

## Chapter 1: Introduction

The International Court of Justice famously declared that, in the absence of a system to determine the validity of acts of United Nations organs, ‘each organ must, in the first place at least, determine its own jurisdiction’.<sup>1</sup> This so-called principle of autointerpretation had already been endorsed by the drafters of the United Nations Charter at the San Francisco Conference.<sup>2</sup> The same conference had decided against a comprehensive system of judicial review of United Nations acts by the ICJ. The hopes of the drafters that the advisory procedure of the ICJ might be used as the preferred means to provide legal guidance on the Charter and the secondary law of the Organization did not materialize. It was used mostly in the early years of the United Nations, and requests for questions arising from the workings of UN institutions have since declined.<sup>3</sup> The drafters envisaged two other non-judicial mechanisms

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- 1 *Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter)* (Advisory Opinion) [1962] ICJ Rep 151, 168. See also *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, 45 (stating that ‘the Court does not possess powers of judicial review or appeal in respect of the decisions taken by the United Nations organs concerned’).
  - 2 Leo Gross, ‘States as Organs of International Law and the Problem of Autointerpretation’ in *Essays on International Law and Organization* (Springer 1984). See Commission IV, Report of the Rapporteur of Committee IV/2, as Approved by the Committee (1945) 13 UNCIO 703, 709–710.
  - 3 Dapo Akande, ‘Selection of the International Court of Justice as a Forum for Contentious and Advisory Proceedings (Including Jurisdiction)’ (2016) 7 JIDS 320, 339–340; Pierre d’Argent, ‘Article 96 UN Charter’ in Andreas Zimmermann and Christian J Tams (eds), *The Statute of the International Court of Justice: A Commentary* (3rd edn, Oxford University Press 2019) 275. Examples include: *Conditions of Admission of a State to Membership in the United Nations (Article 4 of the Charter)* (Advisory Opinion) [1948] ICJ Rep 57; *Reparation for Injuries Suffered in the Service of the United Nations* (Advisory Opinion) [1949] ICJ Rep 174; *Competence of the General Assembly for the Admission of a State to the United Nations* (Advisory Opinion) [1950] ICJ Rep 4; *Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter)* (n 1); *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt* (Advisory Opinion) [1980] ICJ Rep 73; *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights* (Advisory Opinion) [1999] ICJ Rep 62.

for interpretation: setting up an ad hoc committee of jurists (inspired by the experience of the League of Nations),<sup>4</sup> and requesting legal advice from the Sixth (Legal) Committee of the General Assembly.<sup>5</sup> None of these gained any traction in United Nations practice.

This book is about another mechanism of interpretation that developed in the practice of the United Nations: the advisory practice of the United Nations Legal Counsel, and especially formal legal opinions (*avis juridiques officiels*) that carry the signature of the Legal Counsel or the Office of Legal Affairs. Formal legal opinions are legal interpretations by the Legal Counsel issued upon procedurally valid requests of a competent United Nations body on specific questions of law. In an average year the United Nations Office of Legal Affairs, headed by the Under-Secretary-General for Legal Affairs and Legal Counsel of the United Nations, prepares around 1,600 pieces of legal advice on the law of the United Nations such as those regarding the Charter and resolutions.<sup>6</sup> According to a statement by the Legal Counsel, roughly 95 per cent of the work of the Office of Legal Affairs is informal and five per cent are formal legal opinions,<sup>7</sup> amounting to about 80 formal legal opinions per year.

### 1.1. Research Question and Unique Standing of the Legal Counsel

‘Much could be said about the role of the Legal Counsel’, a former UN Legal Counsel wrote.<sup>8</sup> According to a former President of the International Court

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

5 UNGA Res 684 (VII) (6 November 1952) A/RES/684(VII), para 1(d) (‘when a Committee considers the legal aspects of a question important, the Committee should refer it for legal advice to the Sixth Committee’). This was envisaged by the Preparatory Commission of the United Nations: Preparatory Commission of the United Nations ‘Report of the Executive Committee’ (12 November 1945) PC/EX/113/Rev.1, 30, para 11.

