

**NON-APPEARANCE BEFORE
THE INTERNATIONAL COURT OF JUSTICE**

LEGAL ASPECTS OF INTERNATIONAL ORGANIZATION

S. Rosenne, *Procedure in the International Court*. A commentary on the 1978 rules of the International Court of Justice. 1983.
ISBN 90 247 3045 7

Taslim O. Elias, *The International Court of Justice and some Contemporary Problems*. Essays on international law. 1983.
ISBN 90 247 2791 X

Ijaz Hussain, *Dissenting and Separate Opinions at the World Court*. 1984.
ISBN 90 247 2920 3

J. Elkind, *Non-Appearance before the International Court of Justice*. 1984.
ISBN 90 247 2921 1

E. Osieke, *Constitutional Law and Practice in the International Labour Organization*. *In press*.
ISBN 90 247 2985 8

JEROME B. ELKIND

*Senior Lecturer in Law
University of Auckland
New Zealand*

Non-Appearance before the International Court of Justice

Functional and Comparative Analysis

1984 **MARTINUS NIJHOFF PUBLISHERS**
a member of the KLUWER ACADEMIC PUBLISHERS GROUP
DORDRECHT / BOSTON / LANCASTER



Distributors

for the United States and Canada: Kluwer Academic Publishers, 190 Old Derby Street, Hingham, MA 02043, USA

for the UK and Ireland: Kluwer Academic Publishers, MTP Press Limited, Falcon House, Queen Square, Lancaster LA1 1RN, England

for all other countries: Kluwer Academic Publishers Group, Distribution Center, P.O. Box 322, 3300 AH Dordrecht, The Netherlands

Library of Congress Cataloging in Publication Data

Elkind, Jerome B.

Non-appearance before the International Court of Justice.

(Legal aspects of international organization ; v. 4)

Bibliography: p.

1. International Court of Justice. 2. Jurisdiction (International law) 3. Provisional remedies.

I. Title. II. Series: LAIO ; v. 4.

JX1971.6.E59 1984 341.5'52 83-27165

ISBN 90-247-2921-1 (this volume)

ISBN 90-247-3044-9 (series)

Copyright

© 1984 by Martinus Nijhoff Publishers, Dordrecht.

All rights reserved. No part of this publication may be reproduced, stored in a retrieval system, or transmitted in any form or by any means, mechanical, photocopying, recording, or otherwise, without the prior written permission of the publishers,

Martinus Nijhoff Publishers, P.O. Box 163, 3300 AD Dordrecht, The Netherlands.

PRINTED IN THE NETHERLANDS

**To Judge Philip C. Jessup
for his encouragement**

In the world community, as in the individual State, there is no more powerful incentive to good order than the expectation and example of good order

C. Wilfred Jenks, *The prospects of international adjudication*

We have always been for peace, but some things are more important

World Leader speaking as her armies were invading the territory of another country.

TABLE OF CONTENTS

Foreword	ix
Author's preface	xiii
Acknowledgments	xv
1. Default in municipal law	1
Introduction	1
Roman law	2
<i>In jure</i> proceedings	4
<i>In judicium</i> proceedings	5
Imperial procedure	6
Mediaeval German procedure	6
Romano-Canonical procedure	8
German and Austrian procedure	9
French law	12
English law	15
United States law	24
Suits between States	24
Suits between individuals	27
Summary	29
2. Non-appearance and the cases	31
Non-appearance before the Permanent Court of International Justice	31
<i>Sino-Belgian Treaty Case</i>	31
<i>Electricity Company of Sofia and Bulgaria Case</i>	33
<i>The Eastern Carelia Case</i>	35
Before the International Court of Justice	38
<i>The Corfu Channel Case</i>	38
<i>Monetary Gold Case</i>	41
<i>The Anglo-Iranian Oil Co. Case</i>	44
<i>The Nottebohm Case</i>	49
<i>The Fisheries Jurisdiction Cases</i>	53
<i>The Nuclear Test Cases</i>	58
<i>The Trial of Pakistani Prisoners of War Case</i>	62
<i>The Aegean Sea Case</i>	67
<i>The Hostages Case</i>	73

VIII

3. 'Default' before the International Court of Justice	79
Introduction	79
Consent and jurisdiction	82
Non-appearance and default	90
The drafting history of article 53	100
4. Interim protection and non-appearance	103
Introduction	103
The basis of jurisdiction	105
Categories of jurisdiction	107
Drafting history	108
Article 35	110
Probability of Jurisdiction	111
Conclusion	114
5. Three kinds of self judgment	117
Introduction	117
Self-judging reservations	120
Implicitly self-judging reservations	122
Explicitly self-judging reservations	124
United States policy prior to Connally	124
Senate debates on the Connally Amendment	125
<i>The Norwegian Loans Case</i>	139
<i>The Interhandel Case</i>	148
<i>Aerial Incident of 27 July 1955</i>	155
Reasonableness and good faith	157
'Essentially'	164
Self-judging conduct	168
6. Conclusion — The willingness of States to submit to jurisdiction	171
Procedural disadvantages	171
Procedural reform	172
Pleas and exhortations	173
Recommendations for procedural reform	176
Impartiality	178
Impartiality and procedure	178
Impartiality of judges	179
Impartiality of the law	185
Justiciability	187
Third party settlement	203
Bibliography	207
Table of cases	215
Name index	219
Subject index	223