

## Chapter 3: Legal Regime of Formal Legal Opinions

### 3.1. Introduction

In the practice of the United Nations certain rules and principles guide the provision of formal legal advice by the Legal Counsel. In the first place, these rules and principles limit the advisory function of the Legal Counsel. They regulate which actor may request formal legal advice, what questions are permissible and what preconditions must be met for a valid request. Thus, their primary purpose is to limit the advisory competence of the Legal Counsel.

In this sense, these rules and principles are similar in certain aspects to jurisdictional principles applicable to international courts, especially in relation to their advisory jurisdiction. While it is not wrong to denote these rules and principles as ‘jurisdictional’, it is helpful to keep in mind that the provision of formal legal advice may not be equated to a judicial process.

At the same time—and this is crucial—such rules and principles establish and reinforce the competence of the Legal Counsel to issue formal legal opinions to UN organs and related international bodies. By regulating the circumstances when the Legal Counsel may *not* provide formal legal advice, they raise the status and the authority of such advice when the Legal Counsel does advise. They also distinguish the Legal Counsel from other actors who may opine on legal issues in the UN such as Member States. In other words, a consistent and established practice that guides the advisory function adds another layer of authority to the Office of Legal Affairs. It is not only a body that appears neutral and impartial, it is also a body where the very activity of providing legal advice is itself guided by legal principles. If the very provision of formal legal opinions is itself embedded in an established practice, it is reasonable to consider whether the Office of Legal Affairs may constitute a type of ‘impartial legal body’ for the rule of law at the UN level.<sup>1</sup>

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1 See Robert McCorquodale, ‘Defining the International Rule of Law: Defying Gravity?’ (2016) 65 ICLQ 277, 292–298 for the argument that the distinctive features of the international legal order require an ‘independent *legal* body’ instead of a focus on judicial courts. In 2012, the General Assembly ‘recognize[d] that the rule of law applies to ... international organizations, including the United Nations and its principal organs’: Declaration of the High-Level Meeting of the General Assembly on the Rule

The outcome, while formally not binding, is certainly of relevance. Put differently, a formal opinion of the Legal Counsel does not bind the requesting organ. Nevertheless, it is a legal document by an office of the UN that enjoys an appearance of neutrality and independence. Furthermore, it is a legal document by an office that represents the institutional memory of the Organization, having likely the most complete and accurate knowledge of UN practice, at least when compared to scholars or even Member States.

In United Nations practice, there are three clear rules that guide the advisory function of the Legal Counsel. First, a formal legal opinion may only be issued in response to a request by a competent UN organ.<sup>2</sup> Importantly, Member States do not have the right to request a formal legal opinion. They may try to convince the organ concerned, but the Office of Legal Affairs only responds to requests by the organ itself, not its Member States or individual members. Second, the request of of an organ for a formal legal opinion requires a decision in accordance with the applicable rules of procedure.<sup>3</sup> Third, the request must concern a legal question. Lastly, the request usually is made in writing by the presiding officer of the requesting body.<sup>4</sup>

The practices reflect at the very least norms that guide the appropriate exercise of the advisory function. But at least some of these norms (such as the necessity of a request by a competent organ of the UN) are so ingrained as to form an ‘established practice’ of the Organization making it part of the rules of the organization.<sup>5</sup> The practice to advise United Nations organs only is equally founded in the Office’s mandate.<sup>6</sup> The internal legal framework is clear in that the ‘Legal Counsel is the senior legal adviser to the Secretary-

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of Law at the National and International Levels, UNGA Res 67/1 (30 November 2012) A/RES/67/1, para 2.

2 See Section 3.3 in this Chapter.

3 See Section 3.4 in this Chapter.

4 See Section 3.5 in this Chapter.

5 cf Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character (adopted 14 March 1975, not yet in force) A/CONF.67/16, Article 1(1)(34). For the notion of ‘established practice’, see Section 5.2 in Chapter 5.

6 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) 61 (stating that giving formal advice to individual Member States ‘serait ... contraire à son mandat’).

General, the Secretariat, funds and programmes and other organs of the United Nations' and not individual Member States.<sup>7</sup>

### 3.2. *Formal and Informal Legal Advice*

It is essential to define the kind of documents to which these rules and principles apply. Formal legal opinions must be distinguished from a number of other activities of the Legal Counsel and the Office of Legal Affairs that may involve interpretations of law, but which are not customarily subject, for example, to the rule that only a competent body may request a formal legal opinion.

As such, there is a wide field of activities of the Legal Counsel and the Office of Legal Affairs that are not subject to these rules because they are closely intertwined with policy or involve routine Secretariat functions. Some of these have been described in the preceding chapters. Thus, the delegated responsibility of the Office of Legal Affairs of the Secretary-General's depositary functions, the review of administrative policies and bulletins, or the drafting of agreements fall outside this ambit. Similarly, if the legal counsel represents the organization in legal proceedings or is tasked with policy implementation such as the establishment of courts and inspection panels, these jurisdictional principles do not apply.

There is, however, an activity of the Legal Counsel that may be regarded as providing legal opinions, but nevertheless does not seem to be subject to the identified rules and principles. The activity in question are various 'statements' by the Legal Counsel or subordinate officers in the various UN committees. It does not always appear that there needs to be a request by a the organ itself; rather the Legal Counsel may give a statement in response to statements by governments. Nevertheless, some of these pronouncements are considered to enjoy the same or similar authority as formal legal opinions.

A relevant case concerns the denial of the U.S. Department of State for a visa request submitted by the then-Chairman of the Palestine Liberation Organization. As will be recounted later, the dispute between the U.S. and the United Nations centered on the question whether the Headquarters Agreement was subject to a national security reservation. In the Host Country

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<sup>7</sup> Secretary-General's Bulletin 'Organization of the Office of Legal Affairs' (18 January 2021) ST/SGB/2021/1, para 3.3.

