

Russia's Veto in the Security Council: Whither the Duty to Abstain under Art. 27(3) of the UN Charter?

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Abstract	215
I. Introduction	216
II. The Duty to Abstain under Art. 27(3) of the Charter and Its Applicability to the Draft Resolution on Crimea	217
III. State and Institutional Practice	222
IV. A Provision Fallen into <i>Desuetude</i>	224
V. An Alternative Legal Explanation	228
VI. Conclusion	230

Abstract

Among the many legal issues that were raised by the recent crisis in Crimea and by Russia's annexation of the province, one has gone largely unnoticed by commentators and doctrinal contributions, i.e. Russia's veto in the meeting of the Security Council (SC) of 15.3.2014, which led to the non-adoption of the draft resolution tabled by 42 countries, condemning the referendum which was held in Crimea a few days after. While the right of a P-5 to cast its veto on substantive resolutions adopted by the Council is not in doubt, it is arguable that the draft resolution tabled on 15.3.2014 fell under the last part of Art. 27, para. 3, of the Charter according to which "[...] in decisions under Chapter VI and under paragraph 3 of Article 52, a party to a dispute shall abstain from voting". Quite interestingly, none of the States intervening in the debate, even those flatly condemning the "abuse" of Russia's veto on political grounds, raised the issue of the applicability of the obligation under the above provision. The present article discusses the latter issue and questions whether the obligation under Art. 27, para. 3, has fallen into desuetude or whether an alternative, less radical, explanation better captures the legal consequences deriving from the institutional practice of the Security Council.

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I. Introduction

The crisis in Crimea and in Ukraine in general, and Russia's role in the crisis have been discussed by the Security Council several times during 2014 and yet, on one occasion only – namely that of the downing of Malaysia Airlines MH17 flight – has the polarised dialectics among permanent members led to institutional action, with the adoption of Resolution 2166 (2014), deploring the incident and calling for an independent international investigation.¹ On another occasion, during the meeting of 15.3.2014, the Security Council failed to adopt a draft resolution, tabled by 42 States, including Ukraine, the United States and all 28 EU countries, condemning Crimea's prospective referendum, due to Russia's veto (with China abstaining).² Whereas Russia's vote against the draft resolution has been strongly criticised by many States intervening in the debate in the Council on political grounds, especially on account of Russia's alleged destabilising role in the Crimean crisis and in its dispute with Ukraine concerning the treatment of Russian speaking groups within Ukraine,³ none of those countries raised the issue of the applicability of the duty to abstain under the last part of Art. 27, para. 3, of the UN Charter. According to the latter provision, “[d]ecisions of the Security Council [...] 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*” (emphasis added).⁴ Had the latter provision been considered applicable, Russia, as a member of the Security Council party to a dispute with Ukraine, should have abstained from voting, which, in turn, would have probably resulted in the approval of the resolution.

The present article discusses the applicability of the obligation under Art. 27, para. 3, to the voting on the draft resolution tabled on 15.3.2014 concerning the situation in Crimea; after examining the practice of the Council and of States within the Council since the creation of the United Nations in 1945, it addresses the questions whether the “oblivious” institutional practice signaled by the voting on the Crimea situation is indicative of a desuetude of the provision or whether an alternative, less radical, explanation bet-

¹ UN Doc. S/RES/2166 (2014).

² UN Doc. S/PV.7138 (2014), 3 et seq.

³ UN Doc. S/PV.7138 (note 2), see especially declarations by the US Representative (Ms. *Power*), 3 et seq., and by the Representative of Ukraine (Mr. *Sergeyev*), 11 et seq.

⁴ Art. 27, para. 3 UN Charter.

ter captures the legal consequences deriving from the institutional practice of the Security Council.

II. The Duty to Abstain under Art. 27(3) of the Charter and Its Applicability to the Draft Resolution on Crimea

It is common knowledge among international lawyers that the voting procedure in the Security Council results from the so-called “Yalta Formula” that was endorsed by the four Sponsoring Governments (US, UK, China and the USSR) during the San Francisco Conference. The “formula” also made reference to the duty to abstain incumbent upon members of the Council, if the Council were acting upon a dispute within the framework of its Chapter VI powers and its powers under Art. 52, para. 3.⁵ Indeed the provision for the so-called obligatory abstention (to be distinguished from voluntary abstentions under Art. 27) derived from a compromise between the positions of Britain, on the one hand, which held that both considerations of fairness (*nemo iudex in re sua*) and of effectiveness required members to a dispute to abstain from voting, and of the USSR, on the other hand, which was very reluctant to diminish the enhanced status of the P-5 within the Council, even in those cases in which the permanent member were a party to a dispute dealt with by the Council.⁶ The end result was to limit the duty to abstain to non-binding, conciliatory measures adopted mainly under Chapter VI of the Charter.

