

Chapter 2: Structure of the Office of Legal Affairs

To an international lawyer, the creation of an office of legal affairs in the United Nations may be self-evident. But it certainly is not. It is well within the realm of possibility that an international institution may survive (and be quite effective) without a legal service and even a policy of not hiring lawyers as the experience of the GATT for its first decades shows.¹ The UN Charter in no way requires the establishment of a separate legal office within the Secretariat, and it is no exception in this regard.² Nevertheless, in most, if not all, international organizations, there is a need for a legal counsel or legal affairs office.³ The United Nations is no exception. As one of its first decisions, the General Assembly directed the creation of a ‘Legal Department’ in 1946, the predecessor to the current Office of Legal Affairs.⁴

This chapter takes a closer look at the legal and governance framework of the Office of Legal Affairs. In particular, it will inquire into a possible norm of independence of the Legal Counsel—a norm that constitutes an important prerequisite for the institutional authority of the Legal Counsel’s advice. It will then turn to the various functions of the Office of Legal Affairs (beside the legal advisory function in institutional disputes that is of specific interest to this book).

1 Asif H Qureshi, ‘The Legal Counsel as the “Persona of Law” in an International Economic Organization: A Constitutional Perspective’ in Asif H Qureshi and Xuan Gao (eds), *International Economic Organizations and Law: The Perspective and Role of the Legal Counsel* (Wolters Kluwer 2012) 12 (noting that until 1981 the GATT had a no-lawyer employment policy).

2 Within the UN family, only the ITU treaty provides that the Secretariat may provide legal advice to its constituent organs: Convention of the International Telecommunication Union (adopted 22 December 1992, entered into force 1 July 1994) 1825 UNTS 390 (1992 ITU Convention) Article 5(1)(h).

3 Daniel Feakes, ‘The Adoption of the Convention and the Work of the Preparatory Commission’ in Walter Krutzsch, Eric Myjer, and Ralf Trapp (eds), *The Chemical Weapons Convention: A Commentary* (Oxford University Press 2014) 24.

4 UNGA Res 13 (I) (13 February 1946) A/RES/13(I), para 2.

2.1. Legal and Governance Framework

2.1.1. Statutory Framework

Within the United Nations legal order, the mandate of the Office of Legal Affairs is derived from resolutions of the General Assembly, administrative issuances of the Secretary-General, and documents emanating from the interaction between the Secretary-General and the General Assembly during the budgetary process.⁵ First among those is resolution 13 (I) of 1946 which provided for a ‘Legal Department’ within the UN Secretariat.⁶ This is still the basic legal document of the Office to this day.⁷ Nowadays, the Office of Legal Affairs regards resolution 13 (I) as providing for ‘the central legal service of the Organization’ (that is the United Nations as a whole and not only the Secretariat).⁸ But beside providing for this central legal service, resolution 13(I) leaves many details to be fleshed out by the secondary law of the Organization, and many responsibilities are solely based on practice without an obvious statutory basis.

A more detailed description of the functions, statutory rights and duties of the UN Office of Legal Affairs can be found in several administrative issuances, the most important being the Secretary-General’s bulletins on the Organization of the Office of Legal Affairs and on the Organization of the Secretariat of the United Nations.⁹

Secretary-General’s bulletins are administrative issuances establishing rules, policies or procedures of general application.¹⁰ These issuances are required for important policy decisions, including the implementation of General Assembly or Security Council decisions, the organization of the

5 See for an overview of the various legislative mandates established by General Assembly resolutions, treaties and other legal acts: UNGA ‘Proposed Programme Budget for 2021, Section 8: Legal Affairs’ (15 April 2020) A/75/6 (Sect. 8), paras 8.17, 8.39, 8.56, 8.71, 8.88, 8.105, 8.122, 8.175 and 8.195.

6 Res 13 (I) (n 4) para 2.

7 cf UNGA ‘Proposed Programme Budget for 2020, Section 8: Legal Affairs’ (18 April 2019) A/74/6 (Sect. 8), para 8.1 (referencing General Assembly resolution 13 (I)).

8 *ibid* para 8.1.

9 Secretary-General’s Bulletin ‘Organization of the Office of Legal Affairs’ (18 January 2021) ST/SGB/2021/1; Secretary-General’s Bulletin ‘Organization of the Secretariat of the United Nations’ (22 July 2015) ST/SGB/2015/3.

10 Secretary-General’s Bulletin ‘Procedures for the Promulgation of Administrative Issuances’ (18 December 2009) ST/SGB/2009/4, ss 1 and 3.3.

Secretariat and the establishment of specially funded programs.¹¹ In the hierarchy of norms, these administrative issuances are subject to General Assembly resolutions which in turn are measured against the UN Charter.¹² They are binding on UN staff members as an exercise of the Secretary-General's powers as the 'chief administrative officer'.¹³ Section 3.3 of the Bulletin on Procedures for the Promulgation of Administrative Issuances, requiring approval by the Secretary-General for issuing bulletins,¹⁴ supports this proposition. Accordingly, the binding force of administrative issuances by the Secretary-General is firmly grounded in Article 97 of the UN Charter. The *Villamoran* judgment by the UN Dispute Tribunal supports this conclusion when it held that properly promulgated administrative issuances are vested with legal authority.¹⁵

As one of the 'major organizational units' of the Secretariat, the UN Office of Legal Affairs is headed by the Under-Secretary-General for Legal Affairs, the Legal Counsel, who is accountable to the Secretary-General.¹⁶ This structure is common to the UN system.¹⁷ The Office is divided into several organizational units which are the Office of the Under-Secretary-General for Legal Affairs, the Office of the Legal Counsel, the General Legal Division, the Treaty Section and the Codification Division. In 1967, the International Trade Law Division was created, in 1992 the Division for Ocean Affairs and the Law of the Sea was integrated into OLA and in 1996 the Executive Office

11 *ibid* ss 3.1 and 3.2.

12 *Villamoran v Secretary-General of the United Nations* (12 July 2011) UNDT/2011/126, para 29; *Hastings v Secretary-General of the United Nations* (7 October 2009) UNDT/2009/030, para 18; Wolfgang Stöckl, 'Article 101' in Bruno Simma and others (eds), *The Charter of the United Nations: A Commentary* (3rd edn, Oxford University Press 2012) paras 19-20.

13 cf 'Procedures for the Promulgation of Administrative Issuances' (n 10) s 2.2; Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945)

15 UNCIO 335 (UN Charter) Article 97; *Adrian v Secretary-General of the United Nations* (30 September 2004) AT/DEC/1183, para 6.

14 'Procedures for the Promulgation of Administrative Issuances' (n 10) s 3.3.

15 *Villamoran* (n 12) para 29.

16 'Organization of the Secretariat of the United Nations' (n 9) para 3.2; 'Organization of the Office of Legal Affairs' (n 9) para 3.1.

17 UNIDO Legal Office 'Interoffice Memorandum re: Certain Aspects regarding the Legal Adviser/Legal Office' [2003] UNJYB 563, 565.

was established.¹⁸ Such subdivision of legal offices into sections handling administrative, contract, and internal law is a common feature in the UN system.¹⁹

Lastly, a third basis of the Office's mandate are the various documents produced as part of the program budget. Under the Charter, it is for the Secretary-General to propose a budget and for the General Assembly to approve it (Articles 97 and 17).²⁰ Although it is the Fifth Committee that approves the Office's budget, Member States exercise the bulk of review through the Committee for Programme and Coordination, a subsidiary body of the Economic and Social Council.²¹

Through the Committee on the Programme and Coordination, Member States exercise a significant governance role with respect to the Office of Legal Affairs. For example, in 2016 the Secretary-General submitted his proposal in which he *inter alia* stated the objective of the Office of Legal Affairs is to 'enhance the respect for the rule of law ... by the principal and subsidiary organs of the United Nations'.²² After having examined this proposal, the Committee added a new indicator of achievement for the Office's success, namely the 'number of pieces of advice on questions relating to the interpretation and application of the Charter, legal agreements, United Nations resolutions and general questions of public international law to ensure uniform and consistent practice of the law'.²³ The Committee also

18 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) 305.

19 UNESCO Executive Board 'Role of UNESCO's Office of International Standards and Legal Affairs' (25 August 2016) 200 EX/4.INF.2, para 22.

20 For a recent proposal of the Secretary-General with regard to the budget item of the Office of Legal Affairs: 'Proposed Programme Budget for 2020, Section 8: Legal Affairs' (n 7).

21 UNGA Res 72/266 A (15 January 2018) A/RES/72/266, para 11.

22 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.