Committee, many delegates had condemned the visa denial as a violation of the Headquarters Agreement.

When introducing his statement in the Host Country Committee, the Legal Counsel underlined that '[i]t had not been [his] intention, therefore, to make a statement'. He nonetheless wished to make some remarks 'in the light of the statements made by a number of representatives, and in particular that of the host country'.<sup>8</sup> It seems clear that there was no formal request by the Host Country Committee for this statement. Nevertheless, when the General Assembly endorsed the statement of the Legal Counsel, it referred to the 'opinion of the Legal Counsel of the United Nations rendered on 29 November 1988'.<sup>9</sup> And in subsequent years the 1988 statement of the Legal Counsel became an important precedent in the deliberations of the Host Country Committee that was invoked by States,<sup>10</sup> and was reaffirmed by the Legal Counsel in 2019.<sup>11</sup>

A second category contains requests for a formal opinion, but the body may not have standing to request because it is neither a UN office nor an intergovernmental organ, nor a treaty organ that is closely linked with the UN. In such cases, the Office of Legal Affairs may not issue a formal opinion, but instead responds in an informal way.<sup>12</sup>

For example, the 2014 letter to the Secretariat of the Biodiversity Convention explicitly advises on an 'informal basis', that its views 'do not purport to be an authoritative or definite interpretation', and that the opinion 'is sub-

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8 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 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, para 1.

9 UNGA Res 43/48 (30 November 1988) A/RES/43/48, recital 6.

10 UNGA 'Report of the Committee on Relations with the Host Country' (29 October 2019) A/74/26, para 17 (Chair of the Committee), para 30 (Russian Federation) and para 165(j) (recommendation and conclusion of the Committee); UNGA 'Report of the Committee on Relations with the Host Country' (22 October 2018) A/73/26, para 51 (Russian Federation).

11 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, 2 (stating that the legal position 'remains unchanged from that which was provided by the then Legal Counsel to this Committee in 1988, set out in document A/C.6/43/7').

12 See Section 3.3 in this Chapter for the notion of 'competent UN organ' in the context of requests for formal legal opinions by the Legal Counsel.

ject to adjustments depending on the specific circumstances of each case.<sup>13</sup> Notwithstanding its informal character, the Convention Secretariat based its analysis of the issue on the advice of the Office.<sup>14</sup> What is more, the Conference of Parties even ‘recognize[d] the advice of the United Nations Office of Legal Affairs’, quoted verbatim the conclusion of the Office letter and built its decision on that analysis.<sup>15</sup>

Two conclusions may be drawn from this practice. First, it shows that the Legal Counsel’s views matter even when there was no formal request for an opinion. Oral statements and various Legal Counsel letters matter in the day-to-day interpretation of law in the UN, even when it is not described as a formal legal opinion. This was the case with the Legal Counsel’s letter on the consequences of General Assembly resolution 47/1 and the status of Yugoslavia within the United Nations that responded to a letter by Bosnia and Herzegovina and Croatia and that was published as a note by the Secretary-General.<sup>16</sup> This letter is widely cited in the literature, and influenced at least in part the International Court of Justice in the *Bosnian Genocide* cases.<sup>17</sup> But it does not mean that the rules and principles governing the issuance of formal legal opinions are meaningless.

The point is simply that in the practice of the Office of Legal Affairs there is a distinction between formal legal advice and advice on an informal basis. The Legal Counsel has pointed to this distinction many times, for example, in exchanges with members of the ILC. In 2015, some members asked the Legal Counsel about opinions regarding the use of force against ISIL. The Legal Counsel responded that the Office of Legal Affairs provides advice quite frequently to the Secretary-General and Member States ‘on an informal basis’.<sup>18</sup> By contrast, ‘no formal written opinions had been or would

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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, Annex.

14 *ibid* para 4.

15 CBD Dec XII/12 F (13 October 2014) UNEP/CBD/COP/DEC/XII/12, recitals 4–5 and para 2.

16 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.

17 See Section 5.3 in Chapter 5.

18 ILC ‘Provisional Summary Record of the 3245th Meeting’ (2 June 2015) A/CN.4/SR.3245, 9.

be issued'.<sup>19</sup> The Legal Counsel suggested that a formal legal opinion of his Office might well be a good substitute for an advisory opinion of the International Court of Justice, even though he did not provide formal opinions very often.<sup>20</sup> In addition, the Legal Counsel stated that '[c]urrently, some 95 per cent of the work of his Office was informal: formal legal opinions were the exception.'<sup>21</sup> Lastly, a formal legal opinion issued in response to a request by a United Nations organ identifies a different actor. Whereas informal legal advice identifies the 'Secretariat' as the author, the 'Office of Legal Affairs' (or the 'Legal Counsel') is identified as the author of formal legal advice.<sup>22</sup>

The first difference is that informal legal advice in most cases will remain 'secret law' as only a small selection is published in the *United Nations Juridical Yearbook* and may only surface through secondhand accounts, whereas formal written opinions will invariably become public as a UN document or because they appear in the official records of the UN.<sup>23</sup> This public element makes it more likely that they acquire the status of a legal precedent within the UN. That precedential effect is less likely with most informal opinions. The second difference is that informal advice is often more tentative and subject to various disclaimers. That may not in itself mean that the advice is meaningless. To the contrary, even informal legal advice

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19 'Provisional Summary Record of the 3245th Meeting' (n 18) 9.

20 ILC 'Provisional Summary Record of the 3371st Meeting' (3 August 2017) A/CN.4/SR.3371, 9.

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

22 OLA 'Inter-office Memorandum to the Assistant Secretary-General, Controller Office of Programme Planning, Budget and Accounts Department of Management, concerning what Constitutes Official Documents of the United Nations that need to be Issued in the Six Official Languages of the United Nations' [2015] UNJYB 311, para 3.