Considerable efforts were made during the first years after the entry into force of the UN Charter to clarify the scope and contours of the most important provisions of the Charter, including those dealing with the voting procedure within the Council. As far as Art. 27 is concerned, the General Assembly established in November 1947 an Interim Committee “to consider the problem of voting in the Security Council”.⁷ With regard to the obligatory abstention rule, a particularly pressing problem since the very outset was the determination whether a particular matter should be considered a “dispute” or a “situation” for the purposes of the application of Art. 27,

⁵ Text available at <<http://www.avalon.law.yale.edu>>. For an early appraisal of the formula see *F. O. Wilcox*, II. The Yalta Voting Formula, *Am. Polit. Sci. Rev.* 39 (1945), 943 et seq.

⁶ *P. Tavernier*, *La Charte des Nations Unies*, Commentaire article per article sous la direction de Jean-Pierre Cot et Alain Pellet, 2nd ed. 1999, 504.

⁷ UN Doc. A/RES/111 (1947), Establishment of an Interim Committee of the General Assembly.

para. 3. The Interim Committee gave the following definition of “dispute”, which was proposed without prejudice to the possibility of the parties themselves recognising the existence of a dispute or of the Security Council qualifying the matter as such in circumstances not covered by the definition:

“Whenever the State or States bringing the matter before the Security Council allege that the actions of another State or States in respect of the first State or States constitute a breach of an international obligation or are endangering or are likely to endanger the maintenance of international peace and security, or that such actions demonstrate preparation to commit a breach of international obligations or to endanger the maintenance of international peace and security, and the State or States which are the subject of these allegations contest, or do not admit, the facts alleged or inferences to be drawn from such allegations.”⁸

Notwithstanding the endorsement of the Interim Committee’s work by the General Assembly, the P-5 were unable to reach an agreement on the general matter of voting procedures.⁹ Nevertheless, it appears that the definition of dispute rendered by the Interim Committee was not the real stumbling block. With regard to the definition of what would constitute a “dispute” under Art. 27, para. 3, the British position that “if a State makes a charge against another State, and the State against which it is made repudiates it or contests it, then there is a dispute” was shared by the Soviet delegation; whereas in the words of the US representative a “dispute” would exist if “charges have been made against these Governments, and these Governments have contested these charges and made countercharges”.¹⁰ Both definitions did not deviate from the definition provided by the Interim Committee.

Doctrinal writings have sought to interpret the provision, focusing on such matters as the definition of “dispute”,¹¹ the distinction between “situation” and “dispute”,¹² the identification of the relevant “parties” to the dispute,¹³ or whether measures adopted arguably outside the framework of

⁸ UN Doc. A/578 (1948), para. 22, Report of Interim Committee of General Assembly (15.5.1948) on the problem of voting in the Security Council cit. in: UNYB (1948), 291 et seq.

⁹ UN Doc. A/RES/267 (1949) on the problem of voting in the Security Council. See also GAOR, 3rd Sess., Suppl. n. 9.

¹⁰ UN Doc. A/578 (note 8). For an appraisal see also *B. Fassbender*, UN Security Council Reform and the Right of Veto: A Constitutional Perspective, 1998, 332 et seq.

¹¹ *B. Conforti/C. Focarelli*, *Le Nazioni Unite*, 9th ed. 2012, 96 et seq.

¹² *B. Simma/S. Brunner/H. P. Kaul*, in: *B. Simma* (ed.), *The Charter of the United Nations: A Commentary*, 2nd ed., Vol. I, 2002, 504 et seq., and *A. Zimmermann*, in: *B. Simma/D. E. Kahn/G. Nolte/A. Paulus* (eds.), *The Charter of the United Nations: A Commentary*, 3rd ed. 2012, 923 et seq.; contra *B. Conforti/C. Focarelli* (note 11), 100.

¹³ *B. Conforti/C. Focarelli* (note 11), 96 et seq.

Chapter VI, such as those under Art. 94, fall under the scope of the duty to abstain.¹⁴ Yet even the most elaborate and pristine constructions of the obligatory abstention under Art. 27 have had to grapple with the fact that the practice of application of the obligatory abstention rule dates back to the first five years of the organization, namely between 1946 and 1951, whereas subsequently the provision has become most notable for its persistent non-application. The latter phenomenon is discussed in detail in the next section; suffice it to state at this stage that it can hardly be imputed to the decrease in disputes being dealt with by the Security Council. Even the mechanism of a procedural decision adopted by the Council, in order to qualify a certain matter as a “dispute” falling under scope of Art. 27, para. 3 – a mechanism indicated by the International Court of Justice in the Namibia advisory opinion¹⁵ – has never become operational and this is a further indicator of the scarce willingness of the Security Council and its members to take on-board the constraints expressed in the provision.

