court system — must have been given by the State through one of the instruments just recalled, such consent covering the relevant dispute.

Correct as this surely is with regard to the Court's power to *ius dicere* on the *merits* of any dispute [33], it would be mistaken to

[31] An ambiguity on this point seems to exist even in STARACE's outstanding monograph *La competenza della Corte internazionale di Giustizia,* at page 249 ff.

[32] It need hardly be recalled that not all treaties and compromissory clauses contemplating judicial settlement envisage the possibility that proceedings be initiated by a unilateral requete. Many such treaties or clauses require that actual submission to the Court of the dispute they contemplate be effected by *both* parties, namely by *compromis.*

[33] Except in so far as an issue on the merits may be of relevance in the exercise by the Court of functions *other* than the decision on the merits itself.

believe that with regard to any dispute on the merits of which the Court were *not* validly empowered to exercise its function, proceedings *could not be opened* before the Court with the consequent acquisition of " party status " by the respondent State [34]. With regard to the possibility of a unilateral initiation of the proceedings (and consequent acquisition of " party status " by respondent) the situation is less simple than it would appear if one took *à la lettre* the frequent, just recalled, statement that the initiation of proceedings is subject to the *existence* of the Court's principal or " substantive " jurisdiction. Correct in a sense, this statement does not mean — and should not be understood to mean — that the Court is not enabled to exercise *any* function (and to open proceedings), on the basis of a unilateral application, *before* the existence of a valid consent to compulsory jurisdiction (in the above-mentioned sense) had been admitted by the respondent State or ascertained by the Court.

On the contrary, there are surely judicial functions which the Court is enabled to exercise vis-à-vis a State *prior* to — and *regardless* of — any finding of the *existence* of a *valid* consent subjecting that State to the Court's principal (or " substantive ") jurisdiction. This is precisely the case of some of the judicial functions which — unlike those envisaged in Articles 36, paras 1-5 and 37 of the Statute — are directly conferred on the Court by the Statute. I refer, *inter alia,* to the functions contemplated in Article 36.6, which directly provides that " [i]n the event of a dispute as to whether the Court has jurisdiction, the matter shall be settled by the decision of the Court ", and in Article 41, which directly provides for the Court's power " to indicate, if it considers that circumstances so require, any provisional measures which have to be taken to preserve the respective rights of either party ".

Both these provisions are generally classified, together with those of Articles 60 (Court's power to interpret its judgments), 61 (revision of judgments), 62-63 (third party's intervention) and 64 (power of the Court to decide on the expenses), not to mention Article 53 itself, as provisions covering " incidental " or " accessory " judicial functions. These are the functions directly conferred upon the Court by the Statute and not requiring, unlike the principal competence contemplated in Articles 36.1-5 and 37, any consent other

[34] *Supra,* in this same paragraph.

than the general consent which is inherent in participation in the Statute. We actually wonder, however, whether Articles 36.6 and 41 — alone or together with other provisions among those listed — do not cover functions which are more than just " incidental " or " accessory ".

c) To begin with the most important provision, Article 36.6 endows the Court with *Kompetenz-Kompetenz,* namely with the competence to judge over the *existence* and *validity* of the title or titles of jurisdiction relied upon by the applicant State. By so providing, Article 36.6 directly subjects to the Court's judicial power not just disputes over jurisdiction but — in so far as jurisdictional issues are concerned — *all the States participating in the Statute.* To put it bluntly, on the mere strength of the Statute, any State participating in that instrument is entitled, whether it is *or is not* in possession of a valid title of compulsory jurisdiction (namely of a legally perfect jurisdictional link), unilaterally to initiate proceedings before the Court *vis-à-vis* another State participating in the Statute. Such other State is thus *automatically* subject to the Court's statutory power to settle the issue of jurisdiction (or admissibility).

The consequence for our present purposes is that, however strongly a respondent State may feel that a valid jurisdictional link does not exist, it is *not* entitled to contest the judicial function *(Kompetenz-Kompetenz)* provided for by Article 36.6. Any State participating in the Hague Court system is bound *ipso facto* — namely by virtue of the mere legal situation represented by such participation — to submit to any decision rendered by the Court on the question whether the latter is possessed or not of jurisdiction with regard to a dispute of which the tribunal has been (unilaterally) seized by another participating State.

d) The well-known — but occasionally forgotten or unmentioned — truth is that, notwithstanding the 1920 failure to establish that *general* compulsory jurisdiction which had not passed the test of the consent of States in 1907, some steps were taken in that direction in 1920. And those steps brought international adjudication, in so far as the Hague Court system was concerned, into a stage decidedly more advanced than the stage reached in 1907 by the establishment of the (so-called) Permanent Court of Arbitration.

First of all, there was the really permanent character of the judicial body. By itself, in addition to other well-known implications, this step forward eliminated, in so far as the Court's system was concerned, any one of those well known obstacles to adjudication that otherwise derived and derive from the necessity of setting up the tribunal and by the resistance to, or "boycott" of, such operation on the part of the State unwilling or less willing to submit to a tribunal [35]. Thanks to the solid basis represented by the permanent character of the judicial body they were setting up in 1920, the authors of the Statute were in a position *further* to provide :

(i) on the one hand, for that relatively modest substitute for a generalized compulsory jurisdiction which is the mechanism of the so-called "optional clause" — plus the further possibility of creating distinct areas of compulsory jurisdiction by general treaties or compromissory clauses — and

(ii) on the other hand, for such an important mechanism as the Court's *Kompetenz-Kompetenz* (Article 36.6) and for the Court's power to indicate interim measures of protection (Article 41).

e) As recalled earlier, Article 36.6 is generally referred to, together with the other provisions listed under *(b)* above, as covering an "incidental" or "accessory" function [36] : and this is perfectly correct in the sense that the power of the Court to determine its juris-

[35] Within the framework of arbitration — Permanent Court of Arbitration included — this was and still is a major bottleneck on the way to the effective use of arbitral procedure. The devices by which this obstacle could be (and is occasionally) circumvented are well-known.

[36] FITZMAURICE, Separate Opinion in the case of *Northern Cameroons* (Preliminary exception phase), *I.C.J. Reports*, 1963, pages 103 ff. ; BRIGGS, *La compétence incidente de la Cour internationale de Justice*, page 217 ff. ; SHIHATA, *The Power of the International Court*, pages 169 ff. ; ABI-SAAB, *Les exceptions préliminaires dans la procédure de la Cour internationale*, pages 84 ff. ; STARACE, *La Competenza della Corte internazionale di Giustizia*, page 250.

FITZMAURICE, *The Law and Procedure of the International Court of Justice*, more felicitously states (*à propos* of interim measures) that "incidental" jurisdiction "does not depend on any direct consent... but *is an inherent* part of the standing powers of the Court under its Statute" (at page 107 ; emphasis added). This more appropriate term is also used by SINCLAIR, *Some Procedural Aspects*, at page 341.

diction over a given matter is *instrumental*, in case of dispute, to the existence (and exercise) of the Court's power to adjudicate the merits. "Incidental" and "accessory" are not really the accurate terms, however, to characterize the *rôle* the Court performs when it is called upon by the Statute to decide on its competence. That *rôle* is neither an "incident" nor an "accessory" to the Court's jurisdiction on the merits.

The truth seems to be that *Kompetenz-Kompetenz* exists even in the instances where — as it has often been found to be the case by the Court itself — jurisdiction on the merits was determined not to exist. It follows that the competence attributed by Article 36.6 is neither "incidental" nor "accessory" in a proper sense. Really incidental or accessory are perhaps such judicial powers as those set forth in Article 60 (disputes over the interpretation of a judgment given by the Court), 62-63 (third State's intervention), 63 (counter-claims or set-off). The function directly conferred on the Court by such provisions is strictly "incidental" or, better, "accessory", in that its concrete existence and exercise is lawful only on the condition that the Court has performed or is performing its function on the merits of the case with regard to which the relevant additional function is to be exercised.

However, the judicial function envisaged in Article 36.6 and called *Kompetenz-Kompetenz* is not subject to any condition of the kind [37]. It exists *per se* and operates on its own, regardless of what may be the result of its exercise by the Court and regardless *(a fortiori)* of the opinion entertained or professed by the respondent State's foreign office and its legal experts.

This is easily explained by the features of the Hague Court system recalled so far in this Section. No compulsory jurisdiction, and no proceedings capable of being instituted by a unilateral application are normally conceivable unless the (permanent) body before which such proceedings are to be carried out is endowed with *Kompetenz-Kompetenz* in the *full* sense of the term. The only exception would be the case, relatively frequent in arbitration, where a separate existing body were entrusted with the task of settling (on

[37] Conditions will of course be that the applicant is a *State*, that it *participates* in the system, that it *invokes* a title of compulsory jurisdiction which is *not obviously* a moot title.

the unilateral request of either party) any dispute over "justiciability" or jurisdiction[38]. It is perhaps worth noting, by way of incident, that in so far an international body possesses *Kompetenz-Kompetenz* in the "full sense of the term" as it is enabled to settle *any* issue of jurisdiction (the *an*) and not just the question of the *extent* of jurisdiction *(quantum)*[39].

In brief, Article 36.6 is not just an *accessory* of compulsory jurisdiction and of the consequent right to apply unilaterally for international justice. It is an essential condition or prerequisite of the existence of *any* measure — large or small, general or particular — of effectively compulsory jurisdiction. "Inherent" is a more correct characterization of a function directly attributed by the Statute.

f) Similar considerations apply to that other function — among those directly provided for in the Statute — which is attributed to the Court with regard to interim measures of protection (Article 41).

By empowering the Court "to indicate, if it considers that circumstances so require, any provisional measures which ought to be taken to preserve the respective rights of either party", Article 41 entitles any applicant State to seek interim measures of protection

[38] Or, more precisely, over an obligation to arbitrate.

[39] An ambiguity frequently conceals itself behind the statement that *Kompetenz-Kompetenz* of arbitral tribunals is nowadays — and would have been for some time — a matter covered by a general (customary) rule of international law. Applied to that most ordinary and frequent model of arbitral undertaking in which the initiation of proceedings is subject to the *conclusion of a special agreement* (and the setting up of the tribunal) that statement only means that the tribunal is empowered to interpret (once set up) its mandate *as described* in the *compromis.* This is far less than what, in a more advanced model of arbitral commitment, may be decided by a body entrusted with the task (a far more penetrating task) to decide whether the whole dispute is justiciable *at all* under a given arbitration treaty or clause.

In the first case, it is only the question, however much it may matter in certain instances, of *delimiting* the *area* or *object* of a dispute. In the second case, it is the *very* question whether *that dispute* (whatever its precisely delimited extent or object) is covered by the parties's arbitration agreement.

Article 36.6 decidedly covers *both kinds of issues*: which is probably not the case with the unwritten rule generally acknowledged by the doctrine of international arbitration.

pending, either the Court decision on the merits (if jurisdiction thereon is not contested), or the settlement by the Court — in the exercise of *Kompetenz-Kompetenz* — of the question of jurisdiction. Article 41 thus entitles any State party to the Statute invoking a manifestly not invalid jurisdictional link, to obtain, if the circumstances considered by the Court so require, an order indicating interim measures of protection.

Again we are confronted here with one of the Court's functions characterized as "incidental" or "accessory" jurisdiction. Correct as this qualification surely is in the sense that the only possible aim of interim measures of protection is to preserve the rights of the parties *pending* judgment on the merits, the circumstances or conditions under which an order for interim measures can be issued by the Court suggest that these terms are rather ambiguous. "Inherent" would again be a more accurate qualification of the Court's power under Article 41.

g) The whole system of the Hague Court seems thus to indicate that although the respondent State is free to choose whether to appear before the tribunal, its negative choice does not affect in any measure the acquisition, by that State, of the status of a party before the Court[39-a].

It follows, of course, that the non-appearing respondent State is fully bound by any decisions of the Court (Articles 36.6, 38.1, 59, etc.).

Indeed, it is on the basis of the line of conduct that the non-appearing respondent State will adopt, at the appropriate time, *vis-à-vis* any decision emanating from the Court under Article 53 — an indication of provisional measures, a positive decision on jurisdiction, or a totally or partially adverse judgment on the merits — that the respondent State's willingness to comply with its "statutory" obligations will ultimately be tested. It will be *at that stage* (provisional, incidental or final) that the non-appearing State's respect or disregard for the rule of international law will conclusively manifest itself. That will be, in a sense, *le moment de la vérité.* Up to that moment, however, the conduct of the non-appearing State would

[39-a] On this issue, *supra,* paras. 2 and footnote 12, 8 and footnotes 27 and 39; and *infra,* para. 10 bis.

not be totally irreprehensible if it were to include — as in some cases it seems clearly to have included — express or implied *a priori* rejection of any subjection to the judicial powers that the Court is exercising [40].

9. The next question relates to the stage of the Court's proceedings at which Article 53, or any equivalent rules inherent in the system, may come into play in order to regulate the duties of the tribunal and the respective positions of the parties.

a) At first sight, the views of writers (and of the members of the Court who expressed themselves on the subject) vary considerably [41].

A number of writers maintain that the non-appearance procedure is not applicable before the phase of the merits. This view is held, *inter alios*, by Rosenne [42], Lamberti Zanardi [43], Guyomar [44], Judges Bengzon and Jimenez de Aréchaga [45], Eisemann [46] and Favoreu [47]. These writers seem to exclude the applicability of Article 53 in the interim measures phase or in the phase dealing with jurisdiction or admissibility. Different views are held, if we understand correctly, by Judge Gros [48] and by Mosler [49], von Mangoldt [50], Fitzmaurice [51],

[40] *Infra*, paragraphs 14 ff.

[41] A list of the possibilities in BOWETT, *Contemporary Developments*, pages 207-8.

[42] *The Reconceptualization of Objections*, pages 735 ff., at pages 749-750.

[43] *Forme nuove di contestazione della competenza*, at page 461.

[44] *Commentaire du Règlement de la Cour internationale de Justice*, page 192.

[45] Dissenting Opinion in the *Icelandic Fisheries Jurisdiction* cases, *I.C.J. Reports*, 1972, pages 184 ff.

[46] *Les effets de la non-comparution*, pages 356-358.

[47] *Les Affaires de la compétence*, esp. pages 257-258.

[48] Quoted by EISEMANN, page 360, for the interim measure phase (*Nuclear Tests, I.C.J. Reports*, 1979, pages 117, 151-152).

[49] *Nichtteilnahme einer Partei*, page 441.

[50] *Versäumnisverfahren*, at page 519.

[51] *The Problem of the "Non-appearing" Defendant Government*, pages 89, 120-121.

Sinclair [52] and Thirlway [53]. According to these writers the non-appearance procedure, notably Article 53, applies — with or without some adaptation — both in the interim measures and in the so-called jurisdictional phase.

In our opinion, the fact that the wording of Article 53 *seems* not to cover non-appearance in the jurisdictional and interim measures phases is not sufficient to exclude that the provisions of that Article — or any equivalent inherent rules or principles — come into play in either of these phases. Those provisions would actually apply, possibly *mutatis mutandis*, even if it were demonstrated — as it might well be — that the drafters of Article 53 did not think, at the time of their labours, of non-appearance or failure to defend in the jurisdictional or interim measures phase. Indeed, one would still have to consider, whatever the gaps in the drafting or in the original conception of Article 53, that the principles embodied in that Article were so inherent or essential in the Court's system — as rightly pointed out by Ricci-Busatti [54] — that they would apply even if Article 53 had not been inscribed into the Statute: and this both by way of analogy and in view of the absurd consequences that would follow from the non-application of Article 53.

Suffice it here to consider the two paragraphs of Article 53, first with respect to the jurisdictional phase and then with respect to the interim measures phase.

b) Not to apply the first paragraph of Article 53 in case of non-appearance in the jurisdictional phase would mean not to let the Court perform its function whenever the respondent State, instead of appearing with a regular plea to the Court's jurisdiction, decided not to appear or not to defend in due form its negative stand on jurisdiction. It would mean that simply by not appearing a State could evade the *Kompetenz-Kompetenz* conferred upon the Court by Article 36.6 of the Statute. This would purport, in its

[52] *Some Procedural Aspects*, pages 340 ff., esp. 344. According to Sinclair, from "the sequence of the relevant provisions of the Statute... it is clear that Article 53 is concerned... with the *jurisdictional* and merits stages of any proceedings". According to Sir Ian, Article 53 does not apply, on the contrary, in the interim measures stage (*ibidem*). But he refers presumably only to the second paragraph of Article 53.

[53] *Non-apperance*, pages 35 ff., esp. 43-45.

[54] *Supra*, footnote 18.

turn, to defeat by mere absence, silence or lack of a formal objection to jurisdiction — the provision of the Statute failing which the system of compulsory jurisdiction cannot work. To put it bluntly, there would be no measure of compulsory jurisdiction left, at all.

Not to apply in the jurisdictional phase the second paragraph of Article 53 would mean, in turn, not to extend, to the treatment of the jurisdictional issue, the requirements specified in that paragraph in order to safeguard the interest of the absent State in the proper application of the law to the jurisdictional issue.

Both paragraphs of Article 53 should naturally be applied in the phase in question *cum grano salis*. They would have to be to the nature of the particular function the Court is to perform adapted to the nature of the particular function the Court is to perform in the jurisdictional phase.

Thus, the « claim » which the Court would be enabled to decide upon by virtue of Article 53.1 would obviously not be the principal claim on the merits. The claim will be either that the Court proceed, in the absence of any plea to jurisdiction, to deal with procedural matters instrumental to the consideration of the merits, or, in the presence of a regular or irregular plea to jurisdiction, that the Court decide on such a plea under Article 36.6, further to move, *le cas échéant*, to the subsequent phase.

On the basis of paragraph 2 of Article 53 the Court would be enjoined — as regards the jurisdictional phase — to meet two requirements. One requirement will be that the Court « satisfy itself » that it is empowered, in the case at hand, to act under Article 36.6, namely that there is a *dispute* or *contestation* concerning its jurisdiction and calling for the exercise of *Kompetenz-Kompetenz*. The second requirement will be that the Court « satisfy itself » that the applicant's claim that *the Court declare itself competent* is well founded in law with regard to the substantive dispute *de qua agitur*. It will be the question whether (*ratione personae, materiae, temporis*, etc.) the application is admissible and justiciable before the Court.

c) Similar considerations apply to non-appearance in the interim measures phase.

Not to apply in such a phase the first paragraph of Article 53 would mean to deny the applicant State the right to seek — and, *le cas échéant*, obtain — an indication of interim measures to which (subject to a positive finding by the Court) any State is entitled by virtue of the Statute itself. Provided that the minimum conditions for interim measures are met, no State participating in the Court's Statute can lawfully be denied such a right merely by reason of the fact that the respondent State failed to appear or regularly to defend its case (against the indication of measures). Nor can any State party to the Statute get rid of its automatic, direct, subjection to Article 41, by mere non-appearance or *fin de non recevoir*.

Not to apply the second paragraph of Article 53 would be in its turn equally unjustified. Surely the Court must determine — under that paragraph — both whether it *is* empowered to decide on interim measures under Article 41 *and* whether the request for such measures *is* justified by the nature of the case and the circumstances.

It will again be only reasonable, on the other hand, that both requirements be met by the Court *cum grano salis* or *mutatis mutandis*. Both requirements must be met, in plainer words, to the extent and to the depth necessary to ensure an objective settlement of the issues of competence and substance involved in the consideration of a *requête* for interim measures of protection.

It is obvious, therefore, that the requirement of jurisdiction should be met only in the measure *(extent* and *depth)* necessary for the Court to achieve the relatively reduced degree of reliability of the positive finding of jurisdiction normally required for the Court to exercise its function under Article 41. There cannot therefore be any question of ascertaining jurisdiction in the measure *(extent* and *depth)* in which such a determination is necessary for the Court to feel empowered to deal *with the merits*. Article 53 being applicable within the limits of the analogy, a finding by the Court that its competence on the merits is « possible », « probable » or « not manifestly inexistent » — according to the doctrine normally applied — would have, by all means, to suffice. Of the *prima facie* existence or non-existence of jurisdiction on the merits — not more — the Court would have to « satisfy itself » *for the purposes* of an examination of the *requête* for interim measures.

To ask for more than that would frustrate the very purpose of Article 41 and deprive the applicant State of a right it derives directly from the Statute.

