

Abstention Obligation Under the UN Charter in the Light of the Subsequent Practice of the Permanent Members

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ABSTRACT

A permanent member of the Security Council derives its veto power from Article 27(3) of the Charter of the United Nations. The proviso of Article 27(3), however, provides that when the Security Council is considering a non-procedural resolution under Chapter VI and Article 52(3) of the Charter, a party to the dispute to which the resolution relates shall not vote. It is also known as the obligatory abstention rule. The abstention obligation seems clear, but the practice of the obligation is not as straightforward. Some scholars argue against the abstention obligation because it has not been invoked for decades. On the other hand, some argue that treaty obligations cannot be modified or amended by subsequent practice. This paper argues that the abstention obligation under Article 27(3) cannot be amended by the subsequent practice of the Security Council, and it proposes that the General Assembly make an application to the International Court of Justice (ICJ) for an authoritative pronouncement in this regard.

Keywords: United Nations Security Council; Permanent members; Abstention rule; Amendment; Subsequent practice

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1. Introduction

The veto power of the permanent members of the United Nations Security Council, grounded in Article 27(3) of the UN Charter, is subject to a critical yet often overlooked limitation: the obligatory abstention rule. This rule stipulates that any permanent member who is a party to a dispute under consideration must abstain from voting on non-procedural resolutions under Chapter VI and Article 52(3). Despite its clear textual mandate, the Security



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Council's longstanding practice reveals a consistent disregard for this obligation, prompting scholarly debate over whether such practice can alter treaty obligations. This paper contends that the abstention requirement remains legally binding and cannot be modified by subsequent practice. It calls for the General Assembly to seek an advisory opinion from the International Court of Justice (ICJ) to clarify the legal status of Article 27(3) and address the implications of its continued neglect.

2. Has the Abstention Obligation Been Observed by the Permanent Members?

Article 27(3) requires concurring votes from the permanent members for the Security Council's decisions on non-procedural matters. Nevertheless, it follows with a proviso, and the proviso precludes the concurring votes requirement for decisions under Chapter VI,¹ and Article 52(3),² when a voting party is a party to the dispute in question. It literally means that when the Security Council is considering a non-procedural resolution under Chapter VI and Article 52(3), a party to the dispute to which the resolution relates shall not vote. This applies even to a permanent member of the Security Council. It is also known as the obligatory abstention rule.³

The earliest instance when the abstention obligation was raised among the permanent members of the Security Council was the Lebanese and Syrian question in 1946. Lebanon and Syria complained to the Security Council about the continued presence of French and British troops in Syria and Lebanon, even though hostilities had been terminated.⁴ They referred the matter to the Security Council pursuant to Article 34 and urged it 'to adopt a decision recommending the total and simultaneous evacuation of the foreign troops from the Syrian and Lebanese territories'.⁵ During deliberation and before voting, France's representative expressed that 'it had been my intention in this case in which my country was involved to set the example of not participating in the Council's decision'.⁶ The United Kingdom representative followed suit.⁷ The Security Council failed to adopt any resolution on the

¹ Chapter VI of the Charter consists of six provisions, and they are Articles 33 to 38. Except for Article 35, these provisions equip the Security Council with tools for peaceful settlement of disputes. In essence, the Security Council is empowered to 'call upon the parties to settle their dispute' by peaceful means; to 'investigate any dispute' to determine whether its continuance is 'likely to endanger the maintenance of international peace and security'; to 'recommend appropriate procedures or methods of adjustment'; to 'recommend' 'terms of settlement'; and to 'make recommendations to the parties' upon their request, 'with a view to a pacific settlement of the dispute'.

² Art 52(3) of the Charter requires the Security Council to 'encourage the development of pacific settlement of local disputes through regional arrangements or by regional agencies either on the initiative of the States concerned or by reference to the Security Council'.

³ Stephen Eliot Smith, 'Reviving the Obligatory Abstention Rule in the UN Security Council: Reform From the Inside Out' (2014) 12 *New Zealand Yearbook of International Law* 15, 18.

⁴ UNSC, 'Letter from the Heads of the Lebanese and Syrian delegations' (4 February 1946) UN Doc S/5.

⁵ *ibid.*

⁶ UNSC: 23rd Meeting (16 February 1946) UN Doc S/PV.23, 357–358.

⁷ *ibid* 358.