23 ECOSOC 'Draft Report: Proposed Strategic Framework for the Period 2018-2019, Programme 6: Legal Affairs' (24 June 2016) E/AC.51/2016/L.4/Add.12, para 11; UNGA 'Proposed Programme Budget for the Biennium 2018-2019, Section 8: Legal Affairs' (6 April 2017) A/72/6 (Sect. 8), para 8.36.

initiates the regularly occurring evaluation process by the Office of Internal Oversight Services.²⁴

Over the years, the reports of the Committee evince support and criticism by Member States. In 2012, a report noted ‘concerns ... regarding the nature of some legal opinions provided by the Office of Legal Affairs that contradicted some very sensitive United Nations resolutions’. According to the report these legal opinions were ‘negatively affecting the deliberation and decision-making processes of Member States’, an issue which should be addressed by the General Assembly.²⁵ On the other hand, a 2014 report commended the Office and stressed that ‘the legal interpretations provided by the Office of Legal Affairs were very important’.²⁶

It is through the budgetary process that the Office is allocated the number of staff and other resources. In 2020, the UN Office of Legal Affairs employed around 170 staff members.²⁷ This number has modestly risen from approximately 160 staff members in 1998.²⁸ Generally, the offices of legal adviser in other international organizations follow the UN model.²⁹ However, given the enormous scope of UN activities, legal offices in other international organizations are usually smaller. By way of example, UNESCO’s legal office in 2016 consisted of eleven staff members.³⁰

Some UN organizations follow the UN’s example by setting out their legal adviser’s functions in legally-binding administrative instructions issued by

24 See, eg, ECOSOC ‘Triennial Review of the Implementation of the Recommendations made by the Committee for Programme and Coordination at its Forty-Second Session on the In-Depth Evaluation of Legal Affairs’ (17 March 2005) E/AC.51/2005/5; ECOSOC ‘Evaluation of the Office of Legal Affairs: Report of the Office of Internal Oversight Services’ (25 March 2019) E/AC.51/2019/9; ECOSOC ‘Triennial Review of the Implementation of Recommendations on the Programme Evaluation of the Office of Legal Affairs: Report of the Office of Internal Oversight Services’ (17 March 2022) E/AC.51/2022/8.

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

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

27 UNGA ‘Composition of the Secretariat: Staff Demographics’ (29 November 2021) A/76/570, 152.

28 Corell, ‘United Nations Office of Legal Affairs’ (n 18) 315.

29 Treasa Dunworth, ‘The Legal Adviser in International Organizations: Technician or Guardian?’ (2009) 46 Alta L Rev 869, 876.

30 ‘Role of UNESCO’s Office of International Standards and Legal Affairs’ (n 19) para 22.

the organization's head. In other organizations of the UN system, the responsibilities of the legal adviser are codified in program and budget documents, organization charts, or in the post description of the organization's legal adviser.³¹ For example, the legal bases for the functions of the UNESCO Legal Adviser are the Approved Programme and Budget, the post description and UNESCO's organizational chart.³²

2.1.2. Unified Legal Service and Direct Reporting Line to the Organization's Chief Officer

The particular institutional design of the Office of Legal Affairs is a precondition for its status within the United Nations. In principle, two models are possible: a single legal adviser serving the entire organization or a diffused model of lawyers working in every policy unit. If the choice is made in favor of a unified legal service, the next issue is the place of that service within the organization: Should the legal adviser directly report to the chief officer or indirectly through another non-legal official? In the United Nations, the choice in favor of a unified legal service with a direct reporting line to the Secretary-General was made early in the history of the Organization. None of these design choices were inevitable but both enhance the role of law and lawyers within the United Nations.

As two opinions on the status of the legal adviser in UNESCO and UNIDO make clear, a separate and unified legal service (as opposed to numerous legal officers in various departments of the secretariat) is essential for the consistent interpretation and application of the law.³³ When the UNESCO Executive Board considered the necessity to have its own legal adviser, a committee of the Executive Board pointed out that a legal adviser of the Executive Board distinct from the UNESCO secretariat would 'lower the status of the official concerned [ie the UNESCO Legal Adviser]'.³⁴ This equally applies to the United Nations: a separate legal counsel of the General

31 'Role of UNESCO's Office of International Standards and Legal Affairs' (n 19) para 23.

32 *ibid* paras 9-10.

33 'Interoffice Memorandum re: Certain Aspects regarding the Legal Adviser/Legal Office' (n 17) 563-64; 'Role of UNESCO's Office of International Standards and Legal Affairs' (n 19) paras 7, 10.

34 UNESCO Executive Board 'Methods of Work of the Executive Board' (20 April 2000) 159 EX/13, para 12.

Assembly would invariably lower the status of the Office of Legal Affairs while a design choice in favor of a single legal service increases the status of the Office of Legal Affairs. It is therefore deliberate that the official title of the Legal Counsel is the ‘Legal Counsel of the United Nations’, and not the legal counsel of the UN Secretary-General.

This principle was first applied in the United Nations. The Office of Legal Affairs was created as the ‘Legal Department’ in 1946 by the General Assembly and designated as one of the ‘principal units’ of the Secretariat.³⁵ This decision dates back to a proposal of the Preparatory Commission of the United Nations, according to which the Legal Department were to ‘advise the Secretariat and the other organs on legal and constitution matters’.³⁶ Although the principal function—legal advice to organs of the United Nations—has remained largely unchanged since its creation,³⁷ the Office of Legal Affairs went through several reorganizations and gained several new tasks.³⁸ In 1954, as part of a larger reorganization of the UN Secretariat, the Legal Department was reorganized into the Office of Legal Affairs ‘[i]n order to bring more closely under [Secretary-General] direction certain central control functions’.³⁹ The reorganization as an Office of Legal Affairs was also driven to reflect more closely its role in providing legal advice to the Secretary-General and acting on behalf of the Secretary-General in legal matters.⁴⁰

The second design feature of major importance is the direct reporting line of the Legal Counsel to the Secretary-General without being under

35 Res 13 (I) (n 4) para 2.

36 Preparatory Commission of the United Nations ‘Report of the Executive Committee’ (12 November 1945) PC/EX/113/Rev.1, 77, para 30.

37 Miguel de Serpa Soares, ‘The role of the legal adviser in an inclusive, networked multilateralism’ in Jan Wouters (ed), *Legal Advisers in International Organizations* (Edward Elgar 2023) 40; cf Dunworth, ‘The Legal Adviser in International Organizations: Technician or Guardian?’ (n 29) 876 (writing that the ‘the function and structure of the Office has remained relatively constant’ since its inception).

38 See, eg, Gerold Herrmann, ‘Das Justitiariat der Vereinten Nationen: Aufgaben und Gliederung nach der jüngsten Reorganisation’ [1979] Vereinte Nationen 210 (describing an internal reorganization of the Office of Legal Affairs in 1979).

39 UNGA ‘Organization of the Secretariat: Report of the Secretary-General’ (21 November 1954) A/2731, 3, para 9; Secretary-General’s Bulletin ‘Organization Manual: Description of the Functions and Organization of the Office of Legal Affairs’ (17 October 1989) ST/SGB/Organization/Section:OLA, 1.

40 Corell, ‘United Nations Office of Legal Affairs’ (n 18) 305.

the supervision of another official.⁴¹ Although a direct reporting line to the head of the institution may seem to be a minor question of organization, its importance should not be underestimated. If the legal counsel had no direct reporting line to the chief officer but reports through a vice-president, the intermediary could filter the advice or add non-legal considerations.⁴² Former legal advisers also emphasize that the legal adviser's direct accountability to the head of the organization is crucial for the effective discharge of the various functions assigned to the legal adviser.⁴³ Thus, the lack of a direct reporting line seriously compromises the institutional standing and integrity of legal offices and the strength and impact of legal advice.

The direct reporting line to the chief officer constitutes a common feature in the UN system.⁴⁴ This contrasts to the General Counsels of the Asian Development Bank and the Inter-American Development Bank who report to Vice-Presidents, thus lessening the role of lawyers in both organizations.⁴⁵ Even where there were attempts to depart from this principle in the United Nations system, the direct reporting line of the legal adviser was eventually restored to the UN standard.⁴⁶

41 'Interoffice Memorandum re: Certain Aspects regarding the Legal Adviser/Legal Office' (n 17); Yves Renouf, 'Legal Counsel to the Administration: A Legal Adviser Who Should Not Look like One' in Gabrielle Marceau (ed), *A History of Law and Lawyers in the GATT/WTO: The Development of the Rule of Law in the Multilateral Trading System* (Cambridge University Press 2015) 338.

42 John W Head, 'Law and Policy in International Financial Institutions: The Changing Role of Law in the IMF and the Multilateral Development Banks' (2008) 17 *Kan J L & Pub Pol'y* 194, 224; Richard W Edwards, 'The Role of the General Counsel of an International Financial Institution' (2008) 17 *Kan J L & Pub Pol'y* 254, 270; Jan Klabbers, *An Introduction to International Organizations Law* (4th edn, Cambridge University Press 2022) 257.

43 Alfons AE Noll, 'The Role of the Legal Adviser of an Intergovernmental Organization' in Office of Legal Affairs (ed), *Collection of Essays by Legal Advisers of States, Legal Advisers of International Organizations and Practitioners in the Field of International Law* (United Nations 1999) 286; Edwards (n 42) 270.

44 For example IAEA, WHO, FAO, ICAO, IFAD: 'Interoffice Memorandum re: Certain Aspects regarding the Legal Adviser/Legal Office' (n 17) 565.