10. As summarized in paragraphs 5-9, the study of the Hague Court system seems clearly to indicate that the régime of non-appearance before that tribunal is so structured as to satisfy, at one and the same time, three equally vital exigencies. The first exigency is to ensure the right of any respondent State freely to choose whether or not to appear and whether or not to defend its case. The second exigency is to ensure the right of the applicant State to obtain adjudication, with regard to the merits, to jurisdiction or interim measures (as the case may be) notwithstanding the respondent State's choice not to appear, not to defend or to defend in irregular fashion. The third exigency is to ensure that the Court discharge its function — notwithstanding the respondent State's absence, silence or irregular conduct — in such a fashion as not only to « satisfy itself » with regard to jurisdiction and merits but also to ensure the « equality of arms » between the present and the absent party.

Obviously interrelated, these exigencies are met by equally interrelated devices :

(i) Freedom to choose whether to appear is ensured at one and the same time by the absence of any sanction against the non-appearing State and by the Court's duty under Article 53.2 to « satisfy itself » with regard to jurisdiction and merits.

(ii) The second exigency, *i.e.* the right of the applicant State to obtain adjudication [55], is met by the combined effect of the provision enabling (and enjoining) the Court to proceed *in absentia*, on the one hand, and by the fact that non-appearance affects *neither* the *party status* of the absent respondent State nor the *obligation* of that same State to comply with the Court's judgment [56].

(iii) The exigency of a fair trial is met, on the one hand, by the duties placed upon the Court by Article 53.2 (namely to « satisfy itself », etc.), on the other hand — as regards, in particular, « equality of arms » — by the various norms, surely inherent in the system and set forth in the Court Rules, ensuring (as well as in national legal systems) that in no circumstances a party be placed at a disadvantage

[55] Subject, of course, to a positive finding on jurisdiction.
[56] Under the provisions of Articles 36.6, 59, 38.1 etc. of the Statute.

vis-à-vis the other by any inequality of treatment in the conduct of the proceedings.

10 *bis*. On the whole, the oral and written exchanges within Commission 4 have shown so far a relatively high degree of agreement on the points dealt with in the part of the Preliminary Report corresponding to paras. 5-10 *supra*.

(a) With regard to our position concerning the lawfulness — or non-unlawfulness — of non-appearance (paras. 15-17 of the Preliminary Report), some interesting *nuances* manifested themselves. Rightly denying that one could speak of a "legal right" not to appear, Briggs believes that appearance is the object of a "normal expectation" of appearance accompanied by the recognition of a "factual possibility that, contrary to [such] normal expectation, a State may not appear". According to McWhinney, a State "retains the right at all times to choose, as a tactical-legal decision, to appear or not to appear". Amerasinghe seems to believe (points v-vi of his letter of October 19, 1990) that an obligation to appear does exist. While agreeing (with Briggs) that the term "right" is more appropriate to indicate the entitlement of the appearing State to invoke Article 53 and demand a decision of its claim, we would be inclined to stress (as done in a sense by McWhinney) what in Italian or French would be a "facoltà" or "faculté" of the State to choose to appear or not to appear. *Prima facie* attractive is the concept of "onus", drawn by Jiménez de Aréchaga from "Chiovenda and his followers in the prestigious Italian school" (an "onus", Jiménez states, comparable to the "onus probandi", a "condition of success in the litigation"). We hesitate to accept the term *onus* because, while surely the non-appearing State would not be relieved (by its choice not to appear) from any *onus probandi* which were incumbent upon it with regard to any issue or "condition of success", appearance seems not to be, under Article 53, a *legal* "condition of success" — much as *non*-appearance may be *in fact* a condition of... *un*-success — of the respondent State's resistance to the appearing State's claim.

(b) With regard to the "lawfulness" (or, perhaps better, "non-unlawfulness") issue account should be taken of the interesting and

ample developments presented by our Confrère Torrez Bernárdez (paras. 4-32 and 44 ff. of his comments). While still convinced that Non-Appearance is *not unlawful* under the Court Statute I would agree, of course, that that does not mean that there may be no cases where applicable (procedural or substantive) instruments bind a given State to appear (*see*, for example, Torrez Bernárdez' para. 21). The position I have taken since the outset of the exercise only concerns the " statutory " situation.

(c) None of the members who made comments seems to disagree either with the Preliminary Report's suggestion (paras. 18-24) that the respondent State is, despite non-appearance, a " party " to the proceedings. Express agreement on this point has been total from Briggs, Doehring, Bennouna and Jiménez de Aréchaga ; *nuancé* from Rosenne and McWhinney who seem to cast doubt on the importance of an issue we consider instead to be crucial for the subjection of the non-appearing respondent to the Court's statutory powers [56 a]. Further considerations on the point are put forward in para. 4 of Shabtai Rosenne's comments of September 30, 1990 and by Amerasinghe in para. (iv) of his letter of October 19, 1990. Developments are also present in Torrez Bernárdez comments of October 1990 (paras. 44 ff.).

(d) No doubt, lawyers and laymen use the term " party " in a number of meanings. As the present Rapporteur uses it in connection with the relationship of party status with non-appearance, he merely intends to address the issue raised by the respondent State in the *Nuclear Tests* Cases (dealt with by Judge Gros in the Dissenting Opinion quoted *supra*, footnote 27 and treated in unambiguous terms by the Court in *Military and Paramilitary Activities in and against Nicaragua* — ICJ Reports 1986, p. 24). Indeed, I refer to the simple issue whether a non-appearing State is or is not a party *to the*

[56 a] We fail to understand, in particular, that part of our confrère Rosenne's answer according to which : " Yes " [the non-appearing State is a party], " *if the Court has jurisdiction and the claim is admissible* " (emphasis supplied by us). In our view the non-appearing State is a party from the very outset, *prior* to any determination on jurisdiction or admissibility. To deny it is to exempt the non-appearing State from subjection to *compétence de la compétence* (and perhaps to Article 41).

proceedings before the Court, whatever the phase of such proceedings. On *that* issue I believe, to put it clearly, that the *dictum* that " to speak of two parties in proceedings in which one has failed to appear, and has on every occasion re-affirmed that it will not have anything to do with the proceedings is to *refuse to look the facts in the face...* " (*supra*, footnote 27, emphasis added) may well be an understandable (although unacceptable) argument for the non-appearing State counsel to put forward, so to speak, *ad abundantiam*. If accepted, however, by the Court, it would imply, in our view, simply a *refusal to look at the law*.

(e) It goes without saying, anyway, that the term " party " would be used in a different sense where a State applying for permission to intervene (and as such — in the *above* sense — a *party in the Court proceedings dealing with the application*) declares that it intends (or intends not) to participate in the case as a party ; or where the Court grants or refuses (totally or in part) such status to an intervenor. As well as our Confrère Rosenne we have not seen yet the recent judgment regarding Nicaragua's request for permission to intervene in the El Salvador-Honduras Case. The communiqué seems to state that the Court granted a limited intervention *without party status :* and " party " means here something different from what we intend to say when we reject *in toto* any notion that a non-appearing State is not a party to the proceedings as long as they... proceed.

(f) A further major point of agreement is the one dealt with in paragraphs 25-32 of the Preliminary Report. That Article 53 comes into play in any phase of the proceedings (including the interim measures and jurisdiction/admissibility phases) is agreed in particular by Briggs, Doehring, Jiménez de Aréchaga, McWhinney, Bennouna and Torrez Bernárdez. *Nuancée* seems to be Rosenne's position.

Part Two. — *Conceivable Remedies for Procedural Difficulties in the Light of the Law of Non-Appearance.*

11. An attempt can now be made to test the legality, practicability and usefulness of the remedies suggested so far or conceivable in order to reduce any undesirable effects of non-appearance.

a) Among the remedies suggested so far, the first in a logical order — and a general one — seems to be the adoption by the Court of a "sterner attitude" towards the non-appearing State [57]. According to Fitzmaurice, the Court would have actually "condoned" non-appearance [58]. On the contrary, the Court should condemn non-appearance as a violation of the legal or moral obligation to appear that some commentators are inclined to infer from the Court's Statute or from the Charter of the United Nations [59]. "Condemnation" is deemed to be "inappropriate" by Amerasinghe (para (vii) of his comments).

b) A corollary of the above condemnation — and a preliminary to the further concrete steps suggested by Fitzmaurice and others — is Sir Gerald's suggestion that the Court "(d)eclare the impugned State, for the purposes of Article 59 of the Statute, to be a "party"

[57] This is implied in Sir Gerald FITZMAURICE's dissatisfaction at what he calls "the Court's apparent complete lack of concern about a practice that strikes at the very foundations of its prestige and authority as court of law, or for the perfunctory and pedestrian character of the language used by the Court when referring to it, or for the Court's seeming want of any sense of outrage such as has been felt by many onlookers — not least at the attitude of the Court itself, almost bordering on the self-satisfied" (FITZMAURICE, *The Problem*, pages 116-117). The implication seems to be that the Court should consider non-appearance as a wrongful act towards the applicant State and/or a form of contempt of Court. Sir Gerald seems to wish to bring non-appearance back to that concept of *contemplia* of the tribunal's authority from which "contumacia", the modern Italian term for non-appearance (but *not* the present regulation of non-appearance in the Italian codes of civil and criminal procedure), seems to derive.

[58] *Ibidem*, 117. Sir Gerald is obviously inspired by O'CONNELL's views cited *supra*, paragraph 2.

[59] One may suppose that the suggested Court condemnation could also help, in the opinion of its advocates, in the problematic application of Article 94 of the UN Charter.

in, and to, any proceedings brought against it by virtue of an instrument under which it has purported to accept the Court's jurisdiction, unless it appears before the Court to show cause why the instrument is invalid, no longer in force, or not applicable to the circumstances of the case" [60]. The same scholar added the far-reaching suggestion that "(f)inally throughout the proceedings the Court should resolve all border-line questions or questions of serious doubt in favour of the complainant State, unless the State impugned appears to show cause why not, and in proper form" [61]. It must be noted, however, that Sir Gerald himself admits that for the Court to go so far "is perhaps too much to expect" [62]. With regard, in particular, to the jurisdictional issue, Sir Gerald suggested that whenever a *prima facie* basis appears to exist for its jurisdiction, the Court should "inform the Government impleaded that unless it appears before the Court to show cause why jurisdiction should nevertheless not be assumed, the Court will proceed to do so, and will go on to hear and decide the merits" [63].

[60] Cited article, at page 121.

[61] It is worth noting FITZMAURICE's conclusion that "(t)o follow a settled course on the above lines might not eradicate the practice of non-appearance: it should go far to deter it, or at least to render it of little point juridically. It would also help to redress the balance at present heavily tilted in favour of the non-appearer, and to restore to the complainant some measure of the equalilty of arms at present lacking because of the handicaps in the presentation of its case which the non-appearance and unorthodox procedure of the other party creates. Last, but not least, the Court, by doing all that lay within its power to discourage and draw the teeth of non-appearance, would have ceased to lay itself open to the justified reproach of treating casually a practice that constitutes a blot on administration of international justice and on its own authority and repute" (cited article's conclusion at pages 121-122).

[62] Cited article, page 121.

[63] FITZMAURICE, *The Problem*, pages 113, 115 ff. More precisely, the Court should, according to the late Judge, — "first and foremost" — give up what was indicated by it in the *Hostages* case as its "settled jurisprudence" on the requirement of Article 53.2 relating to jurisdiction. The Court should notably abandon the interpretation it would seem to have adopted of the second paragraph of Article 53, namely of the phrase: "satisfy itself... that it has jurisdiction». In applying this requirement the Court should distinguish, in Sir Gerald's own words, "between the case (call it class (A) case) where a *prima facie* basis 'of jurisdiction' is *totally non-existent*, and the case

c) As a prelude to the adoption of the course thus summed up, Fitzmaurice suggests that the Court take some " step which — while *not* affecting necessarily the final outcome — might elicit some feeling of doubt and discomfort in the mind of the non-appearer — such as, for instance, a formal intimation... that (the Court) could not take judicial cognizance of any communications objecting to its jurisdiction that were neither in the form, nor presented in the manner, prescribed by the Statute and Rules of Court " [64]. It should be noted, however, that this suggestion does not seem to be renewed in that final part of Sir Gerald's often cited article in which he sets forth, " in recapitulation and summary... what the Court can do " [65].

d) A further device proposed by Fitzmaurice — a development in a sense, of what he suggested with regard to the jurisdictional issue but deserving separate notation because it affects also the treatment of the merits — would be the following : " In any case of serious doubt as to the propriety, in the particular circumstances, of proceeding as described... above, automatically *join all preliminary issues to the merits without allowing any preliminary phase.* Although the deterrent effect would not be as great, it would still be considerable — for one of the objects of the non-appearer is to avoid all possibility of any examination of the merits — an object it might well achieve if it appeared and, in a preliminary phase, persuaded the Court then and there to decline jurisdiction or pronounce the claim inadmissible. Why not compel it to do so if it wants to achieve that object ? " [66].

— class (B) — where it *does* exist but the State concerned *denies its validity or applicability* in the particular circumstances of the dispute before the Court ". What the Court ought to do — sir Gerald concludes — is : *(i)* " if no such *prima facie* basis *appears to exist* at all (class (A) cases), to *declare itself incompetent* ; while if *(ii)* — class (B) — such a basis does appear to exist, to inform the Government impleaded that *unless it appears before the Court to show cause why jurisdiction should nevertheless not be assumed, the Court will proceed to do so, and will go on to hear and decide the merits* " (emphasis added).

The suggestion is taken up again by FITZMAURICE in his conclusions (pages 120-121).

[64] FITZMAURICE, at page 117.

[65] The same, at pages 120-121 (emphasis added).

[66] FITZMAURICE, cited article, at page 121 (emphasis added).

e) According to Leo Gross, who seems to find in the fear that the Court may apply the doctrine of *forum prorogatum* at least one of the motives of some instances of non-appearance, a remedy to that possible motive could be the introduction in the Court Rules of an explicit provision " for a ' special appearance ' " confined to the purpose of formally objecting to the Court's jurisdiction. Such a provision should serve, in Gross' opinion [67], to dispel or reduce the fear of the unilaterally assigned respondent State doing anything which might justify a Court finding of *forum prorogatum.* Gross suggests that one would thus introduce in international litigation an institution resembling the " special " or " conditional " appearance through which English and American law permit a foreign sovereign to present itself for the sole purpose of asserting its immunity from jurisdiction [68].

f) Of a different kind is Sir Ian Sinclair's suggestion. Preoccupied by the undue advantages accruing to the absent State by both its silence and irregular communications and statements, Sir Ian suggests that in cases of non-appearance the Court play a more active role in order to bring about a better balance between the active and the absent party's interests. In order to achieve such a balance, the Court :

(i) " should invite argument from the appearing party on issues which it may feel tempted to take into account *proprio motu* if it considers that those issues have not been canvassed, or have not been adequately canvassed, in the written or oral pleadings ".

(ii) " if necessary, should be prepared to re-open the oral hearings " [69].

A different adjustment of the Court's practice concerning non-appearance would be presumably advocated, with regard at least to the possibility for the Court to indicate interim measures of protection, by Judge Gros.

From his Opinions referred to *supra,* paragraph 8 *(a),* he would seem to suggest that when the Court is confronted with the non-

[67] *The dispute between Greece and Turkey,* pages 54-59.

[68] Cited article, at page 58.

[69] SINCLAIR, *Some Procedural Aspects,* pages 356-357.

appearance of the respondent State, it should immediately apply the second paragraph of Article 53. If we understand correctly, the Court should proceed forthwith to " satisfy itself " that it has jurisdiction : and only after satisfying itself that it has jurisdiction in the *fullest* sense would the Court be enabled to proceed, notably, to indicate interim measures of protection. Indeed, until such full verification were accomplished the non-appearing State would not even be, according to Judge Gros, a " party " before the Court in a technical sense (*supra*, paras. 2 and footnote 12 ; 8 (a-g) and footnotes 27 and 39 ; and 10 *bis*).

12. *a)* To begin with the remedies affecting especially the question of jurisdiction, serious obstacles would prevent, in our view, the adoption of the suggestion that in cases of non-appearance other than those where the Court judges that no *prima facie* basis of jurisdiction exists, namely in the cases where a *prima facie* of jurisdiction does exist, the Court should inform the " impleaded " Government that unless it appears to show why jurisdiction could not be assumed, the Court will proceed to do so and will go on to hear and decide the merits.

Briefly, such a practice by the Court would amount, we submit, to a manifest disregard of both the express requirement of article 53.2 and of the principle that the Court is not empowered to decide on the merits of a case unless it possesses *jurisdiction* (and not just a *semblance* of jurisdiction). We would notably be unable to concur with the opinion that only " formal objection " would arise from the word " satisfy " in Article 53.2. The objection is not just a formal one : and it seems, in any case, to be insurmountable in so far as the determination of jurisdiction is concerned.

b) An entirely different matter seems to be the determination of jurisdiction for the limited and provisional purposes of the indication of interim measures of protection.

In this respect the phrase " satisfy " itself of Article 53.2 can only mean, in case of non-appearance, that the Court should " satisfy " itself as to jurisdiction in the same sense, namely within the same *prima facie* limits within which it normally " satisfies " itself that it has jurisdiction for the purpose of deciding about interim measures [70]. On the other hand, no analogy could reasonably be established between the determination of jurisdiction for such a limited and provisional purpose, on one side, and the assessment of jurisdiction for the purpose of a decision on the merits, on the other side. Sir Gerald himself does not draw any such analogy.

c) Of not great use would probably be the introduction of that " special " or " conditional appearance " which is suggested by Leo Gross with a view to allowing the respondent State to escape an application of the *forum prorogatum* doctrine. Correct as it may be with regard to particular cases, the view that non-appearance could be motivated in any substantial measure by fear of unjustified application of the *forum prorogatum* doctrine, does not seem to be a realistic one.

In the first place, the regular appearance of a respondent State accompanied by the submission of an objection to jurisdiction or admissibility, can hardly expose the appearing State to an interpretation of its conduct as an implied consent to the Court's jurisdiction. Thirlway argues this point persuasively [71]. Secondly — as stated at the outset of the present paper — the negative attitude of the respondent State with regard to appearance seems rather due to the intent (I would say determination) *not to submit in any way* — and even to the detriment of the State's international image — to the Court's action, either under Article 36.6 *(Kompetenz-Kompetenz)* or on the merits, or, for that matter, on interim measures, *and* to that legal consequence of such action which is the binding effect of Court decisions on jurisdiction or merits. It is not, therefore, a matter of lack of *confidence* in the Court's equanimity or correctness in dealing with the jurisdictional issue — or, for that matter, with the merits or with an application for interim measures [72]. As will be shown further on, it amounts to backing-up — with regard to a given case — from any commitment that may exist for the State to submit to the Court's competence, either on the merits or on the jurisdictional or interim measures issues. On a choice not to appear

[70] This has been explained *supra*, paragraph 8 *(f)*.

[71] *Non-appearance*, at pages 161 ff.

[72] Compare SINCLAIR, *Some Procedural Aspects*, esp. page 344.

so motivated nothing could be gained by offering to the respondent State the possibility of a "special" or "conditional appearance"[73].

d) It is less easy to express an opinion on the two remedies conceived by Fitzmaurice, either as a *prelude,* or as *alternative,* to the adoption of the severe course on jurisdiction discussed *supra,* under *(a)*: *(i)* the "prelude" would be the "intimation" to the non-appearing State that the Court could not take cognizance of *extra ordinem* or otherwise non-regular objections to its jurisdiction. Such an intimation would practically condemn as invalid any *extra ordinem* communications relating to the jurisdictional issue. *(ii)* The alternative would be, in any case of serious doubt as to the propriety of reducing the assessment on jurisdiction to a *prima facie* evaluation, "automatically to join all preliminary issues to the merits without allowing any preliminary phase". This might help induce the respondent State to feel that a decision not to appear would not serve the purpose of preventing that examination by the Court of the merits of the case which is probably the main preoccupation of non-appearing respondent States.

(i) The suggestion concerning *extra ordinem* communications touches upon one of the crucial features of the practice of non-appearance in the cases we are concerned with. It is indeed a feature involving a twofold puzzling contradiction.

Firstly, there is a contradiction, normally absent in default before national tribunals, between the choice of the respondent State not to appear, on one side, and the issuing of a more or less continuous set of "irregular" communications, often addressed directly to the Court, on the other side. Secondly, there is a contradiction between the interest of the applicant State that the absentee does not defend its case at all — or defends it only in a regular fashion — and the interest of that same State to learn as much a possible about the legal arguments upon which the respondent State's procedural or substantive position could be defended.

