RETHINKING THE APPLICABILITY OF THE *NEMO JUDEX* RULE TO THE DECISION-MAKING PROCESS IN THE SECURITY COUNCIL*

Abstract

The rule of nemo judex in causa sua (nemo judex rule), which is one of the twin pillars of natural justice, demands that no one should act as a judge in a case in which he has a personal or vested interest. This procedural rule, which is predicated on the fact that justice should not only be done but should manifestly and undoubtedly be seen to be done[1], forms part of the general principles of law recognized by civilized nations[2], because law of nations is a law founded on the great and immutable principles of equity and natural justice.[3] It is for this reason that the United Nations Charter provides in the proviso to its Article 27 (3) that in decisions of the Security Council under Chapter VI and under Article 52 (3) of the United Nations Charter, a party to a dispute shall abstain from voting. But this adaptation of the nemo judex rule in the proviso to Article 27(3) of the United Nations Charter is not holistic because it is restricted to only decisions of the Security Council under Chapter VI and under Article 52 (3) of the United Nations Charter which deal solely with pacific settlement of dispute, and so does not apply to decisions of the Security Council under other Chapters or Articles of the United Nations Charter. As a result of this, members of the Security Council participate in the decision-making process in the Security Council under other Chapters and Articles of the United Nations Charter over disputes which they are parties to which makes them judges in their own case, contrary to the dictates of the nemo judex rule. Also, this creates a dangerous leeway for the permanent members of the Security Council to use their veto power to block draft resolutions of the Security Council in disputes which they are parties to, like Draft Resolution S/2022/155 sponsored by eighty-five state parties to, among other things, compel Russia to withdraw its military forces from the territory of Ukraine which was vetoed by the Russian Federation on the 25th February, 2022 to justify its unlawful use of force against Ukraine. Therefore, there is an urgent need to rethink the applicability of the nemo judex rule to the decision-making process in the Security Council so as to make it holistic.

Keywords: International Law, *Nemo Judex* Rule, Security Council, United Nations, Veto Power

1. Introduction

Justice is one of the core values and ideals of the United Nations because of its nexus with peace and security especially international peace and security, which the United Nations was primarily established to maintain.[4] Thus, according to Kofi Annan, the erstwhile Secretary-General of the United Nations, 'justice is an ideal of accountability and fairness in the protection and vindication of rights and the prevention and punishment of wrongs.'[5] As a concept, the notion of justice is very broad and manifests itself in various forms; and one of the major means of administering justice is through natural justice.[6] Thus, according to Oputa, JSC, 'the ordinary rules by which justice should be administered are of course the rules of natural justice.'[7] Natural justice is a fundamental concept which is rooted in the natural law and founded on the twin pillars of *audi alteram partem* (hear the other side) and *nemo judex in causa sua* (no one should be a judge in his own cause).[8] Although the principles of natural justice are easy to proclaim, its precise extent is far less easy to define.[9] In the English days of jurisprudence, these two rules have been reduced to two very familiar words – Impartiality and Fairness, which are distinct but closely related.[10] Thus, according to Lord Denning, 'the rule against bias is one thing. The right to be heard is another. The two rules are essential characteristics of what is often called 'natural justice'. They are the twin pillars supporting it. The Romans put them in two maxims: *Nemo judex in causa sua and* Au*di alteram partem*. They have recently been put in two words, Impartiality and Fairness, but they are separate and are governed by different considerations.' While impartiality relates to the forum itself, fairness relates to the right

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[1] R. v Sussex Justices, Ex parte McCarthy [1924] 1 KB 256.

[2] Statute of the International Court of Justice 1945, art. 38 (1) (d).

[3] The Venus, 8 Cranch 258, 297 (1814).

[4] D Clark, 'If You Want Peace, Work for Justice', *Catholic Exchange*, Nov. 29, 2011, <http://catholicexchange.com/if-you-want-peace-work-for-justice>, accessed on 13/04/2022.

[5] Report of the Secretary-General, S/2004/616, August 24, 2004, para. 7.

