Felix Boos

The Advisory Practice of the United Nations Legal Counsel in International Institutional Law

Nomos

Beiträge zum
ausländischen öffentlichen Recht und Völkerrecht

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Abbreviations

1925 Opium Convention	International Opium Convention, 1925
1971 Convention	Convention on Psychotropic Substances, 1971
1988 Convention	Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances
2nd Cir	United States Court of Appeals for the Second Circuit
ACABQ	Advisory Committee on Administrative and Budgetary Questions
AFDI	Annuaire français de droit international
Am J Comp L	American Journal of Comparative Law
Alta L Rev	Alberta Law Review
ASEAN	Association of Southeast Asian Nations
ASIL Proc	American Society of International Law Proceedings
BYBIL	British Yearbook of International Law
CAC	Codex Alimentarius Commission
Cath ULR	Catholic University Law Review
CBD	Convention on Biological Diversity
CERD	Convention on the Elimination of All Forms of Racial Discrimination
CLCS	Commission on the Limits of the Continental Shelf
CND	Commission on Narcotic Drugs
Colum J Transnat'l L	Columbia Journal of Transnational Law
COP	Conference of Parties
Cornell Int'l LJ	Cornell International Law Journal
COSP	Conference of States Parties
Duke LJ	Duke Law Journal
ECOSOC	Economic and Social Council
EJIL	European Journal of International Law
EMBL	European Molecular Biology Laboratory
FAO	Food and Agriculture Organization of the United Nations
IAEA	International Atomic Energy Agency
IBRD	International Bank for Reconstruction and Development
ICAO	International Civil Aviation Organization
ICC	International Criminal Court
ICCD	United Nations Convention to Combat Desertification
ICJ	International Court of Justice
ICJ Pleadings	ICJ, Pleadings, Oral Arguments, Documents
ICJ Statute	Statute of the International Court of Justice, 1945
ICLQ	International and Comparative Law Quarterly

IFAD	International Fund for Agricultural Development
IJMCL	International Journal of Marine and Coastal Law
ILA	International Law Association
ILC	International Law Commission
ILM	International Legal Materials
ILO	International Labour Organization
ILOAT	ILO Administrative Tribunal
ILR	International Law Reports
IMCO	Inter-Governmental Maritime Consultative Organization
IMF	International Monetary Fund
IMO	International Maritime Organization
INCB	International Narcotics Control Board
IOLR	International Organizations Law Review
IPBES	Intergovernmental Platform on Biodiversity and Ecosystem Services
ITU	International Telecommunication Union
J History Intl L	Journal of the History of International Law
JIDS	Journal of International Dispute Settlement
Kan J & L Pub Pol'y	Kansas Journal of Law & Public Policy
LNTS	League of Nations Treaty Series
LJIL	Leiden Journal of International Law
MPEPIL	Max Planck Encyclopedia of Public International Law
MPUNYB	Max Planck Yearbook of United Nations Law
NILR	Netherlands International Law Review
OIOS	United Nations Office of Internal Oversight Services
OLA	United Nations Office of Legal Affairs
OPCW	Organisation for the Prohibition of Chemical Weapons
OXIO	Oxford International Organizations
PCIJ	Permanent Court of International Justice
Recueil des cours	Recueil des cours de l'Académie de droit international
RECIEL	Review of European, Comparative and International Environmental Law
RGDIP	Revue générale de droit international public
RIAA	Reports of International Arbitral Awards
Single Convention	Single Convention on Narcotic Drugs, 1961, as amended by the 1972 Protocol
SPLOS	States Parties to the United Nations Convention on the Law of the Sea
Staff Pap	IMF Staff Papers
UN	United Nations
UNAT	United Nations Administrative Tribunal
UNCAC	United Nations Convention against Corruption
UNCIO	Documents of the United Nations Conference on International Organization
UNCLOS	United Nations Convention on the Law of the Sea

UNDT	United Nations Dispute Tribunal
UNCTAD	United Nations Conference on Trade and Development
UNECE	United Nations Economic Commission for Europe
UNEP	United Nations Environment Programme
UNESCO	United Nations Educational, Scientific and Cultural Organization
UNGA	United Nations General Assembly
UNIDO	United Nations Industrial Development Organization
UNJYB	United Nations Juridical Yearbook
UNOPS	United Nations Office for Project Services
UNSC	United Nations Security Council
UNTS	United Nations Treaty Series
UNU	United Nations University
WHO	World Health Organization
Yale JIL	Yale Journal of International Law
VCLT	Vienna Convention on the Law of Treaties, 1969
Vereinte Nationen	Zeitschrift für die Vereinten Nationen und ihre Sonderorganisationen (German Review on the United Nations)
YBILC	Yearbook of the International Law Commission

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'.[1] This so-called principle of autointerpretation had already been endorsed by the drafters of the United Nations Charter at the San Francisco Conference.[2] 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.[3] 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),[4] and requesting legal advice from the Sixth (Legal) Committee of the General Assembly.[5] 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.[6] 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,[7] 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.[8] According to a former President of the International Court

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'.[9] 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.[10] 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,[11] and it is not infrequently misconceived.[12] 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.[13] 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.[14] 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

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.[15] Admittedly, the law regarding United Nations immunities may be in flux,[16] or domestic courts may exercise a *Kadi*-type review.[17] 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.[18]

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.[19] The paper prepared by Michael Wood draws attention to informal mechanisms for resolving disputes.[20]

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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.[21] 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.[22] 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.[23]

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.[24] The institutional law concerns aspects such as Member State-organization re-

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.[25] 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.[26]

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'.[27] 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.[28] This document has become a central document in the Western Sahara dispute,

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,[29] and being cited by the Legal Counsel of the African Union,[30] an Advocate General of the Court of Justice of the European Union and British courts.[31]

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.[32] 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.[33]

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.[34] None of these contributions, however, offer a *legal* analysis of the advisory practice of the Legal Counsel.[35]

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,[36] 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.[37]

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

34 See HCL Merillat (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,[39] 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.[40] 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.[41] 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.[42] Furthermore, the criteria for publishing opinions in the *Juridical Yearbook* remain unclear.[43] 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).[44] As Klabbers has outlined, functionalism is basically a principal-agent theory, according to which the founding States assign certain tasks to their organization.[45] 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.[46] In that sense, functionalism essentially views international organizations as instruments in the hands of States.[47] As a theory explaining the relationship between an organization and its Member States,[48] 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.[49] Consequently, this study follows the footsteps of public law approaches, and has found the formal approach of 'international

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 Counsel as a specific standard instrument in the institutional law of the United Nations.[50]

1.3. Principal Objective and Outline

This study aims to develop a legal analysis of the advisory practice of the Legal Counsel. At its heart, this study challenges the idea that—because of the absence of a clear basis in the Charter—opinions of the Legal Counsel 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'.[51] This study is motivated to expand the traditional focus of international organizations law on materials such as constituent treaties, secondary law and judicial decisions,[52] and to provide an explanation why scholars (and courts) cite opinions of the Legal Counsel in the first place. In the realm of the institutional law of the United Nations, the advisory practice of the Legal Counsel is just another example of how international law is 'creative and innovate' to develop dispute procedures 'not ... fully articulated in writing'.[53]

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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,[54] 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.[55]

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.[56] 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

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.

Chapter 2: Structure of the Office of Legal Affairs

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

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

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

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

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

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

2.1. Legal and Governance Framework

2.1.1. Statutory Framework

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

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

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

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

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

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

8 ibid para 8.1.

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

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

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

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

11 ibid ss 3.1 and 3.2.

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

13 cf 'Procedures for the Promulgation of Administrative Issuances' (n 10) s 2.2; Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945) 15 UNCIO 335 (UN Charter) Article 97; *Adrian v Secretary-General of the United Nations* (30 September 2004) AT/DEC/1183, para 6.

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

15 *Villamoran* (n 12) para 29.

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

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

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

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

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

18 Hans Corell, 'United Nations Office of Legal Affairs' in Karel Wellens (ed), *International Law: Theory and Practice – Essays in Honour of Eric Suy* (Martinus Nijhoff 1998) 305.

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

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

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

22 UNGA 'Proposed Strategic Framework for the Period 2018-2019, Part Two: Biennial Programme Plan, Programme 6: Legal Affairs' (7 June 2016) A/71/6 (Prog. 6) and Corr. 2, para 6.6.

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

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

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

It is through the budgetary process that the Office is allocated the number of staff and other resources. In 2020, the UN Office of Legal Affairs employed around 170 staff members.[27] This number has modestly risen from approximately 160 staff members in 1998.[28] Generally, the offices of legal adviser in other international organizations follow the UN model.[29] However, given the enormous scope of UN activities, legal offices in other international organizations are usually smaller. By way of example, UNESCO's legal office in 2016 consisted of eleven staff members.[30]

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

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

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

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

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

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

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

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

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

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

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

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

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

32 ibid paras 9-10.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

45 Head (n 42) 224.

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

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

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

But it is equally plain when there is an organ that sometimes exercises a judicial function. In ICAO, the Legal Bureau customarily refuses to provide legal opinions in proceedings under Article 84 of the Chicago Convention. This refusal is based on the assumption that the ICAO Council acts as a 'judicial body' under Article 84, and that it would be inappropriate for the Legal Bureau to assume, even partially, the dispute settlement function under Article 84.[49] Outside of the Article 84 context, however, there is ample advisory practice of the ICAO Legal Bureau.[50]

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

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

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

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

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

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

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

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

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

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

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

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

General Assembly.[55] In practice, the General Assembly has extended this right to the Economic and Social Council, the Trusteeship Council, most specialized agencies (except for the Universal Postal Union) and the IAEA.[56] Significantly, the Secretary-General is the only principal organ without authorization to request advisory opinions.[57] And there is little prospect for change as the Legal Counsel predicted in 2017.[58] No subsidiary organ of the United Nations has been granted the right to request an advisory opinion except for the Interim Committee of the General Assembly—a standing body that exercises the General Assembly's mandate between regular sessions.[59] Finally, treaty organs—organs established by a separate treaty but institutionally linked to the United Nations—cannot be authorized under Article 96 even though treaty organs may be United Nations organs for immunity purposes.[60] This excludes treaties and expert bodies such as the Continental Shelf Commission that are not 'organs' under Article 96 but operate under the UN umbrella as experts on mission.

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

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

56 cf [2017-2018] ICJ Yearbook 74.

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

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

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

60 This has never been tested in Court: (1945–1954) 5 Repertory of Practice of United Nations Organs 91–2 (Secretary-General considering that Human Rights Committee is not an organ for Article 96(2) purposes). See, however, CLCS 'Letter dated 11 March 1998 from the Legal Counsel, the Under-Secretary-General of the United Nations for Legal Affairs, addressed to the Commission on the Limits of the Continental Shelf' (11 March 1998) CLCS/5, para 2 (Continental Shelf Commission treaty organ for General Convention purposes).

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

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

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

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

62 Commission IV, Report of the Rapporteur of Committee IV/2, as Approved by the Committee (1945) 13 UNCIO 703, 709 ('In the course of the operation from day to day of the various organs of the Organization, it is inevitable that each organ will interpret such parts of the Charter as are applicable to its particular functions. This process is inherent in the functioning of any body which operates under an instrument defining its functions and powers'); Joseph Gold, *Interpretation: The IMF and International Law* (Kluwer Law International 1996) 3.

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

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

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

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

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

2.1.4. Independence or Appearance of Independence?

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

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

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

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

69 cf Dimitri Van Den Meerssche, 'Performing the Rule of Law in International Organizations: Ibrahim Shihata and the World Bank's Turn to Governance Reform' (2019) 32 LJIL 47, 61.

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

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

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

70 UN Charter, Article 100.

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

72 UNGA 'Letter dated 21 November 2016 from the Permanent Representative of the Syrian Arab Republic to the United Nations addressed to the Secretary-General' (23 November 2016) A/71/626-A/C.3/71/8, 3 (letter by Syria calling on the Secretary-General to rescind a legal opinion of the Office of Legal Affairs).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

85 ibid Annex I.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

97 ibid SR.9, paras 16 and 30.

98 ibid SR.9, para 32.2.

99 ibid SR.4, para 12.

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

2.1.5. Multiplicity of 'Clients' and Legal Ethics

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

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

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

102 See Chapter 3 in this book.

103 Merillat (n 101) 7.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

113 See Chapter 3, especially Section 3.3.

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

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

2.2. Functions of the Legal Counsel

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

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

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

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

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

2.2.1. Counsel, Negotiator, Advocate

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

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

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

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

118 ibid para 6.2(a).

119 ibid para 7.2(a).

120 cf Louis B Sohn, 'Procedures Developed by International Organizations for Checking Compliance' in Stephen M Schwebel (ed), *The Effectiveness of International Decisions* (Sijthoff/Oceana 1971) 53 (noting that, in relation to the ILO, Member States frequently resort to administrative interpretations without any mention to this effect in the constituent instrument of the respective international organization).

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

122 Noll (n 43) 298-9.

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

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

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

2.2.2. Administrative Functions

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

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

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

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

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

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

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

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

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

131 ibid paras 2.1 and 11.2.

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

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

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

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

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

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

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

136 General Convention, Section 21.

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

138 ibid 239.

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

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

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

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

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

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

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

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

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

144 General Convention, Section 2.

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

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

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

148 ibid 92.

149 Noll (n 43) 311–312.

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

2.2.3. Review of Proposed Regulations

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

2.2.4. Review of Tort Claims

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

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

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

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

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

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

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

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

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

155 ibid r 105.12.

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

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

2.2.5. Norm Entrepreneur and Institution Builder

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

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

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

159 Merillat (n 101) viii.

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

161 Edwards (n 42) 258–262.

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

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

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

2.2.6. Coordinating Legal Offices of the UN System

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

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

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

166 Renouf (n 41) 337.

167 ibid 337.

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

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

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

171 ibid Annex.

Chapter 3: Legal Regime of Formal Legal Opinions

3.1. Introduction

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

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

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

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

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

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

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

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

2 See Section 3.3 in this Chapter.

3 See Section 3.4 in this Chapter.

4 See Section 3.5 in this Chapter.

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

6 Ralph Zacklin, 'Les Nations Unies et la crise du Golfe' in Brigitte Stern (ed), *Les aspects juridiques de la crise et de la guerre du Golfe: Aspects de droit international public et de droit international privé* (Montchrestien 1991) 61 (stating that giving formal advice to individual Member States 'serait ... contraire à son mandat').

General, the Secretariat, funds and programmes and other organs of the United Nations' and not individual Member States.[7]

3.2. Formal and Informal Legal Advice

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

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

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

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

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

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

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

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

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

8 UNGA 'Statement by the Legal Counsel concerning the Determination by the Secretary of State of the United States of America on the Visa Application of Mr. Yasser Arafat, Made at the 136th Meeting of the Committee on Relations with the Host Country, on 28 November 1988' (29 November 1988) A/C.6/43/7, para 1.

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

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

11 UNGA 'Statement by the United Nations Legal Counsel to the Committee on Relations with the Host Country at its 295th Meeting, on 15 October 2019' (16 October 2019) A/AC.154/415, 2 (stating that the legal position 'remains unchanged from that which was provided by the then Legal Counsel to this Committee in 1988, set out in document A/C.6/43/7').

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

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

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

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

13 CBD 'Analysis on the Implication of the Use of the Term "Indigenous Peoples and Local Communities" for the Convention and its Protocols' (25 June 2014) UNEP/CBD/COP/12/5/Add.1, Annex.

14 ibid para 4.

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

16 UNGA 'Letter dated 29 September 1992 from the Under-Secretary-General, the Legal Counsel, addressed to the Permanent Representatives of Bosnia and Herzegovina and Croatia to the United Nations' (30 September 1992) A/47/485.

17 See Section 5.3 in Chapter 5.

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

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

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

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

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

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

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

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

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

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

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

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24 'Statement by the Legal Counsel concerning the Determination by the Secretary of State of the United States of America on the Visa Application of Mr. Yasser Arafat, Made at the 136th Meeting of the Committee on Relations with the Host Country, on 28 November 1988' (n 8).

25 UNGA 'Summary Record of the 51st Meeting' (5 December 1988) A/C.6/43/SR.51, para 44.

26 UNGA 'Exchange of Letters between the Chair of the Third Committee and the Assistant Secretary-General in Charge of the Office of Legal Affairs' (11 October 2018) A/C.3/73/2.

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

28 ICCD 'Legal Opinion from Parties concerning the Recommendations of the Joint Inspection Unit to the Conference of the Parties to the United Nations Convention to Combat Desertification regarding the Global Mechanism: Response from the United Nations Office of Legal Affairs' (30 September 2009) ICCD/COP(9)/9/Add.2.

29 UNEP 'Legal Advice of the Office of Legal Affairs of the United Nations concerning Certain Legal Issues pertaining to an Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services: Note by the Assistant Secretary-General for Legal Affairs to the Chair of the Plenary Meeting' (5 October 2011) UNEP/IPBES.MI/1/INF/14.

3.3. Request by a Competent United Nations Organ

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

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

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

30 'Legal Opinion from Parties concerning the Recommendations of the Joint Inspection Unit to the Conference of the Parties to the United Nations Convention to Combat Desertification regarding the Global Mechanism: Response from the United Nations Office of Legal Affairs' (n 28) Annex I, para 3; UNGA 'Verbatim Record of the 58th Plenary Meeting' (9 December 2016) A/71/PV.58, 2; 'Inter-office Memorandum to the Assistant Secretary-General, Controller Office of Programme Planning, Budget and Accounts Department of Management, concerning what Constitutes Official Documents of the United Nations that need to be Issued in the Six Official Languages of the United Nations' (n 22) para 2.

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

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

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

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

35 See Chapter 5.

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

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

It is true that Member States sometimes challenge this approach and contend that each Member State has a 'right to seek a legal opinion'.[42] Yet, when Member States directly approach the Legal Counsel for a formal written

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

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

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

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

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

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

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

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

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

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

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

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

43 cf UNGA 'Letter dated 28 December 2006 from the Representatives of Burkina Faso, El Salvador, the Gambia, Honduras, Malawi, the Marshall Islands, Nauru, Nicaragua, Palau, Saint Kitts and Nevis, Saint Vincent and the Grenadines, Sao Tome and Principe, Solomon Islands, Swaziland and Tuvalu to the President of the General Assembly' (15 March 2007) A/61/792, 1 (referring to informal consultations with the Legal Counsel after a group of Member States had requested a legal opinion directly).

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

45 'Legal Opinion from Parties concerning the Recommendations of the Joint Inspection Unit to the Conference of the Parties to the United Nations Convention to Combat Desertification regarding the Global Mechanism: Response from the United Nations Office of Legal Affairs' (n 28) Annex I, para 3.

46 ibid Annex I, para 3.

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

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

When two UN special rapporteurs wrote a letter to the World Bank in 2012 and invoked the 2006 document against the Bank,[55] the Bank made

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

48 Galit A Sarfaty, 'Why Culture Matters in International Institutions: The Marginality of Human Rights at the World Bank' (2009) 103 AJIL 647, 665; Dimitri Van Den Meerssche, 'Performing the Rule of Law in International Organizations: Ibrahim Shihata and the World Bank's Turn to Governance Reform' (2019) 32 LJIL 47, 61; Ibrahim FI Shihata, 'The Dynamic Evolution of International Organizations: The Case of the World Bank' (2000) 2 J History Intl L 217, 225.

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

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

51 Sarfaty (n 48) 665.

52 ibid 666.

53 ibid 666.

54 ibid 666–665.

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

clear that the opinion was 'not reflective of an official World Bank approach consistent with the World Bank's Board authority to interpret the Articles of Agreement'.[56]

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

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

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

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

58 ibid paras 13–15.

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

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

61 ibid para 103.

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

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

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

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

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

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

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

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

66 ibid Annex.

67 ibid Annex.

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

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

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

3.4. Procedural Validity of the Request

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

69 'Legal Opinion from Parties concerning the Recommendations of the Joint Inspection Unit to the Conference of the Parties to the United Nations Convention to Combat Desertification regarding the Global Mechanism: Response from the United Nations Office of Legal Affairs' (n 28) Annex I, para 3 (refusing a request for formal legal advice because it emanated from a group of States and adding that 'COP itself is a treaty body and not a UN organ').

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

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

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

vote precludes a formal request necessary for a legal opinion. Much like the formal request requirement, this condition is well established in the UN.[73]

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

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

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73 See, eg, UNGA 'Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples: Report of the Fourth Committee' (9 December 1978) A/33/460, para 15 ('the Fourth Committee decided, by 89 votes to 26, with 7 abstentions, to secure the advice of the Office of Legal Affairs').

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

75 ibid paras 61, 63 (emphasis added).

76 ibid para 66.

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

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

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

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

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

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

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

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

81 Bethlehem (n 80) 780.
82 ibid 794.
83 'Summary Record of the 340th Meeting' (n 40) paras 30–36.
84 ibid paras 43, 45 and 47–48.
85 ibid para 58.
86 ibid para 62.
87 ibid para 64 (emphasis added).

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

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

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

3.5. Legal Question and Discretion

3.5.1. The Necessity of a Legal Question

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

88 ibid para 64 (emphasis added).

89 ibid para 64.

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

91 ibid 2.

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

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

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

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

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

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

95 ibid para 36.

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

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

replied that 'this question does not rise to a legal question; it is not a question of a legal nature, per se.'[98]

3.5.2. Discretion to Refuse Legal Advice?

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

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

98 UNGA 'Letter dated 21 November 2016 from the Permanent Representative of the Syrian Arab Republic to the United Nations addressed to the Secretary-General' (23 November 2016) A/71/626-A/C.3/71/8.