Notwithstanding such contrasting exigencies, it would be surely in the best interest of the active State, as well as in conformity with the good administration of justice, that the respondent State

[73] See also THIRLWAY, *Non-appearance,* esp. at page 165.

set forth its defences through the regular channels and within the time limits indicated by Statute, Rules and Court rulings. From this general point of view it might appear therefore desirable that the non-appearing respondent be invited by the Court not to use *extra ordinem* communications and to produce its defenses by appearing and acting in a regular fashion. However, it is doubtful whether difficulties would be reduced (they might actually increase) and whether a really useful purpose would be served by the Court's "intimation" that "it could not take cognizance" of *extra ordinem* objections to its jurisdiction. In itself lawful, such an "intimation": *(a)* might prevent, if complied with by the non-appearing party, precisely that knowledge of the respondent State's arguments, the absence of which has been rightly lamented as a cause of "embarrassment" both to the active State and to the Court; *(b)* would not serve a useful purpose (while jeopardizing the Court's prestige) in that it would in fact be impossible for the Court, in case of non-compliance, to enforce an "intimation" the violation of which would *in fact* bring about the "cognizance" refused in principle by the "intimation".

(ii) As for the idea of joining all preliminary issues to the merits, thus frustating the non-appearing or inactive State's hope to prevent — temporarily or absolutely — any consideration of the merits, it seems to us to meet two objections. As a matter of law, it seems to be not quite in conformity with Article 53 (or any equivalent inherent rule). The intent clearly behind that provision is to ensure that the procedural and substantive treatment of the non-appearing State's position be as fair as if that State were present. To join to the merits any procedural issue that would not be so treated if the interested party has appeared could be considered legally unfair. Secondly, and as a matter of expediency, the suggested measure would inevitably be looked upon as inspired by a punitive intent *vis-à-vis* the non-appearing State. As such, the measure would be incompatible with the lawfulness of non-appearance.

13. Moving now to remedies affecting preliminaries as well as merits, the ascertained lawfulness of non-appearance and procedural inaction excludes, in our view, that the Court could feel authorized or obliged to take any formal step, in case of original or supervening

non-appearance or inaction, to condemn the behaviour of an absent State.

a) In qualifying absence or inaction as innocent we do not exclude that it may cause embarrassment to the Court, to the applicant State or both. O'Connell is right, in our opinion, when he stresses this point. On the other hand, a lawful conduct cannot lawfully be condemned just as a matter of embarrassment. The Court, in a sense, is there *also* — as Article 53 implies — to be... embarrassed by absence or inaction of one of the parties. As for the applicant State, it knew of the possibility of non-appearance — and of Article 53 — when it became a party to the Statute and eventually put itself in the condition of being entitled to submit to the Court a unilateral *requête*. For the Court it is — with respect — a *risque du métier*. For the applicant State it is a fact of life.

This means not that the Court or the applicant are not entitled — and the Court perhaps under an obligation — to express regret as occasionally the Court has done either with regard to non-appearance *per se* or with regard to any specific consequences thereof on the conduct of the proceedings. Nor does it mean — this is what matters most — that lawful ways and means to overcome or reduce embarrassment could not be found, including, possibly, appeal to the absent State to clarify any facts. It does mean, however, that neither *ex officio* nor on a complaint from the active party should the Court be legally obliged or justified in labelling the absent party's choice as less than lawful. In the measure in which Sir Gerald's complaint that the Court actually "condoned" non-appearance implied that in his opinion the Court should have *condemned*, we would not be able to agree with that eminent jurist. Non-appearance, or procedural inaction, is not a violation of an international obligation. It is *per se*, and subject to what will be said *infra*, paragraphs 14 ff., neither a matter of "contempt of Court", nor a tort to the detriment of the applicant State . Remedies other than condemnation should be sought for any "embarrassment".

b) As a matter of law, no serious obstacle can be seen instead (apart from the expression of "regrets") to a statement of the Court's "declaring" the impugned State, as suggested by Fitzmaurice, "to be a party in, and to, the proceedings". To the acceptance of this suggestion we would only add a few elementary qualifications.

First, it might be perhaps superfluous for the Court to say what is, in our view, quite obvious. The respondent State is inevitably a party in the sense explained [74]. That it is a party follows inescapably from the Court's action in the case of non-appearance or inactivity. Any lawyer consulted by the respondent State could not fail to advise his client accordingly.

Second, it would not be sufficient to demand that the Court declare the non-appearing State to be a "party" — as Sir Gerald seems to do — *only* on the condition that proceedings were brought against it by virtue of a valid instrument of compulsory jurisdiction [75]. Of course, the absent respondent would *cease* to be a party once the Court were to find that the instrument is invalid, no longer in force or not applicable. It should be clear, however — *pace* Judge Gros [75 a] — that the respondent State becomes a party as soon as proceedings begin and remains a party *as long as they continue*. Party status derives directly from the Court Statute. It is dependent, notably for the purposes of Articles 36.6 (and 59), neither upon the instrument instituting the Court's substantive competence nor on a positive decision of the Court on its jurisdiction.

It should, of course, be recommended, on the other hand, that the Court take a firm and explicit stand on the question whether the respondent is a party, *whenever* the respondent were to intimate, as was done in *Nuclear Tests*, that such were not the case.

c) Practicable as well as lawful seem to be other remedies aimed at avoiding or reducing the embarrassment caused to the Court and to the active party by the non-appearing State's conduct. I refer *both* to the embarrassment deriving from a non-appearing State's *silence* over its arguments (on jurisdiction and/or the merits) and/or from that State's sending or issuing *extra ordinem* statements or communications. I refer to the remedies broadly indicated by Sir Ian Sinclair as intended to correct what he calls the tendency of the Court "to lean over backwards" in the interests of the non-appea-

[74] *Supra*, paragraph 8 *(g)*.
[75] *Supra*, paragraph 11.
[75 a] *Supra*, footnote 17 and para. 10 bis.

ing party[76]. As already indicated, the Court should, in order to achieve a more equitable balance between the present party's and the absent party's interests : *(i)* " invite argument from the appearing party on issues which it may feel tempted to take into account *proprio motu* if it considers that those issues have not been canvassed, or have been inadequately canvassed ", and *(ii)* " if necessary reopen the oral hearings "[77].

In the first place, the adoption of Sinclair's suggestions would meet no objection from the point of view of lawfulness. In addition to being compatible with the legal régime of non-appearance as described in the preceding Section (notably with the lawfulness of the choice not to appear or not to defend) they consist of measures falling surely within the Court's power to regulate the proceedings as provided for by Article 48 of the Statute and specified in Articles 44 ff. of the Rules. Secondly, the devices in question might well obviate, without reducing in any measure the safeguards of the absent or silent State's legitimate interests, most, if not all, of the lamented *inconvénients* of which the administration of justice and the active State might suffer from non-appearance as experienced so far.

Whenever the absence or silence of the non-appearing respondent were deemed by the Court to cause unjust embarrassment to the active State or to the Court itself (thus hindering or deviating the proper course of international adjudication), the Court would use, for example, its powers under the relevant articles of the Rules. Such might have been the case, for example, in *Icelandic Fisheries Jurisdiction* and in *Aegean Sea Continental Shelf*. There may well be instances where such powers should be exercised to the advantage of the respondent itself.

If, on the contrary, the Court were to think that the nature and timing of *extra ordinem* statements or communications from the non-appearing State might determine — on a matter of procedure or on a matter of merits, in law or in fact — a situation of disadvantage for the active State or of undue advantage for the non-

[76] See also *supra*, paragraph 11 *(f)*.

[77] SINCLAIR, as quoted *supra*, footnote 52. We join, with regard to these devices, THIRLWAY's positive evaluation (cited work, at page 175).

appearing (or formally inactive) State, the Court could easily devise ways and means to re-establish that balance of procedural chances between the parties which must be preserved in international as well as national litigation. A measure to that effect would have been perhaps indicated, if the *doléances* of some commentators proved to be justified, in order fully to satisfy that exigency, in *Trial of Pakistani Prisoners of War*, following the last minute communication submitted by the non-appearing respondent. The active State's agent would not have faced the ordeal of preparing a last minute reply.

d) Again impracticable, as a matter of law (and morally), would be in our opinion the further suggestion that, throughout the proceedings the Court " resolve all borderline questions or questions of serious doubt in favour of the complainant State, unless the State impugned appears to show cause why not, and in proper form ".

Considering that questions of " serious doubt " may well involve also the merits, this suggestion is even more objectionable than the one discussed *supra* under *a)*. The Court would again engage itself on a line manifestly contrary both to the express provision of Article 53.2 and to any inherent equivalent principle.

Much as they are worthy of the most careful attention in order to ensure that the Court perform its task in a proper manner even in the relatively abnormal situation created by the absence and irregular participation of the respondent State, the difficulties considered so far are, however, not insurmountable.

It is indeed a different matter with the problems we address ourselves to in the following Section.

13 *bis*. No major disagreements seem to have emerged so far within Commission 4 with regard to the possible procedural remedies. We may perhaps venture to assume that our conclusions in that respect (now in paras. 11-13 of the present Report) were deemed to be acceptable.

The view of our most eminent Confrère the late Professor Herbert Briggs, that " more difficult [was] the question of the attitude which the Court should take with regard to irregular procedures and communications " (Briggs' reply to our question

no. 16) seems implicitly shared by all the Members who manifested themselves. In that respect we believe it would be useful to accept, in addition to the above-mentioned suggestions of Sir Ian Sinclair (*supra*, para. 13.c), Herbert Brigg's " pragmatic solution " with regard to irregular communications. According to Professor Briggs, when the Court receives a communication not in accordance with the Statute or Rules : " (1) it should be communicated in full to the Judges and to the other party and frankly characterized for what it is : an irregular procedure or communication ; (2) the Court, while studying its contents, need not refer to the communication officially in its Judgment and Orders ; (3) while this may still leave the other party at a disadvantage as to points not raised or developed by the non-appearing party, the Court has the authority under its Statute to open proceedings for further argument " (cited reply to our question no. 16).

13 *ter*. Condemnation of the practice of irregular communications is expressed by Brownlie in his comments of October 18, 1990. He suggests that the Court should " give notice of its intentions relating to the admissibility of irregular communications ". Torrez Bernárdez suggests (para. 38 of his comments) that " To suspend proceedings on the merits, a State should file a " preliminary objection ", whether it is appearing or non-appearing. Otherwise proceedings under Article 53 of the Statute should be the object of a sole and single phase. This point should be considered... in the context of the *conceivable remedies* dealt with in Part Two of the report ". Bennouna, for his part, wonders (in his reply to question 13 of the Questionnaire) whether " Ne peut-on pas proposer, *de lege ferenda*, que la compétence de l'Etat de saisir la cour par voie de requête unilatérale doit être liée à son engagement de se présenter devant la cour s'il est l'objet de la même procédure ? ".

Part Three. — *Non-Appearance and the Repudiation of the Court's Statutory Functions.*

14. The second set of problems indicated at the outset — namely, the problems arising from the non-appearing respondent State's concomitant conduct — emerge, more or less bluntly, from all the

cases of the series. A study of those episodes suggests that non-appearing respondent States have not confined themselves — in explaining a choice not to appear which they were not, incidentally, under any legal duty to explain — to those pleas of incompetence or inadmissibility which are an almost invariable defense of the respondent State in proceedings initiated by a unilateral *requête*. The relevant cases — including *Corfu Channel (Damages)* — indicate that the resistance of non-appearing respondents went indeed beyond that.

The respondent State in the *Damages phase* of *Corfu Channel* did not quite confine itself to an irregular plea of lack of jurisdiction. It seemed to contest the competence of the Court to settle the question of jurisdiction [78]. By its conduct subsequent to the Court's judgment on damages that same respondent contested or disregarded the binding force of that judgment, or, which amounts to the same, its own subjection thereto [79]. The respondent State in the *Icelandic Fisheries Jurisdiction* cases did not confine itself to contesting *(extra ordinem)* the legal validity — original or *superveniens* — of the agreements invoked by the applicants as the legal bases of the Court's jurisdiction. By emphasizing repeatedly that the " vital interests " of its population and a decision of the national legislature prevented it from *accepting* that jurisdiction, the respondent State's government implicitly intimated a refusal to recognize, in principle, any positive finding of the Court on the question of jurisdiction (whether with regard to provisional measures or to the merits) : and this implied, in principle, a refusal to recognize any judgment on the merits which would totally or partially sacrifice those « vital interests " as understood or defined by the respondent government itself. The respondent State in the *Pakistani Prisoners of War* case did not confine itself to contesting *(extra ordinem)* the titles of jurisdiction invoked by the applicant. It went decidedly and explicitly beyond that judicially innocent claim by stating that " in the face of the *patent* and *manifest* lack of jurisdiction ", namely, when " the absolute absence of jurisdiction is so patent and manifest at the threshold of

[78] *I.C.J. Reports*, 1949, *Corfu Channel* Case (Assessment of Compensation), pp. 243, 246 ff.

[79] See ROSENNE, *The International Court of Justice*, p. 98 ; and ELKIND, *Non-Appearance*, p. 40 f.

the institution of proceedings, the question of *summoning the parties for a hearing to determine... jurisdiction does not arise.* The only proper action for the Court to take... is to remove the application from the list by an *administrative* order" [80]. The refusal to accept any positive finding of the Court under Article 36.6 of the Statute seems implied. It is further to be presumed that such a motivation of the decision not to appear implied *a fortiori* — at least for the time being — an intention not to comply with any adverse judgment that the Court might render on the merits. Beyond a mere irregular exception to jurisdiction also went the non-appearing respondent in the *Nuclear Tests* cases. The objections to jurisdiction (again *extra ordinem*) are accompanied by statements and communications, including a white paper, which manifestly exclude any disposition, on the part of the respondent government, to admit that the Court proceed to an evaluation of those exceptions (perhaps in part well-founded) within the framework of Article 36.6 of the Statute. The respondent State repeatedly intimates the unacceptability of any positive finding of the Court with regard to the justiciability of the dispute before the Court or, for that matter, before any other international body. Decidedly qualified as a non-legal one, the dispute concerned, according to some of the relevant documents, « des activités se rapportant à la défense nationale » and « à (la) sécurité et à (l') indépendance » : matters, these, not susceptible of settlement — it was contended — through an international procedure [81]. It was, in the words of one commentator « une question politique fondamentale, face à laquelle le juge international *mesure la faiblesse de son autorité* » [82], and with regard to which the respondent State « ne *laissera pas* mettre en cause l'objectif fondamental de la sécurité et de l'indépendance du pays », notably « la mise au point d'un armement nucléaire... nécessaire à sa sécurité et à son indépendance » [83]. This nature of the subject matter led actually the respondent government to state that in its opinion « on

[80] *Pakistani Prisoners of War, I.C.J. Pleadings,* p. 11 (Statement of the Government of India).

[81] Compare the official position of France in DE LACHARRIÈRE, *Commentaires,* pages 235 ff.

[82] COT, *Affaires des essais nucléaires,* page 254.

[83] DE LACHARRIÈRE, *Commentaires,* page 248.

ne peut plus faire confiance... (to the ICJ)... au stade actuel de son évolution, pour appliquer le droit international lorsque la sécurité et l'indépendance » of the country « sont en jeu » [84]. The implication that the respondent Government would feel bound neither by a positive finding on jurisdiction (with regard to the merits or provisional measures) nor by an adverse judgment on the substance of the applicant State's claims was once more sufficiently clear if not manifest. Less drastic seems to be the non-appearing respondent's attitude in *Aegean Sea Continental Shelf.* Nevertheless, after listing a set of arguments partly to be found valid in the negative finding on jurisdiction that the Court was to make under Article 53, after noting that the conditions for the continuation of serious negotiations between the parties « sont inconciliables avec la continuation d'une procédure judiciaire internationale » and expressing the belief « que la Cour *ne manquera pas* de se déclarer incompétente », the non-appearing respondent State claimed, in a note verbale, « la *radiation de l'affaire du rôle* de la Cour » [85]. The decision not to defend regularly before the Court its objections to jurisdiction would thus seem to prelude to a possible refusal to submit to a positive judgment on jurisdiction or to an adverse decision on the merits. Moving to another case, by non-appearing and claiming that the question submitted by the applicant State was only a secondary aspect of a broader problem ranging from the applicant State's meddling in the respondent State's affairs to the repercussions of the recent religiously-inspired revolution — the latter being "a matter essentially and directly within... (its)... national sovereigny" — the non-appearing State took an attitude, in *US Diplomatic and Consular Staff in Tehran,* which would seem to announce at least an original intention to refuse any subjection, either to a positive finding of the Court on jurisdiction or admissibility or to an adverse judgment on the merits. Although the Court's judgment presumably did not fail to play a role, the dispute was only composed, in practice, by a process of negotiation rather than by mere compliance with the Court's decision. Once again, one registers a challenge to the Court's *compé-*

[84] THIERRY, *Les Arrêts du 20 décembre 1974,* page 288.

[85] *Aegean Sea, I.C.J. Pleadings,* pages 588-589 (letter from the Ambassador of Turkey to Holland).

tence de la compétence under paragraph 6 of Article 36 and, ultimately, to Article 59. Equally clear challenges to the Court's statutory tasks emerge from *Military and Paramilitary Activities in and against Nicaragua.* Preceded as they had been by the regular participation in the preliminary phase, in the course of which the respondent State had argued in regular fashion its plea of lack of jurisdiction and inadmissibility [86], and combined as they were with the expression of aspersive charges against two of the judges and on the Court's electorale [87], the articulate explanations supplied by the respondent State to justify its "withdrawal" from the proceedings following the positive decision on jurisdiction are amply indicative of a considered, deliberate and flat refusal to recognize any binding force of the preliminary judgment rendered by the Court under Article 36.6 of the Statute. The rejection of that judgment is manifest in the January 18, 1985 notification of "withdrawal", where it is alleged both, that "the Court *lacks* jurisdiction and competence" and that "the Court's decision of November 26, 1984, finding that it has jurisdiction, *is contrary to law and fact*" [88]. *A fortiori,* the non-appearing or withdrawing respondent's attitude had to be understood at the time as implying the non-recognition of any legal validity and binding force of the Court's judgment on the merits [89]: an attitude amply confirmed by the respondent State's subsequent negative and positive conduct.

15. It is easy to see that attitudes such as those considered create, or are susceptible of creating, situations that go far beyond the difficulties deriving from the respondent State's non-participation or irregular participation.

Nothing less than normal, of course, in the fact that the non-appearing respondent claimed — albeit in the irregular form of *extra ordinem* communications — that the Court had no jurisdiction in the case or that the *requête* was inadmissible. Practically, as noted, a

[86] *I.C.J. Reports,* 1984, pages 175, 178, 392 ff.

[87] See the statement of the U.S. Department of State reproduced in AJIL, 79 (1985), pages 439-441.

[88] Dept. of State to the American Embassy at The Hague, telegram No. 017113, Jan. 18, 1985 (reproduced in *AJIL,* 79 (1985), page 439).

[89] *Infra,* paragraph 16.

regular occurrence of ICJ proceedings initiated by a unilateral application, such objections are part of the judicial game. It is another matter, however, for the Court's *compétence de la compétence* under paragraph 6 of Article 36: and the relevant cases seem to be all characterized by some implied or explicit form of contestation of the Court's power under that paragraph. In a number of the relevant cases the non-appearing respondent not only intimated *at the outset* that it considered the Court's lack of jurisdiction so certain and so manifest that there was practically not a question of jurisdiction or admissibility requiring the performance, by the Court, of the judicial task entrusted to it — vis-à-vis *any* State party to the Statute (regardless of any acceptance of the Optional Clause) — by paragraph 6 of Article 36 — and that the Court should confine itself to striking the case from its agenda by a merely administrative act — but it confirmed its position, following the Court's positive finding as one the preliminary issues, by alleging the invalidity of that finding as one of the reasons justifying the respondent's non-appearance in the merits phase.

Announced since its outset, the same attitude of non-recognition is maintained throughout the merits phase of the proceedings. The Court's task is thus carried out, notwithstanding the positive finding on jurisdiction and admissibility, under constant *extra ordinem* protest — so to speak — of utter lack of jurisdiction. And in the measure in which the active applicant's claim is finally made any good by the Court, the merits decision is not recognized as a valid judgment, compliance with it being refused in principle as a consequence. In *Corfu Channel (Damages)* compliance only came about following a lapse of time and negotiations between the parties. In the latest, Nicaragua - United States case, compliance has now been refused for some time: and the refusal to comply has been amply emphasized, before the Security Council and the General Assembly, in the course of the unsuccessful applicant's attempts to secure compliance.