23 A case in point is the controversial adoption of Security Council resolution 1422 that arguably conflicted with Article 16 of the Statute of the International Criminal Court. In informal discussions prior to its adoption, the then-Legal Counsel Corell had cleared resolution 1422 as consistent with Article 16 'in the present circumstances' since it presented a non-issue. See Amnesty International, 'International Criminal Court: The Unlawful Attempt by the Security Council to Give US Citizens Permanent Impunity from International Justice' (*AI Index: IOR 40/006/2003*, 30 April 2003) <<https://www.amnesty.org/en/documents/ior40/006/2003/en/>> accessed 7 July 2024, 36, fn 120. For further background on Security Council resolution 1422, see Andreas Zimmermann, "'Acting under Chapter VII (...)': Resolution 1422 and Possible Limits of the Powers of the Security Council" in Jochen Abr Frowein and others (eds), *Negotiating for Peace: Liber Amicorum Tono Eitel* (Springer 2003).

constitutes organizational practice and there are cases when such informal advice was quite influential.

The 1988 Legal Counsel statement concerning the denial of a visa request by Yasser Arafat in this sense is an exception that confirms the rule. In that case, the oral statement of the Legal Counsel was ‘circulated pursuant to a decision of the Sixth Committee at its 51th meeting, 29 November 1988’.<sup>24</sup> At that meeting of the Sixth Committee, the United Arab Emirates requested that the statement of the Legal Counsel ‘should be issued *in extenso*’, and the Committee decided to do so by consensus.<sup>25</sup> This last point indicates that the line between formal and informal advice may not always be that clear.

Finally, a few words on form and substance are necessary. From a substantive perspective, it is axiomatic that a legal opinion contains legal reasoning and expresses a view on a certain legal issue. They come with a variety of titles: letter or exchange of letters,<sup>26</sup> memorandum,<sup>27</sup> opinion,<sup>28</sup> advice,<sup>29</sup> or similar names. But the responsible author must be an international civil servant such as the UN Legal Counsel, the Office of Legal Affairs or the legal adviser of another UN specialized agency who are part of the secretariat.

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- 24 ‘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 8).
- 25 UNGA ‘Summary Record of the 51st Meeting’ (5 December 1988) A/C.6/43/SR.51, para 44.
- 26 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.
- 27 UNIDO Legal Office ‘Interoffice Memorandum re: Certain Aspects regarding the Legal Adviser/Legal Office’ [2003] UNJYB 563.
- 28 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.
- 29 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.

### 3.3. Request by a Competent United Nations Organ

According to the longstanding practice of the Office of Legal Affairs, a formal legal opinion may only be issued in response to a request by a competent UN organ.<sup>30</sup> While the Legal Counsel may provide informal advice to Member States, formal written opinions are reserved to UN bodies and committees.<sup>31</sup> The Office of Legal Affairs may also present advice to ensure effective drafting of resolutions,<sup>32</sup> but such advice is limited to drafting style and the use of technical terms in the drafting process.<sup>33</sup>

This practice contrasts with that of other international organizations. For example, the Legal Adviser of the International Labour Organisation and the General Counsel of the International Monetary Fund provide formal opinions also in response to requests from Member States directly.<sup>34</sup>

This rule has a number of salient features. The requirement of request is critical by itself, having implications for the normative value of legal opinions.<sup>35</sup> That a competent organ must request the legal opinion means

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30 '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' (n 28) Annex I, para 3; UNGA 'Verbatim Record of the 58th Plenary Meeting' (9 December 2016) A/71/PV.58, 2; 'Inter-office Memorandum to the Assistant Secretary-General, Controller Office of Programme Planning, Budget and Accounts Department of Management, concerning what Constitutes Official Documents of the United Nations that need to be Issued in the Six Official Languages of the United Nations' (n 22) para 2.

31 It appears that this rule is also applicable in IFAD, where it is described as a 'policy': IFAD General Counsel 'Question concerning the Reporting to the Executive Board by the Evaluation Committee' (2009) EC 2009/60/C.R.P.1, para 2.

32 UNGA 'Statement of UN Legal Counsel to UN Fourth Committee and Discussion' (1967) 6 ILM 171, 179 and 184.

33 cf UNGA 'Rules of Procedure of the General Assembly' (15 September 2022) A/520/REV.20, Annex II, para 35.

34 ILO 'Employment Injury Benefits Convention, 1964 (No 121) (Article 18, paragraph 1)' (1977) 60 Off Bull 286, para 1 (request by Norway for an interpretation by the ILO legal office); ILO 'Migrant Worker (Supplementary Provisions) Convention, 1975 (No 143) (Article 9, paragraph 1)' (1977) 60 Off Bull 287, para 1 (request by Sweden for an interpretation by the ILO legal office); Joseph Gold, 'The Fund Agreement in the Courts: IX' (1967) 14 Staff Pap 369, 389 (request by a German court of appeals concerning the conformity of a foreign exchange regulation with Article VIII(2)(b) of the IMF Agreement).

