Chapter 4: The Authority of Formal Legal Opinions in the Practice of the United Nations

4.1. Introduction

When reading through opinions of the Legal Counsel, there is a common feature that regularly appears after the Legal Counsel has chosen a legal interpretation. Most opinions include some type of disclaimer.[1] Although this is not always the case,[2] most opinions state that they are non-binding and that—echoing the *Certain Expenses* principle—it is up to the organ concerned to decide upon any doubt as to its jurisdiction.[3] This is not only a practice of the UN Legal Counsel, but also of legal advisers of specialized agencies.[4]

This reference to the principle of autointerpretation as first announced in *Certain Expenses* warrants closer inspection. In *Certain Expenses*, the Court explained that attempts to introduce a system of judicial review in the Charter were unsuccessful in 1945, and that consequently 'each [United Nations]

1 Miguel de Serpa Soares, '70 Jahre Vereinte Nationen: Der Beitrag der UN zur Fortentwicklung des Völkerrechts' [2015] Vereinte Nationen 215, 219; José E Alvarez, *The Impact of International Organizations on International Law* (Brill Nijhoff 2017) 363.

2 cf UNGA 'Exchange of Letters between the Chairman of the Fifth Committee and the Under-Secretary-General for Legal Affairs, the Legal Counsel' (5 April 2001) A/C.5/55/42; UNGA 'Exchange of Letters between the Chair of the Third Committee and the Assistant Secretary-General in Charge of the Office of Legal Affairs' (11 October 2018) A/C.3/73/2.

3 cf ECOSOC 'Legal Opinion from the Office of Legal Affairs of the Secretariat' (20 February 2015) E/CN.7/2015/14, section II, para 2; CLCS 'Letter dated 25 August 2005 from the Legal Counsel, Under-Secretary-General of the United Nations for Legal Affairs, addressed to the Chairman of the Commission on the Limits of the Continental Shelf' (7 September 2005) CLCS/46, 13; CBD 'Analysis on the Implication of the Use of the Term "Indigenous Peoples and Local Communities" for the Convention and its Protocols' (25 June 2014) UNEP/CBD/COP/12/5/Add.1, para 8.

4 WHO 'Statement made by the Director of the Legal Division at the 12th Plenary Meeting of the Thirty-second World Health Assembly' [1979] UNJYB 199; ILO 'Hours of Work and Manning (Sea) Convention, 1936' (1938) 23 Official Bulletin 30, 32; ILO 'Shipowners' Liability (Sick and Injured Seamen) Convention, 1936 (No 55)' (1950) 33 Official Bulletin 305.

organ must, in the first place at least, determine its own jurisdiction.'[5] True to this principle, a legal opinion may emphasize that 'it is a matter for the States Parties to a treaty to interpret the text, including the scope of the mandate',[6] or that the view of the Office of Legal Affairs 'should not in any way be construed as the only or definitive view'.[7]

This is, of course, rather obvious. Neither the UN Charter nor any secondary legal act invest a Legal Counsel opinion with decisive effect or clearly express a legal effect short of binding force.[8] Emphasizing this evident feature of legal opinions is a product of the peculiar standing of an official operating within an international bureaucracy. According to the *Guide to Writing for the United Nations*, international civil servants often feel the need to 'play it safe' and 'leave a back door open for escape from the critics in the front'.[9] Similarly, it is convenient to stick to an established form and style,[10] as is attested by the existence of elaborate correspondence manuals.[11]

Providing an organ with legal advice while entering such a disclaimer is somewhat peculiar. If States enlist the Office of Legal Affairs as an external actor precisely because they cannot agree on a common legal interpretation, why emphasize that they are the masters of the treaty in the first place? Emphasizing the responsibility of States in these circumstances appears to be an attempt to downplay the influence of interpretations of the Legal Counsel.

Despite their apparent non-binding nature, there have been attempts to define the authority of Legal Counsel opinions. Although some adhere to the

5 *Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter)* (Advisory Opinion) [1962] ICJ Rep 151, 168.

6 ICCD 'Legal Opinion from Parties concerning the Recommendations of the Joint Inspection Unit to the Conference of the Parties to the United Nations Convention to Combat Desertification regarding the Global Mechanism: Response from the United Nations Office of Legal Affairs' (30 September 2009) ICCD/COP(9)/9/Add.2, Annex II, para 3.

7 'Legal Opinion from the Office of Legal Affairs of the Secretariat' (n 3) II, para 2.

8 José E Alvarez, *International Organizations as Law-makers* (Oxford University Press 2005) 437.

9 Department of Conference Services, *A Guide to Writing for the United Nations* (UN 1984) 4.

10 ibid 3.

11 eg Department of General Assembly Affairs and Conference Services, *United Nations Correspondence Manual: A Guide to the Drafting, Processing and Dispatch of Official United Nations Communications* (UN 2000) Exhibit 1 (example of a letter from the United Nations Legal Counsel).

'purely advisory' nature,[12] others attach more weight. Without giving much to their context, some describe the value of legal opinions in general terms as 'influential',[13] 'carry[ing] some weight',[14] or of a persuasive force equivalent to that of an advisory opinion of the International Court of Justice.[15] Given the sharp difference between the self-declared and perceived authority of legal opinions, they are a legitimate object of inquiry. This chapter takes a closer look at the interaction of the Legal Counsel with the various United Nations bodies that request legal advice for a more nuanced understanding.

As a first step, this study examines to what extent the opinions of the Legal Counsel are treated as precedents or authority in the United Nations as a matter of practice (and not whether this is correct as a matter of law).[16]

Secondly, this chapter examines the use of Office opinions in disputes between different UN bodies. The point here is not to so much whether an organ complies with the Legal Counsel's advice. Rather, the jurisdictional boundaries between different organs in the UN system are often fuzzy. When a body intrudes on the autonomy of another organ, the advice of the Legal Counsel is employed to contest jurisdictional claims.

Finally, the chapter explores the review function of the Legal Counsel with regard to mandate issues. It does so by considering the circumstances that have led to the request, the types of legal issues that are referred to the Legal Counsel, and the character of the organ that requests the advice. But, most importantly, it ascertains the reactions of that organ to the advice where this evidence is public.

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12 Oscar Schachter, 'The Development of International Law Through the Legal Opinions of the United Nations Secretariat' (1948) 25 BYBIL 91, 94–95.

13 Suzette V Suarez, *The Outer Limits of the Continental Shelf: Legal Aspects of their Establishment* (Springer 2008) 108.

14 See the statement of the Legal Counsel: ILC 'Provisional Summary Record of the 3371st Meeting' (3 August 2017) A/CN.4/SR.3371, 9.

15 Ralph Zacklin, 'Les Nations Unies et la crise du Golfe' in Brigitte Stern (ed), *Les aspects juridiques de la crise et de la guerre du Golfe: Aspects de droit international public et de droit international privé* (Montchrestien 1991) 63.

16 Authority and precedent are used in a loose manner. They describe a 'source ... cited in support of a legal argument' and '[a] decided case that furnishes a basis for determining later cases involving similar facts or issues', respectively: Bryan A Garner, *Black's Law Dictionary* (9th edn, Thomson Reuters 2009) 153, 1295.

4.2. Recognition as Legal Precedent

In the legal system of the United Nations, three argumentative practices explain the recognition of legal opinions as legal precedent. First and most importantly, an interpretation of the Legal Counsel was once overturned by the General Assembly. Second, Member States deem opinions of the Legal Counsel important enough to criticize—or to cite them favorably in support of their position. Lastly, the decision to publish a portion of otherwise confidential opinions in the *Juridical Yearbook* or as a UN document by itself signals a recognition of their normative value—something that is indispensable for the policy of *stare decisis* in the Office of Legal Affairs.

4.2.1. 'Overruling' of Legal Opinions by the General Assembly

It might be somewhat counter-intuitive to start with an example where formal legal advice was later overruled, but less so upon second view. In a national legal system, the highest court will sometimes interpret a law in a way that goes against the intention of the legislature or simply against the current political majority. Regardless of the differences between common law and civil law jurisdictions and the formal acceptance of the *stare decisis* doctrine, a parliament in such cases may want to change the law in a way that renders the reasoning of the judicial ruling inapplicable for future cases. Even if the legal system in question knows of no formalized *stare decisis* doctrine, lower courts and practicing lawyers treat a judicial decision as persuasive authority in future cases. It is because of these wider consequences that it makes sense for a legislature to overrule a judgment if it is not pleased with it. But is the very act of overruling that takes the authority of the highest court seriously.[17] By analogy, if the Security Council or the General Assembly occasionally overturn an opinion of the Legal Counsel, there is a good argument that legal opinions carry some authority in the day-to-day operation of law within the United Nations beyond the specific circumstances that gave rise to the original opinion request.

17 For comparative survey of mechanisms of legislative overruling see Frank Schorkopf, 'Gesetzgebung durch Höchstgerichte und Parlamente: Zu Anspruch und Versuch einer gewaltenübergreifenden Korrektur von Rechtsprechungsrecht' (2019) 144 Archiv des öffentlichen Rechts 202, 223–228.

Historically, there have been cases where the General Assembly or the Security Council acted against the Legal Counsel's opinion. For example, beginning in the 1970s the General Assembly rejected the credentials of the South African apartheid regime despite an opinion of the Legal Counsel that this was contrary to the UN Charter, but it stopped short of making that explicit in a formal resolution or decision.[18] At other times, it is not a case of a principal organ overruling the advice of the Legal Counsel but rather a conflict between the principal organs. Here, the Legal Counsel's letter on Yugoslavia's status following General Assembly resolution 47/1 comes to mind.[19] With respect to Yugoslavia, this was not an actual case of 'overruling' a Legal Counsel opinion, but rather evidence of a conflict between the Security Council and the General Assembly;[20] the Security Council took the position that Yugoslavia had ceased to exist while the General Assembly suggested that the issue was more about representation, participation, and credentials.[21]

But there is a 2001 case that neatly fits this framework of an explicit overruling by the General Assembly, and the Legal Counsel even recognized that the General Assembly had overturned an opinion once.[22] The Fifth Committee of the General Assembly requested the Legal Counsel interpretation of the phrase 'taking note' in resolutions of the General Assembly in 2001.[23] While couched in mundane terms, it is ultimately about the relationship between the General Assembly's power of the purse and organs that propose and implement policy. The issue comes up if the General Assembly instructs the Secretary-General or a subsidiary body to study a problem and suggest policy measures. The particular organ recommends a certain course of action and reports back to the General Assembly. The General Assembly in turn 'takes note' of the report. What is the meaning if the General Assembly 'takes

18 cf Leo Gross, 'On the Degradation of the Constitutional Environment of the United Nation' in *Essays on International Law and Organization* (Springer 1984) 662–663.

19 UNGA 'Letter dated 29 September 1992 from the Under-Secretary-General, the Legal Counsel, addressed to the Permanent Representatives of Bosnia and Herzegovina and Croatia to the United Nations' (30 September 1992) A/47/485.

20 See Henry G Schermers and Niels M Blokker, *International Institutional Law: Unity with Diversity* (6th edn, Brill Nijhoff 2018) 99–100 (and the literature cited therein).

21 James Crawford, *The Creation of States in International Law* (2nd edn, Oxford University Press 2007) 707–709.

22 ILC 'Provisional Summary Record of the 3398th Meeting' (11 June 2018) A/CN.4/SR.3398, 7.

23 Schermers and Blokker (n 20) 893–894.

note'? Is it a neutral expression or does it signify some form of approval? It is this question on which the General Assembly's Administrative and Budgetary Committee requested the Legal Counsel's opinion.

According to the Legal Counsel's opinion, the answer depended on whether the proposal entails financial implications. If the Secretary-General or a subsidiary organ proposes a specific action that is within existing resources, a decision by the General Assembly 'taking note' of the conduct authorizes the proposed action. Where a proposed action has financial implications, a decision 'taking note' of the action does not constitute authorization.[24] That legal opinion relied on a previous opinion dated 1988 of the Office of Legal Affairs that had adopted the same principle.[25] The Legal Counsel noted that some Member States had cited the 1988 opinion in support of their position but essentially criticized them for misunderstanding the 1988 opinion.

The most notable aspect of the opinion is its last paragraph: the Legal Counsel calls on Member States to clearly express their intention 'if Member States do not agree with the Office of Legal Affairs' opinion on the definition of the expression "taking note of"'.[26] In other words, Member States are to adapt to the opinion of the Legal Counsel (by making their intention clear) rather than the Legal Counsel modifying his interpretive presumption.

That particular legal opinion met the opposition of Member States who expressed their dissatisfaction with the opinion of the Legal Counsel. Delegations demanded that there should be a clear understanding on the meaning of 'taking note'—an issue on which the General Assembly should take an official position.[27] One delegation even stated that the Legal Counsel's opinion had created confusion on the meaning of the term, and called on the Legal Counsel to withdraw the opinion.[28]

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24 'Exchange of Letters between the Chairman of the Fifth Committee and the Under-Secretary-General for Legal Affairs, the Legal Counsel' (n 2) Annex II.

25 Quoted in UNGA 'Provisional Verbatim Record of the 99th Meeting' (5 January 1988) A/42/PV.99, 4–5. The opinion also appears in the record of the Fifth Committee: UNGA 'Summary Record of the 67th Meeting' (19 December 1987) A/C.5/42/SR.67, paras 72–73.

26 'Exchange of Letters between the Chairman of the Fifth Committee and the Under-Secretary-General for Legal Affairs, the Legal Counsel' (n 2) Annex II, 4.

27 UNGA 'Report of the Committee for Programme and Coordination on its forty-first session (11 June-6 July 2001)' (10 July 2001) A/56/16, para 458.

28 UNGA 'Verbatim Record of the 103rd Plenary Meeting' (14 June 2001) A/55/PV.103, 3.

Just five months later, the General Assembly approved an interpretative decision that if it 'takes note' of a proposal, the intention is to be neutral and to neither approve or disapprove of the proposed action.[29] This decision does not explicitly mention that it was adopted in reaction to the Legal Counsel's opinion. But the timing makes it all but certain that General Assembly decision 55/488 was a direct reaction to an interpretation that encroached on the General Assembly's budgetary authority and that ran the risk of 'accidentally' authorizing a policy without making this intention textually clear.

Decision 55/488 represented an unusual step of the General Assembly to overturn an interpretation of the Legal Counsel.[30] Although the General Assembly surprisingly chose the legal instrument of a 'decision' and not a 'resolution',[31] the case illustrates that a principal organ of the United Nations is very much aware that interpretations of the Legal Counsel shape the expectations of actors within the United Nations.[32] If the opinions of the Legal Counsel were in reality simply non-binding and carried no more force than the arguments it employed, there would be little reason for the General Assembly to take the unusual step of publicly overturning an opinion. Coming close to having authoritative quality, interpretations of the Legal Counsel thus enjoy a status within the United Nations legal system different from interpretations by legal writers.[33] Seen from this angle, decision 55/488 implicitly recognizes that an opinion of the Legal Counsel carries a certain

29 UNGA Decision 55/488 (7 September 2001) A/55/49 (Vol. III). See also UNGA 'Organization of the Seventy-Second Regular Session of the General Assembly, Adoption of the Agenda and Allocation of Items: Memorandum by the Secretary-General' (12 September 2017) A/BUR/72/1, para 52.

30 cf 'Provisional Summary Record of the 3398th Meeting' (n 22) 7.

31 General Assembly decisions and resolutions have the same legal status. Resolutions are reserved for policy recommendations and budgetary matters, whereas decisions are usually short and deal with procedural questions or elections. See Nicole Ruder, Kenji Nakano, and Johann Aeschliman, *The GA Handbook: A Practical Guide to the United Nations General Assembly* (2nd edn, Permanent Mission of Switzerland to the UN 2017) 52.

32 See Paul Tavernier, 'L'année des Nations Unies (20 décembre 1986 – 21 décembre 1987): Questions juridiques' (1987) 33 AFDI 399, 402 (who argued that the interpretation espoused in the 1988 opinion can be transposed to other General Assembly resolutions).

33 cf Louis B Sohn, 'The UN System as Authoritative Interpreter of its Law' in Oscar Schachter and Christopher C Joyner (eds), *United Nations Legal Order* (vol 1, Cambridge University Press 1995) 169 (distinguishing between authoritative and scholarly interpretations of the Charter).

measure of authority and is a legal precedent—at least if the opinion in question is a formal opinion in the public domain and not a mere internal document.

Citing decision 55/488, recent Office opinions have interpreted the meaning of 'taking note' in a neutral manner and do not rely on the distinction made in its previous opinions.[34] And this aspect can be crucial as the negotiations on an intergovernmental biodiversity platform attest. At a meeting on biodiversity and ecosystem services in June 2010, governments adopted a resolution which became to be known as the Busan Outcome. The Busan Outcome stated that 'an intergovernmental science-policy platform for biodiversity and ecosystem services should be established'.[35] The Busan Outcome did not specify any details regarding the establishment and operationalization of the platform. But it recommended that the General Assembly consider the conclusions of the Busan Outcome and take appropriate action to establish the platform.[36] With resolution 65/162, the General Assembly 'took note' of the Busan Outcome and related decisions of other international organizations, and requested the UNEP to convene a plenary meeting to fully operationalize the platform.[37]

At the first plenary meeting, there arose some debate as to the legal status of the platform.[38] The plenary, through its Chair, requested legal advice from the UN Office of Legal Affairs.[39] Formal legal advice was requested

34 UNEP 'Legal Advice of the Office of Legal Affairs of the United Nations concerning Certain Legal Issues pertaining to an Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services: Note by the Assistant Secretary-General for Legal Affairs to the Chair of the Plenary Meeting' (5 October 2011) UNEP/IPBES.MI/1/INF/14, Annex, para 5 (citing General Assembly decision 55/488 for the applicable interpretative rule instead of the 2001 opinion).

35 UNEP 'Legal Issues relating to the Establishment and Operationalization of the Platform' (21 July 2011) UNEP/IPBES.MI/1/2, para 1.

36 ibid para 2.

37 UNGA Res 65/162 (15 March 2011) A/RES/65/162, para 17.

38 'Legal Issues relating to the Establishment and Operationalization of the Platform' (n 35) para 6; UNEP 'Report of the First Session of the Plenary Meeting to Determine Modalities and Institutional Arrangements for an Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services' (10 October 2011) UNEP/IPBES.MI/1/8, para 24.

39 'Legal Advice of the Office of Legal Affairs of the United Nations concerning Certain Legal Issues pertaining to an Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services: Note by the Assistant Secretary-General for Legal Affairs to the Chair of the Plenary Meeting' (n 34).

in circumstances where States could not agree on a legal question, namely whether paragraph 17 of General Assembly resolution 65/162 had already established the science-policy platform – or not. That advice, however, had not been conveyed at the beginning of the plenary meeting. Interestingly, this raised concerns among some governments who wished to have the benefit of the legal advice before discussing any legal issues relating to the establishment of the platform, and the plenary decided to defer any discussion on the legal issues until having received the advice of the Office of Legal Affairs.[40] The decision to await the provision of formal legal opinions indicates that delegations considered the advice important enough that no decision could be taken without having considered the view of the Office of Legal Affairs.

The issue was whether the General Assembly had already established the platform by 'taking note' of the Busan Outcome in resolution 65/162. According to the Office of Legal Affairs, the answer was clearly no. Relying on General Assembly decision 55/488, it recalled that the term 'takes note' indicates neither approval nor disapproval. Consequently, the General Assembly did not decide to establish the platform through resolution 65/162.[41] Secondly, the Office interpreted the Busan Outcome itself, and ruled that the Busan Outcome document had only recommended the establishment of the platform, but did not take a decision to establish the platform itself.[42] In addition to the Office of Legal Affairs opinion, the UNEP Secretariat submitted a supplementary opinion 'on the basis of the legal advice of the Office of Legal Affairs' which reached the same conclusion.[43]

Despite the opinion, some States took the view that the General Assembly had already established the platform through paragraph 17 of resolution

40 'Report of the First Session of the Plenary Meeting to Determine Modalities and Institutional Arrangements for an Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services' (n 38) para 16.