[6] There are many categories of justice like commutative justice, distributive justice, natural justice, preventive justice, substantial justice, social justice and a host of others. See R Otaru, 'Access to Justice and Right to Fair Hearing,' A lecture delivered by Roland Otaru, Esq., SAN at the Nigerian Institute of Advance Legal Studies, December 2, 2010, p.6, <http://www.otaruotaru.com/papers/ACCESS%20TO%20JUSTICE%20AND%20RIGHT%20TO%20FAIR%20HEARING.pdf> , accessed on 08/04/2022.

[7] L.P.D.C v. Fawehinmi (1985) 2 NWLR (Pt. 7) 300 at 387.

[8] *Kanda v. Government of Malaya* (1962) A.C., 322 at 337.

[9] Abbott v Sullivan (1952) 1 Q.B.189 at 195

[10] Above at note 7, p. 384.

of the person accused to be heard.[11] It is well settled that the rules of natural justice are not only limited to judicial decision and determinations, but also applies to administrative decisions and determinations.[12] Thus, in *Wood v. Wood*,[13] Kelly, C.B. noted as follows: 'this rule is not confined to the conduct of strictly legal tribunals, but is applicable to every tribunal or body of persons invested with authority to adjudication upon matters involving civil consequences to individuals'.[14] Individuals here include entities possessing juristic personality like sovereign states and international organizations. Thus, in the case of *Reparation for Injuries Suffered in the Service of the United Nations[1]*, the International Court of Justice held that the United Nations had international legal personality because this was indispensable in order to achieve the purpose and principles of the United Nations as stated in its Charter.[15] Consequently, any tribunal or body of persons invested with authority to adjudication upon matters involving civil consequences to sovereign states are bound to observe rules of natural justice. One of such bodies is the United Nations Security Council, which is conferred with certain roles by the United Nations Charter which are adjudicatory in nature, even though it is an executive organ that enforces the will of the international community under the aegis of the United Nations. It was for this reason that Article 27(3) of the United Nations Charter provides that a party to a dispute shall abstain from voting in decisions of the Security Council under Chapter VI, and under Article 52(3) of the United Nations Charter, which deal solely with pacific settlement of disputes. However, the restriction of this provision to only decisions of the Security Council under Chapter VI of the United Nations Charter and Article 52(3) of the United Nations Charter as against all the decisions of the Security Council relating to settlement of disputes is very questionable. This is because it does not only make members of the Security Council judges in their own cause contrary to the *nemo judex* rule, but also allows permanent members of the Security Council to use their veto power to block resolutions of the Security Council in disputes which they are parties to contrary to the dictates of the *nemo judex* rule. Therefore, there is an urgent need to reconsider the applicability of the *nemo judex* rule to the decision-making process of the Security Council so as to make it applicable to all the decisions of the Security Council relating to settlement of disputes.

2. Application of the *Nemo Judex* Rule under International Law

Under International law, natural justice is not just a mere concept but a cardinal principle. Hence, according to the former US Chief Justice, John Marshall, 'the law of nations is a law founded on the great and immutable principles of equity and natural justice.'[16] The existence of the principle of *nemo judex in causa sua* under the contemporary international law could be viewed from various stand points. In the first place, the *nemo judex* rule could be regarded as an autonomous source of international law by virtue of Article 38(1) of the Statute of the International Court of Justice. According to the said Article 38(1):

> The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:
> a. international Conventions, whether general or particular, established rules expressly reorganized by the contesting states;
> b. international custom, as evidence of general practice accepted as law;
> c. the general principles of law recognized by civilized nations;
> d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

The principle of *nemo judex in causa sua* is one of the general principles of law recognized not only by the so-called 'civilized nations', but virtually by all the nations of the world and therefore, eminently qualified as autonomous source of international law. Hence, Umozurike noted that 'other examples of the general principles of law are: a party cannot be a judge in his own case…'[17] Also, while justifying the application of the *nemo judex* rule by the International Criminal Court, Chigara noted that '*Nemo judex in causa sua* is an example of general principle of law recognized by most judicial systems of the world. Therefore, its observance by the ICC (International Criminal Court) should be mandatory'.[18] Secondly, the principle of *nemo judex in causa sua* can as well stand as an autonomous source of international law on the strength of paragraph 1 (d) of Article 38 of the

