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## CONSEQUENCES OF NON-APPEARANCE BEFORE THE INTERNATIONAL COURT OF JUSTICE: DEBATE AND DEVELOPMENTS IN RELATION TO THE CASE NICARAGUA VS. COLOMBIA

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### ABSTRACT

The article analyzes the non-appearance before the International Court of Justice motivated by the turbulent reception by the Colombian Government of the 2012 and 2016 sentences of the I.C.J in the cases between Nicaragua and Colombia, with the objective of establishing the consequences of such conduct. Methodologically, the jurisprudence that has applied Article 53 of the Statute, and the different consequences of non-appearance in cases before the Court are studied. Through an analysis of jurisprudence the document discusses the nature of non-appearance, its effects on the sentence, the agents, the applicable law, the evidence and the procedure, to conclude that, although non-appearance is a behavior allowed to the State Parties, it is in general detrimental to its procedural interests, its defense of the case and the administration of international justice as a system, especially in such technical cases as those related to maritime delimitation and liability in relation to alleged violations of sovereign rights and maritime spaces.

**KEY WORDS:** unilateral act of the State, article 53 of the Statute of the Court, non-appearance, mandatory sentencing.

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## **CONSECUENCIAS DE LA NO COMPARECENCIA ANTE LA CORTE INTERNACIONAL DE JUSTICIA: DEBATE Y DESARROLLOS A PROPÓSITO DEL CASO NICARAGUA VS. COLOMBIA**

### **RESUMEN**

El presente artículo analiza la no comparecencia ante la Corte Internacional de Justicia, motivado por la turbulenta recepción del gobierno colombiano de las sentencias de 2012 y 2016 de la C.I.J en los casos entre Nicaragua y Colombia, con el objetivo de establecer las consecuencias de tal conducta. Metodológicamente, se estudia la jurisprudencia que ha aplicado el artículo 53 del Estatuto y las distintas consecuencias de la no comparecencia en los casos ante la Corte. Mediante un análisis de jurisprudencia, el documento discute la naturaleza de la no comparecencia, sus efectos en la sentencia, los agentes, el derecho aplicable, la evidencia y el procedimiento, para concluir que, aunque sea no comparecer sea un comportamiento permitido a los Estados Partes, es en general, perjudicial para sus intereses procesales, su defensa del caso y la administración de la justicia internacional como sistema, especialmente en casos tan técnicos como los relativos a delimitación marítima y responsabilidad en materia de alegadas violaciones a derechos soberanos y espacios marítimos.

**PALABRAS CLAVE:** acto unilateral del Estado, Artículo 53 del Estatuto de la C.I.J, no comparecencia, obligatoriedad de la sentencia.

## INTRODUCTION

### **I. Context of the non-appearance debate in the ongoing proceedings: A political decision and a unilateral act of the State**

The International Court of Justice rendered two judgments on preliminary objections, in the proceedings instituted by Nicaragua against Colombia in “Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 nautical miles from the Nicaraguan Coast” and “Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea” cases. The declarations of the Colombian President amounted (for many) to an apparent verbal declaration of non-appearance. It was moreover vague enough as to have two meanings. First, that Colombia will not appear to both cases. Second, that it will only not appear to the “continental shelf” case. Colombia filed its counter-memorial in the “alleged violations case” on the date fixed by the Court. Later, after months of secrecy, Colombia took back its declaration of non-appearance and decided to fill its counter-memorial for the “alleged violations” case, including four counterclaims, which were partially accepted by the I.C.J in a recent order of November 15, 2017.

Against this background and based on the debate that this particular menace of non-appearance generated in the international legal community, this article seeks to analyze the issue in the following aspects. First, the presidential declaration as a political and unilateral act of the State. Second, a review of the recent developments regarding non-appearance of States before the Court. Third, an analysis concerning the nature of non-appearance in the Statute of the Court. Fourth and last, the possible consequences for Colombia, or any State, in cases they decide not to appear.

### **2. The Presidential Declaration**

The presidential declaration can be analyzed from two angles: as a political decision, and, as a unilateral act of the State, entailing consequences in the ongoing proceedings before the Court.

Politically, the controversial option of non-appearance has been discussed by the State and local analysts in Colombia as a sovereign decision and the last line of defense against what the Government has qualified as a set of “ultra vires” and unlawful decisions from the Court. Such criticism concerning the legal soundness of the 2016 judgments, has also been developed on published qualified legal commentaries (Vega-Barbosa, 2016). The political reason of this option was based in the need of a strong internal countermeasure of the political, administrative and electoral consequences of the judgments. This is not *per se* unusual since every government would have to face strong political turmoil in front of an apparent international legal defeat.

