Chapter 5: Doctrinal Use and Normative Effects of Legal Opinions in International Institutional Law

5.1. Introduction

The Legal Counsel is an important legal authority in the legal order of the United Nations. Interpretations are considered legal precedents. The Legal Counsel is often called on to delineate the jurisdictional boundaries between organs and exercises an embryonic form of legal review over expert and technical bodies. That is the main takeaway of the previous chapter.

So what, it may be well be asked. After all, a structural analysis of the authority of the Legal Counsel opinions *in practice* is by necessity retrospective and may be of little help for future problems. Taking some of the insights of the previous chapter, this chapter inquires into the normative status and effects of Legal Counsel opinions in the legal order of the United Nations. This is not a purely theoretical question as this issue has been raised in individual opinions of ICJ judges.[1]

The internal law of the United Nations (the 'rules of the organization') consist of the Charter, legal instruments adopted pursuant to the Charter, and 'established practice'.[2] When it comes to legal instruments, legal doctrine distinguishes between internal and external acts,[3] binding and non-binding acts,[4] or 'what the instrument is supposed to do'.[5] As with many distinctions in law, none of these examples are clear-cut and even internal acts may have

1 See the separate opinion of Judge Oda in *Legality of the Use by a State of Nuclear Weapons in Armed Conflict* (Advisory Opinion) [1996] ICJ Rep 66, 91–96 (discussing relevance of interpretations of WHO Legal Counsel) and Section 5.3 below.

2 Articles on the Responsibility of International Organizations, UNGA Res 66/100 (27 February 2012) A/RES/66/100, Annex, Article 2(b).

3 See eg Manuel Diez de Velasco, *Las organizaciones internacionales* (12th edn, Tecnos 2002) 142–148.

4 CF Amerasinghe, *Principles of the Institutional Law of International Organizations* (2nd edn, Cambridge University Press 2005) 163.

5 Jan Klabbers, *An Introduction to International Organizations Law* (4th edn, Cambridge University Press 2022) 159–160 (distinguishing law-making instruments, law-applying instruments, non-binding instruments that are intended to influence behavior, and household matters).

an external effect.[6] Within these categories, textbooks analyze 'decisions', 'recommendations', 'declarations', 'organizational' and 'operational' acts.[7] 'Legal opinions' are ignored despite appearing in a dedicated chapter in the *United Nations Juridical Yearbook* for decades. Except for short comments,[8] there appears to be no systematic treatment (or an outright denial) of the normative place of legal opinions in the United Nations legal order or other organizations—even though legal opinions feature prominently in the footnotes of many standard textbooks on international organizations law.

There is little merit in ascribing Legal Counsel opinions the quality of a formal source of internal law. In the absence of a clear statutory basis, it cannot be reasonably claimed that Legal Counsel opinions constitute a source of law of the rules of the organization. Even the ICJ as the principal judicial organ of the United Nations does not have that kind of authority. The toolkit of international (institutional) law then offers three plausible frames. First, legal opinions could be evidence of internal law and the 'rules of organization', in particular of an 'established practice'.[9] Secondly and in analogy to Article 38(1)(d) of the ICJ Statute, legal opinions could be seen as a 'subsidiary means for the determination of the rules of [institutional] law'.[10] Lastly and going beyond these familiar frames, this chapter situates

6 Henry G Schermers and Niels M Blokker, *International Institutional Law: Unity with Diversity* (6th edn, Brill Nijhoff 2018) 790–791; Maarten Bos, 'The Interpretation of Decisions of International Organizations' (1981) 28 NILR 1, 3.

7 See, eg, Benedetto Conforti and Carlo Focarelli, *The Law and Practice of the United Nations* (5th edn, Brill Nijhoff 2016) ch 4. For a similar typology see Schermers and Blokker (n 6) 785–865.

8 Oscar Schachter, 'The Development of International Law Through the Legal Opinions of the United Nations Secretariat' (1948) 25 BYBIL 91, 94–95 (distinguishing between 'purely advisory' and opinions with 'direct legal effect' in matters where the Secretary-General exercises an administrative function); Ralph Zacklin, 'Les Nations Unies et la crise du Golfe' in Brigitte Stern (ed), *Les aspects juridiques de la crise et de la guerre du Golfe: Aspects de droit international public et de droit international privé* (Montchrestien 1991) 63 (opinions of the Legal Counsel not legally binding, but considered as a persuasive authority within the UN internal legal order equivalent to advisory opinions of the ICJ); Suzette V Suarez, *The Outer Limits of the Continental Shelf: Legal Aspects of their Establishment* (Springer 2008) 108 (opinions of the Legal Counsel have no legal effect, but are 'influential' and have 'considerable impact' on CLCS).

9 cf Articles on the Responsibility of International Organization (n 2) Article 2(b).

10 cf Statute of the International Court of Justice (adopted 26 June 1945, entered into force 24 October 1945) 15 UNCIO 355 (ICJ Statute) Article 38(1)(d).

legal opinions within alternative approaches to traditional sources doctrine and asks whether formal legal opinions constitute a standard instrument in their own right ('other acts' in terms of Article 2(b) of the Articles on Responsibility of International Organizations).

5.2. *Informal and Formal Legal Opinions as Evidence of Established Practice*

Much like customary international law or subsequent practice (Article 31(3)(b) VCLT),[11] the identification of an 'established practice' of the United Nations relies on evidence (usually in written or published form). Even though the notion of 'established practice' appears in a number of international instruments,[12] the methodology for identifying an established practice, its specific legal effects and doctrinal character remains underdeveloped and controversial.[13]

Some distinctions are helpful. There is a basic distinction between the practice of States within the United Nations and the practice of the Organization as such.[14] This distinction may be difficult to draw because of the uncertain legal nature of international organizations. Sometimes international organizations are a vehicle for States, sometimes they are an independent

11 ILC 'Draft Conclusions on Subsequent Agreements and Subsequent Practice in relation to the Interpretation of Treaties, with Commentaries' (2018) A/73/10, para 52, Conclusion 6 and accompanying cmt 22; ILC 'Draft Conclusions on Identification of Customary International law, with Commentaries' (2018) A/73/10, para 66, Conclusion 6 and accompanying cmt.

12 Articles on the Responsibility of International Organization (n 2) Article 2(b); Vienna Convention on the Law of Treaties between States and International Organizations or Between International Organizations (adopted 21 March 1986, not yet in force) A/CONF.129/15, Article 2(1)(j); 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).

13 ILC 'Third Report on Subsequent Agreements and Subsequent Practice in relation to the Interpretation of Treaties by Georg Nolte, Special Rapporteur' (7 April 2015) A/CN.4/683, para 82 with further references; ILC 'Seventh Report on Responsibility of International Organizations by Giorgio Gaja, Special Rapporteur' (27 March 2009) A/CN.4/610, para 16.

14 Michael Akehurst, 'Custom as a Source of International Law' (1975) 47 BYBIL 1, 11; Irina Buga, *Modification of Treaties by Subsequent Practice* (Oxford University Press 2018) 36.

legal actor, or they may be both a vehicle for States and an autonomous legal actor at the same time.[15] But conceptually this distinction is sound as it recognizes the separate legal personality of the United Nations and that of its members.

Within the practice of the Organization, it is proposed to draw another distinction between external and internal practice.[16] The common thread here is that an 'external' practice of an organization may be relevant for identifying a rule of customary international law while a purely internal practice may give rise to an 'established practice'.[17]

This second distinction, however, makes little sense. Conceptually, most decisions and law-making practices of international institutions have both internal and external effects.[18] Legally, it is very much possible that an established practice may have external effects and not be limited to purely internal operations. An organization may incur international responsibility for breaching an established practice towards its members.[19] A scheduling decision of the Commission on Narcotic Drugs, even if illegal, may nevertheless trigger suppression and cooperation obligations for States under the drug conventions. Or an individual could conceivably have a claim against the United Nations for supporting an international tribunal empowered to hand down capital punishment because it breaches the Secretariat's long-standing position not to lend support to the death penalty even though it is not prohibited as such under customary international law.[20] Accordingly, this chapter

15 Catherine Brölmann, *The Institutional Veil in Public International Law: International Organisations and the Law of Treaties* (Hart 2007) 1.

16 Alain Pellet and Daniel Müller, 'Article 38' in Andreas Zimmermann and Christian J Tams (eds), *The Statute of the International Court of Justice: A Commentary* (3rd edn, Oxford University Press 2019) 907; Julio A Barberis, 'Réflexions sur la coutume internationale' (1990) 36 AFDI 9, 33.

17 ILC 'Third Report on Identification of Customary International Law by Michael Wood, Special Rapporteur' (27 March 2015) A/CN.4/682, para 72.

18 Jan Wouters and Philip De Man, 'International Organizations as Law-Makers' in Jan Klabbers and Åsa Wallendahl (eds), *Research Handbook on the Law of International Organizations* (Edward Elgar 2011) 194; ILC 'Draft Articles on the Law of Treaties between States and International Organizations or between International Organizations' [1982-II(2)] YBILC 17, 21, para 25 ('There would have been problems in referring to the "internal law" of an organization, for while it has an internal aspect, this law also has in other respects an international aspect').

19 Articles on the Responsibility of International Organization (n 2) Article 10(2).

20 cf OLA 'Note on the Death Penalty under International Law and the Position of the United Nations Secretariat' [2007] UNJYB 475, 476.

proceeds from the assumption that an established practice, while arising on the institutional plane, may well have external normative effects.

The doctrinal character of an established practice has come to be defined as a 'customary law of the organization'.[21] At the very least, this produces two distinct legal effects. As the customary law of the organization, the established practice is law-creating and becomes an element of the secondary law of the organization.[22] In practice, the most important effect of an established practice is as a means of interpretation of the constituent instrument of an international organization.[23] This may extend to treaties such as the General Convention that are very closely related to the constituent instrument.[24] An 'interpretative' established practice and a 'law-making' established practice may be very similar, if even distinguishable at all.[25] The abstention of the permanent members in the Security Council as a 'concurring vote' is probably

21 Christopher Peters, 'Informelle Anpassungsmechanismen der Gründungsverträge Internationaler Organisationen und ihre Bedeutung für die Konstitutionalisierung des Völkerrechts' in Ingolf Pernice, Manuel Müller, and Christopher Peters (eds), *Konstitutionalisierung jenseits des Staates: Zur Verfassung der Weltgemeinschaft und den Gründungsverträgen internationaler Organisationen* (Nomos 2012) 24; 'Third Report on Identification of Customary International Law by Michael Wood, Special Rapporteur' (n 17) para 72. This understanding goes back to the ILC: ILC 'Draft Articles on the Law of Treaties' [1963-II] YBILC 189, 213 ('customary rules developed in its practice').

