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“NORMATIVE SURRENDER” AND THE “DUTY” TO APPEAR BEFORE THE INTERNATIONAL COURT OF JUSTICE: A REPLY

*H. W. A. Thirlway**

A recent article in the Michigan Yearbook of International Legal Studies by Professor Jerome Elkind¹ included a section, headed “Jurisdiction of the International Court of Justice,” which was addressed to the question whether States have a legal duty to appear before the International Court of Justice when cited as respondents in cases instituted by unilateral application. This question was dealt with by the present writer at some length in a recent book,² and since Professor Elkind, who has also published a book on the subject,³ reaches a different conclusion, and refers critically to the views I have expressed, some further explanation of those views and comments on Professor Elkind’s arguments may be of interest.

It will be as well to define first the area of agreement between Professor Elkind and myself, not least to correct any misunderstanding which may arise from the juxtaposition of my contention that there is no such duty with the self-justifying attitudes of some Governments which have chosen to stand aloof from proceedings brought against them — attitudes which Professor Elkind rightly criticizes.

My approach to the matter can be summed up in the following propositions:

(i) Decisions of the Court in a case, including decisions on jurisdiction or admissibility, are binding on the parties to the case, whether or not such parties appear in the proceedings.

(ii) If the Court decides that it has jurisdiction, a State named as party to the case cannot validly deny that it is a party and that it is

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1. Elkind, *Normative Surrender*, 9 MICH. Y.B. INT’L LEG. STUD. 263 (1988). What appears to be a virtually identical text of part of the article was published in 37 INT’L & COMP. L.Q. 674, 674-81 (1988).

2. H.W.A. THIRLWAY, *NON-APPEARANCE BEFORE THE INTERNATIONAL COURT OF JUSTICE* (1985) [hereinafter *NON-APPEARANCE (THIRLWAY)*].

3. J. ELKIND, *NON-APPEARANCE BEFORE THE INTERNATIONAL COURT OF JUSTICE: FUNCTIONAL AND COMPARATIVE ANALYSIS* (1984) [hereinafter *NON-APPEARANCE (ELKIND)*]. Professor Elkind’s book was awarded the Francis Lieber prize of the Institute of International Law.

therefore bound by the decision on the merits. Similarly in proceedings addressed to the question of jurisdiction, the effect of the principle of *la compétence de la compétence* is that the State named as party to the case is a party to those proceedings and therefore bound by the decision on jurisdiction.

(iii) Article 53, paragraph 1, of the Statute of the Court provides 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." Since this text enables the Court to proceed to a decision notwithstanding the non-appearance, the non-appearance is without legal effects or sanction, and therefore it is meaningless to speak of a *legal* duty to appear.⁴

It is because the non-appearance of a party neither prevents the Court from taking a decision, nor affects the binding character of the decision for the absent party, that a duty to appear is, in my view, in no way a necessary component of the judicial system. As Professor Arangio-Ruiz has pointed out, this is a consequence of the development of a permanent international tribunal from a system of *ad hoc* arbitration:

[T]he 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.⁵

Arangio-Ruiz also draws attention to the fact, often overlooked, that even in developed national systems of law, there is in general no duty to appear before a civil court, except in the sense that failure to appear does not prevent judgment being given, exactly in parallel to the system of article 53 of the Statute.

4. There are of course practical implications for the course of the proceedings. As Professor Colliard expresses it, "[S]i la non-comparution a nécessairement des effets sur l'instance elle-même, au contraire elle devrait demeurer sans effet sur le jugement lui-même, sa valeur et sa portée." "La non-comparution," in *LA JURIDICTION INTERNATIONALE PERMANENTE* 167, 177 (Société Française pour le Droit International (1987)) [hereinafter "la non-comparution"].