Due to the uncertainties surrounding some of the controversial legal issues concerning the interpretation of the provision and due to the lack of practice clarifying those uncertainties, it is submitted that an evaluation of a specific instance, such as that of the vote in the meeting of the Security Council of 15 March, can lead us to a *prima facie* assessment only. Subject to the above caveat, there are strong arguments in favour of the proposition that, on the basis of the ordinary meaning of Art. 27, para. 3, and in the light of its object and purpose, Russia, as a party to a dispute with Ukraine, should have not participated in the vote on the draft resolution being adopted under Chapter VI of the Charter, possibly with the exception of one operative paragraph of the resolution.¹⁶

¹⁴ With regard to the possibility of applying the duty to abstain to Art. 94, para 2, UN Charter, concerning the recommendations or decisions related to measures giving effect to a judgment of the ICJ, *Tanzi* states that “the voting procedure that applies when the Council deliberates under Article 94(2) cannot be determined on principle, once and for all. Rather such a determination should be made on a case-by-case basis, having regard to the content of the operative part of a given draft resolution, in order to assess whether the latter falls within the framework of Chapter VI or VII” (*A. Tanzi*, Problems of Enforcement of Decisions of the International Court of Justice and the Law of the United Nations, EJIL 6 (1995), 539 et seq., at 553 et seq.). See also *S. Paliwal*, Reviewing and Reconsidering *Medellin v. Texas* in Light of the Obligatory Abstention from Security Council Voting, Colum. J. Transnat'l L. 48 (2010), 541 et seq.

¹⁵ Legal consequences for states of the continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970), I.C.J. Reports 1971, 22 et seq., paras. 22-26.

¹⁶ Draft Resolution UN Doc. S/2014/189.

In the meeting of 1.3.2014 – which followed immediately after a request by Ukraine in accordance with Arts. 34 and 35 of the Charter to convene an urgent meeting of the Council – Ukraine put forward a number of charges against Russia’s involvement in Crimea, stating that

“such action by the Russian Federation constitutes an act of aggression against the State of Ukraine and a severe violation of international law, posing a serious threat to the sovereignty and territorial integrity of our country, as well as peace and stability in the whole region. The Russian Federation is not complying with its obligations as a State guarantor of Ukraine under the Budapest Memorandum, obliging Russia, as well as other permanent members of the Security Council, to refrain from the threat or use of force against the territorial integrity of Ukraine”.¹⁷

Russia’s delegation denied those charges by stating that the intervention of Russia military personnel in Crimea was requested by ousted President *Yanukovych* and by the authorities of the Autonomous Republic of Crimea in order to bring stability in the peninsula and “until the civic and political situation in Ukraine can be normalized”.¹⁸ With regard to the referendum held in Crimea, in the meeting of 19 March, Ukraine called both the referendum and the act of annexation by the Russian Federation “illegitimate” “call[ing] upon the entire civilized world not to recognize the illegitimately declared independence of Crimea and its violent dismembering from the territory of the country”.¹⁹ The Russian delegation replied by stating that

“[i]n strict compliance with international law and democratic procedure, without outside interference and through a free referendum, the people of Crimea have fulfilled what is enshrined in the Charter of the United Nations and a great number of fundamental international legal documents – their right to self-determination”.²⁰

The existence of a dispute – which clearly emerges from the statements just mentioned – finds textual confirmation in para. 2 of the draft resolution, “urg[ing] *all parties* to pursue immediately the peaceful resolution of *this dispute*” (emphasis added).²¹ While Russia is not explicitly mentioned either in the preamble or in the operative part of the resolution, the numer-

¹⁷ UN Doc. S/PV.7124 (2014), at 3, Mr. *Sergeyev’s* (Ukraine) declaration. For an appraisal see also UN Doc. A/49/765 (1994) Budapest Memorandum on Security Assurances in Connection with Ukraine’s Accession to the Treaty on the Non-Proliferation of Nuclear Weapons, 729 UNTS 161.

¹⁸ UN Doc. S/PV.7124 (note 17), at 5.

¹⁹ UN Doc. S/PV.7144 (2014), at 5.

²⁰ UN Doc. S/PV.7144 (note 19), at 8.

²¹ UN Doc. S/2014/189 (note 16).

ous references to the obligation to abstain from the threat or use of force in international relations and to peacefully settle the dispute point to the fact that the resolution was not merely addressed to internal actors in Ukraine, but also to Russia as one of the *parties to the dispute*.

Moreover, the above elements, in addition to the lack of any reference to Chapter VII or to the determination of the existence of a threat to international peace and security, show that the Council was generally acting for the promotion of a peaceful settlement of the dispute, hence within its Chapter VI powers. Paragraph 2 of the resolution, with the general call to settle the dispute peacefully “through direct political dialogue” and with the specific indication that the parties should “engage fully with international mediation efforts”, finds a specific legal basis in Art. 33, para. 2, and Art. 36, para. 1 of the Charter, respectively.²² Less clear is whether the last paragraph of the resolution, para. 5, in which the Council declared the referendum illegal and called upon member States not to recognise any alteration in the status of Crimea may be considered a measure falling under Chapter VI or rather whether it should be construed as a decision falling under Art. 25 of the Charter;²³ if the latter, it is arguable that Russia's veto was not incompatible with the duty to abstain under Art. 27, para. 3, as far as the last paragraph of the resolution was concerned.