Lebanese and Syrian question on that occasion due to the veto of the USSR.⁸ However, this instance demonstrated the preparedness of certain permanent members to observe the abstention obligation when they were involved in a dispute where a resolution for peaceful settlement was sought.

The next occasion which put the abstention obligation under the spotlight arose immediately after that. In 1947, the Security Council had to deliberate on the Corfu Channel question. The United Kingdom referred the question to the Security Council pursuant to Articles 34 and 35.⁹ The Security Council considered a resolution to appoint a subcommittee for the purpose of examining all the evidence made available in relation to the Corfu Channel incidents and reporting to the Security Council. During deliberation and before voting, the United Kingdom representative asked the then-President of the Security Council if the United Kingdom was entitled to vote.¹⁰ The USSR immediately intervened to say that the United Kingdom, as a party to the dispute, is not entitled to vote.¹¹ The then President disagreed with the USSR and held the view that the appointment of the sub-committee would not be a decision under Article 34 and it would be a procedural decision, thus the United Kingdom was entitled to vote.¹² As a result, the Security Council adopted Resolution 19 of 27 February 1947,¹³ with the United Kingdom also voting in favour.¹⁴ About a month later, on 25 March 1947, the Security Council deliberated on a draft resolution concerning the Corfu Channel question, which, if adopted, would recommend that the United Kingdom and Albania settle the dispute.¹⁵ The Security Council did not adopt the draft resolution as the USSR vetoed it. It is, however, worth noting that the United Kingdom did not participate in the voting.¹⁶ Subsequently, on 9 April 1947, the Security Council adopted Resolution 22 of 9 April 1947 whereby it recommended that the United Kingdom and Albania 'should immediately refer the dispute to the International Court of Justice in accordance with the provisions of the Statute of the Court'.¹⁷ The United Kingdom also did not participate in the voting on this resolution.¹⁸

Within the same year, the Security Council had to deliberate on the Egyptian question, which also concerned the United Kingdom as a party. The Egyptian question stemmed from

⁸ *ibid* 367–368. USSR representative explained that USSR vetoed the draft resolution because USSR's proposed amendments had not been accepted by the Security Council.

⁹ Laurence W Maher, 'Half Light Between War and Peace: Herbert Vere Evatt, the Rule of International Law, and the Corfu Channel Case' (2005) 9(1) *Australian Journal of Legal History* 47, 54.

¹⁰ UNSCOR No 21 (27 February 1947) UN Doc S/PV.114, 425.

¹¹ *ibid* 425.

¹² *ibid* 426.

¹³ UNSC Res 19 (27 February 1947) UN Doc S/RES/19 (1947).

¹⁴ UNSCOR (n 10) 432.

¹⁵ UNSCOR No 29 (25 March 1947) UN Doc S/PV.122, 19.

¹⁶ *ibid*.

¹⁷ UNSC Res 22 (9 April 1947) UN Doc S/RES/22 (1947).

¹⁸ UNSCOR No 34 (9 April 1947) UN Doc S/PV.127, 727.

Egypt's complaint that British troops remained on Egyptian territories without its consent.¹⁹ Egypt, therefore, referred the matter to the Security Council under Articles 35 and 37.²⁰ On 28 August 1947, the Security Council deliberated on Brazil's draft resolution recommending that Egypt and the United Kingdom resume direct negotiations on the question of withdrawing United Kingdom troops from Egypt and Sudan.²¹ The official records of the meeting recorded that 'the United Kingdom representative did not take part in the voting, in accordance with Article 27 of the Charter' without any elaboration.²² Subsequently, on 29 August 1947²³ and 10 September 1947²⁴ respectively, when the Security Council deliberated on the draft resolutions sponsored by other State parties on the same question, the United Kingdom again did not take part in the voting, and a similar expression was recorded without any elaboration.²⁵ The official records of the meeting also recorded the United Kingdom representative to have saying, 'Of course, I do not have a vote' during deliberation, and footnoted Article 27(3) of the Charter.²⁶ Based on the aforementioned instances, the permanent members of the Security Council appeared to have observed the obligatory abstention rule in its infancy.