Nor has it ever been suggested that the practical difficulties in ascertaining the facts which may arise in the absence of the Respondent would justify a refusal to give judgment. A passage in Judge Oda's dissenting opinion appended to the judgment on the merits in the case of *Military and Paramilitary Activities In and Against Nicaragua* (Nicar. v. U.S.), 1986 I.C.J. 14, 245, has been read in this sense. See E. McWHINNEY, *THE INTERNATIONAL COURT OF JUSTICE AND THE WESTERN TRADITION OF INTERNATIONAL LAW* 116-17. However, Judge Oda seems merely to have been expressing doubts whether, in the absence of the United States from the proceedings, the Court should not have taken some fact-finding action *motu proprio*, rather than giving judgment solely on the basis of the material supplied by Nicaragua.

5. Arangio-Ruiz, *Notes on Non-Appearance before the International Court of Justice*, in 3 *INTERNATIONAL LAW AT THE TIME OF ITS CODIFICATION: ESSAYS IN HONOUR OF ROBERTO AGO* 3, 11-12 (1987).

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 jurisdiction⁶

Any survey of the history of cases before the Court in which a state has chosen not to appear will however show that such non-appearance has often gone hand in hand with an attitude to the Court which suggests, first that the Court has unjustifiably concerned itself with matters over which it has no jurisdiction, and secondly that the State concerned is fully entitled to treat the proceedings as of no legal significance or impact. The contention which I have made that there is no legal duty to appear before the Court should not be equated with a justification of these attitudes;⁷ I have emphasized the distinction, and criticized these attitudes, in the book referred to above.⁸

Professor Elkind is emphatic that a State named as respondent in proceedings before the Court has a duty to appear in those proceedings. Curiously, however, the point was never expressly adverted to in the recent book he devoted to the subject; and in that work he notes that "[t]he International Court of Justice has no power to compel attendance or to punish States for non-attendance. Thus the chief penalties suffered by the non-appearing party involve procedural disadvantages,"⁹ and these prove — with one exception — to be the necessary practical results of non-participation, which I and all other writers recognize.

The exception is the possibility, discerned by Elkind, "that non-appearing conduct will result in a State's acceptance of compulsory jurisdiction being regarded as having no legal effect;"¹⁰ this will be considered separately below.

What is not clear is whether or not Elkind agrees with the view that non-appearance has no impact on the effect of the judgment given, in particular its binding character. I had supposed that this was self-evident, since if it were not so, article 53 would have no practical usefulness; but some of Elkind's arguments seem to proceed on an un-

6. *Id.*

7. To quote Arangio-Ruiz once more, "[T]he conduct of the non-appearing State [during the proceedings] 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 subjection to the judicial powers that the Court is exercising." *Id.* at 21-22.

8. NON-APPEARANCE (THIRLWAY), *supra* note 2, at ch. 9, *passim*.

9. NON-APPEARANCE (ELKIND), *supra* note 3, at 171.

10. *Id.* at 171.

stated assumption that the participation of both parties in the proceedings is necessary for the Court to be able to give an effective decision.

The subject of Professor Elkind's article is what he calls "normative surrender," an approach to international law which "concedes large areas of law to the will and whim of States;"¹¹ and he takes my view on the existence or non-existence of a duty to appear as an example of this. The term in his use of it

describes an approach to law which denies the normative legal content of certain rules which can be authenticated according to one of the three law-creating processes set out in Article 38 of the Statute of the International Court of Justice.¹²

This accusation surprises me somewhat. My contention is that a duty to appear cannot be shown to be a rule of international law authenticated by one of the law-creating processes mentioned, not that it is such a rule but has no "normative legal content." Professor Elkind may disagree, but is not justified in deducing from this disagreement my allegiance to a whole philosophy of over-restrictive positivism.