35 See Chapter 5.

first and foremost that the advice is intended for the organ concerned, even though individual Member States might have initiated the request by the competent organ.<sup>36</sup> This condition results in a purpose similar to that of advisory opinions of the International Court of Justice. To borrow a standard phrase in advisory opinions of the Court, an opinion of a legal adviser is given to the organ that requested it, not to States,<sup>37</sup> and its purpose is to furnish the requesting organ with legal advice necessary for its action and to guide the organ concerned.<sup>38</sup>

The rule that only competent UN organs have standing to seek a formal legal opinion is firmly rooted in the consistent practice of the Office of Legal Affairs and UN organs.<sup>39</sup> As early as 1952, an official of the then UN Legal Department stated that ‘the Legal Department preferred to refrain from giving an opinion unless formally requested to do so by the organ concerned’.<sup>40</sup> The importance of this rule is underlined by legal advisers when introducing legal opinions to bodies. In the context of the Rotterdam Convention, the UNEP legal adviser ‘explained that the UNEP legal office had not acted on its own initiative in preparing the legal opinion: it had been requested to do so by the Conference of Parties itself.’<sup>41</sup>

It is true that Member States sometimes challenge this approach and contend that each Member State has a ‘right to seek a legal opinion’.<sup>42</sup> Yet, when Member States directly approach the Legal Counsel for a formal written

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36 UNGA ‘Summary Record of the 122nd Meeting’ (7 October 1948) A/C.5/SR.122, 203 (Chairman stating, although any State had the right to seek a legal opinion, the Fifth Committee had the right to decide whether it wished to hear the opinion or not).

37 cf. *mutatis mutandis*, *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania (First Phase)* (Advisory Opinion) [1950] ICJ Rep 65, 71.

38 cf. *mutatis mutandis*, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) [2004] ICJ Rep 136, 162-3, para 60.

39 cf Henry G Schermers and Niels M Blokker, *International Institutional Law: Unity with Diversity* (6th edn, Brill Nijhoff 2018) 893–895 (describing the practice that ‘usually’ legal departments of international organizations provide interpretations only when expressly requested to do so).

40 UNGA ‘Summary Record of the 340th Meeting’ (1 February 1952) A/C.5/SR.340, para 64.

41 Rotterdam Convention ‘Report of the Chemical Review Committee on the work of its sixth meeting’ (5 May 2011) UNEP/FAO/RC/COP.5/9/Add.2/Rev.1, para 38.

42 UNGA ‘Summary Record of the 14th Meeting’ (12 November 2018) A/C.3/73/SR.14, para 2 (Morocco, also on behalf of the African Group); UNGA ‘Summary Record of the 9th Meeting’ (23 November 2018) A/C.3/73/SR.9, para 87 (Egypt, supported by

opinion, the Office has so far refused to follow up on such requests and did not issue a formal opinion. Instead, the Office may informally consult with the Member State concerned.<sup>43</sup>

For example, in 2005 Venezuela sought legal advice from the UN Office of Legal Affairs on the 2005 World Summit Document. In his reply, the President of the General Assembly, transmitting an oral reply by the Office, stated that ‘as a matter of long-standing policy and practice, the Office does not provide legal advice to individual Member States. Legal advice is provided only if the request emanates from a United Nations organ, in this case the General Assembly.’<sup>44</sup> Consequently, the UN Office of Legal Affairs did not opine on the question submitted in the Venezuelan note verbale.

Another case reinforces that the Legal Counsel’s approach is not a mere policy, but sufficiently consistent to be regarded as an established practice. In 2009, Sweden, on behalf of the EU, requested an opinion from the Office of Legal Affairs on different options for the construction and role of a global mechanism and its relationship with bodies of the Convention to Combat Desertification. The Office of Legal Affairs replied that ‘[i]t has been a long-standing policy of the Office of Legal Affairs to only provide formal legal opinions when requested by a competent organ of the UN and not to individual members or to a group of members of that organ.’<sup>45</sup> Accordingly, the Office saw itself unable to provide the opinion as the request came from a group of States within the Conference of Parties.<sup>46</sup>

The necessity to follow long-standing practices is crucial. For if they are not followed, this may raise doubts as to the status of pronouncements by

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Syria), para 93 (Cuba) and para 94 (China); ‘Summary Record of the 122nd Meeting’ (n 36) 203 (Poland).

43 cf 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, 1 (referring to informal consultations with the Legal Counsel after a group of Member States had requested a legal opinion directly).

44 UNGA ‘Letter dated 1 November 2005 from the President of the General Assembly to the Permanent Representative of the Bolivarian Republic of Venezuela’ (3 November 2005) A/60/535.

45 ‘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’ (n 28) Annex I, para 3.

46 *ibid* Annex I, para 3.

legal advisers. Although the role of the World Bank General Counsel differs from that of the UN Legal Counsel, a case from the World Bank may also illustrate this. In 2006, the then General Counsel Robert Dañino released a document entitled ‘Legal Opinion on Human Rights and the Work of the World Bank’.<sup>47</sup> Under World Bank practice, the General Counsel writes legal opinions on request of the Board of the World Bank which then endorses these opinions.<sup>48</sup> This contrasts with a plain reading of the Bank’s founding charter which assigns the power of interpretation to its Board.<sup>49</sup> Nevertheless, legal opinions are privileged and may only be published with the consent of the Board.<sup>50</sup>

The legal opinion in question, however, had not been requested by the Bank’s board, but by its senior management.<sup>51</sup> Since the Board did not endorse, let alone request the opinion, the document’s status as an official legal opinion was cast in doubt.<sup>52</sup> Some World Bank employees considered it as a source of advice for the management and as a purely internal matter.<sup>53</sup> Even within the Bank, not every employee received the opinion and its heightened status outside the Bank appears to be largely the result of a leak to NGOs.<sup>54</sup>

When two UN special rapporteurs wrote a letter to the World Bank in 2012 and invoked the 2006 document against the Bank,<sup>55</sup> the Bank made

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47 Available at: World Bank ‘Legal Opinion on Human Rights and the Work of the World Bank’ (27 January 2006) OXIO 215.

48 Galit A Sarfaty, ‘Why Culture Matters in International Institutions: The Marginality of Human Rights at the World Bank’ (2009) 103 AJIL 647, 665; 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; Ibrahim FI Shihata, ‘The Dynamic Evolution of International Organizations: The Case of the World Bank’ (2000) 2 J History Intl L 217, 225.