[11] *Kanada v. Government of Malaya* (1962) A.C. 322.
[12] Above at note 7.
[13] (1874) LR. 9 Ex.190.
[14] *Ibid.*
[15] ICJ Reports, 1949, p. 174.
[16] Above at note 3.
[17] UO Umozurike, *Introduction to International Law* (3rd edn, Ibadan: Spectrum Books Limited, 2005), p.22. See also R K Gardiner, *International Law* (London: Pearson Education Limited, 2003), *p.122.*
[18] B A Chigara, 'Towards a *nemo judex in parte sua* Critique of the International Criminal Court?', International Criminal Law Review 19 (2019) 412-444, at 414, <https://brill.com/view/journals/icla/19/3/article-p412_412.xml?language=en&ebody=pdf-49903>, accessed on 08/04/2022.

said Statute of the International Court of Justice because notable international courts have on a number of cases recognized the universal application of this principle. For example, the principle of *nemo judex in causa sua* was confirmed by the Permanent Court of International Justice in the *Mosel Boundary Case*.[19] Finally, the principle of *nemo judex in causa sua* can as well stand as an autonomous source of international law under the same paragraph 1 (d) of Article 38 of the Statute of the International Court of Justice, because most eminent international law jurists and publicists regard the principle of *nemo judex in causa sua* as a fundamental principle of international law.[20]

The principle of *nemo judex in causa sua* is aimed at ensuring fair hearing and prevention of bias in the determination of the civil rights of parties. As Chigara noted, *nemo judex in causa sua* is 'a general principle of international law that prohibits all from adjudicating cases in which they are an interested party'.[21] Thus, by *nemo judex in causa sua*, judicial bodies and quasi-judicial bodies should not only be constituted in such a way that their impartiality and neutrality should be guaranteed, but should also be constituted in such a way that it would make them appear to be impartial and neutral. This point was well stated in the English case of *King v. Sussex Justice 'Exparte McCarthy'*[22] where Lord Hewart, CJ noted that 'it is not merely of some importance but is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to have been done.' At the international level, the principle of *Nemo judex in causa sua* demands that states or their representatives should not participate in deciding any matter or dispute in which they have direct or implied interests. Unfortunately, this principle is more often than not observed in the breach whether at the Security Council or at the General Assembly. But, the nonobservance of the principle of *Nemo judex in causa sua* at the Security Council raises greater concern because its decisions are not only binding, but also form part of international law.[23]

3. Establishment of the United Nations Security Council

The Security Council is one of the six principal organs of the United Nations established under Article 7(1) of the United Nations Charter. It is the organ of the United Nations primarily responsible for the maintenance of international peace and security.[24] As the maintenance of international peace and security is unarguably the major purpose for the establishment of the United Nations Organization, the Security Council occupies pride of place in the scheme of the United Nations system.[25] The Security Council is an exclusive organ which is structured to act as the executive arm of the United Nations Organization.[26]As the executive arm of the United Nations, it is its responsibility to execute and enforce the will of the international community. It is for this reason that the Security Council is the only organ of the United Nations ordinarily empowered by the United Nations Charter to make binding decisions apart from the International Court of Justice.[27] Thus, according to Richard Gardiner, 'the Security Council is the executive body within the UN which has the authority to order or authorize enforcement.'[28] Although the Security Council is an executive organ that enforces the will of the international community, the United Nations

[19] Article 3(2) of the Treaty of Lausanne (Frontier between Turkey and Iraq), Advisory Opinion No. 12, (1925) PCIJ Series B, No. 12, p. 32. See also United Nations, 'Summaries of Judgments, Advisory Opinions and Orders of the Permanent Court of International Justice' *United Nations Publications*, New York, 2012, ST/LEG/SER.F/1/Add.4, <http://legal.un.org/PCIJsummaries/documents/english/PCIJ_FinalText.pdf>, accessed on 08/04/2022.

[20] Statement by H.E. Judge Peter Tomka, President of the International Court of Justice, at the High-Level Meeting on the Rule of Law on Sept. 24, 2012, p. 2, <http://www.unrol.org/files/Statement_ICJ.pdf>, accessed on 08/04/2022.

[21] B A Chigara, above at note 18, p. 416.

[22](1924)1 KB 256 at p. 25.

