

REVIVING THE OBLIGATORY ABSTENTION RULE IN THE UN SECURITY COUNCIL: REFORM FROM THE INSIDE OUT

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I. INTRODUCTION

At the beginning of 2015, New Zealand commenced a two-year term as one of the 10 elected members of the United Nations (UN) Security Council. Upon taking the seat, New Zealand's Minister of Foreign Affairs triumphed that the move "will place us at the heart of international decision-making for the next two years".¹

Members of the public would be excused for being unimpressed with the Minister's optimism: the Security Council *makes decisions*? Although the body continues to be reasonably productive in the number of resolutions issued,² it has been widely regarded as ineffective in addressing recent conflicts in Syria, Gaza, Georgia, Crimea and eastern Ukraine. A significant impediment in the Council's ability to address these conflicts has been the so-called veto power bestowed by the UN Charter on the Council's five permanent member states (P5).³ Threatened and actual vetoes by Russia and China have prevented robust Security Council action in Syria.⁴ Russia has similarly prevented

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1 Hon Murray McCully "New Zealand takes UN Security Council Seat" (press release, 5 January 2015).

2 In 2014, the Security Council issued 63 resolutions, which essentially represents a "normal" annual output for the Council in the post-Cold War era. Since 1992, the Council has issued an average of 64 resolutions per year; prior to 1992, the Council averaged approximately 16 resolutions annually. For ongoing statistical analysis of the work of the Security Council, see Security Council Report <www.securitycouncilreport.org>.

3 Charter of the United Nations, art 27(3). The Charter does not refer explicitly to a "veto": rather, it states that decisions of the Council "shall be made by an affirmative vote of nine members including the concurring votes of the permanent members". Since 1946, abstentions by permanent members have without exception been regarded as a non-impediment to the adoption of a proposal, provided that it receives the necessary number of affirmative votes. This conventional practice has been variously justified over the years as either a legitimate interpretation of the Charter's text or as an amendment of it by unorthodox means, but the most convincing interpretation remains the one summarised by Fassbender as being one of "[n]ullo actore nullus iudex – the present practice stands as long as it is not challenged as unconstitutional": Bardo Fassbender *UN Security Council Reform and the Right of Veto: A Constitutional Perspective* (Kluwer Law International, The Hague, 1998) at 183 (footnote omitted). This argument was first made in Leo Gross "Voting in the Security Council: Abstention from Voting and Absence from Meetings" (1951) 60 Yale LJ 209 at 227-228.

4 *Security Council 6627th meeting* S/PV.6627 (2011) (rejecting S/2011/612); *Security Council 6711th meeting* S/PV.6711 (2012) (rejecting S/2012/77); *Security Council 6810th meeting* S/PV.6810 (2012) (rejecting S/2012/538); *Security Council 7180th meeting* S/PV.7180 (2014) (rejecting S/2014/348).

proposed UN action in Ukraine⁵ and any proposed decision regarding the Israeli-Palestinian conflict has traditionally been faced with the threat of a veto by the United States.⁶ Since the revitalisation of the UN at the close of the Cold War, reform of the Security Council – including possible elimination or limitation of the veto power – has been proposed by states and extensively discussed at the UN.⁷ As early as 1996, there was widespread support among UN states for limitations to be placed on the veto,⁸ but no changes have been implemented, primarily because any amendment to the Charter must be ratified by all P5 member states.⁹ The holders of the veto power understandably remain the most vigorous opponents of changes to it.¹⁰

The project of Security Council reform is now more than 20 years old. Article 27 of the UN Charter reads precisely as it did when the document was amended in 1966 to increase Council membership from 11 to 15:¹¹

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.

5 *Security Council 7138th meeting S/PV.7138* (2014) (rejecting S/2014/189).

6 Since the conclusion of the Six-Day War in 1967, the United States has vetoed more than 40 proposed Security Council resolutions related to the Israeli-Palestinian conflict.

7 For an introduction to the various discussions and proposals, see Brian Cox “United Nations Security Council Reform: Collected Proposals and Possible Consequences” (2009) 6 *SC J Int’l L & Bus* 89.

8 Joachim Müller (ed) *Reforming the United Nations: New Initiatives and Past Efforts* (Kluwer Law International, The Hague, 1997) vol 1 at I/192. New Zealand was a strong early supporter of reform: in 1993, it stated that “New Zealand remains, as it was in 1945, adamantly opposed to the veto”: Secretary-General *Question of Equitable Representation on and Increase in the Membership of the Security Council A/48/264* (1993) at 69.

