

Article 23

(1) The Court shall remain permanently in session, except during the judicial vacations, the dates and duration of which shall be fixed by the Court.

(2) Members of the Court are entitled to periodic leave, the dates and duration of which shall be fixed by the Court, having in mind the distance between The Hague and the home of each judge.

(3) Members of the Court shall be bound, unless they are on leave or prevented from attending by illness or other serious reasons duly explained to the President, to hold themselves permanently at the disposal of the Court.

(1) La Cour reste toujours en fonction, excepté pendant les vacances judiciaires, dont les périodes et la durée sont fixées par la Cour.

(2) Les membres de la Cour ont droit à des congés périodiques dont la date et la durée seront fixées par la Cour, en tenant compte de la distance qui sépare La Haye de leurs foyers.

(3) Les membres de la Cour sont tenus, à moins de congé, d'empêchement pour cause de maladie ou autre motif grave dûment justifié auprès du Président, d'être à tout moment à la disposition de la Cour.

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A. Historical Development

I. The Statute of the PCIJ

1. *The Original Statute and the 1922 Rules of Court*

- 1 Article 23, dealing with the working of the Court, is the provision in the Statute that has seen the most comprehensive changes over the years. In its original version, as signed on 16 December 1920, it reads:

A session of the Court shall be held every year.

Unless otherwise provided by rules of Court, this session shall begin on June 15,¹ and shall continue for so long as may be deemed necessary to finish the cases on the list.

The President may summon an extraordinary session of the Court whenever necessary.²

In 1920, it was thought that at the outset the Court would have ‘little to do’;³ in order to provide for permanence it was decided that the Court should nevertheless hold at least one ordinary session a year at a fixed date. If the exigencies of its work required, the President could always summon an extraordinary session of the Court.

- 2 The Rules of Court adopted on 24 March 1922⁴ (revised on 31 July 1926⁵ and amended on 7 September 1927⁶) dealt with the sessions of the Court in Arts. 27 and 28.⁷

2. *The Need for Revision of the Statute*

- 3 The increasing workload of the Court quickly made the distinction between ordinary and extraordinary sessions unsatisfactory. The distinction never had much substantial significance, although for a time the Court seems to have thought that extraordinary sessions should be avoided as far as possible.⁸ In its first 14 years, from 1922 to 1935, the Court held 35 sessions; an ordinary session each year, whether or not a case was ready for hearing, and 21 extraordinary sessions. Some confusion resulted from the provision requiring the annual session to continue as long as deemed necessary to finish the cases on the (session) list. As a result, in some years the new ordinary session started before the old one had ended.⁹

- 4 In its early years, one of the recurring problems of the Court was to assure the attendance of the judges at its sessions.¹⁰ The 1922 Rules of Court did not include a provision on the obligation of judges to be present at the Court’s sessions and ‘some degree of abuse’ subsequently crept into the system.¹¹ The judges from overseas participated regularly in the ordinary summer sessions, but were absent during most of the extraordinary sessions convened during the winter period. This led to markedly different compositions of the Court, the Court at many extraordinary sessions being composed

¹ On the reasons for choosing 15 June as starting date, *cf.* de Bustamante, A.S., *The World Court* (1925), p. 163.

² PCIJ, Series D, No. 1. For a commentary on the original version of Art. 23, *cf.* von Stauffenberg, pp. 112–124.

³ Procès-Verbaux of the Proceedings of the Advisory Committee of Jurists (1920), p. 718.

⁴ Rules of Court, PCIJ, Series D, No. 2, pp. 560 *et seq.*

⁵ Revised Rules of Court, PCIJ, Series D, No. 1, 1st edn., pp. 33 *et seq.*

⁶ Fourth Annual Report, PCIJ, Series E, No. 4, pp. 72–78.

⁷ For a discussion of the relevant provisions of the 1922 Rules, *cf.* PCIJ, Series D, No. 2, pp. 338, 99–100, 131, 185–186.

⁸ *Cf.* Third Annual Report, PCIJ, Series E, No. 3, pp. 183–184.

⁹ *Cf. e.g.* von Stauffenberg, p. 117.

¹⁰ *Cf.* the overview of the attendance record of judges in Hudson, *PCIJ*, p. 338. *Cf.* also PCIJ, Series D, No. 2, 2nd Add. p. 17, 27.

¹¹ PCIJ, Series D, No. 2, 2nd Add. p. 27.

almost exclusively of European judges. In November 1928, an extraordinary session even had to be adjourned because there was no quorum.¹² This experience was one of the reasons for the decision in 1928 to examine the Statute with a view to amending it.¹³

3. *The 1929 Revision Protocol Amending the Statute*

The Revision Protocol of 14 September 1929 brought about a complete overhaul of Art. 23. The new text provided:

1. The Court shall remain permanently in session, except during the judicial vacations, the dates and duration of which shall be fixed by the Court.
2. Members of the Court whose homes are situated at more than five days' normal journey from The Hague shall be entitled, apart from the judicial vacations, to six months' leave every three years, not including the time spent in travelling.
3. Members of the Court shall be bound, unless they are on regular leave or prevented from attending by illness or other serious reasons duly explained to the President, to hold themselves permanently at the disposal of the Court.

The modifications introduced in Art. 23 were probably the most important of the 1929 amendments to the Statute.¹⁴ The Protocol introduced the system of permanence and an obligation of attendance. Until then, judges had been regarded as being normally at their homes, and present at The Hague as an exception. This expectation was now reversed. Judges were not only to adjudicate on cases, but to take their share in the daily life of the Court and in its functional activities, so that it would be 'a living Court'.¹⁵ Long leave for judges from distant countries, on the other hand, was seen as a necessary part of the system of permanence. It was intended to facilitate acceptance of membership of the Court by judges from American countries in particular,¹⁶ and was introduced so that judges would not lose contact with their home country.

The questions of permanency of the Court and the obligatory attendance of judges were among the chief grounds of opposition to the 1929 Protocol which delayed its entry into force until 1 February 1936.

4. *Partial Implementation of the Changes in the 1931 Rules of Court*

As the Revision Protocol did not enter into force as quickly as had been hoped, the Assembly of the League of Nations on 25 September 1930 expressed the hope that the Court would consider the possibility of regulating, pending the coming into force of the revised Statute, the questions of the sessions of the Court and the attendance of the judges (including the question of leave) in its Rules.¹⁷

The Court gave effect to the revised Art. 23 as far as compatible with the existing Statute in Art. 27 of its Rules of 21 February 1931.¹⁸ The Court could not yet adopt the system of a permanent session. Instead, it changed the beginning of the ordinary session to 1 February.¹⁹ This date constituted a compromise: it was to give the impression of

¹² On the required quorum of judges *cf.* Palchetti on Art. 25 MN 13–19.

¹³ Hurst, C., *The Permanent Court of International Justice* (1931), p. 5; Hudson, *PCIJ*, p. 339.

¹⁴ For a more general assessment of the 1929 revision *cf.* Spiermann, Historical Introduction, MN 37–38.

¹⁵ *PCIJ*, Series D, No. 2, 2nd Add., p. 12. ¹⁶ Hudson, *PCIJ*, p. 172.

¹⁷ Resolution No. 3 on the Organization of the Permanent Court of International Justice, LNOJ, Spec. Suppl. No. 83 (October 1930), p. 9.