The norm changed, however, when the Security Council dealt with the question of the Panama Canal Zone between the Republic of Panama and the United States. Panama complained that the Isthmian Canal Convention between it and the United States turned it into a 'transected' country and impaired its right to administer its entire territory.²⁷ On 21 March 1973, the United States voted against a draft resolution which, *inter alia*, urged the United States and Panama to continue negotiations and to conclude a new treaty aimed at the 'prompt elimination of the causes of conflict between them'.²⁸ The draft resolution, or at least the part aforementioned, is for peaceful settlement of disputes,²⁹ but the Security Council did not discuss the abstention obligation which may apply to the United States.

The Security Council was reminded of the abstention obligation only about three years later, when it dealt with the situation in Comoros. On 28 January 1976, Comoros informed the Security Council about French aggression against its territory and requested the Security Council to convene a meeting in order to maintain peace and to take all necessary action to

¹⁹ UNSC 'Letter of 8 July 1947' (8 July 1947) UN Doc S/410.

²⁰ *ibid.*

²¹ UNSCOR No 86 (28 August 1947) UN Doc S/PV.198.

²² *ibid* 2303–2305.

²³ UNSCOR No 87 (29 August 1947) UN Doc S/PV.200.

²⁴ UNSCOR No 88 (10 September 1947) UN Doc S/PV.201, 2347.

²⁵ *ibid* 2339–2340 and 2362.

²⁶ *ibid* 2348.

²⁷ UNSCOR (21 March 1973) UN Doc S/PV.1704, 4 [31]–[32].

²⁸ UNSC Draft Resolution (21 March 1973) UN Doc S/10931/Rev.1, [3].

²⁹ UN, 'Consideration of the provisions of Chapter VI of the Charter' in *Repertoire of the Practice of the Security Council: Supplement 1972–1974*, 199, 216. The draft resolution does not mention Chapter VI and/or any of the provisions thereunder, but the *Repertoire of the Practice of the Security Council* considers the discussion an activity of the Security Council under Chapter VI.

safeguard its integrity.³⁰ On 6 February 1976, the Security Council deliberated on a draft resolution which, *inter alia*, requested France to ‘enter into immediate negotiations’ with Comoros ‘for the purpose of taking appropriate measures to safeguard the unity and territorial integrity’ of Comoros.³¹ France vetoed the draft resolution, and hence the Security Council did not adopt it.³² Interestingly, after the voting, the representatives of Benin, Libya, Panama and Tanzania questioned France’s right to veto as it was a party to the dispute with Comoros.³³ In response, the French representative, unsurprisingly, referred to the question of the Panama Canal Zone between Panama and the United States to justify the exercise of the veto.³⁴ Although the question led to some discussions on Article 27(3), it did not bear any consequences on the voting outcome. The reason is that the question was raised only after the voting. Nevertheless, it is interesting to note that the then President of the Security Council said that he had thought of the potential challenge on France’s right to vote before the meeting and consulted the Secretariat in advance, and he then remarked that ‘had the question of the right of France to vote been raised in a timely way, which is to say before the vote, the President of the Council believes that the right of France to participate in the voting would have been sustained’.³⁵ It is unclear as to why he concluded in such a way. However, it can be seen that the Security Council’s practice of the abstention obligation among the permanent members on Chapter VI-related questions had changed at that point in time, if not earlier in 1973, which appears to be a departure from the abstention obligation under Article 27(3).

The departure, unfortunately, seems to have succeeded in the subsequent practice of the Security Council in disputes involving the permanent members when Chapter VI resolutions were sought.³⁶ On 28 February 2014, Ukraine requested an urgent meeting of the Security Council ‘in accordance with Articles 34 and 35 of the Charter’.³⁷ Ukraine claimed that the Russian troops had illegally entered its territory in Crimea and that the number of troops was increasing.³⁸ On 15 March 2014, the Security Council deliberated on a draft resolution which, *inter alia*, called upon the parties to pursue immediately the peaceful resolution of the

³⁰ UNSC ‘Telegram dated 28 January 1976 from the Head of State of the Comoros addressed to the President of the Security Council’ (28 January 1976) UN Doc S/11953.

³¹ UNSCOR (6 February 1976) UN Doc S/PV.1888, 4.

³² *ibid* 26.

³³ *ibid* 28–33.

³⁴ *ibid* 29 [271].

³⁵ *ibid* 31 [293].