[23] However, we are not unaware of the dust that this submission would inevitably raise especially as the reason for this exclusion is tied to the very logic behind the inclusion of the veto power in the United Nations as discussed above. Hence, according to Wouters and Ruys, 'This provision was a compromise solution between the idea that the Security Council should never adopt coercive measures against one of its permanent members on the one hand, and the general principle of nemo iudex in sua causa on the other hand.' See J Wouters and T Ruys, *Security Council reform: A New Veto for a New Century? (Egmont Paper 9)* (London: Academia Press, 2005), p. 12.

[24] The United Nations Charter, 1945, Art. 24.

[25] Note that other organs of the United Nations also play vital roles in the maintenance of international peace and security, especially the General Assembly, but their roles are merely complementary to that of the Security Council.

[26]According to Malcolm Shaw, 'the Council was intended to operate as an efficient executive organ of limited membership, functioning continuously. See M N Shaw *Ibid*., p. 1004. According to Phil Leech, 'the original intention behind its creation was for it to be an executive arm of the UN, enforcing the will of the international community against rogue states, ensuring compliance with international norms and promoting world peace.' P Leech and R Gowan, 'Is it time to junk the UN Security Council?' *New Internationalist Magazine,* Dec. 2013 <http://newint.org/sections/argument/2013/12/01/argument-junk-un-security-council/>, accessed on 08/04/2022.

[27] Above at note 24., Art. 24.

[28] R K Gardiner, above at note 17, p.12.

Charter also confers on it certain roles which are judicial in nature.[29] For example, under Chapter VI of the United Nations Charter, the Security Council is empowered to investigate and determine whether the continuance of any dispute or situation is likely to endanger the maintenance of international peace and security. Similarly, under Chapter VII, the Security Council is authorized to determine whether an action of any state constitutes a threat to the peace, breach of the peace, or act of aggression. In fact, most of the decisions of the Security Council are judicial and judgmental in nature because they usually affect the legal rights and duties of states and other subjects of international law. Hence, there is a near unanimity among scholars of international law that the Security Council performs quasi-judicial function.[30]

4. Application of the *Nemo Judex* Rule to the Decision-Making Process in the Security Council

The fact that the Security Council performs quasi-judicial functions demands that the Security Council should comply with the dictates of the *nemo judex rule* in its decision-making processes. And as expected, there is an inbuilt mechanism in the United Nations Charter to ensure that this rule is complied with. Hence, the United Nations Charter provides in its Article 27 (3) that in decisions of the Security Council under Chapter VI and under Article 52 (3) of the United Nations Charter, a party to a dispute shall abstain from voting. This provision which is otherwise known as the compulsory abstention rule is an impressive attempt by the drafters of the United Nations Charter to guarantee and ensure the impartiality and neutrality of the Security Council while acting under Chapter VI and Article 52 (3) of the United Nations Charter is in line with the *nemo judex rule*. It is, however, not very clear why the provision of Article 27(3) is limited to Chapter VI and Article 52 (3) of the United Nations Charter only. There seems to be no good reason why the compulsory abstention rule should not also apply to Chapter VII of the United Nations Charter, especially as decisions of the Security Council under Chapter VII is binding on the member states. The application of the compulsory abstention would only estop a member of the Security Council from voting in any matter relating to pacific settlement of dispute if it is a party to it. Thus, it only applies to members of the Security Council who are parties to the dispute being considered by the Security Council. Although the compulsory abstention rule seems to be well intended by the framers of the United Nations Charter, it is nevertheless inadequate because equity and fairness demand that a party to a dispute shall not only abstain from voting, but shall also not participate at all in any meeting of the Security Council where issues relating to such dispute would be discussed. Furthermore, the United Nations Charter neither defines nor states what constitutes 'a party to a dispute' for the purposes of the compulsory abstention rule. A term like this requires proper clarification so that the essence of the compulsory abstention rule would be fully actualized. In practice, this term is given a very narrow interpretation, covering only states that are directly involved in a dispute.[31] Unfortunately, notwithstanding its application to Chapter VI and Article 52(3) of the United Nations Charter, the compulsory abstention rule has been flagrantly neglected and abused by the members of the Security Council, especially the permanent members.[32] A case in point is Resolution 748 (1992) which the United States, the United Kingdom, and France participated in its adoption even though they were parties to the subject matter of the resolution. This action was however condemned by Ali Ahmed Elhouderi, the representative of Libyan Arab Jamahiriya at the 3063rd meeting of the council, held on 31st March, 1992, who rightly noted that 'the procedure that the Security Council had followed in adopting that resolution had not taken into account the correct implementations of Article 27(3), which provides that in the case of decisions adopted under Chapter VI, a party to a dispute shall abstain from voting.'[33]