How can we assess the presidential declaration from the point of view of non-appearance both from the studies regarding international adjudications and the role of international law and international relations? First, a decision of non-appearance, just like an attitude of non-compliance (Paulson, 2004), is an undesirable conduct that undermines the trust in the international system of peaceful settlement of disputes (Posner, 2004). However, in the Colombian case, was an option that, when discussed, is based on an alleged justified protest against what the State considers legal inconsistencies of mere legal nature. It is not a decision of open reluctance to participate in the international legal order as a whole, or a defiance of international courts as a valid settlement system *per se*. The President himself noted in his declaration that,

In its second application, Nicaragua requested to extend its continental shelf beyond 200 nautical miles, until the proximities of our own continental coast in the Caribbean. This is a claim that Nicaragua had already raised before the Court, and that the Court had denied in its ruling of 2012. That issue was already *res judicata*... However, the International Court - in a tie rarely seen in the Court - declared itself with jurisdiction to entertain this application. In this judgment- which is of jurisdiction- the Court of The Hague has incurred in fundamental contradictions: First, it did not respect his own Ruling of the year 2012. Second, The Court did not follow his Statute, which indicates that it cannot reopen an already closed case. And third, it intends to apply to Colombia a treaty of which we are NOT part, the Convention of the Law of the Sea. Therefore, and in the face of such contradictions, I have decided that Colombia will NOT keep appearing in this case before the International Court of Justice. (Colombia, 2016)

In this sense, and even if the consequences for the procedure are the same, Colombia's non-appearance would had not been grounded in a rogue State's (Goldsmith, 2005) doctrine, following an open defiance to international judicial adjudication. It would had been a controversial decision considered as a response to what the State considers grave juridical mistakes in the judgment (Sarzo, 2017). Colombia's potential declaration of non-appearance (abandoned once it filled its counterclaims and decided to appear), concurs with the elements of the unilateral act, as set forth by International Law Commission in its "Guiding Principles" (ILC, ILC Report A/61/10 chap. IX, paras. 160–177, 2006), and the successive reports of its special rapporteur on the topic. (ILC, Eighth Report of the Special Rapporteur, Mr. Víctor Rodríguez Cedeño, (57th session of the ILC (2005)). Ninth Report (58th session of the ILC, 2006). Notably, the eighth report develops eleven types of unilateral acts and identified multiple examples of each of them (ILC, A/CN.4/557 ILC Report, A/60/10, chap. IX, paras. 295–326, 2005). Under the criteria stated in the said report (A/CN.4/557), a decision of non-appearance amounts to an "*act by which a State reaffirms a right or a claim (protest)*".

Based on the general characteristics of unilateral acts of states developed by the ILC, the declaration on non-appearance from Colombia, if hypothetically would had turned into a decision of non-appearance, is a valid act with legal effects since (i) It is proffered by an authority “authorized to formulate an unilateral act on behalf of the State”; (ii) is a declaration “intended to produce “legal” effects, creating, recognizing, safeguarding or modifying rights, obligations or legal situations”; and, (iii) against the act, there are no current domestic law mechanisms that challenge its validity<sup>1</sup>.

### **3. Non-appearance and compliance of I.C.J judgments**

A close relation exists between non-appearance, compliance and enforceability of judgments. The fact that a State decides not to appear after a judgment on preliminary objections, might lead to a complex scenario of non-compliance of the merits.

The legal consequences of non-compliance and the post-judicial tasks regarding enforceability of I.C.J judgments by the Security Council are subject of multiple studies (Cronin-Furman, 2006) (Tanzi, 1995). The implications in the case of Colombia have also been reviewed by local sources (Arevalo-Ramirez, 2013), but in any case, before addressing the consequences of non-appearance, it is necessary to note that in each of the ongoing cases, the I.C.J will render a judgment on the merits binding upon the parties. This means that the country, if it had decided not to appear, would still had to cope with the unknown legal consequences of those rulings. This is a situation that politically speaking will be even harder for its authorities, in case that the decision of non-appearance is kept until the closure of the proceedings.

## **DISCUSSION**

To develop a discussion regarding the procedural consequences of non-appearance in the I.C.J case law, we found mandatory to begin with a brief legal and historical background of Article 53 of the I.C.J Statute:

53.1. 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.

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<sup>1</sup> Interestingly, the third criterion was developed by the ILC in review of Colombia's note dated 22 November, 1952, from the Minister of Foreign Affairs, regarding its sovereignty over Los Monjes archipelago. This note was challenged and nullified by the Council of State of Colombia in 1992. The ILC therefore noted the contradiction between the position of the Government of Colombia and that of the Council of State. In consequence, it noted that the said contradiction would lead to consider the nature of such acts and whether they must be consistent with constitutional norms, especially when, as in this case, issues relating to State boundaries are involved. See: A/CN.4/557 ILC Report, A/60/10, 2005.