99 cf ICJ Statute, Article 65(1) ('The Court *may* give an advisory opinion').

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

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

3.6. Form and Procedure

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

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

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

102 ibid para 3.5.

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

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

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

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

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

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

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106 See 'Legal Opinion from Parties concerning the Recommendations of the Joint Inspection Unit to the Conference of the Parties to the United Nations Convention to Combat Desertification regarding the Global Mechanism: Response from the United Nations Office of Legal Affairs' (n 28) Annex II (not mentioning informal consulations between the Office of Legal Affairs and IFAD). Nevertheless, IFAD was invited to express its views on the status of the global mechanism. See IFAD's Written Comments of 11 March 2011, para 45 in the proceedings concerning the *Judgment No 2867 of the Administrative Tribunal of the International Labour Organization upon a Complaint Filed against the International Fund for Agricultural Development* (Advisory Opinion) [2012] ICJ Rep 10.

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

108 CLCS 'Letter dated 25 August 2005 from the Legal Counsel, Under-Secretary-General of the United Nations for Legal Affairs, addressed to the Chairman of the Commission on the Limits of the Continental Shelf' (7 September 2005) CLCS/46.

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

Chapter 4: The Authority of Formal Legal Opinions in the Practice of the United Nations

4.1. Introduction

When reading through opinions of the Legal Counsel, there is a common feature that regularly appears after the Legal Counsel has chosen a legal interpretation. Most opinions include some type of disclaimer.[1] Although this is not always the case,[2] most opinions state that they are non-binding and that—echoing the *Certain Expenses* principle—it is up to the organ concerned to decide upon any doubt as to its jurisdiction.[3] This is not only a practice of the UN Legal Counsel, but also of legal advisers of specialized agencies.[4]

This reference to the principle of autointerpretation as first announced in *Certain Expenses* warrants closer inspection. In *Certain Expenses*, the Court explained that attempts to introduce a system of judicial review in the Charter were unsuccessful in 1945, and that consequently 'each [United Nations]

1 Miguel de Serpa Soares, '70 Jahre Vereinte Nationen: Der Beitrag der UN zur Fortentwicklung des Völkerrechts' [2015] Vereinte Nationen 215, 219; José E Alvarez, *The Impact of International Organizations on International Law* (Brill Nijhoff 2017) 363.

2 cf UNGA 'Exchange of Letters between the Chairman of the Fifth Committee and the Under-Secretary-General for Legal Affairs, the Legal Counsel' (5 April 2001) A/C.5/55/42; UNGA 'Exchange of Letters between the Chair of the Third Committee and the Assistant Secretary-General in Charge of the Office of Legal Affairs' (11 October 2018) A/C.3/73/2.

3 cf ECOSOC 'Legal Opinion from the Office of Legal Affairs of the Secretariat' (20 February 2015) E/CN.7/2015/14, section II, para 2; CLCS 'Letter dated 25 August 2005 from the Legal Counsel, Under-Secretary-General of the United Nations for Legal Affairs, addressed to the Chairman of the Commission on the Limits of the Continental Shelf' (7 September 2005) CLCS/46, 13; CBD 'Analysis on the Implication of the Use of the Term "Indigenous Peoples and Local Communities" for the Convention and its Protocols' (25 June 2014) UNEP/CBD/COP/12/5/Add.1, para 8.

4 WHO 'Statement made by the Director of the Legal Division at the 12th Plenary Meeting of the Thirty-second World Health Assembly' [1979] UNJYB 199; ILO 'Hours of Work and Manning (Sea) Convention, 1936' (1938) 23 Official Bulletin 30, 32; ILO 'Shipowners' Liability (Sick and Injured Seamen) Convention, 1936 (No 55)' (1950) 33 Official Bulletin 305.

organ must, in the first place at least, determine its own jurisdiction.'[5] True to this principle, a legal opinion may emphasize that 'it is a matter for the States Parties to a treaty to interpret the text, including the scope of the mandate',[6] or that the view of the Office of Legal Affairs 'should not in any way be construed as the only or definitive view'.[7]

This is, of course, rather obvious. Neither the UN Charter nor any secondary legal act invest a Legal Counsel opinion with decisive effect or clearly express a legal effect short of binding force.[8] Emphasizing this evident feature of legal opinions is a product of the peculiar standing of an official operating within an international bureaucracy. According to the *Guide to Writing for the United Nations*, international civil servants often feel the need to 'play it safe' and 'leave a back door open for escape from the critics in the front'.[9] Similarly, it is convenient to stick to an established form and style,[10] as is attested by the existence of elaborate correspondence manuals.[11]

Providing an organ with legal advice while entering such a disclaimer is somewhat peculiar. If States enlist the Office of Legal Affairs as an external actor precisely because they cannot agree on a common legal interpretation, why emphasize that they are the masters of the treaty in the first place? Emphasizing the responsibility of States in these circumstances appears to be an attempt to downplay the influence of interpretations of the Legal Counsel.

Despite their apparent non-binding nature, there have been attempts to define the authority of Legal Counsel opinions. Although some adhere to the

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5 *Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter)* (Advisory Opinion) [1962] ICJ Rep 151, 168.

6 ICCD 'Legal Opinion from Parties concerning the Recommendations of the Joint Inspection Unit to the Conference of the Parties to the United Nations Convention to Combat Desertification regarding the Global Mechanism: Response from the United Nations Office of Legal Affairs' (30 September 2009) ICCD/COP(9)/9/Add.2, Annex II, para 3.

7 'Legal Opinion from the Office of Legal Affairs of the Secretariat' (n 3) II, para 2.

8 José E Alvarez, *International Organizations as Law-makers* (Oxford University Press 2005) 437.

9 Department of Conference Services, *A Guide to Writing for the United Nations* (UN 1984) 4.

10 ibid 3.

11 eg Department of General Assembly Affairs and Conference Services, *United Nations Correspondence Manual: A Guide to the Drafting, Processing and Dispatch of Official United Nations Communications* (UN 2000) Exhibit 1 (example of a letter from the United Nations Legal Counsel).

'purely advisory' nature,[12] others attach more weight. Without giving much to their context, some describe the value of legal opinions in general terms as 'influential',[13] 'carry[ing] some weight',[14] or of a persuasive force equivalent to that of an advisory opinion of the International Court of Justice.[15] Given the sharp difference between the self-declared and perceived authority of legal opinions, they are a legitimate object of inquiry. This chapter takes a closer look at the interaction of the Legal Counsel with the various United Nations bodies that request legal advice for a more nuanced understanding.

As a first step, this study examines to what extent the opinions of the Legal Counsel are treated as precedents or authority in the United Nations as a matter of practice (and not whether this is correct as a matter of law).[16]

Secondly, this chapter examines the use of Office opinions in disputes between different UN bodies. The point here is not to so much whether an organ complies with the Legal Counsel's advice. Rather, the jurisdictional boundaries between different organs in the UN system are often fuzzy. When a body intrudes on the autonomy of another organ, the advice of the Legal Counsel is employed to contest jurisdictional claims.

Finally, the chapter explores the review function of the Legal Counsel with regard to mandate issues. It does so by considering the circumstances that have led to the request, the types of legal issues that are referred to the Legal Counsel, and the character of the organ that requests the advice. But, most importantly, it ascertains the reactions of that organ to the advice where this evidence is public.

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12 Oscar Schachter, 'The Development of International Law Through the Legal Opinions of the United Nations Secretariat' (1948) 25 BYBIL 91, 94–95.

13 Suzette V Suarez, *The Outer Limits of the Continental Shelf: Legal Aspects of their Establishment* (Springer 2008) 108.

14 See the statement of the Legal Counsel: ILC 'Provisional Summary Record of the 3371st Meeting' (3 August 2017) A/CN.4/SR.3371, 9.

15 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.

16 Authority and precedent are used in a loose manner. They describe a 'source ... cited in support of a legal argument' and '[a] decided case that furnishes a basis for determining later cases involving similar facts or issues', respectively: Bryan A Garner, *Black's Law Dictionary* (9th edn, Thomson Reuters 2009) 153, 1295.

4.2. *Recognition as Legal Precedent*

In the legal system of the United Nations, three argumentative practices explain the recognition of legal opinions as legal precedent. First and most importantly, an interpretation of the Legal Counsel was once overturned by the General Assembly. Second, Member States deem opinions of the Legal Counsel important enough to criticize—or to cite them favorably in support of their position. Lastly, the decision to publish a portion of otherwise confidential opinions in the *Juridical Yearbook* or as a UN document by itself signals a recognition of their normative value—something that is indispensable for the policy of *stare decisis* in the Office of Legal Affairs.

4.2.1. 'Overruling' of Legal Opinions by the General Assembly

It might be somewhat counter-intuitive to start with an example where formal legal advice was later overruled, but less so upon second view. In a national legal system, the highest court will sometimes interpret a law in a way that goes against the intention of the legislature or simply against the current political majority. Regardless of the differences between common law and civil law jurisdictions and the formal acceptance of the *stare decisis* doctrine, a parliament in such cases may want to change the law in a way that renders the reasoning of the judicial ruling inapplicable for future cases. Even if the legal system in question knows of no formalized *stare decisis* doctrine, lower courts and practicing lawyers treat a judicial decision as persuasive authority in future cases. It is because of these wider consequences that it makes sense for a legislature to overrule a judgment if it is not pleased with it. But is the very act of overruling that takes the authority of the highest court seriously.[17] By analogy, if the Security Council or the General Assembly occasionally overturn an opinion of the Legal Counsel, there is a good argument that legal opinions carry some authority in the day-to-day operation of law within the United Nations beyond the specific circumstances that gave rise to the original opinion request.

17 For comparative survey of mechanisms of legislative overruling see Frank Schorkopf, 'Gesetzgebung durch Höchstgerichte und Parlamente: Zu Anspruch und Versuch einer gewaltenübergreifenden Korrektur von Rechtsprechungsrecht' (2019) 144 Archiv des öffentlichen Rechts 202, 223–228.

Historically, there have been cases where the General Assembly or the Security Council acted against the Legal Counsel's opinion. For example, beginning in the 1970s the General Assembly rejected the credentials of the South African apartheid regime despite an opinion of the Legal Counsel that this was contrary to the UN Charter, but it stopped short of making that explicit in a formal resolution or decision.[18] At other times, it is not a case of a principal organ overruling the advice of the Legal Counsel but rather a conflict between the principal organs. Here, the Legal Counsel's letter on Yugoslavia's status following General Assembly resolution 47/1 comes to mind.[19] With respect to Yugoslavia, this was not an actual case of 'overruling' a Legal Counsel opinion, but rather evidence of a conflict between the Security Council and the General Assembly;[20] the Security Council took the position that Yugoslavia had ceased to exist while the General Assembly suggested that the issue was more about representation, participation, and credentials.[21]

But there is a 2001 case that neatly fits this framework of an explicit overruling by the General Assembly, and the Legal Counsel even recognized that the General Assembly had overturned an opinion once.[22] The Fifth Committee of the General Assembly requested the Legal Counsel interpretation of the phrase 'taking note' in resolutions of the General Assembly in 2001.[23] While couched in mundane terms, it is ultimately about the relationship between the General Assembly's power of the purse and organs that propose and implement policy. The issue comes up if the General Assembly instructs the Secretary-General or a subsidiary body to study a problem and suggest policy measures. The particular organ recommends a certain course of action and reports back to the General Assembly. The General Assembly in turn 'takes note' of the report. What is the meaning if the General Assembly 'takes

18 cf Leo Gross, 'On the Degradation of the Constitutional Environment of the United Nation' in *Essays on International Law and Organization* (Springer 1984) 662–663.

19 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.

20 See Henry G Schermers and Niels M Blokker, *International Institutional Law: Unity with Diversity* (6th edn, Brill Nijhoff 2018) 99–100 (and the literature cited therein).

21 James Crawford, *The Creation of States in International Law* (2nd edn, Oxford University Press 2007) 707–709.

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

23 Schermers and Blokker (n 20) 893–894.

note'? Is it a neutral expression or does it signify some form of approval? It is this question on which the General Assembly's Administrative and Budgetary Committee requested the Legal Counsel's opinion.

According to the Legal Counsel's opinion, the answer depended on whether the proposal entails financial implications. If the Secretary-General or a subsidiary organ proposes a specific action that is within existing resources, a decision by the General Assembly 'taking note' of the conduct authorizes the proposed action. Where a proposed action has financial implications, a decision 'taking note' of the action does not constitute authorization.[24] That legal opinion relied on a previous opinion dated 1988 of the Office of Legal Affairs that had adopted the same principle.[25] The Legal Counsel noted that some Member States had cited the 1988 opinion in support of their position but essentially criticized them for misunderstanding the 1988 opinion.

The most notable aspect of the opinion is its last paragraph: the Legal Counsel calls on Member States to clearly express their intention 'if Member States do not agree with the Office of Legal Affairs' opinion on the definition of the expression "taking note of"'.[26] In other words, Member States are to adapt to the opinion of the Legal Counsel (by making their intention clear) rather than the Legal Counsel modifying his interpretive presumption.

That particular legal opinion met the opposition of Member States who expressed their dissatisfaction with the opinion of the Legal Counsel. Delegations demanded that there should be a clear understanding on the meaning of 'taking note'—an issue on which the General Assembly should take an official position.[27] One delegation even stated that the Legal Counsel's opinion had created confusion on the meaning of the term, and called on the Legal Counsel to withdraw the opinion.[28]

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24 'Exchange of Letters between the Chairman of the Fifth Committee and the Under-Secretary-General for Legal Affairs, the Legal Counsel' (n 2) Annex II.

25 Quoted in UNGA 'Provisional Verbatim Record of the 99th Meeting' (5 January 1988) A/42/PV.99, 4–5. The opinion also appears in the record of the Fifth Committee: UNGA 'Summary Record of the 67th Meeting' (19 December 1987) A/C.5/42/SR.67, paras 72–73.

26 'Exchange of Letters between the Chairman of the Fifth Committee and the Under-Secretary-General for Legal Affairs, the Legal Counsel' (n 2) Annex II, 4.

27 UNGA 'Report of the Committee for Programme and Coordination on its forty-first session (11 June-6 July 2001)' (10 July 2001) A/56/16, para 458.

28 UNGA 'Verbatim Record of the 103rd Plenary Meeting' (14 June 2001) A/55/PV.103, 3.

Just five months later, the General Assembly approved an interpretative decision that if it 'takes note' of a proposal, the intention is to be neutral and to neither approve or disapprove of the proposed action.[29] This decision does not explicitly mention that it was adopted in reaction to the Legal Counsel's opinion. But the timing makes it all but certain that General Assembly decision 55/488 was a direct reaction to an interpretation that encroached on the General Assembly's budgetary authority and that ran the risk of 'accidentally' authorizing a policy without making this intention textually clear.

Decision 55/488 represented an unusual step of the General Assembly to overturn an interpretation of the Legal Counsel.[30] Although the General Assembly surprisingly chose the legal instrument of a 'decision' and not a 'resolution',[31] the case illustrates that a principal organ of the United Nations is very much aware that interpretations of the Legal Counsel shape the expectations of actors within the United Nations.[32] If the opinions of the Legal Counsel were in reality simply non-binding and carried no more force than the arguments it employed, there would be little reason for the General Assembly to take the unusual step of publicly overturning an opinion. Coming close to having authoritative quality, interpretations of the Legal Counsel thus enjoy a status within the United Nations legal system different from interpretations by legal writers.[33] Seen from this angle, decision 55/488 implicitly recognizes that an opinion of the Legal Counsel carries a certain

29 UNGA Decision 55/488 (7 September 2001) A/55/49 (Vol. III). See also UNGA 'Organization of the Seventy-Second Regular Session of the General Assembly, Adoption of the Agenda and Allocation of Items: Memorandum by the Secretary-General' (12 September 2017) A/BUR/72/1, para 52.

30 cf 'Provisional Summary Record of the 3398th Meeting' (n 22) 7.

31 General Assembly decisions and resolutions have the same legal status. Resolutions are reserved for policy recommendations and budgetary matters, whereas decisions are usually short and deal with procedural questions or elections. See Nicole Ruder, Kenji Nakano, and Johann Aeschliman, *The GA Handbook: A Practical Guide to the United Nations General Assembly* (2nd edn, Permanent Mission of Switzerland to the UN 2017) 52.

32 See Paul Tavernier, 'L'année des Nations Unies (20 décembre 1986 – 21 décembre 1987): Questions juridiques' (1987) 33 AFDI 399, 402 (who argued that the interpretation espoused in the 1988 opinion can be transposed to other General Assembly resolutions).

33 cf Louis B Sohn, 'The UN System as Authoritative Interpreter of its Law' in Oscar Schachter and Christopher C Joyner (eds), *United Nations Legal Order* (vol 1, Cambridge University Press 1995) 169 (distinguishing between authoritative and scholarly interpretations of the Charter).

measure of authority and is a legal precedent—at least if the opinion in question is a formal opinion in the public domain and not a mere internal document.

Citing decision 55/488, recent Office opinions have interpreted the meaning of 'taking note' in a neutral manner and do not rely on the distinction made in its previous opinions.[34] And this aspect can be crucial as the negotiations on an intergovernmental biodiversity platform attest. At a meeting on biodiversity and ecosystem services in June 2010, governments adopted a resolution which became to be known as the Busan Outcome. The Busan Outcome stated that 'an intergovernmental science-policy platform for biodiversity and ecosystem services should be established'.[35] The Busan Outcome did not specify any details regarding the establishment and operationalization of the platform. But it recommended that the General Assembly consider the conclusions of the Busan Outcome and take appropriate action to establish the platform.[36] With resolution 65/162, the General Assembly 'took note' of the Busan Outcome and related decisions of other international organizations, and requested the UNEP to convene a plenary meeting to fully operationalize the platform.[37]

At the first plenary meeting, there arose some debate as to the legal status of the platform.[38] The plenary, through its Chair, requested legal advice from the UN Office of Legal Affairs.[39] Formal legal advice was requested

34 UNEP 'Legal Advice of the Office of Legal Affairs of the United Nations concerning Certain Legal Issues pertaining to an Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services: Note by the Assistant Secretary-General for Legal Affairs to the Chair of the Plenary Meeting' (5 October 2011) UNEP/IPBES.MI/1/INF/14, Annex, para 5 (citing General Assembly decision 55/488 for the applicable interpretative rule instead of the 2001 opinion).

35 UNEP 'Legal Issues relating to the Establishment and Operationalization of the Platform' (21 July 2011) UNEP/IPBES.MI/1/2, para 1.

36 ibid para 2.

37 UNGA Res 65/162 (15 March 2011) A/RES/65/162, para 17.

38 'Legal Issues relating to the Establishment and Operationalization of the Platform' (n 35) para 6; UNEP 'Report of the First Session of the Plenary Meeting to Determine Modalities and Institutional Arrangements for an Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services' (10 October 2011) UNEP/IPBES.MI/1/8, para 24.

39 'Legal Advice of the Office of Legal Affairs of the United Nations concerning Certain Legal Issues pertaining to an Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services: Note by the Assistant Secretary-General for Legal Affairs to the Chair of the Plenary Meeting' (n 34).

in circumstances where States could not agree on a legal question, namely whether paragraph 17 of General Assembly resolution 65/162 had already established the science-policy platform – or not. That advice, however, had not been conveyed at the beginning of the plenary meeting. Interestingly, this raised concerns among some governments who wished to have the benefit of the legal advice before discussing any legal issues relating to the establishment of the platform, and the plenary decided to defer any discussion on the legal issues until having received the advice of the Office of Legal Affairs.[40] The decision to await the provision of formal legal opinions indicates that delegations considered the advice important enough that no decision could be taken without having considered the view of the Office of Legal Affairs.

The issue was whether the General Assembly had already established the platform by 'taking note' of the Busan Outcome in resolution 65/162. According to the Office of Legal Affairs, the answer was clearly no. Relying on General Assembly decision 55/488, it recalled that the term 'takes note' indicates neither approval nor disapproval. Consequently, the General Assembly did not decide to establish the platform through resolution 65/162.[41] Secondly, the Office interpreted the Busan Outcome itself, and ruled that the Busan Outcome document had only recommended the establishment of the platform, but did not take a decision to establish the platform itself.[42] In addition to the Office of Legal Affairs opinion, the UNEP Secretariat submitted a supplementary opinion 'on the basis of the legal advice of the Office of Legal Affairs' which reached the same conclusion.[43]

Despite the opinion, some States took the view that the General Assembly had already established the platform through paragraph 17 of resolution

40 'Report of the First Session of the Plenary Meeting to Determine Modalities and Institutional Arrangements for an Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services' (n 38) para 16.

41 'Legal Advice of the Office of Legal Affairs of the United Nations concerning Certain Legal Issues pertaining to an Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services: Note by the Assistant Secretary-General for Legal Affairs to the Chair of the Plenary Meeting' (n 34) Annex, para 5.

42 ibid Annex, para 6.

43 UNEP 'Legal Opinion of the Secretariat concerning Certain Legal Issues relating to the Establishment and Operationalization of the Platform' (3 October 2011) UNEP/IPBES.MI/1/INF/9, paras 1, 4.