22 Schermers and Blokker (n 6) 754; Paul Reuter, 'Quelques reflexions sur la notion de "pratique international" spécialement en matière d'organisations internationale' in *Studi in onore di Giuseppe Sperduti* (Giuffrè 1984) 205.

23 Christiane Ahlborn, 'The Rules of International Organizations and the Law of International Responsibility' (2011) 8 IOLR 397, 425; 'Third Report on Subsequent Agreements and Subsequent Practice in relation to the Interpretation of Treaties by Georg Nolte, Special Rapporteur' (n 13) para 82; Christopher Peters, *Praxis Internationaler Organisationen: Vertragswandel und völkerrechtlicher Ordnungsrahmen* (Springer 2016) 181.

24 Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945) 15 UNCIO 335 (UN Charter) Article 105(3) (General Convention as a way to flesh out the details of Article 105(1) and (2)).

25 Rosalyn Higgins, 'The Development of International Law by the Political Organs of the United Nations' (1965) 59 ASIL Proc 116, 121 ('aspects of treaty interpretation and customary practice in this field merge very closely').

the best example,[26] with some saying it is an interpretative practice and others suggesting that it informally amended Article 27(3) of the Charter.[27]

What are the conditions for the formation of an established practice? First of all, practice does not have the same status in each organization.[28] However, the status of practice in the United Nations continues to be at the center of case-law and writings. It is clear that an established practice is a qualified form of practice of the organization.[29] The practice needs to reach a certain consistency.[30] The general acceptance by Member States of the organization is a further necessary element.[31] This acceptance may be express, tacit or by acquiescence,[32] although the degree of acquiescence is less marked than in other fields of international law because an organ in line with *Certain Expenses* has the initial authority to make a decision regarding interpretation.[33] Even a simple lack of reaction by a majority of Member

26 Schermers and Blokker (n 6) 755; Peters, *Praxis Internationaler Organisationen* (n 23) 249–250.

27 Andreas Zimmermann, 'Article 27' in Bruno Simma and others (eds), *The Charter of the United Nations: A Commentary* (3rd edn, vol I, Oxford University Press 2012) 915 with further references.

28 'Draft Articles on the Law of Treaties between States and International Organizations or between International Organizations' (n 18) 21, para 25.

29 'Third Report on Subsequent Agreements and Subsequent Practice in relation to the Interpretation of Treaties by Georg Nolte, Special Rapporteur' (n 13) para 82; Schermers and Blokker (n 6) 754.

30 Christopher Peters, 'Subsequent Practice and Established Practice of International Organizations: Two Sides of the Same Coin?' (2011) 3 Göttingen JIL 617, 632–3; 'Draft Articles on the Law of Treaties between States and International Organizations or between International Organizations' (n 18) 21, para 25 (ruling out an 'uncertain or disputed' practice).

31 'Third Report on Subsequent Agreements and Subsequent Practice in relation to the Interpretation of Treaties by Georg Nolte, Special Rapporteur' (n 13) para 82; ILC 'Second Report on Responsibility of International Organizations by Giorgio Gaja, Special Rapporteur' (2 April 2004) A/CN.4/541, para 25.

32 'Third Report on Subsequent Agreements and Subsequent Practice in relation to the Interpretation of Treaties by Georg Nolte, Special Rapporteur' (n 13) para 82.

33 Higgins, 'The Development of International Law by the Political Organs of the United Nations' (n 25) 121; Laurence Boisson de Chazournes, 'Subsequent Practice, Practices, and "Family-Resemblance": Towards Embedding Subsequent Practice in its Operative Milieu' in Georg Nolte (ed), *Treaties and Subsequent Practice* (Oxford University Press 2013) 58.

States, it has been argued, is not an obstacle to an established practice.[34] It must be emphasized, however, that these conditions have been developed with an 'interpretative' established practice in mind (that is, the established practice of the organization as a means to interpret the constituent instrument).

In particular, it may be asked whether the conditions for the formation of an established practice are different when the focus shifts from the plenary organs to administrative organs such as the Secretary-General or expert bodies that are independent of Member States.[35] Similarly, it may be asked whether State endorsement must be satisfied to the same degree for a 'law-making established' practice. When employing the established practice as a means of interpretation of the constituent instrument, the general acceptance by Member States is necessary to avoid bypassing formal amendment procedures. There is no risk in bypassing formal amendment procedures through an established practice when the Organization is free to act or not to act. The legal regime governing the formal advisory function of the Legal Counsel is a case in point. The Charter neither bars nor does it expressly authorize the Legal Counsel's formal advisory function. It has simply developed in practice.

Whatever the precise contours of the notion of 'established practice', much like customary international law or the notion of subsequent practice (Article 31(3)(b) VCLT), it relies on written evidence for its identification. And it is in the identification of an interpretative established practice that opinions of the Legal Counsel play an important role in the jurisprudence of the ICJ.[36]

The Advisory Opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* is the most obvious example. In that case, Israel alleged that the advisory opinion request by the General Assembly was invalid because it contravened Article 12 of the Charter. Article 12 provides that '[w]hile the Security Council is exercising in respect of any dispute or situation the functions assigned to it in the present Charter, the General Assembly shall not make any recommendation with regard to that dispute or situation'. Given the Security Council's active engagement with the

34 Peters, 'Subsequent Practice and Established Practice of International Organizations: Two Sides of the Same Coin?' (n 30) 638.

35 cf Boisson de Chazournes (n 33) 58.

36 See also the separate opinion of Judge ad hoc Kreća in *Legality of Use of Fore* (*Serbia and Montenegro v United Kingdom*) (Preliminary Objections) [2004] ICJ Rep 1307, 1412, para 28 (classifying a 2000 Letter of the UN Legal Counsel regarding Yugoslavia's status in the UN as evidence of the 'subsequent consistent practice of the Organization').

situation in the Middle East, Israel argued, the General Assembly resolution requesting the advisory opinion was *ultra vires*.[37]

The Court accepted that initially the General Assembly had refrained from making recommendations while the same matter was on the Security Council's agenda. But that interpretation 'evolved subsequently'. In the early 1960s, the General Assembly made recommendations on decolonization policy these matters remained formally on the Security Council's agenda without any recent Security Council resolution. Importantly, the Court cited an oral statement by the Legal Counsel of the United Nations. According to the Legal Counsel, the General Assembly had interpreted the words 'is exercising the functions' in Article 12 as meaning 'is exercising the functions at this moment'. The Court concluded 'that the accepted practice of the General Assembly, as it has evolved, is consistent with Article 12, paragraph 1, of the Charter'.[38]

The literature has interpreted the Court's consideration of the views of the Legal Counsel in different, but not necessarily exclusive ways. For some, the Court's 'adoption' of the Legal Counsel opinion on the General Assembly's practice means that decisions of the United Nations may be relevant to the decision-making process of the Court.[39] Arato argued that the Court's consideration of the practice of the Legal Counsel signals a more profound change in the interpretation of constituent instruments. Not only does the Court rely on organizational practice as a 'proxy' for direct State practice, but also on the practice of the Legal Counsel—an autonomous organ independent of Member States—as a proxy for organizational practice. The Court, according to Arato, gives 'presumptive interpretative weight' to the practice of autonomous bodies such as the Legal Counsel as long as Member States appear to have acquiesced. If members disagree with the interpretations of autonomous bodies like the Legal Counsel, the burden is on them to make

37 *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) [2004] ICJ Rep 136, 148, paras 24–25.

38 *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (n 37) 149–150, paras 27–28; *Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem* (Advisory Opinion) (2024) <https://www.icj-cij.org/case/186> accessed 19 July 2024, para 42.

39 James Sloan and Gleider I Hernández, 'The Role of the International Court of Justice in the Development of the Institutional Law of the United Nations' in Christian J Tams and James Sloan (eds), *The Development of International Law by the International Court of Justice* (Oxford University Press 2013) 199, fn 12.

their disapproval explicit.[40] For Peters, it is unlikely that the Court intended to give interpretative weight to the views of the Legal Counsel. Rather, the Court merely cited the Legal Counsel's opinion as evidence of the General Assembly's practice.[41]

A second, less obvious example, is the Advisory Opinion regarding the *Applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations* (the *Mazilu* case). In that case, Dumitru Mazilu, a Romanian national, was elected as special rapporteur of the Sub-Commission on the Prevention of Discrimination and Protection of Minorities of the Commission on Human Rights. The Sub-Commission asked him to prepare a report on human rights and youth. When Mr. Mazilu was scheduled to present his report, Romanian authorities informed the Sub-Commission that Mr. Mazilu had suffered a heart attack and was unable to attend the meeting. Romania resisted attempts by the United Nations to contact Mr. Mazilu. In reality, Romanian authorities harassed Mr. Mazilu and his family. While Romania's motivation was unclear, it refused to issue a travel permit for Mr. Mazilu and it disputed that Mr. Mazilu enjoyed immunities under Section 22 of the General Convention. Romania argued that special rapporteurs were not experts on missions under the General Convention and that, in any event, immunities only applied in the country in which the special rapporteur is on mission, while that mission is pending. Outside of this context, Romania submitted that immunities only protect 'actual words spoken or written ... in connection with the mission.'[42]

The text of the General Convention, the Court observed, did not define 'experts on mission'. Nor did the legislative materials provide any guidance. But the Court noted that the purpose of Section 22 was to provide persons that are not officials of the UN with the necessary immunities. The Court continued that '[i]n practice, according to the information supplied by the Secretary-General, the United Nations has had occasion to entrust missions—increasingly varied in nature—to persons not having the status of United Nations officials', such as members of the ILC or the Human Rights Com-

40 Julian Arato, 'Treaty Interpretation and Constitutional Transformation: Informal Change in International Organizations' (2013) 38 Yale JIL 289, 326–328. See also Buga (n 14) 41.