A number of factors are responsible for the poor implementation of the compulsory abstention rule as encapsulated in the proviso to Article 27(3) of the United Nations Charter by the Security Council. Firstly, the fact that the proviso deals only with Chapter VI and Article 52(3) of the United Nations Charter and not with Chapter VII has been blamed for the indifferent attitude of the Security Council towards its implementation. Thus, according to

[29] The Council possesses some attributes of a legislative body like the General Assembly, for example its decisions are predicated upon the votes of its members. But unlike the General Assembly that meets only in regular and special sessions, the Council functions continuously; hence each member is permanently represented in the United Nations at all times. Thus, according to Kochler, 'The Security Council exercises de facto supreme legislative and executive powers.' See H Kochler, 'The United Nations and International Democracy: The Quest for UN Reform', I.P.O. Reseach Paper presented first at the final meeting of the research network on 'The Political Theory of Transnational Democracy' at the University of Cambridge (UK), 29 March 1996, <http://www.i-p-o.org/unid.htm>, accessed on 08/04/2022.

[30] R Abeyratne, *Aviation Security Law* (New York: Springer Science & Business Media, 2010) p.48; E D Wet, *The Chapter VII Powers of the United Nations Security Council* (Oxford: Hart Publishing, 2004), p.368; E Lauterpacht, *Aspects of the Administration of International Justice* (Cambridge: Cambridge University Press, 1991), p.37.

[31] J Wouters and T Ruys, *Security Council reform: A New Veto for a New Century? (Egmont Paper 9)* (London: Academia Press, 2005), p. 12.

[32] Thus, according to Boonstra, this proviso 'has been invoked rarely in the UN's history'. J Boonstra, 'A mandatory Abstention for Russia' The UN Dispatch, 13th August, 2008 <http://www.undispatch.com/a-mandatory-abstention-for-russia>, accessed on 02/05/2022.

[33] Repertiore of the Practice of the Security Council: 1989 – 1992 (New York: United Nations, 2008), p. 91.

Heller, 'the Article applies only to resolutions that invoke Chapter VI of the UN Charter, 'Pacific Settlement of Disputes.' It does not apply to resolutions that invoke Chapter VII, 'Action with Respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression.' That limitation seems to render Article 27(3)'s abstention provision essentially worthless … Abstaining on a Chapter VI resolution would thus appear to have no real cost for a party to the dispute, which makes me wonder why we have not seen an Article 27(3) abstention in the past 48 years.'[34] Secondly, there is no definite parameter for determining whether a resolution was adopted under Chapter VI or under Chapter VII. And the fact that the Security Council rarely states whether its decisions are based in Chapter VI or Chapter VII compounds this problem.[35] Finally, the proviso relates only to 'disputes' and therefore, does not include 'situations', and there is no clear-cut difference between a dispute and a situation under international law. According to Kelsen, 'if a member of the Security Council is involved in a situation which has not, or is yet to have the character of a dispute, the member is not excluded from voting in case the Security Council decides under Article 34 to investigate the situation, or makes recommendation under Article 36 for the adjustment of the situation'.[36]As there is no clear-cut difference between a dispute and a situation under international law, states usually circumvent the compulsory abstention rule by avoiding the word 'disputes' in their draft resolution. However, there are a handful of resolutions of the Security Council that were adopted in total compliance with the compulsory abstention Rule including Resolution 19 (1947) on the Corfu Channel incident in which the UK, a permanent member of the Security Council, abstained from voting and Resolution 138 (1960) on the question relating to the case of Adolf Eichmann where Argentina, an elected member of the Security Council abstained from voting.[37]