6 UNGA ‘Proposed Programme Budget for 2021, Section 8: Legal Affairs’ (15 April 2020) A/75/6 (Sect. 8), para 8.28.

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

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

of Justice, the Legal Counsel of the United Nations is ‘highly important’.<sup>9</sup> Many scholars have recognized the importance of the advisory practice of legal advisers of international organizations for the development of the law of international institutions.<sup>10</sup> Opinions of the Legal Counsel are cited in the literature and by the International Law Commission. They have made their way into decisions of the International Court of Justice. Still, the position of the Office of Legal Affairs within the legal system of the United Nations has so far received little systematic attention in the literature,<sup>11</sup> and it is not infrequently misconceived.<sup>12</sup> This book seeks to shed light on the role of the advisory function of the UN Legal Counsel in the institutional law of the United Nations.

The advisory function of the United Nations Legal Counsel constitutes a promising research question for several reasons.<sup>13</sup> In the United Nations legal system, a system without clear hierarchy or separation of powers doctrine and no court with general jurisdiction, the pronouncement of the Legal Counsel then becomes particularly crucial. What Michael Wood explained with regard to legal advisers of foreign ministries applies equally to the United Nations Legal Counsel: by the very fact of saying what the law is, the Legal Counsel sets precedents.<sup>14</sup> And unlike in general public international law (where there are as many legal advisers of foreign ministries as there are States) or European Union law (which has separate institutional legal services in the

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9 Rosalyn Higgins, ‘Fleischhauer Leaves the Court’ (2003) 16 LJIL 55.

10 Dapo Akande, ‘The Competence of International Organizations and the Advisory Jurisdiction of the International Court of Justice’ (1998) 9 EJIL 437, 438; Cedric Ryngaert and others, ‘General Introduction’ in Cedric Ryngaert and others (eds), *Judicial Decisions on the Law of International Organizations* (Oxford University Press 2016) 2.

11 Denis Croze, ‘Le bureau des affaires juridiques des Nations Unies: un cabinet-conseil au service du droit et de la communauté internationale’ (1990) 43 La Revue Administrative 67. See also Bertrand G Ramcharan, *The Principle of Legality in International Human Rights Institutions: Selected Legal Opinions* (Martinus Nijhoff 1997) 4.

12 Eugene Kontorovich, ‘Economic Dealings with Occupied Territories’ (2015) 53 Colum J Transnat’l L 584, 602 (referring to ‘the ‘Security Council’s Legal Advisor’s Opinion’ on Western Sahara).

13 Jan Wouters and James Rischbieth, ‘Legal advisers in international organizations: Uncovering a little-known world’ in Jan Wouters (ed), *Legal Advisers in International Organizations* (Edward Elgar 2023) 1–2.

14 Committee of Privy Counsellors, *The Report of the Iraq Inquiry* (HC 265-V, 2016) (Chilcot Report) para 391.

Commission and Council), there is a single Legal Counsel in the legal order of the United Nations.

This standing of the Legal Counsel is even more enhanced because there exists no comprehensive system to determine the validity of legal acts in the United Nations legal order through judicial review, nor is there any other non-judicial body (such as the Sixth Committee) that regularly issues authoritative legal advice. Finally, there is little room for domestic courts in matters of international institutional law. In practice, functional immunity of the United Nations results in virtually absolute immunity before domestic courts.<sup>15</sup> Admittedly, the law regarding United Nations immunities may be in flux,<sup>16</sup> or domestic courts may exercise a *Kadi*-type review.<sup>17</sup> Nevertheless, it is hardly conceivable that domestic courts would review questions of institutional law as such. Finally, the United Nations Legal Counsel occupies a special place among legal advisers of the United Nations system, setting precedents for legal advisers of its specialized agencies.<sup>18</sup>

The relevance of this research is underscored by the recent decision of the ILC to include the topic of '[t]he settlement of international disputes to which international organizations are parties' in its long-term program of work.<sup>19</sup> The paper prepared by Michael Wood draws attention to informal mechanisms for resolving disputes.<sup>20</sup>

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15 Jan Klabbers, 'The EJIL Foreword: The Transformation of International Organizations Law' (2015) 26 EJIL 9, 14.

16 *Jam v International Finance Corp* 139 S Ct 759 (US 2019).