Elkind juxtaposes his mention of my views with passages from an article by Professor J.S. Watson of Mercer University Law School entitled "A Realistic Jurisprudence of International Law."¹³ Watson's main thesis is that insufficient attention is being paid by legal theorists to the basic differences between international law and domestic law, in particular the "lack of a central source of authoritative rules"¹⁴ in international law. In Watson's view: "The result of this is that the norms generated by theorists are frequently not observed even by a majority of States. Consequently these rules do not have a normative function, nor are they descriptive of reality."¹⁵

Elkind indicates that one of the characteristics of "normative surrender" is "the Austinian fallacy that a norm which cannot be enforced is not a legal norm."¹⁶ Now this may be a fair criticism of Watson's views; but as a comment on my writings, it is somewhat imperceptive. There is a distinction between an alleged duty which cannot in practice be enforced (Watson's hypothesis) and an alleged duty for which there is no legal sanction (my view of the "duty" to appear). The breach of an obligation involves a duty to make reparation; a legal duty is here involved, and this is so whether or not any practical steps

11. Elkind, *supra* note 1, at 264.

12. *Id.* at 287.

13. Watson, *A Realistic Jurisprudence of International Law*, 34 Y.B. WORLD AFF. 265, 278 (1980).

14. *Id.* at 265.

15. *Id.*

16. Elkind, *supra* note 1, at 287.

can be taken to enforce it. Similarly, it is not my contention that merely because a State cannot be compelled to appear in proceedings, there is therefore no duty to do so; my view is that if non-appearance produces no distinct legal consequences, it is meaningless to talk of a duty to appear.

On the specific question of appearance before the International Court, Elkind cites the following passage from Watson's article:

The International Court of Justice, consistent with the traditional theory of international law, bases its jurisdiction firmly on State consent. This acknowledgment of the importance of State consent has the effect of substantially increasing the compliance rate of the Court's judgments since, in deciding whether to appear before the Court, a State can assess its own willingness to comply with an adverse decision. A State that is not willing to comply with such a decision will simply not appear before the Court.¹⁷

Elkind considers that this passage implies that States have no duty to appear before the Court. But what it in fact appears to imply is that if a State does not appear when cited, no judgment will be given against it: only on that basis can the requirement of State consent have "the effect of substantially increasing the compliance rate of the Court's judgments." Again, it may well be appropriate to describe Watson's view as a "normative surrender;" the concept is not mine, nor is the quarrel. It is however only on the assumption that appearance is necessary for a binding judgment to be given that it becomes necessary to assert, in contradiction to Watson's view, the existence of a duty to appear.

Now whether or not Professor Watson and I would agree on the existence or non-existence of a duty to appear, no one who had read my book could possibly suppose that I thought that the non-participation of a State in proceedings prevented judgment being given against it. I stated the opposite view forcibly and, I hope, clearly.¹⁸ It appears therefore that Elkind may agree with Watson that non-appearance prevents judgment being given; but disagrees with him inasmuch as for Elkind there is a duty to appear in order to enable the Court to give judgment. This would explain the importance attached by Elkind to the question of the "duty to appear."

If Professor Elkind and I in fact agree on what the legal consequences of non-appearance are, then our dispute over the existence of a "duty to appear" is little more than a semantic one. I would even go so far as to concede, on this assumption, that appearance before the

17. Watson, *supra* note 13, at 278.

18. NON-APPEARANCE (THIRLWAY), *supra* note 2, at chap. 4, *passim*.

International Court may be classified, by those who find it a more appropriate approach, as a "duty," *provided it is appreciated that it is a duty for which the only sanction is article 53 of the Statute*. To me it seems to be a strained analysis to say that the court decides a case in the absence of the Respondent State because that State is in breach of its duty to appear, since article 53 requires just as full an investigation of the case as in the presence of both parties, and — particularly — since article 53 may actually work to favor the absent State.¹⁹ That is one reason why it seems to me more correct to analyze the position as one of absence of duty, and thus of "privilege."²⁰

The Hohfeldian analysis²¹ I employed in my book, of non-appearance as the counterpart of a "non-right," and therefore, in Hohfeld's terminology, a "privilege,"²² may have given rise to misunderstanding.²³ Some clarification in this respect may therefore be useful.

It will, I trust, be generally accepted that the existence of a legal duty (for we are not talking about a moral or political duty) entails the existence of some sanction for its breach. Unless we can say of a particular duty that if it is not fulfilled certain legal consequences follow, which would not have followed if the duty had been complied with, we are not talking about a legal duty at all.