65/162.[44] According to them, 'Member States present at the current meeting were not bound to follow the various legal opinions'.[45] Many governments disagreed. For them, the legal opinions 'clearly showed that the platform had not yet been established.'[46] For others, the establishment of the platform was not a question of law, but could be affected by the delegations assembled in the ad hoc meeting.[47] Eventually, the decision was postponed as the delegations could not reach a consensus on the legal status of the platform.[48]

For the second plenary meeting, the UNEP Secretariat submitted a further paper on the establishment and operationalization of the platform. That paper was prepared 'taking fully into account the legal opinion of the Office of Legal Affairs of the United Nations dated 4 October 2011'.[49] When delegations considered that paper, an overwhelming majority adopted a resolution establishing the platform as an independent intergovernmental body at that second plenary session.[50] While that resolution does not specifically refer to the legal opinions, it concurred with the essence of those opinions in that General Assembly resolution 65/162 had not established the platform and some further legal act was required. But the legal advice continues to play a role as it provided a menu of options on the link between the platform and the United Nations.[51]

As the legal advice on the establishment of the biodiversity platform demonstrates, the Office of Legal Affairs faithfully follows the decision

44 'Report of the First Session of the Plenary Meeting to Determine Modalities and Institutional Arrangements for an Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services' (n 38) para 25.

45 ibid para 25.

46 ibid para 26.

47 ibid para 27.

48 ibid para 30.

49 UNEP 'A Possible Way Forward for the Establishment and Operationalization of the Platform: Note by the Secretariat' (10 April 2012) UNEP/IPBES.MI/2/INF/5, Annex, para 1.

50 UNEP 'Report of the Second Session of the Plenary Meeting to Determine Modalities and Institutional Arrangements for an Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services' (18 May 2012) UNEP/IPBES.MI/2/9, paras 34–5 and Annex I, para 1.

51 That question had been left open: 'Report of the Second Session of the Plenary Meeting to Determine Modalities and Institutional Arrangements for an Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services' (n 50) Annex I, para 2; IPBES 'Link between the Platform and the United Nations System: Note by the Secretariat' (13 November 2012) IPBES/1/11, para 5.

overturning its prior interpretations. Whatever authority its legal opinions may enjoy, it is always subject to being overruled by the General Assembly (or the Security Council). But the rarity of overturning interpretations of the Legal Counsel reinforces their influential status in the institutional and legal practice of the United Nations. The General Assembly may take similar steps in the future. A 2012 report by the General Assembly noted 'concerns [by some Member States]... regarding the nature of some legal opinions provided by the Office of Legal Affairs that contradicted some very sensitive United Nations resolutions'.[52] Along the same line, some Member States argued that the General Assembly should address this issue, arguing that these legal opinions were 'negatively affecting the deliberation and decision-making processes of Member States', with some States advocating that this issue should be addressed by the General Assembly.[53] Even for a principal and political organ, the interpretations of the Legal Counsel are too important to be ignored.

4.2.2. Criticism and Reliance of States and UN Bodies

The idea that the advice of the Legal Counsel carries some weight in United Nations practices is corroborated when Member States, usually in the minority, strategically demand the Legal Counsel's advice to contest a political decision of the majority. It is in these circumstances that Member States lobby for a legal opinion by the Legal Counsel as an actor external to the deliberations in the hope of lending greater credibility to their legal case that the majority decision is wrong. When that strategy does not pay off, those States often feel the need to put their opposition on record to the view of the Office of Legal Affairs. A good example is the request by Burundi in 2018 on the competence of the Third Committee to hear the Chair of the Commission of Inquiry on Burundi. Burundi had strongly lobbied for such an opinion.[54] But when the legal opinion was issued, Burundi claimed that

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

53 ibid para 162.

54 See Section 3.3 of Chapter 3.

the 'procedure for its issuance had been irregular and obscure' and that the opinion was 'politically motivated'.[55]

But there are similar sustained critiques. In 2006, several States requested to add two pro-Taiwan items to the agenda of the General Assembly. The first proposal related to '[a] proactive role for the United Nations in maintaining peace and security in East Asia', the second concerned the 'Question of the representation and participation of the 23 million people of Taiwan in the United Nations'.[56]

According to the sponsoring States, the General Committee of the General Assembly 'chose to amalgamate these quite distinct proposals into one item and to arbitrarily limit the number of speakers'.[57] Such a political judgment, the members argued, was without precedent, violated rules of procedure and went against the provisions of the Charter—there was simply no cogent justification to combine these two distinct issues into one, and there was a suspicion that the majority had simply appeased China.[58] At the end of the letter, the Member States 'require[d] a legal opinion to confirm the views in the debate to which we are entitled' and asked for consultations with the Legal Counsel.[59]

In response, it does not appear that the Office of Legal Affairs issued a formal opinion, probably because the minority could not get the General Committee to formally request such advice.[60] But during informal consultations, the Office of Legal Affairs suggested that the co-sponsors 'had failed to raise points of order to protest the errors we asserted in our letter of 3 Octo-

55 UNGA 'Summary Record of the 19th Meeting' (6 December 2018) A/C.3/73/SR.19, para 4.

56 UNGA 'Organization of the Sixty-First Regular Session of the General Assembly, Adoption of the Agenda and Allocation of Items: Memorandum by the Secretary-General' (11 September 2006) A/BUR/61/1, para 52 (items 41) and para 56 (item 155).

57 UNGA 'Identical Letters dated 3 October 2006 from the Permanent Representatives of Burkina Faso, El Salvador, the Gambia, Honduras, Malawi, the Marshall Islands, Nauru, Nicaragua, Palau, Saint Kitts and Nevis, Saint Vincent and the Grenadines, Sao Tome and Principe, Solomon Islands, Swaziland and Tuvalu to the United Nations addressed to the Secretary-General and the President of the General Assembly' (23 October 2006) A/61/534, 1.

58 ibid.

59 ibid 2.

60 See Section 3.3 of Chapter 3.

ber.'[61] To the co-sponsors, the Office had gotten the deliberative nature of the United Nations wrong.[62] But they felt it necessary to put their opposition to the interpretation of the Office of Legal Affairs on record: '[w]e will therefore agree to disagree with the Office of Legal Affairs on its narrow, restrictive, and, in our view, incorrect, interpretations of the rules of procedure.'[63]

Another episode concerned the use of the term 'Syrian regime' in a draft resolution of the Third Committee of the General Assembly. The Syrian delegation opposed this term in the strongest terms and asked for clarification from the Office of Legal Affairs whether it was permissible to refer to the government of a Member State as a 'regime'.[64] The Office replied that there was precedent for using the term 'Syrian regime' in a previous resolution and that the Syrian request did not pose a strictly legal issue. Accordingly, the Office recommended that the Third Committee proceed with the consideration of the draft resolution.[65] Syria went at length to criticize the opinion, saying that that the equal sovereignty of States demanded that they be called by their official names and that insulting language such as the term 'regime' violated the Charter.[66]

It is apparent that Syria recognized that the unfavorable opinion would become a precedent. It attacked the Office of Legal Affairs as lacking the necessary independence, professionalism, and respect for the rule of law.[67] It circulated its concerns as to the 'invalidity of this legal opinion' as a United Nations document. Otherwise the opinion 'will establish a new era at the United Nations'. According to Syria, the Secretary-General had to rescind the opinion and—interestingly—order the issuance of a new opinion based

61 UNGA 'Letter dated 28 December 2006 from the Representatives of Burkina Faso, El Salvador, the Gambia, Honduras, Malawi, the Marshall Islands, Nauru, Nicaragua, Palau, Saint Kitts and Nevis, Saint Vincent and the Grenadines, Sao Tome and Principe, Solomon Islands, Swaziland and Tuvalu to the President of the General Assembly' (15 March 2007) A/61/792.

62 ibid.

63 ibid.

64 UNGA 'Summary Record of the 48th Meeting' (10 January 2017) A/C.3/71/SR.48, para 75.

65 UNGA 'Letter dated 21 November 2016 from the Permanent Representative of the Syrian Arab Republic to the United Nations addressed to the Secretary-General' (23 November 2016) A/71/626-A/C.3/71/8.

66 'Summary Record of the 48th Meeting' (n 64) para 79.

67 ibid para 79.

on the Syrian view of Article 2(1) of the Charter.[68] The concerns of Syria that the legal opinion would create a precedent were more than justified when Saudi Arabia referred to the opinion to justify its position that the term 'Syrian regime was permitted' two years later.[69]

Finally, the authority of opinions of the Legal Counsel is equally implied when Member States, UN organs and officials favorably cite a legal opinion published in the *Juridical Yearbook* or as a UN document as a precedent in support of whatever legal or political argument they make. Examples include the Special Rapporteur on Extreme Poverty and Human Rights,[70] an independent panel on sexual abuse by UN peacekeeping forces,[71] the United States,[72] or a group of European States.[73]

4.2.3. Publicity of Opinions and Stare Decisis

The legal authority of the Legal Counsel is an unspoken premise of the practice to publish opinions of major importance. In the early years of the UN,[74] the General Assembly mandated the publication of some legal opinions

68 'Letter dated 21 November 2016 from the Permanent Representative of the Syrian Arab Republic to the United Nations addressed to the Secretary-General' (n 65).

69 UNGA 'Summary Record of the 50th Meeting' (16 January 2019) A/C.3/73/SR.50, para 9.

70 UNGA 'Report of the Special Rapporteur on Extreme Poverty and Human Rights' (26 August 2016) A/71/367, para 30.

71 UNGA 'Report of an Independent Review on Sexual Exploitation and Abuse by International Peacekeeping Forces in the Central African Republic' (23 June 2016) A/71/99, paras 273–276.

72 UNGA 'Letter dated 27 March 1997 from the Representative of the United States of America on the Committee on Relations with the Host Country addressed to the Chairman of the Committee' (31 March 1997) A/AC.154/309, Annex; UNGA 'Letter dated 20 September 2005 from the Permanent Representative of the United States of America to the United Nations addressed to the Chairman of the Committee' (22 September 2005) A/AC.154/363, Annex.

73 UNCAC 'Report of the Conference of the States Parties to the United Nations Convention against Corruption on its Fifth Session, held in Panama City from 25 to 29 November 2013' (29 January 2014) CAC/COSP/2013/18, para 17; 'Summary Record of the 19th Meeting' (n 55) para 5.

74 UNGA Res 1814 (XVII) (18 December 1962) A/RES/1814(XVII).

that are of general interest and continuing significance.[75] The idea behind the publication of legal opinions in the *Juridical Yearbook* is an attempt to broaden the availability of practice of international organizations.[76] But it implies an implicit recognition of their legal authority and a particular standing of the Legal Counsel to produce 'law'. This implication of the General Assembly's decision to publish select legal opinions in the *Juridical Yearbook* or as an official UN document becomes clear if it is compared to the European Union. Under EU law, legal opinions of the Commission's Legal Service are confidential and must be removed from any case file before the Court of Justice.[77]

Sometimes States employ the publication of a statement of the Legal Counsel as a separate United Nations document as a tool to create a precedent and bolster their legal position.[78] This occurred with regard to the long-standing disagreement between the United Nations and the U.S. on the refusal of visa under the Headquarters Agreement on grounds of national security.[79] During the 1988 deliberations of the Host Country Committee, the Legal Counsel made an oral statement concluding that the U.S. was under an unconditional obligation to facilitate the entry of Mr. Arafat to the headquarters district.[80]

75 UNGA 'Question of the Publication of United Nations Juridical Yearbook: Report of the Secretary-General' (21 July 1959) A/4151, para 55; UNGA 'United Nations Programme of Assistance in the Teaching, Study, Dissemination and Wider Appreciation of International Law: Report of the Secretary-General' (10 October 2013) A/68/521, para 42, fn 16.

76 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, 29.

77 Judgment of 31 January 2020 C-457/18 *Slovenia v Croatia* ECLI:EU:C:2020:65, paras 64–73; Order of 23 October 2002 C-445/00 *Austria v Council* ECLI:EU:C:2002:607, para 12; Gregorio G Clariana, 'The Work of the Legal Adviser of International Organisations, With Special Reference to the European Union' in CJ Piernas (ed), *The Legal Practice in International Law and European Community Law* (Brill 2006) 247.

78 See, eg, UNGA 'Summary Record of the 25th Meeting' (5 December 1978) A/C.4/33/SR.25, paras 76–78.

79 The dispute began in 1988 when the U.S. denied a visa request by the Chairman of the Palestinian Liberation Organization. See Elizabeth Zoller, 'The National Security of the United States as the Host State for the United Nations' (1989) 1 Pace YB Int'l L 127 and William Michael Reisman, 'The Arafat Visa Affair: Exceeding the Bounds of Host State Discretion' (1989) 83 AJIL 519.

80 UNGA 'Statement by the Legal Counsel concerning the Determination by the Secretary of State of the United States of America on the Visa Application of Mr. Yasser

The United Arab Emirates asked to issue the 1988 statement *in extenso* as a separate document.[81] The Legal Counsel's statement was accordingly 'circulated pursuant to a decision of the Sixth Committee at its 51th meeting, 29 November 1988'.[82] Subsequently, a General Assembly resolution '[e]ndors[ed] the opinion of the Legal Counsel of the United Nations',[83] a statement that is usually applied to advisory opinions of the ICJ.[84]

The 1988 statement became the basis for the Legal Counsel to reaffirm the position of the UN when the issue arose again in 2019.[85] The separate publication of the 2019 statement of the Legal Counsel was initiated by the Russian Federation, in part to make the case for triggering arbitration under section 21 of the Headquarters Agreement.[86] Since its publication as a separate document, a General Assembly resolution and a working paper by Syria have invoked the 2019 statement.[87]

The policy of making opinions publicly available—whether as a UN document or more systematically in the *Juridical Yearbook*—is presumably

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Arafat, Made at the 136th Meeting of the Committee on Relations with the Host Country, on 28 November 1988' (29 November 1988) A/C.6/43/7. The General Assembly relocated for part of its session to Geneva as the U.S continued to refuse a visa to the PLO Chairman after having been asked to reconsider its decision by the General Assembly. See UNGA Res 43/49 (2 December 1988) A/RES/43/49.

81 UNGA 'Summary Record of the 51st Meeting' (5 December 1988) A/C.6/43/SR.51, para 44.

82 'Statement by the Legal Counsel concerning the Determination by the Secretary of State of the United States of America on the Visa Application of Mr. Yasser Arafat, Made at the 136th Meeting of the Committee on Relations with the Host Country, on 28 November 1988' (n 80).

83 UNGA Res 43/48 (30 November 1988) A/RES/43/48.

84 cf 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) 219–220.

85 UNGA 'Statement by the United Nations Legal Counsel to the Committee on Relations with the Host Country at its 295th Meeting, on 15 October 2019' (16 October 2019) A/AC.154/415.

86 UNGA 'Report of the Committee on Relations with the Host Country' (29 October 2019) A/74/26, para 157.

87 UNGA Res 74/195 (30 December 2019) A/RES/74/195, paras 6, 8 and 15; UNGA 'Privileges and Immunities enjoyed by Representatives of the Members of the United Nations and Officials of the Organization that are necessary for the Independent Exercise of their Functions in Connection with the Organization: Working Paper submitted by the Syrian Arab Republic' (10 February 2020) A/AC.182/L.155, 5.

motivated by two considerations. Member States want to get a better grasp of the views of the Legal Counsel. Through this lens, the Legal Counsel inevitably becomes a producer of legal knowledge.[88] Secondly, there may be a desire for the greater predictability of the interpretations of the Legal Counsel and the Secretariat more generally. The decision to publish some opinions invariably forces the Legal Counsel to give weight to earlier interpretations, be it as a matter of formal *stare decisis* or of bureaucratic imperatives.

The last point appears to have succeeded to the effect that the Office of Legal Affairs appears to follow a unstated policy of *stare decisis*. A secretary of the Fifth Committee stated without reservation that an 'opinion already expressed by the Office of Legal Affairs remained valid unless and until it was contradicted by a subsequent opinion.'[89]

As a former Legal Counsel elaborated, the first task for the Office when asked to give legal advice is to research whether an earlier legal opinion on the same or similar issue exists. If a legal opinion on a similar or the same issue has been delivered in the past, there is a presumption that earlier legal advice should be upheld. This is a demand of consistency as Member States rely on the Legal Counsel's advice. But there may be circumstances that demand a different answer. In that case, the Legal Counsel must carefully explain why she or he has reached a different answer than what was previously established.[90]

And there are indeed many opinions that follow an earlier opinion, sometimes even explicitly extending an 'established precedent' because of similar circumstances.[91] The culture of precedent reflects a bureaucratic imperative. If the Legal Counsel upholds an earlier opinion, this will ensure a measure of protection if Member States criticize that opinion. This logic also explains

88 cf Benedict Kingsbury, 'International Courts: Uneven Judicialisation in Global Order' in James Crawford and Martti Koskenniemi (eds), *The Cambridge Companion to International Law* (Cambridge University Press 2012) 219 (describing international courts as producers of legal knowledge).

89 UNGA 'Summary Record of the 53rd Meeting' (5 April 2001) A/C.5/55/SR.53, para 16.

90 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.

91 cf 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 5.

why the General Assembly took the extraordinary step to overturn the Legal Counsel's opinion on the meaning of the term 'taking note': the influence of the Legal Counsel and the culture of precedent might have otherwise entrenched an interpretation of secondary law that the General Assembly deemed undesirable.[92] Indeed, the use of legal opinions as precedents is so routine that sometimes a subsidiary body in its formal request for legal advice refers to a prior opinion to assess how it applies to the disputed legal issue before it.[93]

4.3. Strategic Appeal to Opinions in Inter-Organ Disputes

Jurisdictional disputes between United Nations bodies are inevitable in its institutional life. Because of the diffused allocation of authority within the Organization and the lack of remedies comparable to domestic constitutional and administrative law, there is no clear way to resolve them. In negotiations and successive correspondence, an organ invokes its enabling statute while the other body responds by pointing to its legal mandate. In such situations, recourse is often made to the advice of the Legal Counsel to provide greater legitimacy to the claim of one organ. The point here is that the request for legal advice comes from an organ that perceives the action of another organ as encroaching on its legal mandate. Unlike in a situation of 'pure' Legal Counsel review discussed later,[94] the request for legal advice and the reviewed act do not stem from the same body.

4.3.1. Opposing or Ignoring Legal Advice

The strategic request of legal advice in inter-organ disputes does not always lead to a negotiated solution based on the legal advice. There are instances in which the other organ does not follow or simply ignores the advice of the Legal Counsel.

The first example concerns the remuneration of members of the International Narcotics Control Board (INCB). Under the 1961 Single Convention

92 See Section 4.2.1 in this Chapter.

93 See UNCAC 'Legal Opinion from the Office of Legal Affairs' (26 August 2010) CAC/COSP/IRG/2010/9, para 7.

94 See Section 4.4 in this Chapter.

on Narcotic Drugs, INCB members shall receive an 'adequate remuneration as determined by the General Assembly'.[95] In 2002, the General Assembly reduced the annual pay from 3,000 to 1 U.S. dollar.[96] For the INCB, this decision was contrary to the 1961 Single Convention,[97] and it suggested to the Economic and Social Council to request an opinion from the Office of Legal Affairs.[98] The ECOSOC President was sympathetic to the situation of INCB, writing that 'a legal opinion of the Office of Legal Affairs ... could be the eventual basis for, in effect, asking the General Assembly to amend its decision'.[99] In response to the request by the Economic and Social Council, the Legal Counsel opined that the General Assembly's decision 'may be viewed as not corresponding to the legislative intent of the relevant provision of the 1961 Convention.'[100] Although the opinion mentioned other considerations that might lead to a different conclusion, the INCB wrote to the General Assembly that the opinion 'states clearly' that the remuneration be adequate.[101] Despite these arguments, the remuneration of INCB members is still 1 U.S. dollar per year,[102] and there is no information publicly available that indicates the reasons for the General Assembly's opposition to the legal opinion or even the refusal to consider the issue.

A second case of outright opposition to an Office opinion arose in the context of a disagreement between the Office of Internal Oversight Services

95 Single Convention on Narcotic Drugs (adopted 30 March 1961, entered into force 13 December 1964) 520 UNTS 204, as amended by Protocol amending the Single Convention on Narcotic Drugs, 1961 (adopted 25 March 1972, entered into force 8 August 1975) 976 UNTS 3 (Single Convention) Article 10(6).

96 UNGA 'Letter dated 29 March 2006 from the President of the General Assembly addressed to the Chairman of the Fifth Committee' (6 April 2006) A/C.5/60/29, Annex; UNGA Res 35/218 (17 December 1980) A/RES/35/218, para 1 (setting the annual pay at 3,000 U.S. dollars).

97 'Letter dated 29 March 2006 from the President of the General Assembly addressed to the Chairman of the Fifth Committee' (n 96) Enclosure.

98 ECOSOC 'Honorariums Payable to Members of the International Narcotics Control Board: Note by the Secretariat' (16 July 2003) E/2003/96, Annex I.

99 ibid Annex II.

100 'Letter dated 29 March 2006 from the President of the General Assembly addressed to the Chairman of the Fifth Committee' (n 96) Attachment.

101 ibid Enclosure and Attachment.

102 ECOSOC 'Election of one Member of the International Narcotics Control Board from among Candidates Nominated by Governments: Note by the Secretary-General' (17 November 2021) E/2022/9/Add.2, Annex II, para 5.