¹⁸ Rules of Court, *PCIJ*, Series D, No. 1, 2nd edn., pp. 23 *et seq.* For the drafting history of new Art. 27 of the 1931 Rules, *cf.* *PCIJ*, Series D, No. 2, 2nd Add., pp. 10–88, 97–101, 202–207.

¹⁹ Seventh Annual Report, *PCIJ*, Series E, No. 7, p. 284.

permanence while allowing judges to spend Christmas in their home countries. A proposal to include a provision on judicial holidays in the Rules was also not accepted,²⁰ but the Court adopted a resolution in which it expressed the opinion that ‘[t]he Court considers it desirable that it should not be convened between July 1 and October 1, except for urgent cases’.²¹ The Court also incorporated the duty of attendance and the entitlement to long leave in its Rules. But, as the revised Statute had not come into force, the Court felt unable to compel judges to establish their residence close to The Hague to attend sittings of the Court at short notice. It therefore created an incentive for overseas judges: only those judges who by reason of the fulfilment of their duty of attendance voluntarily ‘live[d] away from their own country’ were entitled to periodic leave.²²

5. *The 1936 Rules of Court*

- 9 When the Revision Protocol had finally entered into force, the Court on 11 March 1936 brought its Rules in line with the revised Statute. Article 23 was implemented by Arts. 25 to 27 of the 1936 Rules.²³ The Court adopted a judicial year from 1 January to 31 December and fixed the judicial vacations, which totalled three and a half months. With the entry into force of the revised Statute, all judges were under an obligation to hold themselves permanently at the disposal of the Court. This meant that, owing to Art. 23, para. 2, judges whose homes were more than five days distant from The Hague could no longer reside at their homes, but were required to take up residence near the seat of the Court. By way of compensation, they were entitled to periods of long leave.²⁴

II. The Statute of the ICJ

1. *Drafting of the Statute*

- 10 Article 23 did not prove controversial during the drafting of the ICJ Statute.²⁵ The discussion largely turned around the elimination of para. 2.²⁶ A proposal by Cuba of a three-month judicial recess period during the summer was not implemented.²⁷ In the end, only two changes were made: para. 2 was modified, extending the entitlement to periodic leave to all judges and making the system more flexible, and in para. 3 the word ‘regular’ before leave was deleted. The improvement in modern communications no longer seemed to require special treatment for overseas judges.

2. *Proposed Amendments of the Statute*

- 11 On the proposal of the Court, the UN General Assembly included in the agenda of its 24th session in 1969 and five subsequent sessions an item entitled ‘Amendment to Art. 22 of the Statute of the International Court of Justice’ (allowing the Court to take its seat at places other than The Hague), and consequential amendments to Arts. 23 and 28. But the Assembly postponed the item each year, and in 1976 it finally decided to remove it from its agenda.²⁸

²⁰ PCIJ, Series D, No. 2, 2nd Add., pp. 72–74, 76–78.

²¹ PCIJ, Series D, No. 2, 2nd Add., p. 80; Seventh Annual Report, PCIJ, Series E, No. 7, p. 285. But the Court was convened in July 1931 and July 1933.

²² PCIJ, Series D, No. 2, 3rd Add., p. 539. Cf. also PCIJ, Series D, No. 2, 2nd Add., pp. 83, 84.

²³ Rules of Court, PCIJ, Series D, No. 1, 1st edn., pp. 28 *et seq.* For the drafting history of Arts. 25–26 of the 1936 Rules, cf. PCIJ, Series D, No. 2, 3rd Add., pp. 523–547, 629–635.

²⁴ PCIJ, Series D, No. 2, 3rd Add., pp. 543–545 (but contrast Hudson, *PCIJ*, p. 341).

²⁵ UNCIO XIII, pp. 381–393, 387; *ibid.*, p. 156.

²⁶ UNCIO XIV, pp. 120–122.

²⁷ UNCIO XIV, pp. 387–542, 406.

²⁸ ICJ Yearbook (1968–1969), pp. 108–110; ICJ Yearbook (1976–1977), p. 113. For further details, cf. Karl on Art. 70 MN 7–10.

3. Rules of Court

The changes to Art. 23 required some consequential changes to the 1946 Rules which dealt with the provision in Arts. 25 to 27. In the 1972 Rules the relevant articles were renumbered and became Arts. 28 to 30 without any substantive changes being made. The 1978 Rules combined all the rules implementing the provision in Art. 20 and introduced some substantial changes which will be dealt with in the course of the commentary. 12

B. Analysis

I. The Permanence of the Court

Pursuant to Art. 23, para. 1, the Court shall remain permanently in session, except during the judicial vacations. A court may be permanent in name but may not be permanently in session, as is shown by the example of the PCIJ, which was permanently in session only from March 1936. On the other hand, *ad hoc* courts may be permanently in session. As regards the ICJ, Art. 23, para. 1 means that there are no special Court 'sessions' (either ordinary or extraordinary), but there is instead a 'judicial year' which coincides with the calendar year.²⁹ The term 'judicial year' is therefore only another name for a continuous session which lasts the whole year.³⁰ One practical consequence of the Court being permanently in session is that the verbatim records of sittings are numbered consecutively throughout the year.³¹ 13

Being permanently in session does not mean that the Court functions permanently; what is permanent is the readiness of the Court to discharge its functions. Thus, the Court may be permanently in session, but it is not sitting permanently.³² Sitting means that, if necessary, the judges are ready at short notice to hold a public or private sitting or, simply, that the Court is ready to meet at any moment.³³ The Rules of Court, in many places, envisage the possibility that the Court might not be sitting at a particular time and, in that case, allow the President to exercise the powers of the Court.³⁴ Judging by the number of Orders made by the President over the last 25 years, the Court has not been sitting on quite a number of occasions.³⁵ In 1976, judges spent 'an average of seven months a year' in The Hague.³⁶ By 1996, the presence of the judges at the seat of Court had only slightly increased to 'on average seven to eight months'.³⁷ Although it has been pointed out that judges need not be present at The Hague for the purpose of studying the pleadings in a case, if they were there for longer, the Court's effectiveness and productivity might be enhanced. 14

²⁹ Note that the judicial year is not identical with the reporting period of the ICJ Yearbook.

³⁰ PCIJ, Series D, No. 2, 3rd Add., p. 525.

³¹ The Verbatim Records of the Court are headed 'CR [year]/number'. Cf. also Sixteenth Report, PCIJ, Series E, No. 16, p. 164. ³² Cf. PCIJ, Series D, No. 2, 3rd Add., pp. 530, 531, 532.

³³ PCIJ, Series D, No. 2, 3rd Add., p. 532.

³⁴ Cf. Arts. 37, para. 1, 44, para. 4, 53, para. 1, 54, para. 3, 63, para. 2, 69, para. 3, 74, paras. 2 and 3, 79, para. 5, 83, para. 1, 85, para. 1, 86, para. 1, 88, para. 3, 89, para. 3, 92, para. 1, 98, para. 3, 99, para. 2, 105, para. 2, 106 of the Rules.

³⁵ Between 1978 and 2003 the Court rendered 274 decisions (Judgments, Advisory Opinions and Orders) of which 91 (Orders) or some 30 per cent were made by the President because the Court was not sitting.