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.

## **Historic context of Article 53**

### **1. Legal background of Article 53: the Advisory Committee of Jurists and the Judicial Organization Committee at the San Francisco Conference**

The preparatory documents for the I.C.J Statute include, the Statute of its predecessor the Permanent Court of International Justice, its own Advisory Committee of Jurists and the works of the Judicial Organization Committee during the San Francisco Conference, bound to design the judicial system of the United Nations (Meyer, 2002).

All these sources concur that Article 53 of the P.C.I.J and the I.C.J Statutes were based on the practice of common law courts. They consider non-appearance as a “default”, i.e. an incident in the proceedings, which do not allow for an automatic judgment against the non-appearing party, as it is the case in other legal systems. (PCA, 1920). During the *travaux préparatoires* for the final text of Article 53 of the P.C.I.J Statute, it was observed that non-appearance could not derive in the direct concession and adjudication of the opposing party's claims for two reasons. First, the inexistence of universal compulsory jurisdiction for States. Second, a general agreement of the present legal advisors that a system other than the continental law was needed for international adjudication, taking into account that many branches of law in the continental system include provisions that condemn the non-appearing party by considering as proven all the alleged facts from the appearing party. Such a system does not fit international adjudication (Elkind, 1984).

Based on this understanding, the drafters of the Statute sought to allow proceedings to continue in absence of one of the parties, and prevent the shift of the burden of proof for any of the parties. Hence, even in the absence of the respondent State, the applicant must comply with the *onus probandi incumbitactori* principle and support each of the facts it alleges (Kokott, 1998).

### **2. Legal nature of paragraphs 1 and 2 of Article 53**

By amounting to a “soft default”, the application of Article 53 does not allow the I.C.J to take the submissions by the appearing State for granted, or to accept its interpretation of the law. Hence, Article 53 does not imply a *facta confessio* against the absent party. It only allows the Court to continue the proceedings despite the non-appearance of one of the parties.

In its first paragraph, Article 53 contains what has been regarded as an acknowledgement of the possibility that a State might be absent to the proceedings. It also allows the appearing State to request the Court decide in its favour (which does not mean an automatic judgment in favour), if it is satisfied of its jurisdiction in the case at hand. This seems to imply that Article 53 is applicable only during the merits proceedings, since it seems to require that any questions on jurisdiction must be exhausted. Nevertheless, the case law shows it has been used during jurisdiction stages (Lamm, 1986).

On the other hand, Article 53 in its second paragraph establishes a limitation and a guideline for the Court in performing its judicial function, namely, that before rendering a judgment, it must satisfy itself that the claims are sound and well founded in law and facts, avoiding a direct loss of the absent party of the direct adjudication in favor of the appearing party (Eisemann, 1973).

### **3. Remarks of I.C.J judges regarding the nature of Article 53**

Although it is clear that Article 53 does not comprise a direct sanction for the non-appearing State, or an immediate acceptance of the applicant's submissions, the debate about the possibilities of a sanctionary interpretation of Article 53 persists. Its application in previous cases (below) has led to different consequences: from protecting the continuity of the proceedings, to orders that seem to punish the behavior of the absent party, decisions to protect the equality of arms and some others that might be interpreted as favouring the present party. In this regard, is important to consider two separate opinions by I.C.J judges, regarding the nature of Article 53.

In the *Corfu Channel* case, the *ad hoc* judge for Albania, Bohuslav Ečer, noted in his dissenting opinion how the interpretation of Article 53 was somewhat penalizing Albania, since the Court considered the State as fully in default, when, according to its view, the Court should had considered the fact and law expressed by Albania during the jurisdiction and merits stages of the case, since its non-appearance was only partial.

By not doing so, the Court seemed to have penalized Albania's for its non-appearance at the stage of assessment of the amount of compensation. In only considering the United Kingdom's arguments and without assuming a more active role in "fabricating" the possible arguments of Albania that could be inferred from its arguments in previous stages of the proceedings, the Court took a penalizing approach towards Article 53. In his own words:

The default of the respondent-and Albania is the respondent party in the present stage of proceedings-cannot be deemed to be a recognition of the claim and the facts alleged by the applicant. Consequently, the

Court is compelled by Article 53 to examine the assertions of the applicant and to satisfy itself that the submissions in the Application are well founded in fact and in law. But in that case, the Court's responsibility is, so to speak, "diminished". The Court is not obliged to examine the facts alleged by the applicant with the same exactness as in the case of an issue raised by the respondent. But I cannot accept this interpretation of Article 53. To begin with, in this case the Court is not faced with a simple default... The present stage of proceedings is not a new case, such as, in my view, is primarily referred to in Article 53, but the final stage in a case that has to be considered as a whole, from the date of the Application-or at any rate of the Special Agreement to final judgment. In the present proceedings, therefore, the Court is faced with a situation somewhat different to that referred to in Article 53. The interpretation of Article 53 therefore, in these proceedings, cannot be the same as in a case of pure default. (I.C.J., Dissenting opinion by Judge ad hoc Ečer, Judgment of 15 December 1949. Assessment of the amount of compensation due from the People's Republic of Albania to the United Kingdom of Great Britain and Northern Ireland, 1949)