9 Charter of the United Nations, arts 108-109.

10 Although controversial, the veto provision in the Security Council’s voting procedure was viewed by the American delegation at the 1945 San Francisco conference as a necessary prerequisite for the Charter to succeed: Edward C Luck *UN Security Council: Practice and Promise* (Routledge, Abingdon, 2006) at 13-15. From the perspective of the United States, its continued possession of a veto remains a feature of the Council that is “non-negotiable”: David Bosco “Course Corrections: The Obama Administration at the United Nations” (2011) 6 *The Hague Journal of Diplomacy* 335 at 341. France has proposed a self-imposed limitation on the current veto powers of the permanent members. For the French proposal, see *General Assembly, Sixty-eighth session, 5th plenary meeting A/68/PV.5* (2013) at 34 and Laurent Fabius “A Call for Self-Restraint at the U.N.” *The New York Times* (online ed, New York, 4 October 2013). The proposal has gained some support from the United Kingdom: New York Center on International Cooperation *Pathways to Security Council Reform* (New York University, New York, 2014) at 15. Russia recently stated it is opposed to the French proposal: ITAR-TASS World Service “Russia stands against restriction of veto right in UN Security Council” (2 April 2015).

11 Charter of the United Nations, art 27.

The goal of restricting the P5 veto by amendment remains as quixotic as it has always been. There is virtually zero chance that all P5 states would willingly relinquish or water down the power of veto, even if doing so could (and perhaps, in some cases, especially because it would) result in a healthier, more vigorous and less anachronistic UN.

This does not mean, however, that there is no hope for reform. Formal amendment of the Charter is but one of a range of actions whereby reform can be accomplished. This note proposes a far more plausible method of positive change which would require no amendment to the Charter and would be reasonably simple to implement through the initiative of a single member of the Council. This possibility therefore provides New Zealand with a potential means of introducing reform to the Council in 2015 and 2016.

II. *NEMO IUDEX IN CAUSA SUA* AND ARTICLE 27(3)

Article 27 of the UN Charter contains within its text a neglected provision which, if observed in the manner in which it was intended by the drafters to apply, would begin the process of revitalising and re-legitimising the work of the Security Council. It is a principle of common sense and one with deep legal roots in principles of natural justice and inherent fairness:¹²

(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.

The principle of *nemo iudex in causa sua* – that no one ought to be a judge in one's own cause – has deep roots in law, political philosophy and even Protestant Christian theology. The Roman emperor first promulgated the principle in 378 CE and it thereafter appeared as a self-standing title in the *Code of Justinian* produced in 534.¹³ In *Dr Bonham's Case* of 1610, Coke CJ took the extraordinary step of voiding an Act of Parliament because it authorised the inherent absurdity of allowing the College of Physicians to act as both the judge and a party in cases wherein unlicensed medical practitioners were tried;¹⁴ although Coke CJ's remedy was unusual, the underlying principle he cited was

12 Article 27(3) (emphasis added). I will refer hereinafter to the emphasised portion of the subsection as art 27(3) *in fine*.

13 Codex Iustinianus § 3.5 in Paulus Krueger (ed) *Corpus Iuris Civilis* (14th ed, Weidmann, Dublin, 1967) vol 2 at 125: "*Generali lege decernimus neminem sibi esse iudicem vel ius sibi dicere debere in re enim propria inequum admodum est alicui licentiam tribuere sententiae*" ("We decree by this general law that no one shall act as judge in his own case, or interpret the law for himself, as it would be very unjust to give anyone the right to render a decision in an affair which is his own").

14 *Bonham v College of Physicians* (1610) 8 Co Rep 107a, 77 ER 638 (Comm Pleas). Coke CJ's chosen remedy proved to be controversial, and the common law power of judges to void Acts of Parliament was ultimately eclipsed by the doctrine of parliamentary supremacy. In the United States, the basic premise of Coke CJ's remedial innovation was famously revived in *Marbury v Madison* 5 US (1 Cranch) 137 (1803).

commonplace and had been well understood in the Common Law since the earliest times.¹⁵ Thomas Hobbes¹⁶ and John Locke¹⁷ accepted *nemo iudex in causa sua* as a self-evident principle of ideal political governance, and one author has recently suggested that Martin Luther's writings reveal that the principle played a central role in Luther's theology – in this view, even “God reveals that he is a righteous judge by consistently not being judge in his own case”.¹⁸