The legal and — even more — the para-legal issues raised by such attitudes surely transcend by far the procedural *inconvénients* which the respondent's non-appearance may cause. Attitudes such as those we are discussing have not much to do with questions relating to the applicability, interpretation or application of Article 53

or of any identical or analogous inherent rule. They call into question, however — *together with some of the most fundamental among the rules of the Court's Statute — the very core of the Court's compulsory jurisdiction*[89 a].

It is indeed difficult, in the presence of such issues, to escape the impression that in most, if not all, the cases of the series (starting from *Corfu Channel - Damages*) non-appearance is not chosen by States for reasons comparable to those which normally suggest or impose that course to respondent parties in litigation before municipal courts. It is chosen, it seems, mainly in order to add force and consistency to the message which the concomitant conduct of the respondent State is intended to convey to the Court, to the applicant and to public opinion, national and international. The message consists essentially (without excluding further negative choices for the future of the respondent State's commitment to compulsory jurisdiction) of a kind of "contracting-out", for the pending case, not only from any existing compulsory jurisdiction but *from the Court's Statute itself*[90]. It is surely *the very Statute* that is involved when compliance with 36.6 or 59 is put into question.

The first intimation to that effect is the *a priori* repudiation, for the pending case, of that *compétence de la compétence* which is a function attributed to the Court by all the participants in the Statute, *all of which* are subject to the corresponding power, including, as we

[89 a] Torrez Bernárdez actually points out (para. 55 of his comments to our draft Report) that the attitudes in question "amounted to a denial of the non-appearance régime itself. Article 53 should be listed, therefore, among the casualties of the attitudes of challenge" dealt with in this part of the present Report. We are inclined to share our *Confrère's* view.

[90] It is hardly necessary to stress that this phenomenon is far different from the "contracting out" system suggested by GROSS, L., *The Future of the International Court of Justice*, vol. II, Conclusions, at page 731 (and discussed by Gross himself in Chapter Two of vol. I of the same work).

The practice under review is another piece of evidence of the total lack of foundation — legal or sociological — of the frequently evoked concept (Kelsen, Gross) of the Court's Statute as an instrument constituting the so-called "international judicial *community*". For a criticism of the widespread abuse of the concept of "community" in the theory of international organization (including judicial settlement), ARANGIO-RUIZ, *The Normative Role* etc. in *Hague Recueil*, 1972-III, pages 670 ff.; and *The UN Declaration on Friendly Relations*, pages 240 ff.

have seen, the States which are *not* subject to compulsory jurisdiction under 36.1 or 36.2. Considering that it is thanks to the presence of that rule (in addition to the permanent character of the judicial body) that proceedings can be successfully initiated by a unilateral application, such a repudiation runs contrary to the very heart of compulsory jurisdiction.

Indeed, once the Court's *compétence de la compétence* is put into question the only feature distinguishing the Hague system of compulsory jurisdiction from the most common, rudimentary forms of so-called "compulsory" arbitration would be the permanent character of the adjudicating body. As well as in that form of ordinary "compulsory" arbitration, in so far would a State *in concreto* be subject to adjudication as it happened to be willing *in concreto* — namely, *after* considering the object and nature of a given dispute and all the factual and legal chances of its successful adjudication — to conclude with the other party a special agreement to that effect. Unless adequate provisions were introduced in judicial settlement treaties or compromissory clauses in order to have any issues of justiciability settled by some procedure *other* than the parties' mutual agreement, the Hague Court's system would not even attain that *relatively* high degree of development which is attained, from the point of view of the effectiveness of the acceptance of adjudication, by those general arbitration treaties and compromissory clauses which provide that any question concerning the justiciability of a given dispute allegedly covered by the obligation to arbitrate, would be decided with binding effect, on a unilateral request from either side, by some third party.

16. A further intimation resulting from the terms in which non-appearance is formally explained or from the concomitant and subsequent conduct of the absentee, is the threat, eventually carried out, not to recognize the binding force of any judgment on the merits pronounced by the Court, and not to comply therewith. If such an attitude is explained by the succumbent absentee merely by the alleged incompetence of the Court (or inadmissibility of the *requête*), it is, of course, but a logical consequence of the rejection of the Court's *compétence de la compétence*. If it is explained also by the alleged lack foundation of the judgment "in law or fact", it

constitutes an additional direct repudiation of the binding nature of the Court's decisions under the Statute.

In one way or another, the threat not to recognize the legitimacy of the judgment on the merits adds (to the repudiation of *compétence de la compétence*) the further threat of a claim of nullity and of non-compliance.

One must thus register another difference for the worse from the features of that supposedly... less developed form of adjudication which is ordinary arbitration. I refer notably to any kind of arbitral proceedings based upon a *compromis*. Even where the special agreement was negotiated and entered into in compliance with a pre-existing general treaty or compromissory clause — but provided it was concluded *after* the dispute had arisen — an arbitration based on a *compromis* has better chances to escape the pitfalls of claims of nullity or non-compliance than compulsory judicial settlement as practised by non-appearing respondent States in the cases considered in the present paper.

No doubt, arbitral awards themselves are not exempt from claims of nullity and from non-compliance. However, the voluntary nature of the submission — even where the *compromis* was entered into on the basis of a pre-existing obligation — makes arbitral awards surely less prone to repudiation [90 a].

17. The challenge to the Court's *compétence de la compétence*, and the overt or implied threat of non-compliance with any adverse decision, must unfortunately be reckoned also as a menace to the proper discharge by the Court of its judicial function. I refer notably to the preservation of that high standard of impartiality which has characterized since the twenties the Hague Court's judgments.

However strong may be the disposition of the judges to carry out their function in absolute objectivity, that disposition is put to a very severe test by the attitude of a respondent State which on one hand complains that the exercise of the Court's function would constitute an attempt against its sovereignty, independence and vital national interests of a military, political or economic nature, and on the other hand avails itself of its sovereign independence to threaten

[90 a] Amerasinghe seems not to agree (point X of his comments).

non-compliance with any adverse judgment. The most able and conscientious of judges is bound to be seriously tempted to mitigate in some measure, *le cas échéant*, the adversity of the judgment in the honest pursuit of both the cause of a successful peaceful settlement of the case in the interest of the parties and the cause of the promotion of international adjudication and of the rule of law.

It is obvious, on the other hand, that any mitigation of justice in favour of the respondent would work not only in the sense of making judicial settlement before the Hague Court more palatable to prospective respondents — who will be also encouraged, inevitably, to take in the future a similar course of non-appearance combined with contestation or threats of repudiation or non-recognition — but also in the sense of making settlement in the Hague less palatable to prospective applicants.

Be as it may of the effects, more than a suspicion that some such mitigation may have occurred has been rightly expressed by commentators. I refer of course to the *Icelandic Fisheries Jurisdiction* and *Nuclear Tests* cases [91], both too well known for it to be necessary for us to expand into any demonstration. The comments referred to are for us sufficient evidence — also in the light of the Dissenting Opinions appended to the judgments — of the fact that the Court leant backwards presumably in order to appease the non-appearing, resisting, sovereign. It is possible that in *Nuclear Tests* the respondent State's threatening attitude worked actually in different directions with regard to the decision on jurisdiction and with regard to the outcome on the merits. With regard to jurisdiction it may notably have induced the judges to spare the applicant States an early disappointment by a negative finding on very questionable juridictional issues, whereas on the merits it would have induced mitigation in favour of the applicant State.

Were such or similar suspicions to prove lacking in foundation, the very fact that they manifested themselves is unfortunately suf-

[91] For *Icelandic Fisheries Jurisdiction* see especially FAVOREU, *Les affaires de la compétence en matière de Pêcheries*, and THIERRY, *Les arrêts du 20 décembre 1974*.

For *Nuclear Tests* see RUBIN, *The International Legal Effects of Unilateral Declarations*, pages 1-30; and SUR, *Les Affaires des Essais nucléaires*, pages 972-1027.

ficient to mar the Court's image to the detriment of the causes of adjudication and the rule of law. A prospective respondent State may be encouraged to follow bad examples. Prospective applicants may be discouraged.

In addition, one must reckon the negative effect of this phenomenon on the generally recognized contribution of the Court to the certainty of international legal rules and their interpretation. Apart from the damage that an incorrect stand of the Court may determine in given areas of primary or secondary law — and the question of the alleged binding force of unilateral declarations is an example, masterly illustrated by Rubin — the suspicion, if not the knowledge, that the Court is not as reliable as it should be in the performance of this indirect function would be conducive to results diametrically opposite to those that would contribute to the certainty of the law. This affects not only the relatively small circle of States which show a certain inclination to bring cases before the Court, but the international " community " as a whole.

Part Four. — *The Repudiation's Motivations. Possible Relevance thereof.*

18. The question arises, at this point, whether the lines of conduct considered in the present section, namely the respondent State's actions or omissions *other* than non-appearance *per se* — may be justified, and under what conditions ; and to what extent should Commission 4 (or, for that matter, the Institute) proceed to an analysis of such conditions. Should one investigate, for instance, the relevance of the interests involved in each case, the degree of certainty the respondent State could entertain in each case with regard to the Court's lack of jurisdiction, the degree of reliance that State could place on the soundness of its legal stand on the merits, the degree to which it could trust the Court's technical ability or impartiality, etc. ? — As regards the interests involved, could any justification be found, for example, in the importance of the interest of Iceland in its fishing industry, the interest of Iran not to have the *Hostages* case adjudicated separately from its grievances for United States interference in Iranian politics, the interest of Turkey

not to submit to legal adjudication claims over areas of Aegean sea-floor which might perhaps more advantageously or less disadvantageously be pursued by different means, the interest of France not to be hampered by international adjudication in its pursuit of a nuclear defence policy, or the interest of the United States not to be exposed to adjudication of actions it deemed indispensable for the nation's security ? — Could any measure of justification be found, in any one of the relevant cases, in the degree of foundation of the respondent State's objection(s) to the Court's jurisdiction ? In the affirmative, should one compare the degrees of justification the various respondent States may have had in refusing to submit on the occasion to the Court's *compétence de la compétence ?* — As regards interim measures, would any analyses and comparisons of the kind be necessary or desirable in order to assess the degree of justification of any resisting State's attitude with regard to the exercise of the Court's function under Article 41 of the Statute ? — And should any analogous analyses and comparisons be made with regard to the merits of any decision of the Court — on a preliminary question or on the principal — in order to assess the degree of justification of a refusal by respondent State to accept the Court's pronouncement as a binding one ? — and should any consideration be given to any doubt a respondent State may formulate with regard to the Court's composition or technical or political reliability ? [91 a].

19. To pronounce themselves on such issues — *de lege lata* or *ferenda* — is of course an essential part of the task of scholars : and in carrying out that task it is inevitable that they pass judgment — moral and political as well as legal — on the conduct of States, of arbitral tribunals, of the Court and of the single arbitrators or judges who expressed dissenting or separate opinions. A commendable example is the American Society's choice of 1985 to place on its agenda the study of the Nicaragua case ; and a number of the

[91 a] Rosenne would have been " in favour of recognizing the need for an examination, in concrete cases, of the kind of issues mentioned " in this paragraph. Not opposed by other Members of the Commission, our view seems to be shared instead with emphasis by Torrez Bernárdez.

authors cited *supra*, footnote 2, have appropriately applied themselves (with more or less discordant results) to valuable analyses of a number of the issues arisen in the relevant cases.

20. We doubt, however, that issues of the kind of those indicated in paragraph 18 *supra* would be appropriate subjects for a — targeted — discussion of the kind the Institute carries out with a view to pronouncing itself, by resolution or otherwise, on current aspects of international law.

A first cause of perplexity — but not the principal one — is the presumable difficulty of achieving, on the various issues in question — as they arise from any one of the relevant cases — a significant degree of consensus within a collective body like the Institute.

The second and main reason of doubt is that the study of the relevant cases shows that in none of them the terms of the issues in question or of the solutions defended by the parties or adopted by the Court seem to have been of such a nature as to justify *de lege lata* a unilateral choice of the respondent State to disregard its obligations under the Court's Statute. I refer to obligations such as those deriving from the Articles concerning the Court's *compétence de la compétence*, the Court's function under Article 41, or the binding force of a Court judgment on competence, admissibility or the merits. Of course, a respondent State could *in fact* claim that the interest at stake in the case was of such a nature and dimension as to justify its political decision to disregard one or more of those obligations. Respondent State could *in fact* also claim that the lack of competence was so manifest that the Court could not but recognize it by a negative (formal or informal) finding for the purposes of interim measures or the merits. Respondent State could actually *in fact* entertain such a firm belief in the soundness of its stand on the merits as to refuse compliance with any adverse judgment pronounced by the Court thereon. Whatever the political or moral merits of any such positions, none of them, however, seems likely to justify *de lege lata* — absent manifest arbitrariness of any actual Court decision on jurisdiction, interim measure or merits — the challenges to the unambiguous provisions of Articles 36.6, 41 or 59 (and other provisions implying the binding nature of the Court's judgments on jurisdiction or merits).

Considering what was explained in Part One, *supra*, notably in paras. 8 ff., especially 8 (b-g), it seems hardly necessary to emphasize again that the attitudes under discussion are not merely breaches of any respondent State's commitment to submit to the Court's *compulsory* jurisdiction (by unilateral declaration, by appropriate compromissory clause or general treaty). They constitute breaches of the *very rules of the Court's Statute evoked in the text.* One is thus not just in the presence of attempts to " contract out " of the burden represented by a generous or simply imprudent acceptance of the Court's compulsory jurisdiction. The attempt is to *" contract out " of nothing less than the most elementary obligations deriving directly from the Statute,* for any participating State, *regardless* of any acceptance on its part of compulsory jurisdiction.

Subject only to the proviso set forth hereunder (following paragraph) no justification of the kind evoked in paragraph 18 *supra* would in our opinion be worthy of consideration *de jure curiae condito.*

21. The proviso just referred to concerns the hypothesis that a respondent State, faced with an unwelcome positive finding on jurisdiction and eventually an adverse judgment on the merits (or an unwelcome order for interim measures) challenges the legal validity of any such decision or decisions [91 b]. Although quite infrequent in arbitration — and with uncertain precedent in judicial settlement before the Permanent Court or the ICJ — this hypothesis, into which we deem it inappropriate to engage ourselves here, falls into the general problem of the validity of decisions of international judicial as well as political bodies. It should eventually be discussed within a broader context other than the present paper. It should be noted, however, that for a challenge of the kind to possess a minimum of credibility some conditions should be met. It would seem, for example, that a State which had not defended its case in

[91 b] As maintained, for instance, by the U.S. State Department Legal Adviser in his statement before the U.S. Foreign Relations Committee in 86 Department of State Bulletin (Jan. 1986), No. 2106, pp. 67-71 ; and, at scholarly level (on the basis of partially different arguments) by REISMAN, W.M., Has the International Court exceeded its Jurisdiction ?, American Journal of International Law, 1986, pp. 128-134.

either phase would find it more difficult to challenge the validity of a preliminary or principal judgment given by the Court. A further notation concerns that particular *motif* of challenge to the validity of a Court decision that a resisting State might be tempted to find in an allegedly inappropriate current composition of the adjudicating body[91 c]. For such a challenge to possess a minimum of credibility it should not be put forward *following* an unwelcome or adverse Court decision. It should have been taken into account by the State's legal advisers in suggesting to the foreign ministers (not necessarily in a public statement), a radical amendment or withdrawal — failing the possibility or the will to withdraw from participation in the Court's Statute altogether — of any undertaking accepting the possibility of settlement before the Court.

Conclusions

22. The distressing thought is that at no other time, since 1907, have the prospects of international compulsory adjudication (and of *compétence de la compétence* of international tribunals) looked so grim as they do in the mid 1980's.

That the prospects of compulsory jurisdiction were far less than bright is the indication emerging from the best literature on the subject. Bright those prospects had been only in 1920 and in 1945, namely on the two occasions on which the advocates of an automatic, generalized compulsory jurisdiction were able to console themselves — not without the help of a good dose of optimism and some overstatements on the part of international lawyers — on the new defeat of their ideal (after the defeats of 1989 and 1907) with the thought that the so-called Optional Clause could work, together with general treaties and compromissory clauses, the great miracle of bringing about a state of affairs more or less close to the situation that would have obtained if a rule establishing an automatic, generalized compulsory jurisdiction had been accepted by the Powers as an integral part of the Hague Court Statute in 1920 or 1945. The

[91 c] See, *inter alios*, BRIGGS, The International Court of Justice Lives up to its Name, 81 American Journal of International Law, (1987) at page 85, footnote 37.

period immediately following 1920 was still relatively bright thanks both to the high percentage of League of Nations members accepting the Optional Clause and to the contemporary multiplication of treaties providing for compulsory adjudication. Although reservations reduced considerably, even at that time, the spheres of accepted compulsory jurisdiction, thus excluding that the desired goal was around the corner, there existed some room for hope or illusion. The picture had become grim, however, pretty early after 1945. Writing in the mid-fifties, the then Professor Waldock noted that after a first period of growth between 1947 and 1952-53 — from 26 to 37 — the number of " adherents " to the clause had since decreased to become 32 in 1954-5[92]: and notwithstanding the unprecedented growth of the UN membership in the following decades, the highest figure attained did not really surpass (except for a few units) the peak figure of 42 attained in 1934. To put it with Kearney, who wrote about the mid-seventies, at the time when the " rash " was just starting, a quarter century of relative progress had been followed by a quarter century of falling off[93]: an estimate which seems to be correct, considering also the greater impact of reservations, in spite of some signs of improvement in the disposition to accept the compulsory jurisdiction by compromissory clauses in multilateral treaties.

The following period of about fifteen years is precisely the one which is marked by the " rash " of non-appearance: and the general indication emerging from that " rash ", seems unfortunately to be in the sense of a further step backwards. Indeed, more than one half of the third quarter-of-a-century seems to be characterized by an involution in the direction of the " voluntarism " of the pre 1920 era.

We can only express the hope that *better prospects may emerge*, between the finalization of the present Report and the Basel session, from both the *momentous developments currently characterizing East-West relations* and the *" Third World " 's felicitously increasing reliance upon the ICJ.*

[92] Estimates in WALDOCK, H., *Decline of the Optional Clause, BYBIL*, 1955-56, pages 245-46; and KEARNEY, R.D., *Amid the Encircling Gloom*, in GROSS, L. (ed.), *The Future of the International Court of Justice*, vol. I, 1976, pages 108 ff.

[93] KEARNEY, cited work, at page 111.

23. Turning to action that the Institute might wish to take, the present writer feels that it should deal with both sets of problems considered in the present Report. On the one hand are the issues pertaining to the régime of non-appearance, namely the questions of the lawfulness of non-appearance and of the proper understanding and application, in case of non-appearance, of Article 53 of the Court's Statute (paras. 6-13 *bis, supra*). On the other hand are the issues — by far more important and difficult — arising from the express or implied challenges, by a non-appearing State, to some of the Court's statutory functions (paras. 14-22, *supra*).

24. With respect to the first set of issues, the Institute should recognize that any State summoned before the Court by a unilateral application of another State — as well as, for that matter, *any State otherwise a party to proceedings before the Court* — is at legal liberty, by virtue of Article 53 of the Statute and any equivalent rule inherent in the ICJ system, to choose as a matter of policy whether to appear (and defend its case) or not to appear (paras. 6-7, *supra*). The Institute could further indicate the procedural devices to which it would seem most proper for the Court to resort in meeting the requirements set forth in Article 53. Such devices, which ought to be in conformity with those requirements and any other relevant provision of the Statute, should be intended to safeguard, notwithstanding the particular circumstances determined by a party's non-appearance, the fullest "equality of arms" between the parties in the proceedings and, more generally, the good administration of international justice (paras. 11 ff., *supra*).