Be that as it may, what matters most for our purposes is the fact that the duty to abstain was not raised by any State during the discussion, despite the critical attitudes towards Russia's veto. If such silence is placed in the context of a consistent, institutional pattern of non-application – to which we turn in the next section –, we see how the vote on Crimea is possibly less significant in terms of a violation of the Charter, than it is in confirming a normative evolution in the interpretation and application of the provision in point.

²² Art. 33, para. 2, UN Charter: “The Security Council shall, when it deems necessary, call upon the parties to settle their dispute by such means.” Art. 36, para. 1, UN Charter: “The Security Council may, at any stage of a dispute of the nature referred to in Article 33 or of a situation of like nature, recommend appropriate procedures or methods of adjustment.”

²³ UN Doc. S/2014/189 (note 16). Art. 25 UN Charter: “The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter.” See also *E. Suy*, in: J. P. Cot/A. Pellet/M. Forteau (eds.), *La Charte des Nations Unies. Commentaire article par article*, Vol. I, 2005, 471 et seq.

III. State and Institutional Practice

The obligatory abstention under Art. 27, para. 3, was consistently honoured and recalled in the first years of the organization. A glimpse at the Repertoire of the practice of the Security Council in the time frame 1946-1951 shows that on eight different occasions a member of the Council abstained in compliance with Art. 27, para. 3.²⁴ Abstention was considered and debated five other times. It is quite interesting to note that in those cases in which members effectively abstained, three saw the abstention by the United Kingdom, four by India and one by Egypt: It is probably not a coincidence that all of those cases were characterised by a voluntary choice to submit to the rule under Art. 27, para. 3, made by the main proponent of the provision and by countries still profoundly influenced by British positions in matters of international law.

After that, an analysis of the relevant practice of the Security Council shows that the provision has been prominent for its non-application. The last few and controversial instances in which the matter of its application was raised during the debates date back to the period between 1960 and 1982. In 1960, during the determinations concerning the dispute between Argentina and Israel over the kidnapping of *Eichmann*, the representative of Argentina referred to the provision and stated:

“My delegation does not wish to enter into a legal or procedural analysis of the application of that wording to the case we are considering, but for reasons of tact, which I am sure the Council will understand, my delegation requests the President, and through him, the Council for permission not to take part in the vote.”

The Chinese presidency stated that the representative of Argentina “had *a perfect right* to refrain from participation in the vote” (emphasis added).²⁵ In 1978, upon discussion of the US decision to allow the President of Southern Rhodesia to enter the US territory, in contravention of SC Resolution 253 (1968), the US delegate stated that he would abstain “since we are party to this particular matter and acting in the spirit of Article 27(3) of the Charter”.²⁶ It has been rightly noted that, in the latter case, the matter dealt with by the Council was a situation, rather than a dispute, and the US reference to the “spirit” of Art. 27(3) does not render the case a clear instance of

²⁴ UN Doc., Repertoire of the Practice of the Security Council, 1946-1951, Chapter IV, Part III, 166 et seq.

²⁵ UN Doc., Repertoire of the Practice of the Security Council, 3rd Suppl. 1959-1963, Chapter IV, Part III, at 94.

²⁶ UN Doc. SCOR, 2090th meeting of 10.10.1978, para. 31; see also UN Doc. S/RES/437 (1978) and UN Doc. S/RES/253 (1968).

application of the abstention rule.²⁷ In 1982, during the discussion over the conflict in the Falkland Islands, there was general acceptance by the Council of the position expressed by the British delegation, to the extent that a duty to abstain would not apply as the matter fell under Chapter VII of the Charter.²⁸

In the period between 1952 and 1990, *Blum* identifies 16 clear instances of non-compliance with the rule.²⁹ Especially interesting for our purposes – not least because, on political grounds, the precedent was raised by Russia during the meeting of 15 March this year – is the discussion that took place in the Council on 6.2.1976, after France vetoed a resolution condemning the referendum held in the island of Mayotte and leading to the separation of the island from the Comores.³⁰ Several members, namely Benin, Libya, Tanzania and Panama, disputed France's right to participate in the vote and to veto the resolution, since the matter should have fallen under the obligatory abstention rule.³¹ France's reply was that it could give numerous examples, similar to that discussed in the meeting, in which permanent members had cast their veto, without any challenge by other members: Any deviation from such a 25 year long practice would force States to resort to Chapter VII measures in order to make sure that their right is not challenged.³² The President of the Council (US) held that any challenge to France's right to vote should have been put forward before the vote and that in any case, such a challenge "would have been sustained" (*sic*).³³

In the Post Cold War period, the obligatory abstention rule has been raised in a concrete case only once by Libya, during the discussion concerning the adoption of Resolution 731 (1992) related to the Lockerbie incident. According to Libya the US, the UK and France should have abstained in the vote as they were parties to a dispute concerning the application of the 1971 Montreal Convention; the British and US responses hinted at the fact that the matter was not a bilateral dispute over the application of the con-

²⁷ Y. Z. *Blum*, *Eroding the United Nations Charter*, 1993, 207.