41 'Legal Advice of the Office of Legal Affairs of the United Nations concerning Certain Legal Issues pertaining to an Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services: Note by the Assistant Secretary-General for Legal Affairs to the Chair of the Plenary Meeting' (n 34) Annex, para 5.

42 ibid Annex, para 6.

43 UNEP 'Legal Opinion of the Secretariat concerning Certain Legal Issues relating to the Establishment and Operationalization of the Platform' (3 October 2011) UNEP/IPBES.MI/1/INF/9, paras 1, 4.

65/162.[44] According to them, 'Member States present at the current meeting were not bound to follow the various legal opinions'.[45] Many governments disagreed. For them, the legal opinions 'clearly showed that the platform had not yet been established.'[46] For others, the establishment of the platform was not a question of law, but could be affected by the delegations assembled in the ad hoc meeting.[47] Eventually, the decision was postponed as the delegations could not reach a consensus on the legal status of the platform.[48]

For the second plenary meeting, the UNEP Secretariat submitted a further paper on the establishment and operationalization of the platform. That paper was prepared 'taking fully into account the legal opinion of the Office of Legal Affairs of the United Nations dated 4 October 2011'.[49] When delegations considered that paper, an overwhelming majority adopted a resolution establishing the platform as an independent intergovernmental body at that second plenary session.[50] While that resolution does not specifically refer to the legal opinions, it concurred with the essence of those opinions in that General Assembly resolution 65/162 had not established the platform and some further legal act was required. But the legal advice continues to play a role as it provided a menu of options on the link between the platform and the United Nations.[51]

As the legal advice on the establishment of the biodiversity platform demonstrates, the Office of Legal Affairs faithfully follows the decision

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44 'Report of the First Session of the Plenary Meeting to Determine Modalities and Institutional Arrangements for an Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services' (n 38) para 25.

45 ibid para 25.

46 ibid para 26.

47 ibid para 27.

48 ibid para 30.

49 UNEP 'A Possible Way Forward for the Establishment and Operationalization of the Platform: Note by the Secretariat' (10 April 2012) UNEP/IPBES.MI/2/INF/5, Annex, para 1.

50 UNEP 'Report of the Second Session of the Plenary Meeting to Determine Modalities and Institutional Arrangements for an Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services' (18 May 2012) UNEP/IPBES.MI/2/9, paras 34–5 and Annex I, para 1.

51 That question had been left open: 'Report of the Second Session of the Plenary Meeting to Determine Modalities and Institutional Arrangements for an Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services' (n 50) Annex I, para 2; IPBES 'Link between the Platform and the United Nations System: Note by the Secretariat' (13 November 2012) IPBES/1/11, para 5.

overturning its prior interpretations. Whatever authority its legal opinions may enjoy, it is always subject to being overruled by the General Assembly (or the Security Council). But the rarity of overturning interpretations of the Legal Counsel reinforces their influential status in the institutional and legal practice of the United Nations. The General Assembly may take similar steps in the future. A 2012 report by the General Assembly noted 'concerns [by some Member States]... regarding the nature of some legal opinions provided by the Office of Legal Affairs that contradicted some very sensitive United Nations resolutions'.[52] Along the same line, some Member States argued that the General Assembly should address this issue, arguing that these legal opinions were 'negatively affecting the deliberation and decision-making processes of Member States', with some States advocating that this issue should be addressed by the General Assembly.[53] Even for a principal and political organ, the interpretations of the Legal Counsel are too important to be ignored.

4.2.2. Criticism and Reliance of States and UN Bodies

The idea that the advice of the Legal Counsel carries some weight in United Nations practices is corroborated when Member States, usually in the minority, strategically demand the Legal Counsel's advice to contest a political decision of the majority. It is in these circumstances that Member States lobby for a legal opinion by the Legal Counsel as an actor external to the deliberations in the hope of lending greater credibility to their legal case that the majority decision is wrong. When that strategy does not pay off, those States often feel the need to put their opposition on record to the view of the Office of Legal Affairs. A good example is the request by Burundi in 2018 on the competence of the Third Committee to hear the Chair of the Commission of Inquiry on Burundi. Burundi had strongly lobbied for such an opinion.[54] But when the legal opinion was issued, Burundi claimed that

52 UNGA 'Report of the Committee for Programme and Coordination' (5 July 2012) A/67/16, para 162.

53 ibid para 162.

54 See Section 3.3 of Chapter 3.

the 'procedure for its issuance had been irregular and obscure' and that the opinion was 'politically motivated'.[55]

But there are similar sustained critiques. In 2006, several States requested to add two pro-Taiwan items to the agenda of the General Assembly. The first proposal related to '[a] proactive role for the United Nations in maintaining peace and security in East Asia', the second concerned the 'Question of the representation and participation of the 23 million people of Taiwan in the United Nations'.[56]

According to the sponsoring States, the General Committee of the General Assembly 'chose to amalgamate these quite distinct proposals into one item and to arbitrarily limit the number of speakers'.[57] Such a political judgment, the members argued, was without precedent, violated rules of procedure and went against the provisions of the Charter—there was simply no cogent justification to combine these two distinct issues into one, and there was a suspicion that the majority had simply appeased China.[58] At the end of the letter, the Member States 'require[d] a legal opinion to confirm the views in the debate to which we are entitled' and asked for consultations with the Legal Counsel.[59]

In response, it does not appear that the Office of Legal Affairs issued a formal opinion, probably because the minority could not get the General Committee to formally request such advice.[60] But during informal consultations, the Office of Legal Affairs suggested that the co-sponsors 'had failed to raise points of order to protest the errors we asserted in our letter of 3 Octo-

55 UNGA 'Summary Record of the 19th Meeting' (6 December 2018) A/C.3/73/SR.19, para 4.

56 UNGA 'Organization of the Sixty-First Regular Session of the General Assembly, Adoption of the Agenda and Allocation of Items: Memorandum by the Secretary-General' (11 September 2006) A/BUR/61/1, para 52 (items 41) and para 56 (item 155).

57 UNGA 'Identical Letters dated 3 October 2006 from the Permanent Representatives of Burkina Faso, El Salvador, the Gambia, Honduras, Malawi, the Marshall Islands, Nauru, Nicaragua, Palau, Saint Kitts and Nevis, Saint Vincent and the Grenadines, Sao Tome and Principe, Solomon Islands, Swaziland and Tuvalu to the United Nations addressed to the Secretary-General and the President of the General Assembly' (23 October 2006) A/61/534, 1.

58 ibid.

59 ibid 2.

60 See Section 3.3 of Chapter 3.

ber.'[61] To the co-sponsors, the Office had gotten the deliberative nature of the United Nations wrong.[62] But they felt it necessary to put their opposition to the interpretation of the Office of Legal Affairs on record: '[w]e will therefore agree to disagree with the Office of Legal Affairs on its narrow, restrictive, and, in our view, incorrect, interpretations of the rules of procedure.'[63]

Another episode concerned the use of the term 'Syrian regime' in a draft resolution of the Third Committee of the General Assembly. The Syrian delegation opposed this term in the strongest terms and asked for clarification from the Office of Legal Affairs whether it was permissible to refer to the government of a Member State as a 'regime'.[64] The Office replied that there was precedent for using the term 'Syrian regime' in a previous resolution and that the Syrian request did not pose a strictly legal issue. Accordingly, the Office recommended that the Third Committee proceed with the consideration of the draft resolution.[65] Syria went at length to criticize the opinion, saying that that the equal sovereignty of States demanded that they be called by their official names and that insulting language such as the term 'regime' violated the Charter.[66]

It is apparent that Syria recognized that the unfavorable opinion would become a precedent. It attacked the Office of Legal Affairs as lacking the necessary independence, professionalism, and respect for the rule of law.[67] It circulated its concerns as to the 'invalidity of this legal opinion' as a United Nations document. Otherwise the opinion 'will establish a new era at the United Nations'. According to Syria, the Secretary-General had to rescind the opinion and—interestingly—order the issuance of a new opinion based

61 UNGA 'Letter dated 28 December 2006 from the Representatives of Burkina Faso, El Salvador, the Gambia, Honduras, Malawi, the Marshall Islands, Nauru, Nicaragua, Palau, Saint Kitts and Nevis, Saint Vincent and the Grenadines, Sao Tome and Principe, Solomon Islands, Swaziland and Tuvalu to the President of the General Assembly' (15 March 2007) A/61/792.

62 ibid.

63 ibid.

64 UNGA 'Summary Record of the 48th Meeting' (10 January 2017) A/C.3/71/SR.48, para 75.

65 UNGA 'Letter dated 21 November 2016 from the Permanent Representative of the Syrian Arab Republic to the United Nations addressed to the Secretary-General' (23 November 2016) A/71/626-A/C.3/71/8.

66 'Summary Record of the 48th Meeting' (n 64) para 79.

67 ibid para 79.

on the Syrian view of Article 2(1) of the Charter.[68] The concerns of Syria that the legal opinion would create a precedent were more than justified when Saudi Arabia referred to the opinion to justify its position that the term 'Syrian regime was permitted' two years later.[69]

Finally, the authority of opinions of the Legal Counsel is equally implied when Member States, UN organs and officials favorably cite a legal opinion published in the *Juridical Yearbook* or as a UN document as a precedent in support of whatever legal or political argument they make. Examples include the Special Rapporteur on Extreme Poverty and Human Rights,[70] an independent panel on sexual abuse by UN peacekeeping forces,[71] the United States,[72] or a group of European States.[73]

4.2.3. Publicity of Opinions and Stare Decisis

The legal authority of the Legal Counsel is an unspoken premise of the practice to publish opinions of major importance. In the early years of the UN,[74] the General Assembly mandated the publication of some legal opinions

68 'Letter dated 21 November 2016 from the Permanent Representative of the Syrian Arab Republic to the United Nations addressed to the Secretary-General' (n 65).

69 UNGA 'Summary Record of the 50th Meeting' (16 January 2019) A/C.3/73/SR.50, para 9.

70 UNGA 'Report of the Special Rapporteur on Extreme Poverty and Human Rights' (26 August 2016) A/71/367, para 30.

71 UNGA 'Report of an Independent Review on Sexual Exploitation and Abuse by International Peacekeeping Forces in the Central African Republic' (23 June 2016) A/71/99, paras 273–276.

72 UNGA 'Letter dated 27 March 1997 from the Representative of the United States of America on the Committee on Relations with the Host Country addressed to the Chairman of the Committee' (31 March 1997) A/AC.154/309, Annex; UNGA 'Letter dated 20 September 2005 from the Permanent Representative of the United States of America to the United Nations addressed to the Chairman of the Committee' (22 September 2005) A/AC.154/363, Annex.

73 UNCAC 'Report of the Conference of the States Parties to the United Nations Convention against Corruption on its Fifth Session, held in Panama City from 25 to 29 November 2013' (29 January 2014) CAC/COSP/2013/18, para 17; 'Summary Record of the 19th Meeting' (n 55) para 5.

74 UNGA Res 1814 (XVII) (18 December 1962) A/RES/1814(XVII).

that are of general interest and continuing significance.[75] The idea behind the publication of legal opinions in the *Juridical Yearbook* is an attempt to broaden the availability of practice of international organizations.[76] But it implies an implicit recognition of their legal authority and a particular standing of the Legal Counsel to produce 'law'. This implication of the General Assembly's decision to publish select legal opinions in the *Juridical Yearbook* or as an official UN document becomes clear if it is compared to the European Union. Under EU law, legal opinions of the Commission's Legal Service are confidential and must be removed from any case file before the Court of Justice.[77]

Sometimes States employ the publication of a statement of the Legal Counsel as a separate United Nations document as a tool to create a precedent and bolster their legal position.[78] This occurred with regard to the long-standing disagreement between the United Nations and the U.S. on the refusal of visa under the Headquarters Agreement on grounds of national security.[79] During the 1988 deliberations of the Host Country Committee, the Legal Counsel made an oral statement concluding that the U.S. was under an unconditional obligation to facilitate the entry of Mr. Arafat to the headquarters district.[80]

75 UNGA 'Question of the Publication of United Nations Juridical Yearbook: Report of the Secretary-General' (21 July 1959) A/4151, para 55; UNGA 'United Nations Programme of Assistance in the Teaching, Study, Dissemination and Wider Appreciation of International Law: Report of the Secretary-General' (10 October 2013) A/68/521, para 42, fn 16.

76 Stephen Mathias, 'The Work of the International Law Commission on Identification of Customary International Law: A View from the Perspective of the Office of Legal Affairs' (2016) 15 Chinese JIL 17, 29.

77 Judgment of 31 January 2020 C-457/18 *Slovenia v Croatia* ECLI:EU:C:2020:65, paras 64–73; Order of 23 October 2002 C-445/00 *Austria v Council* ECLI:EU:C:2002:607, para 12; Gregorio G Clariana, 'The Work of the Legal Adviser of International Organisations, With Special Reference to the European Union' in CJ Piernas (ed), *The Legal Practice in International Law and European Community Law* (Brill 2006) 247.

78 See, eg, UNGA 'Summary Record of the 25th Meeting' (5 December 1978) A/C.4/33/SR.25, paras 76–78.

79 The dispute began in 1988 when the U.S. denied a visa request by the Chairman of the Palestinian Liberation Organization. See Elizabeth Zoller, 'The National Security of the United States as the Host State for the United Nations' (1989) 1 Pace YB Int'l L 127 and William Michael Reisman, 'The Arafat Visa Affair: Exceeding the Bounds of Host State Discretion' (1989) 83 AJIL 519.

80 UNGA 'Statement by the Legal Counsel concerning the Determination by the Secretary of State of the United States of America on the Visa Application of Mr. Yasser

The United Arab Emirates asked to issue the 1988 statement *in extenso* as a separate document.[81] The Legal Counsel's statement was accordingly 'circulated pursuant to a decision of the Sixth Committee at its 51th meeting, 29 November 1988'.[82] Subsequently, a General Assembly resolution '[e]ndors[ed] the opinion of the Legal Counsel of the United Nations',[83] a statement that is usually applied to advisory opinions of the ICJ.[84]

The 1988 statement became the basis for the Legal Counsel to reaffirm the position of the UN when the issue arose again in 2019.[85] The separate publication of the 2019 statement of the Legal Counsel was initiated by the Russian Federation, in part to make the case for triggering arbitration under section 21 of the Headquarters Agreement.[86] Since its publication as a separate document, a General Assembly resolution and a working paper by Syria have invoked the 2019 statement.[87]

The policy of making opinions publicly available—whether as a UN document or more systematically in the *Juridical Yearbook*—is presumably

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Arafat, Made at the 136th Meeting of the Committee on Relations with the Host Country, on 28 November 1988' (29 November 1988) A/C.6/43/7. The General Assembly relocated for part of its session to Geneva as the U.S continued to refuse a visa to the PLO Chairman after having been asked to reconsider its decision by the General Assembly. See UNGA Res 43/49 (2 December 1988) A/RES/43/49.

81 UNGA 'Summary Record of the 51st Meeting' (5 December 1988) A/C.6/43/SR.51, para 44.

82 'Statement by the Legal Counsel concerning the Determination by the Secretary of State of the United States of America on the Visa Application of Mr. Yasser Arafat, Made at the 136th Meeting of the Committee on Relations with the Host Country, on 28 November 1988' (n 80).

83 UNGA Res 43/48 (30 November 1988) A/RES/43/48.

84 cf James Sloan and Gleider I Hernández, 'The Role of the International Court of Justice in the Development of the Institutional Law of the United Nations' in Christian J Tams and James Sloan (eds), *The Development of International Law by the International Court of Justice* (Oxford University Press 2013) 219–220.

85 UNGA 'Statement by the United Nations Legal Counsel to the Committee on Relations with the Host Country at its 295th Meeting, on 15 October 2019' (16 October 2019) A/AC.154/415.

86 UNGA 'Report of the Committee on Relations with the Host Country' (29 October 2019) A/74/26, para 157.

87 UNGA Res 74/195 (30 December 2019) A/RES/74/195, paras 6, 8 and 15; UNGA 'Privileges and Immunities enjoyed by Representatives of the Members of the United Nations and Officials of the Organization that are necessary for the Independent Exercise of their Functions in Connection with the Organization: Working Paper submitted by the Syrian Arab Republic' (10 February 2020) A/AC.182/L.155, 5.

motivated by two considerations. Member States want to get a better grasp of the views of the Legal Counsel. Through this lens, the Legal Counsel inevitably becomes a producer of legal knowledge.[88] Secondly, there may be a desire for the greater predictability of the interpretations of the Legal Counsel and the Secretariat more generally. The decision to publish some opinions invariably forces the Legal Counsel to give weight to earlier interpretations, be it as a matter of formal *stare decisis* or of bureaucratic imperatives.

The last point appears to have succeeded to the effect that the Office of Legal Affairs appears to follow a unstated policy of *stare decisis*. A secretary of the Fifth Committee stated without reservation that an 'opinion already expressed by the Office of Legal Affairs remained valid unless and until it was contradicted by a subsequent opinion.'[89]

As a former Legal Counsel elaborated, the first task for the Office when asked to give legal advice is to research whether an earlier legal opinion on the same or similar issue exists. If a legal opinion on a similar or the same issue has been delivered in the past, there is a presumption that earlier legal advice should be upheld. This is a demand of consistency as Member States rely on the Legal Counsel's advice. But there may be circumstances that demand a different answer. In that case, the Legal Counsel must carefully explain why she or he has reached a different answer than what was previously established.[90]

And there are indeed many opinions that follow an earlier opinion, sometimes even explicitly extending an 'established precedent' because of similar circumstances.[91] The culture of precedent reflects a bureaucratic imperative. If the Legal Counsel upholds an earlier opinion, this will ensure a measure of protection if Member States criticize that opinion. This logic also explains

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88 cf Benedict Kingsbury, 'International Courts: Uneven Judicialisation in Global Order' in James Crawford and Martti Koskenniemi (eds), *The Cambridge Companion to International Law* (Cambridge University Press 2012) 219 (describing international courts as producers of legal knowledge).

89 UNGA 'Summary Record of the 53rd Meeting' (5 April 2001) A/C.5/55/SR.53, para 16.

90 Hans Corell, 'The Legality of Exploring and Exploiting Natural Resources in Western Sahara' in Neville Botha, Michèle Olivier, and Delarey van Tonder (eds), *Multilateralism and International Law with Western Sahara as a Case Study* (University of South Africa Press 2010) 233.

91 cf CLCS 'Letter dated 11 March 1998 from the Legal Counsel, the Under-Secretary-General of the United Nations for Legal Affairs, addressed to the Commission on the Limits of the Continental Shelf' (11 March 1998) CLCS/5, para 5.

why the General Assembly took the extraordinary step to overturn the Legal Counsel's opinion on the meaning of the term 'taking note': the influence of the Legal Counsel and the culture of precedent might have otherwise entrenched an interpretation of secondary law that the General Assembly deemed undesirable.[92] Indeed, the use of legal opinions as precedents is so routine that sometimes a subsidiary body in its formal request for legal advice refers to a prior opinion to assess how it applies to the disputed legal issue before it.[93]

4.3. Strategic Appeal to Opinions in Inter-Organ Disputes

Jurisdictional disputes between United Nations bodies are inevitable in its institutional life. Because of the diffused allocation of authority within the Organization and the lack of remedies comparable to domestic constitutional and administrative law, there is no clear way to resolve them. In negotiations and successive correspondence, an organ invokes its enabling statute while the other body responds by pointing to its legal mandate. In such situations, recourse is often made to the advice of the Legal Counsel to provide greater legitimacy to the claim of one organ. The point here is that the request for legal advice comes from an organ that perceives the action of another organ as encroaching on its legal mandate. Unlike in a situation of 'pure' Legal Counsel review discussed later,[94] the request for legal advice and the reviewed act do not stem from the same body.