25. With respect to the second set of issues, the Institute should, in the view of the present writer, call the attention of governments to the necessity that any State participating in the Statute (whether as a member of the United Nations or otherwise) fully comply under any circumstances — whether or not it chooses to appear and formally defend its case — with all the provisions of the Statute (paras. 14 ff., *supra*). A solemn reminder should notably be made to the effect that any State, *whether or not it has submitted* a declaration of acceptance of the Court's *compulsory jurisdiction* under Article 36.2 of the Statute and *whether or not* it has otherwise accepted that

compulsory jurisdiction, is bound by the provisions of the Statute *regardless* of its own opinion concerning the Court's competence. This should be stressed in particular with regard to the provisions concerning the Court's *compétence de la compétence*, the Court's function relating to the indication of interim measures and with regard to the binding character of any Court's judgments on jurisdiction or the merits (paras. 15 ff., *supra*).

26. One might be tempted to argue (*supra*, para. 4) that since the item chosen by the Bureau and entrusted to Commission 4 was the problem of non-appearance, the task of the Commission — and of the Institute — should be confined to the first set of issues. In the view of this Rapporteur the relevant cases show such a close relationship between the respondent State's choice not to appear and the challenge by that same State to the most relevant among the Court's functions, that any silence of the Institute with regard to the issues raised by such challenge would very likely lend itself to interpretations that might be detrimental to the cause of international adjudication. Indeed, the detriment might affect not just the particular "cause" of compulsory judicial settlement before the International Court of Justice. It might affect, together with the very distinction between legal and political disputes (or the legal and the political aspects of any conflictual situation), the notion of the binding force of any commitments to any kind of settlement or quasi-settlement procedures.

27. The attached draft Resolution, which is intended for discussion by Commission 4 at the stage of the Basel session preceding the plenary debate on the item, has been prepared by the Rapporteur in the light of his understanding of the views overwhelmingly prevailing so far within the Commission.

Annex

Observations on the draft Final Report

1. *Observations of Mr E. McWhinney*

August 21, 1990

I thank you for your letter of July 24, 1990, and for the accompanying *Draft Final Report* which builds on your earlier *Preliminary Report* and also contains an excellent, (and very fair and balanced), synthesis of the comments made to you by individual members of our Commission. You already have my communications of August 7, 1985, November 18, 1985, and December 11, 1989, containing my replies, *sediatim*, to the detailed questions set out by you in the *Preliminary Report*, and also my own reactions to some of the very interesting points made by Commission members in their responses to the *Preliminary Report*. There is no need to report what I have already said, of which you have, in any case, taken appropriate note in your *Draft Final Report*. I will confine myself, now, to some small refinements or nuances to positions originally taken, and to some general observations relevant to long-range policy trends in Court *jurisprudence* and in Court *doctrines* on the subject.

I have absolutely no objection to your qualification of my comment that a State "retains the right at all times to choose, as a tactical-legal decision, to appear or not to appear", and to your suggesting "*falcoltà*", or "*faculté*", as the more appropriate characterisation. I had originally considered using the term "privilege" rather than "right", here invoking Hohfeld's well-known analytical jurisprudence categories and the distinctions involved in them. However, the Italian and French terms are an even more exact description of what is involved than is "privilege" in terms of the privilege/right legal antinomy; and I am happy now to adopt your suggestion in that behalf.

My general conclusion remains the same, however. We are dealing with a living institution, the International Court, that is itself actively engaged in the "progressive development of International Law", through its own, step-by-step *jurisprudence*. It is neither desirable, nor possible, to attempt to fetter that creative, evolutionary, judicial law-making process by attempting to lay down too strict, *a priori* rules on the juridical consequences of Non-Appearance by a State. Actually, the empirical examination of the Court's case law in past problem-situations of Non-Appearance, offered by several of our distinguished

confrères, tends to confirm the main impressions from my own studies of the Court's trial-and-error testing.

First, Non-Appearance by a State, does not, and need not, inhibit the Court from asserting Preliminary Jurisdiction and also from then proceeding on to hear a case on the Merits and to render a final judgement. It is, of course, for the Court, and not the parties (Appearing, or Non-Appearing), to determine jurisdiction.

Second, on the actual record of the Court's *jurisprudence*, a Non-Appearing State, so far from being legally disadvantaged, may actually have benefited from the Court's indulgence and from the well-evidenced seriousness and concern of the judges to satisfy themselves that the conditions outlined in Article 53(2) — "not only that [the court] has jurisdiction in accordance with Articles 36 and 37, but also that the claim is well founded in fact and law" — have been fully met. This is in full accord with established judicial practice, and patterns of judicial behaviour, in major Municipal, national legal systems.

The high-water mark of such manifest judicial favouring of an absent state party — what, in the phrase of the U.S. Supreme Court, might be called a judicial "bias against bias" against an absent defendant, is probably in *French Nuclear Tests*. The only example that might reasonably be argued to go the other way perhaps is *Nicaragua*, 1986, where the U.S., because its walk-out after the earlier 1984 unfavourable ruling of the Court on the preliminary, jurisdictional issue, may have suffered from a failure to communicate to the Court the special political facts in Central America on which, in the U.S. Administrations view, the U.S. substantive-legal defences on the Merits in *Nicaragua* rested. Of course, the concept of Judicial Notice, well-known in Municipal, national legal systems, and permitting Courts to consider, and utilise, facts of general public knowledge without the need for leading special proof thereof, remained available to the International Court: and the background facts to *Nicaragua*, as perceived by the Court majority, were evidently considered to be sufficiently patent to be acted upon so far as relevant to rendering final judgement on the Merits in the case.

2. *Observations of Mr S. Rosenne*

Jerusalem, 30 September 1990

1. In reply to your letter of 24 July with the draft of your final report on Non-Appearance before the ICJ, I have re-read your Preliminary Report and my original letter to you of 25 November 1985. I have for the moment a few words to add.

2. In paragraph 2 of my previous communication I surveyed the evolution of my views over the years. Those views are still evolving in the light of further experience and further study. I would therefore like to draw your

attention to p. 93 and following of the 4th edition of my *The World Court: What it is and how it works* (1989), which I will not repeat in full now. I will only recite the last two paragraphs of that section:

> The real challenge which non-appearance presents to the Court is to ensure that neither side profits from the non-appearance of one of the parties. The Court must "satisfy itself" and not merely "be satisfied" that the claim is well-founded in fact and in law.
>
> The fact that a State decides not to take any part in the proceedings in a case in which it is *properly* [emphasis added here] a party does not in itself affect the final and binding quality of the Court's decision, or the Charter obligations of compliance.

In all frankness, I do not think you have given adequate expression to my views in your draft report. In that connection, I would be in favour of recognizing the need for an examination, in concrete cases, of the kind of issues mentioned in your new paragraph 18.

3. Since 1985, I have been continuing my researches into various aspects of the Court's activities, and I have been struck by the Report of the Co-ordination Commission of 14 May 1934 when the Permanent Court was engaged in the revision of the Rules of Court. That Report, so far as I know, has only been published in French and here is a relevant extract:

> La question a été soulevée de savoir si le fait, par une partie, etc., de ne pas se conformer aux dispositions du nouvel article [on the appointment of an agent] constituerait un cas de défaut déclenchant la procédure envisagée à l'article 53 du Statut. On a soutenu, d'une part, qu'il conviendrait d'exprimer clairement que tel ne serait pas le cas, le défaut n'étant constitué que par le fait, pour une partie, de ne pas présenter ses pièces de la procédure écrite dans les délais fixés ou de ne pas faire acte de présence lors de la procédure orale ; mais il a été maintenu, d'autre part, que le texte de l'article 53 du Statut, à côté du cas où l'une des parties s'abstient de faire valoir ses moyens, vise également le cas où elle ne « se présente » pas.
>
> Dans ces conditions, la Commission a préféré laisser la question ouverte pour le moment, afin que la Cour puisse la trancher en pleine liberté si elle venait à se poser dans un cas concret. PCIJ, Ser. D, No. 2, Addendum 3 at 866.

That passage is, I believe, based on what occurred at the meeting of the Court on 15 March 1934, when the President, Sir Cecil Hurst, cut short the discussion on the relationship between the non-appointment of an agent and Article 53, by ruling that this question was outside the scope of the draft article then under discussion. Ibid., at 843-846. This is what underlies the words "as soon as possible" in Article 35, paragraph 3, of the Rules of Court

of 1936, now appearing, in this respect substantially unchanged, as Article 40, paragraphs 2 and 3, second sentence, of the Rules of 1978. In the light of that legislative history, I am inclined to think that the words "as soon as possible" should be read as being intended to preserve the freedom of action of any party other than the applicant with regard to the appointment of an agent, implying in particular its right to rely on Article 53 of the Statute. The imprecision of the words "as soon as possible" is, so it seems to me, quite deliberate.

4. I cannot at this stage offer you any comments on a possible resolution, but I understand that you will be sending us a draft or an outline soon. I do feel it necessary, however, to make one observation in reaction to your new note 56 a, and I very much hope that this reaction will find appropriate reflection in any draft resolution you may be thinking of putting forward:

I am coming round more firmly to the conclusion, which I can only formulate tentatively for the present, to the effect that a State cannot be party to what the Court has called "mainline" proceedings (see the judgment of 21 March 1984, para. 37) so long as the jurisdiction of the Court to determine that "mainline" case is not established. I do not think that the low threshold *prima facie* jurisdiction which the Court has adopted as the basis for indicating provisional measures of protection stands on the same footing as "mainline" jurisdiction. I believe that the questions what is a "party" to a case, what "case" is it a party to, and from what point of time does it have the status of "party", are more complex than has hitherto been assumed. I have not yet seen the recent judgment of the Chamber regarding Nicaragua's request for permission to intervene in the El Salvador/Honduras case, but if I understand correctly the Court's communiqué No. 90/16 of 13 September, Nicaragua has been granted a limited intervention without the status of a party. I have no views yet on how this affects the more general question of what is a party and from what point of time. However, I think that under no circumstances should our Commission submit a draft resolution which assumes that a "non-appearing" State, howsoever defined, is a party to the "mainline" case so long as the questions of jurisdiction and admissibility are outstanding, and especially when it is the Court that has initiated those interlocutory proceedings. I am not sure that being a party to interlocutory or incidental proceedings is necessarily the same as being a party to the mainline proceedings, and I do think that we ought not to prejudice that issue.

5. I hope that you will find the above observations of assistance, and that you will be able to produce a draft resolution which will enable our Commission to consense itself on a text (if I may be permitted that neologism).

.....

3. *Observations of Mr I. Brownlie*

18th October 1990

I very much enjoyed reading your Draft Final Report. In particular, I found the section on Remedies impressive. The only point of substance I have to make is by way of emphasis. From my own experience of non-appearance, a key question concerns the Court's practice in relation to irregular communications (see paragraph 13 *bis*). Thus, I would consider the proposals by Briggs to be of particular importance. In the *Nicaragua* case (Merits phase), the U.S. Embassy in The Hague issued a very substantial document (100 pages and more), which was made available to the Court through the Registry. This appeared on the first day of the Oral Hearings, and Nicaragua already had a mass of material to deal with in front of the Court. In fact, without giving notice to Nicaragua, the Court explicitly took this document into account as an item of evidence. This practice seems to me to be obviously wrong in principle. I believe that as a minimum protection to the appearing State the Court should give notice of its intentions relating to the admissibility of irregular communications.

I agree very much with your conclusions as formulated in paragraphs 20 and 23.

.....

4. *Observations of Mr C. Amerasinghe*

October 19, 1990

.....

I must congratulate the rapporteur on a very interesting and largely acceptable draft final report. Although I was not on this Commission when it began its work and, therefore, did not have an opportunity to answer the questionnaire and make comments initially, I must confess that I find myself, if not in total, at least in general, agreement with the ideas and sentiments expressed in the report. There are a few comments which, however, I would like to make.

(i) I think it would be useful to cite the whole of Article 53 of the Statute somewhere in the report.

(ii) In para. 5 (pp. 10-11) of the report the issue of the court's jurisdiction is discussed. I would like it emphasized more that in general, where the jurisdiction of the court is agreed to or invoked, the agreement or invocation is *irrevocable* whatever the fate of a larger instrument, if any, by which it is invoked. This is so even if the jurisdiction of the court arises under the doctrine of *forum prorogatum*. By the same token, because the court is a *juge d'exception* (as an international tribunal), where there is no title to jurisdiction by agreement or otherwise the court cannot have jurisdiction. The point is important because it will have an impact on Articles 53 and 59.

(iii) It is also important that the title of the court to jurisdiction under Article 36.6 (to decide the court's own jurisdiction - *compétence de la compétence*) derives from signature of the Statute and has little to do with the title to jurisdiction over the merits which arises from an additional act. This in turn has relevance for the definition of the term "party" in Article 53 and Article 59.

(iv) Clearly, where the court has *manifestly* no title to jurisdiction (this is so particularly where the applicant proposes to rely on *forum prorogatum*), although it has power by virtue of Article 36.6 to decide the issue whether it has jurisdiction, when both States involved have signed the Statute, the conclusion cannot be avoided that the respondent State is not a "party" to the proceedings for the purposes of Articles 53 and 59 particularly of the Statute (the point is relevant to the discussion in paras. 8 *(b)* and *(g)* and 13 *(b)* - pp. 17, 21 and 35). There is a slight circularity about this position. If the court has jurisdiction to decide on its competence, should not the respondent State be a party to the proceedings from the very inception of the proceedings, at least until the decision is made that the court has no jurisdiction? How can the court have jurisdiction, albeit to decide on its own competence, if the respondent State is not a party? The solution proposed is that in circumstances, where the court *manifestly* has no jurisdiction (and the court would decide this), even though it has jurisdiction to decide the issue, the respondent State must be regarded as never having been a party in the case, although this will be established retrospectively. Article 53 would not apply in this situation really because the State was never a party to proceedings and never had an obligation to appear. The point is that the respondent is entitled not to appear where there is manifestly no jurisdiction in the court. It takes a risk, if it chooses not to appear, that the court will hold that it has jurisdiction and then it would not have discharged and would not be discharging its obligation of appearance. But it must take this risk. If, on the other hand, in these circumstances the court holds that the court *manifestly* has no jurisdiction, the respondent would not have violated any obligation, although this fact would be established retrospectively. This leaves it to the respondent State to evaluate whether there is *manifestly* no title to jurisdiction in the court and, thus, not appear, taking the risk of being in violation of its obligation to appear.

(v) The discussion under point *(iv)* above assumes that the respondent State has a "legal obligation" to appear when it is a party to proceedings. The matter is discussed in the report on p. 13 (para. 6), p. 26 *bis*, footnote 91 a and para. 24 (p. 53) of the report. [It is said "a State may choose to appear or not to appear"]. I would disagree that Article 53 implies that a party to proceedings, i.e. one that is legitimately and legally so, has no obligation to appear. Article 53 does not have to be interpreted in this way. A party to proceedings would in any legal system have a legal obligation to appear. This is a normal consequence of being a party to proceedings where the subject is part of a legal system. It would be inaccurate and unnecessary to state that under the system of the ICJ a State party to proceedings can "lawfully" not appear

or has a "liberty" (in Hohfeldian terms) not to appear. It is precisely because a party has a duty to appear that Article 53 seems to have been inserted. What that article does is to lay down the "sanction", so to speak, for non-appearance. It explains clearly the action that may be taken by the other party and by the court, establishing limits, particularly for the court. There are a variety of actions that a court may take by way of sanction in the circumstances. The extreme sanction is automatically to give an award in favor of the applicant. There may be lesser sanctions. What the drafters of the Statute chose was the procedure established in Article 53 which could result in an award totally in favor of the applicant or may have a different result. There is still an element of sanction, since the respondent will clearly be at a disadvantage when Article 53 (2) is applied, if it does not present its case. It is far from certain that the court could hear arguments and evidence as thoroughly as when the respondent conducts its own case.

The language used by the court in the cases discussed, where the respondent has failed to appear and Article 53 has been invoked, does not indicate that the court regards a party as not being under a legal obligation to appear when the court does not manifestly have no jurisdiction. In fact the courts' statements were generally non-committal. Hence, perhaps resort to a general principle of law which requires a party to appear, particularly where a court has jurisdiction may be more useful in interpreting Article 53 than what is implied in the text of the report.

If the point I make here is not acceptable to the majority of the Commission, it should be explained in the report why it is not acceptable and on what basis.

(vi) I agree that where the court does not *manifestly* have no title to jurisdiction, the respondent becomes a party at the time the case is constituted but ceases to be a party, if the court decides that it has no jurisdiction. This means that in these circumstances the respondent will have the obligations incumbent upon a party until the court decides that it has no jurisdiction and Article 53 will apply. The respondent must then be regarded during that period as having been in breach of its obligation as a result of which sanctions as reflected in Article 53 become applicable.

(vii) The question of "condemnation" (para. 6 - page 11) is rather inappropriate. Clearly, the court has never described the delinquency of the respondent as a breach of its obligations which would be as much as it could do. Beyond characterizing the failure of the respondent thus, it would not be necessary for it to go. While it may be useful and proper for the court to point out that obligations are not being carried out, I would not advocate any further condemnation. On the other hand, it would be in order for the court to point out that as a result of the failure of the respondent to fulfill its obligations the sanctions reflected in Article 53 were being applied.

(viii) I agree with the approach to interim measures (para. 12 *(b)* - p. 21). Given that the respondent is a party except where the court manifestly has no jurisdiction, no problem arises under Article 41. The attitude of the court does not pose a problem, either, because it ascertains whether it manifestly has no jurisdiction before ordering interim measures.

(ix) I also think that the court would not be interfering with the course of justice or betraying its mandate in entertaining informal communications from a respondent party which refuses to appear.

(x) Para. 16, page 44 - I am not in agreement that arbitral awards are more likely to be complied with because they are based on a *compromis*. If a respondent State does not want to honour its obligations to appear before an arbitral tribunal, albeit under an agreement, it would do so and just as in the case of the ICJ would be less likely to carry out the award. It is not clear that the existence of a *compromis* would induce a respondent necessarily to appear before an arbitral tribunal. Nor does it follow that because of the existence of a compromis a respondent would be more ready to carry out an adverse award than in the case of a judgement of the ICJ.

5. *Observations of Mr S. Torres Bernárdez*

Madrid, 27 October 1990

.....

Many thanks for your final draft report on "non-appearance before the ICJ", as well as for the copy of the provisional report.

Allow me to begin expressing my admiration for the study you made of a complex and difficult topic. All my congratulations. Very sincerely, it is a most brilliant piece of work. It is also, I must say it, a report whose reading is highly refreshing and inspiring, providing an excellent basis for the finalization of the task of Commission 4, a Commission to which, as you know, I have just been appointed.

Attached herewith you will find my comments and observations. While agreeing with most of the essentials I am unable, however, to go along with your conclusion that under the Statute "non-appearance" is "lawful" and should be so declared by the Institute. It is because of that that I felt compelled to explain with some detail the reasons of my disagreement on that particular point.

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Non-appearance before the International Court of Justice
Observations by Santiago Torres Bernárdez

Introduction

1. At this juncture, the adoption by the Institute of a text concerning issues relating to "non-appearance" before the International Court of Justice seems to me particularly timely. In the mood prevailing a few years ago in international relations, affirmations, clarifications and technical remedies concerning "non-appearance" before the Court would have been out of place. The root of the problem being political in character in most of the concrete cases, the lawyer then had little to say, although the theses defended by certain non-appearing States were sometimes cast in legal terms. The adoption by the Institute in such a context of a legal text on "non-appearance" would not have made much sense and could even have been detrimental. Today, voices are again being heard claiming and recognizing the need to strengthen the international legal order as well as to make more effective international institutions and procedures, in the field *inter alia* of the peaceful setlement of international disputes. In this new international environment the above-mentioned reservations do not have the same weight. *Commission 4* should, therefore, go ahead with its work in order soon to be in a position to submit to the Institute the draft resolution you have under preparation.

I. *The régime of "non-appearance"* (Part One)

2. Most of your developments in this Part of the report are particularly brilliant and, except for me on one point, absolutely convincing. The only point with which I am in disagreement concerns your conclusion that "non-appearance" is under the Statute of the Court "lawful" and that it should be so recognized by the Institute. My observations on Part One of the report will be, therefore, addressed mainly to that issue.

3. Commission 4 should be most careful in endorsing a suggestion which could be easily misconstrued, whatever caveats might be attached to it, to the detriment of the regularity expected in proceedings before the International Court of Justice. I do not see either the need for the Institute to recognize "non-appearance" as "lawful". Furthermore, I consider it dangerous for "judicial settlement".