³⁶ For example, UNSCOR (4 December 1979) UN Doc S/PV.2178, 2[12] and UNSC Res 457 (4 December 1979) UN Doc S/PV.2178 (4 December 1979) where the United States participated in the voting of a resolution which, *inter alia*, called upon Iran ‘to release immediately the personnel of the Embassy of the United States being held at Teheran’; and UNSCPR (11 January 1989) UN Doc S/PV.2841, 47 where the United States vetoed a draft resolution which called upon it and Libya, *inter alia*, to ‘co-operate with the Secretary-General in an effort to bring about a peaceful settlement of the differences existing between the two countries’.

³⁷ UNSC ‘Letter dated 28 February 2014 from the Permanent Representative of Ukraine to the United Nations addressed to the President of the Security Council’ (28 February 2014) UN Doc S/2014/136.

³⁸ UNSCPR (1 March 2014) UN Doc S/PV.7124, 3.

dispute through 'direct political dialogue' and to 'engage fully with international mediation efforts'.³⁹ The Security Council did not adopt the draft resolution due to the negative vote from Russia.⁴⁰ Nevertheless, on 17 February 2015, the Security Council unanimously adopted Resolution 2202, which was sponsored by Russia.⁴¹ It is observed that Russia participated in the voting on both 15 March 2014⁴² and 17 February 2015⁴³. More significantly, the Security Council failed to adopt a draft resolution on 25 February 2022, which was intended to end Russia's 'special military operation' in Ukraine, as a result of Russia's veto.⁴⁴ On 27 February 2022, the Security Council acknowledged the failure to reach a consensus between its permanent members and decided 'to call an emergency special session of the General Assembly' to look at the issue arising from the 'special military operation'.⁴⁵ The failure to adopt the draft resolution and the subsequent 'handover'⁴⁶ of the agenda to the General Assembly show the Security Council's inability to perform its functions impartially when a dispute concerning a permanent member arises. It appears that the Security Council allows its permanent member, who is also a party to the dispute under its deliberation, to frustrate the discharge of its primary responsibility by simply casting a negative vote.

How does the Security Council's conduct over many years in allowing a permanent member who is also a party to a dispute to vote and the lack of objection by other members implicate the abstention obligation under Article 27(3)?

Not only that the Security Council silent about the apparent deviance, but the General Assembly, too, did not discuss this issue. It may be the implicit reason the General Assembly adopted the groundbreaking resolution 76/262 which, *inter alia*, decided that 'within ten working days of the casting of a veto by one or more permanent members of the Security Council', 'the President of the General Assembly shall convene a formal meeting of the General Assembly' in order 'to hold a debate on the situation as to which the veto was cast'.⁴⁷ It is, however, not the explicit reasons given by the sponsors and co-sponsors when they expressed their positions at the plenary session. Rather, the resolution was aimed at making the permanent members accountable for their veto on every occasion.⁴⁸ Nevertheless, some State parties sought to revive the abstention obligation at the 68th and 69th meetings of the

³⁹ UNSC Draft Resolution 189 (15 March 2014) UN Doc S/2014/189, para 2.

⁴⁰ UNSCPR (15 March 2014) UN Doc S/PV.7138, 3.

⁴¹ UNSCPR (17 February 2015) UN Doc S/PV.7384, 2.

⁴² UNSCPR (n 40).

⁴³ UNSCPR (n 41).

⁴⁴ UNSCPR (25 February 2022) UN Doc S/PV.8979, 6.

⁴⁵ UNSC Res 2623 (27 February 2022) UN Doc S/RES/2623 (2022).

⁴⁶ UNGA Res 377A(V) (3 November 1950) UN Doc A/RES/377(V)A-C. The Resolution, which is also known as the Uniting for Peace Resolution, gives the power to the General Assembly to consider a matter if the Security Council 'fails to exercise its primary responsibility' as a result of 'lack of unanimity of the permanent members'.

⁴⁷ UNGA Res 76/262 (26 April 2022) UN Doc A/RES/76/262.

⁴⁸ UNGA (26 April 2022) GAOR UN Doc A/76/PV.69, 3-7.

General Assembly on 26 April 2023.⁴⁹ The representative of Lithuania remarked that the Security Council ‘cannot assure full accountability for the crime of aggression against Ukraine’ because of the ‘abusive use of a veto by a permanent member’. After that, the representative of the Netherlands also called on the members to ‘act in the spirit of Article 27(3)’. Similarly, the representative of Romania also commented that ‘hostage-like’ crises in the Security Council could be avoided by refraining from the use of veto in situations in Article 27(3). In addition, the representatives of Austria, Bulgaria and Germany also called on the members to ‘consistently implement and observe’ Article 27(3) when they are parties to disputes. What light does it shed on the consistent departure of the Security Council from the obligatory abstention rule? The section below will delve into the legal implications of the practice developed on the abstention obligation under Article 27(3).