4.3.1. Opposing or Ignoring Legal Advice

The strategic request of legal advice in inter-organ disputes does not always lead to a negotiated solution based on the legal advice. There are instances in which the other organ does not follow or simply ignores the advice of the Legal Counsel.

The first example concerns the remuneration of members of the International Narcotics Control Board (INCB). Under the 1961 Single Convention

92 See Section 4.2.1 in this Chapter.

93 See UNCAC 'Legal Opinion from the Office of Legal Affairs' (26 August 2010) CAC/COSP/IRG/2010/9, para 7.

94 See Section 4.4 in this Chapter.

on Narcotic Drugs, INCB members shall receive an 'adequate remuneration as determined by the General Assembly'.[95] In 2002, the General Assembly reduced the annual pay from 3,000 to 1 U.S. dollar.[96] For the INCB, this decision was contrary to the 1961 Single Convention,[97] and it suggested to the Economic and Social Council to request an opinion from the Office of Legal Affairs.[98] The ECOSOC President was sympathetic to the situation of INCB, writing that 'a legal opinion of the Office of Legal Affairs ... could be the eventual basis for, in effect, asking the General Assembly to amend its decision'.[99] In response to the request by the Economic and Social Council, the Legal Counsel opined that the General Assembly's decision 'may be viewed as not corresponding to the legislative intent of the relevant provision of the 1961 Convention.'[100] Although the opinion mentioned other considerations that might lead to a different conclusion, the INCB wrote to the General Assembly that the opinion 'states clearly' that the remuneration be adequate.[101] Despite these arguments, the remuneration of INCB members is still 1 U.S. dollar per year,[102] and there is no information publicly available that indicates the reasons for the General Assembly's opposition to the legal opinion or even the refusal to consider the issue.

A second case of outright opposition to an Office opinion arose in the context of a disagreement between the Office of Internal Oversight Services

95 Single Convention on Narcotic Drugs (adopted 30 March 1961, entered into force 13 December 1964) 520 UNTS 204, as amended by Protocol amending the Single Convention on Narcotic Drugs, 1961 (adopted 25 March 1972, entered into force 8 August 1975) 976 UNTS 3 (Single Convention) Article 10(6).

96 UNGA 'Letter dated 29 March 2006 from the President of the General Assembly addressed to the Chairman of the Fifth Committee' (6 April 2006) A/C.5/60/29, Annex; UNGA Res 35/218 (17 December 1980) A/RES/35/218, para 1 (setting the annual pay at 3,000 U.S. dollars).

97 'Letter dated 29 March 2006 from the President of the General Assembly addressed to the Chairman of the Fifth Committee' (n 96) Enclosure.

98 ECOSOC 'Honorariums Payable to Members of the International Narcotics Control Board: Note by the Secretariat' (16 July 2003) E/2003/96, Annex I.

99 ibid Annex II.

100 'Letter dated 29 March 2006 from the President of the General Assembly addressed to the Chairman of the Fifth Committee' (n 96) Attachment.

101 ibid Enclosure and Attachment.

102 ECOSOC 'Election of one Member of the International Narcotics Control Board from among Candidates Nominated by Governments: Note by the Secretary-General' (17 November 2021) E/2022/9/Add.2, Annex II, para 5.

(OIOS) and the UN Compensation Commission (UNCC).[103] Created by the Security Council, the UNCC has been described as a political organ that 'performs an essentially fact-finding function of ...resolving disputed claims', one that may in some respect involve a 'quasi-judicial function'.[104] OIOS was created by the General Assembly as an operationally independent office under the authority of the Secretary-General to conduct internal audits to review the use of financial resources and to make appropriate recommendations.[105] As framed in an OIOS report, the issue was whether OIOS had the authority to make recommendations to the Commission concerning the applicable law, the application of that law to claims, the sufficiency of evidence and the organization of the UNCC.[106] Initially, OIOS had only audited the functioning and finances of the UNCC but not claims awards.[107] Beginning in 2001, OIOS recommended changes in claims processing that resulted in overcompensation and were, according to OIOS, due to the inconsistent application of the UNCC's own methodology. The UNCC rejected these recommendations,[108] mainly because there were factors other than 'accountancy aspects' that determined the exact amount due to claimants.[109]

In 2002, the UNCC requested an opinion of the Office of Legal Affairs on the appropriate scope of OIOS audits of the processing and resolution of

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103 The episode is described in: US Government Accountability Office, *United Nations: Lessons Learned from Oil for Food Program Indicate the Need to Strengthen UN Internal Controls and Oversight Activities* (GAO-06-330, 2006) 34–5.

104 See UNSC 'Report of the Secretary-General pursuant to Paragraph 19 of Security Council Resolution 687 (1991)' (2 May 1991) S/22559, para 20; Rosalyn Higgins and others, *Oppenheim's International Law: United Nations* (Oxford University Press 2017) 1254–1278; Thomas A Mensah, 'United Nations Compensation Commission (UNCC)' in Rüdiger Wolfrum (ed), *MPEPIL* (online edn, Oxford University Press 2011).

105 UNGA Res 48/218 B (12 August 1994) A/RES/48/218 B, paras 5(a), (c)(ii) and c(v); Schermers and Blokker (n 20) 741–742.

106 UNGA 'Report of the Secretary-General on the Activities of the Office of Internal Oversight Services' (9 September 2005) A/60/346, para 73.

107 Ronald J Bettauer, 'Policy Issues Surrounding the Creation and Operations of the UNCC' in Timothy J Feighery, Christopher S Gibson, and Trevor M Rajah (eds), *War Reparations and the UN Compensation Commission: Designing Compensation after Conflict* (Oxford University Press 2015) 21.

108 UNGA 'Report of the Office of Internal Oversight Services' (4 October 2002) A/57/451, paras 37–38.

109 UNGA 'Report of the Office of Internal Oversight Services' (11 September 2003) A/58/364, para 37.

claims. The ensuing opinion concluded that 'OIOS functions do not extend to the examination, review and appraisal of decisions that are the results of a legal process. Likewise, they clearly do not include the examination, review and appraisal of decision-making that takes place in the course and as an integral part of such a process'.[110] The opinion concluded that OIOS may only audit the 'computation by panels of the amounts of compensation which they recommend to be paid', but that 'it would not be proper for OIOS to review those aspects of the work of panels which are constituent elements of a legal process'.[111] OIOS simply stated that it would continue its audits 'in order to protect the interests of the Organization',[112] and to improve the quality of the claims process.[113]

At the heart of the dispute was a clash between a juridical and an auditing paradigm, and the somewhat unique status of the Commission.[114] In 2003, both organs concluded a memorandum of understanding.[115] Pursuant to that memorandum, OIOS was required to take into account the Office opinion (which was annexed to the memorandum) in its audit of claims processing.[116] Despite the memorandum, OIOS continued to its oversight, maintaining that

110 'Report of the Secretary-General on the Activities of the Office of Internal Oversight Services' (n 106) para 73(a).

111 Quoted in 'Report of the Office of Internal Oversight Services' (n 109) para 38. The opinion was not published as a UN document. Excerpts are reproduced in Bettauer (n 107) 22. It can be fully accessed at: United Nations Archives. Reference code S-1095-0021-04-00013. Letter from Hans Corell, Under-Secretary-General for Legal Affairs, to Rolf G. Knuttson, Executive Director, United Nations Compensation Commission (27 November 2002) <https://search.archives.un.org/s-1095-0021-04-00013> accessed 7 July 2024.

112 'Report of the Office of Internal Oversight Services' (n 109) para 38.

113 UNGA 'Report of the Office of Internal Oversight Services' (27 October 2004) A/59/359, para 56.

114 'Report of the Secretary-General on the Activities of the Office of Internal Oversight Services' (n 106) para 74. In his opinion, the Legal Counsel cited the Commission's Provisional Rules for Claims Procedure to demonstrate that some aspects of the Commission's work constituted a legal process. See eg UNCC 'Provisional Rules for Claims Procedure' (1992) S/AC.26/1992/INF.1, Article 31 (applicable law) and Article 35(1) (rules of evidence).

115 UNSC 'Letter dated 27 June 2003 from the President of the Governing Council of the United Nations Compensation Commission addressed to the President of the Security Council' (24 July 2003) S/2003/755, 4.

116 'Report of the Secretary-General on the Activities of the Office of Internal Oversight Services' (n 106) paras 74(a) and 76.

General Assembly resolutions required an audit of the entire claims process and that the Commission's position ran against these resolutions.[117] It seems that by 2008 both OIOS and the UNCC came to a tacit understanding that OIOS audits were limited to accounting matters.[118]

These two cases are instructive because they show that UN bodies do not always defer to the Legal Counsel's advice. One may only speculate about the reasons. The obvious similarity is that both cases concerned budgetary and financial matters, although there are opinions with financial implications that were ultimately followed by the organ concerned.[119] Another is that the requesting body did so to limit an alleged intrusion on its mandate by another, more powerful organ (the General Assembly, a principal organ, in the case of the INCB, and the OIOS, a centerpiece of the UN reform agenda in the 1990s in the case of the UNCC).[120] Unlike in the many cases that will be surveyed later,[121] neither the General Assembly nor OIOS requested legal advice to review the legality of its own action.

But non-compliance is not the only perspective here. Rather the two episodes show that an organ who feels that it actions are second-guessed or intruded on by another organ regards the advice of the Legal Counsel as a useful tool that may help bolster its position with a view to eventually change the behavior of the other organ. Even if the desired change does not always happen (as in the INCB case) or the reasons for change may remain somewhat unclear (as in the UNCC case), the strategic use of legal opinions in inter-organ disputes attests to the Legal Counsel's influence in institutional matters.

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117 UNGA 'Report of the Office of Internal Oversight Services: Part One' (15 August 2006) A/61/264 (Part I), para 92.

118 Bettauer (n 107) 25; UNGA 'Activities of the Office of Internal Oversight Services for the Period from 1 July 2007 to 30 June 2008' (18 August 2008) A/63/302 (Part I), para 68; UNSC 'Letter dated 10 April 2008 from the President of the Governing Council of the United Nations Compensation Commission to the President of the Security Council' (22 April 2008) S/2008/265, 3.

119 See Section 4.3.2 in this Chapter on the emoluments of ICJ judges.

120 cf Alexandru Grigorescu, 'International Organizations and their Bureaucratic Oversight Mechanisms: The Democratic Deficit, Accountability and Transparency' in Bob Reinalda (ed), *Routledge Handbook of International Organization* (Routledge 2013) 182; Joachim Müller, *Reforming the United Nations: A Chronology* (Brill Nijhoff 2016) 27.

121 See Section 4.4 in this Chapter.

4.3.2. Eventual Explicit or Implied Compliance with Legal Advice

The strategic use of legal opinions in inter-organ disputes is even more obvious in situations where a review by the Legal Counsel formed the basis for an organ to eventually adjust its challenged act. In 2007, General Assembly resolution 61/262 set, for newly elected judges of the International Court of Justice, a salary lower than that for sitting judges.[122] Before the adoption of that resolution, the President of the Court had expressed the Court's concerns that the proposed salary scheme would create inequality among judges.[123] The Registrar had sent a similar letter to the Secretariat's Office of Human Resources Management.[124] The Office of Human Resources Management sought the views of the Office of Legal Affairs to reply to the letter of the Registrar.[125] In his memorandum the Legal Counsel found that the concerns of the Court were 'justified' as the salary reform undermined the principle of equality of members of the Court as reflected in Article 31(6) of the Statute. The opinion noted that it was 'very difficult to reconcile' the principle of equality of members and the prohibition of lowering a sitting judge's salary (Article 31(5) of the Statute) in view of the staggered election of judges. But the Legal Counsel stopped short at calling the salary reform outright illegal, instead merely concluding that the principle of equality of treatment should be duly taken into account.[126]

The opinion had a sizable impact on Member States. The Advisory Committee on Administrative and Budgetary Questions (ACABQ) noted that the Legal Counsel had 'largely concurred' with the Court's concerns regarding resolution 61/262. Notably, the ACABQ could not 'but note that this interpretation could affect the exercise of the General Assembly's mandate under Article 32 of the Statute of the Court'.[127] Accordingly, the ACABQ laid out

122 UNGA Res 61/262 (3 May 2007) A/RES/61/262, paras 7–8. For further details, see Higgins and others (n 104) 1199–1203.

123 UNGA 'Conditions of Service and Compensation for Officials other than Secretariat Officials: Members of the International Court of Justice and Judges and Ad Litem Judges of the International Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda' (8 November 2007) A/62/538, para 1.

124 ibid Annex I, para 1.

125 ibid Annex I, para 6.

126 ibid Annex I, paras 12–14.

127 UNGA 'Thirty-seventh Report of the Advisory Committee on Administrative and Budgetary Questions on the Programme Budget for the Biennium 2008-2009' (12 March 2008) A/62/7/Add.36, para 13.

two proposals from the Secretary-General to remedy the concerns.[128] In the debates of the Fifth Committee, many delegations agreed that resolution 61/262 undermined the principle of judicial equality, with some explicitly pointing to the Legal Counsel's advice.[129] Ultimately, the General Assembly decided in 2008 to set the annual pay of judges equally.[130] In recounting this dispute, the President of the Court referred to the Legal Counsel's advice and stated that the 'interposition of the Secretary-General and his staff turned out to be decisive', presumably referring to the Legal Counsel.[131]

A second example was a disagreement between the UNCTAD Secretariat and a subsidiary body of UNCTAD that related to the respective rights in the budgetary process. In that case, the Working Party on the Medium-term Plan and the Programme Budget (Working Party) requested detailed information on financial and resource allocation from the UNCTAD Secretariat. The Working Party was a subsidiary body of the Trade and Development Board (Board) which is composed of States. The Board, in turn, is the permanent organ of UNCTAD that carries out the functions of UNCTAD when the Conference is not in session.[132] The UNCTAD Secretariat, on the other hand, is administratively part of the UN Secretariat.[133]

Although it was common ground between the UNCTAD Secretariat and the Working Party that the Secretary-General of UNCTAD must forward the program budget, the UNCTAD Secretariat refused to provide any detailed financial information.[134] According to the Working Party, such detailed financial tables and information were necessary to properly review the program

128 'Thirty-seventh Report of the Advisory Committee on Administrative and Budgetary Questions on the Programme Budget for the Biennium 2008-2009' (n 127) paras 14–15; 'Conditions of Service and Compensation for Officials other than Secretariat Officials: Members of the International Court of Justice and Judges and Ad Litem Judges of the International Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda' (n 123) paras 73–75.

129 UNGA 'Summary Record of the 32nd Meeting' (13 May 2008) A/C.5/62/SR.32, paras 38 (Uruguay) and 54 (Peru).

130 UNGA Decision 62/547 (3 April 2008) A/62/49 (Vol III), para (b).

131 Abdulqawi A Yusuf, 'The Governance of the International Court of Justice' (*ICJ*, 20 September 2019) <https://www.icj-cij.org/en/statements-by-the-president> accessed 7 July 2024, para 40.

132 UNCTAD 'Legal Opinion by the Under-Secretary-General for Legal Affairs, the Legal Counsel' (24 June 1993) TD/B/WP/INF.27, Annex I.

133 UNGA Res 1995 (XIX) (30 December 1964) A/RES/1995(XIX), para 26.

134 cf 'Legal Opinion by the Under-Secretary-General for Legal Affairs, the Legal Counsel' (n 132) Annex I, 2.

budget of UNCTAD.[135] It was in those circumstances that the UNCTAD Secretariat and the Working Party referred their disagreement to the Legal Counsel for a legal opinion.[136]

The UNCTAD Secretariat invoked instructions of the UN Secretary-General for the biennial program budget of 1994-1995. Those instructions stated, inter alia, that '[s]pecialized intergovernmental bodies do not review the programme budget proposals of the Secretary-General', and that such bodies may only be given a copy of the program of work.[137] The Working Party, for its part, found support for its position in a rule of the Programming Regulations and Rules, which mandated the provision of 'further information and detail, if required by the specialized intergovernmental bodies'.[138] At the core were conflicting mandates by the General Assembly, and the uncertain status of the Working Party within UNCTAD's legal framework and the general budgetary process.

As noted by the Secretary-General of UNCTAD, '[t]he lack of access by the Working Party to the financial tables' had been a long-standing issue.[139] Stressing the need for a satisfactory solution, the UNCTAD Secretary-General mentioned that '[o]n the initiative of the Working Party, the matter had been referred to Headquarters for a legal ruling'.[140] Once the legal ruling was available, he would organize the necessary consultations to review the role and the mandate of the Working Party.[141]

The opinion of the Legal Counsel is quite complex, and deals with a lot of little-known rules relating to the UN budgetary process. A central issue was the interpretation of General Assembly resolution 45/248. In that resolution, the General Assembly reaffirmed the role of the Fifth Committee and the Advisory Committee on Administrative and Budgetary Questions as the main policy organs in budgetary matters. Crucially, paragraph 3 of resolution 45/248 voiced the General Assembly's concern 'at the tendency of its [i.e. the

135 cf ibid Annex I, 2.

136 UNCTAD 'Report of the Trade and Development Board on its Third Executive Session' (27 April 1993) TD/B/EX(3)/3, para 57.

137 cf 'Legal Opinion by the Under-Secretary-General for Legal Affairs, the Legal Counsel' (n 132) Annex I, 2.

138 ibid Annex I, 3.

139 'Report of the Trade and Development Board on its Third Executive Session' (n 136) para 57.

140 ibid para 57.

141 ibid para 57.

General Assembly's] substantive Committees and other intergovernmental bodies to involve themselves in administrative and budgetary matters'.[142]

According to the Legal Counsel, it must be presumed that the Working Party was established after sufficient consultation with the relevant bodies, including the Fifth Committee and the Advisory Committee,[143] as is required by paragraph 23 of General Assembly resolution 1995 (XIX), the resolution which established UNCTAD.[144] Therefore, the Legal Counsel reasoned, it is reasonable to assume that the Board and the Working Party do not duplicate the work of other UN organs when reviewing budget proposals.[145] Since the definition of policy priorities inevitably involves choices over financial resources, the Working Party and the Board—as the organs charged with oversight over the UNCTAD program—must have a say in the allocation of resources.[146] This aspect, according to the opinion, distinguishes the UNCTAD Board and the Working Party from the 'substantive committees' (such as the Second Committee) or the 'specialized intergovernmental bodies' (such as the International Law Commission) referred to in General Assembly resolution 45/248.[147] For these reasons, the Legal Counsel concluded that the Working Party of the UNCTAD Board must receive the 'same information' as main budgetary bodies of the General Assembly (especially the ACABQ) to effectively discharge its functions. For the Legal Counsel, this included 'details of the financial and resource distribution' for the implementation of UNCTAD policies.[148]

The Legal Counsel's opinion hinged on the interpretation of two General Assembly resolutions. First, General Assembly resolution 45/248 had removed substantive committees and specialized intergovernmental bodies from the budgetary process and had affirmed the preeminent role of the Fifth Committee and the Advisory Committee. Secondly, relying on the General

142 UNGA Res 45/248 B (21 December 1990) A/RES/45/248, section VI, para 3.

143 'Legal Opinion by the Under-Secretary-General for Legal Affairs, the Legal Counsel' (n 132) Annex I.

144 Res 1995 (XIX) (n 133) para 23 ('The terms of reference of ... any other subsidiary established by the Board shall be adopted after consultation with the appropriate organs of the United Nations and shall take fully into account the desirability of avoiding duplication and overlapping responsibilities').

145 'Legal Opinion by the Under-Secretary-General for Legal Affairs, the Legal Counsel' (n 132) Annex I.