However, even the application of the compulsory abstention rule in the Security Council's decisions relating to Chapter VI is self-defeating, because before any decision bothering on Chapter VI of the United Nations Charter could be enforced, the Security Council would be required to adopt another resolution under Chapter VII of the United Nations Charter and such resolution could easily be vetoed by any permanent member of the Security Council who is a party to the dispute. Hence, according Korowicz, 'under Art. 27/3, a permanent member of the Security Council …. has to abstain from voting in a dispute to which it is a party. But if it is found guilty, and if sanction should be applied against it, it has the right to vote, that is to veto the respective draft resolution. If its adversary is not a state belonging to the Big Five, this adversary would not enjoy the right of veto, and would have to yield or suffer the sanction'.[38] This situation could be compared to what obtained under the League of Nations Covenant, where Articles 10, 11, 13 and 16 of the Covenant imposed certain duties on the member states in respect of pacific settlement of dispute and at the same time Article 5 of the Covenant required the unanimity of all the members of the Security Council and Assembly to adopt any resolution both at the Security Council and at the General Assembly. Hence, under the League of Nations, it was possible for any member of the Security Council or the Assembly accused of threatening or disturbing the peace under Article 11 of the League's Covenant to halt any punitive action against her by interposing its veto.[39] While examining this apparently conflicting provisions, Hersch Lauterpacht, asked 'whether the rigid provision of Article 5 of the Covenant relating to the requirement of unanimity ought not, as a matter of law, to be interpreted subject to general legal principles such as the principle that no one may be a judge in his own case.'[40] It is important to note that the Permanent Court of International Justice answered the foregoing question in the affirmative in the *Treaty of Lausanne Case.*[41] According to the court, 'in the case of the settlement of a dispute, the rule of unanimity is applicable, subject to the limitation that the votes cast by representatives of the interested parties do not affect the required unanimity ... The well-known rule that no one can be the judge in his own suit holds good.'[42]

[34]K J Heller, 'The Curious Article 27(3) of the UN Charter,' *The Opinion Juris*, Aug. 14, 2008, <http://opiniojuris.org/2008/08/14/the-curious-Article-273-of-the-un-charter/>, accessed on 02/05/2022.
[35] L Gross, 'The double Veto and the Four-Power Statement on Voting in the Security Council', (1953-1954) *Harvard L. Rev.*, p. 505.
[36]H. Kelsen, *The Law of the United Nations: A Critical Analysis of Its Fundamental Problems : with Supplement* (New Jersey: The Lawbook Exchange Ltd, 1950), p. 262.
[37] See also Resolution 80 (1950), Resolution 91 (1951) and Resolution 96 (1951) each of which dealt with the India-Pakistan question in which India as elected member of the Council abstained from voting.
[38] M S Korowicz, ' The Dominant Doctrine of Sovereignty' in The Hague Academy of International Law, *Recueil Des Cours 1961* (Leiden Martinus Nijhoff Publishers, 1968), p.46.
[39] R Basu, *The United Nations: Structure & Functions Of An International Organisation* (Sterling Publishers Pvt. Ltd, 2004), p.33.
[40] H Lauterpacht, *The Development of International Law by the International Court* (Cambridge: Cambridge University Press, 1982), p. 159.
[41] Above at note 19.
[42] *Ibid.,* p. 32.

4. Need to Observe the *Nemo Judex* Rule in the Exercise of Veto Power

Veto power is the power of the permanent members of the United Nations Security Council to nullify any draft resolution on non-procedural matters just by casting a negative vote. This voting arrangement which resulted from a compromise between the United States, the former Union of Soviet Socialist Republics (now represented by Russia) and the United Kingdom, at the conference of Yalta of 1945[43] is contained in Article 27 of the United Nations Charter which provides as follows:

1. Each member of the Security Council shall have one vote.
2. Decisions of the Security Council on procedural matters shall be made by an affirmative vote of nine members.
3. Decisions of the Security Council on all other matters shall be made by an affirmative vote of nine members including the 'concurring votes of the permanent members;' provided that, in decisions under Chapter VI, and under paragraph 3 of Article 52, a party to a dispute shall abstain from voting.[44]