49 Articles of Agreement of the International Bank for Reconstruction and Development (adopted 27 December 1944, entered into force 27 December 1945) 2 UNTS 134 (IBRD Articles) Article IX.

50 World Bank, *The World Bank Policy on Disclosure of Information* (World Bank 2002) para 75; World Bank ‘Bank Policy: Access to Information’ (2015) EXC4.01-POL.01, para 2(d).

51 Sarfaty (n 48) 665.

52 *ibid* 666.

53 *ibid* 666.

54 *ibid* 666–665.

55 Reproduced in Oliver De Schutter, *International Human Rights Law: Cases, Materials, Commentary* (3rd edn, Cambridge University Press 2019) 282.

clear that the opinion was ‘not reflective of an official World Bank approach consistent with the World Bank’s Board authority to interpret the Articles of Agreement’.<sup>56</sup>

Lastly, a case from the Third Committee of the General Assembly bears mentioning. In 2018, the agenda of the Third Committee included a dialogue with the chairperson of the Commission of Inquiry on Burundi. Burundi challenged that part of the agenda as contrary to certain resolutions of the General Assembly and of the Human Rights Council.<sup>57</sup> Eventually, Burundi asked for a legal opinion after the Committee’s secretary explained that the invitation to the chairperson of the Commission was in accordance with the practice of the Committee.<sup>58</sup>

During the debates, many States argued that Burundi had a ‘right to seek a legal opinion’,<sup>59</sup> and that no decision of the Committee was required. However, the Committee’s secretary explained that, while any Member State could ‘send a request, that request would only have effect if the relevant intergovernmental body had agreed thereto, either through consensus or pursuant to a vote.’<sup>60</sup> In response, some States asked for the basis ‘of the rule stipulating that a legal opinion could only be sought by the Committee as a whole.’<sup>61</sup> According to the Committee’s secretary, that rule was not codified in the rules of procedure but reflected a ‘long-standing practice at the United Nations’. Pursuant to that practice, ‘legal opinions were issued by the Legal Counsel only at the request of an intergovernmental body and not at the request of an individual Member State or group of Member States.’<sup>62</sup>

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56 Reproduced in De Schutter (n 55) 283. In addition, the World Bank attempted to lower the impact of the opinion by arguing that the opinion focused on the human rights obligation of States and that every opinion must be seen within the context of the Bank’s overall legal framework and practice.

57 UNGA ‘Summary Record of the 1st Meeting’ (9 October 2018) A/C.3/73/SR.1, paras 7–9, 12.

58 *ibid* paras 13–15.

59 ‘Summary Record of the 14th Meeting’ (n 42) para 2 (Morocco, also on behalf of the African Group); ‘Summary Record of the 9th Meeting’ (n 42) para 87 (Egypt, supported by Syria), para 93 (Cuba) and para 94 (China).

60 ‘Summary Record of the 9th Meeting’ (n 42) para 95.

61 *ibid* para 103.

62 *ibid* para 104. See also the statement by U.S. in para 90 (‘According to the rules of procedure, any legal opinion must be sought by the Committee as a whole and not by a single Member State from the floor of the Committee’).

In line with that practice, the Committee voted on Burundi's request to seek a legal opinion from the UN Legal Counsel.<sup>63</sup>

Therefore, the principle that the Office of Legal Affairs only provides formal legal opinions upon formal request is firmly rooted in the established practice of the UN. As such, it is part of the rules of the organization. In analyzing this rule, the question logically arises which bodies are 'competent organs' for the purpose of this rule and enjoy standing to request a legal opinion. A 2014 opinion sheds light on this issue. In that case, the Secretariat of the Convention on Biological Diversity requested advice on the interpretation of a treaty term. The Secretariat is an autonomous body under the Biodiversity Convention while being institutionally linked to the United Nations Environmental Programme.<sup>64</sup>

In its opinion, the Office of Legal Affairs 'recall[ed] that the primary responsibility of the Office of Legal Affairs is to provide formal legal opinions to United Nations offices, funds or programmes and to United Nations inter-governmental organs at the formal request of those organs.'<sup>65</sup> The opinion added that the Office 'provide[s] legal opinions to Treaty Bodies on questions of international law but that is usually pursuant to a formal and written request from the intergovernmental organs of the Treaty Body concerned.'<sup>66</sup> Because it was the Secretariat, and not the Conference of Parties that had requested the advice, the office responded on an 'informal basis'.<sup>67</sup>

Accordingly, formal requests may be submitted by the principal and subsidiary organs of the UN as well as treaty bodies with an institutional link to the UN.<sup>68</sup> In the case of treaty bodies with an institutional link to the UN, the 2014 Office of Legal Affairs letter regarding the EU request in the context of the Conference of Parties of the Convention to Combat Desertification suggests that only the intergovernmental organs of such treaty bodies have

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63 'Summary Record of the 14th Meeting' (n 42) paras 1–5.

64 Convention on Biological Diversity (adopted 5 June 1992, entered into force 29 December 1993) 1760 UNTS 79, Article 24; CBD Dec I/4 (28 February 1995) UNEP/CBD/COP/DEC/I/4, para 1 (designating UNEP as the competent international organization to host the Convention Secretariat).

65 'Analysis on the Implication of the Use of the Term "Indigenous Peoples and Local Communities" for the Convention and its Protocols' (n 13) Annex.

66 *ibid* Annex.

67 *ibid* Annex.