³⁶ ICJ (ed.), *The International Court of Justice* (1st edn., 1976), p. 24. It is of interest to note that in 1929 it was anticipated that 'the Court would have seven months' work a year' (Minutes of the 1929 Committee of Jurists, p. 56).

³⁷ ICJ (ed.), *The International Court of Justice* (4th edn., 1996), p. 26.

The 'Periods during which the Court has been sitting' or, more recently, the number of public sittings and private meetings, are recorded in the ICJ Yearbook. The following statistic gives an overview of the Court's sittings.³⁸

Year	Days sitting	Public sittings	Private meetings	Year	Days sitting	Public sittings	Private meetings
1946–1947	66			1975–1976	72	2	32
1947–1948	70			1976–1977	33	4	19
1948–1949	134			1977–1978	47	0	32
1949–1950	141			1978–1979	104	9	23
1950–1951	142			1979–1980	116	6	33
1951–1952	158			1980–1981	102	12	32
1952–1953	108			1981–1982	184	28	56
1953–1954	134			1982–1983	8	0	6
1954–1955	93			1983–1984	110	15	23
1955–1956	93			1984–1985	208	45	36
1956–1957	113			1985–1986	225	13	49
1957–1958	71			1986–1987 ³⁹	36	2	26
1958–1959	197			1987–1988	35	11	28
1959–1960	168			1988–1989	12	2	21
1960–1961	118			1989–1990	25	7	34
1961–1962	144			1990–1991	25	13	20
1962–1963	86			1991–1992	30	17	25
1963–1964	207			1992–1993	–	34	a number of
1964–1965 ⁴⁰	132	63	41	1993–1994	–	11	a number of
1965–1966 ⁴¹	200	40	54	1994–1995	–	19	a number of
1966–1967	45	1	28	1995–1996	–	31	a number of
1967–1968	96	0	62	1996–1997	–	22	a great number of
1968–1969	237	78	93	1997–1998	–	23	a great number of
1969–1970	126	2	33	1998–1999	–	44	a great number of
1970–1971	168	25	50	1999–2000	–	29	a great number of
1971–1972	111	13	46	2000–2001 ⁴²	–	17	a great number of
1972–1973	209	21	101	2001–2002	–	50	a great number of
1973–1974	No data	14	70	2002–2003	–	33	a great number of
1974–1975	182	34	44	2003–2004	–	30	a great number of

³⁸ A similar statistic for the PCIJ is given by Hudson, *PCIJ*, p. 335.

³⁹ From 1986–1987 onwards, the Yearbook no longer gives the periods during which the Court was sitting, but lists the days at which it was sitting.

⁴⁰ From 1964–1965 onwards, the Yearbook also lists the number of 'hearings' or 'public sittings' and the number of 'private meetings' of the Court which are not identical with the total period during which the Court sat (which includes Saturdays, Sundays and public holidays). There may also be more than one sitting or meeting on the same day.

⁴¹ Since 1965–1966, the judicial year runs from 1 August to 31 July. In the years before the judicial year ran from 16 July to 15 July, with the exception of 1964–1965 when the judicial year ran from 16 July to 31 July.

⁴² From 2000 onwards, the number of public sittings is no longer given in the ICJ Yearbook. The Yearbook only lists the cases in which 'public hearings' were held during the period under review. The

II. Judicial Vacations and Public Holidays

1. Judicial Vacations

Following Art. 23, para. 1 (*fine*), the dates and duration of the judicial vacations are to be fixed by the Court. The use of the plural indicates that the Statute envisages at least two periods of judicial vacations per year.⁴³ Until 1978, the Rules of Court provided:

In the absence of a special resolution by the Court, the dates and duration of the vacations of the Court are fixed as follows: (a) from December 18 to January 7; (b) from the Sunday before Easter to the second Sunday after Easter; (c) from July 15 to September 15.⁴⁴

The choice of periods of judicial vacations is necessitated by the general vacation situation at the seat of the Court, but it also reflects a certain Christian and northern hemispheric bias in the operational structure of the Court.⁴⁵ On several occasions, by special resolution, the Court has deviated from the dates laid down in the Rules in order to sit during the judicial vacations and dispose of unfinished cases.⁴⁶

Since 1978, the Rules of Court no longer specify the periods of judicial vacations. Instead, Art. 20, para. 4 provides that the Court shall fix the dates and duration of the judicial vacations having regard to the state of its General List and to the requirements of its current work. This approach gives the Court more flexibility to respond to the fluctuations and exigencies of its caseload. In practice, the Court has only rarely fixed the dates of the judicial vacations in advance. In recent years, judicial vacations have been announced only once. A press release, dated 22 February 2002, announced that the Court had fixed the following judicial vacations for 2002: ‘1 August 2002 to 31 August 2002 inclusive. 23 December 2002 to 3 January 2003 inclusive’.⁴⁷ But the fact that the Court does not usually announce judicial vacations does not mean that there are no such vacations. An examination of the Court’s practice since 1978 shows that, between 30 July and 10 September, and between 21 December and 21 January, the full Court has never adopted any decision or held any public sitting. States wishing to have recourse to the Court should know the periods during which they cannot expect the Court to deal with ordinary, as opposed to urgent, matters.⁴⁸ The announcement of judicial vacations in advance is thus preferable to the present system of ‘*de facto* judicial vacations’.⁴⁹

During judicial vacations the Court is not in session, *i.e.* the judges normally are not bound to sit. While the President can always convoke the members of the Court when the Court is in session but not sitting, he can do so during the judicial vacations only in cases of urgency; for example, in case of a request for provisional measures or an urgent request for an advisory opinion.⁵⁰

number of sittings has been compiled from the Verbatim Records; it includes public sittings at which Judgments and Orders have been read and at which judges have made their solemn declaration in accordance with Art. 20.

⁴³ PCIJ, Series D, No. 2, 3rd Add., pp. 524, 525.

⁴⁴ Art. 28, para. 1 of the 1972 Rules, Art. 25, para. 1 of the 1946 Rules, Art. 25, para. 1 of the 1936 Rules.

⁴⁵ Cf. PCIJ, Series D, No. 2, 2nd Add., p. 76.

⁴⁶ *Corfu Channel case* (United Kingdom/Albania), Pleadings, vol. V, p. 230. Cf. also ICJ Yearbook (1951–1952), pp. 49, 90, 95; ICJ Yearbook (1952–1953), p. 47; ICJ Yearbook (1964–1965), p. 81.

⁴⁷ ICJ Press Release 2002/5, available at <http://www.icj-cij.org>.

⁴⁸ Cf. Rosenne, *Procedure*, p. 50.

⁴⁹ For criticism of the whole system of judicial vacations, cf. Guyomar, *Commentaire*, pp. 109, 110.

⁵⁰ Cf. Arts. 20, para. 6, 74, para. 2, 103 of the Rules. Cf. also ICJ Yearbook (1953–1954), p. 108; ICJ Yearbook (1956–1957), p. 104 and PCIJ, Series D, No. 2, 3rd Add., p. 528. For other possible scenarios of urgency, cf. *ibid.*, p. 531.