17 Judgment of 18 July 2013 C-584/10 P *European Commission and Others v Yassin Abdullah Kadi* ECLI:EU:C:2013:518.

18 UNIDO Legal Office 'Interoffice Memorandum re: Certain Aspects regarding the Legal Adviser/Legal Office' [2003] UNJYB 563, para 5; Michael Wood, 'Legal Advisers' in Rüdiger Wolfrum (ed), *MPEPIL* (online edn, Oxford University Press 2017) para 35; Yves Renouf, 'Legal Counsel to the Administration: A Legal Adviser Who Should Not Look like One' in Gabrielle Marceau (ed), *A History of Law and Lawyers in the GATT/WTO: The Development of the Rule of Law in the Multilateral Trading System* (Cambridge University Press 2015) 337; UNESCO Executive Board 'Role of UNESCO's Office of International Standards and Legal Affairs' (25 August 2016) 200 EX/4.INF.2.

19 ILC 'Report of the International Law Commission: Sixty-eighth Session' (2016) A/71/10, paras 29, 36, 308.

20 ILC 'Sir Michael Wood: The Settlement of International Disputes to which International Organizations are Parties' (2016) A/71/10, Annex A, para 23.

## 1.2. Scope of the Study and Methodological Questions

The scope of this book is circumscribed in three ways. The primary object is the Under-Secretary-General for Legal Affairs, commonly referred to as the Legal Counsel of the United Nations.<sup>21</sup> There is an ongoing debate whether legal advisers of international organizations share common features, or if they are too different to group as an analytical category.<sup>22</sup> Leaving aside this debate, the choice to focus on the Legal Counsel is informed by a desire to gain a more nuanced understanding of the impact of non-judicial interpretations in the institutional law of the United Nations. While the role of legal advisers in UN specialized agencies and other international organizations is outside its scope, this study refers on occasion to the practice of legal advisers in specialized agencies, in particular when their institutional standing is similar to the United Nations Legal Counsel and their practice themselves makes references to the United Nations Legal Counsel.<sup>23</sup>

Moreover, the focus is on the advisory practice of the Legal Counsel with respect to the institutional law of the United Nations. Within the law of international organizations, Amerasinghe distinguishes between the institutional and the functional (or substantive) law of international organizations.<sup>24</sup> The institutional law concerns aspects such as Member State-organization re-

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- 21 The terms ‘Legal Counsel’ and ‘Office of Legal Affairs’ are used interchangeably as the Legal Counsel as the responsible head bears the ultimate responsibility even where the opinion is formally signed by a subordinate legal officer.
- 22 Wood, ‘Legal Advisers’ (n 18) para 33 (‘The position of legal advisers within international organizations varies greatly depending on the powers and functions, and practices, of the particular organization. The position is also likely to vary over time, depending in part on how particular legal advisers see their role’); Peter Quayle, ‘Legal Advisers and International Organisations: The Convergence of Interior and Exterior Legal Obligations’ in Andraž Zidar and Jean-Pierre Gauci (eds), *The Role of Legal Advisers in International Law* (Brill Nijhoff 2017) 264 (arguing that ‘advisory responsibilities are uniform to all lawyers who lead the legal advice to international organisations’).
- 23 This applies especially to two documents of the UNIDO and UNESCO legal advisers on the institutional role of their respective offices. See ‘Role of UNESCO’s Office of International Standards and Legal Affairs’ (n 18); ‘Interoffice Memorandum re: Certain Aspects regarding the Legal Adviser/Legal Office’ (n 18).
- 24 CF Amerasinghe, ‘The Law of International Organizations: A Subject Which Needs Exploration and Analysis’ (2004) 1 IOLR 9, 14; CF Amerasinghe, *Principles of the Institutional Law of International Organizations* (2nd edn, Cambridge University Press 2005) xiii.

lations (eg membership status, immunities) and the operation of principal, subsidiary and treaty organs (eg competence, procedure, budget, discretion, interpretation of secondary law, inter-organ relations). The functional law in turn consists of the substantive law of each organization (eg use of force and self-defense under Articles 2(4) and 51 UN Charter or the obligations with regard to non-self-governing territories under Chapter XI of the UN Charter). This distinction is very similar to Lusa Bordin's distinction between the 'institutional plane' where the rules of the organization apply (Charter, resolutions, and other internal rules), and the 'international plane' where the organization interacts with the 'outside world' under rules of general public international law.<sup>25</sup> This work therefore focuses on the 'case law' of the Legal Counsel on matters of institutional law, and leaves out a possible contribution of the Legal Counsel's interpretations to customary international law.<sup>26</sup>

Like most distinctions, the distinction between institutional and functional law may not always be clear-cut but it provides a sensible limit to the scope of this work. It is equally motivated by legal reasons because, according to the General Assembly, the Office's legal advisory mandate is closely tied to the 'effective functioning of the principal and subsidiary organs of the United Nations'.<sup>27</sup> This means that most legal opinions are about institutional law. When the Legal Counsel is asked to provide formal advice on the substantive law of the Charter, they often garner a lot of attention. One such example is the 29 January 2002 letter by the Legal Counsel on the legality of Morocco's exploration and exploitation of Western Sahara's oil resources.<sup>28</sup> This document has become a central document in the Western Sahara dispute,

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25 Fernando Lusa Bordin, *The Analogy between States and International Organizations* (Cambridge University Press 2018) 8–9.