3. Can Article 27(3) Be Modified or Amended by Subsequent Practice?

The UN Charter enshrines the procedures for amendment to the Charter itself in Chapter XVIII. Any such amendments require a vote of two-thirds of the members of the General Assembly and are followed by ratification by two-thirds of the members, including all the permanent members of the Security Council.⁵⁰ Notwithstanding the ‘special characteristics’ of the UN Charter, it remains an international treaty to which the general rules and principles of the Vienna Convention on the Law of Treaties between States and International Organizations 1986 (VCLT) apply.⁵¹ Both the UN Charter and the VCLT are silent on whether the UN Charter can be modified or amended by subsequent practice.

Article 31(3)(b) of the VCLT requires the relevant subsequent practice in the application of the treaty to be taken into account for the purpose of the interpretation of a treaty. Nevertheless, the interpretation of a treaty should be distinguished from modification or amendment of a treaty. The VCLT itself has made the distinction clear as the interpretation of treaties is contained in Section 3 of Part III, while the amendment and modification of treaties are in Part IV of the VCLT. Therefore, while subsequent practice is relevant for the purpose of interpretation, the VCLT is silent as to its effect on the amendment and modification of treaties. The International Law Commission (ILC) had considered including such a provision in the draft version of the VCLT to allow amendments and modifications of treaties by subsequent practice, but it was ultimately rejected by a majority vote in the 1966 UN Conference on the Law of Treaties.⁵² The ILC, in the Draft Conclusions on Subsequent Agreements and Subsequent Practice in Relation to the Interpretation of Treaties 2018,

⁴⁹ UN, ‘General Assembly Holds First-Ever Debate on Historic Veto Resolution, Adopts Texts on Infrastructure, National Reviews, Council of Europe Cooperation’ (Meetings Coverage 26 April 2023) <<https://press.un.org/en/2023/ga12500.doc.htm>>.

⁵⁰ UN Charter, art 108.

⁵¹ Certain Expenses of the United Nations (Art 17, Para 2, of the Charter) (Advisory Opinion) 1962 International Court of Justice Rep 151, 157. Maurizio Arcari, ‘Limits to Security Council Powers under the UN Charter and Issues of Charter Interpretation’ (2012) 32 Polish Yearbook of International Law 239, 242.

⁵² UN Conference on the Law of Treaties ‘Summary Records of the Plenary Meetings and of the Meetings of the Committee of the Whole’ (25 April 1968) 1st Session 38th Meeting UN Doc A/CONF.39/11, 215 [60].

concluded that 'the possibility of amending or modifying a treaty by subsequent practice of the parties has not been generally recognised'.⁵³ However, immediately following the conclusion, the ILC added that the draft conclusion is 'without prejudice to the rules on the amendment or modification of treaties' under the VCLT and 'under customary international law'.⁵⁴

Some scholars suggest that the court's jurisprudence arguably has recognised the general principle that clear and consistent subsequent practice can have the effect of modifying a treaty obligation.⁵⁵ In this regard, the oft-cited cases are the Namibia Opinion and Israeli Wall Opinion. In the former, the ICJ had to determine whether the Security Council's resolution, which requested the advisory opinion, was adopted in accordance with Article 27(3), given that it requires concurring votes on the resolution from the permanent members, but two permanent members abstained from voting.⁵⁶ The ICJ ruled that the proceedings of the Security Council in the past had established the positions of the permanent members that voluntary abstention by a permanent member does not bar the adoption of resolutions.⁵⁷ In the Israeli Wall Opinion, the ICJ had to determine whether the General Assembly had acted *ultra vires* by requesting the advisory opinion from the ICJ, given the active engagement of the Security Council with the Palestinian question.⁵⁸ The ICJ recognised that Article 12 of the UN Charter does not permit the General Assembly to make recommendations with regard to a dispute or situation to which the Security Council is exercising its functions.⁵⁹ However, the ICJ ruled that the General Assembly and the Security Council had on many occasions considered matters in parallel with different aspects of focus.⁶⁰ In this regard, the ICJ remarked that the accepted practice of the General Assembly is consistent with Article 12(1).⁶¹ Apart from these two advisory opinions, the ICJ, in delivering the judgment on the merits of the Case concerning the Temple of Preah Vihear (*Cambodia v*

⁵³ International Law Commission, 'Draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties 2018', 3, Conclusion 7[3].