41 Peters, *Praxis Internationaler Organisationen* (n 23) 269–270, fn 955.

42 *Applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations* (Advisory Opinion) [1989] ICJ Rep 177, 179–185, paras 9–24.

mittee. For the Court, 'the practice of the United Nations shows that the persons so appointed, and in particular the members of these committees and commissions, have been regarded as experts on missions within the meaning of Section 22.'[43]

The 'information supplied by the Secretary-General' on the practice of the Organization consisted almost exclusively of opinions of the Legal Counsel, including two opinions published in the *United Nations Juridical Yearbook*.[44] While the Court did not expressly cite these opinions, the Court treated these legal opinions as highly persuasive evidence of an established practice of the Organization.[45] This effect has also been recognized by the Legal Counsel in later opinions on the interpretation of Section 22.[46]

Miller argues that there is a practical reason for treating the advisory practice of the Office of Legal Affairs as a relevant interpretative device in the context of the General Convention. In reality, the Office of Legal Affairs is the first institution that Member States approach when raising immunity issues of UN officials. Office opinions serve as guidelines for resolving disagreements on the scope of immunities between the Organization and its Member States. The request for a decisive advisory opinion under Section 30 of the General Convention is rarely a realistic option, especially on short notice. Although Office opinions are not 'law' in a traditional sense, the advisory practice of the Office of Legal Affairs in immunity matters indicates its widespread acceptance by States, standing in contrast to the limited role of the ICJ with only two advisory opinions having been rendered so far.[47]

Indeed, it is in the immunities and privileges context that Schachter's concept of the 'direct effect' of some legal opinions remains relevant in

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43 *Applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations* (n 42) 194, para 48.

44 *Applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations*, ICJ Pleadings, Written Statement Submitted on Behalf of the Secretary-General of the United Nations, Annex I, 194–196.

45 cf Anthony J Miller, 'Privileges and Immunities of United Nations Officials' (2007) 4 IOLR 169, 172.

46 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 4. See also Section 4.4.3 in Chapter 4.

47 Anthony J Miller, 'United Nations Experts on Mission and their Privileges and Immunities' (2007) 4 IOLR 11, 13–14.

contemporary United Nations law.[48] In an early contribution to the legal opinions of the Secretariat, Schachter distinguished between 'purely advisory' and legal opinions with 'direct effect'. The second category relates to matters over which the Secretariat has authority to make administrative decisions.

Under the General Convention, the Secretary-General has authority to waive the immunities of experts on a mission,[49] a power not subject to judicial review by the internal justice system of the United Nations.[50] And the United Nations is central to the General Convention even though it is not a party in the formal sense.[51] Because any waiver decision necessitates a preliminary analysis of whether immunity applies in the first place, the special legal nature of the General Convention renders the Legal Counsel's advisory practice particularly relevant for the interpretation and application of the General Convention.[52] This could also be the legal justification for the use of Legal Counsel opinions as evidence of practice by the Special Rapporteur on Responsibility of International Organizations.[53] Distinct from its advisory mandate, the Legal Counsel is also mandated to defend the Organization's legal interests against private parties with the specific objective to reduce

48 cf 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) (authorizing the Legal Counsel to waive, on behalf of the Secretary-General, the confidentiality obligations of UN staff to testify before the ICC). In staff matters, the creation of an employment tribunal in 1950 subjected the authority of the Secretary-General in staff matters to judicial review, thereby ultimately removing any such 'direct effect' of legal opinions in staff matters: Abdelaziz Megzari, *The Internal Justice of the United Nations: A Critical History 1945–2015* (Brill Nijhoff 2015) ch 1.

49 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) Section 23.

50 *Kozul-Wright v Secretary-General of the United Nations* (29 June 2018) 2018-UNAT-843, paras 59–64 (holding that decisions of the Secretary-General to waive the immunity of staff members are executive, not administrative, in nature and therefore not subject to judicial review by the United Nations Dispute Tribunal).

51 General Convention, s 30.

52 Miller, 'United Nations Experts on Mission and their Privileges and Immunities' (n 47) 12–14.

53 See eg ILC 'Draft Articles on the Responsibility of International Organizations, with Commentaries' [2011-II(2)] YBILC 46, 57, 66 (citing opinions of the UN Legal Counsel).

legal liability.[54] Much like in the immunities context, this authorization by the Organization could explain why this Special Rapporteur treated Legal Counsel opinions as practice even though it was never indicated whether these were 'generally accepted' by the membership.[55]

Outside the particular fields in which the Legal Counsel also exercises an administrative mandate (such as immunities and the legal responsibility of the Organization), methodological and practical reasons explain the use of both formal and informal legal opinions as evidence of the existence and general acceptance of an organizational practice. Much like customary international law, there is a need for documentary evidence of the practice of an organ or the entire Organization. The sheer volume of official records, reports and documents makes it difficult for outsiders to ascertain whether a practice is sufficiently accepted, or it may not be publicly available at all.[56] Opinions of the Legal Counsel are a particularly reliable source to identify this 'common law' of the United Nations.[57]

There could also be an alternative reason for the abundant references by the Special Rapporteur on Responsibility of International Organizations to Legal Counsel opinions or the implicit reference by the ICJ to such opinions in the *Mazilu* case. The Office of Legal Affairs enjoys an intricate knowledge of the institutional life of the United Nations as the institutional memory and 'guardian of the practice' of the United Nations.[58] Even many permanent

54 UNGA 'Proposed Programme Budget for 2021, Section 8: Legal Affairs' (15 April 2020) A/75/6 (Sect. 8), paras 8.41–8.43.

55 Boisson de Chazournes (n 33) 58 (noting that the Special Rapporteur routinely treated Legal Counsel opinions as organizational practice even though they are documents that are created without State participation).

56 'Draft Articles on the Responsibility of International Organizations, with Commentaries' (n 53) (noting the 'limited availability of pertinent practice' and that 'relevant practice resulting from exchanges of correspondence may not be always easy to locate, nor are international organizations or States often willing to disclose it').

57 cf Leo Gross, 'The United Nations and the Role of Law' in *Essays on International Law and Organization* (Springer 1984) 161–162 (considering the possibility of the growth of a 'common law' arising from the practice of the organs in applying, adjusting, modifying, supplementing, and even supplanting provisions of the Charter).

58 cf Abdulqawi A Yusuf, 'Le Conseiller juridique d'une organisation international face à la pratique' in Société française pour le droit international (ed), *La pratqiue et le droit international: Colloque de Genève* (Pedone 2004) 254; ILC 'Provisional Summary Record of the 3398th Meeting' (11 June 2018) A/CN.4/SR.3398, 7 (UN Legal Counsel stating that opinions on the law of international organizations 'were based on many years of practice'). See also Rosalyn Higgins, 'Fleischhauer Leaves

missions may not match this extensive expertise, their views on United Nations practice may not be consistent over time or they may be biased. Indeed, the Court's reliance on the Legal Counsel's interpretation assumes a certain degree of independence of the Legal Counsel from the political organs, Member States, and importantly the Secretary-General. It would hardly be consistent with good judicial practice to cite the legal view of an actor seen as biased as the only external source.

5.3. *Subsidiary Means of Interpretation?*

Could opinions of the Legal Counsel be more than a 'proxy' or evidence of an organizational practice? The most familiar analogy is Article 38(1)(d) of the ICJ Statute. If opinions of the Legal Counsel are thought of as 'subsidiary means for the determination of the rules of [institutional] law', the pronouncements of an international civil servant would acquire a normative meaning independent of State endorsement—without there being a basis in the Charter itself.

Quite apart from the question whether the pronouncements of a civil servant can be analogized to 'judicial' decisions, there is some support for the idea that interpretations of the Legal Counsel carry normative weight independent of State endorsement. Some level of support comes, first, from the Office of Legal Affairs itself. Zacklin, then a senior officer in the Office of Legal Affairs, wrote that Legal Counsel opinions are considered a persuasive authority within the United Nations legal order with a status equivalent to advisory opinions of the ICJ.[59] De Serpa Soares, the current Legal Counsel has stated that 'advisory opinions [of the ICJ] should in general be used sparingly as a means of clarifying international law'. And, interestingly, he suggested that States should make use of formal legal opinions as an alternative to advisory opinions of the ICJ:

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the Court' (2003) 16 LJIL 55 (noting that Judge Fleischhauer's 'knowledge and understanding of the institutional and legal life of the United Nations' as a former Legal Counsel was invaluable to the Court).

59 Zacklin, 'Les Nations Unies et la crise du Golfe' (n 8) 63 ('Bien que les avis du Conseiller juridique n'aient pas, bien entendu, force obligatoire, ils sont considérés comme ayant force persuasive dans l'ordre juridique interne de l'Organisation (au même titre qu'un avis consultatif de la Cour internationale de Justice)').

> Although he himself did not provide formal legal opinions very often, consideration 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.[60]

The advisory practice of the Office of Legal Affairs, de Serpa Soares continued, contributed to the development of the law of international organizations, especially their internal law and immunities, and its legal opinions 'were recognized to carry legal authority'.[61] Finally, then-Legal Counsel Corell explained to members of the Continental Shelf Commission that 'although the legal opinion was not per se binding on States, such opinions were usually respected by States.'[62] While such insider statements need to be taken with a grain of salt, they contrast, curiously enough, with the general view by academics that opinions of the Legal Counsel are merely 'non-binding'.[63]

Secondly, the idea that opinions of the Legal Counsel carry some legal weight independent of State endorsement has surfaced in separate and dissenting opinions of ICJ judges.[64] Probably the most frequently cited document by the Legal Counsel is the 1992 letter interpreting General Assembly resolution 47/1 on the status of Yugoslavia within the United Nations,[65] an 'important

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

61 'Provisional Summary Record of the 3398th Meeting' (n 58) 7.

62 CLCS 'Statement by the Chairman of the Commission on the Limits of the Continental Shelf on the Progress of Work in the Commission' (15 May 1998) CLCS/7, para 8.

63 See Section 4.1 in Chapter 4.

64 The Court has also cited Legal Counsel letters on two other occasions. See *Constitution of the Maritime Safety Committee of the Inter-Governmental Maritime Consultative Organization* (Advisory Opinion) [1960] ICJ Rep 150, 167 (citing with approval a Legal Counsel letter in the exercise of treaty depositary functions); *Application for Revision of the Judgment of 11 July 1996 in the Case concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Yugoslavia), Preliminary Objections* (*Yugoslavia v Bosnia and Herzegovina*) (Judgment) [2003] ICJ Rep 7, 31, paras 71–72 (noting that a 2000 Legal Counsel letter cannot have affected the position of the Federal Republic of Yugoslavia in relation to treaties and could have revealed a previously unknown fact to trigger the Article 61 procedure).