To take an example: in France, legal penalties may in certain circumstances be imposed upon someone who could have gone to the assistance of a person in mortal danger, but failed to do so.²⁴ There is thus a legal duty to give such assistance.²⁵ In English law, a reluctant Samaritan incurs no legal liability; there is therefore no legal duty

19. See NON-APPEARANCE (THIRLWAY), *supra* note 2, at 124-30; Fitzmaurice, *The Problem of the 'Non-Appearing' Defendant Government*, 51 BRIT. Y.B. INT'L L. 90, particularly at 117-18 (1980).

20. Arangio-Ruiz, *supra* note 5, at 25, is prepared to go further: he considers that one of the "vital exigencies" of the system of article 53 of the Statute 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" (emphasis added).

21. May I here record my debt to the late Judge Hardy Dillard, Member of the International Court 1970-1979, who first introduced me to Hohfeld's thinking.

22. NON-APPEARANCE (THIRLWAY), *supra* note 2, at 81.

23. Professor Colliard uses the word "faculté": "Ne pas comparaître est un faculté dont l'Etat attrait devant la Cour peut user:" "La non-comparution," *supra* note 4, at 190.

24. Article 63 of the Code pénal provides for punishment of "quiconque s'abstient volontairement de porter à une personne en péril l'assistance que, sans risque pour lui ou pour les tiers, il pouvait lui prêter, soit par son action personnelle, soit en provoquant un secours." A similar rule was enacted in Belgium by the Law of 6 January 1961. The same result was sometimes reached under pre-Revolution law by the concept of "homicide by omission" - "Qui peut et n'empêche, pêche." See P. BOUZAT & J. PINOTEL, *TRAITÉ DE DROIT PÉNAL ET DE CRIMINOLOGIE* (2d ed. 1970).

25. The duty is enforceable also by civil action: "L'abstention de l'article 63 du Code pénal, faute pénale, est en même temps une faute civile," P. LE TOURNEAU, *LA RESPONSABILITÉ CIVILE* 565 (2d ed., 1976) (para. 1622).

(though there may be a moral one, on the basis of most ethical systems). In this case, to say that in England the citizen has a *right*, or even a *privilege*, to refuse assistance to a person in danger may sound shocking: I have deliberately chosen an emotive example to underscore the point. The fact remains that there is a difference between the legal position of one who refuses assistance according to whether French law or English law applies, and it should be possible to define that difference with appropriate terminology.

The Hohfeldian system aims to supply a twofold definition of each legal relationship according to whether the relationship is looked at from the side of the one participant or the other. If A is under a legal duty towards B, then B has a right against A; when A owes no duty to B, then if the relationship has to be defined from B's side, it can be called a "privilege." All that this privilege means however is that A can act as he wishes, since whichever course of action he chooses, he will incur no liability to B. To revert to the example above: in England, B in mortal danger has no legal right to A's assistance; thus A has a "privilege" not to go to B's rescue.

To return to Professor Elkind's criticisms, he permits himself a rather vivid analogy in support of them:

The purpose of Article 53 is to provide for the eventuality of non-appearance. To contend that it thereby permits non-appearance is rather like arguing that if one buys a policy of fire insurance, that person thereby creates in some other person a right to burn down his or her house.²⁶

Now of course it is not the case that article 53 "permits" non-appearance in the sense of making legally permissible something that would, if article 53 had not existed, have been impermissible, and I have never suggested this. But in any event, the analogy, as here stated, is wholly inapt. The property-right involved in the ownership of a house has in any event to be respected by others, so that they can be said to be under a duty, imposed by the civil law,²⁷ not to burn it down. This duty exists prior to and independently of the fire insurance policy, which only "creates" rights or duties for the parties to it. It is not the function of the insurance policy to "permit" or "forbid" anything, but to provide for the legal consequences, as between the parties, of certain possible events. For the analogy to be at all meaningful, it would be necessary to establish that there was a general duty to appear before a permanent international judicial tribunal, prior to and independently

26. Elkind, *supra* note 1, at 286.

27. *Id.* The fact that, as Professor Elkind points out in a footnote, arson is contrary to the criminal law is beside the point.

of article 53 of the Statute of the International Court, — in other words the suggested analogy begs the whole question.