(OIOS) and the UN Compensation Commission (UNCC).[103] Created by the Security Council, the UNCC has been described as a political organ that 'performs an essentially fact-finding function of ...resolving disputed claims', one that may in some respect involve a 'quasi-judicial function'.[104] OIOS was created by the General Assembly as an operationally independent office under the authority of the Secretary-General to conduct internal audits to review the use of financial resources and to make appropriate recommendations.[105] As framed in an OIOS report, the issue was whether OIOS had the authority to make recommendations to the Commission concerning the applicable law, the application of that law to claims, the sufficiency of evidence and the organization of the UNCC.[106] Initially, OIOS had only audited the functioning and finances of the UNCC but not claims awards.[107] Beginning in 2001, OIOS recommended changes in claims processing that resulted in overcompensation and were, according to OIOS, due to the inconsistent application of the UNCC's own methodology. The UNCC rejected these recommendations,[108] mainly because there were factors other than 'accountancy aspects' that determined the exact amount due to claimants.[109]

In 2002, the UNCC requested an opinion of the Office of Legal Affairs on the appropriate scope of OIOS audits of the processing and resolution of

103 The episode is described in: US Government Accountability Office, *United Nations: Lessons Learned from Oil for Food Program Indicate the Need to Strengthen UN Internal Controls and Oversight Activities* (GAO-06-330, 2006) 34–5.

104 See UNSC 'Report of the Secretary-General pursuant to Paragraph 19 of Security Council Resolution 687 (1991)' (2 May 1991) S/22559, para 20; Rosalyn Higgins and others, *Oppenheim's International Law: United Nations* (Oxford University Press 2017) 1254–1278; Thomas A Mensah, 'United Nations Compensation Commission (UNCC)' in Rüdiger Wolfrum (ed), *MPEPIL* (online edn, Oxford University Press 2011).

105 UNGA Res 48/218 B (12 August 1994) A/RES/48/218 B, paras 5(a), (c)(ii) and c(v); Schermers and Blokker (n 20) 741–742.

106 UNGA 'Report of the Secretary-General on the Activities of the Office of Internal Oversight Services' (9 September 2005) A/60/346, para 73.

107 Ronald J Bettauer, 'Policy Issues Surrounding the Creation and Operations of the UNCC' in Timothy J Feighery, Christopher S Gibson, and Trevor M Rajah (eds), *War Reparations and the UN Compensation Commission: Designing Compensation after Conflict* (Oxford University Press 2015) 21.

108 UNGA 'Report of the Office of Internal Oversight Services' (4 October 2002) A/57/451, paras 37–38.

109 UNGA 'Report of the Office of Internal Oversight Services' (11 September 2003) A/58/364, para 37.

claims. The ensuing opinion concluded that 'OIOS functions do not extend to the examination, review and appraisal of decisions that are the results of a legal process. Likewise, they clearly do not include the examination, review and appraisal of decision-making that takes place in the course and as an integral part of such a process'.[110] The opinion concluded that OIOS may only audit the 'computation by panels of the amounts of compensation which they recommend to be paid', but that 'it would not be proper for OIOS to review those aspects of the work of panels which are constituent elements of a legal process'.[111] OIOS simply stated that it would continue its audits 'in order to protect the interests of the Organization',[112] and to improve the quality of the claims process.[113]

At the heart of the dispute was a clash between a juridical and an auditing paradigm, and the somewhat unique status of the Commission.[114] In 2003, both organs concluded a memorandum of understanding.[115] Pursuant to that memorandum, OIOS was required to take into account the Office opinion (which was annexed to the memorandum) in its audit of claims processing.[116] Despite the memorandum, OIOS continued to its oversight, maintaining that

110 'Report of the Secretary-General on the Activities of the Office of Internal Oversight Services' (n 106) para 73(a).

111 Quoted in 'Report of the Office of Internal Oversight Services' (n 109) para 38. The opinion was not published as a UN document. Excerpts are reproduced in Bettauer (n 107) 22. It can be fully accessed at: United Nations Archives. Reference code S-1095-0021-04-00013. Letter from Hans Corell, Under-Secretary-General for Legal Affairs, to Rolf G. Knuttson, Executive Director, United Nations Compensation Commission (27 November 2002) <https://search.archives.un.org/s-1095-0021-04-00013> accessed 7 July 2024.

112 'Report of the Office of Internal Oversight Services' (n 109) para 38.

113 UNGA 'Report of the Office of Internal Oversight Services' (27 October 2004) A/59/359, para 56.

114 'Report of the Secretary-General on the Activities of the Office of Internal Oversight Services' (n 106) para 74. In his opinion, the Legal Counsel cited the Commission's Provisional Rules for Claims Procedure to demonstrate that some aspects of the Commission's work constituted a legal process. See eg UNCC 'Provisional Rules for Claims Procedure' (1992) S/AC.26/1992/INF.1, Article 31 (applicable law) and Article 35(1) (rules of evidence).

115 UNSC 'Letter dated 27 June 2003 from the President of the Governing Council of the United Nations Compensation Commission addressed to the President of the Security Council' (24 July 2003) S/2003/755, 4.

116 'Report of the Secretary-General on the Activities of the Office of Internal Oversight Services' (n 106) paras 74(a) and 76.

General Assembly resolutions required an audit of the entire claims process and that the Commission's position ran against these resolutions.[117] It seems that by 2008 both OIOS and the UNCC came to a tacit understanding that OIOS audits were limited to accounting matters.[118]

These two cases are instructive because they show that UN bodies do not always defer to the Legal Counsel's advice. One may only speculate about the reasons. The obvious similarity is that both cases concerned budgetary and financial matters, although there are opinions with financial implications that were ultimately followed by the organ concerned.[119] Another is that the requesting body did so to limit an alleged intrusion on its mandate by another, more powerful organ (the General Assembly, a principal organ, in the case of the INCB, and the OIOS, a centerpiece of the UN reform agenda in the 1990s in the case of the UNCC).[120] Unlike in the many cases that will be surveyed later,[121] neither the General Assembly nor OIOS requested legal advice to review the legality of its own action.

But non-compliance is not the only perspective here. Rather the two episodes show that an organ who feels that it actions are second-guessed or intruded on by another organ regards the advice of the Legal Counsel as a useful tool that may help bolster its position with a view to eventually change the behavior of the other organ. Even if the desired change does not always happen (as in the INCB case) or the reasons for change may remain somewhat unclear (as in the UNCC case), the strategic use of legal opinions in inter-organ disputes attests to the Legal Counsel's influence in institutional matters.

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117 UNGA 'Report of the Office of Internal Oversight Services: Part One' (15 August 2006) A/61/264 (Part I), para 92.

118 Bettauer (n 107) 25; UNGA 'Activities of the Office of Internal Oversight Services for the Period from 1 July 2007 to 30 June 2008' (18 August 2008) A/63/302 (Part I), para 68; UNSC 'Letter dated 10 April 2008 from the President of the Governing Council of the United Nations Compensation Commission to the President of the Security Council' (22 April 2008) S/2008/265, 3.

119 See Section 4.3.2 in this Chapter on the emoluments of ICJ judges.

120 cf Alexandru Grigorescu, 'International Organizations and their Bureaucratic Oversight Mechanisms: The Democratic Deficit, Accountability and Transparency' in Bob Reinalda (ed), *Routledge Handbook of International Organization* (Routledge 2013) 182; Joachim Müller, *Reforming the United Nations: A Chronology* (Brill Nijhoff 2016) 27.

121 See Section 4.4 in this Chapter.

4.3.2. Eventual Explicit or Implied Compliance with Legal Advice

The strategic use of legal opinions in inter-organ disputes is even more obvious in situations where a review by the Legal Counsel formed the basis for an organ to eventually adjust its challenged act. In 2007, General Assembly resolution 61/262 set, for newly elected judges of the International Court of Justice, a salary lower than that for sitting judges.[122] Before the adoption of that resolution, the President of the Court had expressed the Court's concerns that the proposed salary scheme would create inequality among judges.[123] The Registrar had sent a similar letter to the Secretariat's Office of Human Resources Management.[124] The Office of Human Resources Management sought the views of the Office of Legal Affairs to reply to the letter of the Registrar.[125] In his memorandum the Legal Counsel found that the concerns of the Court were 'justified' as the salary reform undermined the principle of equality of members of the Court as reflected in Article 31(6) of the Statute. The opinion noted that it was 'very difficult to reconcile' the principle of equality of members and the prohibition of lowering a sitting judge's salary (Article 31(5) of the Statute) in view of the staggered election of judges. But the Legal Counsel stopped short at calling the salary reform outright illegal, instead merely concluding that the principle of equality of treatment should be duly taken into account.[126]

The opinion had a sizable impact on Member States. The Advisory Committee on Administrative and Budgetary Questions (ACABQ) noted that the Legal Counsel had 'largely concurred' with the Court's concerns regarding resolution 61/262. Notably, the ACABQ could not 'but note that this interpretation could affect the exercise of the General Assembly's mandate under Article 32 of the Statute of the Court'.[127] Accordingly, the ACABQ laid out

122 UNGA Res 61/262 (3 May 2007) A/RES/61/262, paras 7–8. For further details, see Higgins and others (n 104) 1199–1203.

123 UNGA 'Conditions of Service and Compensation for Officials other than Secretariat Officials: Members of the International Court of Justice and Judges and Ad Litem Judges of the International Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda' (8 November 2007) A/62/538, para 1.

124 ibid Annex I, para 1.

125 ibid Annex I, para 6.

126 ibid Annex I, paras 12–14.

127 UNGA 'Thirty-seventh Report of the Advisory Committee on Administrative and Budgetary Questions on the Programme Budget for the Biennium 2008-2009' (12 March 2008) A/62/7/Add.36, para 13.

two proposals from the Secretary-General to remedy the concerns.[128] In the debates of the Fifth Committee, many delegations agreed that resolution 61/262 undermined the principle of judicial equality, with some explicitly pointing to the Legal Counsel's advice.[129] Ultimately, the General Assembly decided in 2008 to set the annual pay of judges equally.[130] In recounting this dispute, the President of the Court referred to the Legal Counsel's advice and stated that the 'interposition of the Secretary-General and his staff turned out to be decisive', presumably referring to the Legal Counsel.[131]

A second example was a disagreement between the UNCTAD Secretariat and a subsidiary body of UNCTAD that related to the respective rights in the budgetary process. In that case, the Working Party on the Medium-term Plan and the Programme Budget (Working Party) requested detailed information on financial and resource allocation from the UNCTAD Secretariat. The Working Party was a subsidiary body of the Trade and Development Board (Board) which is composed of States. The Board, in turn, is the permanent organ of UNCTAD that carries out the functions of UNCTAD when the Conference is not in session.[132] The UNCTAD Secretariat, on the other hand, is administratively part of the UN Secretariat.[133]

Although it was common ground between the UNCTAD Secretariat and the Working Party that the Secretary-General of UNCTAD must forward the program budget, the UNCTAD Secretariat refused to provide any detailed financial information.[134] According to the Working Party, such detailed financial tables and information were necessary to properly review the program

128 'Thirty-seventh Report of the Advisory Committee on Administrative and Budgetary Questions on the Programme Budget for the Biennium 2008-2009' (n 127) paras 14–15; 'Conditions of Service and Compensation for Officials other than Secretariat Officials: Members of the International Court of Justice and Judges and Ad Litem Judges of the International Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda' (n 123) paras 73–75.

129 UNGA 'Summary Record of the 32nd Meeting' (13 May 2008) A/C.5/62/SR.32, paras 38 (Uruguay) and 54 (Peru).

130 UNGA Decision 62/547 (3 April 2008) A/62/49 (Vol III), para (b).

131 Abdulqawi A Yusuf, 'The Governance of the International Court of Justice' (*ICJ*, 20 September 2019) <https://www.icj-cij.org/en/statements-by-the-president> accessed 7 July 2024, para 40.

132 UNCTAD 'Legal Opinion by the Under-Secretary-General for Legal Affairs, the Legal Counsel' (24 June 1993) TD/B/WP/INF.27, Annex I.

133 UNGA Res 1995 (XIX) (30 December 1964) A/RES/1995(XIX), para 26.

134 cf 'Legal Opinion by the Under-Secretary-General for Legal Affairs, the Legal Counsel' (n 132) Annex I, 2.

budget of UNCTAD.[135] It was in those circumstances that the UNCTAD Secretariat and the Working Party referred their disagreement to the Legal Counsel for a legal opinion.[136]

The UNCTAD Secretariat invoked instructions of the UN Secretary-General for the biennial program budget of 1994-1995. Those instructions stated, inter alia, that '[s]pecialized intergovernmental bodies do not review the programme budget proposals of the Secretary-General', and that such bodies may only be given a copy of the program of work.[137] The Working Party, for its part, found support for its position in a rule of the Programming Regulations and Rules, which mandated the provision of 'further information and detail, if required by the specialized intergovernmental bodies'.[138] At the core were conflicting mandates by the General Assembly, and the uncertain status of the Working Party within UNCTAD's legal framework and the general budgetary process.

As noted by the Secretary-General of UNCTAD, '[t]he lack of access by the Working Party to the financial tables' had been a long-standing issue.[139] Stressing the need for a satisfactory solution, the UNCTAD Secretary-General mentioned that '[o]n the initiative of the Working Party, the matter had been referred to Headquarters for a legal ruling'.[140] Once the legal ruling was available, he would organize the necessary consultations to review the role and the mandate of the Working Party.[141]

The opinion of the Legal Counsel is quite complex, and deals with a lot of little-known rules relating to the UN budgetary process. A central issue was the interpretation of General Assembly resolution 45/248. In that resolution, the General Assembly reaffirmed the role of the Fifth Committee and the Advisory Committee on Administrative and Budgetary Questions as the main policy organs in budgetary matters. Crucially, paragraph 3 of resolution 45/248 voiced the General Assembly's concern 'at the tendency of its [i.e. the

135 cf ibid Annex I, 2.

136 UNCTAD 'Report of the Trade and Development Board on its Third Executive Session' (27 April 1993) TD/B/EX(3)/3, para 57.

137 cf 'Legal Opinion by the Under-Secretary-General for Legal Affairs, the Legal Counsel' (n 132) Annex I, 2.

138 ibid Annex I, 3.

139 'Report of the Trade and Development Board on its Third Executive Session' (n 136) para 57.

140 ibid para 57.

141 ibid para 57.

General Assembly's] substantive Committees and other intergovernmental bodies to involve themselves in administrative and budgetary matters'.[142]

According to the Legal Counsel, it must be presumed that the Working Party was established after sufficient consultation with the relevant bodies, including the Fifth Committee and the Advisory Committee,[143] as is required by paragraph 23 of General Assembly resolution 1995 (XIX), the resolution which established UNCTAD.[144] Therefore, the Legal Counsel reasoned, it is reasonable to assume that the Board and the Working Party do not duplicate the work of other UN organs when reviewing budget proposals.[145] Since the definition of policy priorities inevitably involves choices over financial resources, the Working Party and the Board—as the organs charged with oversight over the UNCTAD program—must have a say in the allocation of resources.[146] This aspect, according to the opinion, distinguishes the UNCTAD Board and the Working Party from the 'substantive committees' (such as the Second Committee) or the 'specialized intergovernmental bodies' (such as the International Law Commission) referred to in General Assembly resolution 45/248.[147] For these reasons, the Legal Counsel concluded that the Working Party of the UNCTAD Board must receive the 'same information' as main budgetary bodies of the General Assembly (especially the ACABQ) to effectively discharge its functions. For the Legal Counsel, this included 'details of the financial and resource distribution' for the implementation of UNCTAD policies.[148]

The Legal Counsel's opinion hinged on the interpretation of two General Assembly resolutions. First, General Assembly resolution 45/248 had removed substantive committees and specialized intergovernmental bodies from the budgetary process and had affirmed the preeminent role of the Fifth Committee and the Advisory Committee. Secondly, relying on the General

142 UNGA Res 45/248 B (21 December 1990) A/RES/45/248, section VI, para 3.

143 'Legal Opinion by the Under-Secretary-General for Legal Affairs, the Legal Counsel' (n 132) Annex I.

144 Res 1995 (XIX) (n 133) para 23 ('The terms of reference of ... any other subsidiary established by the Board shall be adopted after consultation with the appropriate organs of the United Nations and shall take fully into account the desirability of avoiding duplication and overlapping responsibilities').

145 'Legal Opinion by the Under-Secretary-General for Legal Affairs, the Legal Counsel' (n 132) Annex I.

146 ibid Annex I.

147 ibid Annex I.

148 ibid.

Assembly resolution establishing UNCTAD, the Legal Counsel reasoned that the creation of the Working Party had not resulted in a duplication of the budgetary responsibilities of the Fifth Committee. With this in mind, the Legal Counsel ruled that the Working Party was not a specialized intergovernmental body within the meaning of paragraph 3 of resolution 45/248, and accordingly entitled to the necessary financial information. In essence, the Legal Counsel resolved a conflict between General Assembly resolutions 45/248 and 1995 (XIX).

The Controller of the UN transmitted the opinion and his comments on said opinion to the UNCTAD Secretariat. Although the Controller did not fully share the opinion of the Legal Counsel, the Controller did not 'intend to challenge it or request another review.'[149] Accordingly, he recommended that the UNCTAD Secretariat provide the Working Party with detailed information on financial and resource distribution.[150]

The opinion was subsequently invoked in two documents. Thus, the draft terms of reference of the Working Party cited the legal opinion in its preamble and would have required the UNCTAD Secretary-General to provide the Working Party with financial information.[151] The Board did not, however, adopt those draft terms of reference, but this was due to a disagreement over a different issue.[152] But it did reaffirm that 'the Working Party would receive the same information provided to the CPC and ACABQ, as stated in the Legal Opinion of 24 May 1994.'[153]

4.4. Legal Review of Expert and Technical Bodies

4.4.1. Preliminary Considerations

Treatises on international organizations law are very much aware that UN organs refer legal questions to the the Office of Legal Affairs for guidance.[154]

149 ibid Annex II.

150 ibid Annex II.

151 UNCTAD 'Draft terms of reference of the Working Party on the Medium-term Plan and the Programme Budget' (11 July 1994) TD/B/EX(6)/L.1, para 2(b)(i).

152 UNCTAD 'Report of the Trade and Development Board on its sixth executive session' (12 October 1994) TD/B/EX(6)/2, paras 37–52.

153 ibid para 36.

154 Alvarez, *International Organizations as Law-makers* (n 8) 437-4-38; Schermers and Blokker (n 20) 893–894; CF Amerasinghe, *Principles of the Institutional Law of*

With this comes the idea that the Legal Counsel may review decisions of UN organs,[155] or even prevent patently illegal proposals from appearing on the General Assembly's agenda altogether.[156] As a general proposition, this seems to be too broad.

As the opposition to some opinions of the Legal Counsel in inter-organ disputes indicates, the Legal Counsel's standing vis-à-vis the principal political organs of the UN is somewhat more circumscribed. Although the committees of the General Assembly at times submit requests to the Legal Counsel, the General Assembly has once overruled or simply ignored an opinion of the Legal Counsel. Even from subsidiary bodies such as the OIOS there was protracted resistance.[157] The Security Council is generally hesitant to seek the legal advice of an international civil servant, especially on controversial political issues, and members tend to exclusively rely on their own legal advisers.[158] And there are plenty of highly political issues such as the expulsion or suspension of a Member State where the Legal Counsel's advice was ignored. The General Assembly's rejection of South Africa's credentials to condemn apartheid against the advice of the UN Legal Counsel comes to

International Organizations (2nd edn, Cambridge University Press 2005) 25–26; Finn Seyersted, *Common Law of International Organizations* (Martinus Nijhoff 2008) 253.

155 cf Rutsel Silvestre J Martha, 'Mandate Issues in the Activities of the International Fund for Agricultural Development (IFAD)' (2009) 6 IOLR 447, 460 (analyzing various actions by IFAD that were 'cleared by the Office of the General Counsel as being within the mandate of the organization'); Benedict Kingsbury and Lorenzo Casini, 'Global Administrative Law Dimensions of International Organizations Law' (2009) 6 IOLR 319, 337.

156 Higgins and others (n 104) 1200 (stating that it was astonishing that the 2007 General Assembly resolution lowering the salaries of ICJ judges 'had not set alarm bells ringing in the UN Office of Legal Affairs').

157 See Sections 4.2.1 and 4.3 in this Chapter.

158 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) 197–198; Corell, 'The Legality of Exploring and Exploiting Natural Resources in Western Sahara' (n 90) 233; Ralph Zacklin, *The United Nations Secretariat and the Use of Force in a Unipolar World: Power v. Principle* (Cambridge University Press 2010) 5. See also the statement of the UN Legal Counsel before the ILC: 'Provisional Summary Record of the 3371st Meeting' (n 14) 8 (stating that the Security Council, especially the permanent members, 'would probably not wish to give the Legal Counsel any formal role in its work' and that 'all members of the Security Council had their own legal advisers').

mind.[159] Indeed, the Legal Counsel has made it explicit that the 'Secretariat had no authority to review the legality of the actions of the other principal organs',[160] something the Legal Counsel has not said with respect to subsidiary organs.

In practice, the Legal Counsel's interaction with the principal organs extends to specific and limited circumstances. First, the Legal Counsel may advise on procedural questions.[161] Secondly, the Office is a central interpreter of the General Convention.[162] Thirdly, as the institutional memory of the United Nations, the Legal Counsel may restate the established practice of the political organs.[163] Lastly, the Legal Counsel may opine on jurisdictional

159 Alison Duxbury, *The Participation of States in International Organisations: The Role of Human Rights and Democracy* (Cambridge University Press 2011) 116–117; Simon Chesterman, Ian Johnstone, and David M Malone, *Law and Practice of the United Nations: Documents and Commentary* (2nd edn, Oxford University Press 2016) 228–231. For the opinion of the Legal Counsel see UNGA 'Scope of "Credentials" in Rule 27 of the Rules of Procedure of the General Assembly: Statement by the Legal Counsel Submitted to the President of the General Assembly at its Request' (11 November 1970) A/8160.

160 'Provisional Summary Record of the 3371st Meeting' (n 14) 6.