The drafters of the UN Charter intended that this principle apply to the P5 states for all but the most serious decisions made by the Security Council. Article 27(3) states that parties to disputes are to refrain from voting on decisions made under Chapter VI, which relates to pacific settlement of disputes that, if continued, would be “likely to endanger the maintenance of international peace and security”.¹⁹ Also covered by the voting prohibition are decisions made under art 52(3), which allows the Security Council to formally or informally encourage pacific settlement of local disputes though regional arrangements or agencies.²⁰ This mandate found in art 27(3) *in fine*, known as the “obligatory abstention” rule,²¹ implicitly exempts decisions made under Chapter VII from its ambit; there is no obligatory abstention imposed when decisions are made related to situations that the Security Council determines represent a “threat to the peace, breach of the peace, or act of aggression”.²²

As has been noted, the reason for the limitation in the obligatory abstention rule is that the provision is essentially “a compromise solution”.²³ The Security Council was founded upon the principle that no coercive action could be

15 For a discussion, see DEC Yale “*Iudex in Propria Causa: An Historical Excursus*” (1974) 33 CLJ 80.

16 Thomas Hobbes *Leviathan; or, The Matter, Forme, and Power of a Common-wealth Ecclesiastical and Civill* (Andrew Crooke, London, 1651) at 78: “And seeing every man is presumed to do all things in order to his own benefit, no man is a fit Arbitrator in his own cause”. Hobbes identified the principle as the seventeenth of his 19 “Lawes of Nature, dictating Peace, for a means of the conservation of men in multitudes”.

17 John Locke *Two Treatises of Government* (Awnsham Churchill, London, 1690) at 230-231 (book 2, ch 2, s 13): “To this strange Doctrine, viz. That in the State of Nature every one has the Executive Power of the Law of Nature, I doubt not but it will be objected; That it is unreasonable for Men to be Judges in their own Cases ... I easily Grant, that Civil Government is the proper Remedy for the Inconveniencies of the State of Nature, which must certainly be Great, where Men may be Judges in their own Case, ... But I shall desire those who make this Objection, to remember that Absolute Monarchs are but Men; and if Government is to be the Remedy of those Evils, which necessarily follow from Men's being Judges in their own Cases, and the State of Nature is therefore not to be endured, I desire to know what kind of Government that is, and how much better it is than the State of Nature, where one Man commanding a multitude, has the Liberty to be Judge in his own Case”.

18 Piotr J Malysz “*Nemo iudex in causa sua* as the Basis of Law, Justice, and Justification in Luther's Thought” (2007) 100 Harv Theo Rev 363 at 365.

19 Charter of the United Nations, art 33(1).

20 Article 52(3).

21 Sydney D Bailey and Sam Daws *The Procedure of the UN Security Council* (3rd ed, Clarendon Press, Oxford, 1998) at 250.

22 Charter of the United Nations, art 39.

23 Bruno Simma, Stefan Brunner and Hans-Peter Kaul “Article 27: Voting” in Bruno Simma (ed) *The Charter of the United Nations: A Commentary* (2nd ed, Oxford University Press, Oxford, 2002) vol 1 476 at [75].

taken against any state without the consent of each of the P5 powers, and the sponsoring states studiously avoided creating a system whereby the UN would ever be permitted to coerce one of these great powers. It was natural that smaller and less-powerful states would object to the obvious potential double standards created by such a principle: in accepting membership in the UN Organization, a state is required to acknowledge the legitimacy of the legality of collective force being used against it in the future, but no such accommodation is demanded of the P5. Perhaps because it had already thus been conceded that P5 states would potentially be permitted to be judges in their own causes, when the draft of the Charter was initially presented at San Francisco, it contained no provision at all for obligatory abstention in the Security Council. However, pressure from non-P5 states resulted in the inclusion of the *in fine* clause of art 27(3).²⁴ As a result, the obligatory abstention rule applies equally to permanent and non-permanent members of the Security Council, but its application is limited to decisions on non-coercive measures that may be taken under Chapter VI and art 52(3). The P5 states thus opened themselves up to potential censure by the Council that would carry legal and moral weight, but the possibility of enforcement measures being applied to a P5 state against its will remained non-existent.