45 Head (n 42) 224.

46 As part of an internal reform, the UNIDO Legal Adviser had to report to the Director of Administration. See UNIDO 'Director-General's Bulletin: UNIDO Secretariat Structure 2002' (15 February 2002) UNIDO/DGB/(O).86/Add.9, 3, para 10; UNIDO 'Director-General's Bulletin: Enhancing Organizational Capacity' (14 November 2002) UNIDO/DGB/(M).91, para 2. Eventually the pre-reform situation was restored. Accordingly, the UNIDO legal office had to report to the Director-General.

2.1.3. Institutional Context: General Absence of Judicial Review and Legal Advice by the Sixth Committee

The advisory authority of the Legal Counsel is enhanced by the general absence of judicial or non-judicial bodies that regularly engage in authoritative legal interpretation. This point is most apparent when an international organization is subject to judicial review.⁴⁷ With a system of judicial review, the role of the Legal Counsel would inevitably change. For example, the European Commission's Legal Service standard of legality is whether a proposal would likely stand in the European Court of Justice.⁴⁸

But it is equally plain when there is an organ that sometimes exercises a judicial function. In ICAO, the Legal Bureau customarily refuses to provide legal opinions in proceedings under Article 84 of the Chicago Convention. This refusal is based on the assumption that the ICAO Council acts as a 'judicial body' under Article 84, and that it would be inappropriate for the Legal Bureau to assume, even partially, the dispute settlement function under Article 84.⁴⁹ Outside of the Article 84 context, however, there is ample advisory practice of the ICAO Legal Bureau.⁵⁰

In the normal course of the United Nations, a legal question of institutional law is unlikely to be reviewed by the International Court of Justice whether through the medium of a contentious or an advisory proceeding. Generally,

UNIDO 'Director-General's Bulletin: UNIDO Secretariat Structure 2016' (2016) UNIDO/DGB/2016/01/Amend.1, Annex I.

47 cf United Nations Convention on the Law of the Sea (adopted 10 December 1982, entered into force 16 November 1994) 1833 UNTS 3 (UNCLOS) Articles 187–189 (judicial review of the International Seabed Authority).

48 Päivi Leino-Sandberg, 'Who is Ultra Vires Now? The EU's Legal U-turn in Interpreting Article 310 TFEU' (*Verfassungsblog*, 18 June 2020) <<https://verfassungsblog.de/who-is-ultra-vires-now-the-eus-legal-u-turn-in-interpreting-article-310-tfeu/>> accessed 7 July 2024.

49 ICAO Council 'Summary Minutes of the Eighth Meeting, 214th Session' (23 July 2018) ICAO Doc C-MIN 214/8, para 144 ('when the Council was sitting as a Court, as at present, it was not the role of Legal Affairs to provide its interpretation of the relevant rules'); ICAO Council 'Minutes of the Sixth Meeting, 74th Session' (31 August 1971) ICAO Doc 8956-C/1001-C-Min. LXXIV/6, para 1 ('A request for a legal opinion from the Secretariat on the validity of an immediate decision was denied on the ground that the Council was at this time sitting as a court and according to legal practice would have to pronounce on the question itself').

50 Thomas Buergenthal, *Law-Making in the International Civil Aviation Organization* (Syracuse University Press 1969) 148 and 210.

there is no direct judicial review of United Nations legal acts as international dispute settlement was historically—and still is—limited to States.⁵¹ There are of course exceptions with staff tribunals being the most prominent example. And there is also a limited possibility for indirect judicial review of an international body in a conventional inter-State procedure.⁵²

These structural limits leave the advisory jurisdiction of the International Court of Justice as a venue for institutional disputes and judicial review of UN decisions.⁵³ But the United Nations Charter limits the potential of advisory proceedings to adjudicate institutional issues. In the first place, the right to request an advisory opinion rests with the Security Council and the General Assembly.⁵⁴ The remaining principal organs, subsidiary bodies and specialized agencies of the United Nations require the authorization of the

51 Statute of the International Court of Justice (adopted 26 June 1945, entered into force 24 October 1945) 15 UNCIO 355 (ICJ Statute) Article 34. For arbitrations under headquarter agreements, see *Tax Regime Governing Pensions Paid to Retired UNESCO Officials Residing in France (France v UNESCO)* (Award) (2003) XXV RIAA 231 and *European Molecular Biology Arbitration (EMBL v Germany)* (Award) (1990) 105 ILR 1.

52 August Reinisch, ‘Verfahrensrechtliche Aspekte der Rechtskontrolle von Organen der Staatengemeinschaft’ in Rainer Hofmann and others (eds), *Die Rechtskontrolle von Organen der Staatengemeinschaft: Vielfalt der Gerichte – Einheit des Prozessrechts?* (CF Müller 2007) 50–52, 56; Miriam Cullen, ‘Separation of Powers in the United Nations System? Institutional Structure and the Rule of Law’ (2020) 17 IOLR 492, 521–523 (and the literature cited therein). See eg *Appeal Relating to the Jurisdiction of the ICAO Council (India v Pakistan)* (Judgment) [1972] ICJ Rep 46, 60, para 26 (‘The case is presented to the Court in the guise of an ordinary dispute between States ... Yet in the proceedings before the Court, it is the act of a third entity—the Council of ICAO—which one of the parties is impugning and the other defending’); *Abyei Arbitration (Government of Sudan v Sudan People’s Liberation Movement/Army)* (Final Award) (2009) XXX RIAA 145, 325 (reviewing a decision of a boundary commission composed of experts in history, geography and other relevant fields).

53 Henry G Schermers and Niels M Blokker, *International Institutional Law: Unity with Diversity* (6th edn, Brill Nijhoff 2018) 862. A non-exhaustive list can be found in Dapo Akande, ‘Selection of the International Court of Justice as a Forum for Contentious and Advisory Proceedings (Including Jurisdiction)’ (2016) 7 JIDS 320, 339, fn 89.

54 UN Charter, Article 96(1). On the debate whether the General Assembly and the Security Council are limited by the scope of their jurisdiction when requesting advisory opinions, see Rosalyn Higgins, ‘A Comment on the Current Health of Advisory Opinions’ in Vaughan Lowe and Malgosia Fitzmaurice (eds), *Fifty Years of International Court of Justice: Essays in Honour of Sir Robert Jennings* (Cambridge University Press 1996) 577.

General Assembly.⁵⁵ In practice, the General Assembly has extended this right to the Economic and Social Council, the Trusteeship Council, most specialized agencies (except for the Universal Postal Union) and the IAEA.⁵⁶ Significantly, the Secretary-General is the only principal organ without authorization to request advisory opinions.⁵⁷ And there is little prospect for change as the Legal Counsel predicted in 2017.⁵⁸ No subsidiary organ of the United Nations has been granted the right to request an advisory opinion except for the Interim Committee of the General Assembly—a standing body that exercises the General Assembly's mandate between regular sessions.⁵⁹ Finally, treaty organs—organs established by a separate treaty but institutionally linked to the United Nations—cannot be authorized under Article 96 even though treaty organs may be United Nations organs for immunity purposes.⁶⁰ This excludes treaties and expert bodies such as the Continental Shelf Commission that are not 'organs' under Article 96 but operate under the UN umbrella as experts on mission.

Leaving these legal limits aside, there are practical barriers to advisory proceedings such as the need to build a political majority. Coupled with the length of advisory proceedings, this may counsel against a request especially

55 UN Charter, Article 96(2). The term 'other organs' in Article 96(2) includes subsidiary bodies: *Application for Review of Judgment No 333 of the United Nations Administrative Tribunal* (Advisory Opinion) [1987] ICJ Rep 18, 30; *Application for Review of Judgment No 273 of the United Nations Administrative Tribunal* (Advisory Opinion) [1982] ICJ Rep 325, 334; *Application for Review of Judgment No 158 of the United Nations Administrative Tribunal* (Advisory Opinion) [1973] ICJ Rep 166, 172–5; Pierre d'Argent, 'Article 65' in Andreas Zimmermann and Christian J Tams (eds), *The Statute of the International Court of Justice: A Commentary* (3rd edn, Oxford University Press 2019) 1792.

56 cf [2017-2018] ICJ Yearbook 74.

57 Stephen M Schwebel, 'Authorizing the Secretary-General of the United Nations to Request Advisory Opinions of the International Court of Justice' (1984) 78 AJIL 869.

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

59 UNGA Res 295 (IV) (22 November 1949) A/RES/295(IV), paras 1 and 3.

60 This has never been tested in Court: (1945–1954) 5 Repertory of Practice of United Nations Organs 91–2 (Secretary-General considering that Human Rights Committee is not an organ for Article 96(2) purposes). See, however, 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 2 (Continental Shelf Commission treaty organ for General Convention purposes).

in time-sensitive issues.⁶¹ For the Secretary-General, subsidiary organs and treaty bodies linked to the UN, this means that advisory proceedings are all but a theoretical exercise as they need to secure the support of a principal organ. Although these bodies cannot secure the advice of the principal judicial organ, issues of law are often central to their work. As statutory bodies, every act of an international body implies an interpretation of their mandate.⁶² This includes a garden variety of expert and technical bodies such as human rights treaty bodies, the Commission on Narcotic Drugs or the Continental Shelf Commission that exercise important governance functions but often escape the attention of general international lawyers.