- 19 During the vacations, the functions of the presidency continue to be exercised at the seat of the Court by the President or, in the event of his absence, by the Vice-President, or failing the Vice-President, by the senior judge.⁵¹
- 20 The provision on judicial vacations only applies to ‘the Court’. The Registry remains open during judicial vacations, although with a reduced staff.⁵² The registry is only closed at weekends and on Dutch public holidays,⁵³ so any application or urgent request for provisional measures, as well as any other communication to the Court, may be filed in the Registry during judicial vacations. The Court has also fixed time-limits for the filing of memorials which come to an end during the judicial vacations.⁵⁴
- 21 Neither the Statute nor the Rules of Court include a provision on the question as to whether time limits fixed by the Court shall be suspended during judicial vacations or public holidays.⁵⁵ No such provision is necessary, as the Court, in contrast to the PCIJ, fixes specific dates and does not calculate time-limits in weeks or months, so that the question does not arise in practice.⁵⁶

2. Public Holidays

- 22 Article 20, para. 5 of the Rules of Court provides that the Court shall observe the public holidays customary at the place where the Court is sitting, having regard to the state of its General List and to the requirements of its current work. Public holidays in the Netherlands are: New Year’s Day (1 January), Good Friday and Easter Monday (variable), Queen’s Birthday (30 April), Remembrance Day (4 May), Liberation Day (5 May), Ascension Day (variable), Whit Monday (variable), Christmas Day (25 December), and Boxing Day (26 December).
- 23 In contrast to judicial vacations, the Court remains in session on public holidays. The President may convene the Court on public holidays (including weekends) not only in case of urgency but also because the general work of the Court so requires. The Court has on several occasions sat on both Sundays and public holidays.⁵⁷

III. Periodic Leave of Members of the Court

1. Entitlement to Periodic Leave

- 24 Members of the Court, *e.g.* the elected judges,⁵⁸ are entitled to periodic leave. The entitlement does not apply to judges *ad hoc*, the registrar or the staff of the registry. Periodic leave was first introduced in the 1931 Rules of Court as compensation for the new system of permanence. Judges applying for leave must have taken residence at The

⁵¹ *Cf.* Art. 13, para. 3 of the Rules. This had been expressly laid down in Art. 25, para. 1 of the 1946 Rules.

⁵² *Cf.* ICJ Press Release 2002/5, available at <http://www.icj-cij.org>.

⁵³ But note that Bosnia and Herzegovina filed its application in the *Application of the Convention on the Prevention and Punishment of Genocide case* in the Registry on a Saturday, *cf.* Application of 20 March 1993, General List No. 91.

⁵⁴ *Cf. e.g.* the Order of 28 June 1991 in *Certain Property* (Liechtenstein/Germany), ICJ Reports (2001), pp. 565 *et seq.*, p. 566 where the Court fixed 27 December 2002 as the date for the filing of the Counter-Memorial.

⁵⁵ For such a provision, *cf.* Rules of the Court of Justice of the Economic Community of West African States (2002), Art. 75, para. 1(e).

⁵⁶ *Cf.* Art. 48 of the Rules. For the approach of the PCIJ which calculated time-limits in weeks and months, *cf.* PCIJ, Series D, No. 2, p. 131.

⁵⁷ ICJ Yearbook (1947–1948), p. 67; ICJ Yearbook (1948–1949), p. 76; ICJ Yearbook (1953–1954), p. 108; ICJ Yearbook (1956–1957), p. 104; ICJ Yearbook (1963–1964), p. 105.

⁵⁸ Art. 4, para. 1 of the Statute and Art. 1, para. 3 of the Rules.

Hague or be living away from home in order to hold themselves at the disposal of the Court.⁵⁹ This is also shown by the reference to the ‘distance between The Hague and the home of each judge’ in Art. 23, para. 2. In contrast to the UN Staff Rules and Regulations, the place of ‘home’ is not to be equated with the country of the judge’s nationality but with the judge’s country of residence prior to election.⁶⁰ Periodic leave is to be distinguished from judicial vacations and from a dispensation to sit. It is in addition to the judicial vacations. While the judicial vacations apply to all judges, leave arrangements are worked out for each judge individually.

The Rules of Court no longer include a requirement that the leave of judges is made public in advance, in order that States might know about the composition of the Court during each year.⁶¹ Taking into account the duration of proceedings and the different rules on urgency and priority,⁶² there are many variables which make it very difficult for States to ‘time’ a case so that it could be decided by a certain bench. For that reason alone, a list showing the order of leaves seems to be dispensable.

Nowadays, considering the modern means of communication, periodic leave has lost its *raison d’être* of preventing judges from losing contact with their own countries. As an institution, it has fallen into desuetude. The last application by a member of the Court for leave for a period of three months during a period when the Court was not sitting was recorded in 1954.⁶³ The Rules of Court no longer include detailed provisions on the question of periodic leave, and allude to it only in passing. Requests for leave now have hardly any justification and should be restricted to exceptional cases of sick or recovery leave.⁶⁴

2. Dates, Duration, and Conditions of Periodic Leave

The Court fixes the dates and duration of periodic leave in each individual case; this allows for the necessary flexibility. In addition, the Rules of Court provide that the Court may attach certain conditions to periodic leave.⁶⁵ There are no internal rules or guidelines as to how many days leave a judge may take,⁶⁶ although six months’ leave as provided for in Art. 23, para. 2 of the PCIJ Statute would seem excessive nowadays.

Article 20, para. 4 of the Rules of Court provides that the Court, when fixing the periods and conditions of leave, shall have ‘regard to the state of its General List and to the requirements of its current work’. The provision no longer restates ‘the distance between The Hague and the home of each judge’, mentioned in the Statute, as a factor in the determination of leave.⁶⁷ This reflects the developments in communications since the Statute was prepared in 1945, at a time when air traffic was still not regarded as a ‘normal’ means of travel. Today, the distance between The Hague and the home of a judge no longer plays any role.

In 1978, the Court dropped other requirements for leave, such as the requirement that no more than two members of the Court can be on leave at the same time, neither

⁵⁹ Cf. *supra*, MN 8–9.

⁶⁰ Cf. Travel and Subsistence Regulations of the ICJ, GA Res. 37/240 of 21 December 1982, Annex, reproduced in ICJ Yearbook (1981–1982), pp. 164 *et seq.*, Art. 3(1)(a)(i).

⁶¹ But cf. Art. 27, para. 5 of the 1931 Rules; Art. 26, para. 1 of the 1936 Rules and Art. 7, para. 3 of the 1938 Instructions to the Registry.

⁶² Cf. Arts. 74, 84 and 103 of the Rules.

⁶³ ICJ Yearbook (1953–1954), p. 108. Another application was made in 1952, cf. ICJ Yearbook (1952–1953), p. 80.

⁶⁴ For a similar observation cf. Guyomar, *Commentaire*, pp. 109–110.

⁶⁵ Art. 20, para. 4 of the Rules.

⁶⁶ Information supplied by the Information Department of the Court.