III. THE OBLIGATORY ABSTENTION RULE IN PRACTICE

In practice, however, the P5 states have managed to all but close even that narrow window. As early as 1970, it was pointed out that states were using a variety of justifications to avoid the application of the obligatory abstention rule.²⁵ By the end of the Cold War, it could be said that the practice of the Council was “clearly one of a persistent evasion of the rule in question”.²⁶ Higgins succinctly summarised the two major reasons the obligatory abstention was not working as had been envisaged:²⁷

First, it has become increasingly difficult to identify “the parties” to a dispute. In an increasingly interdependent world, states find it hard to stand aside from the disputes of others. Even if they are not involved directly as the major protagonists in the controversy, they may well be involved indirectly, in the sense that they have interests at stake. Second, a member is enjoined to abstain from voting on a resolution for the pacific settlement of a dispute to which it is a party. But frequently a member of the Security Council is able to deny that it is a party of a dispute, or to assert that the matter is a “situation” but not a “dispute”, or that the decision in question falls under Chapter VII; that is to say, action with respect to threats to the peace, breaches of the peace and acts of aggression. Accordingly, the disqualification from voting, which would serve to limit the dual role of members as participants and decision-makers, is rarely used.

24 Bailey and Daws, above n 21, at 250.

25 See Rosalyn Higgins “The Place of International Law in the Settlement of Disputes by the Security Council” (1970) 64 *Am J Int'l L* 1 at 1-3.

26 Yehuda Z Blum *Eroding the United Nations Charter* (Martinus Nijhoff Publishers, Dordrecht, 1993) at 211.

27 Higgins, above n 25, at 2.

These procedural issues – particularly that of defining a “party” and distinguishing a “dispute” from a “situation” – attracted some discussion at Security Council meetings in its first five years, but ultimately no consensus on the principles emerged. One issue that has long been agreed upon is that it is the Security Council that has the power to determine whether a “dispute” exists, not the parties to the conflict.²⁸ That power has only rarely been explicitly exercised.²⁹

A. *Explicit Invocations of the Rule by Abstaining Members*

Commentators disagree with respect to the number of instances that a member of the Council has abstained from voting in conformity with art 27(3). One sourcebook makes the extraordinary claim that “a state has only once abstained from voting expressly on the ground of Article 27(3)”.³⁰ However, more than 20 years ago, Blum was able to list five such instances plus others in which a party correctly abstained but the obligation to abstain was neither explicitly acknowledged nor denied.³¹ A brief consideration of all of the cases in which art 27(3) *in fine* has been mentioned by an abstaining party is sufficient to demonstrate how rarely the obligatory abstention has been explicitly adhered to.

1. The Corfu Channel question involved an incident in which two ships of the British Royal Navy were damaged by mine explosions in the international Straits of Corfu between Greece and Albania. The question was submitted to the Security Council by the United Kingdom and in March 1947 a vote was held on a British proposal which would have recommended that the two countries negotiate a settlement based on the understanding that the minefield could not have been laid without the knowledge of Albania.³² Without elaboration, the British representative stated, “I am not voting”, and the Soviet Union vetoed the proposal.³³

28 Sydney D Bailey *Voting in the Security Council* (Indiana University Press, Bloomington, 1969) at 63; Bailey and Daws, above n 21, at 257.

29 For an example from the early history of the Security Council, see *Security Council 286th meeting S/PV.286* (1947) at 6, 9-10, where by formal vote the India-Pakistan question was described by the Council as a “dispute”. See Sydney D Bailey “New Light on Abstentions in the UN Security Council” (1974) 50 *International Affairs* 554 at 564.

30 Henry G Schermers and Niels M Blokker *International Institutional Law* (5th rev ed, Martinus Nijhoff Publishers, Leiden, 2011) at § 790. The claim appears to have been adopted from Tavernier, who suggested in 1976 that there had been only one case where the obligatory abstention had been applied “*de manière claire et incontestable*” (“clearly and indisputably”): Paul Tavernier “L’Abstention des États Parties à un différend (Article 27 § 3 *in fine* de la Charte): Examen de la pratique” (1976) 22 *Annuaire français de droit international* 283 at 284. In light of the subsequent material in this section, Tavernier’s claim – as well as Schermers and Blokker’s – must be regarded as incorrect.

31 Blum, above n 26, at 204-206.

32 *Security Council 122nd meeting S/PV.122* (1947) at 608-609.