⁵⁴ *ibid.*

⁵⁵ Irina Buga, 'Subsequent Practice and Treaty Modification' in Michael J Bowman and Dino Kritsiotis (eds) *Conceptual and Contextual Perspectives on the Modern Law of Treaties* (Cambridge University Press 2018) 363, 373-374, 379-380 and 382. Jessica Liang, 'Modifying the UN Charter through Subsequent Practice: Prospects for the Charter's Revitalisation' *Nordic Journal of International Law* (2012) 81(1), 1, 9; and Joost Pauwelyn, 'The case study: The law of the World Trade Organization' in *Conflict of Norms in Public International Law: How WTO Law Relates to Other Rules of International Law* (Cambridge University Press 2003) 25, 50.

⁵⁶ *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (Advisory Opinion)* 1971 International Court of Justice Rep 16 ('Namibia Opinion'), 22 [21].

⁵⁷ *ibid* 22 [22].

⁵⁸ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion)* 2004 International Court of Justice Rep 136 ('Israeli Wall Opinion'), 148 [24].

⁵⁹ *ibid* 148 [24].

⁶⁰ *Ibid* 149-150[27]-[28].

⁶¹ *ibid* 150 [28].

Thailand), also acknowledged the effect of subsequent conduct on a treaty obligation. In that case, the ICJ had to adjudicate a territorial dispute between Cambodia and Thailand over an area surrounding the ruins of the Temple of Preah Vihear.⁶² On the issue of whether the parties' subsequent acceptance of a map delimiting the area constituted a departure from or violation of the terms of a treaty which indicated watershed delimitation but no more than that, the ICJ determined that the map line prevailed over the relevant clause of the treaty. The ICJ's determination was made after having regard to the intention of the parties. In making such a determination, the ICJ based it on the ordinary treaty interpretation. However, by making such a determination, the ICJ had arguably amended the particular clause in the treaty. Some scholars, nevertheless, cautioned against the acceptance of subsequent practice as a legitimate way of amending a treaty obligation, especially in the context of multilateral treaties, because it is hard to determine if all of the members of such a treaty have accepted the subsequent practice.⁶³ This is particularly true in respect of the UN Charter because it cannot simply be assumed that all member States have accepted the way the Security Council or the permanent members interpreted its powers.⁶⁴

Having examined the UN Charter, the VCLT, the ILC's position, the differing views of the scholars, as well as the relevant judicial decisions, it appears that the debate on whether a treaty can be amended or modified by subsequent practice remains a live issue.⁶⁵ It is also possible to take a rather middle approach on this issue, by arguing that subsequent practice can affect amendments or modifications, subject to the nature of treaties and also the nature of the provisions implicated by the relevant practice.⁶⁶ This approach has gained acknowledgement by the ILC.⁶⁷ The Namibia Opinion and the Israeli Wall Opinion must be treated with caution. First of all, the ILC does not consider that in these opinions, the ICJ has explicitly recognised that subsequent practice can have such an effect.⁶⁸ Secondly, even if inference can be drawn from the opinions that subsequent practice can have such an effect, the nature of the provisions in question must be taken into consideration. The provision in question in the Namibia Opinion is Article 27(3) which concerns the issue of whether abstentions can defeat the requirement for concurring votes,⁶⁹ and the provision in question in the Israeli Wall Opinion is Article 12 which concerns the issue of whether the General Assembly can make a recommendation on a matter while that matter remained on the

⁶² Case concerning the Temple of Preah Vihear (*Cambodia v Thailand*) (Judgment) (1962) International Court of Justice Rep 6, 33–35.

⁶³ Arcari (n 51) 251. Rebecca Crootoof, 'Change without consent: how customary international law modifies treaties' (2016) 41(2) *The Yale Journal of International Law* 237, 263–264.

⁶⁴ Arcari (n 51) 251.

⁶⁵ This is also the conclusion arrived at by Buga (n 55) 391.

⁶⁶ *ibid* 391.

⁶⁷ International Law Commission, 'Draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties, with commentaries 2018' UN Doc A/73/10, 62[35].

⁶⁸ *ibid* 61 [31].