Importantly, there is also no non-judicial body that regularly issues legal interpretations in the United Nations such as the Sixth Committee of the General Assembly. Some organizations have set up legal committees that are composed of representatives of Member States and which may engage in legal interpretation. Their statutes may provide that governments may only be represented by legal experts.⁶³ Examples are the FAO Committee on Constitutional and Legal Matters,⁶⁴ and the ICAO Legal Committee.⁶⁵ With regard to the UN Legal Counsel, the Sixth (Legal) Committee of the General Assembly could potentially be a competitor in the provision of authoritative legal advice.

In the early years of the United Nations, the Sixth (Legal) Committee was sometimes asked for a legal opinion by the other main committees on the

61 Higgins, 'A Comment on the Current Health of Advisory Opinions' (n 54) 576.

62 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.

63 See, eg, para 3 of the Constitution of the ICAO Legal Committee. Reprinted in Michael Milde, *International Air Law and ICAO* (Eleven 2008) 177.

64 cf Rule XXIV of the General Rules of the Organization FAO, *Basic Texts of the Food and Agriculture Organization of the United Nations: Volumes I and II* (FAO 2017) 60 (providing, among other tasks, that the Committee shall consider 'the application or interpretation of the Constitution').

65 See, eg, para 2 of the Constitution of the ICAO Legal Committee. Reprinted in Milde (n 63) 177 (providing that the Legal Committee shall advise the Council on the interpretation of the Chicago Convention).

basis of General Assembly resolution 684 (VII).⁶⁶ Resolution 684 (VII) was subsequently annexed to the General Assembly's Rules of Procedure, and is reproduced up to this day.⁶⁷ However, the Legal Counsel has observed that this procedure 'has not been widely used by Committees' and added that its scope has been 'interpreted narrowly in the sense of technical legal aspects rather than substantive legal aspects',⁶⁸ and no recent requests under resolution 684 (VII) have been reported.

If the Sixth Committee were to regularly issue legal opinions on requests of other bodies, this would certainly affect the role of the UN Legal Counsel. However, the absence of any recent practice under resolution 684 (VII) renders this question *de facto* moot. In fact, it is another sign that the UN Legal Counsel enjoys a considerable authority when UN bodies are in need of external legal advice. This should not come as a surprise. If States are divided over a legal question in, say, the First Committee, the same States in the Sixth Committee could contribute very little to the resolution of the dispute. What is needed in situations when autointerpretation is unable to provide a solution out of political gridlock is the introduction of an external actor such as the Legal Counsel.⁶⁹

2.1.4. Independence or Appearance of Independence?

The institutional standing of the Legal Counsel is, at least in part, due to an often unspoken assumption that the advice reflects his or her independent

66 UNGA Res 684 (VII) (6 November 1952) A/RES/684(VII), para 1(d) ('when a Committee considers the legal aspects of a question important, the Committee should refer it for legal advice to the Sixth Committee'). This competence of the Sixth Committee was envisaged by the Preparatory Commission of the United Nations. See 'Report of the Executive Committee' (n 36) 30, para 11. In the early years of the United Nations, the Sixth Committee considered several requests: UNGA 'Summary Record of the 539th Meeting' (22 November 1957) A/C.6/SR.539, para 4 (recounting several requests for legal opinions from other committees to the Sixth Committee).

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

68 Reproduced in Bertrand G Ramcharan, *The Principle of Legality in International Human Rights Institutions: Selected Legal Opinions* (Martinus Nijhoff 1997) 6.

69 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.

judgment, and not just a convenient justification or preferences of Member States or the Secretary-General. In this regard, the independence of the Legal Counsel concerns two relationships: the officer's independence in relation to Member States and in relation to the Secretary-General.

Regarding the relationship to Member States, the Office of Legal Affairs is a division within the Secretariat and its employees are staff members of the UN. Under Article 100 of the UN Charter, staff members enjoy independence and freedom from interference by Member States.⁷⁰ As the ILO Administrative Tribunal held in the *Bustani* case, the independence of international civil servants constitutes an 'essential guarantee' in international organizations law.⁷¹ Consequently, the legal offices of international organizations have the right and the duty to act independently, and governments must refrain from jeopardizing the independent legal advice of legal advisers. Nevertheless, Member States try to influence the Legal Counsel when advice runs counter to their interests.⁷²

Except for UNESCO, Member States exercise no formal influence regarding the choice of the senior legal counsel in the UN system. In all organizations of the UN family, the chief officer appoints his or her legal counsel and is not formally required to consult with principal organs before. Only the Director-General of UNESCO 'shall take decisions concerning the appointment, tenure and termination of appointment of the Legal Adviser of the Organization in consultation with the Executive Board.'⁷³ While only UNESCO has a formal requirement that a principal organ be consulted, it is safe to assume that informal consultations with Member States will usually precede the appointment of the organization's legal adviser. This conforms to a practice in the UN system that the head of the organization must inform or consult with principal organs before senior secretariat officials are appointed or their terms extended or terminated.⁷⁴ With regard to the Legal Counsel of

70 UN Charter, Article 100.

71 *Bustani v Organisation for the Prohibition of Chemical Weapons* (16 July 2003) ILOAT No 2232, para 16.

72 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, 3 (letter by Syria calling on the Secretary-General to rescind a legal opinion of the Office of Legal Affairs).

73 UNESCO General Conference Res 56 (1 November 2001) 31 C/Res 56; 'Role of UNESCO's Office of International Standards and Legal Affairs' (n 19) para 15.

74 UNESCO Executive Board 'Proposed Amendment to Rule 59 of the Rules of Procedures of the Executive Board' (30 August 2016) 200 EX/3 Part II, para 3.

the United Nations, there exists a political convention that the Legal Counsel must be a national of the Western European and Other Group.⁷⁵

The framework for guaranteeing the Legal Counsel's independent judgment vis-à-vis the Secretary-General as the chief administrative officer is less clear. In the first place, the Office of Legal Affairs is part of the Secretariat. It is not a separate organ since its powers are not derived from the founding treaty. Rather its existence is based on secondary law. It remains part of the Secretariat and is, at least legally, therefore subject to the authority of the Secretary-General. This power of the chief officer is also recognized in practice. For example, the IFAD President has a 'supervisory oversight reporting relationship' with the IFAD Office of the General Counsel.⁷⁶ Consequently, the Secretary-General has in principle the power to override advice of the Legal Counsel.

This authority of the chief officer notwithstanding, there is an unwritten rule that legal offices are independent in the discharge of their duties and that the chief administrative officer will not override legal advice. While that rule is not codified in the secondary law of most organizations, there is practice to support such an unwritten rule or convention. In the context of a proposed restructuring of the UNIDO Secretariat, the UNIDO Legal Office referred to a 'principle of independence' common to all legal advisers of the UN system.⁷⁷ The UNIDO Legal Adviser stated that '[t]he practice in the United Nations and the specialized agencies has been unfailingly to have an *independent unified legal service* headed by one legal adviser and not several legal advisers dispersed in different offices of the organization' and that '[a]s a rule, the legal office is a separate and independent office

75 Schermers and Blokker (n 53) 362. Since the UN's founding, the following persons have served as UN Legal Counsel: Ivan Kerno (Czechoslovakia) 1946–1952; Constantin Stavropoulos (Greece) (acting 1953–1954) 1955–1974; Eric Suy (Belgium) 1974–1983; Carl August Fleischhauer (Germany) 1983–1994; Hans Corell (Sweden) 1994–2004; Nicolas Michel (Switzerland) 2004–2008; Patricia O'Brien (Ireland) 2008–2013 and Miguel de Serpa Soares (Portugal) 2013–present. See Corell, 'United Nations Office of Legal Affairs' (n 18) 321–322, fn 36 as well as UN Press Releases SG/A/872-BIO/3569 (18 May 2004), SG/A/1147-BIO/4002 (6 August 2008) and SG/A/1429-BIO/4506-L/3214 (7 August 2013).

76 IFAD Executive Board 'Delivering the IFAD8 Agenda: Second Phase of the Reconfiguration of IFAD Senior Management (Responsibilities and Reporting Arrangements)' (2010) EB 2010/101/R.48/Add.1, para 20.

77 'Interoffice Memorandum re: Certain Aspects regarding the Legal Adviser/Legal Office' (n 17).

reporting directly to the head of the organization.⁷⁸ This principle is also reflected in the internal law of UNIDO when referring to the mandate of the OLA to provide ‘sound and *impartial* legal advice’.⁷⁹ According to the UNESCO Legal Adviser, there is ‘general agreement... that a legal office operating in the United Nations system should be independent, objective and neutral, provide objective and impartial advice to secretariats and governing bodies, and report directly to the executive head of the organization.’⁸⁰

Admittedly, the opinions of the UNESCO and UNIDO legal advisers do not as such speak to the role of the Legal Counsel of the United Nations. But both opinions document the common principles and practices followed in the UN system regarding legal advisers.⁸¹ And the UNESCO opinion is particularly relevant as it was the product of extensive discussions with other legal offices in the United Nations system.⁸² While certain features such as staffing, structure, location and responsibilities may be particular to an organization,⁸³ they nevertheless attest to a common ground. A survey by the Office of Internal Oversight Services noted that stakeholders of the Office of Legal Affairs valued its ‘neutrality’ and ‘credibility’.⁸⁴ In response, the Office of Legal Affairs confirmed that it ‘will continue to strive to respond to the needs of its stakeholders and beneficiaries with the valued specialized legal skill set, institutional memory, credibility and neutrality in delivering our mandate, as noted in the evaluation report’.⁸⁵ Whatever the normative quality of the principle of independence, it is clear that there is a strong convention

78 ‘Interoffice Memorandum re: Certain Aspects regarding the Legal Adviser/Legal Office’ (n 17) paras 7 and 15 (emphasis in original).

