

Chapter 6: Concluding Remarks

This study attempted to analyze the advisory practice of the Legal Counsel of the United Nations. It was motivated by a simple question: why are these legal opinions published, by a legislative mandate, in a separate chapter of the *United Nations Juridical Yearbook*? And why is there a need for legal interpretations by an international civil servant in the UN system? This analysis has yielded the following findings:

The UN Legal Counsel as a legal actor. The Legal Counsel (and the Office of Legal Affairs) is a decidedly *legal* actor. The advisory mandate is based on General Assembly resolutions, budgetary documents and administrative regulations by the Secretary-General. Moreover, there is a defined procedure for issuing formal legal opinions: only certain bodies have standing to request formal legal opinions, and other requirements have to be met as well. Coupled with an unwritten rule of independence of the Legal Counsel, this legal framework establishes the Legal Counsel as an official competent to interpret the institutional law of the United Nations.

Legal precedents, argumentative practice and administrative review of expert bodies. Opinions of the Legal Counsel are a recognized legal precedent with persuasive authority in the UN legal system as they are important enough to be overruled by the General Assembly and to be criticized by Member States. They constitute legal documents, some of which have to be published and which are strategically employed in inter-organ disputes. Crucially, the advisory practice of the UN Legal Counsel has developed into a limited review of expert bodies for certain principles of international organizations law (among them, the principle of speciality, the division of competences and procedural issues).

Evidence of organizational practices and proceduralization of the Certain Expenses principle. The International Court of Justice has used Legal Counsel opinions as evidence to ascertain whether organizational practices of UN organs are sufficiently established. Apart from this, the existence of an administrative review procedure by the Legal Counsel has effected a proceduralization of the *Certain Expenses* principle of autointerpretation and is a modern substitute for non-judicial interpretations by ad hoc committees or the Sixth Committee. In that sense, the existence of such a practice responds to the need for external legal interpretations in a legal system without com-

prehensive judicial review. Coupled with specific rules for issuing formal legal opinions, this legal effect renders formal legal opinions a distinct legal instrument in the institutional law of the United Nations and shapes the decision-making process of UN bodies.

These implications are noteworthy, but should be put in context. The review by, and the advisory practice of, the Legal Counsel of the UN should not be overstated; Legal Counsel review in its current state is by no means an element or a nucleus of the international rule of law at the United Nations that the General Assembly proclaimed in 2012,¹ even if that is the Legal Counsel's normative claim and justification to increase financial resources to OLA.² The rule of law at the national level, and whatever exists within the institutional plane of the United Nations, do not work in the 'same way'.³ The question is also not whether the existence of the advisory practice of the Legal Counsel constitutes a 'thin' or a 'thick' rule-of-law version.⁴

Instead, the rule of law at the United Nations will invariably work in conceptually different ways than at the national level. And that should be of no surprise. To point out that the opinions of the Legal Counsel are non-binding is simultaneously correct and beside the point. The mere existence of an external actor that produces 'law' in an official capacity in response to requests by a UN organ changes the way UN bodies operate. At the very least, the advisory practice of the UN Legal Counsel is an important feature to better understand the development of institutional law in the United Nations.

Legal opinions as a distinct legal instrument have normative effects (evidence of organizational practices, persuasive authority, proceduralization) and are based on a complex amalgam of informal practices and legal bases in the secondary law of the UN. Naturally, this begs the question whether there is a need for policy recommendations. These could come by way of formalizing

1 Declaration of the High-Level Meeting of the General Assembly on the Rule of Law at the National and International Levels, UNGA Res 67/1 (30 November 2012) A/RES/67/1, para 2 (proclaiming 'that the rule of law applies to all States equally, and to international organizations, including the United Nations and its principal organs').

2 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, paras 6.4 and 6.6 (stating that it is OLA's objective to enhance the respect for the rule of law by the principal and subsidiary organs of the UN).

3 cf J H H Weiler, 'Van Gend en Loos: The Individual as Subject and Object and the Dilemma of European Legitimacy' (2014) 12 ICON 94, 103.

4 cf Simon Chesterman, 'An International Rule of Law?' (2008) 56 Am J Comp L 331, 340.

an informal process of administrative interpretations (such as by including provisions for requests of legal opinions in a General Assembly resolution), strengthening the institution of the Office of Legal Affairs (such as by codifying the principle of independence of the Legal Counsel similar to the Office of Internal Oversight Services),⁵ or increasing the transparency of the operations of the Legal Counsel.

There is nothing inherently wrong in such proposals. But the author doubts that much would be gained by increasing the formal powers of the Legal Counsel, codifying her or his independence or by bringing more light to the day-to-day operations of the UN Office of Legal Affairs. In all likelihood, the informal authority of the Legal Counsel is a feature, and not a bug. Every legal system, and there is no reason that the UN legal system should be different, depends on a mix of formal and informal legal authorities.⁶

5 cf UNGA Res 64/263 (5 May 2010) A/RES/64/263, para 9 (providing that OIOS ‘shall exercise operational independence under the authority of the Secretary-General’).

6 This point was made by the Legal Counsel, when pointing to non-binding OLA opinions as an alternative to advisory opinions by the ICJ: ILC ‘Provisional Summary Record of the 3371st Meeting’ (3 August 2017) A/CN.4/SR.3371, 9 (‘In his view, advisory opinions should in general be used sparingly as a means of clarifying international law. In a certain sense, some of the responsibility in that regard might be considered to fall on him and his Office (...) [C]onsideration should perhaps be given to issuing such opinions on specific points of concern more frequently, since, although non-binding, a formal legal opinion by the United Nations Legal Counsel would hopefully carry some weight’).