26 See, eg Jean-Baptiste Merlin, 'The United Nations Secretariat and Custom' in Sufyan Droubi and Jean d'Aspremont (eds), *International Organisations, Non-State Actors and the Formation of Customary International Law* (Manchester University Press 2020); Stephen Mathias, 'The Work of the International Law Commission on Identification of Customary International Law: A View from the Perspective of the Office of Legal Affairs' (2016) 15 Chinese JIL 17.

27 'Proposed Programme Budget for 2021, Section 8: Legal Affairs' (n 6) para 8.28.

28 UNSC 'Letter dated 29 January 2002 from the Under-Secretary-General for Legal Affairs, the Legal Counsel, addressed to the President of the Security Council' (12 February 2002) S/2002/161.

becoming an important precedent for Polisario,<sup>29</sup> and being cited by the Legal Counsel of the African Union,<sup>30</sup> an Advocate General of the Court of Justice of the European Union and British courts.<sup>31</sup>

Finally, this study focuses on the advisory function of the Legal Counsel, and more specifically on situations where the Legal Counsel is formally asked to give legal advice. This leaves out many other functions of the Legal Counsel such as responding to claims by individuals (the cholera outbreak in Haiti comes to mind), depositary functions, legal aspects of procurement, and more policy-oriented activities such as assisting in the negotiation of new treaties or building judicial institutions.<sup>32</sup> Equally beyond the scope of this study are the specialized sections of the Office such as the Treaty Section, the International Trade Law Division and the Division for Ocean Affairs and the Law of the Sea.<sup>33</sup>

The decision to focus on legal opinions is based on two considerations. As legal documents in the public domain, they are the most interesting work product of the Legal Counsel. They effectively substitute for the lack of a comprehensive system of judicial review. That is not to say that the Legal Counsel exercises a judicial function, or that legal opinions are of equal stature as an advisory opinion of the ICJ. Rather, the practice to resort to the

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29 See, eg, UNSC ‘Letter dated 19 October 2015 from the Permanent Representative of South Africa to the United Nations addressed to the Secretary-General’ (20 October 2015) S/2015/804, Annex (letter by Polisario citing the 2002 Legal Counsel letter).

30 UNSC ‘Letter dated 9 October 2015 from the Permanent Representative of Zimbabwe to the United Nations addressed to the President of the Security Council’ (14 October 2015) S/2015/786, Annex (legal opinion of the African Union Office of Legal Counsel on Moroccan economic activities in Western Sahara).

31 Opinion of AG Wathelet C-104/16 P *Council v Front Polisario* ECLI:EU:C:2016:677, paras 71, 139, 228; Opinion of AG Wathelet C-266/16 *Western Sahara Campaign UK* ECLI:EU:C:2018:1, paras 131–132, 230–232, 247; *Western Sahara Campaign UK, R (on the application of) v HM Revenue and Customs* [2015] EWHC 2898 (Admin) paras 22–23, 32, 46–54.

32 See, eg, UNCLOS III ‘Memorandum dated 27 April 1982 from the Legal Counsel to the Special Representative of the Secretary-General to the Third United Nations Conference on the Law of the Sea’ (28 April 1982) A/CONF.62/L.139 (legal opinion on the effect of Conference resolutions) and Elisabetta Morlino, *Procurement by International Organizations: A Global Administrative Law Perspective* (Cambridge University Press 2019) 83–84 (Office of Legal Affairs interpretation of financial rules relating to procurement).

33 See, eg, Serguei Tarassenko and Ilaria Tani, ‘The Functions and Role of the United Nations Secretariat in Ocean Affairs and the Law of the Sea’ (2012) 27 *IJMCL* 683.