4. Even without such recognition from a prestigious institution like the Institute, certain States have used and abused the "non-appearance" régime of the Statute, as the report has not failed to record. One can well imagine possible future situations if "non-appearance" were to be flatly recognized as "lawful". It would be viewed by some as amounting to "condoning" non-appearance conduct, weakening the "regrets", however mild, expressed by the Court in its judgments, over "non-appearance". Moreover, this would have

been done by the Institute precisely when the Court, in its last relevant Judgment, has begun to show a "sterner attitude" — compatible with its Statute — towards "non-appearance". The "regrets" expressed by the Court would not be justified by reason only of the "inconveniences" resulting from the "non-appearance". There is, in my opinion, much more to it. Likewise, it should not be forgotten that under international law in general and international procedures in particular, "regrets" could be much more than a mere expression of moral reprobation. I certainly do not need to stress that "reprobation" or "denunciation" are in international law accepted forms of legally sanctioning State conduct.

5. In connection with the matter under consideration, I missed in the report a deeper analysis of the 1986 Judgment on *Military and Paramilitary Activities in and against Nicaragua (Merits)*, which is very pertinent for the study of "non-appearance" under the Court's Statute and also the last jurisprudential development on the matter. The Court itself has qualified the relevant passages of the Judgment as "guiding principles".

⁂

6. Let us now come to the substance of the issue. Can the opening words of Article 53 of the Court's Statute be construed as a recognition of the "lawfulness" of "non-appearance"? I fail to see how such an interpretation would be possible. For me these words are intended exclusively to determine a "fact", the fact of the "non-appearance" as a material condition whose realization would attract the operation of the "non-appearance" régime set forth in the Statute. This is normal technique in domestic legislation as well as in treaty law formulations. Moreover, nothing in the *travaux préparatoires* of the Statute or in the jurisprudence of the Court would contradict such an interpretation of the opening words in paragraph 1 of Article 53 of the Statute. It follows that it is not possible for me to conclude, because of these words, *that Article 53* recognizes a "right" not to appear. Admittedly, this is not in itself a decisive factor for concluding that "non-appearance" is "unlawful". It is, however, a point of considerable importance in connection with your argument in favour of the "lawfulness" of "non-appearance" based upon the "wording and logic" of Article 53 of the Statute.

7. It is true that Article 53 of the Statute does not entitle *the Court* to "punish" the non-appearing State on the grounds of its non-appearing conduct. It is likewise true that such a "punishment" by the Court is alien to the intention which emerges from the *travaux* and to the Court's own relevant jurisprudence. But one should not lose sight of what we are talking about when stating *that Article 53* does not "punish" the non-appearing State.

8. There is no question under Article 53 of a judgment of the Court in which the non-appearance *per se* could be the ground, or background, of judicial findings detrimental to the non-appearing State which otherwise the Court

would not have reached. " Non-appearance " is not supposed to play such a role by the exclusive operation of Article 53 of the Statute in the judicial determination that the Court may be called to take as to jurisdiction and/or merits. Under the Statute, it is not an element to be weighed by the Court in the process of " satisfying itself " as provided in paragraph 2 of Article 53. When applying the régime of the Statute, the Court must " satisfy itself " judicially of its own jurisdiction and of the merits of the claim of the active State without paying attention *for that purpose* to the non-appearance of the other State. Furthermore, in doing so it must act on the basis of the principle of the " equality of the parties to the dispute " and its procedural corollary : the " equality of arms " principle.

9. With all the above we are in agreement, but we disagree with the conclusion in the report on the " lawfulness " of " non-appearance " because it fails to appraise, as it should, the legal consequences attached *by the Statute itself*, including Article 53, to " non-appearing " conduct. The Court when applying the Statute must act as provided for in paragraph 2 of Article 53, but the legal consequences of " non-appearance " resulting from the provision in paragraph 1 of Article 53 are inescapable for the non-appearing State. The first consequence of " non-appearance ", under paragraph 1 of Article 53, is that it gives rise to a " procedural right " of the appearing State, namely the right to call upon the Court " to decide in favour of its claim ". The Court has to consider, if so requested by the appearing State, the claim as reflected in the latter's submissions as well as to consider whether it should " decide in favour " of these submissions.

10. In other words, the appearing State sets forth the parameters within which, or in respect to which, the Court will take its judicial decision or decisions. And this the Court must do without the points made by the active State in its submissions being fully argued by both States, as is normally the case. In addition, as your report rightly explains, the State which decides not to appear " must accept " or " suffer " other far-reaching legal procedural consequences resulting from the very wording of paragraph 1 of Article 53, namely : *(i)* that proceedings in the case will continue without its participation ; *(ii)* that it will remain a " party " to the case notwithstanding its " non-appearance " ; *(iii)* that it will be bound in exactly the same terms as the appearing State by any judgment or judgments of the Court on the case both with respect to jurisdiction or as to the merits. Certainly, these are not minor legal procedural consequences. Judging by the attitudes adopted by certain non-appearing States, it is difficult to see them as advantageous to the latter.

11. Admittedly, Article 53 does not " expressly " qualify " non-appearance " as " unlawful ". This is not the object and purpose of the provisions in Article 53. These provisions, through the " non-appearance " régime established by them, draw legal procedural consequences from the fact of " non-appearing " without entering to qualify the " non-appearance " as lawful or unlawful.

But, the said legal procedural consequences set forth, or deriving from, Article 53 cannot be put aside when discussing the " lawfulness " or " unlawfulness " of " non-appearance " under the Statute of the Court. In any case, the " non-appearance " régime of the Statute of the Court does not imply because of its mere existence the " lawfulness " of " non-appearance " conduct. The " non-appearance " régime of the Statute of the Court does not imply because of its mere existence the " lawfulness " of " non-appearance " conduct. The " non-appearance " régime of Article 53 is quite compatible with a conclusion that " non-appearance " conduct would de " unlawful " under the Statute. An amendment to the Statute with the effect of declaring non-appearance conduct " unlawful " could well be adopted without at all amending the present Article 53. This Article would be a useful provision even if the Statute declared non-appearance " unlawful ", because factual situations of non-appearance might always arise independently of such a declaration, and the Court must be in a position to cope with them.

12. It must be clear that, in my view, Article 53 does not empower the Court to sanction " non-appearance " conduct by adopting a " default judgment " or any other kind of " punitive judgment ", in the sense of a judgment different in content from that which would otherwise be given by the Court on the case. I have no difficulties with that in the light of the wording of Article 53, its *travaux* and subsequent relevant practice. But even without such elements of evidence at hand, I would be more than reluctant to conclude that such a form of sanction would be possible at the judicial law level of the Statute. International law is not domestic law and still less criminal domestic law. Punitive sanctions are allowed under international law, including conventional international law, only on sparse occasions even within the institution of the " international responsibility of States ", and we are here in the realm of " international judicial law " ! But this does not at all mean that international law in general, or international judicial law in particular, might not have other means of sanctioning conduct contrary to the normal expectations or requirements of its principles or rules. One of this forms — very much akin to rements of its principles or rules. One of these forms — very much akin to paragraph 1 of Article 53 of the Statute of the International Court of Justice.

13. It is, however, a merely procedural form of sanction, albeit of fundamental importance for " judicial settlement ", and one which is not supposed by the Statute to overstep into the application by the Court of paragraph 2 of Article 53. The " non-appearance " régime of the Statute of the Court is, in this respect, " self-contained " both in the identification of the legal procedural consequences it entails and in the definition of its limits. No transgression of such limits is allowed to the Court itself on the basis of the Statute, but the statutory régime on " non-appearance " entails *ipso jure* procedural effects for the non-appearing State amounting to a procedural form of sanction. The non-appearing State, independently of its will, " suffers " the procedural legal consequences established or derived from that régime. One may call this a

" sanction " or otherwise, but one thing is clear : from the standpoint of the Statute, " non-appearance " creates a " new procedural relationship " between the parties to the case whose consequences *at that level* have not been conceived in the interest or for the benefit of the non-appearing State. It is for that reason that I *do* consider " appearance " as being, under the judicial or procedural law of the Statute of the Court, something more than a mere " moral obligation " or " social duty ".

14. Today, the procedural consequences for the non-appearing State of the conduct it has chosen might be viewed as something *qui va de soi*. But this would be a mirage. At the time of the elaboration in 1920 of the Court's Statute, the only generally accepted means of judicial settlement of international disputes was " arbitration ", which, as is recognized in your report, requires, in order to reach a final and binding settlement, the active cooperation, at the various stages, of both parties to the cases with the arbitrator or arbitral tribunal.

15. If one looks at the " non-appearance " régime of Article 53 of the Statute of the Court bearing in mind such a historical background and the fact that " appearance " is the normal conduct expected under the conventional law of the Statute by the parties to it, it is difficult to conclude, to say the least, that the Statute of the Court is even " neutral " so far as " non-appearance " is concerned. Certainly, State parties to the Statute have " freedom to choose " in this as in any other context, otherwise they would not be responsible for their conduct. But this cannot mean that the conduct adopted in the exercise of that " freedom to choose " could not be " unlawful " or questionable with reference to a given system of legal principles and rules. I say that in order to underline, as from now, that even the milder terminology used later on in the report (" legal liberty " instead of " right ") is not acceptable to me, on the basis of the reasoning made in the report.

16. Having considered the issue on the basis of the wording of Article 53 and the logic of the system, the report asks, and rightly so, whether a different conclusion (namely the " lawfulness " of " non-appearance ") could be drawn from sources other than Article 53 and the Court's Statute as a whole. Concerning the United Nations Charter, I do not see the point in beginning to ask whether there is an obligation for Member States under the United Nations Charter which could eventually affect the conclusion of the report that " non-appearance " is " lawful " under the Court's Statute and then, without excluding altogether the existence of such an obligation, in concluding that it does not matter at all because of the content of the very régime of " non-appearance " of the Statute. The logic behind the argument implies that even in the hypothesis that the Charter had stated with plain words that Member States and Parties to the Statute have a " duty " to appear or defend themselves before the International Court of Justice, such a Charter obligation would be nullified by Article 53 of the Statute of the Court. Non-appearing conduct in

proceedings before the Court would be, even in that hypothesis, " lawful " conduct ! I cannot follow that line of argument. For me, the judicial or procedural law of the Court's Statute must be interpreted in the light of substantive United Nations Charter obligations and not the other way round, and particularly so because the Court's Statute is an integral part of the Charter.

17. Regarding the possible incidence on the qualification of " non-appearance " of the instruments (other than the Statute of the Court and the United Nations Charter) upon which " the substantive jurisdiction of the Court is founded ", the report begins by recognizing that " more might theoretically be drawn " from it, only to add immediately after " that even if a strict obligation *to appear* were formulated in any one such instrument, there would still be Article 53 of the Statute ". This is in effect the same argument as the one advanced in connection with the United Nations Charter. I cannot accept it in this context either. The provisions of Article 53 are not necessarily supposed to be interpreted as a denial of *pacta sunt servanda* or of the expectations of the parties resulting from the *pacta*.

18. Independently of any qualification of " non-appearance " conduct in the Court's Statute, I believe that such conduct may constitute a breach of the instruments concerned if it contradicts a commitment to the contrary contained in these instruments. I believe also that the question of such an eventual breach is susceptible of adjudication by the Court notwithstanding Article 53 of the Statute if such a " non-appearance " conduct becomes part and parcel of the " claim " made by the active State. Up to the present, active States have not made submissions to the Court on the " non-appearance " conduct itself as part of their " claims " based upon a particular clause of a conventional instrument. There is therefore no jurisprudence of the Court on the matter. It is also worth recalling that the Court is empowered by Article 64 of the Statute to decide on the costs of the proceedings and that this power is general, i.e. independent of the operation *in casu* of the " non-appearance " regime of the Statute. Some hints in that direction may be found in pleadings and oral arguments of some of the active States concerned in " non-appearance " cases.

19. The considerations made in the preceding paragraphs show, in any case, that before qualifying " non-appearance " as " lawful " one must at least raise the questions : " lawful " with respect to what ? The system of the Court's Statute ? the United Nations Charter ? The instruments providing for the Court's substantive jurisdiction ? To all these queries other questions may be added, as, for example : With respect to the substantive law to be applied by the Court in the case ? With respect to the phase of the proceedings in which " non-appearance " occurred ? As the *Fisheries Jurisdiction* cases demonstrates, jurisdictional clauses and other commitments contained in an international agreement may be so interwoven that the " non-appearance " of

a party to the agreement, with the corresponding lack of co-operation in the Court's proceedings, might be viewed by the other party to the agreement as unbalancing its own commitments under the agreement concerned. It should also be recalled that "non-appearance" situations may occur at any moment and/or phase of the proceedings, even after a previous binding judgment of the Court with *res judicata* force. All this points to the necessity of Commission 4 exercising caution before recommending to the Institute the adoption of a general and unqualified statement declaring "non-appearance" before the Court to be "lawful".

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20. Does the proposition of the "lawfulness" of "non-appearance" find some support on *the conduct of States parties to the Statute* taken as a whole? A review of the "non-appearance" cases in both Courts reveals that in a first move, the non-appearing States tried to explain their attitude by reference to the "impossibility" of appearing. They asserted an "impossibility" supervening as a result of *force majeure* or determinant legal circumstances (national laws, shortness of time-limits). In so doing, the States concerned recognized indirectly that there was an obligation or some kind of duty "to appear", non-compliance with which being *in casu* attributable to the circumstances alleged. In a second move, non-appearing States explained their conduct by invoking a manifest lack of jurisdiction of the Court *in casu* or the inadmissibility of the claim of the active State on several grounds, including "vital interest" and other doctrines or assertions. But they always did this by reference to the particular case and always accompanying "non-appearance" by an official and/or *extra ordinem* justification. The fact that they felt that an *ad hoc* justification was needed is extremely revealing as to the perception by State parties to the Statute of the Court of some kind of duty to appear in cases before the International Court of Justice. In any case, we have here a conduct which it is not possible to ignore in discussing the "lawfulness" or otherwise of "non-appearance" under the Court's Statute. To my eyes, that conduct negates any general conclusion that under the Statute "non-appearance" is "lawful". Not a single State has stated that its "non-appearance" is the mere exercise of a subjective "right" of its own or of its "legal liberty" to choose to appear or not to appear. Neither is it possible, in the interpretation of the "lawfulness" or otherwise of "non-appearance" under the Court's Statute, to ignore the views and assertions of the active parties to the cases concerned and even of third States. In the light of the described conduct of States, I would consider the proposed recognition by the Institute of the "lawfulness" of "non-appearance" as a proposal *de lege ferenda* and one whose merits I do not recognize.

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21. Three final observations concerning questions referred to in the report in the context of the demonstration of the "lawfulness" of "non-appearance". Firstly, Article 53 does not provide one "non-appearance" régime for cases instituted by a unilateral application and another for cases instituted by the notification of a special agreement. The possibility that "non-appearance" situations may also occur in proceedings or phases of proceedings instituted by the notification of a special agreement cannot be altogether excluded. Practice has already provided an example of "non-appearance" in a phase of a case in which the jurisdiction exercised by the Court was based upon a special agreement duly notified. I am referring of course to the *Corfu Channel* case, namely to the initial case in the study made in the report. The notification of a special agreement (compromis) is not a guarantee of "appearance" of both parties to the case. It is, therefore, more than questionable to argue about the "lawfulness" or "unlawfulness" of non-appearing conduct on the assumption that that conduct is susceptible of arising only in the context of "compulsory jurisdiction" cases.

22. It follows from the above that the conclusion in *paragraph 23* of the report must be revised *even if* Commission 4 is ready to endorse the conclusion that "non-appearance" is "lawful". The "legal liberty" recognized in the conclusion *by virtue of Article 53 of the Statute* cannot be limited, if the premise is correct, to situations in which a State is summoned before the Court by the unilateral application of another State. If a majority of Commission 4 is in agreement about the "legality" or "legal liberty" of "non-appearance" under the Statute of the Court, it must of necessity, to be consistent, endorse such a conclusion also for "non-appearance" situations in contentious proceedings instituted by the notification of a special agreement. In this connection, it is not without relevance to point out that in the case of certain incidental or derivative proceedings, the Rules of the Court leave in the hands of the Parties the alternative of instituting the corresponding proceedings either by a unilateral application or by the notification of a special agreement. In those hypotheses, it seems to me unthinkable to leave the suggested "legality" or "legal liberty" of "non-appearance" at the mercy of the way in which proceedings were instituted.

23. Secondly, it is also stated in the report that the provisions in Article 53 of the Court's Statute defining how the Court should proceed in "non-appearance" situations exclude "any detrimental consequences of failure to 'appear or defend' other than those deriving from the mere fact of not taking full part in the proceedings". Without denying the particle of truth contained in that statement, I think that it requires some comment in order to avoid possible misunderstandings. In so far as the "detrimental consequences" referred to relate to the duty of the Court to "satisfy itself" as to its jurisdiction in the case and as to the claim of the active party being well founded in fact and law, I have no problems with the statement. There is no question, as already indicated, of a default or punitive judgment on

jurisdiction and/or on the merits by reason of "non-appearance" as such. But the "non-appearance" régime operates under the control of the Court, which has also the power of directing the proceedings. In its exercise of such control and power, the Court may take into account the fact of "non-appearing". Thus "non-appearance" may, in that sense, quite independently of the question of qualifying it as "lawful" or otherwise under the Statute, have consequences detrimental to the "non-appearing" party *in addition* to those "deriving from the mere fact of not taking full part in proceedings".

24. For example, when applying the "non-appearance" régime of the Statute, the Court retains its normal freedom to select the grounds upon which it will base its judgment and it is under no obligation to examine all considerations and arguments advanced by the active party in favour of its "claim" if other considerations and arguments appear to the Court to be sufficient for that purpose. *The same applies conversely to the consideration of "potential" counter-arguments of the absent party.* The Court always tries, with or without communications of *extra-ordinem* information emanating from the non-appearing State, to figure out possible objections to the considerations and arguments on fact and law made by the appearing State. But this is done by the Court within responsible judicial limits. The Court's jurisprudence in this respect was already formulated in the *Corfu Channel case* (*I.C.J. Report 1949*, p. 248). This has also been the guiding principle followed by the Court in subsequent cases of "non-appearance". This, coupled with the fact that the condition that the claim of the active party should be "*supported by substantial evidence*" was dropped from Article 53 by the authors of the Statute, could have adverse effects for the non-appearing State under the Statute going beyond those deriving from the mere fact of not taking full part in proceedings. Several other examples could also be mentioned.

25. Lastly, it is perfectly legal under the Statute to file objections to the jurisdiction of the Court or to the admissibility of an application, but it is wrong to conclude from that fact that the Statute envisages "non-appearance" as a regular form of making those objections. The two questions should not be confused. In practice, however, States have sometimes tried to develop allegations combining both issues and the Court has had, in some instances, to face these two different issues more or less simultaneously. This should not be allowed to derogate what is said in the Statute and Rules of Court with respect to "preliminary objections" and with respect to "non-appearance". It further follows that it is not possible to conclude without further ado from the legality of objections to jurisdiction and/or admissibility that "non-appearance" is "lawful" under the Court's Statute.

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26. I am *generally* in agreement with the spirit of the passages devoted in the report to the question of the *stage of the Court's proceedings at which Article 53 may come into play* in order to regulate the duties of the Court and the respective positions of the parties to the case. There is no doubt that Article 53 was conceived and drafted bearing in mind "*merits proceedings*" in a "*single phase*". Since then, however, the procedure by phases has been amply developed by the Court in its Rules, as well as in its practice. Even submissions relating to the merits of the "claim" may be the object of separate phases. The question of the determination of the form and amount of reparation due is, for example, normally left by the Court to a phase subsequent to the main merits phase *(Corfu Channel, Military and Paramilitary Activities in and against Nicaragua).* Article 53 applies without exception to every possible separate phase on the merits.

27. I am also in agreement with your conclusion that Article 53 applies likewise to "jurisdictional" questions, whether or not they are considered by the Court in a phase separated from the merits phase, including "*admissibility* issues". This results from the very wording and logic of Article 53 itself and is fully supported by the jurisprudence of the Court. The "non-appearance" régime of Article 53 of the Statute is an autonomous and single régime which entails, as one of its elements, that before deciding on the claim of the active party the Court "must satisfy itself" that it has jurisdiction to deal with the case. This means that *independently of the existence of a dispute* as to jurisdiction and admissibility between the appearing State and the non-appearing State, or of the filing by the latter of a "preliminary objection" in due form, the Court must *motu proprio* ascertain its jurisdiction in the case and the admissibility of the claim. However, to do that the Court is *not* required by the "non-appearance" régime of Article 53 to open a separate phase on jurisdiction and admissibility, unless it would be in the presence of a "preliminary objection" emanating from the "non-appearant" party. Only when the Court is seised of a "preliminary objection" in accordance with Article 79 of the present Rules of Court must proceedings on the merits be suspended and a separate incidental jurisdictional/admissibility phase be opened, including in cases in which Article 53 applies because of a subsequent non-appearance of one of the States parties.