In the *Fisheries Jurisdiction* case, in his dissenting opinion, Judge Gros asserted that there cannot be penalizing implications in the interpretation of Article 53, even more in the case of a debate regarding jurisdiction and the extent and existence of a dispute, such as the debate on the interpretation of the compromisory clause between The United Kingdom and Iceland (Lamm, 1986).

#### **4. Two types of absence under article 53: "non-appearance" and "défaut de conclure"**

The practice of the Court has allowed doctrine to identify two types of circumstances in which Article 53 can be applied. These are related to the intensity of the absence of the State. Even if the procedural consequences are similar, the differences between these types of non-appearance have led the Court to give different interpretations as to how to apply Article 53, depending on the stage of the proceedings (Zimmermann, 2012).

The first of these two kinds of absence is a complete non-appearance or default. The absence of the party is absolute. The State fully separates itself from the proceedings (jurisdiction and merits), and even if it interacts with the Court or its counterpart by other means, it is fully absent of the indoor proceedings.

The relevant doctrine on the topic has identified a second circumstance (Kohen, 2010), reflecting the criteria adopted for such phenomenon by the continental legal system, the "*défaut de conclure*". It is defined as an absence at *any procedural moment in which the party, even if generally present in the procedures, fails to attend a procedural step, a submission, or to defend a claim. This could be broadly understood as a partial non-appearance and would include the multiple occasions*

*in which the party, for instance, is present in the jurisdiction proceedings, but becomes absent of the merits proceeding* (Eisemann, 1973).

#### **4.1. Previous cases of non-appearance as “default” and “partial non-appearance”.**

Under these two parameters, it is possible to classify the cases in which the I.C.J. has applied Article 53 under the categories of complete non-appearance and partial non-appearance.

For instance, the recent case of Colombia, certainly hypothetical nowadays, since the State finally decided to appear in the proceedings and withdraw its political declaration of non-appearance, could be classified as partial non-appearance, if after taking part in the jurisdiction proceedings of the “continental shelf case”, it decides not to appear during the merits proceedings, just as it occurred in the *Paramilitary Activities* case.

The previous cases in which the absence of the Party was complete, include Iceland in *Icelandic Fisheries Jurisdiction (Jurisdiction and Merits)*, France in the *Nuclear Tests case* (where the court did not expressly apply Article 53 but addressed the absence of France as an issue of admissibility), India in *Pakistani Prisoners of War* (a case removed from the list since the parties entertained direct negotiations), Turkey in *Aegean Sea*, and Iran in the *Teheran Case* (Lamm, 2014). On the other hand, the cases of partial non-appearance are *Corfu Channel* in which Albania decided not to appear for the compensation stage, *Anglo Iranian Oil Company* and *Nottebohm* (tardiness in appointing agents or absence only during early stages of the proceedings), *Paramilitary Activities* (where the United States took part of the preliminary proceedings and not during merits) (Fry, 2010) and *Qatar-Bahrein* (regarding the representation of the respondent) (Lamm, 1986).

Taking into account this classification, we will review the most relevant conclusions extracted from the I.C.J. case law, with a view of ascertaining the rules of law that these cases have developed regarding the consequences of non-appearance in the applicable law and in the fact-finding of the cases. This set of conclusions can be relevant for future cases of non-appearance, such as they were in the hypothetical case of Colombia in the case regarding the “delimitation of the continental shelf beyond 200 miles” to which now the State rightfully in our opinion, decided to appear.

#### **5. The I.C.J CASE law on non-appearance: rules derived from the jurisprudence and procedural consequences**

Without the intention of entertaining a discussion of the value of the I.C.J. case-law as precedent (Reisman, 1989), it is clear that the previous I.C.J. cases constitute a valuable source for understanding the law and practice of the tribunal. In topics

such as non-appearance, it is possible to affirm that the Court has developed some sort of “*jurisprudence constante*” (Pellet, 2013).

### **5.1. Non-appearance and returning to the proceedings: *affaire du Déroit de Corfou.***

In the stage of the proceedings for the assessment of the amount of compensation in the *Corfu Channel* case, Albania decided not to appear. It neither appointed agents nor presented any submissions or counter-memorials to the Court. It argued that the fixation of the reparation amount was out of the jurisdictional scope of the 1948 *compromis* with the United Kingdom.