79 ‘Director-General’s Bulletin: UNIDO Secretariat Structure 2016’ (n 46) Annex II, 4 (emphasis added).

80 UNESCO Executive Board ‘Summary Records’ (18 January 2017) 200 EX/SR.1-8, SR.6 (para 16).

81 ‘Role of UNESCO’s Office of International Standards and Legal Affairs’ (n 19); ‘Interoffice Memorandum re: Certain Aspects regarding the Legal Adviser/Legal Office’ (n 17).

82 ‘Role of UNESCO’s Office of International Standards and Legal Affairs’ (n 19) para 2.

83 ‘Summary Records’ (n 80) SR.6 (para 16); ‘Role of UNESCO’s Office of International Standards and Legal Affairs’ (n 19) paras 20–21.

84 ‘Evaluation of the Office of Legal Affairs: Report of the Office of Internal Oversight Services’ (n 24) paras 25–26.

85 *ibid* Annex I.

and expectation within the United Nations, both of clients and the Office itself, that it will render its legal advice in an independent fashion.

There is also support by Member States that offices of legal affairs should, as a rule, function independently. The principle of independence of legal advisers was the U.S. State Department's justification to remove José Bustani. Bustani was appointed as Director-General of the Organization for the Prohibition of Chemical Weapons (OPCW) in 1997. Although his term was renewed in 2000, by 2001 he had lost the confidence of OPCW members, being accused of mismanagement.⁸⁶ To justify Bustani's removal, the State Department claimed that Bustani had hired a legal adviser 'whose apparent role [was] largely to justify the policies and opinions of the Director-General, rather than to provide an impartial and legally well-founded interpretation of the Convention and related rules and regulations.'⁸⁷ While the U.S. may have imperiled the position of the legal adviser by outright rejecting the legal advice, justifying the removal by claiming that the legal adviser did not provide impartial advice signals tacit acceptance of the principle of independence of legal advisers.⁸⁸ Similarly, the Syrian Government in 2016 denounced an oral opinion by the UN Office of Legal affairs as 'politicized', claiming this incidence demonstrated that the Office of Legal Affairs was 'far from *independent* and did not respect the rules of procedure of the Organization.'⁸⁹ And during the debate on the legality of the General Assembly's efforts to institute an international mechanism to assist in investigating persons responsible for serious crimes in the Syrian Civil War, the Syrian delegate alleged politically motivated rulings by the Legal Counsel, stating that '[the UN legal advisers] must be impartial and independent. They must not be spoiled and corrupt. They must tell the truth.'⁹⁰ Finally, during the proceedings of the Sanctions

86 For further background see: Jan Klabbers, 'The Bustani Case before the ILOAT: Constitutionalism in Disguise?' (2004) 53 ICLQ 455, 457–458.

87 United States Department of State, 'Preserving the Chemical Weapons Convention: The Need for a New Organization for the Prohibition of Chemical Weapons (OPCW) Director-General' (1 April 2002) <<https://2001-2009.state.gov/t/ac/rls/fs/9120.htm>> accessed 7 July 2024.

88 cf. on justifications as confirming legal rules, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America) (Merits)* [1986] ICJ Rep 14, 98, para 186.

89 UNGA 'Summary Record of the 48th Meeting' (10 January 2017) A/C.3/71/SR.48, 11 (emphasis added).

90 UNGA 'Verbatim Record of the 66th Plenary Meeting' (21 December 2016) A/71/PV.66, 29.

Committee established by Security Council resolution 661 (1990) concerning Iraq, Yemen criticized the United States for objecting to requests for legal advice and stated that '[a]n unbiased legal opinion [by the Legal Counsel] was, after all, different from an opinion by a Committee member',⁹¹ implicitly claiming that the Legal Counsel's advice should strive to be impartial and independent.

An important source of State support for an independent and unified legal adviser are the debates during a 2000 reform process in UNESCO, part of which focused on the role of the UNESCO Legal Adviser. In 2000, the Executive Board of UNESCO demanded 'to better ensure the impartiality of the Organization's Legal Adviser',⁹² and emphasized 'the need for the Executive Board to have recourse to independent and impartial legal advice from the Legal Adviser'.⁹³ In response to the UNESCO Legal Adviser's note on the role of the legal affairs office, Pakistan voiced its support that UNESCO's practice should align itself with the common practices of the UN system, including the independence of the legal office.⁹⁴

In carrying out this demand, the Executive Board had tasked a Special Committee with studying the role of the Legal Adviser. Introducing its findings and recommendations, the Special Committee 'had recalled the past circumstances which had led to a questioning of the independence of the legal advice received by the Executive Board under the current system'. To remedy that problem, the Committee considered the need for a distinct legal adviser exclusively providing legal advice to the Executive Board, concluding, however, that the independence of the single Legal Adviser should be guaranteed within the existing framework. Accordingly, 'appointment, tenure and termination of appointment should guarantee his or her [the Legal Adviser's] independence and impartiality'. Even more telling, the Committee recommended 'concrete measures should be devised to ensure immunity for the Legal Adviser against possible victimization for providing independent legal advice'.⁹⁵

91 DL Bethlehem (ed), *The Kuwait Crisis: Sanctions and their Economic Consequences* (Part 2, Cambridge University Press 1991) 843.

92 'Methods of Work of the Executive Board' (n 34) para 14.

93 UNESCO Executive Board 'Methods of Work of the Executive Board' (15 June 2000) 159 EX/Decisions, dec 4.2, para 2.

94 'Summary Records' (n 80) SR.6 (para 18).

95 UNESCO Executive Board 'Summary Records' (25 August 2000) 159 EX/SR.1-11, SR.9, para 1.7.

Some Member States demanded a change in the staff regulations that effectively provided members with a veto power over the appointment of the Legal Adviser by the Director-General. Accordingly, a draft decision foresaw that the Director-General must appoint the Legal Adviser in ‘concurrence’ with the Executive Board. India proposed an amendment, requiring consultations instead of concurrence, arguing that the Executive Board’s consent would run counter to the objectivity and impartiality of an international civil servant and risked politicizing the appointment of the Legal Adviser, whereby Member States would take sides based on the nationality of the candidates for Legal Adviser. India further argued that the consent of Member States for the appointment of the Legal Adviser was unknown in the United Nations system, thereby making such a requirement ‘extraordinary’.⁹⁶ The Indian amendment was pursued to uphold the impartiality of the UNESCO Legal Adviser. It further shows that, with regard to the institutional setting of the Legal Adviser, the norms and practices of the United Nations and its specialized agencies exert a great influence. In the course of the debate, Australia and the Netherlands claimed that the function of the Legal Adviser was to provide independent advice to both the Director-General and the Executive Board.⁹⁷ Similarly, Oman maintained that any appointment procedure needed to guarantee that the Legal Adviser enjoyed the necessary protection to freely exercise her or his functions without interference. Moreover, Oman called for a more proactive role of the Legal Adviser: instead of merely reading out legal texts, the Legal Adviser must be protected from dismissal when legal interpretations are contrary to the views of Member States.⁹⁸ The Director-General, in his address to the Executive Board, spoke of the need to maintain the independence of the Legal Adviser.⁹⁹ Regardless of their position, however, there was an expectation of independence and impartiality of the Legal Adviser.

There is thus a good case that an unwritten rule and convention of independence of the Legal Counsel with regard to the Secretary-General exists in the United Nations. This independence is grounded in and limited to the legal advisory mandate of the Legal Counsel. It does not extend to the administrative functions of the Legal Counsel. But such an independent is ultimately vested in the Legal Counsel as head of the Office of Legal Affairs, and not his

96 *ibid* SR.9, paras 4.2. This argument was reiterated by Japan (para 6).

97 *ibid* SR.9, paras 16 and 30.

98 *ibid* SR.9, para 32.2.