146 ibid Annex I.

147 ibid Annex I.

148 ibid.

Assembly resolution establishing UNCTAD, the Legal Counsel reasoned that the creation of the Working Party had not resulted in a duplication of the budgetary responsibilities of the Fifth Committee. With this in mind, the Legal Counsel ruled that the Working Party was not a specialized intergovernmental body within the meaning of paragraph 3 of resolution 45/248, and accordingly entitled to the necessary financial information. In essence, the Legal Counsel resolved a conflict between General Assembly resolutions 45/248 and 1995 (XIX).

The Controller of the UN transmitted the opinion and his comments on said opinion to the UNCTAD Secretariat. Although the Controller did not fully share the opinion of the Legal Counsel, the Controller did not 'intend to challenge it or request another review.'[149] Accordingly, he recommended that the UNCTAD Secretariat provide the Working Party with detailed information on financial and resource distribution.[150]

The opinion was subsequently invoked in two documents. Thus, the draft terms of reference of the Working Party cited the legal opinion in its preamble and would have required the UNCTAD Secretary-General to provide the Working Party with financial information.[151] The Board did not, however, adopt those draft terms of reference, but this was due to a disagreement over a different issue.[152] But it did reaffirm that 'the Working Party would receive the same information provided to the CPC and ACABQ, as stated in the Legal Opinion of 24 May 1994.'[153]

4.4. Legal Review of Expert and Technical Bodies

4.4.1. Preliminary Considerations

Treatises on international organizations law are very much aware that UN organs refer legal questions to the the Office of Legal Affairs for guidance.[154]

149 ibid Annex II.

150 ibid Annex II.

151 UNCTAD 'Draft terms of reference of the Working Party on the Medium-term Plan and the Programme Budget' (11 July 1994) TD/B/EX(6)/L.1, para 2(b)(i).

152 UNCTAD 'Report of the Trade and Development Board on its sixth executive session' (12 October 1994) TD/B/EX(6)/2, paras 37–52.

153 ibid para 36.

154 Alvarez, *International Organizations as Law-makers* (n 8) 437-4-38; Schermers and Blokker (n 20) 893–894; CF Amerasinghe, *Principles of the Institutional Law of*

With this comes the idea that the Legal Counsel may review decisions of UN organs,[155] or even prevent patently illegal proposals from appearing on the General Assembly's agenda altogether.[156] As a general proposition, this seems to be too broad.

As the opposition to some opinions of the Legal Counsel in inter-organ disputes indicates, the Legal Counsel's standing vis-à-vis the principal political organs of the UN is somewhat more circumscribed. Although the committees of the General Assembly at times submit requests to the Legal Counsel, the General Assembly has once overruled or simply ignored an opinion of the Legal Counsel. Even from subsidiary bodies such as the OIOS there was protracted resistance.[157] The Security Council is generally hesitant to seek the legal advice of an international civil servant, especially on controversial political issues, and members tend to exclusively rely on their own legal advisers.[158] And there are plenty of highly political issues such as the expulsion or suspension of a Member State where the Legal Counsel's advice was ignored. The General Assembly's rejection of South Africa's credentials to condemn apartheid against the advice of the UN Legal Counsel comes to

International Organizations (2nd edn, Cambridge University Press 2005) 25–26; Finn Seyersted, *Common Law of International Organizations* (Martinus Nijhoff 2008) 253.

155 cf Rutsel Silvestre J Martha, 'Mandate Issues in the Activities of the International Fund for Agricultural Development (IFAD)' (2009) 6 IOLR 447, 460 (analyzing various actions by IFAD that were 'cleared by the Office of the General Counsel as being within the mandate of the organization'); Benedict Kingsbury and Lorenzo Casini, 'Global Administrative Law Dimensions of International Organizations Law' (2009) 6 IOLR 319, 337.

156 Higgins and others (n 104) 1200 (stating that it was astonishing that the 2007 General Assembly resolution lowering the salaries of ICJ judges 'had not set alarm bells ringing in the UN Office of Legal Affairs').

157 See Sections 4.2.1 and 4.3 in this Chapter.

158 Hans Corell, 'Personal Reflections on the Role of the Legal Adviser: Between Law and Politics, Authority and Influence' in Andraž Zidar and Jean-Pierre Gauci (eds), *The Role of Legal Advisers in International Law* (Brill Nijhoff 2017) 197–198; Corell, 'The Legality of Exploring and Exploiting Natural Resources in Western Sahara' (n 90) 233; Ralph Zacklin, *The United Nations Secretariat and the Use of Force in a Unipolar World: Power v. Principle* (Cambridge University Press 2010) 5. See also the statement of the UN Legal Counsel before the ILC: 'Provisional Summary Record of the 3371st Meeting' (n 14) 8 (stating that the Security Council, especially the permanent members, 'would probably not wish to give the Legal Counsel any formal role in its work' and that 'all members of the Security Council had their own legal advisers').

mind.[159] Indeed, the Legal Counsel has made it explicit that the 'Secretariat had no authority to review the legality of the actions of the other principal organs',[160] something the Legal Counsel has not said with respect to subsidiary organs.

In practice, the Legal Counsel's interaction with the principal organs extends to specific and limited circumstances. First, the Legal Counsel may advise on procedural questions.[161] Secondly, the Office is a central interpreter of the General Convention.[162] Thirdly, as the institutional memory of the United Nations, the Legal Counsel may restate the established practice of the political organs.[163] Lastly, the Legal Counsel may opine on jurisdictional

159 Alison Duxbury, *The Participation of States in International Organisations: The Role of Human Rights and Democracy* (Cambridge University Press 2011) 116–117; Simon Chesterman, Ian Johnstone, and David M Malone, *Law and Practice of the United Nations: Documents and Commentary* (2nd edn, Oxford University Press 2016) 228–231. For the opinion of the Legal Counsel see UNGA 'Scope of "Credentials" in Rule 27 of the Rules of Procedure of the General Assembly: Statement by the Legal Counsel Submitted to the President of the General Assembly at its Request' (11 November 1970) A/8160.

160 'Provisional Summary Record of the 3371st Meeting' (n 14) 6.

161 See UNGA Res 60/286 (9 October 2006) A/RES/60/286, para 24 (requesting the Office of Legal Affairs to make precedents on the procedural law of intergovernmental organs public). As per that mandate, a document ('Comments on Some Procedural Questions') is available on the website of the Office of Legal Affairs. For examples of legal opinions interpreting the General Assembly's Rules of Procedure, see Robbie Sabel, *Procedure at International Conferences: A Study of the Rules of Procedure at the UN and at Inter-governmental Conferences* (2nd edn, Cambridge University Press 2006) 5 (considering that States usually follow procedural precedents if accompanied by an opinion of a legal adviser), 45 (interpretation of Rule 74), 92 (interpretation of Rule 68), 122 (interpretation of Rule 73) and 203 (interpretation of Rule 130). See also UNGA 'Verbatim Record of the 66th Plenary Meeting' (21 December 2016) A/71/PV.66, 20–22 (General Assembly President relying on Legal Counsel's advice for procedural ruling).

162 See Section 4.2.3 in this Chapter. See Anthony J Miller, 'United Nations Experts on Mission and their Privileges and Immunities' (2007) 4 IOLR 11, 12–13; Anthony J Miller, 'Privileges and Immunities of United Nations Officials' (2007) 4 IOLR 169, 172.

163 *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) [2004] ICJ Rep 136, 149 (citing the opinion of the Legal Counsel on Article 12 of the Charter as evidence of an established practice); 'Verbatim Record of the 66th Plenary Meeting' (n 161) 28–29 (General Assembly President citing interpretation of the Legal Counsel of Article 12 as established practice).

conflicts between the General Assembly and its main committees.[164] The political organs of the UN rarely request the Legal Counsel to engage in constitutional review and highly political matters. There is nothing particular about the fact that Legal Counsel review, much like advisory proceedings and even contentious cases, must be triggered by an organ or party.[165]

Consider also the following case. In 1974, the Trusteeship Council requested a 'formal and official opinion from the Legal Counsel' on the question whether the General Assembly could terminate a trusteeship agreement in anticipation of independence to avoid an undue delay. The Legal Counsel noted that the Charter contained no specific rules for terminating trusteeship agreements and that an anticipatory resolution would be in conformity with UN practice. Despite this limited analysis, the opinion concluded that the proposal was in 'conformity with the practice of the United Nations, the principles of the Charter and international law in general'. The Trusteeship Council based its recommendation on that opinion. See UNGA 'Report of the Trusteeship Council: 23 June 1973 – 23 October 1974' (1975) A/9604, paras 216–219, 222.

164 In 1978, Cuba proposed a hearing of a Puerto Rican independence party before the Fourth Committee. See UNGA 'Letter dated 21 November 1978 from the Permanent Representative of Cuba to the United Nations addressed to the Chairman of the 4th Committee' (21 November 1978) A/C.4/33/14. The U.S. objected as Puerto Rico was not listed as a non-self-governing territory. The Fourth Committee therefore lacked a basis to consider the Puerto Rican question. See UNGA 'Summary Record of the 24th Meeting' (27 November 1978) A/C.4/33/SR.24, para 2. Norway considered that a sounder basis was necessary for the decision and proposed to request a legal opinion of the Legal Counsel and to postpone the debate until the Committee had heard the Legal Counsel. See 'Summary Record of the 25th Meeting' (n 78) paras 52, 56. The Committee subsequently voted, with a substantial minority opposing, to secure the advice of the Office of Legal Affairs. See UNGA 'Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples: Report of the Fourth Committee' (9 December 1978) A/33/460, para 15.
The Legal Counsel, agreeing with the U.S. argument in substance, ruled that 'it would not be within the competence of the Fourth Committee to consider or grant the request' for a hearing of the Puerto Rican petitioners. See 'Summary Record of the 25th Meeting' (n 78) para 75; UNGA 'Statement by the Legal Counsel of the United Nations at the 25th Meeting of the 4th Committee on 24 November 1978' (28 November 1978) A/C.4/33/15, para 8. The Committee acted in concurrence with the Legal Counsel's opinion. See UNGA 'Summary Record of the 26th Meeting' (27 November 1978) A/C.4/33/SR.26, paras 32 and 40.

165 Dan Ciobanu, *Preliminary Objections Related to the Jurisdiction of the United Nations Political Organs* (Martinus Nijhoff 1975) 163 (arguing that the procedure of consulting an ad hoc committee of jurists envisaged at the San Francisco Conference is not 'mandatory for the political organs').

While political considerations explain the hesitation of the General Assembly, and especially the Security Council, to submit opinion requests more frequently, the present state of international organizations law equally explains why the Legal Counsel cannot meaningfully review the actions of the principal organs. Functionalism imposes few, if any, constraints on the United Nations and its principal organs in asserting new powers.[166] In *Certain Expenses*, the International Court of Justice fashioned a presumption against *ultra vires* action of the United Nations.[167] Contrary to this, the enabling resolutions of subsidiary bodies and the principle of respecting institutional divisions of competence circumscribe the mandate of these bodies much more carefully.[168]

A pertinent example is the United Nations University which wanted to introduce a master's program. Upon request of the United Nations University, the Office of Legal Affairs ruled that the University lacked the legal authority to offer graduate degrees, noting the lack of an express power to this effect under the UNU Charter.[169] It recommended that the UNU Council should ask the General Assembly to amend the UNU Charter.[170] The General Assembly subsequently amended the UNU Charter to authorize the UNU to grant master's degrees and doctorates as well as to charge tuition fees.[171] The opinion did not clear the proposed master's program because of lack of an express power to this effect. Yet, it said nothing about the power of the General Assembly to grant such a power under the UN Charter. This again suggests that the Legal Counsel plays a major role in ensuring the boundaries of the secondary law of the Organization and thus with regard to subsidiary bodies, but that the same does not hold true for the constitutional review of the principal organs.

Despite this limited review function, it does not mean that academic writers are generally wrong. Instead, this section argues that the Legal Counsel's

166 Jan Klabbers, 'The EJIL Foreword: The Transformation of International Organizations Law' (2015) 26 EJIL 9, 31–32.

167 *Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter)* (n 5) 168.

168 Higgins and others (n 104) 329–332.

169 OLA 'Note regarding the United Nations University Accreditation Process' [2009] UNJYB 403, 404–406. For the Charter of the United Nations University: UNGA Res 2951 (XXVII) (11 December 1972) A/RES/2951(XXVII); UNGA 'Charter of the United Nations University' (1973) A/9149/Add.2.

170 'Note regarding the United Nations University Accreditation Process' (n 169) 406.

171 UNGA Res 64/225 (2009) A/RES/64/225, para 1.

review function is generally more developed with respect to subsidiary organs of a technical and expert nature that produce normative acts—whether binding, non-binding or something else. There is already some evidence to this effect. As a UN report evaluating the Office of Legal Affairs noted, '[s]takeholders, especially those familiar with technical and expert bodies, frequently mentioned the neutrality of the Office [of Legal Affairs] as an asset.'[172]

This naturally evokes a distinction between political and technical questions, and the idea that technical questions are beyond politics.[173] This is not implied by labeling some bodies as 'technical and expert'. Decisions of the Commission on Narcotic Drugs or the Continental Shelf Commission are of course eminently political. The distinction is, first, analytical. It simply recognizes that States have different conceptions in mind when designing a specialized body such as the Continental Shelf Commission as compared to the Security Council. Secondly, to say that the Legal Counsel exercises a review function with regard to expert and technical bodies (usually constituted as subsidiary organs or treaty bodies) is an empirical observation that the scope *ratione personae* of Legal Counsel review is uneven. Legal Counsel review is more developed over some bodies than others: the Continental Shelf Commission established by UNCLOS is more amenable to Legal Counsel review than the General Assembly or the Security Council. But it also implies that the standard of Legal Counsel review is not uniform: it is less deferential to subsidiary expert and technical bodies than it is towards political bodies (if it happens at all). Finally, the distinction between subsidiary technical bodies and political bodies has normative implications for public law approaches as theoretical frameworks to explain the normative workings of international organizations and as an alternative to functionalism.[174] Whatever their particularities, public law approaches all look for an independent review

172 ECOSOC 'Evaluation of the Office of Legal Affairs: Report of the Office of Internal Oversight Services' (25 March 2019) E/AC.51/2019/9, para 25.

173 cf Jan Klabbers, *An Introduction to International Organizations Law* (4th edn, Cambridge University Press 2022) 25–26.

174 See Section 1.2 of Chapter 1 on contending theoretical approaches to international organizations law.

mechanism.[175] Legal Counsel review may be a means to operationalize such frameworks and not a mere rubber-stamp of administrative decisions.[176]

Legal Counsel review of expert and technical bodies is illustrated by a survey of three legal regimes, in particular by analyzing the interaction of legal advice and decision-makers in context. They concern food regulation (UN-ECE Working Party on Agricultural Quality Standards), the determination of the outer limits of the continental shelf (Continental Shelf Commission), and the addition of new substances subject to international control in international drug law (Commission on Narcotic Drugs). Bearing in mind that terminology lacks coherence,[177] all are subsidiary organs established by resolution or by treaty. These statutory bases tend to be more circumscribed than the competence of, say, the General Assembly or the Security Council. With the exception of the UNECE Working Party, in each legal regime a body composed of States and an advisory body composed of experts serving in their individual capacity must take decisions collectively. This combination

175 See Armin von Bogdandy, Philipp Dann, and Matthias Goldmann, 'Developing the Publicness of Public International Law: Towards a Legal Framework for Global Governance Activities' in Armin von Bogdandy and others (eds), *The Exercise of Public Authority by International Institutions: Advancing International Institutional Law* (Springer 2010) 10; Kingsbury and Casini (n 155) 337; Benedict Kingsbury, Nico Krisch, and Richard B Stewart, 'The Emergence of Global Administrative Law' (2005) 68 Law and Contemporary Problems 15; Jan Klabbers, 'Constitutionalism Lite' (2004) 1 IOLR 31, 56; Clemens A Feinäugle, 'The Rule of Law and its Application to the United Nations' in Christopher May and Adam Winchester (eds), *Handbook on the Rule of Law* (Elgar 2018) 212.

176 cf Philip Alston, 'Book Review: B.G. Ramcharan, The Principle of Legality in International Human Rights Institutions' (1997) 8 EJIL 686, 687–688 (who claims that the Office of Legal Affairs pushes legal boundaries by self-referential reasoning).

177 A 'subsidiary organ' is a body established by and operating under the authority of a principal organ of the United Nations with a certain degree of independence from its principal. See Danesh Sarooshi, 'The Legal Framework Governing United Nations Subsidiary Organs' (1996) 67 BYBIL 413, 416. 'Treaty bodies' or 'treaty organs' are established by treaty but in practice are closely linked to the United Nations through the provision of secretariat services and because they were created to further certain objectives of the United Nations. See Volker Röben, 'Environmental Treaty Bodies' in Rüdiger Wolfrum (ed), *MPEPIL* (online edn, Oxford University Press 2015) paras 8–26; 'Letter dated 11 March 1998 from the Legal Counsel, the Under-Secretary-General of the United Nations for Legal Affairs, addressed to the Commission on the Limits of the Continental Shelf' (n 91) para 2. Finally, there are hybrid bodies such as the Commission on Narcotic Drugs, a subsidiary organ established by ECOSOC, that is entrusted with powers under international drug conventions.

of government and expert decision-making complicates the legal relationship and, importantly, renders legal disputes more likely. But the common feature is that they are bodies with a specialized mandate that exercise public authority.

Although this section examines the advisory practice of the Legal Counsel on the institutional law of technical bodies,[178] it is by no means limited to that. Frequently the advice of the Legal Counsel is sought on the law of the treaties. The ILC's draft conclusions on subsequent practice and agreements and the Special Rapporteur's reports make ample references to this type of advisory practice.[179] Similarly, the Conference of Parties of the Convention on Biological Diversity requested the advice of the Office of Legal Affairs on consensus decisions being construed as subsequent agreements within the meaning of Article 31(3) VCLT.[180] The Convention refers in Article 8(j) to 'indigenous communities',[181] while there were efforts to use the term

178 cf Amerasinghe, *Principles of the Institutional Law of International Organizations* (n 154) xiii.

179 ILC 'Second Report on Subsequent Agreements and Subsequent Practice in relation to the Interpretation of Treaties by Georg Nolte, Special Rapporteur' (26 March 2014) A/CN.4/671, para 84 (IMO Legal Affairs Division advising an interpretive resolution as a subsequent agreement), para 87 (WHO Legal Counsel recognizing that Conference of Parties decisions of the Framework Convention on Tobacco Control represent a subsequent agreement) and paras 103, 106 (opinion of the UN Legal Counsel on the meaning of consensus in United Nations practice); ILC 'Draft Conclusions on Subsequent Agreements and Subsequent Practice in relation to the Interpretation of Treaties, with Commentaries' (2018) A/73/10, para 52, Conclusion 11 and accompanying cmt 34; Georg Nolte, 'Subsequent Agreements and Subsequent Practice of States Outside of Judicial or Quasi-judicial Proceedings: Third Report for the ILC Study Group on Treaties over Time' in Georg Nolte (ed), *Treaties and Subsequent Practice* (Oxford University Press 2013) 370–371, 376–377. For advice on treaties and third States in UNESCO, see Noriko Aikawa-Faure, 'Article 31: Transitional Clause on the Relationship to the Proclamation of Masterpieces of the Oral and Intangible Heritage of Humanity' in Janet Blake and Lucas Lixinski (eds), *The 2003 UNESCO Intangible Heritage Convention: A Commentary* (Oxford University Press 2020) 414–431.

180 CBD 'Report of the Eighth Meeting of the Ad Hoc Open-Ended Inter-Sessional Working Group on Article 8(j) and Related Provisions of the Convention on Biological Diversity' (11 November 2013) UNEP/CBD/COP/12/5, recommendation 8/6, para 4.