During the proceedings, Albania desisted from its decision not to appear and therefore asked the Court to prolong the deadline for the submission of its written observations, in an attempt to return to the proceedings. In application of Article 53, the I.C.J. allowed Albania’s return but strongly stated that it could not affect previous stages that were already closed (Lamm, 1986) and that it could not use the right to return as a mean of dilation of the procedures:

248: The Court points out that it has given ample opportunity to the Albanian Government to defend its case; that, instead of availing itself of this opportunity, that Government has twice disputed the Court’s jurisdiction in the present part of the proceedings, that it did not file submissions and declined to appear at the public hearing on November 17th. In those circumstances the Court cannot grant the request of the Albanian Government<sup>2</sup>. (C.I.J. Recueil, 1949, p. 244)

This first procedural consequence is the Court’s power to assess the return of the State as a tactic to dilate the procedure, and, even when allowing the State to return, deny the retroactive effects on stages already closed, such as deadlines. For the non-appearing State, this implies a strategic burden: the State must be careful to return in an adequate moment to the proceeding, and with the risk that a bad-timed return might be regarded by the Court as a dilation of the process, leading it to deny the prolongation of deadlines or rejecting submissions. These circumstances imply that, the conditions for the return of the State are subjected to the Court’s authority to ensure the soundness of the proceedings.

#### **5.1.1. Experts and non-appearance of the respondent in the *Corfu Channel* Case.**

In the *Corfu Channel* case, ordered the appointment of experts and for the assessment of damages even in the absence of the respondent: this is particularly relevant for future cases of non-appearance, since any orders rendered by the Court are binding and can be produced even in the application of Article 53 (Rosenne, 2006).

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<sup>2</sup> C.I.J., affaire du Déroit de Corfou (fixation dumontant des réparations, arrêt, C.I.J. Recueil 1949.

During the assessment of the amount of compensation stage in the *Corfu Channel* case, the order of the Court relied on Article 53:

Whereas the Government of the People's Republic of Albania has failed to defend its case and whereas, therefore, the Agent of the Government of the United Kingdom has asked that the Court decide in favour of the claim of his Government; Whereas the Albanian Government, duly notified, did not present itself before the Court at the public hearing of November 17th, 1949; Whereas that Government therefore is in the situation envisaged in Article 53 of the Statute ; Whereas in these conditions paragraph 2 of the said Article is applicable ; Whereas the estimates and figures submitted by the Government of the United Kingdom raise questions of a technical nature which call for the application of Article 50 of the Statute; The Agent of this Government having been duly heard; Decides that (1) Experts designated by the Court shall examine the figures and estimates stated in the last submissions filed by the Government of the United Kingdom regarding the amount of its claim for the loss of the Saumarez and the damage caused to the Volage ; (2) This examination shall be entrusted to Rear-Admiral J. B. Berck, of the Royal Netherlands Navy, and Mr. G. de Rooy, Director of Naval Construction, Royal Netherlands Navy<sup>3</sup>. (Article 53)

This is particularly relevant for future cases involving scientific assessment or involving experts of any nature, since despite the absence of the party, the Court will continue with the fact finding procedures. If a very technical case such as the "delimitation of the continental shelf" involving Nicaragua and Colombia, leads to a situation where an expert is appointed, a scientific study is presented (or requested) and the absent party cannot controvert such findings, strongly affecting its position in the case.

## 5.2. Agents not appearing before the Court.

During the *Anglo-Iranian Oil* (I.C.J., *Anglo-Iranian Oil Co. case -jurisdiction-*, Judgment of July 22nd, 1952: I.C.J. Reports 1952, p. 93., 1952) case (jurisdiction) Article 53 was relevant under the circumstance of the non-appearing State failed to appoint an agent and hold official communications with the counterpart and the Court. This reaffirms the rule that there is no obligation to appoint agents, and that failing to do so does not completely implies that the State is not appearing (Lamm, 1986).

Additionally, during this case, provisional measures were ordered (Fenwick, 1951). Hence, a hypothetical decision not to continue with the presence of agents in the *Nicaragua v. Colombia* case and to communicate with the Court only via diplomatic channels, would not deter the proceedings to continue.

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<sup>3</sup> I.C.J., *Corfu Channel*. (United Kingdom of Great Britain and Northern Ireland v. Albania) Order of 19 November 1949 Assessment of the amount of compensation due from the People's Republic of Albania: Appointment of Expert, 1949.

### 5.3. Determining Law and Facts, Burden of Proof: *Fisheries Jurisdiction*.

The *Fisheries Jurisdiction* case, constitutes one of the most relevant cases for understanding the scope of Article 53.