⁶⁹ Namibia Opinion (n 56) 22 [21].

Security Council's agenda.⁷⁰ In both cases, the common underlying problem was the practical implementation of the provisions due to the political reality. Requiring strict observance of the provisions without taking into account the political reality may render the Security Council dysfunctional, or may defeat the object and purpose of the modalities created in the UN Charter. For instance, in the context of the requirement for concurring votes of permanent members under Article 27(3), a permanent member State may abstain from voting on a resolution for certain political reasons, but it does not intend to block the adoption of the resolution. Therefore, the Security Council developed the practice, not considering abstention as a bar to the adoption of a resolution, to ensure the smooth functioning of the organ of the UN with due regard to the object and purpose of the UN Charter. In the context of the prohibition of the General Assembly from making recommendations with regard to a dispute which is under the consideration of the Security Council, it is a reality that there are many aspects to a dispute. The subsequent evolution, which allowed the General Assembly to discuss other aspects of the same dispute, which is being considered by the Security Council, is in fact facilitating the effective discharge of the functions of the organs of the UN. In contrast, the defiance of the abstention obligation in Article 27(3) does not serve a higher purpose, other than the own interest of the permanent member who is also a party to a dispute. It requires strict compliance to better facilitate the adoption of appropriate resolution under Chapter VI, as 'there can be no proper settlement of disputes so long as a disputant can block settlement'.⁷¹ In this connection, the recent views expressed in the 68th and 69th meetings of the General Assembly on 26 April 2023, as mentioned above, should be read against the backdrop of Article 108 of the UN Charter. Article 108 provides for the amendment of the UN Charter, and it requires, *inter alia*, the vote of two-thirds of the members of the General Assembly to adopt an amendment. To put it simply, if the abrogation of the abstention obligation in Article 27(3) is put to a vote pursuant to the formal amendment procedure under the UN Charter, it may not acquire the required two-thirds majority support from the General Assembly.

Based on the above, there cannot be any definitive conclusion to the question of whether the subsequent practice has amended or modified the obligatory abstention rule in Article 27(3). When the Security Council is forced to face this issue, it will not be surprising to find the political organ in a deadlock, again. In view that it is a legal question, a more prudent approach before considering any such resolution is probably to request the ICJ to give an advisory opinion on the legal implications of the subsequent practice or lack of practice of the abstention obligation on Article 27(3).⁷² It is time to address the elephant in the room in order to have a functional Security Council and to restore the confidence of the international community in this organ.

⁷⁰ Israeli Wall Opinion (n 58) 149–150 [27].

⁷¹ Clyde Eagleton, 'The Jurisdiction of the Security Council Over Disputes' (1946) 40(3) American Journal of International Law 513, 532–533.

⁷² UN Charter, art 96(1).

4. Navigating the Way Forward

The Security Council has the power to request the ICJ to give an advisory opinion on any legal question.⁷³ Nonetheless, it is almost impossible for the Security Council to request an advisory opinion on the legal implications of the subsequent practice of the abstention obligation on Article 27(3). It is because of the apparent risk that the ICJ's pronouncement would restrict the power of the members of the Security Council when they were a party or parties to the dispute under deliberation of the Security Council. Nevertheless, Article 96(1) of the UN Charter also clothes the General Assembly with the power to request an advisory opinion from the ICJ. The only condition that such a request must meet is that it must be based on a legal question.⁷⁴ A 'legal question' is a question 'framed in terms of law and raises problems of international law', and is by its 'very nature susceptible of a reply based on law'.⁷⁵ This paper proposes that the legal question should concern the legal implication of the subsequent practice or the lack of practice of the abstention obligation by the Security Council, in particular its permanent members, on Article 27(3). A question of this nature requires the ICJ to examine international legal instruments such as the UN Charter and the VCLT, and determine if the subsequent practice can legitimately amend or modify Article 27(3). Therefore, such a question is likely to fulfil the condition.