99 *ibid* SR.4, para 12.

or her subordinate officers. The existence of such a norm of independence is also not a mere theoretical endeavor. It has important ramifications for the status of the Legal Counsel's advice within the United Nations. It may equally be relevant in staff cases.¹⁰⁰

2.1.5. Multiplicity of 'Clients' and Legal Ethics

As the central legal service of the UN, the Legal Counsel and the lawyers in the Office serve the United Nations as an institution. In the first place, the 'client' of the Office of Legal Affairs is then the United Nations as such. Even though the United Nations is legally a single international person, it consists of many actors, all of whom may ask the Legal Counsel for advice. In reality the Office of Legal Affairs therefore serves a multiplicity of clients.¹⁰¹ This may be the Secretary-General or particular organs of the United Nations system. Since the Legal Counsel does not engage with requests for formal advice by Member States,¹⁰² there is no formal client relationship although it is helpful to maintain good working relationships with Member State delegations.¹⁰³ When preparing dossiers in advisory proceedings before the ICJ or defending the United Nations against legal claims in negotiations, domestic or international courts and tribunals, the client is clearly the United Nations as such. The most widely criticized example is probably the Office's

100 There were staff cases in which the principle of independence of legal advisers was raised by applicants but was ultimately not dealt with by the ILOAT. In one case, a staff member challenged the revision of a post for the chief of legal services section because that revision 'undermined the independence of that post'. See *LT v Preparatory Commission for the Comprehensive Nuclear-Test-Ban Treaty Organization* (28 June 2017) ILOAT No 3864, paras 1(4) and 2 (dismissing that claim as out of time). In another case, the head of the UNIDO legal office complained about a performance appraisal that his approach was rigid and inflexible. In his opinion, this judgment was arbitrary as it misconceived the 'role of a legal adviser of a public international organization' and that the relevant consideration is whether an opinion is legally sound, and not whether it is rigid or inflexible. The Tribunal dismissed the claim as the complainant had not exhausted internal remedies. See *AFH v United Nations Industrial Development Organization* (1 February 2006) ILOAT No 2511.

101 HCL Merillat (ed), *Legal Advisers and International Organizations* (Oceana 1966) 6–9.

102 See Chapter 3 in this book.

103 Merillat (n 101) 7.

letter to survivors of a cholera outbreak in Haiti, that was most certainly caused by UN peacekeeping forces, that these claims are not ‘receivable’.¹⁰⁴

The Haiti case has prompted claims to redefine the ‘client’. Ultimately the purposes of the United Nations Charter, the argument goes, constitute the ‘client’ of the Office of Legal Affairs.¹⁰⁵ This dual loyalty between an institution and the law is a familiar one for government lawyers, especially in areas without or very limited judicial review, in domestic settings and as legal advisers of a foreign ministry.¹⁰⁶ And much has been written about the tension between two competing visions of the legal counsel of an international organization.¹⁰⁷ A narrow view sees the Legal Counsel as a faithful servant, a ‘technician’ of the law. An expansive approach sees a wider responsibility to international law and to the normative foundations of the Organization as

104 UNGA ‘Report of the Special Rapporteur on Extreme Poverty and Human Rights’ (26 August 2016) A/71/367, paras 28–29, 72 (‘From the outside, and to many on the inside, the reason seems to be that the legal advice given by the Office of Legal Affairs has been permitted to override all of the other considerations that militate so powerfully in favor of seeking a constructive and just solution. Rule by law, as interpreted by the Office, has trumped the rule of law’).

105 Priya Pillai, ‘In-House “Lawyering” in International Organizations: The Case of Haiti’ (*Opinio Juris*, 8 May 2020) <<http://opiniojuris.org/2020/05/08/in-house-lawyering-in-international-organizations-the-case-of-haiti/>> accessed 7 July 2024.

106 There is an extensive scholarship on the ethics of government layering in the U.S. context. For an example, see Robert F Bauer, ‘The National Security Lawyer, In Crisis: When the “Best View” of the Law May Not Be the Best View’ (2018) 31 *Georgetown Journal of Legal Ethics* 175. It is impossible to transpose the ethics of domestic government layering to the UN Legal Counsel as they widely diverge among countries. For an overview of the competing loyalties of legal advisers of foreign ministries, see Michael Wood, ‘Legal Advisers’ in Andraž Zidar and Jean-Pierre Gauci (eds), *The Role of Legal Advisers in International Law* (Brill Nijhoff 2017). While the institutional context of a legal adviser to a foreign minister might provide more insights for the UN Legal Counsel (absence of courts, law-making through practice; see Chapter 1), there are still considerable differences. There are about 200 foreign ministries with a view on international law, but there is one central legal service of the UN (especially on institutional law). Moreover, the diversification of international law means that international law is no longer the sole purview of the foreign ministry but, for example, also the ministry for the environment when it comes to climate change law.

107 The seminal piece is Wilfred Jenks, ‘Craftsmanship in International Law’ (1956) 50 *AJIL* 32, 50–56.

a ‘guardian of the rule of law’.¹⁰⁸ These visions may not always be exclusive, but occasionally they may clash since the Organization’s interests may diverge from this wider loyalty. The response to the Haiti cholera outbreak is a case in point. Pursuant to its legal mandate, the Office of Legal Affairs must minimize legal liabilities and private law claims as much as possible.¹⁰⁹ While a rule-of-law function enhances the legitimacy (and effectiveness) of an international organization in the long run, saying ‘no’ occasionally hampers the organization’s capacity to act in the short run.¹¹⁰

Because there is no defined framework of legal ethics, rules of professional responsibility or law governing the lawyers of the Office of Legal Affairs, conclusions regarding professional ethics remain tentative. There is a path to ground the wider vision of the Legal Counsel—a rule-of-law function—in the law of international civil service, in particular the Standards of Conduct for the International Civil Service that foresee a ‘wider loyalty’.¹¹¹ But the law of international civil service has so far not developed specific standards for legal advisers.¹¹²

Alternatively, the strongest argument for this wider vision is the Legal Counsel’s advisory function, in particular the principle that only competent organs of the UN system may request formal advice.¹¹³ In the context of

108 Dunworth, ‘The Legal Adviser in International Organizations: Technician or Guardian?’ (n 29) 877–881; Treasa Dunworth, ‘Towards a Culture of Legality in International Organizations: The Case of the OPCW’ (2008) 5 IOLR 119; Ralph Zacklin, ‘The Role of the International Lawyer in an International Organisation’ in C Wickremasinghe (ed), *The International Lawyer as Practitioner* (BIICL 2000) 63–64.

109 ‘Proposed Programme Budget for 2021, Section 8: Legal Affairs’ (n 5) paras 8.41–8.44.

110 Gerald Fitzmaurice, ‘Legal Advisers and International Organizations (Review Article)’ (1968) 62 AJIL 114, 120.

111 UNGA ‘Report of the International Civil Service Commission for 2012’ (14 August 2012) A/67/30, Annex IV, para 7 (‘International loyalty means loyalty to the whole United Nations system and not only to the organization for which one works; international civil servants have an obligation to understand and exemplify this wider loyalty’). For this argument, see Peter Quayle, ‘Legal Advisers and International Organisations: The Convergence of Interior and Exterior Legal Obligations’ in Andraž Zidar and Jean-Pierre Gauci (eds), *The Role of Legal Advisers in International Law* (Brill Nijhoff 2017) 263.

112 See, eg, Gerhard Ullrich, *The Law of the International Civil Service: Institutional Law and Practice in International Organisations* (Duncker & Humblot 2018). See also the cases cited in Section 2.1.4 in this Chapter.

113 See Chapter 3, especially Section 3.3.

formal legal advice, the institutional self-interest of the Legal Counsel is less pronounced and in any event mitigated by the publication of the legal advice. Seen this way, the principle of a formal request by a competent UN body is also a rule of legal ethics and a basis for the wider vision of the Legal Counsel's role—if only when providing formal legal advice and not when conducting other responsibilities of the Office.

The tension between the two visions is, however, bound to exist. The appearance of independence, the direct reporting line to the Secretary-General and the rule of a formal request by a competent UN organ provide a rudimentary framework but fall short of a comprehensive code of legal ethics for the Office of Legal Affairs.

2.2. Functions of the Legal Counsel

Generally speaking, a legal adviser of an international organization performs many roles: legal counsel, advocate, guardian of the practice and the institutional memory of the respective organization, negotiator and innovator.¹¹⁴ They may exercise a variety of functions: performing secretariat functions such as carrying out the Secretary-General's duty under Article 102 of the UN Charter or as depositary of international agreements; reviewing administrative issuances for legality and deciding upon private law claims by individuals; acting as an administrative appeals body under access to information policies; responding to requests for interpretations by international tribunals, national courts and governments.

In some organizations, legal counsel review constitutes a mechanism for the informal resolution of mandate issues and institutional disputes in international organizations, thus having a broader mandate to ensure the rule of law in international organizations. At a general level, this description fits the UN Office of Legal Affairs as well.¹¹⁵ It must, however, be borne in mind that the Office of Legal Affairs exercises a vast array of functions and that

114 Zacklin, 'The Role of the International Lawyer in an International Organisation' (n 108) 59–60; Abdulqawi A Yusuf, 'Le Conseiller juridique d'une organisation internationale face à la pratique' in Société française pour le droit international (ed), *La pratique et le droit international: Colloque de Genève* (Pedone 2004).

115 For an overview of the functions of the United Nations Office of Legal Affairs: Corell, 'United Nations Office of Legal Affairs' (n 18).

formal legal advice to UN bodies is only a small, albeit important part of its mandate.