²⁸ UN Doc, S/RES/502 (1982); UN Doc, S/RES/505 (1982); UN Doc. S/PV.2350 (1982), 81 et seq.

²⁹ Y. Z. *Blum* (note 27), 207 et seq.

³⁰ UN Doc. SCOR, 1888th meeting of 6.2.1976, para. 247; UN Doc., *Repertoire of the Practice of the Security Council*, 8th Suppl. 1975-1980, Chapter IV, Part III, at 62.

³¹ UN Doc. SCOR (note 30), paras. 266 et seq.

³² UN Doc. SCOR (note 30), paras. 272-273, 289.

³³ UN Doc. SCOR (note 30), paras. 292-293. See also the critical observation of the representatives of Libya (para. 294), Panama (para. 296) and Tanzania (para. 301). *Kelsen*, in his analysis on the obligatory abstention rule, held that "the vote illegally cast by the representative [of a party to a dispute] must not be counted", even after the vote has been cast. *H. Kelsen*, *Law of the United Nations*, 1950, at 264.

vention, but a matter of threat to international peace and security which should be properly addressed by the Council.³⁴

On the other hand, the consistent pattern of non-application has continued unchallenged. Apart from the case of Crimea under examination, among the recent examples, one can mention Morocco's participation in the vote of Resolution 2044 (2012) concerning Western Sahara, in which the Council

“call[ed] upon the parties to continue to show political will and work in an atmosphere propitious for dialogue in order to enter into a more intensive and substantive phase of negotiations”

and

“to continue negotiations under the auspices of the Secretary-General without preconditions and in good faith, taking into account the efforts made since 2006 and subsequent developments, with a view to achieving a just, lasting, and mutually acceptable political solution, which will provide for the self-determination of the people of Western Sahara in the context of arrangements consistent with the principles and purposes of the Charter of the United Nations, and noting the role and responsibilities of the parties in this respect”.³⁵

Noteworthy are also Turkey's vote against Resolution 1898 (2009) concerning Cyprus, in which the Council called for a number of confidence-building measures to be adopted by the parties to the conflict, including the call “on the Turkish Cypriot side and Turkish forces to restore in Strovilia the military status quo which existed there prior to 30 June 2000”,³⁶ and Russia's participation in the vote of Resolution 1866 (2009), clearly a resolution falling under Chapter VI, which concerned its conflict with Georgia over Abkhazia and South Ossetia.³⁷

IV. A Provision Fallen into *Desuetude*

In the aftermath of the above-mentioned vote on the draft resolution on the referendum in the Mayotte Islands in 1976, *Paul Tavernier* examined the practice of the Security Council in respect of Art. 27, para. 3, to conclude that the relevant practice raises

³⁴ UN Doc. S/RES/731 (1992); UN Doc. S/PV.3033 (1992), 24 et seq.

³⁵ UN Doc. S/RES/2044 (2012), paras. 5 and 7; UN Doc. S/PV.6758 (2012), 2 et seq.

³⁶ UN Doc. S/RES/1898 (2009), para. 8; UN Doc. S/PV.6239 (2009).

³⁷ UN Doc. S/RES/1866 (2009); UN Doc. S/PV.6082 (2009).

“le problème de savoir si la pratique ainsi suivie a conduit à la désuétude ou à l’abrogation de la règle posée à l’article 27 § 3 *in fine* de la Charte, ou bien si elle modifié cette règle, notamment en ce qui concerne la distinction entre les situations et les différends. Nous ne prononcerons pas ici sur ces problèmes épineux qui impliquent des réponses à des questions fort délicates, notamment d’ordre ‘constitutionnel’.”³⁸

Indeed *Tavernier’s* question in 1976 is still valid today and the question touches upon “constitutional” matters related to the interpretation and application of the Charter. Generally speaking, a treaty provision can be modified, or even abrogated, by subsequent practice amounting to the creation of a new customary rule affecting the previous treaty provision. The latter scenario is not envisaged by the Vienna Convention on the Law of Treaties (VCLT) due to an explicit choice made by the International Law Commission (ILC) to consider changes to treaties through subsequent custom as falling outside the scope of the law of treaties.³⁹ What is instead envisaged by the VCLT is the termination of a treaty through subsequent practice leading to agreement among the parties: This is specifically provided in Art. 54(b) of the convention in very restrictive terms, as it requires consent and consultation by all the parties to a treaty.⁴⁰

On the other hand, draft Article 38, as approved by the ILC in 1966, provided that a treaty “may be modified by subsequent practice in the application of the treaty establishing the agreement of the parties to modify its provisions”; the ILC commentary explained that “[...] a consistent practice, establishing the common consent of the parties to the application of the treaty in a manner different from that laid down in certain of its provisions, may have the effect of modifying the treaty”.⁴¹ The ILC proposal was re-

³⁸ P. *Tavernier*, *L’Abstention des Etats Parties à un Différend: Art. 27, § 3 in fine de la Charte – Examen de la Pratique*, A.F.D.I. 22 (1976), 283 et seq., at 289. *Tavernier’s* question is also shared by –A. *Tanzi* (note 14), at 558.