Legal Counsel responds to the need for external legal interpretation when autointerpretation by the United Nations organ in question leads to no clear result. In addition, this specific focus closes a gap in the literature. There is an abundant collection of edited volumes featuring interviews, conference papers and speeches of legal counsel of international organizations.<sup>34</sup> None of these contributions, however, offer a *legal* analysis of the advisory practice of the Legal Counsel.<sup>35</sup>

The second reason for focusing on the legal opinions of the Legal Counsel lies in the fact that the problem of confidentiality does not loom as large. Although much of the advice of the Legal Counsel is confidential and rarely published,<sup>36</sup> some legal opinions are published either as an official UN document or in chapter VI of the *United Nations Juridical Yearbook*. In addition, there are some limited private collections of legal opinions in the UN context.<sup>37</sup>

It is an open secret that the Legal Counsel frequently advises informally behind the scenes, and most of these opinions remain confidential.<sup>38</sup> This

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34 See HCL Merrillat (ed), *Legal Advisers and International Organizations* (Oceana 1966); 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); Andraž Zidar and Jean-Pierre Gauci (eds), *The Role of Legal Advisers in International Laws* (Brill Nijhoff 2017); Jan Wouters (ed), *Legal Advisers in International Organizations* (Edward Elgar 2023).

35 For an early exception and an explicitly legal analysis of the legal opinions, see Oscar Schachter, 'The Development of International Law Through the Legal Opinions of the United Nations Secretariat' (1948) 25 BYBIL 91.

36 'Provisional Summary Record of the 3398th Meeting' (n 7) 7; OLA 'Conditions of Access to Internal United Nations Documentation and to Archives of Peacekeeping Operations' [1994] UNJYB 464 (stating that inter-office memoranda and correspondence are not open to governments and the public); Michael Wood, 'The Interpretation of Security Council Resolutions, Revisited' (2017) 20 MPUNYB 1, 15.

37 Ramcharan (n 11). Between 2004 and 2007, the International Organizations Law Review published select opinions of the Office of the Legal Affairs: (2004) 1 IOLR 295–300; (2005) 2 IOLR 241–270; (2006) 3 IOLR 165–176; (2007) 4 IOLR 369–385. International Legal Materials re-published a few legal opinions in the 1960s that were previously published as UN documents.

38 CLCS 'Statement by the Chairman of the Commission on the Limits of the Continental Shelf on the Progress of Work in the Commission' (7 October 2005) CLCS/48, para 9 (Legal Counsel 'inviting' the CLCS to review the consistency of a rule of procedure with Article 5 of Annex II UNCLOS in light of discussions at the meeting of States Parties). The Commission eventually heeded the 'invitation' of the Legal Counsel: CLCS 'Statement by the Chairman of the Commission on the Limits of the Continental

behind-the-scenes advice is very important,<sup>39</sup> but public legal advice frames debates and creates a need for justification. This is different when the Legal Counsel issues formal legal advice in response to a specific request by a UN organ. A formal legal opinion is public legal advice.<sup>40</sup> Importantly, the public nature of some legal opinions renders it possible to contextualize their impact on the deliberations of UN organs.

This research was faced with practical difficulties. In the early years of the UN, it was observed that no central collection of legal opinions exists; instead they appear in meeting records, memoranda of the Secretariat and press releases.<sup>41</sup> Beginning in 1962, the publication of legal opinions in the *United Nations Juridical Yearbook* remedied this problem to a considerable extent although the current practice is to publish the opinions without context, and to redact important information such as dates and the identities of the States concerned.<sup>42</sup> Furthermore, the criteria for publishing opinions in the *Juridical Yearbook* remain unclear.<sup>43</sup> However, with regard to opinions published as UN documents, the UN Digital Library and the Official Document System make it possible to research opinions that were previously not discussed in the literature and to ascertain their impact in the deliberations of UN organs (again, only to the extent these reactions are recorded and published).

Finally, it is apt to situate this study in the theoretical paradigms of the law of international organizations. Broadly speaking two dominant approaches exist: functionalism, and public law approaches employing constitutionalist language (i.e. constitutionalism, global administrative law, international

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Shelf on the progress of work in the Commission' (10 May 2006) CLCS/50, paras 31–45.

39 See, eg, for a treatment of the impact of confidential legal advice: Ralph Zacklin, *The United Nations Secretariat and the Use of Force in a Unipolar World: Power v. Principle* (Cambridge University Press 2010).