The point about article 53, viewed in particular as a treaty stipulation, is that when such a stipulation lays down what is to be the effect between the parties of a particular action or failure to act, then by necessary implication it excludes the idea of any responsibility based on some wider duty to act or not to act. To adopt — and adapt — Elkind's example of a fire insurance policy: such a policy may well provide that in case of under-insurance, and in the event of destruction of part of the property insured, the insurer shall only be bound to pay *pro rata* a proportion of the value of the destroyed property. In the presence of such a provision one could not argue for the existence of a more basic "duty" to insure to the full value, breach of which might, for example, be relied on by the insurer to avoid the policy totally.

Where then is the general duty to appear before a permanent international judicial tribunal, and specifically, before the International Court, to be found? According to Professor Elkind, such a duty is found in Article 36 of the Statute of the Court and, to some extent, in Article 94 of the UN Charter. When we talk about jurisdiction under Article 36(1) of the Statute, whether through special agreement or through "treaties and conventions in force," the duty to appear is a natural by-product of the *pacta sunt servanda* rule combined with the undertaking in those instruments to submit certain disputes for decision by the Court.²⁸

This however is to beg the question, not to resolve it. The *pacta sunt servanda* rule obliges States to perform what they have undertaken to do; it does not help to determine what in particular circumstances a given State has undertaken to do.²⁹

The essential question is thus, what does a compromissory clause in one of the "treaties and conventions in force" actually oblige the parties to do? Normally, it does not even oblige them "to submit certain disputes for decision by the Court," since if a dispute arises to which the clause applies, the parties remain entirely free to settle it by other means, or indeed to leave it unsettled if they so wish.³⁰ The obligation undertaken by a State in entering into a compromissory clause is this, and only this: that if a dispute arises to which the clause

28. Elkind, *supra* note 1, at 286.

29. Cf. a recent dictum of the ICJ: "The principle of good faith is, as the Court has observed, 'one of the basic principles governing the creation and performance of legal obligations' . . . ; it is not in itself a source of obligation where none would otherwise exist." *Border and Transborder Armed Actions (Nicar. v. Honduras)*, 1988 I.C.J. 69, 105 (Dec. 20, 1988) (para. 94).

30. This may be, but is not always, the case even for a special agreement, which may merely empower either party to bring the dispute before the Court; alternatively, it may be worded in apparently imperative terms.

applies, and that dispute is brought before the Court, whether jointly by the parties or unilaterally by one of them, the decision of the Court on that dispute is accepted by each of the parties, in advance, as binding. As a result of article 53 of the Statute, this is so whether or not such party has participated in the judicial proceedings leading up to the decision. As Arangio-Ruiz lucidly puts it:

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*.³¹

It is the use of imprecise terminology like "the undertaking . . . to submit certain disputes for decision"³² which is responsible for much of the confusion over the question of the alleged duty to appear.

Similar confusion may arise from the casual use of the expression "compulsory jurisdiction." Professor Elkind continues,

Article 36(2) says that the States parties to the Statute may declare unilaterally that they recognize the jurisdiction of the Court as compulsory. The Court has held in the *Nuclear Test Cases* (Second Phase) that a unilateral declaration by a State can create legal obligations. It involves a remarkable use of language to contend that a legal duty, freely undertaken, to recognize the court's jurisdiction as compulsory involves no legal duty. There is a legal duty to act consistently with that recognition, to accept the process of the Court and to allow the Court to decide questions of disputed jurisdiction.³³

There is however no need to postulate a duty to appear in order that a State which has accepted compulsory jurisdiction should "allow the Court to decide questions of disputed jurisdiction." The Court has the power to do so in the exercise of what Elkind calls "consent to Statute," by virtue of article 36, paragraph 6, of the statute; and it has that power also when the respondent State does not appear, precisely because article 53 of the Statute so provides. To "allow" the Court to do so implies a power to refuse to allow it to do so, to prevent or impede it; and it is article 53 which provides that States cannot prevent a decision, whether on jurisdiction or on merits, by declining to appear.