28. Notwithstanding the above, practice shows that, in most non-appearance cases, the Court *did* open a separate jurisdictional/admissibility phase even in the absence of a "preliminary objection" submitted in due form. Such an interlocutory decision cannot, however, be interpreted as derogating from the "non-appearance" régime of Article 53 of the Statute. If such régime applies to "jurisdictional" questions when they are considered together with the merits in a single phase, it must likewise apply when through a previous interlocutory decision "jurisdiction" is considered by the Court in a separate phase *prior* to the merits. The adaptation of Article 53 — the *grano salis* of the report — to a separate "jurisdictional/admissibility phase" is, on the other

hand, minimal. This conclusion should be understood without prejudice of the opinion I share that to suspend proceedings on the merits, a State should file a "preliminary objection", whether it is appearing or non-appearing. Otherwise proceedings under Article 53 of the Statute should be the object of a sole and single phase as, for example, in the *United States Diplomatic and Consular Staff* case. This point should be considered by Commission 4 in the context of the *conceivable remedies* dealt with in Part Two of the report.

29. The question of the application of Article 53 as such to *interim or provisional measures* proceedings is, for me, much less clear in law. It may also involve practical disadvantages harmful to the implementation of Article 41 of the Statute. I remain, however, open to your conclusion in the report and wait for further discussions in Commission 4 before reaching my own final conclusion. Here, the *grano salis* in the application of Article 53 is not minimal at all. It involves a considerable adaptation of the provisions in that Article. Almost every point must be adapted in the light of the nature and purpose of the provisional measures of Article 41 of the Statute as developed in the Rules of Court. The guiding principles for the indication of provisional measures by the Court are "necessity" and "urgency" and no reference is made in Article 41 to matters of jurisdiction or admissibility, the jurisprudence of the Court having elaborated the criterion of *prima facie* jurisdiction in the context. I am afraid that to bring Article 53 into the operation of Article 41 and its proceedings (even with adaptations) could make matters more rigid and formal to the detriment of the *finality* pursued by this incidental procedure. Circumstances may also vary from case to case. On the other hand, "non-appearance" situations may occur in provisional measures proceedings also (as practice proves) and the report is quite right to raise the issue.

30. Has the Court in such instances applied what the report calls "equivalent rules inherent in the system"? I think that, rather than "equivalent rules", the Court has elaborated *via* its own jurisprudence, an *ad hoc* "non-appearance" régime for provisional measures proceedings. The essential to cope with such situations is already there: the non-appearance of one of the States concerned cannot by itself constitute an obstacle to the indication of provisional or interim measures of protection (see, for example, *I.C.J. Reports 1976*, p. 6, para. 13). Is it convenient or necessary to go further into the elaboration of that régime? And, if so, by means other than the Court's jurisprudence? These, I think, are questions which need discussing in Commission 4 before reachwe a conclusion on the matter.

31. Another question that Commission 4 should examine is the applicability or otherwise of Article 53 to "non-appearance" situations in proceedings concerning "intervention", "interpretation of a judgment" of the Court and "revision of a judgment" of the Court. The report is silent on the matter. In addition, there is no relevant jurisprudence of the Court concerning "non-appearance" in such contentious proceedings. But the future is unforeseeable

and the issues deserve to be studied. "Non-appearance" should be considered in the context of each of those contentious proceedings, as well as with respect to their possible distinct phases. In principle, I would consider Article 53 applicable to proceedings on interpretation of a judgment and on revision of a judgment (both phases). As to intervention, I would also consider that Article 53 should apply to the phase concerning the granting of the application for permission to intervene or the admission of the declaration of intervention. However, if intervention is granted or admitted the subsequent "non-appearance" of the *intervening State* should not attract the Application of Article 53, unless that State has become a "party" to the main proceedings. It goes without saying that the "non-appearance" of a party to the main case attracts the application of Article 53, independently of the participation in the proceedings of an intervening State.

II. *Conceivable remedies to procedural difficulties in the light of the law of non-appearance* (Part Two)

32. I am very much in agreement with several of the conclusions reached in this part of the report, although not with all of them. Where I disagree, this is due, to a considerable extent, to our different interpretations of the "lawfulness" or "innocence" of "non-appearance" under the statute of the Court. The powers of the Court under Article 53 of the Statute are one thing, and the "lawfulness" or "innocence" of "non-appearance" with respect to the objective applicable law, judicial or substantive, is another. This, of course, also affects some of your reasoning, although I could agree with the relevant conclusion.

For example, I fully agree with you that the Court should not proceed *ex officio* to "condemn" "non-appearance" conduct with reference to the judicial law of the Statute, because, under the Statute, the Court does not have a power, but not because, under the Statute, "non-appearance" is not, or could not be, a violation of an international obligation.

33. In any case, "as a matter of law", you do not see a "serious obstacle" to the expression of "regrets" by the Court, or Court statements on the statutory law of "non-appearance" (i.e. to declare that a non-appearing State is a "party" to the case). This is a point of convergence even if you consider it to be "perhaps superfluous". I do not consider it superfluous at all. But it is a difference of mere emphasis. For my part, the expression of "regrets" and the declaration of the essential legal consequences under the Statute of "non-appearance" are one of the main "remedies" which should be applied. I side therefore with the Court when in its 1986 Judgment on the *Nicaragua case*, after expressing its usual "regrets", it stated:

> "A State which decides not to appear must accept the consequences of its decision, the first of which is that the case will continue

without its participation; the State which has chosen not to appear, remains a party to the case, and is bound by the eventual judgment in accordance with Article 59 of the Statute. There is however no question of a judgment automatically in favour of the party appearing, since the Court is required... to 'satisfy itself' that that party's claim is well founded in fact and law.» (*I.C.J. Reports 1986*, p. 24, para. 28).

and that

"...the non-participation of a party in the proceedings at any stage of the case cannot, in any circumstances, affect the validity of its judgment. Nor does such validity depend upon the acceptance of that judgment by one party. The fact that a State purports to 'reserve its rights' in respect to a future decision of the Court, after the Court has determined that it has jurisdiction, is clearly of no effect on the validity of that decision. Under Article 36, paragraph 6, of its Statute, the Court has jurisdiction to determine any dispute as to its own jurisdiction, and its judgment on the matter, as on the merits, is final and binding on the parties under Articles 59 and 60 of the Statute" (*I.C.J. Reports 1986*, pp. 23-24, para. 27).

34. It is extremely important to recall the mention in a judgment of the Court of those "superfluous" things in the light of the analysis made in Part Three of the report on the question of "non-appearance" and the repudiation of the Court's statutory functions. It is clear that, under Article 53, the Court must always "satisfy itself" that it has jurisdiction in the case. As is likewise clear, the Court is empowered by Article 36, paragraph 6, of the Statute to determine its own jurisdiction in case of a dispute as to jurisdiction. This power of the Court, which the report describes as "inherent", also exists under "general international law" (*I.C.J. Reports 1953*, pp. 119-120). I do not understand, therefore, some of the views expressed in the context with respect to "non-appearance" situations. If one party affirms that jurisdiction is totally non-existent and the other maintains a contrary position, we are in the presence of a "dispute as to jurisdiction" that the Court is always empowered to decide, with or without the participation of both parties in the proceedings, the status of a "party" to a main case being a matter decided by the Statute and Rules of Court. That may be a matter of legitimate apprehension, and certain views and opinions have already received an answer in the 1978 Rules of Court (Art. 38, par. 5). It is not possible to invoke or apply the "non-appearance" régime of Article 53 when the claiming State recognizes that the other State has yet to give or manifest its consent to the Court's jurisdiction in the case. Nobody is entitled to extend or to dimnish the Court's jurisdiction, or the Court's power to decide as to its own jurisdiction, on account of a "non-appearance" situation. I am therefore in agreement with you that it is not possible to accept the suggestion of Sir Gerald Fitzmaurice that, in cases where *prima facie* jurisdiction *does* exist, the Court should inform the non-appearing State that unless it appears to show why jurisdiction should not be assumed, the Court will proceed to do so and will go on to hear and decide the merits. I agree likewise with your conclusions concerning interim measures and *forum prorogatum*.

35. On the other hand, on the question of joining preliminary issues (including jurisdictional and admissibility issues) to the merits in non-appearance cases, I disagree with your conclusion. I think that Sir Gerald Fitzmaurice was right on this suggestion . It is the practice of the Court which is of doubtful conformity with Article 53 of the Statute, to the detriment of the appearing State. Moreover, such practice is by definition subject to *in limine* interpretations of the contents and purposes of mere communications or *extra ordinem* conduct of the non-appearing State, with the result that derogations therefrom, which may be viewed by some as excessively subjective, are always possible. In any case, it would be better to be consistent and uniform in the procedure followed. Both the appearing State and the non-appearing State should know in advance the procedure to be expected from the Court in case of the existence of "preliminary issues". It should be understood, of course, that to follow Sir Gerald's suggestion does not mean at all that the Court must not "satisfy itself" that it has jurisdiction to entertain the case. I recognize that, if I do not have here the same difficulties as you, this is because of our respective positions of principle on the issue of the "lawfulness" of "non-appearance".

36. With respect to the attitude that the Court should take concerning irregular or *extra ordinem* procedures and communications of the non-appearing State, my position corresponds to the one reflected in paragraphs 30 and 31 of the 1986 Judgment of the Court in the *Nicaragua case* (*I.C.J. Reports 1986*, pp. 25-26). The balance to be "struck" is reflected there, including the difficulties of "rigid definition in the form of a precise general rule" (*ibid.*, p. 26). It it because of that that I am unable to accept the relevant suggestions of, on one hand, Sir Gerald Fitzmaurice and, on the other hand, Briggs. Let us try, in Commssion 4, to find a flexible and open formula to cope with this matter.

37. Finally, I am fully in agreement with the suggestion of Sir Ian Sinclair to the effect that the Court should play a more active role in acquiring information in "non-appearance" cases. The specific "remedies" suggested are acceptable to me. Others could also be identified and added to the list, particularly with respect to questions of "fact". This should, of course, be done bearing in mind the interests of all concerned and the fairness which must always preside over proceedings before the International Court of Justice. Article 64 of the Statute of the Court should not be ignored by any inquiry by Commission 4 into this question.

III. *Non-appearance and the repudiation of the Court's statutory functions* (Part Three)

38. International relations have just gone through a period in which (notwithstanding the codification of the law of treaties) the very concept of "international *legal* obligation» has been questioned, in general as well as *in concreto,* by invoking a kind of nebulous and undefined relativism. The statutory functions and powers of the International Court of Justice, even though the Statute is an integral part of the United Nations Charter, have not remained immune to such an attitude. The erosion of the dividing line between having consented and not having consented to has affected the behaviour of States vis-à-vis the Court. Thus when the Court has had occasion to declare the law in a particular case in the exercise of its functions and powers, as previously agreed upon by States via the Statute, some have reacted with surprise if not with indignation. Although apparently addressed to the manner in which the Court had exercised its functions and powers, those manifestations had in fact policy purposes going beyond the Court's activities, as well as philosophical or ideological roots deeper than openly recognized.

39. One of the greatest merits of your report, in my view, is the separate treatment reserved to those *attitudes of challenge to the Court's statutory functions and powers* exhibited by certain non-appearing States. These should not be confused with the question of the "non-appearance" régime of the Statute. The report has avoided such a confusion. Thus the various issues are presented in their right perspective and in the context to which they belong. In this respect, the disadvantage inherent in having adopted the "thinking elicited" by the *Fisheries Jurisdiction* and successive instances of "non-appearance" has not materialized. The questions considered in this part of the report, as in Part Four, constitute a "set of problems" different from those examined in Parts One and Two. I fully agree with that conclusion of yours. It cannot but facilitate the work on the topic of Commission 4 and, ultimately, of the Institute.

40. The *in limine litis* procedural situation in the cases under review involved, on the one hand, the assertion of the active State that the Court has jurisdiction in the case under certain titles exhibited and, on the other hand, the assertion of the other State denying the reality, legal validity or scope of these titles of jurisdiction. It confronted the Court with typical disputes falling under Article 36, paragraph 6, of the Statute. Since the unilateral jurisdictional/admissibility arguments of a sovereign State party to the Statute do not have more weight *a priori* than the contrary unilateral arguments of another sovereign State, a party also to the Statute, the Court has no alternative but to decide that dispute by a judicial decision after hearing the parties in the regular way if they appear, or as provided for in Article 53 of the Statute in "non-appearance" situations. For those aware of the previous jurisprudence of the Court (i.e., *Anglo-Iranian Oil Co.* case) there will be no surprise in the way in which the Court proceeded in the cases concerned regarding *in limine litis* requests or provisional measures of protection. In none of these cases has the *in limine* situation fallen under the hypothesis envisaged by Article 38, paragraph 5, of the 1978 Rules of Court.

41. The study of the cases in question reveals that the various jurisdictional issues at stake were the kind of issues normally decided by the Court pursuant to Article 36, paragraph 6, of the Statute: interpretation and applicability to the case of compromissory clauses in treaties, present validity of a particular convention providing for judicial settlement, possible termination of a bilateral agreement providing for judicial settlement, meaning and effects of reservations in instruments of ratification or acceptance of multilateral treaties, questions concerning the operation of the optional clause system of Article 36, paragraph 2, of the Statute, legal validity of declarations made under Article 36, paragraph 2 of the Statute of the Permanent Court, scope and effects of reservations in declarations accepting the optional clause system, etc. The same applies to the several admissibility issues considered by the Court in the cases concerned: existence of an international dispute, nature and character of the dispute, lack of previous negotiations, negotiations parallel to the application for judicial settlement, competence of other international organs or organisations, interests of third States, etc. If anything might be regarded as excessive in the light of previous jurisprudence, it is the special care and meticulous manner with which, in the cases under review, the Court approached, generally speaking, all questions relating in one way or another to the consensual principle on which its jurisdiction is based upon under the Statute.

42. In the past, and with the exception of the *Corfu Channel* case, an initial "non-appearance" became "appearance" following the adoption by the Court of judgments on jurisdictional questions or of orders concerning the *in limine* indications of provisional measures of protection. The *Nottebohm* case and the *Anglo-Iranian Oil Co.* are well-known examples of that conduct. In the "non-appearance" cases of the 1970's and 1980's that pattern of conduct changed. In most of those cases the respondent States adopted a "non-appearance" conduct all through the procedure. They abstained from participating in each and every one of the various phases of the case, alleging certain justifications and, in particular, the concept of a "*manifest lack of jurisdiction*" of the Court. In one case, the respondent State participated in proceedings relating to *in limine* indication of provisional measures, as well as in a separate jurisdictional/admissibility phase, "withdrawing" from the case specifically after the Court had established its jurisdiction therein by a judgment. Such a withdrawal was accompanied by the assertion that the Court had "erred" in fact and law. It was the change in the attitude of non-appearing States in the 1970's and 1980's, which contrasts with the previous one indicated, that prompted the "high degree of interest" attracted by "non-appearance" during the last two decades, as is so well noted in your report, and gave to those "non-appearance" cases an identity of their own.

43. It was only natural for the States concerned that, in order to justify their attitude, they introduced, irrelevantly, questions concerning the interpretation and application of the Statute of the Court, including questions concerning the operation of the "non-appearance" régime of the Statute. But the attitudes discussed had in fact little to do with Article 53, or with the interpretation of any other statutory rule of the Statute. They amounted to a denial of the statutory "non-appearance" régime. Article 53 should be listed, therefore, among the casualties of the attitudes of challenge commented upon here. To bestow a legal blessing on those attitudes would mean unduly curtailing the factual situations in which the Court is intended to and must apply Article 53 of the Statute. But the Statute does not allow the Court to apply Article 53 to certain "non-appearance" situations to the exclusion of others. If there was any legal ground for the contrary proposition, then the non-appearing States concerned should have provided an appropriate and convincing legal demonstration. Nothing of the kind was done. Mere assertions are not enough in the face of overwhelming legal evidence to the contrary.

44. The non-appearing States which alleged a "*manifest lack of jurisdiction*" of the Court to entertain the case asked the Court to remove the case from the General List, without further *judicial discussion*. Article 36, paragraph 6, of the Statute, does not empower the Court to proceed as requested by those States in the presence of a "dispute" as to jurisdiction. Nothing in the Statute, the *travaux préparatoires* or subsequent practice provides even minimum support for the Court to be in a position to comply with those kind of requests. When the provision in paragraph 6 of Article 36 of the Statute was incorporated into the Article at the end of the work of the Third Commission of the Assembly of the League, it was expressly agreed that the meaning of that provision was that: "*The Court would in all cases decide as to its own competence*" (League of Nations, *Documents concerning the action taken by the Council...*, p. 110). If words have a meaning, this should be crystal clear for all. The San Francisco Conference did not negate what was agreed in this respect in 1920. Neither are doubts possible in the light of the relevant jurisprudence of the Court (i.e. *Nottebohm* case (*Preliminary Objection*)). A dispute on a "manifest lack of jurisdiction" *in casu* is, under the Statute, a dispute "as to jurisdiction" falling under Article 36, paragraph 6.

45. A "withdrawal" from the case, alleging an "error" in law and fact, after having participated in the corresponding jurisdiction phase, is not admitted either by the Statute of the Court. In addition, it would imply, as the Court has not failed to recall, that the Court had jurisdiction in the case only to declare that it lacked jurisdiction (*I.C.J. Reports 1986*, p. 23, para. 27). "Withdrawal" and "error" certainly play a role in connection with the invalidity or termination of treaty obligations — but, as codified in the 1969 Vienna Convention on the Law of Treaties, they are subject, in order to produce the intended effect in international law, to certain "international procedures". Unilateral assertions or conduct of an interested State do not entail such a

legal effect. The "non-appearance" régime of the Statute of the Court is not a means for terminating treaty obligations, including obligations assumed under the Statute of the Court. One could in theory admit that a State could withdraw from the Statute of the Court by withdrawing from the United Nations Charter (although the Charter contains no provision on "withdrawal"), but a State cannot withdraw from a pending case before the Court instituted while it is a party to the Statute. As to the "error in law and fact" thesis, the procedural law of the Statute allows a revision of a judgment of the Court under the conditions and subject to the procedures provided for in Article 61 of the Statute.

46. There is no doubt that, in most of the cases under review, "non-appearance", and concomitant or subsequent additional attitudes of challenge to the Court's statutory functions and powers, was also very much linked to *in limine* requests made by the active States for the indication by the Court of *provisional measures* of protection. The "manifest lack of jurisdiction" thesis probably had the policy purpose of preventing the Court from granting the measures requested or other measures of that kind. But Article 41 is part and parcel of the Statute of the Court and interim measures may be requested and/or granted at any time. On the other hand, the Court was also careful in the treatment given to the corresponding requests of the active States, proceeding without undue haste (*Trial of Pakistani Prisoners of War*) or declining sometimes to grant any provisional measures (*Aegean Sea Continental Shelf*). The Court in no case indicated such measures *motu proprio* and did indicate them on request only when the actions or conduct alleged were actually proceeding and might impair the respective rights of the parties to the cases, which Article 41 of the Statute exists to protect. Several of the measures indicated were addressed to both the active State and the non-appearing State. Study of the cases under review shows likewise that the Court proceeded in the matter more cautiously than on certain previous occasions (e.g. *Anglo-Iranian Oil Co.*). In any case, the possibility that provisional measures may be indicated by the Court under the Statute forms part of the "judicial game" before the Court — to use an expression of your report — and Article 53 of the Statute does not provide that the Court should exercise its provisional measures power differently because one State has chosen to be a "non-appearing" State.