⁶⁷ But cf. Art. 26, para. 1 of the 1946 Rules and Art. 29, para. 1 of the 1972 Rules.

can the President and the Vice-President.⁶⁸ These omissions may be explained by the declining relevance of the institution of leave, and the fact that they no longer seem necessary, considering the ease of modern communications.⁶⁹ Even if both the President and the Vice-President are on leave, the Court is not incapacitated. Article 13, para. 3 of the Rules of Court provides that, in the event of the President's absence and that of the Vice-President, the President may arrange for the functions of the presidency to be exercised by the senior judge.⁷⁰

3. *Consequences of Periodic Leave*

- 30 When on leave, members are not subject to the obligation to hold themselves at the disposal of the Court. A judge on leave will not be obliged to heed a call from the President to attend a meeting of the Court, even if the Court for lack of quorum cannot be constituted otherwise.⁷¹ Consequently, it is advisable always to grant periodic leave subject to the condition that the judge on leave attends meetings of the Court if urgently called upon to do so by the President.
- 31 A judge on leave is not present on the bench in the sense of Art. 31, para. 2. A party to a case whose nationality the judge on leave possesses may thus choose a judge *ad hoc*, if the bench includes a judge of the nationality of the other party. Conversely, a party that does not have a judge of its nationality on the bench may not choose a judge *ad hoc*, so long as the judge of the other party is on leave and thus not present on the bench.⁷²

IV. Duty of Judges to Hold Themselves Permanently at the Disposal of the Court

1. *The Obligation of Permanent Availability*

- 32 The members of the Court are obliged to hold themselves permanently at the disposal of the Court unless they are on leave or prevented from attending by illness or other serious reasons. Article 20, para. 3 of the Rules of Court extends this obligation to judges *ad hoc* with regard to the case in which they are participating. The provision was first included in the Rules of Court in 1978. It seems to be intended to avoid incidents as in the *Pakistani Prisoner of War case*, where the judge *ad hoc* appointed by Pakistan sat throughout the hearing on the Pakistani application for an indication of provisional measures and then 'withdrew' from the case. As Pakistan informed the Court that it was unable to choose a new judge *ad hoc* within the time-limit fixed by the Court, the order rejecting the request was rendered without the participation of a judge *ad hoc* chosen by Pakistan.⁷³ The withdrawal or resignation of a judge *ad hoc* who is not prevented from attending by illness or other serious reasons midway through the proceedings is contrary to that judge's obligation to hold himself permanently at the disposal of the Court.

⁶⁸ Art. 29, para. 2 of the 1972 Rules, Art. 26, para. 2 of the 1946 Rules, Art. 26, para. 2 of the 1936 Rules, Art. 27, para. 5 of the 1931 Rules.

⁶⁹ Rosenne, *Procedure*, p. 50.

⁷⁰ Cf. also Art. 3, para. 6 of the Rules.

⁷¹ Cf. Fachiri, A.P., *The Permanent Court of International Justice: Its Constitution, Procedure and Work* (2nd edn., 1932), p. 47.

⁷² For general comment on the role and function of *ad hoc* judges cf. Kooijmans on Art. 31 MN 4–7.

⁷³ *Trial of Pakistani Prisoners of War* (Pakistan/India), ICJ Reports (1973), p. 328; and Pleadings, pp. 156–157, p. 171.

33 The obligation of judges to hold themselves ‘at the disposal of the Court’ entails attendance at all meetings of the Court.⁷⁴ The fact that the Court found it advisable to include this provision in the 1978 Rules of Court may indicate that difficulties have been experienced in obtaining a quorum for meetings on other than judicial matters.⁷⁵ The obligation to hold themselves at the disposal of the Court is not limited to attendance at the Court’s meetings; it also includes the more general duty of judges to devote their time to the Court and exercise their judicial and other functions such as studying the pleadings. In this sense, Art. 23, para. 3 is closely related to the incompatibility principle laid down in Art. 16, para. 1.⁷⁶

Holding themselves at the disposal of the Court ‘permanently’ means that, at least 34 theoretically, the judges must hold themselves available 365 days a year for convocation of the Court.⁷⁷ This obligation also applies during judicial vacations and public holidays at the place where the Court is sitting. The judges are, effectively, permanently ‘on-call’. This is necessary as the parties to a case may make a request for the indication of provisional measures ‘at any time during the course of the proceedings’.⁷⁸ The judges are only relieved of this obligation in the cases specified in Art. 23, para. 3. They are obliged to heed a call by the President for urgent convocation immediately. A proposal that judges should be obliged to attend at 48 hours’ notice, however, was rejected as too rigid.⁷⁹

Holding themselves permanently at the disposal of the Court does not entail a resi- 35 dency requirement at The Hague.⁸⁰ This conclusion may be drawn from Art. 22, para. 2, which requires only the President and the Registrar to reside at the seat of the Court.⁸¹ The UN General Assembly, however, has expressed a clear preference for judges taking up residence at The Hague. The Travel and Subsistence Regulations of the ICJ, approved by the General Assembly on 21 December 1982, speak of ‘any member of the Court other than the President who takes up residence at the seat of the Court in compliance with Article 23 of its Statute’.⁸² More recently, the Court itself stated:

As a consequence of its increased workload over the last dozen years, the court meets throughout the year, except for mid-summer and the turn of the year. The presence of the judges at the seat of the Court is accordingly required throughout the year. This situation is not going to change soon.⁸³

Under these circumstances, it may be argued that judges, although not formally required by the Statute to reside at The Hague, can only fulfil their obligation to hold themselves permanently at the disposal of the Court by establishing a permanent residence at its seat.⁸⁴

⁷⁴ Art. 20, paras. 2 and 3 of the Rules. ⁷⁵ Cf. Rosenne, *Procedure*, p. 49.

⁷⁶ For a general discussion cf. Couvreur on Art. 16, *passim*.

⁷⁷ Cf. PCIJ, Series D, No. 2 (2nd Add.), p. 22. ⁷⁸ Art. 73, para. 1 of the Rules.

⁷⁹ Cf. Hudson, *PCIJ*, p. 172. ⁸⁰ Cf. PCIJ, Series D, No. 2, 2nd Add., pp. 11, 17.

⁸¹ For further discussion cf. Shaw on Art. 22 MN 23–29.

⁸² GA Res. 37/240 of 21 December 1982, Annex, Art. 1(d) and Art. 3(1), reproduced in ICJ Yearbook (1981–1982), pp. 164–167. This is also shown by the fact that travel expenses are paid for members of the Court to attend sessions at the seat of the Court, but no subsistence allowance while in official travel status. In contrast, such an allowance is paid for journeys to attend sessions at a place other than the seat of the Court and for journeys in connection with the transfer of a judge’s residence to the seat of the Court, cf. Art. 2(1). Cf. also the Travel and Subsistence Regulations of the ICJ adopted by the General Assembly on 11 December 1946, para. 1: ICJ Yearbook (1946–1947), p. 132. For these Regulations as an indication of the Assembly’s intentions, cf. the statement of the Registrar: PCIJ, Series D, No. 2, 2nd Add., p. 13.

⁸³ Conditions of Service and Compensation for Officials other than Secretariat Officials: Members of the International Court of Justice, UN Doc. A/C.5/53/11 (1998), p. 13, para. 59.

⁸⁴ The Court has defined residence status as ‘the establishment, through acquisition or long-term lease, of a permanent residence in The Hague, coupled with the option by the judge concerned for resident status’ (*ibid.*).