What Professor Elkind means by "to accept the process of the

31. Arangio-Ruiz, *supra* note 5, at 21.

32. See the passage quoted above from Professor Elkind's article.

33. Elkind, *supra* note 1, at 286.

Court" is not clear: no "acceptance" is necessary for the Court to proceed to a decision. The "legal duty" accepted is that of respecting the eventual decision of the Court, as explained above, a duty of sufficient import for it to be evident that no "remarkable use of language" is here involved. To "act consistently with" the acceptance of that duty would only require participation in the judicial proceedings if such participation were necessary to enable the Court to arrive at a decision; but, if I may be forgiven for repeating the key element, it is because article 53 exists that participation is *not* necessary for that purpose.

It is equally fallacious to link, as Elkind does, the question of appearance with the existence of jurisdiction:

Once the Court has decided that it has jurisdiction, Article 94 of the UN Charter creates a duty to comply with the decision. Thus, the USA, by refusing to appear after the Court's decision that it had jurisdiction is not only in violation of its duty to appear under Article 36. It is also in violation of Article 94 of the UN Charter.³⁴

Of course there is a duty of the parties to comply with a decision of the Court; but, for the reasons already stated, there is no need to appear in the proceedings in order to "comply with" a decision that the Court has jurisdiction. That decision is simply a link in the chain connecting the original title of jurisdiction through the specific dispute to the eventual decision of the Court on the merits, which the Respondent State has a duty to accept as binding.³⁵

It will be evident from the foregoing, first that the reasons for non-appearance are — legally speaking — irrelevant, that there is no such thing as a justified or an unjustified non-appearance; and secondly that non-appearance has no effect either on the jurisdiction of the Court or on the status of "party" to the proceedings which links the Court's jurisdiction to the individual State. These had seemed to me self-evident elements of the discussion. However in his book on the subject of

34. *Id.*

35. In the view of Arangio-Ruiz:

From Articles 2.3 and 33.1 [of the Charter], 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 *in 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.

Arangio-Ruiz, *supra* note 5, at 12.

non-appearance, Professor Elkind discusses the legal significance of the Connally reservation to the United States acceptance of compulsory jurisdiction, and observes: "If the reservation invalidates the United States declaration, then the United States has not accepted the compulsory jurisdiction of the Court. *That is certainly a justifiable ground for non-appearance.*"³⁶ The implications of this statement are puzzling. Presumably it cannot be intended to mean that the view of the State concerned that there is no existing acceptance of jurisdiction is sufficient to constitute a justifiable ground for non-appearance. Yet, given that most refusals to appear are made at the outset of the proceedings, and are stated by the Government concerned to be justified by lack of jurisdiction, there is presumably no way of knowing whether a non-appearance was justified until the Court rules on the question of jurisdiction, when the point will have become academic.

But Professor Elkind's subsequent argument is even more disquieting. He equates the conduct of a State which refuses to appear on the grounds that the Court has no jurisdiction with the inclusion in a declaration of acceptance of jurisdiction of a self-judging reservation, and applies to such conduct the view of Judge Lauterpacht in the *Certain Norwegian Loans* case, that a self-judging reservation, being inconsistent with the Statute, invalidates the declaration in which it is incorporated.³⁷ Thus in Elkind's view:

It would seem that, where a State, which has filed a declaration under Article 36(2), refuses to appear on the ground that the Court has no jurisdiction, the Court would be justified in concluding that it has not really accepted the compulsory jurisdiction of the Court and in holding the declaration to be a nullity The declaration can only be considered a nullity if the respondent State continues to refuse to appear once the Court has held that it possesses jurisdiction.³⁸