³⁹ J. *Wouters/S. Verhoeven*, *Desuetudo*, MPEPIL (2008), paras. 11-12. For an appraisal: UN Doc. Draft Articles on the Law of Treaties (DALT), Yearbook of the International Law Commission, Vol. II, 1966, Commentary to Art. 38, at 236; UN Doc. GAOR, United Nations Conference on the Law of Treaties, Summary Records of the Plenary Meetings and of the Meetings of the Committee of the Whole, First Session, 26.3-24.5.1968, 207 et seq.

⁴⁰ Art. 54(b) Vienna Convention On the Law of Treaties, 1155 UNTS 331: “The termination of a treaty or the withdrawal of a party may take place: (a) in conformity with the provisions of the treaty; or (b) at any time by consent of all the parties after consultation with the other contracting States.”

⁴¹ UN Doc. Draft Articles on the Law of Treaties (DALT) (note 39), 236. The Special Rapporteur *Waldock* fully supported Art. 38 of the DALT; see UN Doc. GAOR (note 39), at 214. *Waldock’s* approach is shared by J. *Liang*, *Modifying the UN Charter through Subsequent Practice: Prospects for the Charter’s Revitalisation*, Nord. J. of Int’l L. 81 (2012), 1 et seq., at 8 and J. *Arato*, *Subsequent Practice and Evolutive Interpretation: Techniques of Treaty*

jected in Vienna with 53 votes against, 26 abstentions and only 15 votes in favour as it was considered a challenge to the principle of *pacta sunt servanda* and also because it was held that such a provision would create a disincentive towards resort to formal amendment procedures.⁴² A restrictive approach has been recently confirmed by the ILC in its work on treaties and subsequent practice, in particular in draft conclusion 7, where it is stated that

“[i]t is presumed that the parties to a treaty, by an agreement subsequently arrived at or a practice in the application of the treaty, intend to interpret the treaty, not to amend or to modify it. *The possibility of amending or modifying a treaty by subsequent practice of the parties has not been generally recognized.*” (emphasis added)⁴³

Writers dealing with the concept of desuetude have gone even further, by contending that the latter process is not recognised in contemporary international law, except for the specific provisions of the VCLT on treaty termination and for customary abrogation.⁴⁴ According to *Kohen*, “[...] the idea of attributing to subsequent practice the effect of modifying or terminating a treaty is a hazardous exercise and one that should not be undertaken”.⁴⁵

Yet it is submitted that the standard and orthodox position on treaty modification through subsequent practice fails to grasp the specificity of “quasi-constitutional” treaty instruments creating international organizations endowed with an institutional framework in which competent organs are called to apply, interpret and enforce treaty provisions. Undoubtedly the UN Charter, as it has been applied and interpreted over the decades,

Interpretation over Time and Their Diverse Consequences, *The Law and Practice of International Courts and Tribunals* 9 (2010), 443 et seq., at 464.

⁴² *J. Arato*, Treaty Interpretation and Constitutional Transformation: Informal Change in International Organizations, *Yale J. Int'l L.* 38 (2013), 289 et seq. *Waldock* answered to those objections: “The provision was based on the principle that a State which had taken up a position on a point of law, particularly in the interpretation of treaties, and allowed another State to act in accordance with that understanding of the legal position, could not go back on its representation of the legal position and declare the act performed illegal. Consequently, the criticism that the article was contrary to the principle *pacta sunt servanda* could not be accepted”, in: UN Doc. GAOR (note 39), 214.

⁴³ UN Doc. GAOR A/69/10 (2014), Annual Report of International Law Commission, 66th Sess., Chapter VII, 166 et seq., at 179 et seq.

⁴⁴ *J. Wouters/S. Verhoeven*, Desuetudo (note 39); *M. G. Kohen*, Desuetude and Obsolescence of Treaties, in: E. Cannizzaro (ed.), *The Law of Treaties beyond the Vienna Convention*, 2011, 350 et seq.

⁴⁵ *M. G. Kohen*, Keeping Subsequent Agreements and Practice in Their Right Limits, in: G. Nolte (ed.), *Treaties and Subsequent Practice*, 2013, 35 et seq., at 38.

belongs to this narrow category of treaty instruments, in which the material constitution of the organization undergoes continuous transformation, despite the formal constitution crystallised in the constitutive treaty. *Arato* has recently shown the dynamics of constitutional transformation in the UN, with the proactive role of the ICJ – a judicial organ with a weak role in the balance of powers in the organization – in empowering and legitimating constitutional transformation by the political organs.⁴⁶ The three advisory opinions, namely *Certain Expenses*, *Namibia* and *Wall* have paved the way for a radical departure from standard treaty interpretation and modification in three incremental ways, namely: a) by focusing on institutional practice, rather than practice by the parties (*Certain Expenses*); b) by allowing outright modification of treaty provisions, rather than mere interpretation, in the face of acquiescence (*Namibia*); and c) by allowing re-interpretation of previous practice, which was already difficult to square with the text (*Wall*).⁴⁷