161 See UNGA Res 60/286 (9 October 2006) A/RES/60/286, para 24 (requesting the Office of Legal Affairs to make precedents on the procedural law of intergovernmental organs public). As per that mandate, a document ('Comments on Some Procedural Questions') is available on the website of the Office of Legal Affairs. For examples of legal opinions interpreting the General Assembly's Rules of Procedure, see Robbie Sabel, *Procedure at International Conferences: A Study of the Rules of Procedure at the UN and at Inter-governmental Conferences* (2nd edn, Cambridge University Press 2006) 5 (considering that States usually follow procedural precedents if accompanied by an opinion of a legal adviser), 45 (interpretation of Rule 74), 92 (interpretation of Rule 68), 122 (interpretation of Rule 73) and 203 (interpretation of Rule 130). See also UNGA 'Verbatim Record of the 66th Plenary Meeting' (21 December 2016) A/71/PV.66, 20–22 (General Assembly President relying on Legal Counsel's advice for procedural ruling).

162 See Section 4.2.3 in this Chapter. See Anthony J Miller, 'United Nations Experts on Mission and their Privileges and Immunities' (2007) 4 IOLR 11, 12–13; Anthony J Miller, 'Privileges and Immunities of United Nations Officials' (2007) 4 IOLR 169, 172.

163 *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) [2004] ICJ Rep 136, 149 (citing the opinion of the Legal Counsel on Article 12 of the Charter as evidence of an established practice); 'Verbatim Record of the 66th Plenary Meeting' (n 161) 28–29 (General Assembly President citing interpretation of the Legal Counsel of Article 12 as established practice).

conflicts between the General Assembly and its main committees.[164] The political organs of the UN rarely request the Legal Counsel to engage in constitutional review and highly political matters. There is nothing particular about the fact that Legal Counsel review, much like advisory proceedings and even contentious cases, must be triggered by an organ or party.[165]

Consider also the following case. In 1974, the Trusteeship Council requested a 'formal and official opinion from the Legal Counsel' on the question whether the General Assembly could terminate a trusteeship agreement in anticipation of independence to avoid an undue delay. The Legal Counsel noted that the Charter contained no specific rules for terminating trusteeship agreements and that an anticipatory resolution would be in conformity with UN practice. Despite this limited analysis, the opinion concluded that the proposal was in 'conformity with the practice of the United Nations, the principles of the Charter and international law in general'. The Trusteeship Council based its recommendation on that opinion. See UNGA 'Report of the Trusteeship Council: 23 June 1973 – 23 October 1974' (1975) A/9604, paras 216–219, 222.

164 In 1978, Cuba proposed a hearing of a Puerto Rican independence party before the Fourth Committee. See UNGA 'Letter dated 21 November 1978 from the Permanent Representative of Cuba to the United Nations addressed to the Chairman of the 4th Committee' (21 November 1978) A/C.4/33/14. The U.S. objected as Puerto Rico was not listed as a non-self-governing territory. The Fourth Committee therefore lacked a basis to consider the Puerto Rican question. See UNGA 'Summary Record of the 24th Meeting' (27 November 1978) A/C.4/33/SR.24, para 2. Norway considered that a sounder basis was necessary for the decision and proposed to request a legal opinion of the Legal Counsel and to postpone the debate until the Committee had heard the Legal Counsel. See 'Summary Record of the 25th Meeting' (n 78) paras 52, 56. The Committee subsequently voted, with a substantial minority opposing, to secure the advice of the Office of Legal Affairs. See UNGA 'Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples: Report of the Fourth Committee' (9 December 1978) A/33/460, para 15.
The Legal Counsel, agreeing with the U.S. argument in substance, ruled that 'it would not be within the competence of the Fourth Committee to consider or grant the request' for a hearing of the Puerto Rican petitioners. See 'Summary Record of the 25th Meeting' (n 78) para 75; UNGA 'Statement by the Legal Counsel of the United Nations at the 25th Meeting of the 4th Committee on 24 November 1978' (28 November 1978) A/C.4/33/15, para 8. The Committee acted in concurrence with the Legal Counsel's opinion. See UNGA 'Summary Record of the 26th Meeting' (27 November 1978) A/C.4/33/SR.26, paras 32 and 40.

165 Dan Ciobanu, *Preliminary Objections Related to the Jurisdiction of the United Nations Political Organs* (Martinus Nijhoff 1975) 163 (arguing that the procedure of consulting an ad hoc committee of jurists envisaged at the San Francisco Conference is not 'mandatory for the political organs').

While political considerations explain the hesitation of the General Assembly, and especially the Security Council, to submit opinion requests more frequently, the present state of international organizations law equally explains why the Legal Counsel cannot meaningfully review the actions of the principal organs. Functionalism imposes few, if any, constraints on the United Nations and its principal organs in asserting new powers.[166] In *Certain Expenses*, the International Court of Justice fashioned a presumption against *ultra vires* action of the United Nations.[167] Contrary to this, the enabling resolutions of subsidiary bodies and the principle of respecting institutional divisions of competence circumscribe the mandate of these bodies much more carefully.[168]

A pertinent example is the United Nations University which wanted to introduce a master's program. Upon request of the United Nations University, the Office of Legal Affairs ruled that the University lacked the legal authority to offer graduate degrees, noting the lack of an express power to this effect under the UNU Charter.[169] It recommended that the UNU Council should ask the General Assembly to amend the UNU Charter.[170] The General Assembly subsequently amended the UNU Charter to authorize the UNU to grant master's degrees and doctorates as well as to charge tuition fees.[171] The opinion did not clear the proposed master's program because of lack of an express power to this effect. Yet, it said nothing about the power of the General Assembly to grant such a power under the UN Charter. This again suggests that the Legal Counsel plays a major role in ensuring the boundaries of the secondary law of the Organization and thus with regard to subsidiary bodies, but that the same does not hold true for the constitutional review of the principal organs.

Despite this limited review function, it does not mean that academic writers are generally wrong. Instead, this section argues that the Legal Counsel's

166 Jan Klabbers, 'The EJIL Foreword: The Transformation of International Organizations Law' (2015) 26 EJIL 9, 31–32.

167 *Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter)* (n 5) 168.

168 Higgins and others (n 104) 329–332.

169 OLA 'Note regarding the United Nations University Accreditation Process' [2009] UNJYB 403, 404–406. For the Charter of the United Nations University: UNGA Res 2951 (XXVII) (11 December 1972) A/RES/2951(XXVII); UNGA 'Charter of the United Nations University' (1973) A/9149/Add.2.

170 'Note regarding the United Nations University Accreditation Process' (n 169) 406.

171 UNGA Res 64/225 (2009) A/RES/64/225, para 1.

review function is generally more developed with respect to subsidiary organs of a technical and expert nature that produce normative acts—whether binding, non-binding or something else. There is already some evidence to this effect. As a UN report evaluating the Office of Legal Affairs noted, '[s]takeholders, especially those familiar with technical and expert bodies, frequently mentioned the neutrality of the Office [of Legal Affairs] as an asset.'[172]

This naturally evokes a distinction between political and technical questions, and the idea that technical questions are beyond politics.[173] This is not implied by labeling some bodies as 'technical and expert'. Decisions of the Commission on Narcotic Drugs or the Continental Shelf Commission are of course eminently political. The distinction is, first, analytical. It simply recognizes that States have different conceptions in mind when designing a specialized body such as the Continental Shelf Commission as compared to the Security Council. Secondly, to say that the Legal Counsel exercises a review function with regard to expert and technical bodies (usually constituted as subsidiary organs or treaty bodies) is an empirical observation that the scope *ratione personae* of Legal Counsel review is uneven. Legal Counsel review is more developed over some bodies than others: the Continental Shelf Commission established by UNCLOS is more amenable to Legal Counsel review than the General Assembly or the Security Council. But it also implies that the standard of Legal Counsel review is not uniform: it is less deferential to subsidiary expert and technical bodies than it is towards political bodies (if it happens at all). Finally, the distinction between subsidiary technical bodies and political bodies has normative implications for public law approaches as theoretical frameworks to explain the normative workings of international organizations and as an alternative to functionalism.[174] Whatever their particularities, public law approaches all look for an independent review

172 ECOSOC 'Evaluation of the Office of Legal Affairs: Report of the Office of Internal Oversight Services' (25 March 2019) E/AC.51/2019/9, para 25.

173 cf Jan Klabbers, *An Introduction to International Organizations Law* (4th edn, Cambridge University Press 2022) 25–26.

174 See Section 1.2 of Chapter 1 on contending theoretical approaches to international organizations law.

mechanism.[175] Legal Counsel review may be a means to operationalize such frameworks and not a mere rubber-stamp of administrative decisions.[176]

Legal Counsel review of expert and technical bodies is illustrated by a survey of three legal regimes, in particular by analyzing the interaction of legal advice and decision-makers in context. They concern food regulation (UNECE Working Party on Agricultural Quality Standards), the determination of the outer limits of the continental shelf (Continental Shelf Commission), and the addition of new substances subject to international control in international drug law (Commission on Narcotic Drugs). Bearing in mind that terminology lacks coherence,[177] all are subsidiary organs established by resolution or by treaty. These statutory bases tend to be more circumscribed than the competence of, say, the General Assembly or the Security Council. With the exception of the UNECE Working Party, in each legal regime a body composed of States and an advisory body composed of experts serving in their individual capacity must take decisions collectively. This combination

175 See 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) 10; Kingsbury and Casini (n 155) 337; Benedict Kingsbury, Nico Krisch, and Richard B Stewart, 'The Emergence of Global Administrative Law' (2005) 68 Law and Contemporary Problems 15; Jan Klabbers, 'Constitutionalism Lite' (2004) 1 IOLR 31, 56; Clemens A Feinäugle, 'The Rule of Law and its Application to the United Nations' in Christopher May and Adam Winchester (eds), *Handbook on the Rule of Law* (Elgar 2018) 212.

176 cf Philip Alston, 'Book Review: B.G. Ramcharan, The Principle of Legality in International Human Rights Institutions' (1997) 8 EJIL 686, 687–688 (who claims that the Office of Legal Affairs pushes legal boundaries by self-referential reasoning).

177 A 'subsidiary organ' is a body established by and operating under the authority of a principal organ of the United Nations with a certain degree of independence from its principal. See Danesh Sarooshi, 'The Legal Framework Governing United Nations Subsidiary Organs' (1996) 67 BYBIL 413, 416. 'Treaty bodies' or 'treaty organs' are established by treaty but in practice are closely linked to the United Nations through the provision of secretariat services and because they were created to further certain objectives of the United Nations. See Volker Röben, 'Environmental Treaty Bodies' in Rüdiger Wolfrum (ed), *MPEPIL* (online edn, Oxford University Press 2015) paras 8–26; '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' (n 91) para 2. Finally, there are hybrid bodies such as the Commission on Narcotic Drugs, a subsidiary organ established by ECOSOC, that is entrusted with powers under international drug conventions.

of government and expert decision-making complicates the legal relationship and, importantly, renders legal disputes more likely. But the common feature is that they are bodies with a specialized mandate that exercise public authority.

Although this section examines the advisory practice of the Legal Counsel on the institutional law of technical bodies,[178] it is by no means limited to that. Frequently the advice of the Legal Counsel is sought on the law of the treaties. The ILC's draft conclusions on subsequent practice and agreements and the Special Rapporteur's reports make ample references to this type of advisory practice.[179] Similarly, the Conference of Parties of the Convention on Biological Diversity requested the advice of the Office of Legal Affairs on consensus decisions being construed as subsequent agreements within the meaning of Article 31(3) VCLT.[180] The Convention refers in Article 8(j) to 'indigenous communities',[181] while there were efforts to use the term

178 cf Amerasinghe, *Principles of the Institutional Law of International Organizations* (n 154) xiii.

179 ILC 'Second Report on Subsequent Agreements and Subsequent Practice in relation to the Interpretation of Treaties by Georg Nolte, Special Rapporteur' (26 March 2014) A/CN.4/671, para 84 (IMO Legal Affairs Division advising an interpretive resolution as a subsequent agreement), para 87 (WHO Legal Counsel recognizing that Conference of Parties decisions of the Framework Convention on Tobacco Control represent a subsequent agreement) and paras 103, 106 (opinion of the UN Legal Counsel on the meaning of consensus in United Nations practice); 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 11 and accompanying cmt 34; Georg Nolte, 'Subsequent Agreements and Subsequent Practice of States Outside of Judicial or Quasi-judicial Proceedings: Third Report for the ILC Study Group on Treaties over Time' in Georg Nolte (ed), *Treaties and Subsequent Practice* (Oxford University Press 2013) 370–371, 376–377. For advice on treaties and third States in UNESCO, see Noriko Aikawa-Faure, 'Article 31: Transitional Clause on the Relationship to the Proclamation of Masterpieces of the Oral and Intangible Heritage of Humanity' in Janet Blake and Lucas Lixinski (eds), *The 2003 UNESCO Intangible Heritage Convention: A Commentary* (Oxford University Press 2020) 414–431.

180 CBD 'Report of the Eighth Meeting of the Ad Hoc Open-Ended Inter-Sessional Working Group on Article 8(j) and Related Provisions of the Convention on Biological Diversity' (11 November 2013) UNEP/CBD/COP/12/5, recommendation 8/6, para 4.

181 Convention on Biological Diversity (adopted 5 June 1992, entered into force 29 December 1993) 1760 UNTS 79, Article 8(j) (requiring parties to respect practices of 'indigenous and local communities' that conserve biodiversity).

'indigenous peoples' in Conference decisions and secondary documents—a concept that is very controversial in some States.[182] Heeding the Office's advice,[183], the Conference of Parties stipulated that the terminology 'indigenous peoples' is without prejudice to Article 8(j) and the formal amendment process of the Convention.[184] Lastly, the Office of Legal Affairs advised the CERD Committee on the existence or absence of treaty relationships between Palestine and Israel (although only the dissenting minority endorsed the Office's opinion).[185]

4.4.2. UNECE Working Party on Agricultural Quality Standards

Established in 1947, the United Nations Economic Commission for Europe (UNECE) is one of the five regional commissions created by ECOSOC as subsidiary bodies under Article 68 of the Charter.[186] In 1949, UNECE created a subsidiary body to develop quality standards for agricultural products: the Working Party on the Standardization of Perishable Foodstuffs that would become the Working Party on Agricultural Quality Standards in 2002 (commonly referred to as WP.7).[187] According to its Terms of Reference, WP.7 develops, interprets and promotes commercial quality standards for goods

182 France feared that a change in terminology may constitute a de facto amendment and requested a study of Office of Legal Affairs. Japan stressed the importance of having the advice of the Office of Legal Affairs. See 'Report of the Eighth Meeting of the Ad Hoc Open-Ended Inter-Sessional Working Group on Article 8(j) and Related Provisions of the Convention on Biological Diversity' (n 180) paras 92, 96.

183 CBD Dec XII/12 F (13 October 2014) UNEP/CBD/COP/DEC/XII/12, recital 2 ('[r]ecognizing the advice of the United Nations Office of Legal Affairs'). For the legal opinion see: 'Analysis on the Implication of the Use of the Term "Indigenous Peoples and Local Communities" for the Convention and its Protocols' (n 3).

184 Dec XII/12 F (n 183) para 2.

185 CERD 'Inter-State Communication submitted by the State of Palestine against Israel' (12 December 2019) CERD/C/100/5, paras 2.1–2.16 and Annex.

186 Mathias Forteau, 'United Nations, Regional Commissions' in Rüdiger Wolfrum (ed), *MPEPIL* (online edn, Oxford University Press 2007) para 9.

187 UNECE 'Working Party on Agricultural Quality Standards: Report of the Fifty-eighth Session' (11 December 2002) TRADE/WP.7/2002/9, paras 109–112. For a history of governance structure of WP.7: Andrea Barrios Villarreal, *International Standardization and the Agreement on Technical Barriers to Trade* (Cambridge University Press 2018) 13.

like meat, fresh fruit and vegetables to facilitate international trade.[188] WP.7 carries out its standard-setting activities in accordance with the Geneva Understanding on Agricultural Quality Standards—a non-binding document adopted by the UNECE Executive Committee.[189]

UNECE standards are recommendations and do not create obligations under international law.[190] For that reason they must be incorporated in domestic law in order to become legally binding. Most notably, European Union law incorporates UNECE food standards.[191] This leads to a kind of 'Brussels effect' in the food industry.[192] Although UNECE is a regional commission, its food standards 'rule much of the food trade', with some standards being used in the Middle East, Australia or Argentina.[193] The reason is fairly simple. Europe is a big food market, and it is the importer that sets the standards for accessing its market.[194]

Although all UN Member States may participate in WP.7,[195] developing countries tend not to participate and European States make up the most delegates in practice.[196] The global reach of UNECE standards creates an overlap with another standard-setting body in the UN system—the FAO/WHO Co-

188 UNECE 'Terms of Reference of the Working Party on Agricultural Quality Standards (2018)' (18 March 2019) ECE/CTCS/2019/12, para 1.

189 UNECE 'Geneva Understanding on Agricultural Quality Standards' (6 October 2015) ECE/CTCS/WP.7/2015/22.

190 UNECE 'Legal Office Opinion on the Legal Status of the Geneva Protocol' (7 August 2012) ECE/TRADE/C/WP.7/2012/3, para 2.

191 Commission Implementing Regulation (EU) No 543/2011 of 7 June 2011 laying down detailed rules for the application of Council Regulation (EC) No 1234/2007 in respect of the fruit and vegetables and processed fruit and vegetables sectors [2011] OJ L157/1, Article 3(2) (providing that UNECE standards shall be considered as conforming to the general marketing standard); Commission Delegated Regulation (EU) 2019/428 of 12 July 2018 amending Implementing Regulation (EU) No 543/2011 as regards marketing standards in the fruit and vegetables sector [2019] OJ L75/1, recital 3 (aligning Union law with newly developed UNECE standards).

192 cf Anu Bradford, *The Brussels Effect: How the European Union Rules the World* (Oxford University Press 2020) 218–219.

193 Barrios Villarreal (n 187) 207, 210–211.

194 ibid 208–9. See also Joanne Scott, 'The Global Reach of EU Law' in Marise Cremona and Joanne Scott (eds), *EU Law Beyond EU Borders: The Extraterritorial Reach of EU Law* (Oxford University Press 2019) 31.

195 'Terms of Reference of the Working Party on Agricultural Quality Standards (2018)' (n 188) para 5.

196 Barrios Villarreal (n 187) 210.

dex Alimentarius Commission. Much like UNECE, the Codex Alimentarius Commission develops international standards, including food quality standards.[197] Unlike UNECE's WP.7, the Codex Alimentarius Commission as a joint subsidiary body of FAO and WHO has near universal membership and developing countries attend on a much broader basis.[198]

This potential overlap between UNECE and Codex standards is all the more relevant as UNECE aims to develop standards that comply with the WTO Agreement on Technical Barriers to Trade (TBT Agreement).[199] Although non-binding, international standards are legally relevant under WTO law. Government measures based on international standards are presumed to be consistent with TBT Agreement and the Agreement on Sanitary and Phytosanitary Measures (SPS Agreement),[200] creating a procedural incentive for States to follow international standards.[201] While the SPS Agreement explicitly privileges Codex standards as 'relevant international standards',[202] the TBT Agreement does not specify an international standardizing body.[203]

It is precisely this jurisdictional overlap between the UNECE and the Codex Commission that ultimately led to a Legal Counsel review of a UNECE proposal. In 1998, a WP.7 report noted that 'UNECE standards for fresh and dried produce are used widely throughout the world' and that 'the majority of international trade in these products takes place according to UNECE

197 See generally Gerald G Sander, 'Codex Alimentarius Commission (CAC)' in Rüdiger Wolfrum (ed), *MPEPIL* (online edn, Oxford University Press 2016); Ravi Afonso Pereira, 'Why Would International Administrative Activity Be Any Less Legitimate? – A Study of the Codex Alimentarius Commission' in Armin von Bogdandy and others (eds), *The Exercise of Public Authority by International Institutions: Advancing International Institutional Law* (Springer 2010) 541; Nathalies Ferraud-Ciandet, 'La Commission du Codex Alimentarius' [2009] Journal du droit international 1181.

198 Barrios Villarreal (n 187) 191, 198.

199 'Geneva Understanding on Agricultural Quality Standards' (n 189) para 1.

200 Agreement on Technical Barriers to Trade (adopted 15 April 1994) 1868 UNTS 120 (TBT Agreement) Article 2(5); Agreement on the Application of Sanitary and Phytosanitary Measures (adopted 15 April 1994) 1867 UNTS 493 (SPS Agreement) Article 3(2).

201 *European Communities—Measures Concerning Meat and Meat Products (Hormones): Report of the Appellate Body* (16 January 1998) WT/DS26/AB/R, WT/DS48/AB/R, paras 102, 165.