This voting arrangement has created considerable controversy largely because the United Nations Charter itself neither draws any clear-cut line between procedural matters and non-procedural matters nor provides any guide as per how to distinguish between them. Thus, according to Shaw, 'the question of how one distinguishes between procedural matters from non-procedural matters has been a highly controversial one'.[45] Therefore, Article 27 of the United Nations Charter appears to be self-defeating because the purpose of separating procedural matter from non-procedural ones is being defeated as matters that would ordinarily pass for procedural matter are now being subjected to the veto power. The need to harmonize Article 27 of the United Nations Charter with regard to the distinction between procedural matters and non-procedural matters is an urgent one, and the United Nations General Assembly has made enormous contributions in this direction since the inception of the United Nations. For example, the General Assembly adopted Resolution 117(II) of 21st November, 1947, which mandated the Interim Committee it earlier established via Resolution 111 (II) of 13th November, 1947 to investigate the problems of the voting procedure in the Security Council. The Committee in its Report entitled 'the Problem of Voting in the Security Council' tried to streamline the controversies surrounding the veto power of the Security Council, especially as it related to the procedural and substantive matter by drawing a list of Procedural matters. The Committee, among other things, recommended that the question of whether or not an issue is a procedural matter is procedural and so should not be subjected to the veto. By Resolution 267 (III) of 1949, the General Assembly adopted the Committee's Report and called on the Security Council to accept and act in accordance with the Report. However, the General Assembly observed that the list is not conclusive and as such noted that other matters can be considered procedural if the members of the Security Council conclude so. Unfortunately, the permanent members of the Security Council have refused to accept the recommendations of the Committee and have continued to exercise their veto power arbitrarily and unrestrictedly. The United States, for example, has always discarded the idea of defining 'procedural matters', as the same would abridge the right of veto and its scope of application.

One of the greatest demerits of the non-application of the compulsory abstention rule to all the decisions of the Security Council under the United Nations Charter is that it makes the members of the Security Council judges in their own causes, and the veto-wielding members of the Security Council absolute judges in their own causes and this has far-reaching implication for the maintenance of international peace and Security.[46] It simply means that no form of sanction could be imposed by the Security Council under the United Nations Charter against any permanent member of the Security Council. This is so because for such a sanction to be imposed, the permanent member in question must vote in its favour, a situation which is unlikely to occur.[47] There is plethora of cases to demonstrate the impossibility of such a situation, but the most notorious is the *Nicaragua Case,*[48] where the United

[43] B Simma and S Brunner, 'Article 27' in B Simma and B Randelzhofer (eds), *The Charter of the United Nation: A Commentory* (2nd edn, Oxford: Oxford University Press, 2002), p. 435.

[44] Emphasis mine

[45] M N Shaw, *International Law* (5th edn, Cambridge: Cambridge University Press, 2004), p. 1084.

[46] H Kochler, 'The United Nations Organization and Global Power Politics: The Antagonism between Power and Law and the Future of World Order*', Chinese Journal of International Law, (2006) Volume 5, Issue 2*, p. 326.

[47] *Ibid*

[48] Nicaragua v. USA, 1986, ICJ Reports p. 169. Note also that: On 22 August 1968, the Soviet Union vetoed a Security Council resolution concerning the Soviet invasion of Czechoslovakia, on 21 March 1973, the United States vetoed a resolution concerning the status of the Panama Canal, on 6 February 1976, France vetoed a resolution concerning the dispute between France and the Comoros about the Island of Mayotte, on 21 April 1986, the United States vetoed a resolution condemning US air attacks against Libya and also On 17 January 1990, the United States vetoed a resolution condemning the violation by US forces of the inviolability of the residence of the Nicaraguan ambassador in Panama City. See generally J Wouters and T Ruys, above at note 31.