33 At 609.

2. Two weeks later, the United Kingdom again abstained from voting on a proposed resolution related to the Corfu Channel question.³⁴ The proposal recommended that the issue be referred to the International Court of Justice; it was voted on and successfully adopted as Resolution 22.³⁵
3. Later in 1947, Egypt notified the Security Council that it had failed to successfully negotiate the end of the British military occupation of Egypt and the Sudan under the 1936 Anglo-Egyptian Treaty, and that it was therefore requesting that the issue be placed on the Council's agenda.³⁶ In the following weeks, the United Kingdom abstained from voting 11 separate times on proposals to address the dispute.³⁷ Twice during discussion, the British representative acknowledged that "of course" the United Kingdom could not vote on the proposals,³⁸ and art 27(3) was recorded as the basis of the United Kingdom's non-participation in each of the 11 votes.³⁹
4. Egypt was a member of the Security Council in 1950 when it considered the proposal that would become Resolution 89, which addressed the truce between Egypt and Israel.⁴⁰ The Egyptian representative stated that he had not been able to determine if this was a "dispute" or a "situation", but "to allay the legal worries of everybody", he would abstain from voting pursuant to art 27(3).⁴¹
5. India was a member of the Security Council in 1950 and 1951 when the India-Pakistan question was on the Council's agenda, and Pakistan was selected to take India's place on the Council in 1952 and 1953. During these years, India abstained from voting six times on matters related to the dispute⁴² and Pakistan was once recorded as "[p]resent and not voting".⁴³ On four of the occasions, the Indian representative explained following the vote that he regarded his abstention as obligatory under art 27(3).⁴⁴

34 *Security Council 127th meeting S/PV.127* (1947) at 727.

35 *Resolution of 9 April 1947 SC Res 22, S/Res/22* (1947).

36 *Security Council 159th meeting S/PV.159* (1947) at 1343-1345.

37 *Security Council 198th meeting S/PV.198* (1947) at 2302-2305; *Security Council 200th meeting S/PV.200* (1947) at 2238-2240; *Security Council 201st meeting S/PV.201* (1947) at 2362.

38 *Security Council 200th meeting*, above n 37, at 2337; *Security Council 201st meeting*, above n 37, at 2348.

39 *Security Council 198th meeting*, above n 37, at 2302-2305; *Security Council 200th meeting*, above n 37, at 2238-2240; *Security Council 201st meeting*, above n 37, at 2362.

40 *Resolution of 17 November 1950 SC Res 89, S/Res/89* (1950).

41 *Security Council 470th meeting S/PV.470* (1950) at 7, 15.

42 At 4; *Security Council 471st meeting S/PV.471* (1950) at 5-6; *Security Council 539th meeting S/PV.539* (1951) at 15; *Security Council 543rd meeting S/PV.543* (1951) at 4; *Security Council 548th meeting S/PV.548* (1951) at 23; *Security Council 566th meeting S/PV.566* (1951) at [65].

43 *Security Council 611th meeting S/PV.611* (1952) at [111].

44 *Security Council 471st meeting*, above n 42, at 11; *Security Council 539th meeting*, above n 42, at 15; *Security Council 543rd meeting*, above n 42, at 4; *Security Council 548th meeting*, above n 42, at 23.

6. In 1960, Argentina was a member when the Council considered Argentina's complaint regarding Israel's abduction of Adolf Eichmann in Buenos Aires. Before the voting on what would become Resolution 138,⁴⁵ the Argentine representative acknowledged the obligatory abstention provision and its possible application, but stated that it was requesting "for permission not to take part in the vote" on the resolution it had proposed simply "for reasons of tact".⁴⁶ The resolution was adopted, with Argentina being recorded as "[p]resent and not voting".⁴⁷
7. In July 1961, Tunisia submitted to the Council a complaint against France related to French military activity in the African country against Tunisian forces. Prior to the vote on what would become Resolution 164,⁴⁸ the French representative stated that he would abstain, but not because of art 27(3), "since the decision in question is not being taken under Chapter VI".⁴⁹ However, there had been no discussion regarding what chapter the Council would be acting under and the resolution did not declare that it was made pursuant to Chapter VII.⁵⁰ This remains the sole case in which a state abstained after arguing that the obligatory abstention rule did *not* apply to it.
8. In 1978, the United States had allowed Ian Smith, the Prime Minister of Southern Rhodesia, to enter its territory to promote a proposed settlement to the conflict in Rhodesia. The Security Council considered a proposal to declare this action of the United States to be in contravention of Resolution 253, which had called for economic and diplomatic isolation of Southern Rhodesia and a travel ban on its leaders and residents.⁵¹ The 1978 proposal passed,⁵² with the United States stating that it was "acting in the spirit of Article 27, paragraph 3" by abstaining.⁵³

There are no other examples where an abstaining party has mentioned the obligatory abstention rule.

45 *Resolution of 23 June 1960* SC Res 138, S/Res/138 (1960).

46 *Security Council 868th meeting* S/PV.868 (1960) at [51].

47 At [52].

48 *Resolution of 22 July 1961* SC Res 164, S/Res/164 (1961).