2. Absence of Judges

a) The Meaning of Absence

- 36 Absence may be defined as non-attendance at the public sittings or meetings of the Court. It implies a temporary state of affairs and must be distinguished from the general non-participation in a case pursuant to Arts. 17, para. 2, and 24.⁸⁵ Absence may extend to one or more sittings or to the full hearing and determination of a case.⁸⁶ A closer examination of the Verbatim Records of the public sittings and of the Reports shows that the absence of judges is not an exceptional phenomenon. In several cases up to three members of the Court were absent at the same public sitting,⁸⁷ and in one case, due to absence, the number of judges on the bench was reduced to 11.⁸⁸ No public records of attendance are available for the deliberations of the Court and for the meetings in other than judicial matters.⁸⁹

b) The Obligation of Judges Duly to Explain Their Absence

- 37 The reasons for being prevented from attending the meetings of the Court are to be ‘duly explained [by the judge] to the President who shall inform the Court’.⁹⁰ As a rule, such explanation must be given prior to the absence, although there may be exceptional situations such as an accident when the absence can only be explained after the meeting.
- 38 The reasons for the absence must be explained to the President of the Court who serves as initial arbiter of their adequateness.⁹¹ According to Art. 9(i) of the Resolution Concerning the Internal Judicial Practice of the Court, judges who fail to attend part of the public hearing or the Court’s internal proceedings in connection with such a hearing will only be allowed to participate in the final vote if they were absent ‘because of illness or other reasons deemed adequate by the President’.⁹² Any doubt or disagreement on this point is to be settled finally by a decision of the Court.⁹³
- 39 There is no obligation upon the President to inform the parties about the absence of a judge or the reasons for such absence. Traditionally, the President makes an announcement at the beginning of the public sitting, but this is not required. There have been several occasions where no such announcement has been made and the absence of a judge was only revealed by the list of judges preceding the Verbatim Records of the sitting. As a rule, no reasons for the absence are given. The President usually just states that ‘Judge [. . .] is unable to be present during today’s sitting for reasons which have been duly explained to the Court’.⁹⁴ In practice, the reason for a judge’s absence are often conveyed to the parties informally.⁹⁵

⁸⁵ For further detail on these provisions *cf.* Couvreur on Art. 17 and Jennings on Art. 24, respectively.

⁸⁶ *Cf. Passage through the Great Belt* (Finland/Denmark), Request for the Indication of Provisional Measures, CR 91/9, 1 July 1991, p. 8; *Application for Revision of the Judgment of 11 July 1996 in the Case concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosnia and Herzegovina/Yugoslavia), Preliminary Objections (Yugoslavia/Bosnia and Herzegovina), CR 2002/40, 4 November 2002, p. 8.

⁸⁷ *Cf. e.g. Armed Activities on the Territory of the Congo (New Application: 2002)* (Democratic Republic of the Congo/Rwanda), CR 2002/39, 14 June 2002, p. 2; *Land and Maritime Boundary between Cameroon and Nigeria* (Cameroon/Nigeria: Equatorial Guinea intervening), CR 2002/05, 22 February 2002, p. 2.

⁸⁸ *Rights of Nationals of the United States of America in Morocco* (France/United States), ICJ Reports (1952), pp. 176 *et seq.*

⁸⁹ *Cf.* Art. 54, para. 3 of the Statute and Art. 21 of the Rules.

⁹⁰ Art. 20, para. 2 of the Rules.

⁹¹ *Cf.* PCIJ, Series D, No. 2, 2nd Add., pp. 21, 25

⁹² Resolution concerning the internal judicial practice of the Court, adopted on 12 April 1976, ICJ Yearbook (1975–1976), pp. 119–123, 122–123.

⁹³ *Ibid.*, Art. 9(iii).

⁹⁴ *Cf.* most recently *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, CR 2004/5, 25 February 2004, p. 14.

⁹⁵ *Cf. Kasikili/Sedudu Island* (Botswana/Namibia), CR 99/7, 23 February 1999, p. 10 where Counsel for Botswana conveyed from the two delegations their concerns for the health of Judge Fleischhauer.

c) Justifications for Absence

Article 23, para. 3 expressly mentions (periodic) leave and illness as reasons warranting the absence of judges. Illness has been the most frequent reason for absence, not least due to the advanced age of many judges.⁹⁶ One member of the Court (Judge Golunsky) who had been elected in 1951, never participated in any sitting of the Court for health reasons and, consequently, decided to resign in July 1953.⁹⁷ In the event of prolonged illness a judge having the nationality of one of the parties in a pending case may declare that he is unable to sit, in order to allow the party to choose a judge *ad hoc*.⁹⁸ Judges *ad hoc* who are prevented from attending owing to illness usually resign in order to allow the party to choose another judge *ad hoc* to replace them.⁹⁹ 40

Judges may also be absent for ‘other serious reasons’ (Art. 20, para. 2). This operates as a general catch-all provision and has been held to include personal reasons such as a family bereavement,¹⁰⁰ the birth of a child,¹⁰¹ or the performance of official functions such as the representation of the Court at the UN General Assembly or at other occasions.¹⁰² Members of the Court recently elected to replace a member whose term of office has not expired are, as a rule, considered as being prevented from attending the meetings of the Court scheduled immediately following their election.¹⁰³ 41

In principle, *force majeure* may also qualify as a ‘serious reason’ for the absence of a judge. The PCIJ, however, was reluctant to accept this justification: on 18 November 1939, the Bulgarian government informed the Court that owing to the outbreak of World War II and the necessity of traversing belligerent countries to reach The Hague, which involved serious risks to personal safety, it forbade the departure of its judge *ad hoc* nominated to sit in the pending *Electricity Company of Sofia and Bulgaria case*. The Court did not accept that the facts alleged by Bulgaria constituted a situation of *force majeure* and, nevertheless, summoned the judge *ad hoc* to attend the hearing on provisional measures on 4 December 1939¹⁰⁴—a decision which in retrospect may seem difficult to comprehend (*pereat mundus, fiat jus!*). The PCIJ also observed that if a judge’s home State objects to him leaving the country, the judge shall urge consideration of Art. 19, which provides for diplomatic privileges and immunities of the members of the Court 42

⁹⁶ Cf. e.g. ICJ Yearbook (1953–1954), pp. 108, 109; ICJ Yearbook (1954–1955), p. 94; ICJ Yearbook (1956–1957), p. 105; ICJ Yearbook (1957–1958), p. 97; ICJ Yearbook (1959–1960), p. 122; ICJ Yearbook (1962–1963), pp. 117, 118; ICJ Yearbook (1972–1973), p. 137; ICJ Yearbook (1993–1994), p. 209; ICJ Yearbook (1994–1995), p. 200; ICJ Yearbook (1995–1996), p. 225. On resignation cf. further Dugard on Art. 13 MN 17–18. ⁹⁷ ICJ Yearbook (1953–1954), p. 100.

⁹⁸ Art. 37, para. 1 of the Rules.

⁹⁹ Art. 35, para. 4 of the Rules. Cf. also ICJ Yearbook (1949–1950), p. 95; ICJ Yearbook (1954–1955), p. 92; ICJ Yearbook (1984–1985), p. 174.

¹⁰⁰ *Nottebohm* (Liechtenstein/Guatemala), Second Phase, Pleadings, vol. II, p. 42 and ICJ Yearbook (1954–1955), p. 94; *Judgments of the Administrative Tribunal of the ILO upon Complaints Made against UNESCO*, Pleadings, p. 227, and ICJ Yearbook (1956–1957), p. 105.