The practical significance of the argument is at first sight obscure. Again, presumably the Court is not obliged to hold that the declaration is a nullity, and that there is thus no jurisdiction in the case before it, simply because the State concerned does not appear. This would be a negation of the whole purpose of article 53 of the ICJ Statute. But what happens if, after a finding of jurisdiction, there is a continued failure to appear, or, as in the *Nicaragua v. USA* case, a failure to appear only after a finding of jurisdiction? If the declaration is then to be considered a nullity, how can the Court still have jurisdiction? Is it bound to reverse its finding of jurisdiction, simply because of the non-

36. Elkind, *supra* note 3, at 169 (emphasis added).

37. See *Certain Norwegian Loans* (Fr. v. Nor.), 1957 I.C.J. 8, 58-66 (July 6, 1957) (separate opinion of Lauterpacht, J.).

38. Elkind, *supra* note 3, at 170.

appearance? This again would be inconsistent with article 53 of the Statute.

It seems, reading as one has to between the lines, that Professor Elkind's meaning is that a failure to appear in a case based on a particular jurisdictional title constitutes a *prospective* annihilation or suspension of that title; and in particular that this operates to penalize the non-appearing State by depriving it of the possibility of relying on that title subsequently in order to bring proceedings against another State. In the paragraph following that quoted above, he writes:

Likewise, where a State refuses to come to Court under a treaty or convention in force, then, should that State ever seek to invoke the treaty as an applicant, the Court could probably hold, at the request of the respondent, that its past non-appearance has barred it from invoking the treaty in that way. Such a ruling could be made subject to an undertaking by the defaulting State to cure the effects of its default and to comply with Article 36 of the Statute in future.³⁹

The "nullity" of the declaration or treaty clause claimed to result from the non-appearance is thus a pretty odd one: it is not operative *ab initio*, but only effective from the date of the non-appearance,⁴⁰ and even then it is only relative, since a respondent State can choose not to invoke it. In other words the declaration or treaty clause is not void, but voidable at the option of the State against which proceedings are brought.⁴¹ Another obscure point is whether the declaration or treaty-clause can be invoked by another State to bring proceedings against the State which has committed a non-appearance: if it is a nullity, presumably this is not possible, but that conclusion weakens the punitive aspect of the whole theory.

Furthermore, this whole shaky edifice is built on very suspect legal foundations. Judge Lauterpacht's analysis of the impact of the Connally reservation cannot be extended to cover conduct subsequent to the relevant declaration or treaty-text.

The starting point of Judge Lauterpacht's argument is that the Connally reservation or "automatic reservation" is invalid, both because it is contrary to the Statute of the Court and because it is not consistent with the requirements of a legal obligation to submit to the jurisdiction of the Court.⁴² Professor Elkind assimilates the conduct

39. *Id.* at 170 (footnote omitted).

40. Presumably the case in which the non-appearance took place is saved by an analogous application of the *Nottebohm* ruling, the declaration or treaty having been valid and in force at the date of the institution of proceedings.

41. What happens if this State in its turn refuses to appear?

42. Certain Norwegian Loans, 1957 I.C.J. at 43-48, 48-55.

of a non-appearing State to an "automatic reservation" by the following argument:

When a State refuses to appear, claiming that the Court is without jurisdiction, we again have a case of self-judgment. But here we have a different situation. There is no written document to interpret. There are no words that the Court can look at to determine whether a residuum of decision-making power is left to it.

What is involved here is the conduct of the State which is ignoring the court's process. This *conduct* may be described as self-judging conduct. It purports to deprive the Court unilaterally of the power to determine whether it has jurisdiction.⁴³

The present writer would question whether failure to appear can be interpreted in this way, or at least whether it must necessarily be interpreted in this way;⁴⁴ but that is not the nub of the matter. For the purposes of argument let the equivalence of at least some cases of non-appearance with an intended exclusion of *la compétence de la compétence* be admitted.