49 *Security Council 962nd meeting* S/PV.962 (1961) at [55]. France's stated reason for abstaining was that the proposed resolution called for a ceasefire, and "the steps which are to be taken are precisely what [France] has been asking for and it would be illogical, paradoxical even, for France to urge itself to do what it has been pressing for".

50 Because there had been active fighting between French and Tunisian forces, France likely assumed that the proposed resolution was being voted on under Chapter VII as a response to a "breach of the peace" under art 39. This is a plausible assumption to have made and France's argument that it was not obliged to abstain in this case is therefore convincing.

51 *Resolution 253 of 29 May 1968* SC Res 253, S/Res/253 (1968).

52 *Resolution 437 of 10 October 1978* SC Res 437, S/Res/437 (1978).

53 *Security Council 2090th meeting* S/PV.2090 (1978) at [31]. As has been noted, this is an instance in which the obligatory abstention likely did not apply, since the issue "certainly did not constitute a *dispute* between the United States and any other State": Blum, above n 26, at 207. The language of the comment made by the American representative suggests that he was probably aware that he was not, strictly speaking, obliged to abstain.

B. Clear Contraventions of the Rule

Identifying instances in which the obligatory abstention rule was not properly observed is far more difficult, for two reasons. First, it is not always clear whether a proposed decision of the Council is to be made under Chapter VI or Chapter VII,⁵⁴ and art 27(3) does not require that parties to the dispute abstain from decisions made under Chapter VII. It is for this reason that Blum's list of 18 cases of non-observance of the rule between 1948 and 1990⁵⁵ cannot be considered authoritative: several of his examples involve decisions in which the Council vote more than likely came under Chapter VII, not Chapter VI.⁵⁶ Second, since the 1970s, discussion of the obligatory abstention rule in the Security Council has been virtually non-existent, so it is difficult to know what position the member states themselves now take with respect to the application of the rule. At times, even when the rule has clearly been broken, all members of the Council have remained silent regarding the breach.

Enumerated below are seven cases where it could most plausibly be argued that the obligatory abstention rule was violated.

1. The first time the rule was violated was in October 1948, when the Council voted on a proposed resolution related to the administration of post-war Berlin. The four parties involved in the dispute were the occupying powers of Berlin – France, the Soviet Union, the United Kingdom and the United States – but all four participated in the voting, with the Soviet Union exercising its veto and the other three voting in favour.⁵⁷ If all four involved states had abstained, it would still have been possible to pass the resolution with a positive vote from each of the seven remaining members of the Council.⁵⁸

54 For a discussion, see Benedetto Conforti *The Law and Practice of the United Nations* (3rd rev ed, Martinus Nijhoff Publishers, Leiden, 2005) at 149-152.

55 Blum, above n 26, at 207-211.

56 For example, Blum cites the 1986 American veto of a draft resolution that would have condemned the US bombing of sites in Libya as a violation of the obligatory abstention rule: above n 26, at 210. Although the draft resolution did not explicitly invoke Chapter VII, it referred to “armed attacks” by the US against Libya, and the members of the Council that spoke in favour of proposal characterised the American actions using language of a “unilateral resort to force” (Pakistan), “armed attack” (Soviet Union), and “use of force” (Uganda). Libya described the incident as “aggression”, whereas the United States claimed that its actions constituted art 51 self-defence in response to armed attacks against its nationals. In other words, both sides to the dispute and the other members of the Council appeared to agree that this was a case in which there had been a breach of the peace or act of aggression by one state against another, which would have clearly placed the situation under Chapter VII, not Chapter VI. For the draft resolution, see S/18016/Rev.1 (1986). For the Council discussion, see *Security Council 2682nd meeting S/PV.2682* (1986). Among other cases, Blum also incorrectly cites as violations of the obligatory abstention rule the 1968 Soviet veto of a proposed resolution condemning the invasion of Czechoslovakia and the 1989 American veto of a proposed resolution criticising the US invasion of Panama: Blum, above n 26, at 209-210.

57 *Security Council 372nd meeting S/PV.372* (1948) at 14.

58 Until amendments to UN Charter were implemented in 1966, the Security Council consisted of 11 states and the affirmative vote of seven members was required under art 27 to effect a decision.