65 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, Annex.

interpretation'.[66] It is not necessary to consider in detail the uncertain status of Yugoslavia in the United Nations between 1992 and 2000 (when Serbia and Montenegro was admitted under Article 4 of the Charter),[67] and the Court's conflicting judgments.[68]

It is important to note that—although some States called for a formal legal opinion before resolution 47/1 was adopted—the 1992 letter interpreted resolution 47/1 in response to a letter from Bosnia and Herzegovina's and Croatia's UN missions.[69] The letter's main import was that resolution 47/1 'neither terminates nor suspends Yugoslavia's *membership* in the Organization' and that the only practical consequence was that the 'Federal Republic of Yugoslavia (Serbia and Montenegro) can no longer *participate* in the work of the General Assembly, its subsidiary organs, nor conferences and meetings convened by it'.[70] The Legal Counsel continued that resolution 47/1 'does not take away the right of Yugoslavia to participate in the work of organs other than Assembly bodies' and that the 'admission ... of a new Yugoslavia under Article 4 of the Charter will terminate the situation created by resolution 47/1'.[71] This interpretation by the Legal Counsel was not challenged in the General Assembly.[72]

In 1996, the Court had affirmed its jurisdiction.[73] In 2003, it affirmed its 1996 judgment on jurisdiction, pointing out that resolution 47/1 'did not *inter alia* affect the [Federal Republic of Yugoslavia's] right to appear before the

66 Shabtai Rosenne, 'Capacity to Litigate in the International Court of Justice: Reflections on Yugoslavia in the Court' (2009) 80 BYBIL 217, 219.

67 See Rosalyn Higgins and others, *Oppenheim's International Law: United Nations* (Oxford University Press 2017) 301–305 with further references.

68 See Gleider I Hernández, *The International Court of Justice and the Judicial Function* (Oxford University Press 2014) 160–166.

69 Rodoljub Etinski, 'The Role of the Legal Adviser in Considering the Legality of Decisions of International Organizations' 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) 246–247.

70 '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' (n 65) Annex (emphasis in original).

71 ibid Annex.

72 Rosenne, 'Capacity to Litigate in the International Court of Justice: Reflections on Yugoslavia in the Court' (n 66) 238.

73 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (*Bosnia and Herzegovina v Serbia and Montenegro*) (Judgment) [2007] ICJ Rep 43.

Court or to be a party to a dispute before the Court under the conditions laid down by the Statute' and, quoting the Legal Counsel letter, '[t]o "terminate the situation created by resolution 47/1", the FRY had to submit a request for admission to the United Nations'.[74]

Judges and commentators considered the Legal Counsel's interpretation of resolution 47/1 a major influence before Serbia and Montenegro was admitted in 2000 with General Assembly resolution 55/12.[75] In a dissenting opinion, Vice-President Al-Khasawneh considered the UN Legal Counsel as 'the only legal authority to appraise the matter in what was an otherwise blatantly political process'. For him, the '[1992] letter from the Legal Counsel of the United Nations left no room for doubt. It went on to state "on the other hand, the resolution neither terminates nor suspends Yugoslavia's membership".'[76] Although the Legal Counsel's interpretation was 'important', the Court should have assessed Yugoslavia's standing in the United Nations independent of the political organs and the Legal Counsel.[77]

These pronouncements consider the Legal Counsel a 'legal authority' that issues 'important interpretations' relevant to the Court's decision-making process. But they fail to offer reasons, let alone a convincing theoretical basis, for recognizing such normative authority. To date, Judge Oda has offered the most detailed treatment of interpretations of legal offices (in *casu* the WHO

74 *Application for Revision of the Judgment of 11 July 1996 in the Case concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Yugoslavia), Preliminary Objections* (n 64) 31, para 70.

75 See the dissenting opinion of Judge Vereshchetin in ibid 45, para 15 ('Evidently, the assumption of the Court on Yugoslavia's standing in the United Nations was at least partly based on the "considered view" of the United Nations Secretariat'); Rosenne, 'Capacity to Litigate in the International Court of Justice: Reflections on Yugoslavia in the Court' (n 66) 238 ('The first thing to notice is that a major consideration running through the Court's decisions is the formal interpretation of resolution 47/1 given by the Legal Counsel of the United Nations'); Hernández (n 68) 161 ('The Court proceeded on the assumption that Yugoslavia remained bound, basing itself in particular on the United Nations Legal Counsel's letter, addressed to the Permanent Representatives of Bosnia and Herzegovina and Croatia to the United Nations, of 29 September 1992').

76 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (n 73) 243–244, para 6.

77 ibid 244, para 7.

Legal Counsel) in his separate opinion in *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*.[78]

In that case, the Court had to decide whether the WHO could request an advisory opinion on the legality of the use of nuclear weapons 'under international law including the WHO Constitution'. Article 96(b) of the UN Charter empowers specialized agencies of the United Nations, upon authorization by the General Assembly, to request advisory opinions on 'legal questions arising within the scope of their activities.' For the first and so far only time, the Court held that a decision of an international organization had exceeded that organization's competence. The majority opinion based itself on the principle of speciality and the purposes of the system of specialized agencies under the Charter.[79]

In a separate opinion, Judge Oda wrote that the majority opinion should have pointed out that the WHO Legal Counsel 'was fully aware of and actually asserted the Organization's lack of competence to request an advisory opinion of the Court'.[80] During the debates in the WHO, the WHO Legal Counsel had intervened a number of times arguing that the legality of the use of nuclear weapons exceeded the WHO's health mandate. Some authors have questioned Judge Oda's view on the Legal Counsel's interventions, describing the Legal Counsel's interventions as less clear-cut.[81] But the record does not conform to this view.[82] The UK and the United States who strongly objected to the proposed request for an advisory opinion 'share[d] the belief of WHO's own Legal Counsel ... that this matter is not within the competence of WHO'.[83] In

78 Judge Weeramantry also cited an intervention by the WHO Legal Counsel but did not further elaborate in view of his interpretation of the WHO's request: *Legality of the Use by a State of Nuclear Weapons in Armed Conflict* (n 1) 106.

79 ibid 79–81, paras 25–26.

80 ibid 96, para 16.

81 Surabhi Ranganathan, 'The Nuclear Weapons Advisory Opinions (1996)' in Eirik Bjorge and Cameron Miles (eds), *Landmark Cases in Public International Law* (Hart 2017) 415; Virginia Leary, 'The WHO Case: Implications for Specialised Agencies' in Laurence Boisson de Chazournes and Philippe Sands (eds), *International Law, the International Court of Justice and Nuclear Weapons* (Cambridge University Press 1999) 124–128.

82 Pierre Klein, 'Quelques réflexions sur le principe de spécialité et la "politisation" des institutions spécialisées' in Laurence Boisson de Chazournes and Philippe Sands (eds), *International Law, the International Court of Justice and Nuclear Weapons* (Cambridge University Press 1999) 81.

83 *Legality of the Use by a State of Nuclear Weapons in Armed Conflict* (n 1) 94, para 13.

one of the Legal Counsel's clearest interventions, he concluded that '[f]rom a strictly legal point of view ... it was not within the normal mandate of WHO to refer the "illegality" issue to the Court' and that the 'question of the illegality of nuclear weapons did fall squarely within the mandate of the United Nations'.[84]

While the majority opinion did not discuss these interpretations of the WHO Legal Counsel, Judge Oda argued that the Court 'cannot shut [its] eyes to interpretations given by *competent officials* of the Organization'.[85] He was critical that WHO Executive Board 'seems to have paid insufficient attention to the views of the Legal Counsel'.[86] He concluded:

> The Court should have fully noted the fact that, while resolution WHA46.40 was certainly adopted by the majority of the World Health Assembly, this was in spite of strong objections not only from a number of States but also from the Legal Counsel of the Organization, who was fully aware of and actually asserted the Organization's lack of competence to request an advisory opinion of the Court.[87]

This is quite interesting, and there are several ways to read Judge Oda's opinion. The claim that the Executive Board 'paid insufficient attention to the views of the Legal Counsel' does not imply any sort of binding force of interpretations of the WHO Legal Counsel. But it does imply that political organs of the WHO have a procedural duty, as part of institutional due diligence, to pay close attention to the opinions of the WHO Legal Counsel.[88] What is more, the WHO Legal Counsel, according to Judge Oda, is an official competent to interpret the WHO Constitution and that the Court should take judicial notice of interpretations by the Legal Counsel. This suggests something more, namely an institutional mandate of legal interpretation that is wholly independent of State endorsement or acquiescence. But the exact legal basis remains equally unanswered in Judge Oda's opinion.

84 As quoted in the separate opinion of Judge Oda: *Legality of the Use by a State of Nuclear Weapons in Armed Conflict* (n 1) 93, para 10.

85 ibid 96, para 15 (emphasis added).

86 ibid 91, para 7.

87 ibid 96, para 16.

88 cf Gian Luca Burci and Claudia Nannini, 'The Office of the Legal Counsel of the World Health Organization' (*SSRN*, 9 August 2018) <https://ssrn.com/abstract=3229184> accessed 7 July 2024, 18–19 (disregarding legal advice of the Office of Legal Counsel may breach duty of care and due diligence in case WHO's responsibility is engaged).

Thirdly, there is some support by States that the interpretations of the Office of Legal Affairs carry interpretative authority independent of State endorsement. This is exemplified by the positions of Israel and Palestine in the inter-State communication *Palestine v Israel* before the CERD Committee.[89] Israel challenged the Committee's jurisdiction under Article 11 CERD by invoking a notification to the depositary that it had communicated shortly after Palestine acceded to the Convention. According to that statement, Israel's participation in the Convention did not entail recognition of Palestine and Israel declared that, notwithstanding Palestine's accession, it did not consider itself in a treaty relationship with Palestine.