The next, and crucial, state of Judge Lauterpacht's argument, was that it was not open to the Court "to sever the invalid condition from the Acceptance as a whole," on the ground that "the principle of severance applies only to provisions and conditions which are not of the essence of the undertaking."⁴⁵ Examining the history of the "automatic reservation" Judge Lauterpacht had no doubt that it was regarded by the States which inserted it as of the essence of this commitment to jurisdiction.

The court is . . . confronted with the decisive fact that the Government in question was not prepared to subscribe or to renew its commitment of compulsory judicial settlement unless it safeguarded in that particular way its freedom of action. That particular formulation of the reservation is an essential condition of the Acceptance as a whole. It is not severable from it. The phrase "as understood by the Government of the French Republic" must be regarded as being of the very essence of the undertaking in question. It is not a collateral condition which can be separated, ignored and left on one side while all others are given effect. The Acceptance stands and falls with that particular reservation and that particular formulation of the reservation. Without these words the Government which made that reservation would not have been willing to accept the commitments of the compulsory jurisdiction of this Court. This Court cannot properly uphold the validity of the Acceptance as a

43. Elkind, *supra* note 3, at 169 (emphasis in original).

44. It is very difficult to interpret the attitude of Guatemala in the *Nottebohm* case in this way: see *Nottebohm Case (Liech. v. Guat.)*, 1955 I.C.J. Pleadings 7, 162-69 (particularly para. 5, at 168) (Sept. 9, 1952). On the other hand, the United States attitude following the judgment on jurisdiction in the case of *Military and Paramilitary Activities In and Against Nicaragua* did amount to a *de facto* contradiction of *la compétence de la compétence*.

45. *Certain Norwegian Loans*, 1957 I.C.J. at 57.

whole and at the same time treat as non-existent any such far-reaching, articulate and deliberate limitation of its jurisdiction. To do so would run counter to the established practice of the Court — which, in turn, is in accordance with a fundamental principle of international judicial settlement — that the Court will not uphold its jurisdiction unless the intention to confer it has been proved beyond reasonable doubt.⁴⁶

How is this argument, compelling as it is, transposable to the case of a non-appearing State? It is perfectly possible to "sever" the uncooperative attitude of the State in a particular case from its general attitude to judicial settlement expressed in its declaration.⁴⁷ The fact that, perhaps twenty years after accepting the jurisdiction of the Court, the State in question insists on its own interpretation of the acceptance, and rejects that of the court, has nothing whatever to do with the intentions of the State at the time of making the declaration. If the attitude of the non-appearing State is regarded as so radically contrary to the whole structure of the Court's jurisdiction, why not deduce that it rejects that jurisdiction totally, whatever the jurisdictional title invoked, so that each such title would become a "nullity"? Or, more reasonably, why not conclude that refusal to accept the Court's decision on its jurisdiction is legally unjustifiable and therefore a "nullity," but that it has no incidence whatever on the validity or force of the title of jurisdiction on which the Court has pronounced?

It seems possible to conclude that Professor Elkind, while disapproving of non-appearance by a State against which proceedings are regularly instituted, which in his view is a breach of a legal duty, is unable to discern in existing procedural or substantive law any legal consequence of non-appearance which could act as a sanction and accordingly discourage such non-appearance. (It is precisely because there is, in my view, no such sanction that I contend that one cannot speak of a *legal* duty to appear.) Professor Elkind is therefore driven to devise a sanction — rather a hit-and-miss affair, depending for its efficacy on the possibility that the non-appearing State may itself wish to have recourse to the Court, on the basis of the same title of jurisdiction as was relied on by its opponent in the case in which it declined to appear. To produce this sanction, he has to rely on a distortion of Judge Lauterpacht's argument which, it must be said, is quite unconvincing as a legal construction. Is not such an approach at least as destructive to the reputation and development of international law as the "normative surrender" he identifies and criticizes?

46. *Id.* at 58.

47. Particularly if its rejection of jurisdiction is based on a particular aspect of its acceptance: cf. the French reliance on the "national defence" reservation to its optional-clause declaration in the *Nuclear Tests* cases.