2. In 1970, Iran submitted a complaint to the Security Council regarding the status of Bahrain, which had historically been under Persian rule but at the time had long been under the administration of the United Kingdom. In response, the Council unanimously passed Resolution 278;⁵⁹ the United Kingdom voted in favour of the resolution despite its obvious involvement as a party.⁶⁰
3. In 1973, a resolution was proposed that would have addressed the discussions between Panama and the United States over the future of the Panama Canal. The proposal acknowledged Panama's sovereignty over its territory and natural resources and called for the two states to peacefully conclude a new treaty on the Canal.⁶¹ The United States vetoed the resolution; Panama, which was a member of the Council and had sponsored the resolution, voted in favour of it.⁶²
4. What is perhaps the most blatant and unapologetic circumvention of the obligatory abstention rule occurred in 1976, when France vetoed a proposed resolution concerning the future of Mayotte.⁶³ The proposed resolution – which was drafted in response to a complaint from Comoros – would have recognised Mayotte as an integral part of the Comorian state and declared that France's planned referendum in Mayotte on its future political status "constitutes an interference in the internal affairs of the Comoros".⁶⁴ Shortly after the vote, the representatives of Benin and Libya questioned France's right to vote on the proposal under art 27(3) given that it was a party to the dispute.⁶⁵ The French representative responded by citing the 1973 Panama Canal case, when Panama and the United States voted on a resolution relating to a dispute to which they were parties.⁶⁶ The French representative continued:⁶⁷

I think I should remind you that for 25 years now the Council has always felt that situations of the sort on which we had to take a decision today should not prevent States members of the Council or states directly or indirectly concerned in the matter from casting their vote as they undoubtedly would exercise their vote if this matter were considered in the context of Chapter VII of the Charter. To act in any other way would be tantamount to encouraging these States members of the Council to take measures of force as provided for in Article 39 to ensure that their right to vote was not challenged. I hardly need to stress the degree of absurdity we would reach if we were to apply that interpretation.

59 *Resolution 278 of 11 May 1970* SC Res 278, S/Res/278 (1970).

60 *Security Council 1536th meeting* S/PV.1536 (1970) at [7].

61 *Revised draft resolution [on the status of the Panama Canal and the Panama Canal Zone]* S/10931/Rev.1 (1973).

62 *Security Council 1704th meeting* S/PV.1704 (1973) at [66].

63 *Security Council 1888th meeting* S/PV.1888 (1976) at [247].

64 *Draft resolution [on the situation in the Comoros]* S/11967 (1976).

65 *Security Council 1888th meeting*, above n 63, at [266], [269].

66 At [271].

67 At [272].

In other words, France argued that it must be permitted to vote on the Chapter VI issue to avoid France carrying out actions that would deliberately escalate the dispute to incorporate circumstances that would activate Chapter VII. This is perverse logic – to accept the 1976 French position all but obliterates the obligatory abstention rule and creates an all-encompassing blanket veto of a kind that the drafters of the Charter did not intend.

5. In December 1979, the Security Council unanimously adopted Resolution 457,⁶⁸ which called on Iran to release the hostages at the American embassy in Tehran and encouraged Iran and the United States to come to a peaceful resolution on the matter. This resolution clearly “remained within the framework of Chapter VI”,⁶⁹ but the United States did not abstain from voting.⁷⁰ As has been pointed out, the resolution still would have passed had the United States observed the obligatory abstention rule and moreover “a unanimous condemnation by the other members of the Council ... would have had more force had the United States abstained”.⁷¹
6. What is certainly the most notorious violation of art 27(3) *in fine* occurred in 1983, when the Soviet Union vetoed⁷² a proposed resolution that was drafted in response to the downing of a South Korean passenger airliner that had strayed into Soviet airspace.⁷³ The proposal did not invoke Chapter VII or characterise the Soviet action as even a threat to peace, much less a breach of it; rather, it called for the Secretary-General to conduct an investigation into the police action that resulted in the tragedy. What is most surprising about the Council’s discussion – even “disturbing”, according to Conforti⁷⁴ – is that the obligatory abstention rule was not mentioned by any of the participants before or after the vote and the Soviet Union’s right to vote on the proposal was not questioned.
7. In 1992, the Council passed Resolution 731, which called on Libya to respond to requests made by France, the United Kingdom and the United States to turn over Libyan nationals suspected of perpetrating two terrorist bombings of civilian aircraft.⁷⁵ The Council passed the resolution unanimously, with the three requesting states participating,⁷⁶ despite the Libyan representative’s

68 *Resolution 457 of 4 December 1979* SC Res 278, S/Res/278 (1979).

69 Conforti, above n 54, at 80.

70 *Security Council 2178th meeting* S/PV.2178 (1979) at [12].

71 Conforti, above n 54, at 80.

72 *Security Council 2476th meeting* S/PV.2476 (1983) at [131].