68 'Analysis on the Implication of the Use of the Term "Indigenous Peoples and Local Communities" for the Convention and its Protocols' (n 13) Annex; Zacklin, 'Les Nations Unies et la crise du Golfe' (n 6) 61.

standing to request formal opinions (that is conferences of parties common in multilateral agreements on the environment).<sup>69</sup> But the practice of the Office makes clear that treaty bodies composed of experts (such as the Continental Shelf Commission under UNCLOS or the CERD Committee) may also request formal opinions.<sup>70</sup>

The rule that the Legal Counsel only provides formal advice upon a request by a competent organ protects the integrity of the Legal Counsel. As a former Legal Counsel wrote, it ‘would not be appropriate’ to render formal advice to individual States. Member States are often sharply divided on such questions. In such circumstances, the Legal Counsel should only get involved if asked by a competent organ as the Legal Counsel is ‘recognized as objective’.<sup>71</sup> In a similar vein, the requirement means that opinion requests are channeled through a deliberative process and prevent the fragmentation of the advisory practice into opinions of a particular interest rather than of a general interest.<sup>72</sup>

### 3.4. Procedural Validity of the Request

If an organ decides to request a legal opinion, that decision must be in accordance with the rules of the organization or body concerned and any applicable procedural rules. This means that when an organ other than the Secretary-General requests a formal opinion of the Office of Legal Affairs, the members of the organ vote on the proposal or by consensus, and a negative

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69 ‘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’ (n 28) Annex I, para 3 (refusing a request for formal legal advice because it emanated from a group of States and adding that ‘COP itself is a treaty body and not a UN organ’).

70 See the opinions of the Legal Counsel to the CLCS in Section 4.4.3 in Chapter 4. For OLA advice to the CERD Committee, see Section 3.5 in this Chapter. See also UNGA ‘Proposed Strategic Framework for the Period 2018-2019, Part Two: Biennial Programme Plan, Programme 6: Legal Affairs’ (7 June 2016) A/71/6 (Prog. 6) and Corr. 2, para 6.6 (‘Legal advice will also be provided to treaty bodies institutionally linked with the United Nations, upon request’).

71 Hans Corell, ‘United Nations Office of Legal Affairs’ in Karel Wellens (ed), *International Law: Theory and Practice – Essays in Honour of Eric Suy* (Martinus Nijhoff 1998) 316.

72 Zacklin, ‘Les Nations Unies et la crise du Golfe’ (n 6) 61.

vote precludes a formal request necessary for a legal opinion. Much like the formal request requirement, this condition is well established in the UN.<sup>73</sup>

For example, in 1972 Ireland sought a legal opinion in the Fourth Committee of the General Assembly on the issue of whether inviting liberation movements as observers was within the competence of the Committee.<sup>74</sup> Tanzania ‘pointed out that legal advice could be sought only through a decision of the Committee’, a view that was supported by Egypt which called for a vote on the Irish proposal.<sup>75</sup> After an exchange between Ireland and other States, the Committee Chairman ‘put to the vote the proposal by the Irish representative that the Committee should request the opinion of the Legal Counsel.’<sup>76</sup> But the Irish request for a legal opinion failed to garner a majority.<sup>77</sup> Neither the motions of Tanzania and Egypt nor the Chairman’s move to vote on the Irish request for a legal opinion was challenged or criticized by members of the Committee.

The second case arose in the course of the Security Council Committee established by Security Council resolution 661 (1990) concerning the situation in Iraq and Kuwait (Sanctions Committee). Under Security Council resolutions, the Sanctions Committee was charged with examining the implementation of the sanctions regime imposed on Iraq and to seek information from States regarding the implementation of the sanctions regime.<sup>78</sup> Subsequently, the Sanctions Committee mandate was expanded. It was now charged with determining exceptions to sanctions imposed on Iraq on account of humanitarian circumstances.<sup>79</sup> The Committee’s decision-making process operated on the basis of consensus.<sup>80</sup> Specifically, the Committee

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73 See, eg, 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 Fourth Committee decided, by 89 votes to 26, with 7 abstentions, to secure the advice of the Office of Legal Affairs’).

74 UNGA ‘Summary Record of the 1975th Meeting’ (27 September 1972) A/C.4/SR.1975, para 13.

75 *ibid* paras 61, 63 (emphasis added).

76 *ibid* para 66.

77 ‘Summary Record of the 1975th Meeting’ (n 74) para 66; UNGA ‘Report of the Fourth Committee’ (13 November 1972) A/8889, para 4.

78 UNSC Res 661 (6 August 1990) S/RES/661, para 6.

79 UNSC Res 666 (13 September 1990) S/RES/666, para 1.

80 The summary records of the Sanctions Committee (S/AC.25/SR.1-25) are reprinted in DL Bethlehem (ed), *The Kuwait Crisis: Sanctions and their Economic Consequences* (Part 2, Cambridge University Press 1991) 775 et seq.

agreed that, '[if] a legal issue was involved, [the Chairperson] would seek the authorization of members to refer the inquiry to the Legal Counsel which she would do if no objections were raised by the prescribed deadline.'<sup>81</sup> That rule was followed in a number of cases, for example when the Chairperson referred communications by Turkey and Yugoslavia to the Legal Counsel for comments after no member objected.<sup>82</sup>

Although this rule is closely linked to the requirement of a request by a competent organ, it has independent meaning. As such, it may imply that the Office of Legal Affairs will not only satisfy itself that there was consensus or a majority decision in the organ, but there may be reason to look more closely whether the applicable rules of procedure have been complied with. Otherwise the Office of Legal Affairs could refuse to accede to the request for advice.

A case dating from the initial stages of the United Nations may illustrate this. In 1952, several States introduced a draft resolution in the Fifth Committee (Administrative and Budgetary) of the General Assembly aimed at limiting the regular sessions of the General Assembly whose duration had increased considerably with the growing workload of the UN.<sup>83</sup> Uruguay questioned the competence of the Fifth Committee for such a proposal solely on the basis of its budgetary implications, but it did not formally raise the question of competence as required under the General Assembly's rules of procedure.<sup>84</sup> When Uruguay sought an opinion on the question of competence by the Legal Department, the official of the Legal Department merely drew attention to a General Assembly resolution authorizing the Secretary-General to study the issue raised in the draft resolution.<sup>85</sup>

Uruguay in turn regretted that the Legal Department refused to render a legal opinion on the 'fundamental question of competence' which he had raised.<sup>86</sup> The adviser of the Legal Department pointed out that it would give its opinion only if '*formally* requested to do so'.<sup>87</sup> As if to remove any doubt, the legal adviser accepted that 'the competence of the Fifth Committee had

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81 Bethlehem (n 80) 780.