In light of the Parties' submissions, the Committee requested the advice of the Office of Legal Affairs (through the treaty bodies secretariat) on the treaty relations issue.[90] The Office opined that 'a State party to the Convention is able, through a unilateral statement, to prevent the creation of obligations and rights under the Convention between itself and another specific State party.'[91] And further, that there is nothing in the Convention which would prohibit such a unilateral statement properly phrased. Because Israel's statement was framed in such a manner, the Office concluded that the Committee was without jurisdiction to entertain Palestine's communication.[92]

The Parties' submissions regarding the relevance of the memorandum are particularly interesting. Israel had learned of the memorandum before the Committee had decided which action it would take in light of OLA's memorandum.[93] In a first note verbale to the Committee, Israel argued that the Committee is bound by the opinion of the Office of Legal Affairs, something that the Committee rejected as amounting to undue pressure on its independence. The Committee then transmitted the memorandum to Palestine for reasons of procedural fairness.[94] Palestine argued that Israel should be

89 International Convention on the Elimination of All Forms of Racial Discrimination (adopted 21 December 1965, entered into force 4 January 1969) 660 UNTS 195 (CERD) Articles 11–13 (providing for inter-State complaints to the CERD Committee).

90 The resulting OLA memorandum can be accessed online at ohchr.org.

91 CERD 'Inter-State Communication submitted by the State of Palestine against Israel' (12 December 2019) CERD/C/100/5, para 2.3.

92 ibid para 2.3.

93 ibid para 2.4.

94 ibid para 2.5.

estopped from relying on the Office of Legal Affairs opinion because Israel's knowledge of the memorandum violated its duty of procedural good faith.[95]

The Committee rejected both submissions, stating that it would consider the memorandum on its merits 'as was the intention when the Committee requested its advice, with the aim of taking a thorough and independent decision.'[96] Both Parties continued to engage with the memorandum, with Palestine criticizing the opinion as an unbalanced 'internal document' that contained a selective review of State practice.[97] Israel on the other hand considered the memorandum a 'legal authority', arguing that the 'memorandum concluded that the Respondent has validly excluded treaty relations with the Applicant, which precludes the Committee from examining the present inter-state communication'.[98] Although the advice of the Office of Legal Affairs concerned the law of treaties (and not institutional law), the attitudes by Israel and Palestine are nevertheless instructive. Both consider the memorandum legally important, either as a legal authority in favor or as an internal document irregularly obtained to which the principle of estoppel should apply.

To conclude, there is some support for the claim that interpretations of the Legal Counsel carry normative weight independent of State endorsement by former and current Legal Counsel themselves, in the separate and dissenting opinions of the ICJ and by States. Functionally, there are some similarities between Legal Counsel opinions and judicial decisions. Just like the conventional 'law-determining agencies' of Article 38(1)(d),[99] the Legal Counsel necessarily makes interpretative choices, explains and refines the law of the United Nations,[100] especially the secondary law that subsidiary and expert bodies apply. To take but a few examples outlined in the preceding chapter: the Legal Counsel extrapolated a principle of equal judicial pay from the Statute,

95 'Inter-State Communication submitted by the State of Palestine against Israel' (n 91) para 2.6.

96 ibid para 2.7.

97 ibid paras 2.8 and 2.15.

98 ibid para 2.12.

99 Georg Schwarzenberger, *International Law as Applied by International Courts and Tribunals* (3rd edn, vol 1, Stevens & Sons 1957) ch 2 (distinguishing between 'law-creating processes'—treaties, custom and general principles of law—and subsidiary means as 'law-determining agencies' in Article 38(1)).

100 cf Rosalyn Higgins, *Problems and Process: International Law and How We Use It* (Clarendon 1995) 204 ('judicial function is more than an allegedly mere application of rules to facts—the Court is necessarily choosing, explaining, and refining').

the interpretation of the phrase 'takes note' involves a choice to increase the autonomy of policy-implementing organs at the expense of the budgetary authority of the General Assembly, the application of openly textured principles such as the principle of speciality had the result of enjoining the UNECE from issuing the standard instrument 'non-binding global food standard', and, lastly, the Legal Counsel reconciled conflicting secondary law enacted by the political organs in inter-organ disputes between OIOS/UNCC, and within UNCTAD. In the realm of the institutional law of the United Nations, the opinions of the Legal Counsel embody a legal infrastructure to establish whether a rule of institutional law exists and whether the interpretation of a rule of institutional law is convincing.[101]

Moreover, both the Legal Counsel and the Court have advanced the notion that they provide a public good (or produce legal knowledge) which is of use to the United Nations system beyond the particular case they advise on. In the Court's explanation to the General Assembly of its proposed budget, the Court has stated that judgments in contentious proceedings–despite the formal limitations of Article 59 of the ICJ Statute—'serve as guidelines for avoiding and resolving disputes that may subsequently arise between other States' and that the Court's advisory opinions 'contribute[] to the proper functioning of the United Nations system, as well as to preventive diplomacy and the development of international law'.[102] In a similar way, the Legal Counsel has justified the budget of the Office of Legal Affairs by claiming to ensure 'a uniform and consistent practice of the law' that results in the 'effective functioning of the principal and subsidiary organs of the United Nations'.[103]

Evidently, the established practice of the Legal Counsel to issue formal legal advice in response to a request by a competent UN body shares an important feature of the advisory competence of the Court. Formal legal

101 cf Antonio Cassese, 'The Influence of the European Court of Human Rights on International Criminal Tribunals: Some Methodological Remarks' in Morten Bergsmo (ed), *Human Rights and Criminal Justice for the Downtrodden: Essays in Honour of Asbjørn Eide* (Martinus Nijhoff 2003) 20; Aldo Zammit Borda, 'A Formal Approach to Article 38(1)(d) of the ICJ Statute from the Perspective of the International Criminal Courts and Tribunals' (2013) 24 EJIL 649, 654 (stating that the 'verification process' of Article 38(1)(d) consists of a (1) verification of the existence and state of a rule of law and (2) a verification of the proper interpretation of a rule of law).

102 UNGA 'Proposed Programme Budget for 2021, Section 7: International Court of Justice' (2 April 2020) A/75/6 (Sect. 7), para 7.4.

103 'Proposed Programme Budget for 2021, Section 8: Legal Affairs' (n 54) para 8.26.

opinions are rendered in an official capacity and in accordance with a settled process. In the practice of the Office of Legal Affairs, this extends to the authorship of formal legal opinions (that is, in response to a request by UN bodies) being clearly identified as 'information from the Office of Legal Affairs', whereas informal legal advice is transmitted as 'information from the Secretariat'.[104] Coupled with the stated intention of the current Legal Counsel to use formal legal opinions as an alternative to judicial advisory opinions, this adds another layer to the Article 38 analogy. The fact that some legal opinions are ignored or contested does not substantially change the picture. This has also been a feature in the history of the ICJ.[105]

In the final analysis, however, the Article 38(1)(d) analogy is not a convincing framework to explain the normative value of Legal Counsel interpretations. By design the institutional set-up of the Legal Counsel's advisory function is fragile. Unlike the judicial function of the Court,[106] or the interpretative mandates of treaty bodies,[107] it is not established by a treaty. The Legal Counsel's advisory function is made up of an awkward amalgam of secondary law instruments and practice: General Assembly resolutions that establish the Office as the UN's central legal service and implicitly recognize the legal authority of its opinions by mandating their publication,[108] budgetary

104 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.

105 cf Higgins, *Problems and Process* (n 100) 203 (observing that most States have ignored the *Certain Expenses* holding that they are under an obligation to pay for peace-keeping operations).

106 ICJ Statute, Article 1 ('principal judicial organ' of the UN).

107 'Draft Conclusions on Subsequent Agreements and Subsequent Practice in relation to the Interpretation of Treaties, with Commentaries' (n 11) Conclusion 13 and cmts 20–5 (surveying jurisprudence and writings on the contribution of treaty bodies to the interpretation of treaties under their mandates).

108 UNGA Res 13 (I) (13 February 1946) A/RES/13(I); UNGA Res 1814 (XVII) (18 December 1962) A/RES/1814(XVII).

documents,[109] a Secretary-General regulation,[110] and—most importantly—a wealth of practice as analyzed in the previous chapter. Although there is an unwritten rule of independence for the Secretary-General not to interfere with the provision of legal advice, the Legal Counsel remains an international civil servant with an uneasy position within the Secretariat.

Opinions of the Legal Counsel—even in the sphere of institutional law—cannot be assimilated to judicial decisions. While recourse to the Legal Counsel may be a substitute for judicial settlement, there are none of the procedural safeguards of a judicial process such as an adversarial hearing and a full briefing.[111] The Office of Legal Affairs is also not a collegial body. Even though any legal opinion is a 'team effort', the Legal Counsel bears the ultimate responsibility.[112] The Legal Counsel does not exercise a judicial function;[113] the advisory function of the Legal Counsel is administrative in nature. But the paradox between formal and actual authority of the public interpretations of the Legal Counsel is difficult to put in legal terms:[114] the

109 'Proposed Programme Budget for 2021, Section 8: Legal Affairs' (n 54) (budget proposal by the Secretary-General); 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 (recommendations of the Committee on Programme and Coordination modifying performance indicator for the mandate to provide legal services to the entire UN system).

110 Secretary-General's Bulletin 'Organization of the Office of Legal Affairs' (18 January 2021) ST/SGB/2021/1.

111 cf the submission by Sweden during the League of Nations: Secretary-General, 'Conditions of Voting Requests for Advisory Opinions from the Permanent Court of International Justice' (1937) 18 League of Nations OJ 170, 182 ('examination of a question of law by the Court affords the League in general, as well as the interested parties, fuller guarantees of reliability than its examination by a committee of jurists appointed ad hoc').

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

113 cf the dissenting opinion of Judge Fitzmaurice in *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)* (Advisory Opinion) [1971] ICJ Rep 16, 303, para 11 (stating that ad hoc bodies of legal experts do not exercise a judicial function).

114 This paradox is inspired by David D Caron, 'The ILC Articles on State Responsibility: The Paradoxical Relationship between Form andAuthority' (2002) 96 AJIL 857.

Legal Counsel exercises a review function, but the normative product (legal opinions) is itself a non-binding normative act.

5.4. Formal Legal Opinions as an Autonomous Standard Instrument

It is relatively straightforward to make sense of Legal Counsel opinions as a means identifying an 'established practice'. It is altogether more difficult (and less convincing) to squeeze formal legal opinions through the bottleneck of Article 38(1)(d) of the ICJ Statute and to conceive them as 'subsidiary means for the determination of institutional law'.