181 Convention on Biological Diversity (adopted 5 June 1992, entered into force 29 December 1993) 1760 UNTS 79, Article 8(j) (requiring parties to respect practices of 'indigenous and local communities' that conserve biodiversity).

'indigenous peoples' in Conference decisions and secondary documents—a concept that is very controversial in some States.[182] Heeding the Office's advice,[183], the Conference of Parties stipulated that the terminology 'indigenous peoples' is without prejudice to Article 8(j) and the formal amendment process of the Convention.[184] Lastly, the Office of Legal Affairs advised the CERD Committee on the existence or absence of treaty relationships between Palestine and Israel (although only the dissenting minority endorsed the Office's opinion).[185]

4.4.2. UNECE Working Party on Agricultural Quality Standards

Established in 1947, the United Nations Economic Commission for Europe (UNECE) is one of the five regional commissions created by ECOSOC as subsidiary bodies under Article 68 of the Charter.[186] In 1949, UNECE created a subsidiary body to develop quality standards for agricultural products: the Working Party on the Standardization of Perishable Foodstuffs that would become the Working Party on Agricultural Quality Standards in 2002 (commonly referred to as WP.7).[187] According to its Terms of Reference, WP.7 develops, interprets and promotes commercial quality standards for goods

182 France feared that a change in terminology may constitute a de facto amendment and requested a study of Office of Legal Affairs. Japan stressed the importance of having the advice of the Office of Legal Affairs. See 'Report of the Eighth Meeting of the Ad Hoc Open-Ended Inter-Sessional Working Group on Article 8(j) and Related Provisions of the Convention on Biological Diversity' (n 180) paras 92, 96.

183 CBD Dec XII/12 F (13 October 2014) UNEP/CBD/COP/DEC/XII/12, recital 2 ('[r]ecognizing the advice of the United Nations Office of Legal Affairs'). For the legal opinion see: 'Analysis on the Implication of the Use of the Term "Indigenous Peoples and Local Communities" for the Convention and its Protocols' (n 3).

184 Dec XII/12 F (n 183) para 2.

185 CERD 'Inter-State Communication submitted by the State of Palestine against Israel' (12 December 2019) CERD/C/100/5, paras 2.1–2.16 and Annex.

186 Mathias Forteau, 'United Nations, Regional Commissions' in Rüdiger Wolfrum (ed), *MPEPIL* (online edn, Oxford University Press 2007) para 9.

187 UNECE 'Working Party on Agricultural Quality Standards: Report of the Fifty-eighth Session' (11 December 2002) TRADE/WP.7/2002/9, paras 109–112. For a history of governance structure of WP.7: Andrea Barrios Villarreal, *International Standardization and the Agreement on Technical Barriers to Trade* (Cambridge University Press 2018) 13.

like meat, fresh fruit and vegetables to facilitate international trade.[188] WP.7 carries out its standard-setting activities in accordance with the Geneva Understanding on Agricultural Quality Standards—a non-binding document adopted by the UNECE Executive Committee.[189]

UNECE standards are recommendations and do not create obligations under international law.[190] For that reason they must be incorporated in domestic law in order to become legally binding. Most notably, European Union law incorporates UNECE food standards.[191] This leads to a kind of 'Brussels effect' in the food industry.[192] Although UNECE is a regional commission, its food standards 'rule much of the food trade', with some standards being used in the Middle East, Australia or Argentina.[193] The reason is fairly simple. Europe is a big food market, and it is the importer that sets the standards for accessing its market.[194]

Although all UN Member States may participate in WP.7,[195] developing countries tend not to participate and European States make up the most delegates in practice.[196] The global reach of UNECE standards creates an overlap with another standard-setting body in the UN system—the FAO/WHO Co-

188 UNECE 'Terms of Reference of the Working Party on Agricultural Quality Standards (2018)' (18 March 2019) ECE/CTCS/2019/12, para 1.

189 UNECE 'Geneva Understanding on Agricultural Quality Standards' (6 October 2015) ECE/CTCS/WP.7/2015/22.

190 UNECE 'Legal Office Opinion on the Legal Status of the Geneva Protocol' (7 August 2012) ECE/TRADE/C/WP.7/2012/3, para 2.

191 Commission Implementing Regulation (EU) No 543/2011 of 7 June 2011 laying down detailed rules for the application of Council Regulation (EC) No 1234/2007 in respect of the fruit and vegetables and processed fruit and vegetables sectors [2011] OJ L157/1, Article 3(2) (providing that UNECE standards shall be considered as conforming to the general marketing standard); Commission Delegated Regulation (EU) 2019/428 of 12 July 2018 amending Implementing Regulation (EU) No 543/2011 as regards marketing standards in the fruit and vegetables sector [2019] OJ L75/1, recital 3 (aligning Union law with newly developed UNECE standards).

192 cf Anu Bradford, *The Brussels Effect: How the European Union Rules the World* (Oxford University Press 2020) 218–219.

193 Barrios Villarreal (n 187) 207, 210–211.

194 ibid 208–9. See also Joanne Scott, 'The Global Reach of EU Law' in Marise Cremona and Joanne Scott (eds), *EU Law Beyond EU Borders: The Extraterritorial Reach of EU Law* (Oxford University Press 2019) 31.

195 'Terms of Reference of the Working Party on Agricultural Quality Standards (2018)' (n 188) para 5.

196 Barrios Villarreal (n 187) 210.

dex Alimentarius Commission. Much like UNECE, the Codex Alimentarius Commission develops international standards, including food quality standards.[197] Unlike UNECE's WP.7, the Codex Alimentarius Commission as a joint subsidiary body of FAO and WHO has near universal membership and developing countries attend on a much broader basis.[198]

This potential overlap between UNECE and Codex standards is all the more relevant as UNECE aims to develop standards that comply with the WTO Agreement on Technical Barriers to Trade (TBT Agreement).[199] Although non-binding, international standards are legally relevant under WTO law. Government measures based on international standards are presumed to be consistent with TBT Agreement and the Agreement on Sanitary and Phytosanitary Measures (SPS Agreement),[200] creating a procedural incentive for States to follow international standards.[201] While the SPS Agreement explicitly privileges Codex standards as 'relevant international standards',[202] the TBT Agreement does not specify an international standardizing body.[203]

It is precisely this jurisdictional overlap between the UNECE and the Codex Commission that ultimately led to a Legal Counsel review of a UNECE proposal. In 1998, a WP.7 report noted that 'UNECE standards for fresh and dried produce are used widely throughout the world' and that 'the majority of international trade in these products takes place according to UNECE

197 See generally Gerald G Sander, 'Codex Alimentarius Commission (CAC)' in Rüdiger Wolfrum (ed), *MPEPIL* (online edn, Oxford University Press 2016); Ravi Afonso Pereira, 'Why Would International Administrative Activity Be Any Less Legitimate? – A Study of the Codex Alimentarius Commission' in Armin von Bogdandy and others (eds), *The Exercise of Public Authority by International Institutions: Advancing International Institutional Law* (Springer 2010) 541; Nathalies Ferraud-Ciandet, 'La Commission du Codex Alimentarius' [2009] Journal du droit international 1181.

198 Barrios Villarreal (n 187) 191, 198.

199 'Geneva Understanding on Agricultural Quality Standards' (n 189) para 1.

200 Agreement on Technical Barriers to Trade (adopted 15 April 1994) 1868 UNTS 120 (TBT Agreement) Article 2(5); Agreement on the Application of Sanitary and Phytosanitary Measures (adopted 15 April 1994) 1867 UNTS 493 (SPS Agreement) Article 3(2).

201 *European Communities—Measures Concerning Meat and Meat Products (Hormones): Report of the Appellate Body* (16 January 1998) WT/DS26/AB/R, WT/DS48/AB/R, paras 102, 165.

202 SPS Agreement, Article 3(4) and Annex A, para 3(a).

203 Barrios Villarreal (n 187) 130.

standards.'[204] Because of their widespread use in international trade, WP.7 proposed renaming 'UNECE standards' to 'UN standards'.[205] Although the proposed title change seems benign, it could be seen as an attempt by a regional commission to set global standards. Under the terms of reference of UNECE, the proposal needed to go through the governing bodies of UNECE and ultimately secure the approval of ECOSOC.[206]

When the parent body of WP.7 discussed the proposal to change the title to 'UN standards', the Chairman 'explained that the advice of the Legal Counsel of the United Nations was required before any decision could be taken by the Committee'—a decision that was supported by both the Codex Alimentarius Commission and the European Commission.[207] The Committee therefore decided to consider the proposed title change at its next session 'on the basis of the advice received from the Legal Office.'[208]

The UNECE Secretariat did not publish the entire opinion but only a summary. Interestingly, the Legal Counsel of the United Nations did not say that proposed title change was in itself (il)legal. Instead, his conclusion was that the proposal 'may easily be challenged on legal grounds' by ECOSOC members. Acknowledging that UNECE standard were '*de facto* international standards', the Legal Counsel pointed to the '*de jure* international standards' elaborated by the Codex Alimentarius Commission. Member States outside UNECE, the Legal Counsel reasoned, might oppose the title change 'for reasons of maintaining the respective competence of each organization within the existing statutory limits'—that is the respective competence of the FAO/WHO Codex Alimentarius Commission and UNECE. Moreover, the development of 'United Nations standards' by a regional commission

204 UNECE 'Title of Standards Elaborated by the Working Party: Note by the Secretariat' (28 August 1998) TRADE/WP.7/1998/8, para 1.

205 ibid para 2.

206 UNECE 'Working Party on Standardization of Perishable Produce and Quality Development: Report on its Fifty-third Session' (24 November 1997) TRADE/WP.7/1997/11, paras 54–56. See UN 'Terms of Reference and Rules of Procedure of the Economic Commission for Europe' (2009) E/ECE/778/Rev.5, para 4 ('The Commission shall submit for the Council's prior consideration any of its proposals for activities that would have important effects on the economy of the world as a whole').

207 UNECE 'Working Party on Standardization of Perishable Produce and Quality Development: Report of the First Session' (29 January 1998) ECE/TRADE/214, para 26.

208 ibid para 27.

would imply 'an expansion of its competence and authority to the detriment of other regional commissions'. Accordingly, the Legal Counsel deemed it unlikely that the ECOSOC would approve the proposed renaming of UNECE standards as 'UN standards' in light of the likely opposition by non-European States on these legal grounds.[209] Interestingly, the opinion of the Legal Counsel applied two legal concepts to subsidiary organs that were central to the ICJ's reasoning in the *Nuclear Weapons* advisory opinion with regard to specialized agencies such as the WHO: the principle of speciality and the principle of respecting the division of competences between specialized bodies.[210] The principle of speciality necessitated respect for the territorial jurisdiction of other ECOSOC regional commissions. The system of specialized bodies within the UN system necessitated respect for the mandate of the Codex Commission—a specialized body expressly designated to develop global food standards.[211]

The Codex Alimentarius Commission followed the developments in the UNECE closely. At the next session of WP.7, the Codex observer noted that the FAO legal counsel shared the conclusion of the UN Legal Counsel. Earlier, the Codex Alimentarius Commission had taken note of the opinion of the Legal Counsel, but interpreted it in a much more unequivocal fashion. According to the Codex Executive Committee, the opinion stated that 'UNECE as a "regional commission" did not have the authority, unless explicitly so authorized by the Economic and Social Council, to establish subsidiary bodies which are anticipated to elaborate worldwide standards or which are instituted to transfer regional standards into worldwide standards.'[212] But without much comment, WP.7 decided to withdraw its proposal to change

209 'Title of Standards Elaborated by the Working Party: Note by the Secretariat' (n 204) para 5.

210 cf *Legality of the Use by a State of Nuclear Weapons in Armed Conflict* (Advisory Opinion) [1996] ICJ Rep 66, 78 (principle of speciality) and 80–81 (relationship between the UN and its specialized agencies).

211 See Fernando Lusa Bordin, *The Analogy between States and International Organizations* (Cambridge University Press 2018) 128–134 (discussing the principle of speciality).

212 CAC 'Report of the Forty-second Session of the Executive Committee of the Codex Alimentarius Commission' (June 1995) ALINORM 95/4, para 30; CAC 'Report of the Twenty-first Session of the Joint FAO/WHO Codex Alimentarius Commission' (1995) ALINORM 95/37, para 31.

the title of UNECE standards to UN standards.[213] As the UNECE informed the Codex Commission, WP.7 'decided to withdraw the proposal to change the title of the UNECE standards to UN standards in view of the response of the Legal Counsel of the United Nations concerning this issue.'[214]

Interestingly, an almost identical issue would be discussed a decade later. In 2008, WP.7 decided to eliminate the reference to 'United Nations Economic Commission for Europe' from the upper part of the cover page of its standards. According to WP.7, this decision was intended to emphasize and reflect the global character of UNECE standards given that all UN members could participate in WP.7. Without considering the 1998 Legal Counsel opinion, the report merely argued that the new cover page 'does not contradict' an administrative regulation on UN documentation.[215]

At the Codex Alimentarius Commission, this decision to change the cover page of UNECE standards was interpreted as a rehash of the 1998 proposal to formally change the name to 'UN standards'. Some governments were unhappy with the change of the title of 'UNECE' standards to 'UN' standards. For them, WP.7 as a subsidiary body operates under the terms of reference of the UNECE, 'a regional commission of the United Nations which looks at the economic development and integration of a particular region' and therefore 'questioned the international coverage of the standards developed by the Working Party'. For its part, the Codex Secretariat drew attention to the 1998 opinion of the Legal Counsel and the subsequent decision of WP.7 to abandon 'the proposal to change the title of the "UNECE standards" to "UN standards" in view of the response of the Legal Counsel of the United Nations concerning the global status of Codex standards as related to UNECE standards'.[216]

When WP.7 discussed the issue a year later, the Codex representative informed WP.7 that the Codex Alimentarius Commission was examining

213 UNECE 'Working Party on Standardization of Perishable Produce and Quality Development: Report of the Fifty-Fourth Session' (4 December 1998) TRADE/WP.7/1998/9, paras 56–59.

214 CAC 'Report of the Eighth Session of the Codex Committee on Fresh Fruits and Vegetables' (March 1999) ALINORM 99/35A, para 14.

215 UNECE 'Report of the Working Party on Agricultural Quality Standards on its Sixty-Fourth Session' (10 November 2008) ECE/TRADE/C/WP.7/2008/25, para 46. The report referred to UN Secretariat 'Administrative Instruction: Regulations for the Control and Limitation of Documentation' (22 August 2008) ST/AI/189/Add.6/Rev.5.

216 CAC 'Report of the Fifteenth Session of the Codex Committee on Fresh Fruits and Vegetables' (October 2009) ALINORM 10/33/35, paras 10, 12.

the implications of the decision of WP.7 to change the reference to 'UNECE standards' into 'UN standards'. Notably, the Codex observer pointed to the 1998 opinion of the Legal Counsel, according to which UNECE had no authority to adopt worldwide standards. In the view of WP.7, the decision to remove 'UNECE' from the upper part of the cover page of its standards was fully compliant with UN administrative regulations on documentation. Nevertheless, the Working Party suspended the change of its cover page in view of the concerns of the Codex Alimentarius Commission and requested the UNECE Secretariat to approach the UN Office of Legal Affairs for advice.[217]

The opinion of the Office of Legal Affairs was signed by a senior legal adviser of the UN Geneva office. Noting that the 1998 opinion of the Legal Counsel had analyzed a comparable issue, that senior legal adviser expressed his 'considered opinion' that the legal advice would be similar, if not identical today as Member States had agreed on global standards within the FAO/WHO framework. Since the Codex Alimentarius Commission had expressed concerns about the decision, it was unlikely to be approved by ECOSOC. But the legal adviser noted that section 3(1) of the Regulations for the Control and Limitation of Documentation were flexible enough so that WP.7 could drop the reference to 'UNECE' at the top of the cover page while keeping the title 'UNECE standards'.[218]

The Codex Alimentarius Commission (and the WHO Legal Counsel) took note of the 1998 and 2010 legal opinions. The UNECE representative informed the Commission that, although WP.7 had not yet considered the opinion, 'it was expected that [WP.7] would follow the advice of the Office of the Legal Affairs by putting back the reference to "UNECE" in the title of its standards', hoping that this decision would address the concerns of the Codex Alimentarius Commission. Mexico, as Chair of the Codex Committee on Fresh Fruits and Vegetables noted that the Codex Alimentarius

217 UNECE 'Report of the Working Party on Agricultural Quality Standards on its Sixty-Fifth Session' (20 November 2009) ECE/TRADE/C/WP.7/2009/24, paras 30–31.

218 CAC 'Matters arising from the Reports of Codex Committees and Task Forces: Codex Committee on Fresh Fruits and Vegetables' (July 2010) CX/CAC 10/33/8-Add.1, Annex II, paras 2–4. Within the UNECE, the opinion was only issued as an informal document but it is summarized in a report of a subsidiary body of WP.7: UNECE 'Report of the Specialized Section on Standardization of Fresh Fruit and Vegetables on its Fifty-Seventh Session' (8 June 2010) ECE/TRADE/C/WP.7/GE.1/2010/4, para 8.

Commission was the 'truly recognized international UN body to develop worldwide food standards' since the 'SPS/WTO Agreement clearly identified the Codex Alimentarius Commission as the international reference body for the development of food safety standards'.[219]

When UNECE took up the issue, several subsidiary bodies of WP.7 'took note' of the legal opinion and discussed the suggestion by the contested legal opinion to remove 'UNECE' from the top of the page, while keeping the title as 'UNECE Standards'.[220] The Working Party on Agricultural Quality Standards itself decided to retain 'UNECE' in the title of UNECE standards '[b]ased on legal advice received concerning the name change of its standards'. But heeding the suggestion of the legal opinion, WP.7 decided to remove the reference to 'UNECE' at the top of the cover page, while spelling out the full name of the UNECE in the note to the standards.[221]

The 1998 opinion of the Legal Counsel continues to have an enduring impact beyond the issue it specifically addressed. For example, the Codex Secretariat referred to the 1998 reply of the Legal Counsel in a note on the revision of the terms of reference of the Codex Committee on Fresh Fruit and Vegetables.[222] And both the 1998 and 2010 opinions are notable. Arguably, it would have strengthened the case that WP.7 is an international standardizing body under the TBT Agreement if the standards had been

219 CAC 'Report of the Thirty-Third Session of the Codex Alimentarius Commission' (July 2010) ALINORM 10/33/REP, paras 128–135.

220 'Report of the Specialized Section on Standardization of Fresh Fruit and Vegetables on its Fifty-Seventh Session' (n 218) paras 8–9; UNECE 'Report of the Specialized Section on Standardization of Dry and Dried Produce on its Fifty-Seventh Session' (12 July 2010) ECE/TRADE/C/WP.7/GE.2/2010/7, paras 6–7; UNECE 'Report of the Specialized Section on Standardization of Seed Potatoes' (25 March 2010) ECE/TRADE/C/WP.7/GE.6/2010/9, para 8.

221 UNECE 'Report of the Working Party on Agricultural Quality Standards on its Sixty-Sixth Session' (24 November 2010) ECE/TRADE/C/WP.7/2010/16, paras 38–39. The Codex Alimentarius Commission also recognized the decisive impact of the opinion, according to which the 'decision [to retain the title 'UNECE standards' and the removal of 'UNECE' from the upper part of the cover page] was based on the legal advice received from the Senior Legal Adviser of the UN Office at Geneva'. See CAC 'Matters arising from other International Organizations on the Standardization of Fresh Fruits and Vegetables' (April 2011) CX/FFV 11/16/3, para 6.