¹⁰¹ *Kasikili/Sedudu Island* (Botswana/Namibia), CR 99/8, 24 February 1999, p. 10

¹⁰² *Corfu Channel case* (United Kingdom/Albania), Pleadings IV, p. 702; *Aerial Incident of 10 August 1999* (Pakistan/India), CR 2000/3, 5 April 2000 and CR 2000/4, 6 April 2000.

¹⁰³ Cf. e.g. *Arrest Warrant of 11 April 2000* (Democratic Republic of the Congo/Belgium), CR 2002/05, p. 6 (following the resignation of Judge Bedjaoui on 30 September 2001, the General Assembly on 12 October 2001 elected Judge Eleraby who did not take part in the hearings from 15 to 19 October 2001).

¹⁰⁴ *The Electricity Company of Sofia and Bulgaria* (Request for the Indication of Interim Measures of Protection), PCIJ, Series A/B, No. 79, pp. 194 *et seq.*, 197 and *The Electricity Company of Sofia and Bulgaria*, PCIJ, Series A/B, No. 80, pp. 4 *et seq.*, 6, 8. Cf. also Sixteenth Report, PCIJ, Series E, No. 16, pp. 151, 152, 180.

when engaged on the business of the Court and, if that proves ineffective, he shall at once communicate with the President of the Court.¹⁰⁵

- 43 The Court has also excused members on the grounds of their participation in administrative or quasi-judicial activities. In *Rights of Nationals of the United States of America in Morocco*, the Vice-President was excused from taking part in the hearings because of his chairmanship of the *ad hoc* Commission on Prisoners of War, set up by the UN General Assembly to find a humanitarian solution to the problem of prisoners of war, which held its meetings at the same time.¹⁰⁶ In *Kasikili/Sedudu Island*, the Court permitted one of its members to serve as President of the National Commission for supervision of the presidential elections in his country which were held during part of the hearing in that case.¹⁰⁷ Irrespective of their compatibility with Art. 16, para. 1,¹⁰⁸ such activities do not really qualify as serious reasons preventing members of the Court from attending the public sittings and meetings of the Court. The Court itself has emphasized that judges accepting such occasional activities ‘must give absolute precedence to their obligations as members of the Court’.¹⁰⁹ In those cases the Court has, in fact, dispensed the judges from sitting. Such dispensation from sitting duties, according to Art. 25, para. 2, requires provisions in the Rules of Court which do not exist, and therefore is problematic.¹¹⁰

3. Consequences of the Absence of Judges

- 44 The absence of individual judges (both titular and *ad hoc*) or of the President does not prevent the Court from hearing a case, holding deliberations in a case or taking the final vote in a case. On 12 February 1931, the Court decided ‘in accordance with precedent’ that the Court might validly continue its deliberation, notwithstanding the temporary absence of a judge, provided that the number of judges present exceeded the quorum laid down by the Statute.¹¹¹ In the event that the Court is unable to meet the quorum due to the absence of judges,¹¹² the President must adjourn or postpone a scheduled sitting until a quorum can be obtained.¹¹³ In such a situation, the parties by mutual agreement can request that the case be heard and determined either by the Court’s Chamber for summary procedure or by a special chamber to be constituted in accordance with

¹⁰⁵ Sixteenth Report, PCIJ, Series E, No. 16, p. 163. For further information on the privileges and immunities enjoyed by members of the Court cf. Anderson on Art. 19, especially MN 10–24.

¹⁰⁶ ICJ Yearbook (1950–1951), p. 48, ICJ Yearbook (1951–1952), p. 90.

¹⁰⁷ *Kasikili/Sedudu Island* (Botswana/Namibia), CR 99/10, 1 March 1999, p. 10 and ICJ Yearbook (1998–1999), p. 289.

¹⁰⁸ Cf. Couvreur on Art. 16 MN 21–37 for further information on the ICJ’s handling of the issue of incompatibilities.

¹⁰⁹ Conditions of Service and Compensation for Officials other than Secretariat Officials: Members of the International Court of Justice, UN Doc. A/C.5/53/11 (1998), p. 12, para. 48. Cf. also *ibid.*, para. 47 (‘fullest precedence to their supervening duties as members of the Court’).

¹¹⁰ Dispensation of judges is further discussed by Palchetti on Art. 25 MN 10–12.

¹¹¹ Seventh Annual Report, PCIJ, Series E, No. 7, p. 289; and cf. Art. 25, para. 3 for the required quorum.

¹¹² The closest the Court came to such a situation was in *Rights of Nationals of the United States of America in Morocco* (France/United States) when, due to illness (two judges), dispensation (one judge) and leave (one judge), only 11 judges took part in the decision. Cf. ICJ Reports (1952), p. 176 *et seq.* and ICJ Yearbook (1951–1952), p. 90; ICJ Yearbook (1952–1953), p. 80; ICJ Yearbook (1953–1954), pp. 14, 108.

¹¹³ Cf. PCIJ, Series C, No. 16-III, pp. 847–852; Fifth Annual Report, PCIJ, Series E, No. 5, pp. 251–252; PCIJ, Series C, No. 58, pp. 331, 698; Eighth Annual Report, PCIJ, Series E, No. 8, p. 249. Cf. also Art. 30 of the 1922 Rules; Art. 30 of the 1931 Rules; Art. 29 of the 1936 Rules; Art. 29 of the 1946 Rules; Art. 32 of the 1972 Rules; as well as Palchetti on Art. 25 MN 18.

Art. 26, para. 2.¹¹⁴ The parties can also notify the Court that they have agreed to discontinue the proceedings and request the judges actually available to sit as an arbitral tribunal.¹¹⁵ In the event of the absence of the President, the functions of the presidency continue to be exercised at the seat of the Court by the Vice-President, or failing him, by the senior judge.¹¹⁶

Temporary absence from part of the public hearing does not preclude a judge from participating in further proceedings held in the case. Initially, the consent of the parties was sought for a judge to rejoin the public hearing after a temporary absence.¹¹⁷ However, from 1953 onwards, the consent of the parties has no longer been mentioned, and the Court's Yearbook simply records that 'a judge, temporarily unable to be present at some of the hearings, does not thereby lose the right of continuing to take part in the case'.¹¹⁸ There is no formal obligation of judges to read the minutes of the sessions of the hearings they missed before they rejoin the public hearing, but this seems to be a matter of course.¹¹⁹ Temporary absence also does not preclude judges from putting questions to the parties in accordance with Art 61, para. 3 of the Rules of Court; the questions of absent judges will be read by the Registrar or its deputy.¹²⁰

Under the Court's internal judicial practice resolutions, absence during the public hearing or the deliberation may bar the judge from taking part in the final vote. A judge who failed to attend part of the public hearing or of the Court's internal proceedings in connection with such a hearing, may only participate in the final vote on the decision of a case provided that (1) during most of the proceedings, he was, or remained, at the seat of the Court or other locality in which the Court is sitting and exercising its functions, (2) he was able to read the official transcripts of the public hearing, (3) he submitted a written note expressing his views on the case, read the notes of the other judges, and studied the drafts of the drafting committee, and (4) he took a sufficient part in the public hearing and the internal proceedings to enable him to arrive at a judicial determination of all issues of fact and law material to the decision of the case.¹²¹ It is not clear what is meant by taking a 'sufficient' part in proceedings. The 1968 Resolution

¹¹⁴ Cf. Palchetti on Art. 26 MN 4 fn. 11 for references to cases in which the Court indeed suggested such an approach.