82 *ibid* 794.

83 'Summary Record of the 340th Meeting' (n 40) paras 30–36.

84 *ibid* paras 43, 45 and 47–48.

85 *ibid* para 58.

86 *ibid* para 62.

87 *ibid* para 64 (emphasis added).

been raised, *but not in the form prescribed by the rules of procedure.*<sup>88</sup> Therefore, the legal adviser had confined himself to the Secretary-General's suggestion.<sup>89</sup>

Admittedly, this is one of the few examples where legal advice is refused because the request did not conform to the rules of procedure. However, the example is noteworthy and is evidence of a practice whereby the Legal Counsel will inquire into the adoption of a decision to seek a legal opinion and its conformity with applicable legal rules and principles. Conversely, it also means that a valid request for a formal legal opinion cannot be refused by the Legal Counsel.

In most cases, however, it will be the chairperson of the relevant body who will make sure that the procedural framework has been complied with. Thus, when Syria demanded a legal opinion in a plenary meeting of the General Assembly, the President of the General Assembly stressed that any delegation may propose a request for a legal opinion 'in accordance with rule 78 of the rules of procedure, in the form of a draft resolution or resolution that contains a clearly formulated question addressed to the Legal Counsel'.<sup>90</sup> This meant that as a general rule a proposed request for a legal opinion should be submitted in writing so that it may be circulated to other delegations for their review.<sup>91</sup>

### 3.5. *Legal Question and Discretion*

#### 3.5.1. The Necessity of a Legal Question

The third principle is that the request for formal legal advice is only permissible when the request concerns a legal question. This rule is analogous to provisions in the statutes of international tribunals that require a 'legal question' for advisory proceedings.<sup>92</sup> This requirement may sound straightforward, but it is an important safeguard to ensure the independence and impartiality of the Legal Counsel. The appearance of political bias might

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88 *ibid* para 64 (emphasis added).

89 *ibid* para 64.

90 'Verbatim Record of the 58th Plenary Meeting' (n 30) 2.

91 *ibid* 2.

92 cf Statute of the International Court of Justice (adopted 26 June 1945, entered into force 24 October 1945) 15 UNCTAD 355 (ICJ Statute) Article 65(1).

jeopardize the institutional standing of the Legal Council. Providing a formal barrier by requiring a legal question may not preclude bias in its entirety, but it at least avoids the appearance of such bias.

But the peculiar standing of the Legal Council often puts the Office of Legal Affairs in an awkward position. It is precisely because the Legal Council is regarded as a neutral institution that Member States may ask questions that are not purely legal.<sup>93</sup> The UNESCO Legal Adviser in a report on the role of UNESCO's legal office has pointed out that the legal office is often requested to give decisive advice on policy decisions that fall within the sphere of the management or Member States.<sup>94</sup> According to the report, '[i]t is important that the role of the legal office and the legal adviser is properly understood; it is to provide an independent, objective interpretation of the organization's regulatory framework.'<sup>95</sup>

While there is not a wealth of practice on this point, this principle is sufficiently grounded in the practice of the Office of Legal Affairs of the United Nations.<sup>96</sup> As early as 1967, an official of the UN Office of Legal Affairs refused to give an opinion when the question was a political question, rather than a legal one. In UNIDO, a subsidiary organ of the General Assembly at that time, a delegation had inquired whether an amendment to the rules of procedure was 'necessary'. The General Legal Division 'replied that that was a matter of policy for the Board to decide.'<sup>97</sup> Similarly, in 2016 Syria objected to the legality of the phrase 'Syrian regime' to denote the Syrian Government in a draft resolution and requested a legal opinion on this matter. Upon request by the Chair of the Third Committee, the Office of Legal Affairs

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93 Corell, 'United Nations Office of Legal Affairs' (n 71) 316.

94 UNESCO Executive Board 'Role of UNESCO's Office of International Standards and Legal Affairs' (25 August 2016) 200 EX/4.INF.2, paras 24, 36.

95 *ibid* para 36.

96 'Inter-office Memorandum to the Assistant Secretary-General, Controller Office of Programme Planning, Budget and Accounts Department of Management, concerning what Constitutes Official Documents of the United Nations that need to be Issued in the Six Official Languages of the United Nations' (n 22) 313, para 12 ('Finally, we would like to point out that the questions raised by the member of ACABQ are not exclusively of a legal nature. They have administrative and financial implications, such as whether adequate resources are available to carry out the requests made by the General Assembly').

97 UNGA 'Report of the Industrial Development Board on the Work of its 1st Session, 10 April-5 May 1967' (1967) A/6715/Rev.1(Supp), Annex IV, para 27.

replied that ‘this question does not rise to a legal question; it is not a question of a legal nature, per se.’<sup>98</sup>

### 3.5.2. Discretion to Refuse Legal Advice?

The question arises whether the Legal Counsel enjoys some discretion to refuse a formal request.<sup>99</sup> To the author’s knowledge, there is no case where the Legal Counsel refused a formal and valid request by competent United Nations organ. It appears that no such discretion exists as a matter of practice. Nor would such a discretion be justified since the Legal Counsel remains a Secretariat official. The policy directives of the General Assembly and regulations of the Secretary-General emphasize the mandate of the Office of Legal Affairs to provide legal advice to the UN.<sup>100</sup> To some extent, the legal regime applicable to formal legal advice—a formal and procedurally valid request by a competent United Nations organ, and the need for a legal question—protects the integrity of the Legal Counsel’s advisory function.