First, in the judgment on jurisdiction, the I.C.J confirmed its duty to even “simulate” the possible arguments that the non-appearing party might raise in terms of objection to jurisdiction (a practice that should be extended to the merits). The Tribunal must explore the counterarguments that might reasonably be raised by the absent party to the grounds of jurisdiction presented by the applicant. This measure is derived from its duty in paragraph 2 of Article 53, regarding its need to “satisfy itself” in facts and law. Although it can be considered an adequate measure to achieve the mandate in article 36, it should be noted that the Court has only to simulate what it might believe is reasonable, which leads to believe that it could not entertain every objection to jurisdiction possible.

The Court, in accordance with its Statute and its settled jurisprudence, must examine proprio motu the question of its own jurisdiction to consider the Application of the United Kingdom. Furthermore, in the present case the duty of the Court to make this examination on its own initiative is reinforced by the terms of Article 53 of the Statute of the Court... It follows from the failure of Iceland to appear in this phase of the case that it has not observed the terms of Article 62, paragraph 2, of the Rules of Court, which requires inter alia that a State objecting to the jurisdiction should “set out the facts and the law on which the objection is based”... Nevertheless, the Court, in examining its own jurisdiction, will consider those objections which might, in its view, be raised against its jurisdiction<sup>4</sup>. (I.C.J. Reports, 1973, p. 3.)

In this case, during the merits stage of the proceedings, the I.C.J made an interesting interpretation of Article 53 and its relation with the *ituranovit curia* principle:

The Court however, as an international judicial organ, is deemed to take judicial notice of international law, and is therefore required in a case falling under Article 53 of the Statute, as in any other case, to consider on its own initiative all rules of international law which may be relevant to the settlement of the dispute. It being the duty of the Court itself to ascertain and apply the relevant law in the given circumstances of the case, the burden of establishing or proving rules of international law cannot be imposed upon any of the parties, for the law lies within the judicial knowledge of the Court<sup>5</sup>. (I.C.J Reports, 1974, p. 3)

Three grave consequences can be derived from the above: 1) The Court will not put the burden of proof of the applicable law on the applicant as a consequence of the non-appearance of the respondent, 2) the Court retains the burden of establishing

<sup>4</sup> C.I.J, United Kingdom v. Iceland, Jurisdiction of the Court, Judgment, I.C.J. Reports 1973.

<sup>5</sup> I.C.J, Fisheries Jurisdiction (United Kingdom v. New Zealand), Merits, Judgment, I.C.J. Reports 1974.

the applicable law, exploring all rules of international law at its disposal, 3) the Court can create its own version of the non-appearing State arguments regarding the applicable law, based on documents and submissions presented by it in other stages of the proceeding or other communications known by the Court and the applicant. In consequence, in a potential case of non-appearance by Colombia, the Court could consider arguments presented by the State in the jurisdiction stage.

#### **5.4. Binding nature of the decision: *Military and paramilitary activities in and against Nicaragua*.**

The *Military and paramilitary activities in and against Nicaragua* case contains many of the most important case-law rules governing non-appearance that may resemble many future cases of non-appearance, since the United States took part in the preliminary objections proceedings and decided not to appear during the merits stage. This is a conduct that Colombia could hypothetically follow if it decides to appear in the merits proceedings of the “continental shelf” case.

The Court, in *Paramilitary activities*, emphasizes its critique in the position of the United States of abandoning the procedures once the ruling on jurisdiction is produced against them:

27. When a State named as party to proceedings before the Court decides not to appear in the proceedings, or not to defend its case, the Court usually expresses regret, because such a decision obviously has a negative impact on the sound administration of justice... In the present case, the Court regrets even more deeply the decision of the respondent State not to participate in the present phase of the proceedings, because this decision was made after the United States had participated fully in the proceedings on the request for provisional measures, and the proceedings on jurisdiction and admissibility. Having taken part in the proceedings to argue that the Court lacked jurisdiction, the United States thereby acknowledged that the Court had the power to make a finding on its own jurisdiction to rule upon the merits. It is not possible to argue that the Court had jurisdiction only to declare that it lacked jurisdiction... The Court is bound to emphasize 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<sup>6</sup>. (I.C.J. Reports, 1986, p. 14)

Further the Court also denies the possibility for a State to “reserve its right” to comply with the judgment as a consequence of its non-appearance. The Court restates that the I.C.J rulings are binding in all procedural circumstances. Even if non-appearance is a valid option for the State, it has no consequence on the legality of the decision.

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<sup>6</sup> C.I.J, *Military and Paramilitary Activities in and against Nicaragua* (Nicaragua v. United States of America). Merits, Judgment. I.C.J. Reports 1986.