It is, of course, always possible to explain legal opinions through State endorsement or acquiescence.[115] Even if an interpretation of the Legal Counsel is not binding, it may become binding through State endorsement (in the sense of a single act of endorsement, not the kind of consistent endorsement necessary for the identification or formation of an established practice). This is hardly a convincing position because it often results in a pure fiction of State endorsement.[116] Lack of objection was, according to Judge ad hoc Kreća, relevant for considering the 1992 Legal Counsel letter on Yugoslavia's

115 In the World Bank, endorsement by the Executive Board is the normative basis for opinions of the General Counsel. According to Ibrahim Shihata, a former General Counsel of the World Bank, only the endorsement of the Bank's Executive Directors—which are formally empowered to authoritatively interpret the World Bank constitution—endow a General Counsel opinion with authoritative status and allow for the subsequent incorporation in the Bank's practice. See Ibrahim FI Shihata, 'Role of the World Bank's General Counsel' (1997) 91 ASIL Proc 214, 217; Ibrahim FI Shihata, 'The Creative Role of the Lawyer – Example: The Office of the World Bank's General Counsel' (1999) 48 Cath ULR 1041, 1048–1049; Ibrahim FI Shihata, 'The Dynamic Evolution of International Organizations: The Case of the World Bank' (2000) 2 J History Intl L 217, 225; Cornelia Janik, *Die Bindung internationaler Organisationen an internationale Menschenrechtsstandards* (Mohr Siebeck 2012) 330. For a sociological analysis on Shihata's interventions as General Counsel, see 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.

116 cf Arato (n 40) 326 ('insofar as they disagree with the practice of the organization, the burden falls upon the states parties to express their disapproval').

standing in the United Nations.[117] In its early years, the International Labour Office advanced a similar explanation.[118] The publication of a legal opinion in the ILO *Official Bulletin* and the absence of adverse comments by ILO Member States, in the view of the ILO's secretariat, constitute tacit acceptance by ILO members of an Office interpretation of a labor convention with the result 'that [the] provision [is] to be understood in the manner in which the Office has interpreted it'.[119] The fact that this normative claim has since been discarded shows that State endorsement cannot adequately explain the normative authority of legal opinions.[120]

Looking for State endorsement of legal opinions is also impractical because it is often impossible to ascertain the reaction of Member States. Even the ILC initially relied on a legal opinion in the *Juridical Yearbook*, but removed it from the commentary after the UN Secretariat commented that this opinion 'does not reflect the consistent practice of the organization'.[121] Initially, chapter VI of *Juridical Yearbook* provided some information on the

117 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (n 73) 496, para 53 ('It is also relevant that no State has objected to the legal opinion of the United Nations Legal Counsel').

118 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.

119 ILO 'Hours of Work and Manning (Sea) Convention, 1936' (1938) 23 Official Bulletin 30, 32 ('when an opinion given by the Office has been submitted to the Governing Body and published in the Official Bulletin and has met with no adverse comment, the Conference must, in the event of its subsequently including in another Convention a provision identical with or equivalent to the provision which has been interpreted by the Office, be presumed, in the absence of any evidence to the contrary, to have intended that provision to be understood in the manner in which the Office has interpreted it').

120 ILO Governing Body 'Report of the Director-General: Office interpretations of international labour Conventions' (16 November 1982) GB.221/19/1, para 8 ('clearly established that interpretations of Conventions are intended to contain no more than indications for the guidance of governments, and are provided without prejudice to the views of the supervisory bodies of the International Labour Organisation').

121 See ILC 'Responsibility of International Organizations: Comments and Observations received from International Organizations' (17 February 2011) A/CN.4/637/Add.1, draft article 7, cmt 4; ILC 'Eighth Report on Responsibility of International Organizations by Giorgio Gaja, Special Rapporteur' (14 March 2011) A/CN.4/640, para 38.

follow-up of published legal opinions.[122] But this practice was eventually abandoned. More recent opinions published in the *Juridical Yearbook* even omit background information and context available through the version published as an UN document.[123] This could be a deliberate design choice of the Office of Legal Affairs, rendering chapter VI more akin to court reports that are usually not edited and also lack a follow-up.

It is equally unconvincing to stick to the notion that legal opinions are 'non-binding'. If this study called into question anything, it is the notion that interpretations of the Legal Counsel are purely 'non-binding'. They obviously exercise authority independent of States. This is the intention of their authors, and their effect.[124] The traditional vocabulary of State endorsement, bindingness and 'subsidiary means' lack the sophistication to make sense of legal opinions in institutional law. Nor does the 'soft law' label help much. That label ultimately obscures the problem that there is no explanation for much of the normative instruments of international organizations.[125]

A solution could be sought in Goldmann's proposal of 'standard instruments for the exercise of international public authority'. Out of the many alternative approaches to sources doctrine and Article 38, the move towards 'standard instruments' deserves special attention because, first, it aims to provide a specifically legal account 'from an internal, doctrinal perspective' of the many normative instruments of international organizations that do not fit within the confines of Article 38.[126] Secondly, the concept of 'standard instrument' builds on established sources doctrine.[127] Finally, the move towards 'standard instruments' has attracted support from proponents of

122 OLA 'Opinion Given Further to a Request from a Representative in the Commission on Narcotic Drugs' [1977] UNJYB 230, fn 79 (providing information on the 'action taken by the Commission on Narcotic Drugs at its fifth special session on the basis of the above opinion').

123 Compare ECOSOC 'Legal Opinion from the Office of Legal Affairs of the Secretariat' (20 February 2015) E/CN.7/2015/14 and [2015] UNJYB 328.

124 See Chapter 4.

125 Jan Klabbers, 'The Normative Gap in International Organizations Law: The Case of the World Health Organization' (2019) 16 IOLR 272, 274; Jan Klabbers, 'The Redundancy of Soft Law' (1996) 65 Nordic JIL 167.

126 Matthias Goldmann, 'Inside Relative Normativity: From Sources to Standard Instruments for the Exercise of International Public Authority' in Armin von Bogdandy and others (eds), *The Exercise of Public Authority by International Institutions: Advancing International Institutional Law* (Springer 2010) 679.

127 ibid 679.

established sources doctrine,[128] of 'global administrative law',[129] and critics of functionalism.[130] The concept has also been applied to legal acts adopted under multilateral environmental conventions.[131] What then is a 'standard instrument'?

Fundamentally, the concept of standard instruments identifies and defines specific authoritative acts in a given system of (administrative) law and links a legal regime to that instrument by circumscribing their legal effects and attaching specific rules for determining the procedure for their enactment, their validity and possible review by a third actor (in a domestic system usually a court).[132] For example, American administrative law distinguishes between 'rules' and 'orders', defines their respective legal effects and determines procedural rules for their validity.[133] In German administrative law, the distinction between *Allgemeinverfügung* (general order) and *Rechtsverordnung* (by-law) carries consequences for judicial review such as the competent court and questions of standing.[134] Similarly, the concept of standard instruments (*Handlungsformen*) is not wholly foreign to international institutional law. For example, the UN Charter generally distinguishes, in terms of their

128 Hugh Thirlway, *The Sources of International Law* (2nd edn, Oxford University Press 2019) 34.

129 Benedict Kingsbury and Lorenzo Casini, 'Global Administrative Law Dimensions of International Organizations Law' (2009) 6 IOLR 319, 324, fn 15.

130 Jan Klabbers, 'Goldmann Variations' in Armin von Bogdandy and others (eds), *The Exercise of Public Authority by International Institutions: Advancing International Institutional Law* (Springer 2010) 718.

131 Tim Staal, *Authority and Legitimacy of Environmental Post-Treaty Rules* (Hart 2019) 269–775.

132 cf Goldmann, 'Inside Relative Normativity: From Sources to Standard Instruments for the Exercise of International Public Authority' (n 126) 679 (' A standard instrument is a combination of a rule of identification for authoritative instruments of a specific type and a specific legal regime that is applicable to all instruments coming under the rule of identification ... The rule of identification identifies specific instruments that belong to a certain category of authoritative acts to which the same legal regime applies ... The legal regime is the second element of standard instruments. It determines conditions for the validity and legality of the instruments that fall under the rule of identification ... that relate to issues such as competence, procedure, or review').

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

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

normative effect, between General Assembly resolutions on operational matters (such as the creation of subsidiary organs under Article 22) and mere recommendations under Article 13.[135]

This concept is inspired by the history of administrative law in continental Europe.[136] And it is also a characteristic element of American administrative law.[137] The definition of standard instruments was a precondition to explain the activity of administrations in legal terms to operationalize principles of administrative law for particular cases, and to develop an applicable regime of administrative procedure and establish judicial review.[138] As Goldmann notes, this approach is anything but new in international law. The attempts to define different categories of secondary legal acts of the United Nations is one such example.[139]

5.4.1. Defining the Legal Regime Applicable to Formal Legal Opinions

The first step to define and identify a standard instrument of international public authority is put in place by using a toolbox of formal parameters (such as author, addressee, procedure, designation) and parameters concerning the legal effect or follow-up action.[140] The second step to define a standard instrument—the *applicable legal regime*—determines the conditions for the validity or legality of the instruments that have been identified by a set of parameters.[141] For reasons of clarity and importance, the legal effect or follow-up of formal legal opinions is discussed in the next two sections.

Applying a set of formal parameters to formal legal opinions, it becomes clear that they already constitute a standard instrument developed in the practice of the United Nations. Unlike informal legal advice or other reports prepared by the Office of Legal Affairs but ultimately issued by the Secretary-

135 cf Conforti and Focarelli (n 7) 452–453.

136 Goldmann, 'Inside Relative Normativity: From Sources to Standard Instruments for the Exercise of International Public Authority' (n 126) 680.

137 Schmidt-Aßmann (n 133) 164.

138 Peter M Huber, '§ 73 Grundzüge des Verwaltungsrechts in Europa: Problemaufriss und Synthese' in Armin von Bogdandy, Sabino Cassese, and Peter M Huber (eds), *Handbuch Ius Publicum Europaeum* (vol V, CF Müller 2014) paras 101–104.