2.2.1. Counsel, Negotiator, Advocate

The core function of the legal adviser in the UN and in each specialized agency is to provide legal advice to the secretariats and other organs.¹¹⁶ The advice relates to both public law, including public international law and the internal administrative law of the UN, and private law.¹¹⁷ The UN Office of the Legal Counsel prepares legal advice on the interpretation of the Charter and public international law, UN resolutions and the General Convention.¹¹⁸ The General Legal Division prepares legal advice on the administrative law of the UN.¹¹⁹

Notably, the mandate of the Office to advise on United Nations law is not based on the Charter itself but arises from secondary acts and practice.¹²⁰ This is a common feature of the UN system. An exception is the ITU Convention that authorizes the Secretary-General ‘to provide legal advice to the [ITU],’¹²¹ which in practice is exercised by the ITU legal adviser.¹²² But the advisory function of the United Nations Office of Legal Affairs has been recognized by the General Assembly for many years. In 1970, a special committee of the General Assembly tasked with the improvement of the Assembly’s procedures stressed ‘that legal advice [by the Office of Legal Affairs] was always furnished, either orally or in writing, when requested’.¹²³ The General

116 ‘Organization of the Office of Legal Affairs’ (n 9) para 2.1; ‘Interoffice Memorandum re: Certain Aspects regarding the Legal Adviser/Legal Office’ (n 17); Ralph W Phillips, *FAO: Its Origins, Formation and Evolution, 1945-1981* (FAO 1981) 81.

117 ‘Organization of the Office of Legal Affairs’ (n 9) paras 2.1 and 3.3.

118 *ibid* para 6.2(a).

119 *ibid* para 7.2(a).

120 cf 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 (noting that, in relation to the ILO, Member States frequently resort to administrative interpretations without any mention to this effect in the constituent instrument of the respective international organization).

121 1992 ITU Convention, Article 5(1)(h).

122 Noll (n 43) 298-9.

123 ‘Rules of Procedure of the General Assembly’ (n 67) Annex IV, para 124.

Assembly endorsed this conclusion and, importantly, annexed it along with other conclusions to the Rule of Procedure.¹²⁴

The Office of Legal Affairs represents the Secretary-General in legal conferences, judicial and arbitral proceedings.¹²⁵ The Office's role as a negotiator is especially relevant in private law claims by individuals given the UN's immunity from domestic lawsuits. With regard to contract claims, the respondent UN unit will consult the Office of Legal Affairs on legal issues, such as interpretation of contracts and assessments of liability.¹²⁶ The UN favors amicable settlement of disputes.¹²⁷ In cases where the contractor is represented by its lawyers, the Office of Legal Affairs will conduct the negotiations on behalf of the UN and, if an agreement is reached, will prepare the formal settlement document.¹²⁸ This procedure applies essentially to other private law claims, especially tort claims against the UN as well.¹²⁹

2.2.2. Administrative Functions

The Office of Legal Affairs is mandated to carry out certain administrative functions. Thus, the Office of Legal Affairs performs substantive and secretariat functions for legal organs involved in public international law, the law of the sea and international trade law.¹³⁰

The Office performs the functions of the Secretary-General under Article 102 of the UN Charter and discharges the depositary functions of the Secretary-General.¹³¹ In that regard, the Office advises frequently on treaty rules relating to the entry into force and denunciation of treaties.¹³² In relation to questions of statehood, the Secretary-General and by extension the Office

124 UNGA Res 2837 (XXVI) (17 December 1971) A/RES/2837(XXVI).

125 'Organization of the Office of Legal Affairs' (n 9) paras 2.1 and 3.6.

126 UNGA 'Procurement-Related Arbitration: Report of the Secretary-General' (14 October 1999) A/54/458, para 10.

127 OLA 'Memorandum to the Controller' [2001] UNJYB 381, 382.

128 'Procurement-Related Arbitration: Report of the Secretary-General' (n 126) paras 10-11.

129 'Memorandum to the Controller' (n 127) 383.

130 'Organization of the Office of Legal Affairs' (n 9) para 2.1.

131 *ibid* paras 2.1 and 11.2.

132 See for example the letter by UN Legal Counsel cited in *Constitution of the Maritime Safety Committee of the Inter-Governmental Maritime Consultative Organization* (Advisory Opinion) [1960] ICJ Rep 150, 167.

of Legal Affairs, however, follow the practice and determinations of the General Assembly.¹³³ The Office also performs certain functions with regard to treaty practice by the UN itself. Under a Secretary-General's bulletin, the Office, among other tasks, reviews draft treaties to be concluded by the UN and consults with UN departments when full powers, an act of formal confirmation, or an instrument of acceptance is required.¹³⁴

The Office of Legal Affairs further discharges powers of the Secretary-General under the General Convention. Under the General Convention, UN officials enjoy wide-ranging immunities.¹³⁵ But the Secretary-General shall waive the immunity of an official where, in her or his opinion, the immunity would impede the course of justice and the waiver does not prejudice the interests of the UN.¹³⁶ In practice, requests for waivers are referred to the Office of Legal Affairs.¹³⁷ Although the decisions appear to be taken personally by the Secretary-General, the Legal Counsel routinely decides on requests for waivers.¹³⁸ In fact, it is the UN Legal Counsel who customarily informs U.S. courts whether the Secretary-General has waived the immunity of its employees from criminal prosecution by U.S. authorities.¹³⁹

While the UN Legal Counsel has invoked a delegation of authority by the Secretary-General,¹⁴⁰ this delegation does not appear in an administrative issuance.¹⁴¹ However, this delegation is apparent in agreements between the ICC and the UN. Under the Relationship Agreement, the UN shall waive,

133 UN 'Summary of Practice of the Secretary-General as Depositary of Multilateral Treaties: Prepared by the Treaty Section of the Office of Legal Affairs' (1999) ST/LEG/7/Rev.1, paras 82–83.

134 Secretary-General's Bulletin 'Procedures to be Followed by the Departments, Offices and Regional Commissions of the United Nations with regard to Treaties and International Agreements' (28 August 2001) ST/SGB/2001/7, paras 1 and 3.

135 Convention on the Privileges and Immunities of the United Nations (adopted 13 February 1946, entered into force 17 September 1946) 1 UNTS 15 (General Convention) s 19.

136 General Convention, Section 21.

137 Anthony J Miller, 'Privileges and Immunities of United Nations Officials' (2007) 4 IOLR 169, 239.

138 *ibid* 239.

139 *US v Bahel* 662 F3d 610, 621 (2nd Cir 2011); *McGehee v Albright* 210 FSupp2d 210, 218, fn 7 (SDNY 1999).

140 OLA 'Letter to the Legal Liaison Officer, United Nations Office in Geneva' [1978] UNJYB 191.

141 Miller, 'Privileges and Immunities of United Nations Officials' (n 137) 239–240, fn 320.

‘subject to its rules’,¹⁴² an official’s duty of confidentiality if the ICC requests testimony. In a Memorandum of Understanding between the ICC and the UN, it is stated that

only the Legal Counsel of the United Nations or the Assistant Secretary-General for Legal Affairs may, on behalf of the Secretary-General, execute the waiver contemplated in Article 16 of the Relationship Agreement in respect of a member of UNOCI.¹⁴³

The same procedure applies to the UN’s immunity. The UN enjoys virtually absolute immunity from legal proceedings pursuant to Section 2 of the General Convention.¹⁴⁴ While Section 2 contemplates that such immunity may be waived, it does not authorize a specific organ to waive the UN’s immunity.¹⁴⁵ According to the OLA and by virtue of Article 97 of the UN Charter, the Secretary-General has the power to waive the Organization’s immunity.¹⁴⁶ Yet, in practice, the OLA decides on most requests for waivers on behalf of the Secretary-General.¹⁴⁷ Similar to the procedure for waiving officials’ immunity, no formal delegation of authority seems to exist.¹⁴⁸ However, as the ICC-UN Memorandum of Understanding shows, the Legal Counsel executes waivers under the rules of the UN. In the ITU, the Legal Adviser is responsible for immunities and their waivers as well.¹⁴⁹

Lastly, the Office of Legal Affairs exercises an important review function with regard to allegations of criminal conduct by United Nations officials. This function is closely linked to the Office’s delegated mandate with regard to the immunities of the UN and its officials. Under current practice, Secretariat

142 Relationship Agreement between the United Nations and the International Criminal Court (signed 4 October 2004) 2283 UNTS 196, Article 16(1).

143 Memorandum of Understanding between the United Nations and the International Criminal Court concerning Cooperation between the United Nations Operation in Côte d’Ivoire (UNOCI) and the Prosecutor of the International Criminal Court (signed 23 January 2012) 2803 UNTS 324, Article 11(4).

144 General Convention, Section 2.

145 Anthony J Miller, ‘The Privileges and Immunities of the United Nations’ (2009) 6 IOLR 7, 92.

146 OLA ‘Legal Status of the United Nations in the United States of America’ (2006) 3 IOLR 385; Miller, ‘The Privileges and Immunities of the United Nations’ (n 145) 92.

147 Miller, ‘The Privileges and Immunities of the United Nations’ (n 145) 92.

148 *ibid* 92.