States vetoed a Security Council's draft resolution seeking to enforce the judgment of the International Court of Justice against the United States. In this case, the Government of Nicaragua brought an action to the ICJ against United States over the military and paramilitary activities in and against Nicaragua by the United States. The United States reacted by filing a preliminary objection challenging the jurisdiction of the Court to entertain the matter. This application was, however, dismissed after the Court ruled that it had jurisdiction to entertain and determine the suit. This ruling did not go down well with the United States, thus it withdrew from further participation in the case, and the case was heard on merit in the absence of the United States. On the 27th June 1986, the Court handed down its judgment which among other things awarded reparations to Nicaragua. Expectedly, the United States refused to comply with the judgment. Consequently, Nicaragua approached the Security Council pursuant to Article 94(2) of the United Nations Charter with a draft resolution calling on the United States to comply with the ICJ's judgment in conformity with the relevant provisions of the United Nations Charter. But the draft resolution was not adopted when it was put to vote because of the negative vote of the United States.[49] Similarly, Russia has on several occasions used its veto power in recent times to keep the Security Council at bay in disputes which it is a party. For example, on 15th March 2014, Russia arrogantly vetoed the United States' sponsored draft resolution S/2014/189[50], which sought to prevent Russia's illegal annexation of Crimea which forms part of Ukraine. Similarly, on 26th February, 2022, Russia vetoed like Draft Resolution S/2022/155 sponsored by 85 state parties to, among other things, compel Russia to withdraw its military forces from the territory of Ukraine.[51] It is instructive to observe that these two draft resolutions were very popular as all the members of the Security Council in attendance voted in favour of them except Russia.

5. Conclusion and Recommendations

The *nemo judex* rule demands that no one should act as a judge in a case in which he has a personal or vested interest. This procedural law which is predicated on the fact that justice should not only be done but should manifestly and undoubtedly be seen to be done forms part of the general principles of law recognized by civilized nations, because law of nations is a law founded on the great and immutable principles of equity and natural justice.[52] Thus, the proviso to Article 27 (3) of the United Nations Charter provides that in decisions of the Security Council under Chapter VI and under Article 52 (3) of the United Nations Charter, a party to a dispute shall abstain from voting. The restriction of this proviso to only decisions of the Security Council under Chapter VI and under Article 52 (3) of the United Nations Charter simply means that this rule shall not apply to the decisions of the Security Council under other Chapters or Articles of the United Nations Charter because an expression of one thing excludes others. As a result of this, members of the Security Council participate in the decision-making process in the Security Council in disputes which they are parties to. This does not only make them judges in their own case contrary to the dictates of the *nemo judex* rule, but also creates a dangerous leeway for the permanent members of the Security Council to use their veto power to block draft resolutions of the Security Council in disputes which they are parties to. Thus, it is recommended that the restriction of the application of the *nemo judex* rule to decisions of the Security Council bothering on Chapter VI and Article 52 (3) of the United Nations Charter should be rethought so as to make the *nemo judex* rule applicable to every decision of the Security Council.

[49] UN Doc. S/18428. See N D White, *The United Nations and the Maintenance of International Peace and Security,* (Manchester: Manchester University Press, 1990), p. 14; C Focarelli et al, *International Law as Social Construct: The Struggle for Global Justice,* (Oxford: Oxford University Press, 2012), p. 354; G M Goh, *Dispute Settlement in International Space Law: A Multi-door Courthouse for Outer Space* (Leiden: Martinus Nijhoff Publishers, 2007), p. 127; Note that having failed to obtain the help of the Security Council to compel the United States to comply with the ICJ's judgment, Nicaragua shifted to the General Assembly, 'given that the Security Council is not exclusively competent to deal with a consequence to be given to the judgment of ICJ' because under Article 10 of the United Nations Charter, the General Assembly may make recommendations with the view of ensuring compliance with the judgment of ICJ. See A Zimmermann et al, *The Statute of the International Court of Justice: A Commentary***,** (Oxford: Oxford University Press, 2012), p. 202; N Jasentuliyana, *Perspectives on International Law,* (Leiden: Martinus Nijhoff Publishers, 1995), p.284.

[50]S/2014/189, Mar. 15, 2014. For a detailed account of what transpired at the Council during the meeting see the Provisional Verbatim Record of the 7138th Meeting of the Security Council, p. 2, <http://www.un.org/en/ga/search/view_doc.asp?symbol=S/PV.7138>, accessed on 02/05/2022.

[51] M Nicholas and H Pamuk, 'Russia Vetoes U.N. Security Action on Ukraine as China Abstains', *Reuters,* 25th Feb. 2022, <https://www.reuters.com/world/russia-vetoes-un-security-action-ukraine-china-abstains-2022-02-25/>, accessed on 02/05 2022.

[52]Above at note 3.