139 See the bibliography in Conforti and Focarelli (n 7) 445–446.

140 Goldmann, 'Inside Relative Normativity: From Sources to Standard Instruments for the Exercise of International Public Authority' (n 126) 684–691.

141 ibid 703–709.

General or the Secretariat, formal legal opinions are issued in the name of the Office or Legal Counsel. This is best summarized in this passage of an informal opinion:

> [T]he primary responsibility of the Office of Legal Affairs ('OLA') is to provide legal advice to the Secretary-General, Secretariat departments and offices and United Nations organs. Therefore, this Office is not in a position to provide legal advice to individual members of United Nations organs. It can, however, provide legal opinions to United Nations intergovernmental organs at the formal request of those organs.
>
> Thus, in the present case, we are only able to provide information with regard to the questions you have transmitted to us *as opposed to a formal legal opinion*. We would recommend that this information be transmitted as information from the Secretariat, *and not as information from OLA*.[142]

The different designation in authorship (Office of Legal Affairs, and not the Secretariat, in case of formal legal opinions) is a crucial parameter to identify the standard instrument 'formal legal advice'. The addressee is the requesting UN organ. As the passage also demonstrates, the rule of identification and the conditions of validity (specific legal regime) are closely related. To some extent, a formal legal opinion exists if it has been issued on request of a competent UN organ, and vice versa. But this interdependence of the rule of identification and the specific legal regime in the case of formal legal opinions does not render the concept of standard instruments meaningless. To the contrary, it is inherent in the standard instrument approach that legal regime and rules of identification interact and influence each other.[143]

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142 '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 104) paras 2–3 (emphasis added).

143 cf Huber (n 138) para 193 (action for annulment of an administrative act only receivable for certain reasons).

5.4.2. Non-Judicial, Administrative Interpretations with Persuasive Authority

As an autonomous standard instrument of institutional law, the legal effect of formal legal opinions is that they constitute (administrative) interpretations with persuasive authority. The characterization of formal legal opinions as persuasive authority in the United Nations legal system is an appropriate shorthand.[144] These legal interpretations are recognized as legal precedents and too hard to ignore—even for the General Assembly which has the taken the unusual step to formally correct an interpretation by the Legal Counsel.[145] In the practice of the United Nations, they are highly influential in the deliberative process of United Nations organs, especially treaty and subsidiary organs with a specialist, administrative or expert mandate, and are used as method to negotiate the fuzzy jurisdictional boundaries of the complex web of United Nations bodies.[146]

This authority is based on a complex and mutually reinforcing patchwork of secondary law of the United Nations. Principally, these are General Assembly decisions that establish the Office of Legal Affairs as the UN's central and single legal service and constitute the implicit recognition of the legal authority of Office opinions by mandating their publication,[147] as well as the Secretary-General's bulletin on the Organization of the Office of Legal Affairs.[148] The establishment by two separate legal acts of two principal organs of the United Nations (the Secretary-General and the General Assembly) protects the Legal Counsel from being unilaterally abolished by either organ. In addition, the documents emanating from the budgetary process regularly and publicly affirm the advisory mandate of the Office of Legal Affairs.[149] Finally, there is no other institutional actor that regularly issues non-judicial

144 Zacklin, 'Les Nations Unies et la crise du Golfe' (n 8) 63 ('force persuasive dans l'ordre juridique interne de l'Organisation').

145 See Section 4.2.1 in Chapter 4.

146 See Chapter 4.

147 Res 13 (I) (n 108); Res 1814 (XVII) (n 108).

148 Secretary-General's Bulletin 'Organization of the Office of Legal Affairs' (1 August 2008) ST/SGB/2008/13.

149 'Proposed Programme Budget for 2021, Section 8: Legal Affairs' (n 54) (budget proposal by the Secretary-General); 'Draft Report: Proposed Strategic Framework for the Period 2018-2019, Programme 6: Legal Affairs' (n 109) (Committee on Programme and Coordination adding performance indicator for the mandate to provide legal services to the entire UN system).

interpretations of the law such as a separate legal service of the General Assembly. Coupled with a strong convention of impartiality, it is this mandate that makes it appropriate to consider the Legal Counsel, in Judge Oda's words, an official competent to interpret the institutional law of the United Nations.[150]

Because the advisory practice of the Legal Counsel is rooted in the secondary law of the Organization, it would be a misnomer to frame the non-judicial interpretations by the Legal Counsel as another example of 'informal international lawmaking'.[151] To the contrary, formal legal opinions (the French term *avis juridiques officiels* expresses this clearly) are issued in the official capacity of the Office of Legal Affairs only at the request of competent United Nations bodies.[152] But it is misconceiving to equate them with advisory opinions of the ICJ.[153] The Legal Counsel is a 'legal authority',[154] but formal legal opinions remain legal interpretations by a non-judicial and administrative legal authority.

5.4.3. Proceduralization of the *Certain Expenses* Principle of Autointerpretation

There is another legal effect of formal legal opinions that is related to but distinct from their value as non-judicial interpretations with persuasive authority. They effect a change in the practical operation of the *Certain Expenses* principle of autointerpretation that—in the absence of a system of procedure to determine the validity of acts of United Nations organs—'each [United Nations] organ must, in the first place at least, determine its own

150 cf *Legality of the Use by a State of Nuclear Weapons in Armed Conflict* (n 1) 96, para 15.

151 cf Joost Pauwelyn, 'Informal International Lawmaking: Framing the Concept' in Joost Pauwelyn, Ramses A Wessel, and Jan Wouters (eds), *Informal International Lawmaking* (Oxford University Press 2012).

152 cf, *mutatis mutandis* for the ILO, International Labour Office, *International Labour Code 1951, Vol I* (ILO 1952) CIX (International Labour Office interpretations 'enjoy such authority as derives from their having been formulated by the International Labour Office in its official capacity' in accordance with defined processes).

153 Zacklin, 'Les Nations Unies et la crise du Golfe' (n 8) 63 ('au même titre qu'an avis consultatif de la Cour internationale de Justice').

154 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (n 73) 243–244, para 6 (dissenting opinion of Vice-President Al-Khasawneh).

jurisdiction'.[155] While autointerpretation is sometimes mistaken as a right of binding interpretation, it is nothing more than the de facto default in legal systems without highly developed institutions.[156] Autointerpretation by a United Nations body is always somewhat preliminary in character.[157] Because of these features—lack of procedure to determine the validity of legal acts and autointerpretation as the default rule—the orthodox conclusion on the state of legality in international organizations was that '[a]s a system of law all this does not amount to very much'.[158] And that there is no 'general body of procedural law for decision-making'.[159]

The extensive practice of legal advice by the Legal Counsel in advance of a decision by a United Nations organ makes clear that this is hardly an accurate picture of the present state of institutional law. The argument is not that formal advice by the Legal Counsel constitutes a 'procedure for determining the validity of ... a [United Nations] act'.[160] The *Certain Expenses* principle of autointerpretation remains the factual default. But formal advice by the Legal Counsel in advance of a decision effects a proceduralization

155 *Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter)* (Advisory Opinion) [1962] ICJ Rep 151, 168; Commission IV, Report of the Rapporteur of Committee IV/2, as Approved by the Committee (1945) 13 UNCIO 703, 709.

156 Leo Gross, 'States as Organs of International Law and the Problem of Autointerpretation' in *Essays on International Law and Organization* (Springer 1984) 391–394; JHH Weiler and Ulrich R Haltern, 'Constitutional or International? The Foundations of the Community Legal Order and the Question of Judicial Kompetenz-Kompetenz' in Anne-Marie Slaughter, Alec Stone Sweet, and Joseph Weiler (eds), *The European Court and National Courts – Doctrine & Jurisprudence: Legal Change in its Social Context* (Hart 1998) 344 ('factual inevitability').

157 Report of the Rapporteur of Committee IV/2, as Approved by the Committee (n 155) 710 (interpretation by an organ or a committee of jurists must be generally acceptable to acquire binding force).

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

159 Jochen von Bernstorff, 'Procedures of Decision-Making and the Role of Law in International Organizations' in Armin von Bogdandy and others (eds), *The Exercise of Public Authority by International Institutions: Advancing International Institutional Law* (Springer 2010) 778.

160 cf *Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter)* (n 155) 168.

of the principle of autointerpretation.[161] In Gross's words,[162] requesting the Legal Counsel's advice introduces a heteronomous element, a legal body external to the organ taking a decision (and implicitly interpreting its legal mandate). By contributing legal advice to the decision-making process of United Nations bodies, the Legal Counsel procedurally embeds the principle of autointerpretation and becomes part of the institutional legal process in the United Nations. This view best reconciles the paradox that the Legal Counsel has 'no authority to review the legality of the actions of the other principal organs' or of subsidiary organs,[163] while regularly performing a legal review or oversight function as a matter of practice.

Interestingly, this is a major justification of the Legal Counsel in its budgetary submission to the General Assembly, namely that '[p]rincipal and subsidiary organs of the United Nations ... request legal advice as a main component of the decision-making process'.[164] And it is precisely what Judge Oda called for in his opinion in the *Nuclear Weapons* opinion initiated by the WHO when he criticized the political organs for failing to consider the advice of the WHO Legal Counsel. The mutual duty of good faith between organs of the United Nations requires that official legal advice, once duly requested, be given some consideration.[165] If the very fact of a State's membership entails a good faith obligation between an organization and its membership, then the very institutional set-up of separate organs likewise implies a mutual obligation of good faith.[166]

The contemporary advisory practice of the Legal Counsel is not without historical antecedents. In a dissenting opinion, Judge Fitzmaurice argued passionately against the principle of autointerpretation and regretted that the General Assembly could have at the very least consulted an ad hoc committee

161 cf Louis B Sohn, 'Due Process in the United Nations' (1975) 69 AJIL 620, 621 (making the case that the Legal Counsel should be consulted on relevant precedents in advance of any UN decision to ensure a minimum of substantive due process).

162 cf Gross, 'States as Organs of International Law and the Problem of Autointerpretation' (n 156) 394–395.

163 cf 'Provisional Summary Record of the 3371st Meeting' (n 60) 6.

164 'Proposed Programme Budget for 2021, Section 8: Legal Affairs' (n 54) para 8.12.

165 This argument is borrowed from *Voting Procedure on Questions Relating to Reports and Petitions Concerning the Territory of South West Africa* (Advisory Opinion) [1955] ICJ Rep 67, 119 (separate opinion of Judge Lauterpacht).