149 Noll (n 43) 311–312.

departments, UN funds and programs refer relevant investigation findings that may be criminal to the Office of Legal Affairs. In a first step, the Office of Legal Affairs reviews these findings and determines whether there are credible allegations of criminal conduct. If it finds the allegations credible, it refers those findings in a second step to the relevant national authorities.¹⁵⁰

2.2.3. Review of Proposed Regulations

As part of reviewing the administrative law of the UN, the Office of Legal Affairs reviews proposed administrative issuances by the Secretary-General to ensure compliance with procedural and substantive requirements under the Secretary-General's bulletin on Procedures for the Promulgation of Administrative Issuances. Any administrative issuance must be cleared by the Office of Legal Affairs.¹⁵¹ This function is significant. It is the legal basis of the Office's mandate to ensure the legality of proposed administrative issuances of the Secretary-General. According to the ILO Administrative Tribunal, a chief administrative officer has no authority to promulgate an administrative issuance without the requisite clearance of the respective office of legal affairs. Accordingly, an administrative issuance that has not been cleared by the Office of Legal Affairs would be unlawful.¹⁵²

2.2.4. Review of Tort Claims

The UN Office of Legal Affairs also has a review mandate for tort claims occurring in the headquarters district in New York City. Under the Secretary-Generals' bulletin on the Resolution of Tort Claims, the Office is responsible for the preliminary review of tort claims against the UN that occur in the headquarters district. If the Office regards the claim as justified and if the claim does not exceed 5,000 U.S. dollars, it shall, subject to the Controller's approval, negotiate a settlement with the claimant. Any claim not settled

¹⁵⁰ UNGA 'Criminal Accountability of United Nations Officials and Experts on Mission: Report of the Secretary-General' (29 June 2017) A/72/121, 9–10.

¹⁵¹ 'Procedures for the Promulgation of Administrative Issuances' (n 10) paras 6.2(e) and 6.3.

¹⁵² *F v International Criminal Court* (24 January 2018) ILOAT No 3907, para 25.

under this procedure will be referred to the Tort Claims Review Board, and if amicable settlement is not possible, will be settled by arbitration.¹⁵³

Arguably, the OLA has a general duty to review the substance of monetary claims implicit in the Financial Regulations and Rules of the UN. Pursuant to Financial Rule 105.12, the Secretary-General ‘may make such ex gratia payments as are deemed to be necessary in the interests of the [UN]’.¹⁵⁴ However, ex gratia payments are permissible only ‘in cases where, although in the opinion of the Legal Counsel there is no clear legal liability on the part of the United Nations, payment is in the interest of the Organization’.¹⁵⁵ While Rule 105.12 is a procedural condition for ex gratia payments, it is premised on the authority of the Legal Counsel to review the substance of monetary claims. Similar legal frameworks that imply a duty to review private law claims by individuals exist in other international organizations such as UNIDO and the OPCW as well.¹⁵⁶

The OLA itself recognized this mandate when reviewing the recommendation of the local claims review board of the United Nations Stabilization Force in Haiti to grant an ex gratia payment to an injured Haitian citizen: ‘In deciding whether an ex gratia payment be made, therefore, the role of the Office of Legal Affairs is to determine whether the Organization is *legally liable or not* to make the payment.’¹⁵⁷ Accordingly, the responsibility of the OLA to review private law claims is firmly grounded in the internal law and practice of the UN.

153 Secretary-General’s Bulletin ‘Resolution of Tort Claims’ (8 March 1989) ST/SGB/230, para 3; UNGA ‘Procedures in Place for Implementation of Article VIII, Section 29, of the Convention on the Privileges and Immunities of the United Nations, Adopted by the General Assembly on 13 February 1946: Report of the Secretary-General’ (1995) A/C.5/49/65, para 12.

154 Secretary-General’s Bulletin ‘Financial Regulations and Rules of the United Nations’ (1 July 2013) ST/SGB/2013/4, reg 5.11.

155 *ibid* r 105.12.

156 The Financial Rules of both UNIDO and the OPCW require that the legal adviser finds ‘no legal liability’ as opposed to ‘no clear legal liability’ in the Financial Regulations and Rules of the UN: UNIDO ‘Director-General’s Bulletin: Financial Regulations and Rules of UNIDO’ (18 August 2006) UNIDO/DG/B.74/Rev.2, r 109.3.1; OPCW ‘Financial Regulations and Financial Rules’ (2012) OPCW-S/DGB/22, reproduced in OPCW, *OPCW: The Legal Texts* (3rd edn, Asser 2015) 644, r 10.4.01.

157 OLA ‘Interoffice Memorandum regarding Ex Gratia Payment to an Injured Civilian Haitian’ [2009] UNJYB 428, para 11 (emphasis added).

2.2.5. Norm Entrepreneur and Institution Builder

While this study focuses on the advisory practice of the Office of Legal Affairs, the picture would hardly be complete without at least mentioning in brief its role in the development of public international law, and of international institutional law in particular.¹⁵⁸

Especially in international organizations founded after the Second World War, there was little earlier practice or precedents to guide legal advisers.¹⁵⁹ This novel situation created a need for legal advisers to be innovative and creative when dealing with practical problems that had little to do with international law centered on States.¹⁶⁰ For example, Aaron Broches as World Bank General Counsel was instrumental in creating the ICSID Convention, while one of his successors, Ibrahim Shihata, had a critical role in establishing the World Bank Inspection Panel.¹⁶¹ Joseph Gold with the IMF and Wilfred Jenks with the International Labour Organisation helped clarify and develop important parts of the law or devised new policy or legal instruments.¹⁶² Wilfred Jenks in particular developed the idea that new States automatically succeed to obligations under multilateral law-making treaties.¹⁶³ While somewhat less pronounced in contemporary international organizations law, legal advisers still engage in institution building from time to time. Thus, the UN Office of Legal Affairs was responsible for managing commissions of inquiry and instrumental in setting up international criminal tribunals such as the ICTY and modern non-judicial accountability mechanisms such as the International, Impartial and Independent Mechanism for Syria.¹⁶⁴

158 Edwards (n 42) 257 (referring to legal advisers as ‘innovators and institution-builders’); Klabbers, *An Introduction to International Organizations Law* (n 42) 256 (referring to legal advisers of international organizations as ‘norm entrepreneurs’).

159 Merillat (n 101) viii.

160 Merillat (n 101) ix; Jenks, ‘Craftsmanship in International Law’ (n 107) 50–51.

161 Edwards (n 42) 258–262.

162 Klabbers, *An Introduction to International Organizations Law* (n 42) 256.

163 See Wilfred Jenks, ‘State Succession in Respect of Law-Making Treaties’ (1952) 29 BYBIL 105.

164 Zacklin, ‘The Role of the International Lawyer in an International Organisation’ (n 108) 65–68; Miguel de Serpa Soares, ‘Reflections of the United Nations Legal Counsel on the Work of the Office of Legal Affairs’ (2018) 50 Geo Wash Int’l L Rev 707, 714–717.

2.2.6. Coordinating Legal Offices of the UN System

The Legal Counsel of the United Nations occupies a prominent place among legal advisers of the United Nations system.¹⁶⁵ One reason is that the UN Office of Legal Affairs sets precedents for legal questions that also arise in other organizations because the UN is faced with many issues much earlier than other organizations.¹⁶⁶ Another reason is that the UN Office of Legal Affairs' resources far surpass those of other organizations.¹⁶⁷ For reasons of economy, legal offices of other organizations often do not engage in a *de novo* evaluation of a legal question, but will consult with and look to the UN Office of Legal Affairs for guidance on legal questions.¹⁶⁸ The UN Legal Advisers Network provides an institutional basis for this arrangement. The UN Legal Counsel leads the system-wide network of legal advisers of specialized agencies and related organizations, and legal officers of funds, programs, regional commissions and peace operations.¹⁶⁹

An example is the response of the United Nations system to the EU's General Data Protection Regulation (GDPR) which regulates data transfers to international organizations from controllers in the EU. The network of UN legal advisers coordinated a response to the potential conflict between the GDPR and the immunities of the UN.¹⁷⁰ And the Legal Counsel of the UN wrote a letter to the European Commission on behalf of the UN system, including UN funds and programs, specialized and related agencies which layed out the perspective of the UN system with regard to the GDPR.¹⁷¹

165 'Interoffice Memorandum re: Certain Aspects regarding the Legal Adviser/Legal Office' (n 17) para 5; Michael Wood, 'Legal Advisers' in Rüdiger Wolfrum (ed), *MPEPIL* (online edn, Oxford University Press 2017) para 35; Renouf (n 41) 337.

166 Renouf (n 41) 337.

167 *ibid* 337.

168 Zacklin, 'The Role of the International Lawyer in an International Organisation' (n 108) 59.

169 'Organization of the Office of Legal Affairs' (n 9) para 3.4; Wood, 'Legal Advisers' (n 165) para 35.

170 IMO 'Implications of the EU General Data Protection Regulation and Directive on the Organizations of the United Nations System: Note by the Secretary-General' (31 May 2018) C 120/17(a)/3, para 5.

171 *ibid* Annex.