40 Hans Corell, 'Personal Reflections on the Role of the Legal Adviser: Between Law and Politics, Authority and Influence' in Andraž Zidar and Jean-Pierre Gauci (eds), *The Role of Legal Advisers in International Law* (Brill Nijhoff 2017) 197.

41 Schachter (n 35).

42 Compare the legal opinion on the scheduling authority of the Commission on Narcotic Drugs: [2015] UNJYB 328 and ECOSOC 'Legal Opinion from the Office of Legal Affairs of the Secretariat' (20 February 2015) E/CN.7/2015/14.

43 Corell, 'United Nations Office of Legal Affairs' (n 8) 316 (only 'most important ones' are reproduced); 'Provisional Summary Record of the 3398th Meeting' (n 7) 7 (Legal Counsel stating interesting opinions cannot be published while unimportant opinions could be published).

public authority, and rule-of-law approaches).<sup>44</sup> As Klabbers has outlined, functionalism is basically a principal-agent theory, according to which the founding States assign certain tasks to their organization.<sup>45</sup> Because functionalism views the international organization primarily as an agent of its Member States, this approach is geared heavily in favor of its members and is poorly suited to explain an organization's relationship to outside parties other than its Member States.<sup>46</sup> In that sense, functionalism essentially views international organizations as instruments in the hands of States.<sup>47</sup> As a theory explaining the relationship between an organization and its Member States,<sup>48</sup> functionalism cannot readily explain the existence of the advisory practice of the Legal Counsel, even less as a heteronomous element in the process of autointerpretation of organs of the United Nations. And there is no way under a functionalist paradigm to explain the singular success of the Legal Counsel to reverse a regional commission of the United Nations because it lacked an implied power.<sup>49</sup> Consequently, this study follows the footsteps of public law approaches, and has found the formal approach of 'international

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44 See Jan Klabbers, 'Contending Approaches to International Organizations: Between Functionalism and Constitutionalism' in Jan Klabbers and Åsa Wallendahl (eds), *Research Handbook on the Law of International Organizations* (Edward Elgar 2011); Benedict Kingsbury and Lorenzo Casini, 'Global Administrative Law Dimensions of International Organizations Law' (2009) 6 IOLR 319; Armin von Bogdandy, Philipp Dann, and Matthias Goldmann, 'Developing the Publicness of Public International Law: Towards a Legal Framework for Global Governance Activities' in Armin von Bogdandy and others (eds), *The Exercise of Public Authority by International Institutions: Advancing International Institutional Law* (Springer 2010); Clemens A Feinäugle, 'Theoretical Approaches to the Rule of Law and Its Application to the United Nations' in Clemens A Feinäugle (ed), *The Rule of Law and Its Application to the United Nations* (Nomos 2016).

45 Klabbers, 'The EJIL Foreword: The Transformation of International Organizations Law' (n 15) 10.

46 *ibid* 10.

47 See, eg, Henry G Schermers and Niels M Blokker, *International Institutional Law: Unity with Diversity* (6th edn, Brill Nijhoff 2018) 8 (international organizations 'are necessary instruments largely in the hands of states, which have been created to perform specific functions') and 15 (international organizations 'do not have a general field of operation, but are instead "functional" in the sense that they have been created to perform specific functions in a particular area in which institutionalized cooperation is desired').

48 Jan Klabbers, *An Introduction to International Organizations Law* (4th edn, Cambridge University Press 2022) 32–36.

49 See Section 4.4.2 in Chapter 4.

public authority’ particularly helpful to define the formal legal opinions of the Legal Council as a specific standard instrument in the institutional law of the United Nations.<sup>50</sup>

### 1.3. Principal Objective and Outline

This study aims to develop a legal analysis of the advisory practice of the Legal Council. At its heart, this study challenges the idea that—because of the absence of a clear basis in the Charter—opinions of the Legal Council are ‘non-binding’. In the United Nations, it is not very controversial to think that ‘[l]egal consequences can also flow from acts which are not, in the formal sense, “binding”’ and that ‘law is developed by a variety of non-legislative acts which do not seek to secure, in any direct sense, “compliance” from Assembly members’.<sup>51</sup> This study is motivated to expand the traditional focus of international organizations law on materials such as constituent treaties, secondary law and judicial decisions,<sup>52</sup> and to provide an explanation why scholars (and courts) cite opinions of the Legal Council in the first place. In the realm of the institutional law of the United Nations, the advisory practice of the Legal Council is just another example of how international law is ‘creative and innovate’ to develop dispute procedures ‘not ... fully articulated in writing’.<sup>53</sup>

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50 See Section 5.4 in Chapter 5.