The *Namibia* advisory opinion is particularly interesting in that it dealt with the first part of Art. 27, para. 3, namely the issue of the voluntary abstention by a permanent member and whether that would amount to a veto. It is clear that what the Court qualified as a mere re-interpretation amounted to outright modification of a provision requiring the “concurring vote” of all permanent members. Such a process of informal transformation can be also envisaged, at least in principle, for the last part of Art. 27, para. 3, in the sense of an abrogation of the duty to abstain. And yet, tested in the practice, such a proposition is not fully convincing.

Ultimately, while one may contest the thesis of desuetude on the basis of subtle distinctions between situations and disputes and of the claim that the duty to abstain would only apply to the quasi-judicial function of the Security Council under Chapter VI,⁴⁸ *Blum*'s assertion that the desuetude of the

⁴⁶ *J. Arato* (note 42).

⁴⁷ *J. Arato* (note 42), 318 et seq. *Certain Expenses of the United Nations*, ICJ Reports 1962; *Legal consequences for states of the continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)*, ICJ Reports 1971; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, ICJ Reports 2004.

⁴⁸ *B. Simma*, *The Charter of the United Nations: A Commentary*, 2nd ed., Vol. I, 2002. The argument that challenges the thesis of the desuetude of the duty under Art. 27, para. 3, on the basis of the distinction between “situation” and “dispute”, with the Council qualifying matters as “situations” in order to avoid the duty to abstain, especially for permanent members, necessarily implies that a number of provisions within Chapter VI relating to the settlement of disputes would risk [...] falling into desuetude (!), as the concept of “dispute” under Art. 27, para. 3, in no way differs from that of dispute under Chapter VI. The old Roman law maxim *ut res magis valeat quam pereat* should direct the interpreter to examine the desuetude

last part of Art. 27, para. 3, fails on the lack of *opinio juris* in that regard expressed by members and by the Council itself, is most persuasive.⁴⁹ While the practice of non-application has continued for over six decades, the only case in which there has been an express rejection of the validity of the provision, with reference to the general practice of non-application, is that of France's veto in 1976 with regard to the referendum in Mayotte.⁵⁰ Moreover, the practice we have examined shows that, occasionally and especially until the beginning of the 1990s, the issue of the applicability of Art. 27, para. 3, has been raised and participation in the vote by permanent members has been justified on other accounts, such as the fact that the matter was a situation rather than a dispute or the draft resolution fell under Chapter VII rather than Chapter VI. Moreover, while the ICJ in *Namibia* did not hesitate to draw legal consequences from the practice of voluntary abstention, it did not even hint at the possibility of a normative evolution of the last part of the provision in point. In sum, it is submitted that the burden of proof of desuetude for a provision, such as that of Art. 27, para. 3, is cumbersome, and the complex history of the application of the duty to abstain does not easily render itself to such a radical conclusion.⁵¹

V. An Alternative Legal Explanation

On the other hand, exactly because constitutional transformation through informal means, other than the amendment procedure under Art. 108 of the UN Charter, is a reality of the organization, the problem cannot be solved by resorting to a formalist approach to treaty law. Failing the test of desuetude, what we can draw at best is a conclusion as to the continuing formal validity of the provision in point. And yet we are still left with a social and institutional practice characterised by systematic non-fulfilment of the legal obligation, which hints at an implied belief that in all those cases in

of one single procedural provision, rather than that of the whole normative framework on which one of the most important functions of the Council, namely that of dispute settlement, is based.

⁴⁹ *Y. Z. Blum* (note 27), 211 et seq.

⁵⁰ UN Doc. SCOR (note 30).

⁵¹ On the other hand, a situation of obsolescence can be seen with regard to Chapter XII of the Charter, to the references to the latter contained in Chapter XIII and to the references to the concept of "enemy State" contained in several provisions of the Charter. That is clearly signaled by paras. 176 and 177 of the World Summit Outcome Document approved in 2005, which has expressed the intent of the members to formally amend the Charter accordingly. See also *M. Kohen* (note 44). I thank *Wladislaw Czaplinski* for directing me to the above practice.

which the obligation could have applied the obligation was not legally binding for the interested States.⁵² In other words, States have arguably failed to abide by the obligation, not because they have disputed its formal validity, but *because they did not feel as a matter of fact and of law in the specific case bound by the legal obligation*. Their position towards the necessary application of the obligation was probably due to their “multilateral” attitude grounded on a principle of reciprocity that has tended to recognise the liberty of other States to act as they wish, in the legitimate expectation that those States would do otherwise in the future. Needless to state, such multilateral attitude has been particularly strong in the practice of the permanent members. According to *Simma* “Article 27(3) cl. 2 provides for a legal potential which is not fully exploited for political reasons: permanent members prefer to have ‘questions’ or ‘situations’ dealt with, so that any abstention is voluntary”.⁵³ In our view, the “legal potential” has remained such and the practice of the permanent members seems to indicate more far-reaching consequences, than the mere “abuse” of the distinction between “situations” and “dispute”.