202 SPS Agreement, Article 3(4) and Annex A, para 3(a).

203 Barrios Villarreal (n 187) 130.

standards.'[204] Because of their widespread use in international trade, WP.7 proposed renaming 'UNECE standards' to 'UN standards'.[205] Although the proposed title change seems benign, it could be seen as an attempt by a regional commission to set global standards. Under the terms of reference of UNECE, the proposal needed to go through the governing bodies of UNECE and ultimately secure the approval of ECOSOC.[206]

When the parent body of WP.7 discussed the proposal to change the title to 'UN standards', the Chairman 'explained that the advice of the Legal Counsel of the United Nations was required before any decision could be taken by the Committee'—a decision that was supported by both the Codex Alimentarius Commission and the European Commission.[207] The Committee therefore decided to consider the proposed title change at its next session 'on the basis of the advice received from the Legal Office.'[208]

The UNECE Secretariat did not publish the entire opinion but only a summary. Interestingly, the Legal Counsel of the United Nations did not say that proposed title change was in itself (il)legal. Instead, his conclusion was that the proposal 'may easily be challenged on legal grounds' by ECOSOC members. Acknowledging that UNECE standard were '*de facto* international standards', the Legal Counsel pointed to the '*de jure* international standards' elaborated by the Codex Alimentarius Commission. Member States outside UNECE, the Legal Counsel reasoned, might oppose the title change 'for reasons of maintaining the respective competence of each organization within the existing statutory limits'—that is the respective competence of the FAO/WHO Codex Alimentarius Commission and UNECE. Moreover, the development of 'United Nations standards' by a regional commission

204 UNECE 'Title of Standards Elaborated by the Working Party: Note by the Secretariat' (28 August 1998) TRADE/WP.7/1998/8, para 1.

205 ibid para 2.

206 UNECE 'Working Party on Standardization of Perishable Produce and Quality Development: Report on its Fifty-third Session' (24 November 1997) TRADE/WP.7/1997/11, paras 54–56. See UN 'Terms of Reference and Rules of Procedure of the Economic Commission for Europe' (2009) E/ECE/778/Rev.5, para 4 ('The Commission shall submit for the Council's prior consideration any of its proposals for activities that would have important effects on the economy of the world as a whole').

207 UNECE 'Working Party on Standardization of Perishable Produce and Quality Development: Report of the First Session' (29 January 1998) ECE/TRADE/214, para 26.

208 ibid para 27.

would imply 'an expansion of its competence and authority to the detriment of other regional commissions'. Accordingly, the Legal Counsel deemed it unlikely that the ECOSOC would approve the proposed renaming of UNECE standards as 'UN standards' in light of the likely opposition by non-European States on these legal grounds.[209] Interestingly, the opinion of the Legal Counsel applied two legal concepts to subsidiary organs that were central to the ICJ's reasoning in the *Nuclear Weapons* advisory opinion with regard to specialized agencies such as the WHO: the principle of speciality and the principle of respecting the division of competences between specialized bodies.[210] The principle of speciality necessitated respect for the territorial jurisdiction of other ECOSOC regional commissions. The system of specialized bodies within the UN system necessitated respect for the mandate of the Codex Commission—a specialized body expressly designated to develop global food standards.[211]

The Codex Alimentarius Commission followed the developments in the UNECE closely. At the next session of WP.7, the Codex observer noted that the FAO legal counsel shared the conclusion of the UN Legal Counsel. Earlier, the Codex Alimentarius Commission had taken note of the opinion of the Legal Counsel, but interpreted it in a much more unequivocal fashion. According to the Codex Executive Committee, the opinion stated that 'UNECE as a "regional commission" did not have the authority, unless explicitly so authorized by the Economic and Social Council, to establish subsidiary bodies which are anticipated to elaborate worldwide standards or which are instituted to transfer regional standards into worldwide standards.'[212] But without much comment, WP.7 decided to withdraw its proposal to change

209 'Title of Standards Elaborated by the Working Party: Note by the Secretariat' (n 204) para 5.

210 cf *Legality of the Use by a State of Nuclear Weapons in Armed Conflict* (Advisory Opinion) [1996] ICJ Rep 66, 78 (principle of speciality) and 80–81 (relationship between the UN and its specialized agencies).

211 See Fernando Lusa Bordin, *The Analogy between States and International Organizations* (Cambridge University Press 2018) 128–134 (discussing the principle of speciality).

212 CAC 'Report of the Forty-second Session of the Executive Committee of the Codex Alimentarius Commission' (June 1995) ALINORM 95/4, para 30; CAC 'Report of the Twenty-first Session of the Joint FAO/WHO Codex Alimentarius Commission' (1995) ALINORM 95/37, para 31.

the title of UNECE standards to UN standards.[213] As the UNECE informed the Codex Commission, WP.7 'decided to withdraw the proposal to change the title of the UNECE standards to UN standards in view of the response of the Legal Counsel of the United Nations concerning this issue.'[214]

Interestingly, an almost identical issue would be discussed a decade later. In 2008, WP.7 decided to eliminate the reference to 'United Nations Economic Commission for Europe' from the upper part of the cover page of its standards. According to WP.7, this decision was intended to emphasize and reflect the global character of UNECE standards given that all UN members could participate in WP.7. Without considering the 1998 Legal Counsel opinion, the report merely argued that the new cover page 'does not contradict' an administrative regulation on UN documentation.[215]

At the Codex Alimentarius Commission, this decision to change the cover page of UNECE standards was interpreted as a rehash of the 1998 proposal to formally change the name to 'UN standards'. Some governments were unhappy with the change of the title of 'UNECE' standards to 'UN' standards. For them, WP.7 as a subsidiary body operates under the terms of reference of the UNECE, 'a regional commission of the United Nations which looks at the economic development and integration of a particular region' and therefore 'questioned the international coverage of the standards developed by the Working Party'. For its part, the Codex Secretariat drew attention to the 1998 opinion of the Legal Counsel and the subsequent decision of WP.7 to abandon 'the proposal to change the title of the "UNECE standards" to "UN standards" in view of the response of the Legal Counsel of the United Nations concerning the global status of Codex standards as related to UNECE standards'.[216]

When WP.7 discussed the issue a year later, the Codex representative informed WP.7 that the Codex Alimentarius Commission was examining

213 UNECE 'Working Party on Standardization of Perishable Produce and Quality Development: Report of the Fifty-Fourth Session' (4 December 1998) TRADE/WP.7/1998/9, paras 56–59.

214 CAC 'Report of the Eighth Session of the Codex Committee on Fresh Fruits and Vegetables' (March 1999) ALINORM 99/35A, para 14.

215 UNECE 'Report of the Working Party on Agricultural Quality Standards on its Sixty-Fourth Session' (10 November 2008) ECE/TRADE/C/WP.7/2008/25, para 46. The report referred to UN Secretariat 'Administrative Instruction: Regulations for the Control and Limitation of Documentation' (22 August 2008) ST/AI/189/Add.6/Rev.5.

216 CAC 'Report of the Fifteenth Session of the Codex Committee on Fresh Fruits and Vegetables' (October 2009) ALINORM 10/33/35, paras 10, 12.

the implications of the decision of WP.7 to change the reference to 'UNECE standards' into 'UN standards'. Notably, the Codex observer pointed to the 1998 opinion of the Legal Counsel, according to which UNECE had no authority to adopt worldwide standards. In the view of WP.7, the decision to remove 'UNECE' from the upper part of the cover page of its standards was fully compliant with UN administrative regulations on documentation. Nevertheless, the Working Party suspended the change of its cover page in view of the concerns of the Codex Alimentarius Commission and requested the UNECE Secretariat to approach the UN Office of Legal Affairs for advice.[217]

The opinion of the Office of Legal Affairs was signed by a senior legal adviser of the UN Geneva office. Noting that the 1998 opinion of the Legal Counsel had analyzed a comparable issue, that senior legal adviser expressed his 'considered opinion' that the legal advice would be similar, if not identical today as Member States had agreed on global standards within the FAO/WHO framework. Since the Codex Alimentarius Commission had expressed concerns about the decision, it was unlikely to be approved by ECOSOC. But the legal adviser noted that section 3(1) of the Regulations for the Control and Limitation of Documentation were flexible enough so that WP.7 could drop the reference to 'UNECE' at the top of the cover page while keeping the title 'UNECE standards'.[218]

The Codex Alimentarius Commission (and the WHO Legal Counsel) took note of the 1998 and 2010 legal opinions. The UNECE representative informed the Commission that, although WP.7 had not yet considered the opinion, 'it was expected that [WP.7] would follow the advice of the Office of the Legal Affairs by putting back the reference to "UNECE" in the title of its standards', hoping that this decision would address the concerns of the Codex Alimentarius Commission. Mexico, as Chair of the Codex Committee on Fresh Fruits and Vegetables noted that the Codex Alimentarius

217 UNECE 'Report of the Working Party on Agricultural Quality Standards on its Sixty-Fifth Session' (20 November 2009) ECE/TRADE/C/WP.7/2009/24, paras 30–31.

218 CAC 'Matters arising from the Reports of Codex Committees and Task Forces: Codex Committee on Fresh Fruits and Vegetables' (July 2010) CX/CAC 10/33/8-Add.1, Annex II, paras 2–4. Within the UNECE, the opinion was only issued as an informal document but it is summarized in a report of a subsidiary body of WP.7: UNECE 'Report of the Specialized Section on Standardization of Fresh Fruit and Vegetables on its Fifty-Seventh Session' (8 June 2010) ECE/TRADE/C/WP.7/GE.1/2010/4, para 8.

Commission was the 'truly recognized international UN body to develop worldwide food standards' since the 'SPS/WTO Agreement clearly identified the Codex Alimentarius Commission as the international reference body for the development of food safety standards'.[219]

When UNECE took up the issue, several subsidiary bodies of WP.7 'took note' of the legal opinion and discussed the suggestion by the contested legal opinion to remove 'UNECE' from the top of the page, while keeping the title as 'UNECE Standards'.[220] The Working Party on Agricultural Quality Standards itself decided to retain 'UNECE' in the title of UNECE standards '[b]ased on legal advice received concerning the name change of its standards'. But heeding the suggestion of the legal opinion, WP.7 decided to remove the reference to 'UNECE' at the top of the cover page, while spelling out the full name of the UNECE in the note to the standards.[221]

The 1998 opinion of the Legal Counsel continues to have an enduring impact beyond the issue it specifically addressed. For example, the Codex Secretariat referred to the 1998 reply of the Legal Counsel in a note on the revision of the terms of reference of the Codex Committee on Fresh Fruit and Vegetables.[222] And both the 1998 and 2010 opinions are notable. Arguably, it would have strengthened the case that WP.7 is an international standardizing body under the TBT Agreement if the standards had been

219 CAC 'Report of the Thirty-Third Session of the Codex Alimentarius Commission' (July 2010) ALINORM 10/33/REP, paras 128–135.

220 'Report of the Specialized Section on Standardization of Fresh Fruit and Vegetables on its Fifty-Seventh Session' (n 218) paras 8–9; UNECE 'Report of the Specialized Section on Standardization of Dry and Dried Produce on its Fifty-Seventh Session' (12 July 2010) ECE/TRADE/C/WP.7/GE.2/2010/7, paras 6–7; UNECE 'Report of the Specialized Section on Standardization of Seed Potatoes' (25 March 2010) ECE/TRADE/C/WP.7/GE.6/2010/9, para 8.

221 UNECE 'Report of the Working Party on Agricultural Quality Standards on its Sixty-Sixth Session' (24 November 2010) ECE/TRADE/C/WP.7/2010/16, paras 38–39. The Codex Alimentarius Commission also recognized the decisive impact of the opinion, according to which the 'decision [to retain the title 'UNECE standards' and the removal of 'UNECE' from the upper part of the cover page] was based on the legal advice received from the Senior Legal Adviser of the UN Office at Geneva'. See CAC 'Matters arising from other International Organizations on the Standardization of Fresh Fruits and Vegetables' (April 2011) CX/FFV 11/16/3, para 6.

222 Codex Secretariat 'Revision of the Terms of Reference of the Codex Committee on Fresh Fruits and Vegetables' (July 2012) CX/FFV 12/17/13, para 1.

recast as 'UN standards'.[223] By keeping the established name (and following the Legal Counsel's advice) the regional nature of UNECE standards was reinforced—not once but twice. While the opinion was drafted in cautious terms, the result is striking: UNECE's claim to an implied power did not gain recognition in the legal community and the UN system. The rejection of an implied power is very rare in the practice of international organizations law.[224]

WP.7's failure to recast UNECE standards as 'UN standards' is also noteworthy for other reasons. There are few, if any, alternative or 'non-binding' instruments of international institutions that have been subject to legal review—and were even considered illegal whether by courts or otherwise. Even more striking is that the Legal Counsel's opinion reached this result not because the proposed title 'UN standards' would have made these standards any more binding but because the change to 'UN standards' implied a different claim of epistemic authority, namely a claim that UN standards were also globally appropriate standards for food quality.[225]

What is more, the opinion essentially defined two new standard instruments (*Handlungsformen*).[226] A standard instrument (*Handlungsform*) is a concept of domestic administrative law. Basically, the concept of standard instruments identifies specific legal acts in a given system of administrative law, circumscribes their legal effects and attaches specific rules for determining the procedure for their enactment, their validity and possible review by a

223 cf Barrios Villarreal (n 187) 210 (arguing that WP.7 is not an international standardization body under the TBT Agreement).

224 So far the ICJ has only refused once, in the case of the WHO, to acknowledge an implied power of an international organization: *Legality of the Use by a State of Nuclear Weapons in Armed Conflict* (n 210); Lusa Bordin (n 211) 133.

225 On the concept of epistemic authority, see Jan Klabbers, 'The Normative Gap in International Organizations Law: The Case of the World Health Organization' (2019) 16 IOLR 272, 277–282.

226 See Section 5.4 in Chapter 5 for a definition of standard instruments. On standard instruments in international institutional law, see generally Matthias Goldmann, *Internationale öffentliche Gewalt: Handlungsformen internationaler Institutionen im Zeitalter der Globalisierung* (Springer 2015) 5, 169–173; 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) 679–691.

third actor (in a domestic system usually a court).[227] For example, American administrative law distinguishes between 'rules' and 'orders', defines their respective legal effects and determines procedural rules for their validity.[228] 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.[229] 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 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.[230]

In this sense, the legal opinion on the status of UNECE standards defined two standard instruments in international food law: only the Codex Commission could promulgate the standard instrument '*de jure* international standards' on food quality and safety. By implication, the UNECE could only use the standard instrument '*de jure* European standard'. This is an important conclusion for proponents of public law approaches to international organizations law such as 'global administrative law', 'international public authority' or the 'international rule of law' as it indicates a real possibility of legal review of 'non-binding' output of international bodies and of a *Rechtsdogmatik* of international institutional law beyond 'binding' legal acts.[231]

This public law-type review of the proposed renaming of UNECE standards is, finally, also noteworthy because the opinion was drafted in the traditional parlance of functionalism in that it focused on the relationship between the UNECE and its Member States, and the Codex Commission and its membership.

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227 cf Goldmann, 'Inside Relative Normativity: From Sources to Standard Instruments for the Exercise of International Public Authority' (n 226) 679.

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

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

230 cf Benedetto Conforti and Carlo Focarelli, *The Law and Practice of the United Nations* (5th edn, Brill Nijhoff 2016) 452–453.

231 For this traditional approach, see Norman Weiß, *Kompetenzlehre internationaler Organisationen* (Springer 2009) 375, 391–416 (limiting a theory of powers of international organizations to 'binding' acts).

4.4.3. Commission on the Limits of the Continental Shelf

The Commission on the Limits of the Continental Shelf is a body established under Article 76(8) of UNCLOS. As a body of experts in the field of geology, geophysics or hydrography,[232] it evaluates continental shelf claims beyond the 200 nautical miles line and provides scientific and technical advice to States submitting such claims.[233] The Commission shall make recommendations relating to the establishments of the outer limits of the continental shelf. Limits established 'on the basis of these recommendations shall be final and binding'.[234] Although the details are debated, such limits are only opposable to third States if the requirements of Article 76(8) are met.[235]

Although it is envisaged as a purely technical and scientific body, issues of legal interpretation invariably arise in the course of its work.[236] It has been asked whether the Commission is competent to engage in some legal interpretation incidental to its technical mandate, whether it must accept the legal view of the submitting state or whether it can seek legal advice from an external body such as the meeting of States Parties, a tribunal—or the UN Legal Counsel.[237]

According to one commentator, '[a] role of the Legal Counsel of the United Nations or other legal experts in this respect would be difficult to reconcile with the primary competence of the States Parties to the Convention

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232 United Nations Convention on the Law of the Sea (adopted 10 December 1982, entered into force 16 November 1994) 1833 UNTS 3 (UNCLOS) Annex II, Article 2(1).

233 Suzette V Suarez, 'Commission on the Limits of the Continental Shelf' (2010) 14 MPUNYB 131.

234 UNCLOS, Article 76(8).

235 cf *Delimitation of the Maritime Boundary in the Bay of Bengal (Bangladesh/Myanmar)* (Judgment) [2012] ITLOS Rep 4, 106–107, para 407; Lindsay Parson, 'Article 76' in Alexander Proelss (ed), *United Nations Convention on the Law of the Sea: A Commentary* (CH Beck/Hart/Nomos 2017) paras 49–51.

236 Suarez, *The Outer Limits of the Continental Shelf* (n 13) 132.

237 See Alex G Oude Elferink, 'Continental Shelf, Commission on the Limits of the' in Rüdiger Wolfrum (ed), *MPEPIL* (online edn, Oxford University Press 2013) paras 8–9; Bjørn Kunoy, 'The Terms of Reference of the Commission on the Limits of the Continental Shelf: A Creeping Legal Mandate' (2012) 25 LJIL 109; Andrew Serdy, 'Annex II Article 2' in Alexander Proelss (ed), *United Nations Convention on the Law of the Sea: A Commentary* (CH Beck/Hart/Nomos 2017) para 4.

to interpret it.'[238] Theoretically, this view may be sound but it is difficult in practice since States Parties may be unable to agree on a single legal interpretation. Moreover, States Parties could not agree on a procedure for the interpretation of provisions of the Convention that were relevant to the work of the Commission.[239] In particular, some States maintain that the Commission cannot even identify legal issues on which it might request guidance from States Parties.[240] Other parties emphasize the independence of the Commission which must likewise be respected by States Parties.[241] A third view argues that the States Parties have a primary responsibility for issues affecting the rights and obligations of States, while the Legal Counsel should only provide guidance on 'administrative' issues.[242]

For the Commission, this creates an uncertain institutional environment. In its day-to-day operations, a statutory body necessarily interprets its legal mandate.[243] But the Commission's competence to openly engage in legal interpretation is contested. States parties are unlikely to coalesce around a particular legal interpretation.[244] Its members are scientists, not lawyers. On top of that, the Commission cannot trigger advisory proceedings before an international tribunal. In these circumstances, it is hardly surprising that the Commission requested the advice of the Legal Counsel on many occasions as a way out of institutional gridlock or to muster support on legal issues.[245] Although States Parties and scholars are divided on the competence of the

238 Oude Elferink (n 237) para 17.

239 SPLOS 'Report of the Nineteenth Meeting of States Parties' (24 July 2009) SPLOS/203, paras 70–75.

240 ibid para 72.

241 ibid para 74.

242 ibid para 73.

243 cf Commission IV, Report of the Rapporteur of Committee IV/2, as Approved by the Committee (1945) 13 UNCIO 703, 709 ('In the course of the operation from day to day of the various organs of the Organization, it is inevitable that each organ will interpret such parts of the Charter as are applicable to its particular functions. This process is inherent in the functioning of any body which operates under an instrument defining its functions and powers'); Joseph Gold, *Interpretation: The IMF and International Law* (Kluwer Law International 1996) 3.

244 cf Bjarni Már Magnússon, *The Continental Shelf Beyond 200 Nautical Miles: Delineation, Delimitation and Dispute Settlement* (Brill Nijhoff 2015) 54.

245 Andrew Serdy, 'The Commission on the Limits of the Continental Shelf and its Disturbing Propensity to Legislate' (2011) 26 IJMCL 355, 356. Some authors demand an even more institutionalized relationship with the Legal Counsel, arguing in favor of a systematic review of state submissions by the Legal Counsel: Anna

Commission to engage in at least some legal interpretation, the Commission appears to take the view that it may consider and seek legal advice on Article 76 and Annex II of UNCLOS.[246] Interestingly, the Commission has never indicated a legal basis for requesting formal opinions of the Legal Counsel.[247] In particular, it did not rely on its Rules of Procedure which permit the Commission to seek the advice of external 'specialists in any field relevant to the work of the Commission'.[248] This, again, suggests that the advisory mandate of the UN Legal Counsel is a recognized feature in the practice of the United Nations.

It is true that the role of the Legal Counsel with respect to administrative or procedural questions is somewhat less controversial. In 1997, the Continental Shelf Commission for the first time sought a formal opinion from the UN Legal Counsel on the immunity of its members under the General Conven-

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Cavnar, 'Accountability and the Commission on the Limitsof the Continental Shelf: Deciding Who Owns the Ocean Floor' (2009) 42 Cornell Int'l LJ 338, 430.

246 In 2011, a member proposed to seek an opinion of the Legal Counsel on mechanisms for the Commission to procure legal advice on issues other than Article 76 and Annex II. Clarity on these issues was necessary, the member argued, when States disputed the correct interpretation on issues outside Article 76 that nevertheless could impact the outer limits of the continental shelf. According to other members, the Commission as a technical body should refrain from seeking legal advice on matters other than Article 76 and Annex II. The proposal was not further pursued. See CLCS 'Progress of Work in the Commission on the Limits of the Continental Shelf: Statement by the Chairperson' (16 September 2011) CLCS/72, paras 37–40; CLCS 'Progress of Work in the Commission on the Limits of the Continental Shelf: Statement by the Chairperson' (30 April 2012) CLCS/74, para 52.

247 cf CLCS 'Statement by the Chairman of the Commission on the Limits of the Continental Shelf on the Progress of Work in the Commission' (3 May 2005) CLCS/44, para 13 ('Commission decided to seek a legal opinion from the Legal Counsel'); CLCS 'Statement by the Chairman of the Commission on the Limits of the Continental Shelf on the Progress of Work in the Commission' (17 September 1997) CLCS/4, para 20 (Commission 'decided to request the Legal Counsel to provide it with a formal legal opinion').