222 Codex Secretariat 'Revision of the Terms of Reference of the Codex Committee on Fresh Fruits and Vegetables' (July 2012) CX/FFV 12/17/13, para 1.

recast as 'UN standards'.[223] By keeping the established name (and following the Legal Counsel's advice) the regional nature of UNECE standards was reinforced—not once but twice. While the opinion was drafted in cautious terms, the result is striking: UNECE's claim to an implied power did not gain recognition in the legal community and the UN system. The rejection of an implied power is very rare in the practice of international organizations law.[224]

WP.7's failure to recast UNECE standards as 'UN standards' is also noteworthy for other reasons. There are few, if any, alternative or 'non-binding' instruments of international institutions that have been subject to legal review—and were even considered illegal whether by courts or otherwise. Even more striking is that the Legal Counsel's opinion reached this result not because the proposed title 'UN standards' would have made these standards any more binding but because the change to 'UN standards' implied a different claim of epistemic authority, namely a claim that UN standards were also globally appropriate standards for food quality.[225]

What is more, the opinion essentially defined two new standard instruments (*Handlungsformen*).[226] A standard instrument (*Handlungsform*) is a concept of domestic administrative law. Basically, the concept of standard instruments identifies specific legal acts in a given system of administrative law, circumscribes their legal effects and attaches specific rules for determining the procedure for their enactment, their validity and possible review by a

223 cf Barrios Villarreal (n 187) 210 (arguing that WP.7 is not an international standardization body under the TBT Agreement).

224 So far the ICJ has only refused once, in the case of the WHO, to acknowledge an implied power of an international organization: *Legality of the Use by a State of Nuclear Weapons in Armed Conflict* (n 210); Lusa Bordin (n 211) 133.

225 On the concept of epistemic authority, see Jan Klabbers, 'The Normative Gap in International Organizations Law: The Case of the World Health Organization' (2019) 16 IOLR 272, 277–282.

226 See Section 5.4 in Chapter 5 for a definition of standard instruments. On standard instruments in international institutional law, see generally Matthias Goldmann, *Internationale öffentliche Gewalt: Handlungsformen internationaler Institutionen im Zeitalter der Globalisierung* (Springer 2015) 5, 169–173; Matthias Goldmann, 'Inside Relative Normativity: From Sources to Standard Instruments for the Exercise of International Public Authority' in Armin von Bogdandy and others (eds), *The Exercise of Public Authority by International Institutions: Advancing International Institutional Law* (Springer 2010) 679–691.

third actor (in a domestic system usually a court).[227] For example, American administrative law distinguishes between 'rules' and 'orders', defines their respective legal effects and determines procedural rules for their validity.[228] In German administrative law, the distinction between *Allgemeinverfügung* (general order) and *Rechtsverordnung* (by-law) carries consequences for judicial review such as the competent court and questions of standing.[229] Similarly, the concept of standard instruments (*Handlungsformen*) is not wholly foreign to international institutional law. For example, the UN Charter generally distinguishes, in terms of their normative effect, between General Assembly resolutions on operational matters (such as the creation of subsidiary organs under Article 22) and mere recommendations under Article 13.[230]

In this sense, the legal opinion on the status of UNECE standards defined two standard instruments in international food law: only the Codex Commission could promulgate the standard instrument '*de jure* international standards' on food quality and safety. By implication, the UNECE could only use the standard instrument '*de jure* European standard'. This is an important conclusion for proponents of public law approaches to international organizations law such as 'global administrative law', 'international public authority' or the 'international rule of law' as it indicates a real possibility of legal review of 'non-binding' output of international bodies and of a *Rechtsdogmatik* of international institutional law beyond 'binding' legal acts.[231]

This public law-type review of the proposed renaming of UNECE standards is, finally, also noteworthy because the opinion was drafted in the traditional parlance of functionalism in that it focused on the relationship between the UNECE and its Member States, and the Codex Commission and its membership.

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227 cf Goldmann, 'Inside Relative Normativity: From Sources to Standard Instruments for the Exercise of International Public Authority' (n 226) 679.

228 Eberhard Schmidt-Aßmann, *Das Verwaltungsrecht der Vereinigten Staaten von Amerika: Grundlagen und Grundzüge aus deutscher Sicht* (Nomos 2021) 166–167.

229 See the German Code of Administrative Court Procedure (*Verwaltungsgerichtsordnung, VwGO*), §§ 42 and 47.

230 cf Benedetto Conforti and Carlo Focarelli, *The Law and Practice of the United Nations* (5th edn, Brill Nijhoff 2016) 452–453.

231 For this traditional approach, see Norman Weiß, *Kompetenzlehre internationaler Organisationen* (Springer 2009) 375, 391–416 (limiting a theory of powers of international organizations to 'binding' acts).

4.4.3. Commission on the Limits of the Continental Shelf

The Commission on the Limits of the Continental Shelf is a body established under Article 76(8) of UNCLOS. As a body of experts in the field of geology, geophysics or hydrography,[232] it evaluates continental shelf claims beyond the 200 nautical miles line and provides scientific and technical advice to States submitting such claims.[233] The Commission shall make recommendations relating to the establishments of the outer limits of the continental shelf. Limits established 'on the basis of these recommendations shall be final and binding'.[234] Although the details are debated, such limits are only opposable to third States if the requirements of Article 76(8) are met.[235]

Although it is envisaged as a purely technical and scientific body, issues of legal interpretation invariably arise in the course of its work.[236] It has been asked whether the Commission is competent to engage in some legal interpretation incidental to its technical mandate, whether it must accept the legal view of the submitting state or whether it can seek legal advice from an external body such as the meeting of States Parties, a tribunal—or the UN Legal Counsel.[237]

According to one commentator, '[a] role of the Legal Counsel of the United Nations or other legal experts in this respect would be difficult to reconcile with the primary competence of the States Parties to the Convention

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232 United Nations Convention on the Law of the Sea (adopted 10 December 1982, entered into force 16 November 1994) 1833 UNTS 3 (UNCLOS) Annex II, Article 2(1).

233 Suzette V Suarez, 'Commission on the Limits of the Continental Shelf' (2010) 14 MPUNYB 131.

234 UNCLOS, Article 76(8).

235 cf *Delimitation of the Maritime Boundary in the Bay of Bengal (Bangladesh/Myanmar)* (Judgment) [2012] ITLOS Rep 4, 106–107, para 407; Lindsay Parson, 'Article 76' in Alexander Proelss (ed), *United Nations Convention on the Law of the Sea: A Commentary* (CH Beck/Hart/Nomos 2017) paras 49–51.

236 Suarez, *The Outer Limits of the Continental Shelf* (n 13) 132.

237 See Alex G Oude Elferink, 'Continental Shelf, Commission on the Limits of the' in Rüdiger Wolfrum (ed), *MPEPIL* (online edn, Oxford University Press 2013) paras 8–9; Bjørn Kunoy, 'The Terms of Reference of the Commission on the Limits of the Continental Shelf: A Creeping Legal Mandate' (2012) 25 LJIL 109; Andrew Serdy, 'Annex II Article 2' in Alexander Proelss (ed), *United Nations Convention on the Law of the Sea: A Commentary* (CH Beck/Hart/Nomos 2017) para 4.

to interpret it.'[238] Theoretically, this view may be sound but it is difficult in practice since States Parties may be unable to agree on a single legal interpretation. Moreover, States Parties could not agree on a procedure for the interpretation of provisions of the Convention that were relevant to the work of the Commission.[239] In particular, some States maintain that the Commission cannot even identify legal issues on which it might request guidance from States Parties.[240] Other parties emphasize the independence of the Commission which must likewise be respected by States Parties.[241] A third view argues that the States Parties have a primary responsibility for issues affecting the rights and obligations of States, while the Legal Counsel should only provide guidance on 'administrative' issues.[242]

For the Commission, this creates an uncertain institutional environment. In its day-to-day operations, a statutory body necessarily interprets its legal mandate.[243] But the Commission's competence to openly engage in legal interpretation is contested. States parties are unlikely to coalesce around a particular legal interpretation.[244] Its members are scientists, not lawyers. On top of that, the Commission cannot trigger advisory proceedings before an international tribunal. In these circumstances, it is hardly surprising that the Commission requested the advice of the Legal Counsel on many occasions as a way out of institutional gridlock or to muster support on legal issues.[245] Although States Parties and scholars are divided on the competence of the

238 Oude Elferink (n 237) para 17.

239 SPLOS 'Report of the Nineteenth Meeting of States Parties' (24 July 2009) SPLOS/203, paras 70–75.

240 ibid para 72.

241 ibid para 74.

242 ibid para 73.

243 cf Commission IV, Report of the Rapporteur of Committee IV/2, as Approved by the Committee (1945) 13 UNCIO 703, 709 ('In the course of the operation from day to day of the various organs of the Organization, it is inevitable that each organ will interpret such parts of the Charter as are applicable to its particular functions. This process is inherent in the functioning of any body which operates under an instrument defining its functions and powers'); Joseph Gold, *Interpretation: The IMF and International Law* (Kluwer Law International 1996) 3.

244 cf Bjarni Már Magnússon, *The Continental Shelf Beyond 200 Nautical Miles: Delineation, Delimitation and Dispute Settlement* (Brill Nijhoff 2015) 54.

245 Andrew Serdy, 'The Commission on the Limits of the Continental Shelf and its Disturbing Propensity to Legislate' (2011) 26 IJMCL 355, 356. Some authors demand an even more institutionalized relationship with the Legal Counsel, arguing in favor of a systematic review of state submissions by the Legal Counsel: Anna

Commission to engage in at least some legal interpretation, the Commission appears to take the view that it may consider and seek legal advice on Article 76 and Annex II of UNCLOS.[246] Interestingly, the Commission has never indicated a legal basis for requesting formal opinions of the Legal Counsel.[247] In particular, it did not rely on its Rules of Procedure which permit the Commission to seek the advice of external 'specialists in any field relevant to the work of the Commission'.[248] This, again, suggests that the advisory mandate of the UN Legal Counsel is a recognized feature in the practice of the United Nations.

It is true that the role of the Legal Counsel with respect to administrative or procedural questions is somewhat less controversial. In 1997, the Continental Shelf Commission for the first time sought a formal opinion from the UN Legal Counsel on the immunity of its members under the General Conven-

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Cavnar, 'Accountability and the Commission on the Limitsof the Continental Shelf: Deciding Who Owns the Ocean Floor' (2009) 42 Cornell Int'l LJ 338, 430.

246 In 2011, a member proposed to seek an opinion of the Legal Counsel on mechanisms for the Commission to procure legal advice on issues other than Article 76 and Annex II. Clarity on these issues was necessary, the member argued, when States disputed the correct interpretation on issues outside Article 76 that nevertheless could impact the outer limits of the continental shelf. According to other members, the Commission as a technical body should refrain from seeking legal advice on matters other than Article 76 and Annex II. The proposal was not further pursued. See CLCS 'Progress of Work in the Commission on the Limits of the Continental Shelf: Statement by the Chairperson' (16 September 2011) CLCS/72, paras 37–40; CLCS 'Progress of Work in the Commission on the Limits of the Continental Shelf: Statement by the Chairperson' (30 April 2012) CLCS/74, para 52.

247 cf CLCS 'Statement by the Chairman of the Commission on the Limits of the Continental Shelf on the Progress of Work in the Commission' (3 May 2005) CLCS/44, para 13 ('Commission decided to seek a legal opinion from the Legal Counsel'); CLCS 'Statement by the Chairman of the Commission on the Limits of the Continental Shelf on the Progress of Work in the Commission' (17 September 1997) CLCS/4, para 20 (Commission 'decided to request the Legal Counsel to provide it with a formal legal opinion').

248 CLCS 'Rules of Procedure of the Commission on the Limits of the Continental Shelf' (17 April 2008) CLCS/40/Rev.1, rule 57. For the questionable view that Rule 57 includes legal advice, see Cavnar (n 245) 429, fn 298. After all, whether legal interpretation is 'relevant to the work of the Commission' is subject to an ongoing debate.

tion.[249] Although this question was framed as an 'administrative' issue (and by implication of lesser importance), it was in reality motivated to shield the Commission's members from liability in the event a State accused them of leaking confidential and valuable data.[250]

This request constitutes an excellent example for the Legal Counsel's review function as the Commission had by then decided—based on a preliminary statement by the Legal Counsel—that its members enjoyed immunities as experts on mission. They postponed the adoption of draft Annex II of the Rules of Procedure and 'awaited the [formal] opinion of the Legal Counsel as to whether they were correct in asserting that those privileges applied to them.'[251]

In the Legal Counsel's reply, the issue was whether the Commission is an 'organ' of the United Nations to which the General Convention applies, so that its members enjoy immunities as experts on mission under Article VI of the General Convention.[252] For the Legal Counsel, the answer had to be in the affirmative. He did so by extending the rationale of an opinion rendered in 1969.[253] In that opinion, the Office of Legal Affairs had concluded that the CERD Committee as a treaty body was so closely linked to the UN so as to fall under the protection of the General Convention.[254] The Continental Shelf Commission, the Legal Counsel argued, was a treaty body created by UNCLOS and had a similarly close link to the UN.[255] Therefore, the Legal

249 'Statement by the Chairman of the Commission on the Limits of the Continental Shelf on the Progress of Work in the Commission' (n 247) para 20; cf Serdy, 'Annex II Article 2' (n 237) para 12.

250 CLCS 'Statement by the Chairman of the Commission on the Limits of the Continental Shelf on the Progress of Work in the Commission' (11 September 1998) CLCS/9, para 8.

251 CLCS 'Statement by the Chairman of the Commission on the Limits of the Continental Shelf on the Progress of Work in the Commission' (15 May 1998) CLCS/7, para 6. See also 'Statement by the Chairman of the Commission on the Limits of the Continental Shelf on the Progress of Work in the Commission' (n 247) paras 19–20.

252 'Letter dated 11 March 1998 from the Legal Counsel, the Under-Secretary-General of the United Nations for Legal Affairs, addressed to the Commission on the Limits of the Continental Shelf' (n 91) para 2.

253 ibid para 3.

254 OLA 'Memorandum of the Director, Division of Human Rights' [1969] UNJYB 207.

255 'Letter dated 11 March 1998 from the Legal Counsel, the Under-Secretary-General of the United Nations for Legal Affairs, addressed to the Commission on the Limits of the Continental Shelf' (n 91) para 2.

Counsel concluded that 'by established precedent in respect of similar treaty organs' the Commission's members are experts on mission under Article VI.[256]

The Commission subsequently decided that Article VI of the General Convention 'shall apply *mutatis mutandis* to the members of the Commission, as experts on mission for the United Nations.'[257] However, the Commission felt obliged to submit the question to the Meeting of States Parties for consideration although it considered the issue to be resolved.[258] The Meeting of States Parties 'decided to take note of the legal opinion.'[259] And the current Rules of Procedure (last updated in 2008) of the Commission prescribe that its members enjoy immunities as experts on mission while explicitly referring to the opinion of the Legal Counsel.[260] The Legal Counsel's letter continues to be cited as a legal precedent by the Commission in its day-to-day activities.[261]

The Legal Counsel also resolved a related issue, namely the appropriate procedure the Commission should follow if a CLCS member is suspected to have breached the confidentiality of data.[262] Again, on the surface this might be a procedural question. But States invest significant funds in gathering data about the continental margin—data that may reveal insights about oil deposits

256 ibid para 5.

257 SPLOS 'Letter dated 15 May 1998 from the Chairman of the Commission on the Limits of the Continental Shelf addressed to the President of the Eighth Meeting of States Parties' (15 May 1998) SPLOS/28, para 3; 'Statement by the Chairman of the Commission on the Limits of the Continental Shelf on the Progress of Work in the Commission' (n 247) para 20.

258 'Letter dated 15 May 1998 from the Chairman of the Commission on the Limits of the Continental Shelf addressed to the President of the Eighth Meeting of States Parties' (n 257) para 4.

259 SPLOS 'Report of the Eighth Meeting of States Parties' (1998) SPLOS/31, para 50.

260 'Rules of Procedure of the Commission on the Limits of the Continental Shelf' (n 248) Annex II, para 2(1).

261 In 2008, the Office of Legal Affairs recalled that, 'in conformity with the legal opinion of the Legal Counsel', members enjoy immunities as experts on mission, and that certain regulations of the Secretary-General 'therefore apply'. See CLCS 'Statement by the Chairman of the Commission on the Limits of the Continental Shelf on the Progress of Work in the Commission' (25 April 2008) CLCS/58, para 49.

262 CLCS 'Letter dated 15 March 1999 from the Chairman of the Commission on the Limits of the Continental Shelf addressed to the Legal Counsel, Under-Secretary-General of the United Nations for Legal Affairs' (18 May 1999) CLCS/13.

or further exploration activities.[263] Seen this way, this legal opinion is an attempt at building an accountability regime for alleged breaches of CLCS members without having recourse to national courts.[264] In his reply, the Legal Counsel stated that there was no established procedure but recommended that there be an investigating body of Commission members, guarantees of due process and strict confidentiality, and a report to the States Parties.[265] Subsequently, the Commission 'decided to refer to that legal opinion when the need arose and proceed, as appropriate, on the basis of the recommendations' outlined in the opinion.[266] These recommendations are replicated in the Rules of Procedure almost verbatim,[267] and were applied by the Commission in the first investigation of an alleged breach of confidentiality.[268]

Nevertheless, the Legal Counsel's role has not been limited to 'purely administrative or procedural' issues. In the early days of its work, the Commission considered whether the term 'coastal State' and 'State' in Annex II, Article 4 of UNCLOS included States that were not parties to UNCLOS.[269] If answered in the affirmative, the Commission would have to accept submissions by non-parties.[270] It brought this issue to the attention of the States

263 Paula M Vernet, 'The Work of the Commission on the Limits of the Continental Shelf: Current Accomplishments and Challenges on the Verge of its 20th Anniversary' (2017) 20 MPUNYB 36, 44.

264 See Teresa F Mayr, 'Where Do We Stand and Where Do We Go: The Fine Balance between Independence and Accountability of United Nations Experts on a Mission' (2018) 15 IOLR 130, 151–167 (discussing accountability regimes of experts on mission without mentioning the legal opinion on an accountability procedure for CLCS members).

265 CLCS 'Letter dated 30 April 1999 from the Legal Counsel, Under-Secretary-General of the United Nations for Legal Affairs, addressed to the Chairman of the Commission on the Limits of the Continental Shelf' (18 May 1999) CLCS/14, paras 25–27.

266 CLCS 'Statement by the Chairman of the Commission on the Limits of the Continental Shelf on the Progress of Work in the Commission' (18 May 1999) CLCS/12, para 19.

267 'Rules of Procedure of the Commission on the Limits of the Continental Shelf' (n 248) Annex II, para 5.

268 CLCS 'Progress of Work in the Commission on the Limits of the Continental Shelf: Statement by the Chair' (24 September 2014) CLCS/85, paras 68–76.

269 'Statement by the Chairman of the Commission on the Limits of the Continental Shelf on the Progress of Work in the Commission' (n 247) para 19.

270 'Report of the Eighth Meeting of States Parties' (n 259) para 51.

Parties.[271] Many delegates expressed that the meeting of States Parties did not have the competence to render a legal opinion and that the Commission should seek an advisory opinion of the Legal Counsel 'only when the problem actually arises'.[272] Accordingly, the Commission did not pursue the matter further.[273]

In 2005, Brazil sent additional information after it had already submitted information on its outer continental shelf pursuant to Article 76(8) of UNCLOS.[274] This raised complex problems because the original submission by Brazil had been duly published by the Secretary-General under Rule 50 of the Commission's Rules of Procedure and because the outer limits in the additional submission significantly departed from the original submission.

Because of the complexity of the Brazilian submission, the Commission decided to request an opinion of the Legal Counsel 'on a matter of a general nature concerning the application of the rules of procedure of the Commission and the relevant provisions of the United Nations Convention on the Law of the Sea'.[275] In short, the Commission requested legal advice whether such

271 'Letter dated 15 May 1998 from the Chairman of the Commission on the Limits of the Continental Shelf addressed to the President of the Eighth Meeting of States Parties' (n 257) para 5(a).