The fact that a State purports to “reserve its rights” in respect of 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...** When Article 53 of the Statute applies, the Court is bound to “satisfy itself, not only that it has jurisdiction in accordance with Articles 36 and 37, but also that the claim” of the party appearing is well founded in fact and law... **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**<sup>7</sup>. (I.C.J. Reports, 1986, p. 14)

In a mostly procedural matter, the case is relevant as it establishes certain limitations for the return of the non-appearing State to the proceedings, as to protect the *res judicata* during the procedure, which should not be wrongly affected by this return:

Nor should it be overlooked that, while the United States has chosen not to appear or participate in the present phase of the proceedings, Article 53 of the Statute does not debar it from appearing to present its arguments on the question of reparation if it so wishes. On the contrary, the principle of the equality of the Parties requires that it be given that opportunity. **It goes without saying, however, that in the phase of the proceedings devoted to reparation, neither Party may call in question such findings in the present Judgment as have become *res judicata***<sup>8</sup>. (I.C.J. Reports, 1986, p. 14)

From the previous paragraph it can be understood that Article 53 allows for the return of the State during any stage of the proceedings, but that return cannot affect the principle of *res judicata*, from the jurisdiction proceedings, or the different stages during the merits proceedings, such as written submissions, incidents, orders, pleadings, etc.

Colombia or any State hypothetically involved in a situation under Article 53, should note that the return to the proceedings is a right of the State, but its consequences can be regulated by the Court, as to protect the *res judicata* of previous steps taken during the proceedings in which the State was absent, and shall not return with the intent to request a modification of the results of such stages.

### 5.5. Burden of Proof.

*Paramilitary activities* are also a prolific case regarding considerations of the Court about the burden of proof in circumstances where Article 53 is being applied.

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<sup>7</sup> C.I.J., Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America). Merits, Judgment. I.C.J. Reports 1986.

<sup>8</sup> C.I.J., Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America). Merits, Judgment. I.C.J. Reports 1986.

From the merits ruling in that case, one can extract a set of rules regarding the establishment of the applicable law and determining the facts when a party is absent, specifically, when the non-appearing party was present during the jurisdiction proceedings and stated, in particular or in general terms, its position on the facts and the law and now is absent in the merits stage:

29. The use of the term “satisfy itself” in the English text of the Statute (and in the French text the term “s’assurer”) implies that the Court must attain the same degree of certainty as in any other case that the claim of the party appearing is sound in law, and, so far as the nature of the case permits, that the facts on which it is based are supported by convincing evidence. For the purpose of deciding whether the claim is well founded in law, the principle *juranovit curia* signifies that the Court is not solely dependent on the argument of the parties before it with respect to the applicable law (cf. “Lotus”, P.C.I.J., Series A, No. 10, p. 31), so that the absence of one party has less impact. (...)

Nevertheless, the views of the parties to a case as to the law applicable to their dispute are very material, particularly, as will be explained below (paragraphs 184 and 185), when those views are concordant. In the present case, the burden laid upon the Court is therefore somewhat lightened by the fact that the United States participated in the earlier phases of the case, when it submitted certain arguments on the law which have a bearing also on the merits<sup>9</sup>. (I.C.J. Reports, 1986, p. 14)

Some conclusions can be drawn from this ruling. First, in application of the *Juranovit Curia* principle, the Court, in its definition of the applicable law and its interpretation, is not limited to what was stated by the non-appearing party in the jurisdiction procedures once it has left the merits stage. By its own initiative, the Court can take notice of all the possible applicable law even if it was not considered by the absent party in its early submissions.

Second, the Court, in its reconstruction of the facts, and that law applicable *inter alia*, can take into consideration, the facts brought to its attention by the non-appearing party in previous stages of the proceeding, including the jurisdiction procedure. This can be relevant in the case *Nicaragua v. Colombia* “extended continental shelf” and in a potential absence of Colombia in the merits proceedings, since during its preliminary objections, Colombia presented detailed objections involving the interpretation of facts that could be taken into account by the Court in further proceedings in the case of a future non-appearance. (For example, Colombia contends, in its fifth-alternative objection, that neither of the two requests in Nicaragua’s Application are admissible. First, due to the fact that Nicaragua has not secured the requisite recommendation on the establishment of the outer limits of its continental shelf from the CLCS, and second, because the it considers the dispute

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<sup>9</sup> C.I.J., *Military and Paramilitary Activities in and against Nicaragua (Nicaragua vs. United States of America)*. Merits, Judgment. I.C.J. Reports 1986.

to be non-existent, based on its interpretation of the facts leading —and posterior— to the 2012 judgment. In the writings sustaining this objection, the respondent wrote a detailed explanation of its own interpretation of the facts and law, which the Court could use to simulate its arguments in a potential non-appearance to future proceedings.