47. In some of the cases concerned, the non-appearing States threw "*vital interests*" or similar doctrines into the arena, making in this respect various allegations: interests of the population, national defense, independence, sovereignty, security, national revolution, previous grievances of the applicant, existence of an on-going armed conflict, collective self-defence, etc. These allegations were intended to bring into question not only jurisdiction or admissibility but the very existence of an international dispute, its legal character or its "justiciability" as alleged by the active State. Under the Statute of the Court, the procedural rights of the States parties are not, however, subject to

any overall implicit reservation of "vital interests" or of any other kind of interests. The Statute of the Court is not similar in this respect to other international instruments, including The Hague Conventions of 1899 and 1907. There is no legal ground in the Statute of the Court on the basis of which a non-appearing State may claim that the application of the "non-appearance" régime of Article 53 should be modified by the Court because of its particular motives for not appearing. In any case, the Court could only affect such a modification, if at all, by a judicial decision and through due process. Administrative removals from the General List are unthinkable when allegations of such a calibre are on the table. And it is likewise unthinkable that, by such an allegation of "vital interests", a non-appearing State, or any other State, should be able unilaterally to shake off the condition of being a "party" to the case concerned.

48. Finally, it must be stressed that in the cases concerned the substantive legal issues were indisputably issues of public international law. In no case did the issues in dispute relate to matters essentially within the "domestic jurisdiction" of the State.

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49. The attitude adopted by certain non-appearing States, in the cases concerned of challenging some of the Court's statutory functions and powers finds no support in the "non-appearance" régime embodied in the Statute of the Court. It finds no objective legal justification in that régime or in the way the Court applied it *in casu*. No factual situation of "non-appearance" may modify the contents and *modus operandi* of the "non-appearance" law that the Statute of the Court has precisely established with the object and purpose of coping with "non-appearance" situations. I cannot, therefore, but *fully agree* with your conclusion in the report that such attitudes consist of or constitute a message aiming at "*contracting out*" of the Statute for the particualr case. This alleged institution is not, however, contemplated in the Statute of the International Court of Justice.

50. The attitudes here commented upon, as your report demonstrates, contest *la compétence de la compétence* of the Court (Art. 36, para. 6 of the Statute), so as to negate later on the binding and final force of the Court's judgments on jurisdiction/admissibility and on merits (Arts. 59 and 60). But this is not all. They also in sole instances negate the procedural right of bringing cases before the Court by a unilateral application (Art. 40) and the operation in certain hypotheses of the "non-appearance" régime itself (art. 53). They ignore the procedures of the Statute enabling an interpretation or revision of a judgment to be requested (Arts. 60 and 61) and put in question the capacity or ability of the Court to decide the disputes submitted to it in accordance with international law (Art. 38). In their most extreme manifestations, the discussed attitudes cast doubt on the impartiality of Members of the Court and of the Court electorate in the performance of their respective

functions (namely, on the most important provisions of the entire Chapter I of the Statute). Lastly, these attitudes put aside the Rules of procedure enacted by the Court (Art. 30 of the Statute) and, in particular, the rules on instituting proceedings, on preliminary objections, on the possibility of submitting counter-claims, and on discontinuance.

51. In the light of the above, I cannot but share with you the conclusion in the report that "*silence*" on the part of the Institute on that challenge by certain States (contradicted sometimes by their attitudes in other cases in which they acted as applicants) would be detrimental to the cause of the peaceful settlement of international disputes in general and to international adjudication in particular. The arguments advanced by such States lack any foundation under the objective law represented by the Statute of the Court. They were nevertheless made only a few years ago by States which are parties to the Statute, including in certain instances by States which were at that time participants in the optimal clause system of Article 36, paragraph 2, of the Statute. Commission 4 should, therefore, go ahead as proposed in *paragraph 26 of your report.*

52. I support, therefore, the proposal in paragraph 25 of the report to the effect that the Institute should solemnly call the attention of Governments to the necessity (I would say the "legal duty") that any State participating in the Statute of the Court fully comply — whether it apears and defends its case or not — with all the provisions of the Statute. The "solemn reminder" is to me *a minimum.* Commission 4 should discuss the appropriateness of supplementing it with additional statements in the draft resolution to be submitted to the Institute.

53. Your report dwells upon the issue of what it describes as the "constant *extra ordinem* protest" of certain non-appearing States and its possible effects on the Court's task. This involves certain, psychological, political and legal aspects. What is to be done here? I remain open to any proposal that you, or any other member of Commission 4, might have in this respect, but I must say that the position of principle adopted in the report on the "lawfulness" of "non-appearance", if adopted, would not be of help in seeking an appropriate answer, at the legal level, to the question of the "constant *extra ordinem* protest". The matter requires to be considered not only with respect to the relationship between the non-appearing State and the Court, but also, and probably mainly, from the standpoint of the relations between the non-appearing State and the appearing State. The Institute should not remain behind the 1981 Manila Declaration of the Peaceful Setlement of International Disputes (see Part II, paragraph 5 *in fine*, of the Declaration). Threc points, in my opinion, should be covered by the formulation adopted in this regard by Commission 4: *(i)* Article 53 of the Statute of the Court does not authorize a non-appearing State to adopt the conduct referred to; *(ii)* the Court should also in such circumstances proceed as provided in Article 53 in the deter-

mination of the procedural, jurisdictional and substantive rights of both the appearing State and the non-appearing State; *(iii)* the institution and continuance of proceedings before the Court by the active State is not, and cannot, be considered an unfriendly act vis-à-vis the non-appearing State, whatever the latter's views may be concerning the statutory functions and powers of the Court under its Statute.

54. Finally, I do not see the need, or even the advantage to Commission 4 when dealing with "non-appearance" situations, for going too deeply into "compulsory jurisdiction" and its problems. "Compulsory jurisdiction" is quite a topic in itself and not all its aspects can be tackled in a study on "non-appearance". There are several forms of "compulsory jurisdiction", and certain general principles, as for example "mutuality" and "reciprocity", do not operate necessarily in the same manner within each of them. Moreover, "non-appearance" as a "régime" is essentially a problem concerning principles and rules set forth in the Statute of the Court and not a problem relating to the contents and scope of assumed "compulsory jurisdiction" undertakings. For such reasons, I am much inclined to think that passages in the draft resolution concerning the Court's jurisdiction should be worded along the following lines: *(i)* to make reference to "jurisdiction" only and exclusively in so far as this may be required by the "non-appearance" law of the Statute; *(ii)* to distinguish between "jurisdiction on merits" and "statutory jurisdiction" only (including of course *la compétence de la compétence*), but without qualifying the first as "compulsory" or othwerwise.

IV. *The repudiation's motivations. Possible relevance thereof* (Part Four)

55. I agree with your conclusion that Commission 4 should *not* recommend that the Institute pronounce the *merits* of the legal and para-legal arguments advanced by certain non-appearing States in order to justify their conduct. Neither do I see the need for studying the "degree" of foundation of those arguments in the various hypotheses. My conclusion is based upon your "second reason". In no case are the alternative solutions defended by certain non-appearing States *de lege lata* a cause or ground for disregarding the relevant obligations under the Statute of the Court. I would change my mind, however, if our confrères in Commission 4 could convince me that study of the relevant cases shows *in toto* or in part that the said proposition is wrong. The "presumable difficulty" of achieving "a significant degree of consensus" is alien to my conclusion.

56. The legal parameters for appraising the attitudes of challenge adopted and manifested — through conduct, communications, statements or publications — by certain non-appearing States should be found by Commission 4 in the procedural law apposite to the relevant cases. This law, as reflected in the relevant provisions of the Statute and Rules of Court, does not incorporate

"subjective elements" in the definition and/or application of the principles and rules concerned. Consequently, I do not place myself at the "motivations" level; I do not repudiate "motivations". It is the actual conduct which matters for me. The very term "motivations" introduces "moral" and "political" factors on which I will refrain from passing any judgment. It is not the task of Commission 4 and, frankly, I do not have the elements of information required to make such moral or political pronouncements. Hence I do not exclude the possibility that at the political level there could exist explanations with a higher degree of credibility than those at the legal level. In any case, it is obvious that States which bring disputes before the Court and take an active part in the proceedings, are also politically motivated. But this is not the topic under discussion in Commission 4.

57. At the end of this part of the report, you raise the question of whether justifications alleged by non-appearing States (which in the past have challenged statutory functions and powers of the Court) would be nevertheless "worthy of any consideration *de jure curiae condito*" and you conclude also in the negative. I share likewise this conclusion. But the report would seem to subject the conclusion to a "proviso" in its paragraph 21. If the message of the paragraph is that the challenge made by the non-appearing States concerned did not "possess a minimum of credibility" in law because they did not meet "some conditions" which are in part mentioned in the paragraph, I agree also with this aspect of the conclusion. However, the report adds that the matter "should eventually be discussed within a broader context". What is the intended meaning of this reference? Is it a suggestion or a proposal that the Institute should undertake such a task? If so, I must state as from now that it would indeed be an ambitious and risky undertaking. It would be tantamount to suggesting that the Institute prepare a revision of the Statute of the Court and of the United Nations Charter, as well as of some fundamental tenets and organization of "judicial settlement" as a means of resolving international disputes between States. The only revision "worthy of consideration" would concern Article 36 of the Statute of the Court, but this is not what certain non-appearing States had in mind when making the challenge discussed.

58. The assertions and allegations whereby certain non-appearing States have challenged some of the Court's statutory functions and powers, and the legal effects of its decisions, cannot be accepted as a basis of a revision of the Statute of the Court because their adoption would render meaningless, generally speaking, fundamental assumptions and principles upon which "judicial settlement" is based. Their adoption would deny that means of settlement its distinguishing features, destroying its specific nature. For example, to state that a judgment of the Court has erred, in order to affirm the lack of binding force of that judgment for the State making such a statement, implies reversing the respective roles played in "judicial settlement" by the Court and by the parties to the case (independently of their "appearance" or "non-appearance"). The States parties to a case are not the judges

of the Court, but the other way round. One of the characteristics of " judicial settlement " is that the judgments of the International Court of Justice not only are binding for the parties in respect of the particular case, but also are " final and without appeal " (Article 60 of the Statute). The system of " judicial settlement " is not composed of two tiers. There is no second instance for annulment appeals before the Court, or before any other universal judicial body. It follows that all judgments of the Court have *res judiciata* force and that non-compliance with them incurs international responsibility.

59. Should this be changed ? Sovereign States can always by agreement modify most of the rules to which they are subject, and the United Nations Charter and the Statute of the Court contain provisions dealing specifically with procedures for their amendment. I do not know, however, of any proposal aiming at introducing the two-tiers principle into the system of " judicial settlement ". If this were done, would it prevent challenges of the kind we have been considering ? I do not think so. The challenges, if repeated, would just be transferred into the second instance proceedings and the procedure as a whole would become unnecessarily still more time-consuming and expensive. I must add that, in contradiction to arbitration, there would be no basis in State practice and/or doctrine for construing a system for the annulment of judgments of the International Court of Justice. Here also, specific treaty provisions and State practice operate very much the other way round. It is the Court which is sometimes called to hear and decide on the existence, validity or otherwise of international arbitral awards (i.e. *Arbitral Awards made by the King of Spain on 23 December 1906, Arbitral Award of 31 July 1989*).

60. In any case, under the present Statute of the International Court of Justice, following the reading of the judgment, the States parties to the case, appearing or not appearing, are entitled to file an application for interpretation of the judgment and/or an application for the revision of the judgment, in the circumstances and subject to the conditions set forth in Articles 60 and 61 of the Statute. They are not, however, entitled to question the reality of the judgment or its legal effects or to file an application for annulment of the judgment.

6. *Observations de M. M. Bennouna*

Rabat, le 1er novembre 1990

Je tiens à vous remercier de m'avoir fait parvenir votre rapport final à l'Institut de Droit International sur la « non apparution devant la Cour internationale de justice », ainsi que le rapport préliminaire et le questionnaire.

En tant que nouveau membre de la Commission 4, je me propose au vu de ces documents de répondre à ce questionnaire.

1) Je ne pense pas que le travail de la Commission doive se limiter aux difficultés soulevées dans les cas récents de non apparution devant la C.I.J.

2) Je pense que la Commission doit aller au-delà du droit existant et prospecter les possibilités d'amélioration de la situation actuelle (*de lege ferenda*) et faire des propositions en conséquence.

3) Il me semble, d'après l'article 53 du statut, que l'apparution, en cas de saisine unilatérale de la Cour, est laissée à l'appréciation discrétionnaire du défendeur.

4) Le choix du défendeur (d'apparaître ou de non apparaître) est sans préjudice de l'application par la Cour de l'ensemble des dispositions de son statut et de son règlement intérieur y compris l'usage de toutes les prérogatives qui lui sont reconnues par les textes de base.

5) L'Etat défendeur qui choisit de ne pas apparaître devant la Cour doit être considéré comme partie à la procédure devant la Cour (partie par défaut). En effet un Etat ne peut de par sa propre volonté suspendre l'application des dispositions du statut de la Cour ou les modifier.

6) Il en découle que la Cour conserve pleine et entière ses prérogatives pour édicter des mesures provisoires (article 41 du statut) et pour décider de sa propre compétence en la matière (articles 36 et 53).

7) La procédure de non apparution s'applique à toutes les phases de la procédure, à partir du moment où l'Etat défendeur, à qui la saisine unilatérale a été notifiée, a manifesté implicitement ou expressément en sa volonté de ne pas apparaître devant la Cour.

8) Il en découle que la distinction entre la phase dite juridictionnelle et la phase dite des mesures provisoires, ne peut produire d'effets juridiques quant à la situation de l'Etat défendeur qui décide de ne pas se présenter devant la Cour.

9) L'Etat défendeur qui décide de ne pas se présenter devant la Cour est tenu par toutes les obligations prévues par le statut y compris l'article 36, § 6, les articles 36, § 1 et 36, § 2, l'article 41 et les articles 59 et 38, § 1.

En effet il s'agit de ne pas confondre la faculté laissée à l'Etat d'apparaître ou de ne pas apparaître devant la Cour et les obligations qui sont les siennes en tant que partie du statut.

10) Le fait que l'Etat suspend sa participation, après que la cour se soit prononcée affirmativement sur sa compétence, ne change rien à sa situation juridique et à ses obligations au titre du statut.

11) Il est certain que la politique de la chaise vide ne favorise pas une bonne administration de la justice et est susceptible de porter atteinte à la crédibilité de la Cour.

13) Ne peut-on pas proposer, *de lege ferenda*, que la compétence de l'Etat de saisir la Cour par voie de requête unilatérale doit être liée à son engagement de se présenter devant la Cour s'il est l'objet de la même procédure ?

7. *Observations of Mr J. R. Stevenson*

December 7, 1990

.....

I believe that Parts Three and Four take the Committee beyond the mission that was entrusted to it by the Bureau, and I would prefer not to undertake this mission. I feel that if we go beyond "Non-Appearance" in the narrow sense, we will be undertaking a discussion of the effectiveness of the Court and the merits of judicial settlement of disputes initiated unilaterally on which much needs to be said and there will undoubtedly be many different views among members of our Committee.

Accordingly, I would delete in its entirety Parts Three and Four.

Secondly, I do not have the difficulty with Rosenne's answer which you have. It seems to me that if the Court does not have jurisdiction and the claim is inadmissible then the State is clearly not a party thereafter. Accordingly, I would be generally sympathetic with Rosenne's view. I do feel a distinction should be made as to when a state is a party, i.e., it is and remains a party until (but only until) the Court finds that it does not have jurisdiction or that the claim is not well founded in fact or in law. This seems to be the intendment of the second paragraph of Article 53.

Again let me express my appreciation for your grasp of the issues confronting the Court and let me indicate how much I look forward to our oral discussions of the final report at Basle.

I regret that I was not a member of the Commission as originally constituted or at Cambridge since many of my questions could have been answered at that time.

8. *Observations of Mr E. Jiménez de Aréchaga*

December 28, 1990

Just before the end of the year I wish to send my comments with respect to your excellent final report on the question of "Non-appearance before the International Court of Justice".

Allow me, first of all, to congratulate you on this very comprehensive piece of work, which analyzes the subject from every angle and is in line with the other reports on State Responsibility which you have submitted to the International Law Commission. As you probably know, in a recent arbitration, I had the need to rely repeatedly on several of your lucid and well-documented reports for the I.L.C.

As to the present report on Non-Appearance, I fully agree with your view that the Institut should deal with both sets of problems considered in your paper.

Is it perhaps your idea to prepare a draft resolution for the next session of the Institut, based on paragraphs 23 to 27 of your report ?

I fully agree with your comments in paragraphs 25 and 26 and it seems to me that an eventual draft resolution should expressly reiterate what you develop brilliantly in para. 8, namely, that a non-appearing respondent State is, despite its default, a party to the case, subject as such to Article 94 of the Charter and 59 of the Statute, and thus fully bound by the judgments of the Court on jurisdiction or admissibility, as well as on the merits of the case.

As to paragraph 24, I continue to believe that the Institut should avoid a pronouncement on the "lawfulness" of non-appearance, rather than qualify it as "lawful", as you seem to suggest in paras. 6 and 7.

On this divisive issue it seems to me that a distinction should be made concerning the stage reached in a case where non-appearance occurs.

A State has a "legal liberty" to contest jurisdiction by appearing or it may choose not to appear at the initial stage, when jurisdiction is discussed. But, once the Court has found by a judgment that it has jurisdiction with respect to the claim, the respondent State which persists in non-appearing incurs, in my submission, in a material breach of the treaty upon which the Court has found to possess jurisdiction, and, at the same time, it commits a serious violation of Article 36, para. 6, of the Statute.

The following consideration demonstrates, in my view, the existence of such material breaches. If, for instance, a State such as Irán would attempt to bring before the Court any State party to the Protocol on Judicial Settlement annexed to the Vienna Convention on Diplomatic Relations, the summoned State would clearly be entitled to invoke Iran's Material breach of that Protocol, manifested by its default in the Hostages case, as a ground for suspending the operation of the Protocol, in accordance with Article 57, para. 2, litt. c) of the Vienna Convention on the Law of Treaties.

The emergence of such a legal effect plainly demonstrates that there has been a material breach of two treaties, one of them being the Statute, and this can hardly be described as a lawful conduct.

With that reservation, I fully agree with your Report, which should provide the basis for an important pronouncement by the Institut, on a timely subject.

Draft Resolution

The International Law Institute

Considering the frequent cases of Non-Appearance which have occurred before the International Court of Justice during the period 1972-1984 ;

Considering that Article 53 of the Court's Statute expressly provides that Non-Appearance of one of the parties shall not prevent the Court, under conditions set forth therein, from performing its functions under the Statute ;

Considering that the said Article recognizes the possibility that a State may choose whether or not to appear to defend its case before the Court ;

Considering, however, that the absence of a party may in certain circumstances hinder in some measure the most effective conduct of the proceedings and eventually affect the good administration of international justice ;

Considering notably the difficulties that Non-Appearance of a party may present in some circumstances for the other party or parties and for the Court itself, particularly with regard to :

(a) the full implementation of the principle of equality of the parties ; and

(b) the acquisition by the Court of knowledge of facts which may be essential for the Court's pronouncements with regard to interim measures, preliminary questions or the merits ;

Considering further the positions which a Non-Appearing State has taken in a number of relevant cases in concomitance with, or following, its choice not to appear ;

Considering in particular that the terms or the form in which the Non-Appearing party has objected to admissibility or jurisdiction seems, in a number of instances, to call into question the Court's role under paragraph 6 of Article 36 of the Court Statute ;

Considering further the attitude and conduct by the Non-Appearing State in some instances with regard to the Court's pronouncements on interim measures, preliminary questions or the merits ;

Adopts the following Resolution :

Article 1

Each State party to the Court's Statute and with respect to which the Court is seized of a case should consider that under the Statute *it is ipso facto* a party to the Court's proceedings in the case regardless of whether it appears or not.

Article 2

In making a choice whether to appear and defend in a case each State should consider the desirability (implicit in the spirit of the Court's system) that every State party to the Statute co-operate to the best of its ability in the proper performance of the Court's judicial functions and to the preservation of full equality between the parties.

Article 3

Whenever indicated by the circumstances the Court should not refrain from drawing a party's attention to the desirability that it appear and defend its case in conformity with the Court's Statute and Rules, as regards both any objections to admissibility or jurisdiction and any factual or legal aspects of the merits of the case.

Article 4

Every State party to the Court's Statute should recall that participation in the Statute places it under an obligation not to question the Court's proper judicial functions and to comply with

any Court decision on preliminary questions or on the merits, such obligation being unaffected by its choice not to appear and defend its case.

Article 5

The choice of a State not to appear before the Court is *per se* no obstacle, subject to the conditions set forth in Article 53, to the exercise by the Court of its functions under Article 41 of the Statute.

Imp. Bosc Frères - 69600 Oullins - Dépôt légal n° 8774 - juin 1991