272 'Report of the Eighth Meeting of States Parties' (n 259) para 52; 'Statement by the Chairman of the Commission on the Limits of the Continental Shelf on the Progress of Work in the Commission' (n 250) para 9.

273 According to Suarez, the Legal Counsel 'exercised restraint and decided not render an opinion' on this 'highly political issue' that could upset the submission process. See Suarez, *The Outer Limits of the Continental Shelf* (n 13) 108. The source for a discretionary refusal to provide legal advice is unclear. When the Commission first raised the issue, Legal Counsel addressed the 'coastal State' issue on a preliminary basis while indicating that further research would be necessary. See 'Statement by the Chairman of the Commission on the Limits of the Continental Shelf on the Progress of Work in the Commission' (n 247) para 19. The Chairman's statement provides no further details on the content of the Legal Counsel's preliminary statement. It appears that Commission did not pursue the opinion request in light of the comments of States Parties to consider the issue if a case actually arose. See also Andrew Serdy, 'Annex II Article 4' in Alexander Proelss (ed), *United Nations Convention on the Law of the Sea: A Commentary* (CH Beck/Hart/Nomos 2017) para 5.

274 'Statement by the Chairman of the Commission on the Limits of the Continental Shelf on the Progress of Work in the Commission' (n 247) para 12; cf Andrew Serdy, 'Annex II Article 8' in Alexander Proelss (ed), *United Nations Convention on the Law of the Sea: A Commentary* (CH Beck/Hart/Nomos 2017) para 6.

275 'Statement by the Chairman of the Commission on the Limits of the Continental Shelf on the Progress of Work in the Commission' (n 247) para 13.

additional submissions were permissible under the Commission's Rules of Procedure and UNCLOS.[276] There were some debates whether the request should be drafted with reference to specific cases. But the Commission decided to phrase the question in general terms to receive more actionable guidance. In any event, the Commission was cognizant of the respective expertise and decided that the opinion request 'should not include technical or scientific issues'.[277]

The opinion request effectively substituted the absence of a judicial advisory proceeding that the Commission could access. In a thirteen-page response, the Legal Counsel concluded that additional information, of the type submitted by Brazil, was permissible under UNCLOS, the Commission's Rules of Procedure and its Scientific and Technical Guidelines.[278] However, the Legal Counsel emphasized that it is ultimately up to the Commission to determine, in light of its mandate and UNCLOS, which limits of a coastal State are in accordance with Article 76 of UNCLOS.[279]

The Commission, having considered the legal opinion, decided to act accordingly.[280] This decision to act in accordance with the legal opinion seems to have been codified subsequently in the Rules of Procedures that now expressly allow for additional submissions by coastal States.[281] In addition,

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276 The exact question was whether '[i]s it permissible, under the United Nations Convention on the Law of the Sea and the rules of procedure of the Commission, for a coastal State, which has made a submission to the Commission in accordance with Article 76 of the Convention, to provide to the Commission in the course of the examination by it of the submission, additional material and information relating to the limits of its continental shelf or substantial part thereof, which constitute a significant departure from the original limits and formulae lines that were given due publicity by the Secretary-General of the United Nations in accordance with rule 50 of the rules of procedure of the Commission?' See 'Statement by the Chairman of the Commission on the Limits of the Continental Shelf on the Progress of Work in the Commission' (n 247) para 13.

277 ibid para 15.

278 'Letter dated 25 August 2005 from the Legal Counsel, Under-Secretary-General of the United Nations for Legal Affairs, addressed to the Chairman of the Commission on the Limits of the Continental Shelf' (n 3) Annex.

279 ibid Annex.

280 CLCS 'Statement by the Chairman of the Commission on the Limits of the Continental Shelf on the Progress of Work in the Commission' (7 October 2005) CLCS/48, para 17.

281 'Rules of Procedure of the Commission on the Limits of the Continental Shelf' (n 248) r 44bis(2). The Rules of Procedure in force at the time of the request for

the Commission decided to publish the opinion on its website, to issue it as an official document, and to forward the opinion to the States that had already made submissions.[282] Lastly, the subcommission examining the Brazilian submission conveyed the contents of the opinion directly to the Brazilian experts.[283]

In his opinion, the Legal Counsel emphasized the need for transparency of additional information that constitutes a significant departure from the original submission since, according to the Rules of Procedure and the Guidelines, the executive summary of a submission shall be given due publicity.[284] The Commission agreed on the importance of due publicity and decided that 'the coastal State should provide the content of the information to be publicized, e.g., as an addendum or corrigendum to the executive summary'.[285] In light of the opinion, the Commission also invited Brazil to submit an addendum to the original executive summary to be duly publicized by the Secretary-General.[286]

The opinion request was not universally appreciated. According to one State Party, the Commission should not seek legal opinions on the rights and obligations of States Parties but only on administrative issues such as issues of privileges and immunities, and procedural questions such as the handling of confidential data.[287] Questions of such nature were a matter for the States Parties.[288] Consequently, the delegation argued, the opinion request by the Commission and the Legal Counsel's reply 'could not be considered to constitute a precedent authorizing the Commission to request additional

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a legal opinion (CLCS/40) did not contain a provision for additional information submitted on the initiative of the coastal State.

282 'Statement by the Chairman of the Commission on the Limits of the Continental Shelf on the Progress of Work in the Commission' (n 280) para 17.

283 ibid para 17.

284 'Letter dated 25 August 2005 from the Legal Counsel, Under-Secretary-General of the United Nations for Legal Affairs, addressed to the Chairman of the Commission on the Limits of the Continental Shelf' (n 3) Annex.

285 'Statement by the Chairman of the Commission on the Limits of the Continental Shelf on the Progress of Work in the Commission' (n 280) para 18.

286 ibid para 19.

287 SPLOS 'Report of the Sixteenth Meeting of States Parties' (28 July 2006) SPLOS/148, para 81.

288 ibid para 81.

legal opinions of such a nature.'[289] Another delegation, however, welcomed the opinion.[290]

The controversial debate at the meeting of States Parties attests to the persuasive authority of the Legal Counsel. It reinforces the idea, according to a law of the sea practitioner, that the practice of the Commission cannot be dissociated from legal opinions—a derivative source of law that was neither intended nor foreseen in the work of the Commission.[291]

4.4.4. Commission on Narcotic Drugs

International drug control is based on three conventions: the 1961 Single Convention on Narcotic Drugs as amended by the 1972 Protocol (Single Convention), the 1971 Convention on Psychotropic Substances (1971 Convention), and the 1988 Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (1988 Convention). The underlying principle is that States must prevent the illegal production, trafficking, and consumption of substances listed in the schedules of the Single Convention and 1971 Convention.[292] For precursor chemicals listed in the tables of the 1988 Convention, States must prevent their diversion to the illicit production of drugs.[293] Scheduling new substances under the Single Convention and the 1971 Convention carries significant consequences, including the obligation to impose criminal sanctions.[294] Therefore, the institutional design of the scheduling process is crucial.

289 'Report of the Sixteenth Meeting of States Parties' (n 287) para 81.

290 ibid para 81.

291 Elie Jarmache, 'La pratique de la commission des limites du plateau continental' (2008) 54 AFDI 429, 436 (adding that recourse to the advice of the Legal Counsel has not been more systematic and sustained).

292 Daniel Heilmann, 'Narcotic Drugs and Psychotropic Substances' in Rüdiger Wolfrum (ed), *MPEPIL* (online edn, Oxford University Press 2010) para 3.

293 Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (adopted 20 December 1988, entered into force 11 November 1990) 1582 UNTS 95 (1988 Convention) Article 12(1).

294 1988 Convention, Article 3.

Under the drug conventions, the Commission on Narcotic Drugs has the authority to amend the scheduled substances under international control.[295] As a subsidiary body of ECOSOC composed of fifty-three Member States, it is the policy-making body of the United Nations on drug policy.[296] In making its decisions, it must consider the scientific recommendations of the WHO Expert Committee on Drug Dependence (or the International Narcotics Control Board under the 1988 Convention) although the legal consequences of these scientific recommendations is controversial.[297] The Commission decisions amending the schedules require a simple majority,[298] or a two-thirds majority depending on the treaty.[299] Decisions become binding unless a party has submitted the decision for review, and possible reversal, by ECOSOC within the applicable time-limit.[300] An ECOSOC review (and a possible reversal of a Commission decision by ECOSOC) is the only real check on the Commission's authority as there is no possibility to opt out under the Single Convention.[301] Pursuant to Article 2(7) of the 1971 Convention, a State may elect to not apply certain provisions of the 1971 Convention. But Article 2(7) is not a true opting-out provision. States must nevertheless apply a minimum of control measures, are subject to procedural and substantive conditions, as well as the supervision of the International Narcotics Control Board.[302]

The delegation of scheduling decisions to a body with limited membership is unique to the international drug regime. In other treaty regimes, scheduling decisions are made by all States Parties and dissenting States may easily opt

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295 Single Convention, Article 3; Convention on Psychotropic Substances (adopted 21 February 1971, entered into force 16 August 1976) 1019 UNTS 175 (1971 Convention) Article 2; 1988 Convention, Article 12.

296 ECOSOC Res 1991/49 (21 June 1991) E/RES/1991/49; ECOSOC Res 9 (I) (16 February 1946) E/RES/1946/9(I). See SK Chatterjee, *Legal Aspects of International Drug Control* (Springer 1981) 234–256.

297 Heilmann (n 292) paras 21, 37.

298 The Single Convention contains no provision on required majorities. As per rule 58 of the Rules of Procedure of the Functional Commissions of ECOSOC decisions are made by simple majority: ECOSOC 'Challenges and Future Work in the Review of Substances for Possible Scheduling Recommendations: Note by the Secretariat' (18 December 2013) E/CN.7/2014/10, Annex I, para 16.

299 1971 Convention, Article 17(2); 1988 Convention, Article 12(5).

300 Single Convention, Article 3(8); 1971 Convention, Article 2(8); 1988 Convention, Article 12(7).

301 Single Convention, Article 3(7).

302 1971 Convention, Articles 2(7) and 19(7).

out.[303] For dissenting States it becomes all the more crucial to police the Commission through legal argument as they cannot file a reservation and the prospect of the ECOSOC review and reversal procedure seem minimal.[304] It is in this institutional context that the Office of Legal Affairs has frequently been requested to provide legal advice on the scope of the Commission's authority. But even without open disagreement, the complicated architecture of the drug conventions—such as the need to administer exemptions and to consider other treaty regimes—raise many legal issues that necessitate external legal advice.

The need for external legal advice arose for example when international aviation law and drug control law collided (in this case the 1925 International Opium Convention, a precursor convention of the 1961 Single Convention, colliding with an ICAO recommendation).[305] Since its founding in 1944, ICAO had recommended that all planes carry a narcotic drug for first-aid purposes.[306] While the Single Convention would eventually exempt small amount of drugs on airplanes for first-aid purposes,[307] it was doubtful whether the ICAO recommendation were consistent with the trade restrictions in Chapter V of the 1925 Convention.[308] At ICAO's request, the Commission studied the legality of narcotic drugs in first-aid kits on international flights

303 Richard Lines, *Drug Control and Human Rights in International Law* (Cambridge University Press 2017) 43 (comparing the drug conventions to the Convention on International Trade in Endangered Species of Wild Fauna and Flora). See also *Whaling in the Antarctic* (*Australia v Japan: New Zealand intervening*) (Judgment) [2014] ICJ Rep 226, 247, para 45 (describing the objection procedure under the International Convention for the Regulation of Whaling).

304 Both ECOSOC and the Commission are composed of States and there is a substantial overlap in membership. In the history of the Commission, ECOSOC was seised only once with a review application and confirmed the Commission's decision. See 'Challenges and Future Work in the Review of Substances for Possible Scheduling Recommendations: Note by the Secretariat' (n 298) Annex I, para 23.

305 International Opium Convention (adopted 19 February 1925, entered into force 25 September 1928) 81 LNTS 319 (1925 Opium Convention).

306 CND 'Report of the Thirteenth Session' (1958) E/3133-E/CN.7/354, para 153; CND 'Report of the Fourteenth Session' (1959) E/3254-E/CN.7/376, para 358.

307 Single Convention, Article 32(1) ('The international carriage by ships or aircraft of such limited amounts of drugs as may be needed during their journey or voyage for first-aid purposes or emergency cases shall not be considered to be import, export or passage through a country within the meaning of this Convention').

308 'Report of the Thirteenth Session' (n 306) para 153. See 1925 Opium Convention, Articles 12–18 (imposing a system of import and export authorizations).

under the 1925 Convention pending the entry into force of the 1961 Single Convention.[309] Many governments had doubts as to the compatibility with the 1925 Opium Convention.[310] Some argued that the carriage of narcotics in first-aid kits was not permitted under the Opium Convention.[311]

To inform the Commission's deliberations, ECOSOC, on a recommendation by the Commission, 'request[ed] the Secretary-General to prepare a legal opinion on the carriage of narcotic drugs in the first-aid kits of aircraft engaged in international flight in the light of the provisions of Chapter V of the 1925 Convention'.[312] Although ECOSOC addressed its request for an opinion to the Secretary-General, the Secretary-General merely transmitted the opinion of the Office of Legal Affairs.[313] In this opinion, the Office concluded that the carriage of narcotic drugs would not constitute 'international trade' in terms of Chapter V of the 1925 Convention if they were neither removed from the aircraft nor cross the customs station at the destination of the aircraft.[314] Contrary to the contemporary practice of including disclaimers, the Office wrote that it would be a 'useful assumption' for future work if 'governments ... accept the above legal interpretation as to the non-applicability of Chapter V of the 1925 Convention'.[315]

At its next session, the Commission took note of the legal opinion.[316] The UK was the lone dissenter. Although agreeing with the opinion in general, the UK questioned the assumption of the legal opinion that first-aid kits would not leave the airplane upon landing, and that therefore the import inspections under the 1925 Convention did not apply.[317] Upon recommendation by the Commission, ECOSOC took note of the legal opinion and invited

309 'Report of the Thirteenth Session' (n 306) paras 152–172.

310 ibid para 159.

311 ECOSOC 'Carriage of Narcotic Drugs in First-Aid Kits of Aircraft Engaged in International Flight' (3 April 1958) E/CN.7/344, Annex 5, Appendix B.

312 'Report of the Thirteenth Session' (n 306) para 166 and Annex I, resolution IV, para 6. For the ECOSOC resolution see ECOSOC Res 689 (XXVI) F (28 July 1958) E/RES/1958/689(XXVI)F, para 5.

313 ECOSOC 'Carriage of Narcotic Drugs in First-Aid Kits of Aircraft Engaged in International Flight: Legal Opinion and Report under Economic and Social Council Resolution 689 F (XXVI), Operative Paragraphs 3 and 5' (10 April 1959) E/CN.7/367, para 2.

314 ibid paras 4–5.

315 ibid para 8(a).

316 'Report of the Fourteenth Session' (n 306) para 364.

317 ibid para 366.

the Secretary-General to prepare implementing guidelines.[318] In the following year, ECOSOC, again upon the recommendation of the Commission, 'call[ed] the attention of Governments to ... [t]he legal advice of the United Nations Secretariat', and reproduced the opinion's conclusion in identical language.[319]

The Office again interpreted the scope of trade restrictions in 1977—this time under the Single Convention. Similar to Chapter V of the 1925 Convention, Article 31 of the Single Convention restricts international trade by imposing a system of import and export control.[320] Although the Single Convention exempted drugs in first-aid kits, it did not contain a similar clause for small quantities of drugs that needed to be analyzed in foreign laboratories or used as evidence in foreign judicial proceedings. On the initiative of Interpol and some States, the International Narcotics Control Board (INCB) discussed the cross-border shipments of small quantities of drugs seized in illegal traffic in 1977. Naturally, the trade restriction under Article 31 of the Single Convention delayed the shipments of drug samples that were to be examined in foreign laboratories or court proceedings.[321] This prompted the INCB to request an opinion of the Office of Legal Affairs.

In its opinion, the Office held that cross-border shipments of drug samples for the purposes of laboratory testing or for their use as evidence in foreign judicial proceedings did not constitute 'international trade' within the meaning of Article 31 and were therefore exempt from trade restrictions.[322] The control measures, according to the Office, were limited to 'import and export for commercial purposes'.[323] This interpretation is at least debatable as Article 1(1)(m) of the Single Convention defined import and export as the 'physical transfer of drugs' across borders without having regard to a specific purpose. Still, the Office favored its 'reasonable interpretation', especially in view of Single Convention's provisions on international cooperation against

318 ECOSOC Res 730 (XXVIII) G (30 July 1959) E/RES/1959/730(XXVIII)G, recital 1 and para 1.

319 ECOSOC Res 770 (XXX) E (25 July 1960) E/RES/1960/770(XXX)E, section I, para (b); CND 'Report of the Fifteenth Session' (1960) E/3385-E/CN.7/395, paras 251–255 and ch XIV(D).

320 Single Convention, Article 31.

321 ECOSOC 'Implementation of the International Treaties on the Control of Narcotic Drugs and Psychotropic Substances: Note by the Secretary-General' (16 December 1977) E/CN.7/609, paras 15–16.

322 ibid para 17.

323 ibid para 17.

illicit drug trade.[324] The INCB, however, felt that it could not ultimately decide the issue and submitted it to the Commission on Narcotic Drugs.[325]

Within the Commission most members 'expressed their agreement with the legal opinion of the United Nations Office of Legal Affairs'.[326] A working group tasked with the issue equally expressed 'unanimous agreement with the legal opinion of the United Nations Office of Legal Affairs'.[327] Eventually, a Commission resolution 'recognized' the ruling of the Office of Legal Affairs that drug samples for laboratory or judicial proceedings were exempt from Article 31 and recommended that States develop procedures for the shipment of such samples.[328]

In both instances the opinions of the Office of Legal Affairs were instrumental to narrowly interpret the scope of trade restrictions under international drug treaties. The Office increased the flexibility of States in moving drug samples across borders in scenarios that are viewed positively (first-aid kits and mutual legal assistance). Both cases attest to the influence of Office interpretations for the Commission on Narcotic Drugs. And they equally show that the Office sometimes pushes the boundaries of the law by making questionable assumptions (first-aid kits not leaving the airplane) or using purpose-based reasoning (export limited to commercial purposes).[329]

Under the international drug conventions, the advisory function of the Office of Legal Affairs has not been limited to the scope of trade restrictions. It has also been asked to interpret Article 2 of the 1971 Convention, and in particular the interplay between WHO's scientific mandate and the political discretion of the Commission. Article 2(5) provides that the 'Commission, taking into account the communication from the World Health Organization, whose assessments shall be determinative as to medical and scientific matters, and bearing in mind the economic, social, legal, administrative and other factors it may consider relevant, may add the substance to Schedule I, II, III or IV.'[330]

In 1977, the Commission felt the urgent need to place certain salts under international control. At the same time, the WHO had informed the Com-

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324 ibid para 17.

325 ibid para 20.

326 CND 'Report on the Fifth Special Session' (1978) E/1978/35-E/CN.7/621, para 178.

327 ibid para 181.

328 ibid ch XIII, resolution 4 (S-V).

329 cf Alston (n 176) 687.