### **5.6. The value of informal communications with the Court: *Military and Paramilitary Activities.***

One controversial issue regarding non-appearance, is the assessment of communications presented by the non-appearing State to the Court by any extra-official channels, different to submissions inside the process in due course. In the *Paramilitary activities case*, the Court position regarding accepting these communications is very negative, to the point of stating that one cannot take advantage of its absence and the study of such communications cannot derive in undue advantages for the non-appearing party.

31 (...) that the equality of the parties to the dispute must remain the basic principle for the Court. The intention of Article 53 was that in a case of non-appearance neither party should be placed at a disadvantage; therefore, the party which declines to appear cannot be permitted to profit from its absence, since this would amount to placing the party appearing at a disadvantage... The treatment to be given by the Court to communications or material emanating from the absent party must be determined by the weight to be given to these different considerations, and is not susceptible of rigid definition in the form of a precise general rule<sup>10</sup>. (I.C.J. Reports 1986, p. 14)

This case suggests that all circumstances under Article 53 shall be guided by the *equality of the parties* principle and that none of the parties must become disadvantaged in the absence of the other: hence, the non-appearing party cannot derive any advantage from its absence. This principle, applied to the rules of the Statute regarding evidence and pleadings, implies that both parties shall have the same amount of procedural opportunities, submissions, hearings, memorials, etc., which in practice, can be disrupted by informal communications being accepted lightly. Even if they are not ruled out directly, they will have to be studied by the Court from the point of view of the *egalite des armes* before being fully taking into account (Zimmermann, 2012). Any State in future cases of non-appearance that might consider the construction of an informal communication, a “whitebook” or any other type of document to be delivered via extra-procedural instances, shall hold up to this consideration.

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<sup>10</sup> C.I.J., *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*. Merits, Judgment. I.C.J. Reports 1986.

### 5.7. The value of informal communications with the Court.

In a slightly different sense of what was stated in the *Paramilitary activities* case, in the case *Aegean Sea*, the Court exposed a more benevolent view of informal communications, since in its ruling, the Court hold that is “needed” to take into account such communications as part of the duties imposed in Article 53.

In the *Aegean Sea* case, the Court takes notice of the invocation of a reservation made by an absent party that was presented thru non-procedural channels (Devaney, 2016): this position has been criticized by the commentators since it might imply an unbalance in the delicate state of the equality of parts in a procedure governed by Article 53:

47. In the procedural circumstances of the case it cannot be said that the Court does not now have before it an invocation by Turkey of reservation (b) which conforms to the provisions of the General Act and of the Rules of Court. Nor can it be said that the Court substitutes itself for the Turkish Government if it now takes cognizance of a reservation duly invoked in *limine litis* in the proceedings on the request for interim measures. **It would not discharge its duty under Article 53 of the Statute if it were to leave out of its consideration a reservation, the invocation of which by the Respondent was properly brought to its notice earlier in the proceedings.** It follows that the Court has now to examine the scope of reservation (b) and its application to the present dispute<sup>11</sup>. (C. I. J. Recueil, 1978, p. 3)

As a result of the different approaches between the Aegean Sea and Paramilitary Activities cases, any State involved in a future non-appearance needs to contemplate the risk of attempting an informal communication with the Court or any other approach as a “whitebook” or an aide-memoire, since the Court can take different approaches in its evaluation of this information, depending of its content, time and channel of presentation.

## CONCLUSION

This paper conducted an analysis of the most important aspects to be taken into account in cases of non-appearance. It has been conducted in the light of a situation that can potentially amount, to the most recent instance where a State fails to defend its case. Hence, and taking Colombia’s situation as an example, the paper sought to address the most important aspects in the application of Article 53 of the Statute of the I.C.J. The paper presented specific conclusions in each of its sections, from the nature of non-appearance, its effect in the ruling, to the agents, the law, the evidence, the

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<sup>11</sup> C.I.J., Plateau continental de la mer Egée, arrêt, C.I.J. Recueil 1978.

judges ad hoc and the procedure before the I.C.J), all which tend to indicate that non-appearance, although a permitted yet not recurrent behavior of State parties to the procedure, is in general, prejudicial and detrimental for its procedural interests, for its defense of the case and for the international administration of justice as a whole. In the hypothetical case of Colombia, all the consequences presented in the paper along with the technicalities of the case regarding the continental shelf beyond 200 nautical miles, reinforce the conclusion that not defending the case before the I.C.J would be strategically unwise, and the recent decision of Colombia to withdraw its political declaration of non-appearance and presenting its counter-memorials and counterclaims, was the right path. In a highly scientific case of delimitation or a case with a highly disputed factual complex as the one regarding the alleged violations of sovereign spaces, appearing before the Court not only allows the State to present its own experts, controvert the evidence presented by the other State, but also, as Colombia recently did, to present its own counterclaims, which were partially accepted by the I.C.J in its order of 15 November 2017.

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