¹¹⁵ Cf. the proposals of the agent of the French Government in the *Serbian Loans case*, PCIJ, Series C, No. 16-III, pp. 8, 808. The Order recording the discontinuance of the proceedings can be made by the President (Art. 88, para. 3 of the Rules) On the historical development of that provision cf. Wegen, *Discontinuance*, MN 4.

¹¹⁶ Cf. Art. 13, para. 3 of the Rules; ICJ Yearbook (1972–1973), p. 137; ICJ Yearbook (1999–2000), p. 263, and, for examples of Orders of the Senior Judge, ICJ Reports (1998), pp. 423, 746, 749.

¹¹⁷ *Asylum case* (Colombia/Peru), Pleadings, vol. II, p. 8; *Corfu Channel case* (United Kingdom/Albania), Pleadings, vol. III, pp. 195, 196, vol. IV, p. 702. This was also the practice followed by the PCIJ, cf. PCIJ, Series D, No. 2, 2nd Add., p. 212; Seventh Annual Report, PCIJ, Series E, No. 7, p. 288; No. 16, pp. 166–167.

¹¹⁸ ICJ Yearbook (1954–1955), p. 89; ICJ Yearbook (1957–1958), p. 96; ICJ Yearbook (1962–1963), p. 116; ICJ Yearbook (1964–1965), p. 105. The ICJ Yearbook (1953–1954), p. 97 somewhat misleadingly spoke of the presence 'during the oral proceedings'.

¹¹⁹ Cf. *Aerial Incident of 10 August 1999* (Pakistan/India), CR 2000/4, 6 April 2004, where the President who was absent from part of a sitting due to official duties declared on his return: 'I hasten to assure the Parties . . . that . . . I of course read the verbatim record of the hearing very carefully yesterday evening'.

¹²⁰ See *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission of Human Rights*, CR 98/17, 10 December 1998, p. 53. For comment on Art. 61, para. 3 of the Rules cf. Tams on Art. 49 MN 9 *et seq.*; Talmon on Art. 43 MN 101–102.

¹²¹ Resolution concerning the Internal Judicial Practice of the Court, adopted on 12 April 1976, Art. 9(i). The question was first dealt with by the Court in its Resolution Concerning the Internal Judicial Practice, adopted on 5 July 1968, cf. ICJ Yearbook (1967–1968), pp. 88–91.

Concerning the Internal Judicial Practice of the Court had required that the judge should not have missed more than ‘a relatively minor part of the public hearing and private deliberations’.¹²² Judges who missed a third¹²³ or even half¹²⁴ of the public hearing nevertheless participated in the final vote. There is no hard and fast rule, and much is left to the discretion of the Court. Only a judge who missed *all* the public sittings is clearly ruled out from participating in the final vote.¹²⁵ In the event of any doubt arising as to whether the conditions are met—and if this doubt cannot be resolved in the course of the discussion—the matter is to be decided by the Court.¹²⁶

- 47 Absence of a judge from the meeting in which the final vote on a decision is taken because of physical incapacity or other compelling reasons may result, if the circumstances permit, in the postponement of the meeting until he can attend. If, in the opinion of the Court, the circumstances do not permit such a postponement, or render it inadvisable, the Court may, for the purposes of enabling the judge to record his vote, decide to convene elsewhere than at its normal meeting place. If neither of these alternatives is practicable, the judge may be permitted to record his vote in any other manner which the Court decides to be compatible with the Statute.¹²⁷ Again, much is left to the Court’s discretion. The Court has on several occasions allowed a judge to record his final vote in writing.¹²⁸
- 48 Absence of a judge from the public sitting at which the decision is read does not neutralize his final vote. In contrast to the practice of the PCIJ,¹²⁹ the absent judge is listed as participating in the decision in the Reports and may append a declaration or a separate or dissenting opinion to the Court’s decision.¹³⁰
- 49 Repeated absence for inadequate reasons can be sanctioned, in extreme cases, by the dismissal of the judge in accordance with Art. 18, para. 1.¹³¹

C. Evaluation

- 50 Since its revision in 1929, Art. 23 has not given rise to many problems. Paragraph 2 on periodic leave has fallen into abeyance over the last 40 years and could be deleted in a

¹²² Resolution Concerning the Internal Judicial Practice of the Court, adopted on 5 July 1968, Art. 9(i)(a).

¹²³ *Kasikili/Sedudu Island* (Botswana/Namibia), ICJ Reports (1999), pp. 1045 *et seq.*, 1046 (Judge Bedjaoui participated in the decision although missing four out of 12 sittings).

¹²⁴ Vice-President Shi missed two out of four sittings in *Armed Activities on the Territory of the Congo (New Application: 2002)* (Democratic Republic of the Congo/Rwanda), CR 2002/38 and CR 2002/39, 14 June 2002, p. 2, but participated in the deliberation and final vote.

¹²⁵ ICJ Yearbook (1985–1986), p. 165; ICJ Yearbook (1995–1996), p. 225; ICJ Yearbook (1998–1999), p. 289; ICJ Yearbook (2001–2002), p. 291.

¹²⁶ Resolution Concerning the Internal Judicial Practice of the Court, adopted on 12 April 1976, Art. 9(iii).

¹²⁷ *Ibid.*, Art. 9(ii).

¹²⁸ *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Pleadings, vol. II, pp. 605–606; *Application for Review of Judgement No. 158 of the United Nations Administrative Tribunal*, ICJ Yearbook (1972–1973), p. 137; *Aegean Sea Continental Shelf* (Greece/Turkey), Pleadings, p. 499 and ICJ Yearbook (1978–1979), p. 126.

¹²⁹ Fourth Annual Report, PCIJ, Series E, No. 4, p. 273; Tenth Annual Report, PCIJ, Series E, No. 10, p. 154; Eleventh Annual Report, PCIJ, Series E, No. 11, pp. 149–150; Sixteenth Report, PCIJ, Series E, No. 16, p. 198.

¹³⁰ *Aegean Sea Continental Shelf case* (Greece/Turkey), Pleadings, pp. 147, 499, and ICJ Reports (1978), p. 3 *et seq.*; *Application for Review of Judgement No. 158 of the UN Administrative Tribunal*, ICJ Yearbook (1972–1973), pp. 137–138 and ICJ Reports (1973), p. 166 *et seq.*, p. 167.

¹³¹ *Cf.* PCIJ, Series D, No. 2, p. 50; and further Anderson on Art. 18, especially MN 10–11.

future revision of the Statute. The provision on judicial vacations, on the other hand, should again be more readily applied by the Court. The dates and duration of judicial vacations should regularly be made public in a press release at the beginning of the judicial year. Despite all calls for an increased 'throughput', the members of the Court should not be ashamed of taking their vacations openly. The record of the judges' attendance at public sittings has for the most part been very good. The same cannot be said with respect to private sittings and the adoption of orders. If there have been any disputes between the President and individual judges over the adequacy of the reasons for their absence, these have not been dealt with in public.

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