330 1971 Convention, Article 2(5).

mission that it had not completed its public health assessment under Article 2(5) of the 1971 Convention. To speed up the process, the Commission asked the Office of Legal Affairs whether the Commission could adopt a decision amending the schedule but that this decision would only go into effect once the WHO had communicated its findings to the Commission.[331] According to the opinion, the Commission could take a decision only after having considered the WHO recommendation as its findings were determinative with respect to medical and scientific matters. If the Commission were to adopt a decision conditioned on a future WHO recommendation, this would reverse the scheduling procedure as prescribed in Article 2 of the 1971 Convention.[332]

The Office also ruled that the Commission could legally vote by correspondence and that 'the Commission would be within its authority' to request that the WHO immediately forward its recommendation after it had completed its medical assessment.[333] As a consequence, the Commission decided to vote by correspondence once the WHO had communicated its findings to the Commission. It made this decision 'taking into account ... the opinion of ... the Office of Legal Affairs' and 'in view of the opinion of the Office of Legal Affairs'.[334]

The 1977 opinion on a conditional Commission decision manifests a concern for the importance of the WHO recommendation in the scheduling process. More recently, this appears not to have been the case. In 2014, China proposed to include ketamine in Schedule I of the 1971 Convention.[335] Under the 1971 Convention, Schedule I imposes the strictest level of control such as limiting the use for very limited medical purposes, licensing and documentation requirements, and limiting international trade to competent authorities.[336] The WHO, in its Article 2(5) assessment, recommended against placing ketamine in Schedule I. Ketamine, the WHO Expert Committee reasoned, was included in the WHO List of Essential Medicine and it was

331 CND 'Report on the Twenty-Seventh Session' (1977) E/5933-E/CN.7/605, para 446. The opinion is reproduced in OLA 'Opinion Given Further to a Request from a Representative in the Commission on Narcotic Drugs' [1977] UNJYB 230.

332 'Report on the Twenty-Seventh Session' (n 331) para 446.

333 ibid para 446.

334 ibid chap XVI(B) (dec 6 (XXVII)). See also ibid para 448 and ch XVI(A) (res 3(XXVII), para (a) and res 4(XXVII), para 2).

335 ECOSOC 'Changes in the Scope of Control of Substances: Note by the Secretariat' (16 December 2014) E/CN.7/2015/7, para 31 and Annex III.

336 1971 Convention, Article 7.

'widely used as an anaesthetic in human and veterinary medicine', especially 'in developing countries and crisis situations'.[337] As noted by Norway, the strict control under Schedule I would limit the availability and block access to ketamine, something particularly concerning for low- and middle-income countries where ketamine was often the only available anaesthetic.[338]

This pitted the WHO's recommendation, 'whose assessments shall be determinative as to medical and scientific matters' against the broad discretion of the Commission, which may consider any 'economic, social, legal, administrative and other factor'.[339] There was a stark disagreement as to the merits of placing ketamine under international control.[340] But the political divisions involved a legal question: could the Commission place a substance in Schedule I against the medical advice of the WHO?

Before the ketamine controversy, the Secretariat had taken the position that, as a general matter under the 1971 Convention, 'the Commission may decide (even contrary to the recommendation of WHO) to place a substance under international control'. However, the Secretariat made an exception that the Commission cannot place a substance in Schedule I '[i]f WHO finds that a substance has significant therapeutic usefulness ... which would restrict the availability of the substance for medical and scientific purposes.'[341] At an intersessional meeting, the Commission discussed procedural aspects of China's proposal and, in particular, the impact of a negative WHO recom-

337 'Changes in the Scope of Control of Substances: Note by the Secretariat' (n 335) Annex IV.

338 ECOSOC 'Changes in the Scope of Control of Substances: Addendum' (16 December 2014) E/CN.7/2015/7/Add.1, para 22.

339 1971 Convention, Article 2(5).

340 'Changes in the Scope of Control of Substances: Note by the Secretariat' (n 335) paras 34–59; 'Changes in the Scope of Control of Substances: Addendum' (n 338) paras 20–26.

341 See 'Challenges and Future Work in the Review of Substances for Possible Scheduling Recommendations: Note by the Secretariat' (n 298) Annex I, para 14 (outlining procedures to change the scope of control of substances under the 1971 Convention). This exception for Schedule I appears to be based on an official commentary written under the Office of Legal Affairs. But the commentary takes an even broader position that the Commission may not place a substance under international control against the recommendation of the WHO regardless of the proposed schedule. See Adolf Lande, *Commentary on the Convention on Psychotropic Substances* (UN 1976) 71, paras 22, 24.

mendation.[342] Since the WHO findings were determinative as to medical and scientific matters, some members argued, it was not within the authority of the Commission to place ketamine under international control. Others noted that the Commission must also consider economic, social and other factors and that therefore it could schedule ketamine.[343] As a result of these discussions, the Commission requested an opinion of the Office of Legal Affairs on the 'authority of the Commission on Narcotic Drugs to schedule a substance under the 1971 Convention if the World Health Organization has recommended that the substance should not be placed under international control'.[344]

The ensuing legal opinion engendered considerable critique from States and civil society. The Office of Legal Affairs held that 'the ultimate authority to decide whether the substance should be added to a Schedule rests with the Commission ... even if WHO has recommended otherwise.'[345] The opinion leaves many questions unanswered and is certainly not a model of international legal craft.[346] As is often the case, the Office worked under time pressure, delivering the opinion just twelve days after the request, in time for the next meeting. This may explain some of the gaps in the opinion.

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342 'Legal Opinion from the Office of Legal Affairs of the Secretariat' (n 3) section I, para 2(c).

343 ibid section I, para 2(c).

344 ibid section I, para 1 and Annex.

345 ibid Annex, para 21.

346 The opinion did not consider the official commentary, according to which it would be *ultra vires* for the Commission to add a substance to Schedule I if the WHO had issued a negative recommendation and found a significant therapeutic usefulness of the substance. See Lande, *Commentary on the Convention on Psychotropic Substances* (n 341) 71, para 24. This view results from Article 7(1) which reduces availability of a substance for medical purposes—a provision which the opinion also fails to consider. As the opinion acknowledges, there is no relevant subsequent practice that concerned a negative WHO recommendation. See 'Legal Opinion from the Office of Legal Affairs of the Secretariat' (n 3) Annex, para 20. Finally, the opinion fails to consider international human rights law. Placing ketamine under strict Schedule I control is in tension with the core obligation of providing drugs deemed essential by the WHO under the right to health. See CESCR 'General Comment No. 14 (2000): The Right to the Highest Attainable Standard of Health (Article 12 of the International Covenant on Economic, Social and Cultural Rights)' (11 August 2000) E/C.12/2000/4, para 43(d) (stating that the right to health includes the core obligation to 'provide essential drugs, as from time to time defined under the WHO Action Programme on Essential Drugs').

China eventually changed its stance as its Schedule I proposal stood little chance, instead proposing to add ketamine to the much lighter control under Schedule IV before the Commission's official session.[347] The debates at the intersessional meetings are not published in the Commission's report,[348] nor does the Commission publish summary records of its meetings. But a shadow report of an NGO coalition recounted that, at the Commission's meeting, 'several countries stated their reservations with respect to the OLA's reasoning, pointing out the risk of creating a precedent that would enable the CND to schedule by vote any substance under the 1971 Convention'.[349] And an unofficial transcript of the intersessional meeting sheds further light on country's reactions with China stating that States should defer to the high quality analysis of the Office of Legal Affairs, except for clear counter arguments. For the Netherlands and Switzerland, the opinion was flawed because it did not engage with paragraphs 22 and 24 of the official commentary.[350]

In effect, the Office resolved a constructive ambiguity in the 1971 Convention in favor of the ultimate authority of the Commission and against a de facto veto right of the WHO.[351] Both conclusions are reasonable interpretations of the law, at least under the official commentary.[352] But the opponents of China's proposal could not rely on an Office opinion to bolster their (legal) case against the scheduling of ketamine. And the Commission's decision

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347 ECOSOC 'Further Information Provided by the People's Republic of China on the Proposed Scheduling of Ketamine' (5 March 2015) E/CN.7/2015/CRP.5.

348 cf CND 'Report on the Fifty-eighth Session' (2015) E/2015/28-E/CN.7/2015/15, paras 69–72.

349 International Drug Policy Consortium, 'The 2015 Commission on Narcotic Drugs and its Special Segment on Preparations for the United Nations General Assembly Special Session on the World Drug Problem' (*IDPC*, 2015) <https://idpc.net/publications/2015/06/the-2015-commission-on-narcotic-drugs-and-its-special-segment-on-preparations-for-the-ungass-on-the-world-drug-problem-report-of-proceedings> accessed 7 July 2024, 20.

350 International Drug Policy Consortium, 'CND Intersessional – Friday 6th March 2015' (*CND Blog*, 6 March 2015) <http://cndblog.org/2015/03/cnd-intersessional-friday-6th-march-2015/> accessed 7 July 2024.

351 Julie Hannah, 'Ketamine under International Law' (*IntLawGrrls*, 12 March 2015) <https://ilg2.org/2015/03/12/ketamine-under-international-law> accessed 7 July 2024 (equating the legal opinion with the 'prevailing interpretation').

352 cf Lande, *Commentary on the Convention on Psychotropic Substances* (n 341) 71, para 20 (Commission may place substance under international control contrary to the recommendation of WHO) and para 24 (Commission would act unlawful if placing a substance in Schedule I after a negative WHO recommendation).

to postpone the consideration of China's proposal tacitly accepts the legal opinion.[353]

The legal opinion on the scheduling authority of the Commission on Narcotic Drugs exhibits the role of the Office of Legal Affairs in the decision-making process of administrative bodies of the United Nations. As an external actor, the Office of Legal Affairs legalizes politics when the Commission (or ECOSOC) are themselves divided. And in this process, its legal opinions invariably empower one actor (the Commission) over another (the WHO), and with it the relative importance of political discretion and medical expertise.[354] Seen this way it is unsurprising that States would either voice their support or harshly criticize the opinion.

Whatever the ultimate judgment on these opinions, the Commission's interpretation of its mandate cannot be understood without regard to the influential opinions of the Office of Legal Affairs. Even the 1971 Convention on Psychotropic Substances was adopted, at least in some part, because the Office of Legal Affairs had ruled that psychotropic substance were outside the scope of the Single Convention and by consequence outside the Commission's authority.[355] At times, they have pushed the boundaries of the mandate entrusted to the Commission under the drug conventions, such as when the Office cleared a decision amending the schedules of the Single Convention

353 cf 'Report on the Fifty-eighth Session' (n 348) paras 71, 97 (decision 58/2).

354 cf Dimitri Van Den Meerssche, 'Performing the Rule of Law in International Organizations: Ibrahim Shihata and the World Bank's Turn to Governance Reform' (2019) 32 LJIL 47, 61.

355 Adolf Lande, *Commentary on the Single Convention on Narcotic Drugs, 1961* (UN 1973) 87, para 6.
In 1965, the WHO had recommended to place LSD and similar substances under international control but 'was not sure whether that interpretation would be satisfactory from the legal point of view.' See CND 'Report of the Twenty-first Session' (1966) E/4294-E/CN.7/501, paras 302–303. The Office of Legal Affairs in a first opinion held that there were 'legal grounds for doubting the correctness' of the WHO recommendation to place certain psychotropic substance under the regime of the Single Convention. See CND 'Report of the Twenty-second Session' (1968) E/4455-E/CN.7/512, Annex II. A year later, Sweden tabled a draft resolution that would have applied the Single Convention to certain psychotropic substances. The Office of Legal Affairs, primarily relying on the drafting history of the Single Convention, opined that 'it would not be legally correct for the Commission to adopt the [Swedish] draft resolution'. States had differed on the soundness of the legal opinion but Sweden eventually withdrew its proposal. See CND 'Report of the Twenty-third Session' (1969) E/4606/Rev.1-E/CN.7/523/Rev.1, paras 351–357, 373.

before it even was in force—on the innovative rationale that there was a 'good prospect that the Single Convention would enter into force'.[356]

The Office might be hesitant to engage in a substantive review of the authority of the Commission that involves policy choices such as the importance of scientific advice as the ketamine opinion indicates. But the Office's scrutiny is greater with respect to truly procedural questions such as when the Office held that the Commission should not vote before having received the WHO recommendation. While the Commission's interpretation of its mandate cannot be divorced from the Office's advice, its review function does not amount to, nor does it substitute judicial review. Nevertheless, it exercises a limited legal review in an administrative context—limited, but existing as form of legal review nonetheless.

4.5. Concluding Remarks

The UN Legal Counsel is a legal authority in the United Nations legal order—in limited but important aspects. Interpretations of the Legal Counsel are recognized as a legal precedent. They have been formally overturned by the General Assembly. Member States sometimes speak in favor of, at times harshly criticize them. And a policy of *stare decisis* is in place within the Office of Legal Affairs. In jurisdictional disputes between United Nations organs, politically weak organs resort to rulings of the Legal Counsel to strengthen their position. Sometimes this succeeds, at different times it does not. Finally, Legal Counsel review of technical and expert bodies is not a mere rubber-stamp. As the case of the UNECE Working Party shows, legal opinions declared on two occasions that a proposed decision would overstep the mandate of the UNECE. Twice the UNECE reversed its proposed decision after the Legal Counsel weighed in. Sometimes organs or its membership ignored the advice, but often the organ publicly affirmed the advice. While this does not convert a Legal Counsel opinion into a 'binding' obligation, this public affirmation attests to the authoritative nature of the legal advice rendered.[357]

Three factors explain the impact of the Legal Counsel in the development of the institutional law of the United Nations. For obvious reasons,

356 CND 'Report of the Nineteenth Session' (1964) E/3893-E/CN.7/466, paras 155–157.

357 cf, with regard to advisory opinions of the ICJ, Rosalyn Higgins, *Problems and Process: International Law and How We Use It* (Clarendon 1995) 203.

the institutional memory of the Office of Legal Affairs is not even matched by well-resourced Member States. For better or worse, the Legal Counsel enjoys an appearance of independence and impartiality. Coupled with the publicity of the Legal Counsel's formal advisory practice, this makes the Legal Counsel an important actor in the development of the institutional law of the United Nations. For non-lawyers in expert bodies it is especially wise to play it safe on points of law by involving an external actor. This point explains the uneven scope *ratione personae* of Legal Counsel review in that the review of subsidiary organs of a technical and expert nature is more developed than the review of the principal organs of the United Nations.

Generally the standard of Legal Counsel review is 'lite'.[358] Opinions hardly ever elaborate on the standard of review. A rare example is the 2007 memorandum on the reduction of salaries of ICJ judges. There the Legal Counsel stated that 'it is not in the purview of the Office of Legal Affairs to evaluate whether the decision by the Assembly was warranted by objective circumstances, nor to assess the rationale for the resultant decrease in compensation ... [T]he purpose of the present observations is to examine whether such a decrease is legally acceptable, both in principle and in terms of the modalities of its application'.[359] It is not a searching review or one that could be analogized to reasonableness review.[360]

In the institutional law context, the Legal Counsel generally reviews for consistency with the principle of speciality,[361] the principle of respecting the division of competence within bodies and between different organs,[362] questions of competence,[363] administrative and procedural issues,[364] and

358 cf Klabbers, 'Constitutionalism Lite' (n 175).

359 'Conditions of Service and Compensation for Officials other than Secretariat Officials: Members of the International Court of Justice and Judges and Ad Litem Judges of the International Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda' (n 123) Annex I, para 8.

360 cf *Abyei Arbitration* (*Government of Sudan v Sudan People's Liberation Movement/Army*) (Final Award) (2009) XXX RIAA 145, 341 (reviewing a decision of an international body for 'excess of mandate' and employing 'reasonableness' as the applicable standard of review).

361 Section 4.4.2 in this Chapter (UNECE WP.7).

362 Section 4.3.2 in this Chapter (dispute between UNCTAD Working Party and UNCTAD Secretariat); Section 4.3.1 in this Chapter (dispute between OIOS and UNCC).

363 Section 4.4.4 in this Chapter (Commission on Narcotic Drugs).

364 Section 4.4.3 in this Chapter (Continental Shelf Commission).

specific legal standards.[365] Importantly, there is no review for external legal standards like the principle of proportionality or human rights. For example, in the opinion on the scheduling of ketamine, the Office of Legal Affairs did not analyze whether regulatory control of ketamine—an essential WHO medicine—is consistent with the human right to health, General Comment No. 14 of the Committee on Economic, Social and Cultural Rights and its 'core obligation' to provide essential drugs as defined by the WHO.[366] This is not necessarily surprising. Although the Legal Counsel is, to some extent, a functional substitute for a system of judicial review, the Legal Counsel is not a court. Opinions are brief with the longest one not more than thirteen pages,[367] and expected in a matter of days.[368] Legal Counsel review is administrative review by an international civil servant—albeit an important civil servant and results in administrative interpretations of the law, not judicial interpretations.[369]

Embodied and publicized in various documents—letters, opinions, notes and memoranda—interpretations of the Legal Counsel are not legally binding. Nevertheless they constitute a legal document. Consequently, the Committee for Programme and Coordination stressed that 'the legal interpretations provided by the Office of Legal Affairs were very important'.[370] This has also been acknowledged by the Legal Counsel: legal opinions contributed

365 See the opinions on the salary of ICJ judges and the honorarium of INCB members in Section 4.3.2.

366 'General Comment No. 14 (2000): The Right to the Highest Attainable Standard of Health (Article 12 of the International Covenant on Economic, Social and Cultural Rights)' (n 346) para 43(d) (stating that the right to health includes the core obligation to 'provide essential drugs, as from time to time defined under the WHO Action Programme on Essential Drugs'). See also Daniel Wisehart, *Drug Control and International Law* (Routledge 2018) 159–160.

367 cf 'Letter dated 25 August 2005 from the Legal Counsel, Under-Secretary-General of the United Nations for Legal Affairs, addressed to the Chairman of the Commission on the Limits of the Continental Shelf' (n 3).

368 ECOSOC 'Report of the Office of Internal Oversight Services on the In-depth Evaluation of Legal Affairs' (9 April 2002) E/AC.51/2002/5, para 6 (opinions often expected 'as soon as possible' or 'within the current session').

369 cf, in relation to the administrative interpretations by the ILO secretariat, Louis B Sohn, 'Procedures Developed by International Organizations for Checking Compliance' in Stephen M Schwebel (ed), *The Effectiveness of International Decisions* (Sijthoff/Oceana 1971) 53.

370 UNGA 'Report of the Committee for Programme and Coordination' (9 July 2014) A/69/16, para 128.

to the development of international organizations law, were based on many years of practice and 'were recognized to carry legal authority'.[371] Seen this way opinions of the Legal Counsel are an 'intermediate public good' and the institution of the Legal Counsel is a body 'intended to, among other things, facilitate consultations and negotiations among member parties, monitor treaty compliance or provide other types of information'.[372] In an area of international law that generates few judicial decisions,[373] Legal Counsel opinions supply 'law'. They clarify the law, provide a frame of reference and legal infrastructure when the institutional law is doubtful, and are an embryonic nucleus of legality in the United Nations—'a system of law [that] does not amount to very much' when compared to other legal systems.[374]

371 'Provisional Summary Record of the 3398th Meeting' (n 22) 7.

372 cf Inge Kaul, Isabelle Grunberg, and Marc A Stern, 'Defining Global Public Goods' in Inge Kaul, Isabelle Grunberg, and Marc A Stern (eds), *Global Public Goods: International Cooperation in the 21st Century* (Oxford University Press 1999) 13. See also André Nollkaemper, 'International Adjudication of Global Public Goods: The Intersection of Substance and Procedure' (2012) 23 EJIL 769, 771 and 783 (describing international judicial adjudication as as an 'intermediate public good' that contribute towards 'final public goods' such as the protection of the environment or human rights).

373 Cedric Ryngaert and others, 'General Introduction' in Cedric Ryngaert and others (eds), *Judicial Decisions on the Law of International Organizations* (Oxford University Press 2016) 2 (describing that, despite the importance of judicial decisions, international institutional law developed 'out of court', and in particular through the advisory practice of legal counsel of international organizations).

374 cf Felice Morgenstern, 'Legality in International Organizations' (1977) 48 BYBIL 241.