Assuming that the ICJ accepts that the question proposed is a 'legal question', the ICJ still has a discretion to refuse to answer the request. This is because Article 65(1) of the ICJ Statute states that the ICJ 'may' give an advisory opinion upon request. However, the court's jurisprudence has established that the ICJ could only refuse to exercise such discretion when there are 'compelling reasons' to do so.⁷⁶ In this regard, there are a few potential arguments that could be raised as 'compelling reasons' for the ICJ to refuse to answer the request. First, such a legal opinion is unrelated to the work of the General Assembly.⁷⁷ To counter this argument, Article 10 of the UN Charter authorises the General Assembly to 'discuss any questions or any matters within the scope' of the UN Charter or 'relating to the powers and functions of any organs provided' in the UN Charter.⁷⁸ Since the proposed question relates to the voting power of the member of the Security Council who is also a party to a dispute under deliberation, it is closely related to the power and discharge of the function of the Security Council. Pursuant to Article 10, such a question falls within the scope of work of the General Assembly. Second, some may argue that the proposed question has political aspects.

⁷³ *ibid.*

⁷⁴ *ibid.* The Statute of the International Court of Justice, art 65(1).

⁷⁵ *Western Sahara (Advisory Opinion)* 1975 International Court of Justice Rep 12, 18 [15]. *Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion)* 1996 International Court of Justice Rep 226 ('Nuclear Weapons'), 233-234.

⁷⁶ For example, *Certain Expenses of the United Nations (Art 17, para 2, of the Charter) (Advisory Opinion)* 1962 International Court of Justice Rep 151 ('Certain Expenses'), 155; *Nuclear Weapons* (n 74) 235; and *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights (Advisory Opinion)* 1999 International Court of Justice Rep 62, 78 [29].

⁷⁷ *Nuclear Weapons* (n 75) 233 where the same argument was raised to object to the legal question.

⁷⁸ UN Charter, art 10.

In anticipation of this argument, the proposed question does not make any reference to any impending dispute.⁷⁹ In any event, even if the question is politically motivated and has political implications, the ICJ has in the past considered these factors to be irrelevant.⁸⁰ The third possible argument against the ICJ's power to answer the proposed question is that there is no specific dispute on the subject matter.⁸¹ This line of argument is most likely to be picked up by the permanent members of the Security Council since they have condoned the defiance of the abstention obligation for a long time. Nevertheless, the ICJ is unlikely to accept this argument given that it is not the purpose of the advisory opinion to settle a dispute. Instead, the advisory opinion is to 'offer legal advice to the organs and institutions requesting the opinion'.⁸²

Based on the above, a request by the General Assembly to the ICJ for an advisory opinion as proposed is probably the ideal way moving forward. In any case, there are already some voices calling for the General Assembly to request an advisory opinion from the ICJ to clarify 'on possible limits to the veto rights of permanent members' of the Security Council on a different basis—whether the veto rights should be limited in circumstances where the exercise of which would violate the general legal principles of law and the member States' obligation 'to exercise their membership rights in good faith'.⁸³

5. Conclusion

This paper analysed the subsequent practice of the abstention obligation encapsulated in the proviso of Article 27(3) by studying the voting behaviour of the permanent members in the past when either one of them or some of them became a party to a dispute under deliberation. It found that the subsequent practice indicates a departure from the obligatory abstention rule. However, it argued that the subsequent practice cannot have the effect of modifying or amending the abstention obligation in Article 27(3). It proposed that the General Assembly request an advisory opinion from the ICJ to address the legal implications of the subsequent practice of the abstention obligation on Article 27(3), as a way forward. It also remarked on the challenges that such a request might face. Nevertheless, the challenges are unlikely to succeed in the ICJ. In the absence of an authoritative pronouncement from the ICJ in that regard, it is unlikely that the Security Council will change its practice of continued disregard towards Article 27(3).

⁷⁹ Nuclear Weapons (n 75) 236 [15] where the International Court of Justice said that 'the fact that the question put to the Court does not relate to a specific dispute should consequently not lead the Court to decline to give the opinion requested'.

⁸⁰ For example, *ibid* 234 [13]; *Legality of the Use by a State of Nuclear Weapons in Armed Conflict* (Advisory Opinion) 1996 International Court of Justice Rep 66, 73–74[16]; and *Certain Expenses* (n 75) 155.

⁸¹ Nuclear Weapons (n 75) 236.

⁸² *ibid*.

⁸³ Council of Europe, Parliamentary Assembly, Resolution 2436, 'The Russian Federation's aggression against Ukraine: ensuring accountability for serious violations of international humanitarian law and other international crimes' (28 April 2022), 3 [12.5.2]. Peters Anne, 'The war in Ukraine and legal limitations on Russian vetoes' (2023) 10(2) *Journal on the Use of Force and International Law* 162, 167–171.

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