Nevertheless, the question may be asked whether the Legal Counsel should refuse requests for legal advice in appropriate and narrow circumstances even when a valid request concerns a legal question. The experience in the inter-State communication *Palestine v Israel* illustrates an inappropriate request by the CERD Committee, a treaty organ of the United Nations. In that case, Israel challenged the jurisdiction of the Committee because of the alleged lack of treaty relations between Israel and Palestine. The Committee requested the advice of the Office of Legal Affairs on the possibility to foreclose a bilateral treaty relationships under a multilateral treaty because of Israel’s refusal to recognize Palestine’s statehood. The CERD Committee suggested that the Office of Legal Affairs provided mere research assistance when it

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98 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.

99 of ICJ Statute, Article 65(1) (‘The Court *may* give an advisory opinion’).

100 Secretary-General’s Bulletin ‘Organization of the Office of Legal Affairs’ (1 August 2008) ST/SGB/2008/13, s 2.1; UNGA ‘Proposed Programme Budget for the Biennium 2018-2019, Section 8: Legal Affairs’ (6 April 2017) A/72/6 (Sect. 8), para 8.36 (setting a target of over 3000 legal opinions on United Nations law and public international to ensure the operation of the principal and subsidiary organs ‘in accordance with international law, including the United Nations legal regime’ for a period of two years).

requested the advice to arrive at a ‘thorough’ decision.<sup>101</sup> On the other hand, the Committee considers itself as a quasi-judicial ‘guardian of the [CERD] Convention’ with the ‘full powers and duty to interpret the Convention’.<sup>102</sup> It is, however, questionable for a quasi-judicial body to request legal advice from an outside institution on the exercise of its core mandate to interpret a treaty. Expert advice should be reserved for scientific and technical matters, and only after a consultation with the parties.<sup>103</sup>

### 3.6. *Form and Procedure*

Beside these three main principles there does not appear to be other mandatory rules in the practice of the Office of Legal Affairs. Two aspects, however, are worth mentioning.

The first aspect is that, when an organ requests a formal written opinion ‘the precise question is formulated in writing by that organ’.<sup>104</sup> In practice, the presiding officer of the United Nations organ will then transmit the request for legal advice.<sup>105</sup> This requirement does not pose any real problems, and it does not appear to have created any in practice to date. It is, of course, a formality. But it formalizes a process that is informal by design, and delineates the scope of possible answers by the Office. At the same time, it makes it necessary for

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101 CERD ‘Inter-State Communication submitted by the State of Palestine against Israel’ (12 December 2019) CERD/C/100/5, para 2.7.

102 *ibid* para 3.5.

103 cf Christian J Tams and James G Devaney, ‘Article 50’ in Andreas Zimmermann and Christian J Tams (eds), *The Statute of the International Court of Justice: A Commentary* (3rd edn, Oxford University Press 2019) 1439–1440.

104 ‘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’ (n 28), para 3. See also UNSC ‘Letter dated 29 January 2002 from the Under-Secretary-General for Legal Affairs, the Legal Counsel, addressed to the President of the Security Council’ (12 February 2002) S/2002/161, para 1 (referring to a letter of the President of the Security Council requesting the Legal Counsel’s opinion on ‘the legality in the context of international law, including relevant resolutions of the Security Council and the General Assembly of the United Nations, and agreements concerning Western Sahara of actions allegedly taken by the Moroccan authorities consisting in the offering and signing of contracts with foreign companies for the exploration of mineral resources in Western Sahara’).

105 Zacklin, ‘Les Nations Unies et la crise du Golfe’ (n 6) 61.

the Office to interpret the ‘precise question’ and decide whether there is a valid request by a competent UN organ.

The second aspect is that the Office of Legal Affairs may invite Member States and international institutions to express their views or provide them with information. A broader legal and factual record certainly enhances the reasoning. Whether this is a consistent practice is hard to establish since such informal consultations are not always disclosed in the opinion itself.<sup>106</sup>

This is especially apt when the requests arises from a particular controversy as opposed to a more abstract legal question. For example, the UN Legal Counsel requested information from Moroccan authorities on oil exploration contracts in Western Sahara for his 2002 legal opinion on Western Sahara.<sup>107</sup> Similarly, in the context of the Continental Shelf Commission’s request for an opinion on the issue of additional materials, Brazil asked for, and was granted, a meeting with the Legal Counsel. During that meeting Brazil presented a paper on the issue to the Legal Counsel which the opinion quotes in its introduction as ‘worthy of note for the purpose of the present legal opinion’.<sup>108</sup> Sometimes, as in the dispute on the meaning of Annex II of the Rotterdam Convention, the requesting organ even invites NGOs and private corporations to submit their views to the legal office which then has to take into account these views when drafting its opinion.<sup>109</sup>

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106 See ‘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’ (n 28) Annex II (not mentioning informal consultations between the Office of Legal Affairs and IFAD). Nevertheless, IFAD was invited to express its views on the status of the global mechanism. See IFAD’s Written Comments of 11 March 2011, para 45 in the proceedings concerning the *Judgment No 2867 of the Administrative Tribunal of the International Labour Organization upon a Complaint Filed against the International Fund for Agricultural Development* (Advisory Opinion) [2012] ICJ Rep 10.

107 ‘Letter dated 29 January 2002 from the Under-Secretary-General for Legal Affairs, the Legal Counsel, addressed to the President of the Security Council’ (n 104), para 2.

108 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.

109 See Rotterdam Convention ‘Report of the Conference of the Parties on the Work of its Fourth Meeting’ (31 October 2008) UNEP/FAO/RC/COP.4/24, Annex I, decision RC-4/6, para 1.