While not challenging its formal validity, States and the SC itself have made the obligation “dormant”, in “abeyance”.⁵⁴ Such a legal phenomenon can be equated in terms of legal effects to that of a suspension of a treaty provision, even if it cannot be subsumed under any of the grounds for suspension described in the VCLT, be it fundamental change of circumstances, supervening impossibility of performance or material breach; nor it can be said to have occurred through the consent of all the parties to the treaty and through prior consultation in accordance with Art. 57 VCLT. What we can observe is a much more creeping, subtle, implied and protracted process undermining the legality effect of Art. 27, para. 3, which is much more nuanced than the formal suspension envisaged under the VCLT.

⁵² The phenomenon is well described in *M. J. Glennon*, How International Rules Die, *The Geo. L. J.* 93 (2005), 939 et seq., who, however, tends to focus on the dichotomies compliance/violation and validity/invalidity, without taking into consideration the possibility of suspension.

⁵³ *B. Simma* (note 48).

⁵⁴ The possibility of informal suspension is acknowledged by the ILC in Draft Conclusion 6 on “Subsequent agreements and subsequent practice in relation to the interpretation of treaties”, provisionally adopted in 2014, where reference is made to the agreement “not to apply the treaty temporarily ... or to establish a practical arrangement (*modus vivendi*)”: UN Doc. GAOR A/69/10 (2014), Annual Report of International Law Commission (note 43), at 170-179. Quite interestingly, *Kohen* observes that “[s]urprisingly, the possibility that subsequent practice would just amount to the suspension of a treaty is almost never raised in the doctrine”, *M. G. Kohen* (note 45), at 35.

Similar to suspension (Art. 72 VCLT), the legal consequence for members of the Council is that the practice has released them of the obligation to abstain when they are parties to a dispute under consideration. As we write, *the obligation as such is not opposable to any member*, which is party to a dispute being considered by the Council.⁵⁵ And yet, similar to suspension, the Council and its members may decide to resume the application. Even in this respect, the procedure of resumption would be less structured and formal than that which may be inferred by the VCLT – arguably following the same procedure of unanimous consent and prior consultation. Ideally, this should occur through an express institutional resumption adopted through a SC resolution or a presidential statement. Yet even one concrete case of institutional application through consensus, unanimity or general acquiescence in the Council would “revive” the application, even as against those States not members of the SC and even in the face of their protest. In sum, due to the informal means of suspension of treaty obligations, their resumption could also follow informal processes, including through a precedent, which could pave the way for a pattern of law-abiding behaviours.

VI. Conclusion

Russia’s veto in the meeting of the Security Council of 15.3.2014 signals once more the impossibility for the Council to make decisions which come into conflict with significant interests of the P-5. While Russia’s vote has been heavily criticised on many grounds, the principle that any member of the P-5 can prevent the adoption of any decision by the Council which conflicts with its interest has not been put under scrutiny. Art. 27, para. 3, last sentence, which was originally envisaged to limit the influence of particular interests in decision-making related to dispute settlement under Chapter VI, has not been even mentioned. Such silence stands in stark contrast to the animosity of the debate and it gives expression to the “untold” consensus that has crystallised in the Council in the last decades and, in particular, in the Post Cold War period, namely that the P-5 should retain full political leverage over the decision-making process in the Council, even more so when the decisions directly “intersect” their rights and interests. Needless to state, such consensus is irreconcilable with the principle of *nemo iudex in re sua*, which is the very foundation of the duty to abstain under Art. 27,

⁵⁵ And, as a matter of fact, *it has never been opposed* by a member of the Council, the only and few cases of abstentions being based on a voluntary choice of the interested member to abstain.

para. 3, and, in general, with a conception of decision-making legally constrained both in substance and in procedure.

The “suspension” thesis put forward in the present article captures a particular type of “constitutional” transformation of the Charter, based on subsequent, nearly unchallenged, institutional practice, which, however, leaves the “formal” constitution intact. What is evolving is the “material” constitution of the organization, which may change over time and which provides flexible mechanisms of adaptation to the changing institutional realities. As we write, the application of the duty to abstain under Art. 27, para. 3, has been suspended due to a convergence of interests among the P-5 and other members of the Council. And yet it is “simply” with an authoritative decision that the clock can be set back and that the formal constitution may be resumed. There are reasons to believe that a revitalised role for the Security Council in the settlement of many disputes around the world should be accompanied by the affirmation of principles of fairness and effectiveness in its decision-making processes. Resuming the functioning of the duty to abstain under Art. 27, para. 3, would go exactly in that direction and would render the Council a more credible, effective and impartial institutional actor in the performance of its task of promoting international peace and security.