248 CLCS 'Rules of Procedure of the Commission on the Limits of the Continental Shelf' (17 April 2008) CLCS/40/Rev.1, rule 57. For the questionable view that Rule 57 includes legal advice, see Cavnar (n 245) 429, fn 298. After all, whether legal interpretation is 'relevant to the work of the Commission' is subject to an ongoing debate.

tion.[249] Although this question was framed as an 'administrative' issue (and by implication of lesser importance), it was in reality motivated to shield the Commission's members from liability in the event a State accused them of leaking confidential and valuable data.[250]

This request constitutes an excellent example for the Legal Counsel's review function as the Commission had by then decided—based on a preliminary statement by the Legal Counsel—that its members enjoyed immunities as experts on mission. They postponed the adoption of draft Annex II of the Rules of Procedure and 'awaited the [formal] opinion of the Legal Counsel as to whether they were correct in asserting that those privileges applied to them.'[251]

In the Legal Counsel's reply, the issue was whether the Commission is an 'organ' of the United Nations to which the General Convention applies, so that its members enjoy immunities as experts on mission under Article VI of the General Convention.[252] For the Legal Counsel, the answer had to be in the affirmative. He did so by extending the rationale of an opinion rendered in 1969.[253] In that opinion, the Office of Legal Affairs had concluded that the CERD Committee as a treaty body was so closely linked to the UN so as to fall under the protection of the General Convention.[254] The Continental Shelf Commission, the Legal Counsel argued, was a treaty body created by UNCLOS and had a similarly close link to the UN.[255] Therefore, the Legal

249 'Statement by the Chairman of the Commission on the Limits of the Continental Shelf on the Progress of Work in the Commission' (n 247) para 20; cf Serdy, 'Annex II Article 2' (n 237) para 12.

250 CLCS 'Statement by the Chairman of the Commission on the Limits of the Continental Shelf on the Progress of Work in the Commission' (11 September 1998) CLCS/9, para 8.

251 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 6. See also 'Statement by the Chairman of the Commission on the Limits of the Continental Shelf on the Progress of Work in the Commission' (n 247) paras 19–20.

252 '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' (n 91) para 2.

253 ibid para 3.

254 OLA 'Memorandum of the Director, Division of Human Rights' [1969] UNJYB 207.

255 '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' (n 91) para 2.

Counsel concluded that 'by established precedent in respect of similar treaty organs' the Commission's members are experts on mission under Article VI.[256]

The Commission subsequently decided that Article VI of the General Convention 'shall apply *mutatis mutandis* to the members of the Commission, as experts on mission for the United Nations.'[257] However, the Commission felt obliged to submit the question to the Meeting of States Parties for consideration although it considered the issue to be resolved.[258] The Meeting of States Parties 'decided to take note of the legal opinion.'[259] And the current Rules of Procedure (last updated in 2008) of the Commission prescribe that its members enjoy immunities as experts on mission while explicitly referring to the opinion of the Legal Counsel.[260] The Legal Counsel's letter continues to be cited as a legal precedent by the Commission in its day-to-day activities.[261]

The Legal Counsel also resolved a related issue, namely the appropriate procedure the Commission should follow if a CLCS member is suspected to have breached the confidentiality of data.[262] Again, on the surface this might be a procedural question. But States invest significant funds in gathering data about the continental margin—data that may reveal insights about oil deposits

256 ibid para 5.

257 SPLOS 'Letter dated 15 May 1998 from the Chairman of the Commission on the Limits of the Continental Shelf addressed to the President of the Eighth Meeting of States Parties' (15 May 1998) SPLOS/28, para 3; 'Statement by the Chairman of the Commission on the Limits of the Continental Shelf on the Progress of Work in the Commission' (n 247) para 20.

258 'Letter dated 15 May 1998 from the Chairman of the Commission on the Limits of the Continental Shelf addressed to the President of the Eighth Meeting of States Parties' (n 257) para 4.

259 SPLOS 'Report of the Eighth Meeting of States Parties' (1998) SPLOS/31, para 50.

260 'Rules of Procedure of the Commission on the Limits of the Continental Shelf' (n 248) Annex II, para 2(1).

261 In 2008, the Office of Legal Affairs recalled that, 'in conformity with the legal opinion of the Legal Counsel', members enjoy immunities as experts on mission, and that certain regulations of the Secretary-General 'therefore apply'. See CLCS 'Statement by the Chairman of the Commission on the Limits of the Continental Shelf on the Progress of Work in the Commission' (25 April 2008) CLCS/58, para 49.

262 CLCS 'Letter dated 15 March 1999 from the Chairman of the Commission on the Limits of the Continental Shelf addressed to the Legal Counsel, Under-Secretary-General of the United Nations for Legal Affairs' (18 May 1999) CLCS/13.

or further exploration activities.[263] Seen this way, this legal opinion is an attempt at building an accountability regime for alleged breaches of CLCS members without having recourse to national courts.[264] In his reply, the Legal Counsel stated that there was no established procedure but recommended that there be an investigating body of Commission members, guarantees of due process and strict confidentiality, and a report to the States Parties.[265] Subsequently, the Commission 'decided to refer to that legal opinion when the need arose and proceed, as appropriate, on the basis of the recommendations' outlined in the opinion.[266] These recommendations are replicated in the Rules of Procedure almost verbatim,[267] and were applied by the Commission in the first investigation of an alleged breach of confidentiality.[268]

Nevertheless, the Legal Counsel's role has not been limited to 'purely administrative or procedural' issues. In the early days of its work, the Commission considered whether the term 'coastal State' and 'State' in Annex II, Article 4 of UNCLOS included States that were not parties to UNCLOS.[269] If answered in the affirmative, the Commission would have to accept submissions by non-parties.[270] It brought this issue to the attention of the States

263 Paula M Vernet, 'The Work of the Commission on the Limits of the Continental Shelf: Current Accomplishments and Challenges on the Verge of its 20th Anniversary' (2017) 20 MPUNYB 36, 44.

264 See Teresa F Mayr, 'Where Do We Stand and Where Do We Go: The Fine Balance between Independence and Accountability of United Nations Experts on a Mission' (2018) 15 IOLR 130, 151–167 (discussing accountability regimes of experts on mission without mentioning the legal opinion on an accountability procedure for CLCS members).

265 CLCS 'Letter dated 30 April 1999 from the Legal Counsel, Under-Secretary-General of the United Nations for Legal Affairs, addressed to the Chairman of the Commission on the Limits of the Continental Shelf' (18 May 1999) CLCS/14, paras 25–27.

266 CLCS 'Statement by the Chairman of the Commission on the Limits of the Continental Shelf on the Progress of Work in the Commission' (18 May 1999) CLCS/12, para 19.

267 'Rules of Procedure of the Commission on the Limits of the Continental Shelf' (n 248) Annex II, para 5.

268 CLCS 'Progress of Work in the Commission on the Limits of the Continental Shelf: Statement by the Chair' (24 September 2014) CLCS/85, paras 68–76.

269 'Statement by the Chairman of the Commission on the Limits of the Continental Shelf on the Progress of Work in the Commission' (n 247) para 19.

270 'Report of the Eighth Meeting of States Parties' (n 259) para 51.

Parties.[271] Many delegates expressed that the meeting of States Parties did not have the competence to render a legal opinion and that the Commission should seek an advisory opinion of the Legal Counsel 'only when the problem actually arises'.[272] Accordingly, the Commission did not pursue the matter further.[273]

In 2005, Brazil sent additional information after it had already submitted information on its outer continental shelf pursuant to Article 76(8) of UNCLOS.[274] This raised complex problems because the original submission by Brazil had been duly published by the Secretary-General under Rule 50 of the Commission's Rules of Procedure and because the outer limits in the additional submission significantly departed from the original submission.

Because of the complexity of the Brazilian submission, the Commission decided to request an opinion of the Legal Counsel 'on a matter of a general nature concerning the application of the rules of procedure of the Commission and the relevant provisions of the United Nations Convention on the Law of the Sea'.[275] In short, the Commission requested legal advice whether such

271 'Letter dated 15 May 1998 from the Chairman of the Commission on the Limits of the Continental Shelf addressed to the President of the Eighth Meeting of States Parties' (n 257) para 5(a).

272 'Report of the Eighth Meeting of States Parties' (n 259) para 52; 'Statement by the Chairman of the Commission on the Limits of the Continental Shelf on the Progress of Work in the Commission' (n 250) para 9.

273 According to Suarez, the Legal Counsel 'exercised restraint and decided not render an opinion' on this 'highly political issue' that could upset the submission process. See Suarez, *The Outer Limits of the Continental Shelf* (n 13) 108. The source for a discretionary refusal to provide legal advice is unclear. When the Commission first raised the issue, Legal Counsel addressed the 'coastal State' issue on a preliminary basis while indicating that further research would be necessary. See 'Statement by the Chairman of the Commission on the Limits of the Continental Shelf on the Progress of Work in the Commission' (n 247) para 19. The Chairman's statement provides no further details on the content of the Legal Counsel's preliminary statement. It appears that Commission did not pursue the opinion request in light of the comments of States Parties to consider the issue if a case actually arose. See also Andrew Serdy, 'Annex II Article 4' in Alexander Proelss (ed), *United Nations Convention on the Law of the Sea: A Commentary* (CH Beck/Hart/Nomos 2017) para 5.

274 'Statement by the Chairman of the Commission on the Limits of the Continental Shelf on the Progress of Work in the Commission' (n 247) para 12; cf Andrew Serdy, 'Annex II Article 8' in Alexander Proelss (ed), *United Nations Convention on the Law of the Sea: A Commentary* (CH Beck/Hart/Nomos 2017) para 6.

275 'Statement by the Chairman of the Commission on the Limits of the Continental Shelf on the Progress of Work in the Commission' (n 247) para 13.

additional submissions were permissible under the Commission's Rules of Procedure and UNCLOS.[276] There were some debates whether the request should be drafted with reference to specific cases. But the Commission decided to phrase the question in general terms to receive more actionable guidance. In any event, the Commission was cognizant of the respective expertise and decided that the opinion request 'should not include technical or scientific issues'.[277]

The opinion request effectively substituted the absence of a judicial advisory proceeding that the Commission could access. In a thirteen-page response, the Legal Counsel concluded that additional information, of the type submitted by Brazil, was permissible under UNCLOS, the Commission's Rules of Procedure and its Scientific and Technical Guidelines.[278] However, the Legal Counsel emphasized that it is ultimately up to the Commission to determine, in light of its mandate and UNCLOS, which limits of a coastal State are in accordance with Article 76 of UNCLOS.[279]

The Commission, having considered the legal opinion, decided to act accordingly.[280] This decision to act in accordance with the legal opinion seems to have been codified subsequently in the Rules of Procedures that now expressly allow for additional submissions by coastal States.[281] In addition,

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276 The exact question was whether '[i]s it permissible, under the United Nations Convention on the Law of the Sea and the rules of procedure of the Commission, for a coastal State, which has made a submission to the Commission in accordance with Article 76 of the Convention, to provide to the Commission in the course of the examination by it of the submission, additional material and information relating to the limits of its continental shelf or substantial part thereof, which constitute a significant departure from the original limits and formulae lines that were given due publicity by the Secretary-General of the United Nations in accordance with rule 50 of the rules of procedure of the Commission?' See 'Statement by the Chairman of the Commission on the Limits of the Continental Shelf on the Progress of Work in the Commission' (n 247) para 13.

277 ibid para 15.

278 'Letter dated 25 August 2005 from the Legal Counsel, Under-Secretary-General of the United Nations for Legal Affairs, addressed to the Chairman of the Commission on the Limits of the Continental Shelf' (n 3) Annex.

279 ibid Annex.

280 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 17.

281 'Rules of Procedure of the Commission on the Limits of the Continental Shelf' (n 248) r 44bis(2). The Rules of Procedure in force at the time of the request for

the Commission decided to publish the opinion on its website, to issue it as an official document, and to forward the opinion to the States that had already made submissions.[282] Lastly, the subcommission examining the Brazilian submission conveyed the contents of the opinion directly to the Brazilian experts.[283]

In his opinion, the Legal Counsel emphasized the need for transparency of additional information that constitutes a significant departure from the original submission since, according to the Rules of Procedure and the Guidelines, the executive summary of a submission shall be given due publicity.[284] The Commission agreed on the importance of due publicity and decided that 'the coastal State should provide the content of the information to be publicized, e.g., as an addendum or corrigendum to the executive summary'.[285] In light of the opinion, the Commission also invited Brazil to submit an addendum to the original executive summary to be duly publicized by the Secretary-General.[286]

The opinion request was not universally appreciated. According to one State Party, the Commission should not seek legal opinions on the rights and obligations of States Parties but only on administrative issues such as issues of privileges and immunities, and procedural questions such as the handling of confidential data.[287] Questions of such nature were a matter for the States Parties.[288] Consequently, the delegation argued, the opinion request by the Commission and the Legal Counsel's reply 'could not be considered to constitute a precedent authorizing the Commission to request additional

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a legal opinion (CLCS/40) did not contain a provision for additional information submitted on the initiative of the coastal State.

282 'Statement by the Chairman of the Commission on the Limits of the Continental Shelf on the Progress of Work in the Commission' (n 280) para 17.

283 ibid para 17.

284 'Letter dated 25 August 2005 from the Legal Counsel, Under-Secretary-General of the United Nations for Legal Affairs, addressed to the Chairman of the Commission on the Limits of the Continental Shelf' (n 3) Annex.

285 'Statement by the Chairman of the Commission on the Limits of the Continental Shelf on the Progress of Work in the Commission' (n 280) para 18.

286 ibid para 19.

287 SPLOS 'Report of the Sixteenth Meeting of States Parties' (28 July 2006) SPLOS/148, para 81.

288 ibid para 81.

legal opinions of such a nature.'[289] Another delegation, however, welcomed the opinion.[290]

The controversial debate at the meeting of States Parties attests to the persuasive authority of the Legal Counsel. It reinforces the idea, according to a law of the sea practitioner, that the practice of the Commission cannot be dissociated from legal opinions—a derivative source of law that was neither intended nor foreseen in the work of the Commission.[291]

4.4.4. Commission on Narcotic Drugs

International drug control is based on three conventions: the 1961 Single Convention on Narcotic Drugs as amended by the 1972 Protocol (Single Convention), the 1971 Convention on Psychotropic Substances (1971 Convention), and the 1988 Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (1988 Convention). The underlying principle is that States must prevent the illegal production, trafficking, and consumption of substances listed in the schedules of the Single Convention and 1971 Convention.[292] For precursor chemicals listed in the tables of the 1988 Convention, States must prevent their diversion to the illicit production of drugs.[293] Scheduling new substances under the Single Convention and the 1971 Convention carries significant consequences, including the obligation to impose criminal sanctions.[294] Therefore, the institutional design of the scheduling process is crucial.

289 'Report of the Sixteenth Meeting of States Parties' (n 287) para 81.

290 ibid para 81.

291 Elie Jarmache, 'La pratique de la commission des limites du plateau continental' (2008) 54 AFDI 429, 436 (adding that recourse to the advice of the Legal Counsel has not been more systematic and sustained).

292 Daniel Heilmann, 'Narcotic Drugs and Psychotropic Substances' in Rüdiger Wolfrum (ed), *MPEPIL* (online edn, Oxford University Press 2010) para 3.

293 Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (adopted 20 December 1988, entered into force 11 November 1990) 1582 UNTS 95 (1988 Convention) Article 12(1).

294 1988 Convention, Article 3.

Under the drug conventions, the Commission on Narcotic Drugs has the authority to amend the scheduled substances under international control.[295] As a subsidiary body of ECOSOC composed of fifty-three Member States, it is the policy-making body of the United Nations on drug policy.[296] In making its decisions, it must consider the scientific recommendations of the WHO Expert Committee on Drug Dependence (or the International Narcotics Control Board under the 1988 Convention) although the legal consequences of these scientific recommendations is controversial.[297] The Commission decisions amending the schedules require a simple majority,[298] or a two-thirds majority depending on the treaty.[299] Decisions become binding unless a party has submitted the decision for review, and possible reversal, by ECOSOC within the applicable time-limit.[300] An ECOSOC review (and a possible reversal of a Commission decision by ECOSOC) is the only real check on the Commission's authority as there is no possibility to opt out under the Single Convention.[301] Pursuant to Article 2(7) of the 1971 Convention, a State may elect to not apply certain provisions of the 1971 Convention. But Article 2(7) is not a true opting-out provision. States must nevertheless apply a minimum of control measures, are subject to procedural and substantive conditions, as well as the supervision of the International Narcotics Control Board.[302]

The delegation of scheduling decisions to a body with limited membership is unique to the international drug regime. In other treaty regimes, scheduling decisions are made by all States Parties and dissenting States may easily opt

295 Single Convention, Article 3; Convention on Psychotropic Substances (adopted 21 February 1971, entered into force 16 August 1976) 1019 UNTS 175 (1971 Convention) Article 2; 1988 Convention, Article 12.

296 ECOSOC Res 1991/49 (21 June 1991) E/RES/1991/49; ECOSOC Res 9 (I) (16 February 1946) E/RES/1946/9(I). See SK Chatterjee, *Legal Aspects of International Drug Control* (Springer 1981) 234–256.

297 Heilmann (n 292) paras 21, 37.

298 The Single Convention contains no provision on required majorities. As per rule 58 of the Rules of Procedure of the Functional Commissions of ECOSOC decisions are made by simple majority: ECOSOC 'Challenges and Future Work in the Review of Substances for Possible Scheduling Recommendations: Note by the Secretariat' (18 December 2013) E/CN.7/2014/10, Annex I, para 16.

299 1971 Convention, Article 17(2); 1988 Convention, Article 12(5).

300 Single Convention, Article 3(8); 1971 Convention, Article 2(8); 1988 Convention, Article 12(7).

301 Single Convention, Article 3(7).

302 1971 Convention, Articles 2(7) and 19(7).

out.[303] For dissenting States it becomes all the more crucial to police the Commission through legal argument as they cannot file a reservation and the prospect of the ECOSOC review and reversal procedure seem minimal.[304] It is in this institutional context that the Office of Legal Affairs has frequently been requested to provide legal advice on the scope of the Commission's authority. But even without open disagreement, the complicated architecture of the drug conventions—such as the need to administer exemptions and to consider other treaty regimes—raise many legal issues that necessitate external legal advice.

The need for external legal advice arose for example when international aviation law and drug control law collided (in this case the 1925 International Opium Convention, a precursor convention of the 1961 Single Convention, colliding with an ICAO recommendation).[305] Since its founding in 1944, ICAO had recommended that all planes carry a narcotic drug for first-aid purposes.[306] While the Single Convention would eventually exempt small amount of drugs on airplanes for first-aid purposes,[307] it was doubtful whether the ICAO recommendation were consistent with the trade restrictions in Chapter V of the 1925 Convention.[308] At ICAO's request, the Commission studied the legality of narcotic drugs in first-aid kits on international flights

303 Richard Lines, *Drug Control and Human Rights in International Law* (Cambridge University Press 2017) 43 (comparing the drug conventions to the Convention on International Trade in Endangered Species of Wild Fauna and Flora). See also *Whaling in the Antarctic* (*Australia v Japan: New Zealand intervening*) (Judgment) [2014] ICJ Rep 226, 247, para 45 (describing the objection procedure under the International Convention for the Regulation of Whaling).

304 Both ECOSOC and the Commission are composed of States and there is a substantial overlap in membership. In the history of the Commission, ECOSOC was seised only once with a review application and confirmed the Commission's decision. See 'Challenges and Future Work in the Review of Substances for Possible Scheduling Recommendations: Note by the Secretariat' (n 298) Annex I, para 23.

305 International Opium Convention (adopted 19 February 1925, entered into force 25 September 1928) 81 LNTS 319 (1925 Opium Convention).

306 CND 'Report of the Thirteenth Session' (1958) E/3133-E/CN.7/354, para 153; CND 'Report of the Fourteenth Session' (1959) E/3254-E/CN.7/376, para 358.

307 Single Convention, Article 32(1) ('The international carriage by ships or aircraft of such limited amounts of drugs as may be needed during their journey or voyage for first-aid purposes or emergency cases shall not be considered to be import, export or passage through a country within the meaning of this Convention').

308 'Report of the Thirteenth Session' (n 306) para 153. See 1925 Opium Convention, Articles 12–18 (imposing a system of import and export authorizations).

under the 1925 Convention pending the entry into force of the 1961 Single Convention.[309] Many governments had doubts as to the compatibility with the 1925 Opium Convention.[310] Some argued that the carriage of narcotics in first-aid kits was not permitted under the Opium Convention.[311]

To inform the Commission's deliberations, ECOSOC, on a recommendation by the Commission, 'request[ed] the Secretary-General to prepare a legal opinion on the carriage of narcotic drugs in the first-aid kits of aircraft engaged in international flight in the light of the provisions of Chapter V of the 1925 Convention'.[312] Although ECOSOC addressed its request for an opinion to the Secretary-General, the Secretary-General merely transmitted the opinion of the Office of Legal Affairs.[313] In this opinion, the Office concluded that the carriage of narcotic drugs would not constitute 'international trade' in terms of Chapter V of the 1925 Convention if they were neither removed from the aircraft nor cross the customs station at the destination of the aircraft.[314] Contrary to the contemporary practice of including disclaimers, the Office wrote that it would be a 'useful assumption' for future work if 'governments ... accept the above legal interpretation as to the non-applicability of Chapter V of the 1925 Convention'.[315]

At its next session, the Commission took note of the legal opinion.[316] The UK was the lone dissenter. Although agreeing with the opinion in general, the UK questioned the assumption of the legal opinion that first-aid kits would not leave the airplane upon landing, and that therefore the import inspections under the 1925 Convention did not apply.[317] Upon recommendation by the Commission, ECOSOC took note of the legal opinion and invited

309 'Report of the Thirteenth Session' (n 306) paras 152–172.