51 Rosalyn Higgins, *Problems and Process: International Law and How We Use It* (Clarendon 1995) 24.

52 cf 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) 778–779.

53 *Abyei Arbitration (Government of Sudan v Sudan People’s Liberation Movement/Army)* (Final Award) (2009) XXX RIAA 145, 316 (‘In international law, the spectrum of entities designed to engage in dispute settlement varies widely... Some, such as the ICJ, are composed of legal professionals and have a highly articulated procedural regime. At the other end of the spectrum, entities (often established on an ad hoc basis) include non-lawyers and follow very informal procedures, which may not be fully articulated in writing. What is procedurally permissible in some of the decision entities is prohibited in others... International law is creative and innovative in these matters and may sometimes graft some of these procedures onto others in combinations that may appear anomalous to those unfamiliar with international law’).

In particular, it aims to recalibrate scholarly debate by moving beyond the focus on the (few) landmark judgments in international institutional law,<sup>54</sup> and to contribute to a better understanding of the day-to-day operation of law in the United Nations. The Legal Counsel is part and parcel of an institutional legal process in the United Nations, especially when considering the numerous subsidiary and treaty organs of the United Nations. In doing so, this book sheds light on the role of international bureaucracies from an explicitly legal perspective.<sup>55</sup>

But it also makes two normative claims. An opinion of the Legal Counsel should be seen as a legitimate strategic tool of politics in the United Nations, being a counterweight to the advantage of well-resourced permanent missions with legions of lawyers. This is important for countries with a small staff at their permanent missions. With this in mind, the review by the Legal Counsel of acts emanating from UN bodies could be a piece in the puzzle to operationalize the 2012 Rule of Law Declaration of the General Assembly.<sup>56</sup> This is not to say that Legal Counsel review is a true substitute for a comprehensive system of judicial review in the United Nations, but it may well be an embryonic form of legal review in the future, if only by a non-judicial, administrative legal authority.

With these objectives in mind, Chapter 2 introduces the structure of the Office of Legal Affairs. That chapter provides an overview of the numerous functions of the Office of Legal Affairs, other than its legal advisory mandate. More importantly, it analyzes the legal and governance framework, the institutional standing of the Legal Counsel with respect to the Secretary-General and the General Assembly, the Office's 'clients', and discusses the possibility of a (legal) rule of independence of the Legal Counsel when advising United Nations organs on points of law.

Chapter 3 identifies three rules that form the legal regime applicable to formal legal opinions by the Legal Counsel. In the United Nations, there is a clear distinction between informal and formal legal opinions. Under an established practice of the Organization, the Legal Counsel may only render

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54 cf Ryngaert and others (n 10).

55 For a sociolegal perspective on international bureaucracies, see Guy Fiti Sinclair, *To Reform the World: International Organizations and the Making of Modern States* (Oxford University Press 2017).

56 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.

a formal legal opinion in response to a formal request by a competent organ of the United Nations. The request must be valid under the organ's rules of procedure and must concern a legal question.

Chapter 4—the core of this study—examines and contextualizes the authority and functions of legal opinions in United Nations practice. It does so under three themes: the recognition of legal opinions as a legal precedent in United Nations practice, their strategic use in jurisdictional conflicts between different organs, and the legal review of treaty and subsidiary organs with a specialized, expert, or administrative mandate.

Having laid this analytical groundwork, Chapter 5 then situates legal opinions in the doctrine of the institutional law of the United Nations and makes two separate claims. First, it concludes that it is straightforward to define both formal and legal opinions as a means to identify an established organizational practice. Secondly, while formal legal opinions share many features of 'subsidiary means for the determination of rules of [institutional] law', it is ultimately unconvincing to assimilate the advisory function of the Legal Counsel with a judicial function. Interpretations by the Legal Counsel remain interpretations by a non-judicial (although legal) authority. Instead, it is proposed to define formal legal opinions as an autonomous standard instrument of international institutional law, one which is identified through a set of formal parameters and follows a specific legal regime. The legal effects of the standard instrument 'formal legal opinions' are twofold. In the realm of the institutional law of the United Nations, formal legal opinions are non-judicial interpretations with persuasive authority and effect a proceduralization of the *Certain Expenses* principle of autointerpretation.