73 *Revised draft resolution [on the loss of a Korean civil air liner]* S/15966/Rev.1 (1983).

74 Conforti, above n 54, at 80.

75 *Resolution 731 of 21 January 1992* SC Res 731, S/Res/731 (1992). The bombings were the Pan Am bombing of December 1988 over Lockerbie, Scotland, and the Union de transports aériens bombing of September 1989 over the Sahara Desert in Chad.

76 *Security Council 3033rd meeting* S/PV.3033 (1992) at 78.

pre-vote protest that it was “inconceivable that th[e] [legality of the Council’s action] could be achieved through the participation of the parties to this dispute in the voting on the present draft resolution”.⁷⁷

C. Current Status of the Rule

Three general observations may be drawn from these reviews. First, the obligatory abstention rule has only rarely been properly observed and these instances exclusively took place in the first decade of the Security Council’s existence. Second, the observation of the rule fell out of favour in the 1970s, but obvious violations are also reasonably rare events, with no such events having taken place since 1992. Third, although the rule rarely plays a role in the Security Council’s discussions and decision-making, only once has a state – France in 1976 – explicitly argued that it was not required to abide by the rule in art 27(3) *in fine*.

These observations must lead to the conclusion that the obligatory abstention rule – although it may largely be dormant – is not dead. Commentators have been in agreement that Security Council practice has not evinced an informal or *de facto* modification or elimination of the underlying principle of *nemo iudex in causa sua* or of art 27(3) *in fine*.⁷⁸ On the contrary, there have been other instances in which Council member states have stated an abstract fealty to the rule.⁷⁹ As Fassbender has stated:⁸⁰

It has therefore been rightly concluded there still exists an *opinio juris* in favour of the rule in question. ... As far as states have *de facto* departed from the rule, their action has been unconstitutional. It must be part of a reform of the Security Council in a broader sense fully to re-establish in that regard a practice which is in conformity with the Charter.

IV. PROPOSAL FOR ACTION

As a member of the Security Council in 2015 and 2016, New Zealand should take a lead role in reviving the operation of the Charter’s obligatory abstention rule. This is a practical and meaningful way of introducing “reform” to the Council without having to face the near-impossible task of amending the Charter. No extraordinary or unusual action is required – for the rule to be revived, the issue simply needs to be raised by a member of the Security Council during Council meetings in the rare instance when art 27(3)

⁷⁷ At 24-25.

⁷⁸ Fassbender, above n 3, at 191; Simma, Brunner and Kaul, above n 23, at [91]; Blum, above n 26, at 211-212.

⁷⁹ See, for example, a Council discussion that took place regarding proposals being made in response to the landing of Argentine troops in the Falkland (Malvinas) Islands in 1982: *Security Council 2350th meeting S/PV.2350* (1982). During the discussion, Council members regarded it necessary to determine whether the proposals were being made under Chapter VI or Chapter VII, as the decision on that point would control whether the United Kingdom was obligated to abstain from voting: at 17-18. In this case, the Council determined that the proposals fell under Chapter VII, since there had been a breach of the peace, and that therefore the United Kingdom was entitled to vote.

⁸⁰ Fassbender, above n 3, at 191 (footnote omitted).

in fine appears to be prima facie relevant. At that stage, the members of the Council will be forced to assess the situation and determine whether the rule applies to the question under consideration. It is possible that such a course of events will lead the Council to become once again bogged down in a struggle of defining the nature of the question before it and the states involved. (Is this a “dispute”, or merely a “situation”? If it is a dispute, which states are “party” to it?) However, even if this were to occur, the mere fact that the Council had been forced to re-engage with the rule would be a boon to the vitality of the Security Council. And if a question is raised regarding the obligation of a P5 member state to abstain, the Council will be forced to acknowledge that the extent of the veto is indeed inherently limited by the Charter itself. In the slow-moving world of UN reform, those successes alone would be a significant victory.

It is also true that even if such procedural hurdles are avoided and the obligatory abstention rule is successfully revived and robustly applied by the Council, it will not be a panacea for the Security Council’s ills. An application of the rule could not have stopped the Russian veto of proposals regarding Crimea and eastern Ukraine, nor could it prevent American vetoes related to Israeli-Palestinian affairs or Russian and Chinese vetoes regarding the conflict in Syria. Nevertheless, the successful revival of art 27(3) *in fine* would be a modest and reasonable step that could serve to demonstrate that although the Security Council is an inherently political body, it is also one that abides by the rule of law that is established by the Charter and to which all UN member states have agreed.