166 cf *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt* (Advisory Opinion) [1980] ICJ Rep 73, 93.

of jurists as had been the practice of the League of Nations.[167] Recourse to an ad hoc committee of jurists was a 'frequent practice in the League [of Nations]'.[168] The San Francisco Conference also endorsed legal advice by an ad hoc committee as an alternative to the Court's contentious and advisory jurisdiction.[169] But since 1945, this mechanism has never been really used.[170] Initially, the General Assembly experimented with requests for legal opinions by the Sixth Committee.[171] But this only shifted the problem since the Sixth Committee is made up of the same members as whichever Committee requested the opinion. While the United Nations did not follow the League of Nations precedent of creating ad hoc committees of jurists, the Legal Counsel has taken up the function of legal consultation as envisaged in San Francisco and advocated by Judge Fitzmaurice. Comparing the Legal Counsel to the historical model of ad hoc committees displays another facet of proceduralization. By appointing particular lawyers States were able to influence the outcome.[172] Unlike the League of Nations' ad hoc committees, the Legal Counsel is a standing body and able to develop a body of coherent legal advice. As the central and single legal service of the UN, there is no other institutional competitor that provides legal advice in an official capacity. Accordingly, the Legal Counsel is an institutionalized and more legally sophisticated manifestation of the historical model of the ad hoc committee procedure.

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167 *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)* (n 113) 301, para 8.

168 *South West Africa* (*Ethiopia v South Africa; Liberia v. South Africa*) (Second Phase) [1966] ICJ Rep 6, 44, para 81. For an example, see Report of the Special Commission of Jurists, Interpretation of Certain Articles of the Covenant and Other Questions of International Law (1924) 5 League of Nations OJ 523, 524 (legal opinion on Article 15 of the Covenant).

169 Report of the Rapporteur of Committee IV/2, as Approved by the Committee (n 155) 709–710.

170 Gerald Fitzmaurice, 'The United Nations and the Rule of Law' (1952) 38 Transactions of the Grotius Society 135, 139.

171 See Section 3.2 in Chapter 3.

172 Dan Ciobanu, *Preliminary Objections Related to the Jurisdiction of the United Nations Political Organs* (Martinus Nijhoff 1975) 162, fn 24; Pollux, 'The Interpretation of the Charter' (1946) 23 BYBIL 54, 63 ('the real purpose of appointing such a committee is usually quite other than to obtain a legally correct interpretation. It would seem to be rather to provide a legal cloak for whatever solution may appear politically desirable.')

If the Legal Counsel is a contemporary, albeit an institutionalized and more developed, form of the ad hoc committee procedure, it is necessary to consider the two main objections against it. These were that the political organs are under no obligation to have recourse to an ad hoc committee of jurists, and that because of the non-binding nature the political organs are free to disregard its legal opinion.[173]

The first objection can be turned on its head. The 'non-binding' nature of Legal Counsel opinions is a feature and not a bug. The political, mental and practical hurdles of initiating advisory proceedings—let alone of extending the right to seek advisory opinions to subsidiary bodies—render it increasingly theoretical, especially on institutional matters. The non-binding nature makes it easier for organs and Member States to meaningfully engage with the substance of any formal legal advice. This introduces an element of external deliberation in a process that by its very institutional design is introspective. Member States (or individual experts) negotiate in the shadow of an opinion. As bodies established under primary or secondary law, every decision by a UN organ implies an interpretation of its mandate.[174] The introduction of an external interpreter leads to debates as to whether the Legal Counsel's view is convincing or not. Even if the organ does not comply with the advice, it creates a pull to supply alternative reasons for asserting a legal basis if they disagree with the Legal Counsel's rationale.

The second objection is, upon closer inspection, a common feature of decentralized legal systems. Legal Counsel review is not that different from international courts and tribunals, as the more revered institutions of the 'international rule of law' discourse.[175] The talk of judicial *settlement* often

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173 Dan Ciobanu, 'Impact of the Characteristics of the Charter upon Its Interpretation' in Antonio Cassese (ed), *Current Problems of International Law: Essays on UN Law and the Law of Armed Conflict* (Giuffrè 1975) 60–61.

174 cf *Conditions of Admission of a State to Membership in the United Nations (Article 4 of the Charter)* (Advisory Opinion) [1948] ICJ Rep 57, 64 ('The political character of an organ cannot release it from the observance of the treaty provisions established by the Charter when they constitute limitations on its powers or criteria for its judgment. To ascertain whether an organ has freedom of choice for its decisions, reference must be made to the terms of its constitution'); Joseph Gold, *Interpretation: The IMF and International Law* (Kluwer Law International 1996) 3.

175 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 31 (recognizing the ICJ for the 'promotion of the rule of law' and calling on States to accept the jurisdiction of the Court). For an overview see

masks what is more accurately described as judicial *management*. A judgment by the International Court of Justice rarely 'settles' a dispute, and is only the next step in a dispute even if Article 59 of the ICJ Statute codifies the *res judicata* doctrine and gives binding legal force to judgments in contentious proceedings. If the law is in flux or unclear, States essentially request an advisory opinion (or an advisory judgment so to say) through the medium of the contentious procedure to receive guidance for their negotiations.[176] For example, the Court is loath to adjudicate compensation claims and customarily divides the compensation phase and the merits phase to avoid complex questions of compensation.[177] Once a final judgment is rendered, it is not uncommon for parties to create bilateral committees that 'study the decision' and negotiate the judgment's implications.[178] Even were consent to the contentious jurisdiction exists, this only gives an option to the State to bring a contentious case, just like the advisory procedure is an option and never an obligation. Recourse to the Court, whether through the

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Heike Krieger and Georg Nolte, 'The International Rule of Law—Rise or Decline?—Approaching Current Foundational Challenges.' in Heike Krieger, Georg Nolte, and Andreas Zimmermann (eds), *The International Rule of Law: Rise or Decline?* (Oxford University Press 2019) 6–7 with further references. See also Jochen von Bernstorff, 'The Decay of the International Rule of Law Project (1990–2015)' in Heike Krieger, Georg Nolte, and Andreas Zimmermann (eds), *The International Rule of Law: Rise or Decline?* (Oxford University Press 2019) 45–50 (criticizing the concrete mode of operation of compulsory jurisdiction)

176 See, eg, *North Sea Continental Shelf* (*Federal Republic of Germany/Netherlands; Federal Republic of Germany/Denmark*) (Judgment) [1969] ICJ Rep 3, 53–4, para 101. See also Robert Kolb, *The International Court of Justice* (Hart 2013) 759 (fine distinction in substance between an advisory opinion and a declaratory judgment); Nagendra Singh, *The Role and Record of the International Court of Justice* (Martinus Nijhoff 1989) 104 (parties to a dispute asking for legal guidance without delegating to the Court the task to decide the entire dispute).

177 See, eg, *Armed Activities on the Territory of the Congo* (*Democratic Republic of the Congo v Uganda*) (Order of 1 July 2015) [2015] ICJ Rep 580, 581 and *Armed Activities on the Territory of the Congo* (*Democratic Republic of the Congo v Uganda*) (Reparations) [2022] ICJ Rep 13.

178 See, eg, Agreement between the Republic of Cameroon and the Federal Republic of Nigeria concerning the Modalities of Withdrawal and Transfer of Authority in the Bakassi Peninsula (signed 12 June 2006) 2542 UNTS 14. This agreement created a bilateral follow-up committee and set out the modalities to implement the operative paragraph of *Land and Maritime Boundary between Cameroon and Nigeria* (*Cameroon v Nigeria: Equatorial Guinea intervening*) (Judgment) [2002] ICJ Rep 303.

advisory or the contentious procedure, is ultimately a political decision. Seen through this lens, 'the differences between the advisory and the contentious competences as methods for the pacific settlement of international disputes by judicial means appear largely as differences of diplomatic nuance and technique rather than of substance'.[179]

This is not a recast of the familiar charge that the Court lacks enforcement mechanisms and to dismiss the influence of the ICJ. Rather, it is only intended to show that the difference between judicial interpretations and non-judicial interpretations by the Legal Counsel is a matter of degree, and not of kind. Just like the jurisprudence of the ICJ as a public good has effects beyond the cases decided, the advisory acquis of the Legal Counsel has effects that may not be easily dismissed because the United Nations organs are at liberty to initiate the Legal Counsel procedure and to disregard the advice.[180] Legal consequences may flow from acts that are not formally 'binding' or seek the 'compliance' of its addressee.[181] And through its advisory mandate, the Legal Counsel is part of the institutional legal process of the United Nations.

5.5. Conclusion

Legal opinions may be evidence of an established practice of the United Nations if there is an indication of State endorsement,[182] or if the Office of Legal Affairs exercises an administrative mandate by authorization of the Organization along with its advisory function.[183] Importantly, this use of legal opinions as evidence of an established practice includes both formal and informal legal advice.

Apart from this more conventional view, formal legal opinions constitute an autonomous standard instrument of the institutional law of the United Nations. They are issued in the name of the Office of Legal Affairs or the Legal Counsel but not in the Secretariat's name. A specific legal regime applies to

179 Shabtai Rosenne, 'On the Non-Use of the Advisory Competence of the International Court of Justice' (1963) 39 BYBIL 1, 2.

180 cf Robert Howse and Ruti Teitel, 'Beyond Compliance: Rethinking Why International Law Really Matters' (2010) 1 Global Policy 127.

181 Higgins, *Problems and Process* (n 100) 24.

182 See the *Wall* opinion's reliance on a statement by the Legal Counsel regarding Article 12 of the Charter in Section 5.2 of this Chapter.

183 See the *Mazilu* case in Section 5.2 in this Chapter.

formal legal opinions, namely a request by a competent UN body, the need for the procedural propriety of the request and the need for a legal question. As non-judicial and administrative interpretations in the United Nations legal system, formal legal opinions are a persuasive authority and effect a proceduralization of the *Certain Expenses* principle of autointerpretation.[184]

184 Whether informal legal opinions constitute a separate standard instrument (with distinct parameters, legal effects and a specific legal regime different from formal legal opinions) is not considered here. Informal legal opinions do not fall under the standard instrument 'formal legal opinion' as the specific legal regime (request by a competent organ, legal question, procedural propriety of the request) does not apply.