310 ibid para 159.

311 ECOSOC 'Carriage of Narcotic Drugs in First-Aid Kits of Aircraft Engaged in International Flight' (3 April 1958) E/CN.7/344, Annex 5, Appendix B.

312 'Report of the Thirteenth Session' (n 306) para 166 and Annex I, resolution IV, para 6. For the ECOSOC resolution see ECOSOC Res 689 (XXVI) F (28 July 1958) E/RES/1958/689(XXVI)F, para 5.

313 ECOSOC 'Carriage of Narcotic Drugs in First-Aid Kits of Aircraft Engaged in International Flight: Legal Opinion and Report under Economic and Social Council Resolution 689 F (XXVI), Operative Paragraphs 3 and 5' (10 April 1959) E/CN.7/367, para 2.

314 ibid paras 4–5.

315 ibid para 8(a).

316 'Report of the Fourteenth Session' (n 306) para 364.

317 ibid para 366.

the Secretary-General to prepare implementing guidelines.[318] In the following year, ECOSOC, again upon the recommendation of the Commission, 'call[ed] the attention of Governments to ... [t]he legal advice of the United Nations Secretariat', and reproduced the opinion's conclusion in identical language.[319]

The Office again interpreted the scope of trade restrictions in 1977—this time under the Single Convention. Similar to Chapter V of the 1925 Convention, Article 31 of the Single Convention restricts international trade by imposing a system of import and export control.[320] Although the Single Convention exempted drugs in first-aid kits, it did not contain a similar clause for small quantities of drugs that needed to be analyzed in foreign laboratories or used as evidence in foreign judicial proceedings. On the initiative of Interpol and some States, the International Narcotics Control Board (INCB) discussed the cross-border shipments of small quantities of drugs seized in illegal traffic in 1977. Naturally, the trade restriction under Article 31 of the Single Convention delayed the shipments of drug samples that were to be examined in foreign laboratories or court proceedings.[321] This prompted the INCB to request an opinion of the Office of Legal Affairs.

In its opinion, the Office held that cross-border shipments of drug samples for the purposes of laboratory testing or for their use as evidence in foreign judicial proceedings did not constitute 'international trade' within the meaning of Article 31 and were therefore exempt from trade restrictions.[322] The control measures, according to the Office, were limited to 'import and export for commercial purposes'.[323] This interpretation is at least debatable as Article 1(1)(m) of the Single Convention defined import and export as the 'physical transfer of drugs' across borders without having regard to a specific purpose. Still, the Office favored its 'reasonable interpretation', especially in view of Single Convention's provisions on international cooperation against

318 ECOSOC Res 730 (XXVIII) G (30 July 1959) E/RES/1959/730(XXVIII)G, recital 1 and para 1.

319 ECOSOC Res 770 (XXX) E (25 July 1960) E/RES/1960/770(XXX)E, section I, para (b); CND 'Report of the Fifteenth Session' (1960) E/3385-E/CN.7/395, paras 251–255 and ch XIV(D).

320 Single Convention, Article 31.

321 ECOSOC 'Implementation of the International Treaties on the Control of Narcotic Drugs and Psychotropic Substances: Note by the Secretary-General' (16 December 1977) E/CN.7/609, paras 15–16.

322 ibid para 17.

323 ibid para 17.

illicit drug trade.[324] The INCB, however, felt that it could not ultimately decide the issue and submitted it to the Commission on Narcotic Drugs.[325]

Within the Commission most members 'expressed their agreement with the legal opinion of the United Nations Office of Legal Affairs'.[326] A working group tasked with the issue equally expressed 'unanimous agreement with the legal opinion of the United Nations Office of Legal Affairs'.[327] Eventually, a Commission resolution 'recognized' the ruling of the Office of Legal Affairs that drug samples for laboratory or judicial proceedings were exempt from Article 31 and recommended that States develop procedures for the shipment of such samples.[328]

In both instances the opinions of the Office of Legal Affairs were instrumental to narrowly interpret the scope of trade restrictions under international drug treaties. The Office increased the flexibility of States in moving drug samples across borders in scenarios that are viewed positively (first-aid kits and mutual legal assistance). Both cases attest to the influence of Office interpretations for the Commission on Narcotic Drugs. And they equally show that the Office sometimes pushes the boundaries of the law by making questionable assumptions (first-aid kits not leaving the airplane) or using purpose-based reasoning (export limited to commercial purposes).[329]

Under the international drug conventions, the advisory function of the Office of Legal Affairs has not been limited to the scope of trade restrictions. It has also been asked to interpret Article 2 of the 1971 Convention, and in particular the interplay between WHO's scientific mandate and the political discretion of the Commission. Article 2(5) provides that the 'Commission, taking into account the communication from the World Health Organization, whose assessments shall be determinative as to medical and scientific matters, and bearing in mind the economic, social, legal, administrative and other factors it may consider relevant, may add the substance to Schedule I, II, III or IV.'[330]

In 1977, the Commission felt the urgent need to place certain salts under international control. At the same time, the WHO had informed the Com-

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324 ibid para 17.

325 ibid para 20.

326 CND 'Report on the Fifth Special Session' (1978) E/1978/35-E/CN.7/621, para 178.

327 ibid para 181.

328 ibid ch XIII, resolution 4 (S-V).

329 cf Alston (n 176) 687.

330 1971 Convention, Article 2(5).

mission that it had not completed its public health assessment under Article 2(5) of the 1971 Convention. To speed up the process, the Commission asked the Office of Legal Affairs whether the Commission could adopt a decision amending the schedule but that this decision would only go into effect once the WHO had communicated its findings to the Commission.[331] According to the opinion, the Commission could take a decision only after having considered the WHO recommendation as its findings were determinative with respect to medical and scientific matters. If the Commission were to adopt a decision conditioned on a future WHO recommendation, this would reverse the scheduling procedure as prescribed in Article 2 of the 1971 Convention.[332]

The Office also ruled that the Commission could legally vote by correspondence and that 'the Commission would be within its authority' to request that the WHO immediately forward its recommendation after it had completed its medical assessment.[333] As a consequence, the Commission decided to vote by correspondence once the WHO had communicated its findings to the Commission. It made this decision 'taking into account ... the opinion of ... the Office of Legal Affairs' and 'in view of the opinion of the Office of Legal Affairs'.[334]

The 1977 opinion on a conditional Commission decision manifests a concern for the importance of the WHO recommendation in the scheduling process. More recently, this appears not to have been the case. In 2014, China proposed to include ketamine in Schedule I of the 1971 Convention.[335] Under the 1971 Convention, Schedule I imposes the strictest level of control such as limiting the use for very limited medical purposes, licensing and documentation requirements, and limiting international trade to competent authorities.[336] The WHO, in its Article 2(5) assessment, recommended against placing ketamine in Schedule I. Ketamine, the WHO Expert Committee reasoned, was included in the WHO List of Essential Medicine and it was

331 CND 'Report on the Twenty-Seventh Session' (1977) E/5933-E/CN.7/605, para 446. The opinion is reproduced in OLA 'Opinion Given Further to a Request from a Representative in the Commission on Narcotic Drugs' [1977] UNJYB 230.

332 'Report on the Twenty-Seventh Session' (n 331) para 446.

333 ibid para 446.

334 ibid chap XVI(B) (dec 6 (XXVII)). See also ibid para 448 and ch XVI(A) (res 3(XXVII), para (a) and res 4(XXVII), para 2).

335 ECOSOC 'Changes in the Scope of Control of Substances: Note by the Secretariat' (16 December 2014) E/CN.7/2015/7, para 31 and Annex III.

336 1971 Convention, Article 7.

'widely used as an anaesthetic in human and veterinary medicine', especially 'in developing countries and crisis situations'.[337] As noted by Norway, the strict control under Schedule I would limit the availability and block access to ketamine, something particularly concerning for low- and middle-income countries where ketamine was often the only available anaesthetic.[338]

This pitted the WHO's recommendation, 'whose assessments shall be determinative as to medical and scientific matters' against the broad discretion of the Commission, which may consider any 'economic, social, legal, administrative and other factor'.[339] There was a stark disagreement as to the merits of placing ketamine under international control.[340] But the political divisions involved a legal question: could the Commission place a substance in Schedule I against the medical advice of the WHO?

Before the ketamine controversy, the Secretariat had taken the position that, as a general matter under the 1971 Convention, 'the Commission may decide (even contrary to the recommendation of WHO) to place a substance under international control'. However, the Secretariat made an exception that the Commission cannot place a substance in Schedule I '[i]f WHO finds that a substance has significant therapeutic usefulness ... which would restrict the availability of the substance for medical and scientific purposes.'[341] At an intersessional meeting, the Commission discussed procedural aspects of China's proposal and, in particular, the impact of a negative WHO recom-

337 'Changes in the Scope of Control of Substances: Note by the Secretariat' (n 335) Annex IV.

338 ECOSOC 'Changes in the Scope of Control of Substances: Addendum' (16 December 2014) E/CN.7/2015/7/Add.1, para 22.

339 1971 Convention, Article 2(5).

340 'Changes in the Scope of Control of Substances: Note by the Secretariat' (n 335) paras 34–59; 'Changes in the Scope of Control of Substances: Addendum' (n 338) paras 20–26.

341 See 'Challenges and Future Work in the Review of Substances for Possible Scheduling Recommendations: Note by the Secretariat' (n 298) Annex I, para 14 (outlining procedures to change the scope of control of substances under the 1971 Convention). This exception for Schedule I appears to be based on an official commentary written under the Office of Legal Affairs. But the commentary takes an even broader position that the Commission may not place a substance under international control against the recommendation of the WHO regardless of the proposed schedule. See Adolf Lande, *Commentary on the Convention on Psychotropic Substances* (UN 1976) 71, paras 22, 24.

mendation.[342] Since the WHO findings were determinative as to medical and scientific matters, some members argued, it was not within the authority of the Commission to place ketamine under international control. Others noted that the Commission must also consider economic, social and other factors and that therefore it could schedule ketamine.[343] As a result of these discussions, the Commission requested an opinion of the Office of Legal Affairs on the 'authority of the Commission on Narcotic Drugs to schedule a substance under the 1971 Convention if the World Health Organization has recommended that the substance should not be placed under international control'.[344]

The ensuing legal opinion engendered considerable critique from States and civil society. The Office of Legal Affairs held that 'the ultimate authority to decide whether the substance should be added to a Schedule rests with the Commission ... even if WHO has recommended otherwise.'[345] The opinion leaves many questions unanswered and is certainly not a model of international legal craft.[346] As is often the case, the Office worked under time pressure, delivering the opinion just twelve days after the request, in time for the next meeting. This may explain some of the gaps in the opinion.

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342 'Legal Opinion from the Office of Legal Affairs of the Secretariat' (n 3) section I, para 2(c).

343 ibid section I, para 2(c).

344 ibid section I, para 1 and Annex.

345 ibid Annex, para 21.

346 The opinion did not consider the official commentary, according to which it would be *ultra vires* for the Commission to add a substance to Schedule I if the WHO had issued a negative recommendation and found a significant therapeutic usefulness of the substance. See Lande, *Commentary on the Convention on Psychotropic Substances* (n 341) 71, para 24. This view results from Article 7(1) which reduces availability of a substance for medical purposes—a provision which the opinion also fails to consider. As the opinion acknowledges, there is no relevant subsequent practice that concerned a negative WHO recommendation. See 'Legal Opinion from the Office of Legal Affairs of the Secretariat' (n 3) Annex, para 20. Finally, the opinion fails to consider international human rights law. Placing ketamine under strict Schedule I control is in tension with the core obligation of providing drugs deemed essential by the WHO under the right to health. See CESCR 'General Comment No. 14 (2000): The Right to the Highest Attainable Standard of Health (Article 12 of the International Covenant on Economic, Social and Cultural Rights)' (11 August 2000) E/C.12/2000/4, para 43(d) (stating that the right to health includes the core obligation to 'provide essential drugs, as from time to time defined under the WHO Action Programme on Essential Drugs').

China eventually changed its stance as its Schedule I proposal stood little chance, instead proposing to add ketamine to the much lighter control under Schedule IV before the Commission's official session.[347] The debates at the intersessional meetings are not published in the Commission's report,[348] nor does the Commission publish summary records of its meetings. But a shadow report of an NGO coalition recounted that, at the Commission's meeting, 'several countries stated their reservations with respect to the OLA's reasoning, pointing out the risk of creating a precedent that would enable the CND to schedule by vote any substance under the 1971 Convention'.[349] And an unofficial transcript of the intersessional meeting sheds further light on country's reactions with China stating that States should defer to the high quality analysis of the Office of Legal Affairs, except for clear counter arguments. For the Netherlands and Switzerland, the opinion was flawed because it did not engage with paragraphs 22 and 24 of the official commentary.[350]

In effect, the Office resolved a constructive ambiguity in the 1971 Convention in favor of the ultimate authority of the Commission and against a de facto veto right of the WHO.[351] Both conclusions are reasonable interpretations of the law, at least under the official commentary.[352] But the opponents of China's proposal could not rely on an Office opinion to bolster their (legal) case against the scheduling of ketamine. And the Commission's decision

347 ECOSOC 'Further Information Provided by the People's Republic of China on the Proposed Scheduling of Ketamine' (5 March 2015) E/CN.7/2015/CRP.5.

348 cf CND 'Report on the Fifty-eighth Session' (2015) E/2015/28-E/CN.7/2015/15, paras 69–72.

349 International Drug Policy Consortium, 'The 2015 Commission on Narcotic Drugs and its Special Segment on Preparations for the United Nations General Assembly Special Session on the World Drug Problem' (*IDPC*, 2015) <https://idpc.net/publications/2015/06/the-2015-commission-on-narcotic-drugs-and-its-special-segment-on-preparations-for-the-ungass-on-the-world-drug-problem-report-of-proceedings> accessed 7 July 2024, 20.

350 International Drug Policy Consortium, 'CND Intersessional – Friday 6th March 2015' (*CND Blog*, 6 March 2015) <http://cndblog.org/2015/03/cnd-intersessional-friday-6th-march-2015/> accessed 7 July 2024.

351 Julie Hannah, 'Ketamine under International Law' (*IntLawGrrls*, 12 March 2015) <https://ilg2.org/2015/03/12/ketamine-under-international-law> accessed 7 July 2024 (equating the legal opinion with the 'prevailing interpretation').

352 cf Lande, *Commentary on the Convention on Psychotropic Substances* (n 341) 71, para 20 (Commission may place substance under international control contrary to the recommendation of WHO) and para 24 (Commission would act unlawful if placing a substance in Schedule I after a negative WHO recommendation).

to postpone the consideration of China's proposal tacitly accepts the legal opinion.[353]

The legal opinion on the scheduling authority of the Commission on Narcotic Drugs exhibits the role of the Office of Legal Affairs in the decision-making process of administrative bodies of the United Nations. As an external actor, the Office of Legal Affairs legalizes politics when the Commission (or ECOSOC) are themselves divided. And in this process, its legal opinions invariably empower one actor (the Commission) over another (the WHO), and with it the relative importance of political discretion and medical expertise.[354] Seen this way it is unsurprising that States would either voice their support or harshly criticize the opinion.

Whatever the ultimate judgment on these opinions, the Commission's interpretation of its mandate cannot be understood without regard to the influential opinions of the Office of Legal Affairs. Even the 1971 Convention on Psychotropic Substances was adopted, at least in some part, because the Office of Legal Affairs had ruled that psychotropic substance were outside the scope of the Single Convention and by consequence outside the Commission's authority.[355] At times, they have pushed the boundaries of the mandate entrusted to the Commission under the drug conventions, such as when the Office cleared a decision amending the schedules of the Single Convention

353 cf 'Report on the Fifty-eighth Session' (n 348) paras 71, 97 (decision 58/2).

354 cf Dimitri Van Den Meerssche, 'Performing the Rule of Law in International Organizations: Ibrahim Shihata and the World Bank's Turn to Governance Reform' (2019) 32 LJIL 47, 61.

355 Adolf Lande, *Commentary on the Single Convention on Narcotic Drugs, 1961* (UN 1973) 87, para 6.
In 1965, the WHO had recommended to place LSD and similar substances under international control but 'was not sure whether that interpretation would be satisfactory from the legal point of view.' See CND 'Report of the Twenty-first Session' (1966) E/4294-E/CN.7/501, paras 302–303. The Office of Legal Affairs in a first opinion held that there were 'legal grounds for doubting the correctness' of the WHO recommendation to place certain psychotropic substance under the regime of the Single Convention. See CND 'Report of the Twenty-second Session' (1968) E/4455-E/CN.7/512, Annex II. A year later, Sweden tabled a draft resolution that would have applied the Single Convention to certain psychotropic substances. The Office of Legal Affairs, primarily relying on the drafting history of the Single Convention, opined that 'it would not be legally correct for the Commission to adopt the [Swedish] draft resolution'. States had differed on the soundness of the legal opinion but Sweden eventually withdrew its proposal. See CND 'Report of the Twenty-third Session' (1969) E/4606/Rev.1-E/CN.7/523/Rev.1, paras 351–357, 373.

before it even was in force—on the innovative rationale that there was a 'good prospect that the Single Convention would enter into force'.[356]

The Office might be hesitant to engage in a substantive review of the authority of the Commission that involves policy choices such as the importance of scientific advice as the ketamine opinion indicates. But the Office's scrutiny is greater with respect to truly procedural questions such as when the Office held that the Commission should not vote before having received the WHO recommendation. While the Commission's interpretation of its mandate cannot be divorced from the Office's advice, its review function does not amount to, nor does it substitute judicial review. Nevertheless, it exercises a limited legal review in an administrative context—limited, but existing as form of legal review nonetheless.

4.5. Concluding Remarks

The UN Legal Counsel is a legal authority in the United Nations legal order—in limited but important aspects. Interpretations of the Legal Counsel are recognized as a legal precedent. They have been formally overturned by the General Assembly. Member States sometimes speak in favor of, at times harshly criticize them. And a policy of *stare decisis* is in place within the Office of Legal Affairs. In jurisdictional disputes between United Nations organs, politically weak organs resort to rulings of the Legal Counsel to strengthen their position. Sometimes this succeeds, at different times it does not. Finally, Legal Counsel review of technical and expert bodies is not a mere rubber-stamp. As the case of the UNECE Working Party shows, legal opinions declared on two occasions that a proposed decision would overstep the mandate of the UNECE. Twice the UNECE reversed its proposed decision after the Legal Counsel weighed in. Sometimes organs or its membership ignored the advice, but often the organ publicly affirmed the advice. While this does not convert a Legal Counsel opinion into a 'binding' obligation, this public affirmation attests to the authoritative nature of the legal advice rendered.[357]

Three factors explain the impact of the Legal Counsel in the development of the institutional law of the United Nations. For obvious reasons,

356 CND 'Report of the Nineteenth Session' (1964) E/3893-E/CN.7/466, paras 155–157.

357 cf, with regard to advisory opinions of the ICJ, Rosalyn Higgins, *Problems and Process: International Law and How We Use It* (Clarendon 1995) 203.

the institutional memory of the Office of Legal Affairs is not even matched by well-resourced Member States. For better or worse, the Legal Counsel enjoys an appearance of independence and impartiality. Coupled with the publicity of the Legal Counsel's formal advisory practice, this makes the Legal Counsel an important actor in the development of the institutional law of the United Nations. For non-lawyers in expert bodies it is especially wise to play it safe on points of law by involving an external actor. This point explains the uneven scope *ratione personae* of Legal Counsel review in that the review of subsidiary organs of a technical and expert nature is more developed than the review of the principal organs of the United Nations.

Generally the standard of Legal Counsel review is 'lite'.[358] Opinions hardly ever elaborate on the standard of review. A rare example is the 2007 memorandum on the reduction of salaries of ICJ judges. There the Legal Counsel stated that 'it is not in the purview of the Office of Legal Affairs to evaluate whether the decision by the Assembly was warranted by objective circumstances, nor to assess the rationale for the resultant decrease in compensation ... [T]he purpose of the present observations is to examine whether such a decrease is legally acceptable, both in principle and in terms of the modalities of its application'.[359] It is not a searching review or one that could be analogized to reasonableness review.[360]

In the institutional law context, the Legal Counsel generally reviews for consistency with the principle of speciality,[361] the principle of respecting the division of competence within bodies and between different organs,[362] questions of competence,[363] administrative and procedural issues,[364] and

358 cf Klabbers, 'Constitutionalism Lite' (n 175).

359 'Conditions of Service and Compensation for Officials other than Secretariat Officials: Members of the International Court of Justice and Judges and Ad Litem Judges of the International Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda' (n 123) Annex I, para 8.

360 cf *Abyei Arbitration* (*Government of Sudan v Sudan People's Liberation Movement/Army*) (Final Award) (2009) XXX RIAA 145, 341 (reviewing a decision of an international body for 'excess of mandate' and employing 'reasonableness' as the applicable standard of review).

361 Section 4.4.2 in this Chapter (UNECE WP.7).

362 Section 4.3.2 in this Chapter (dispute between UNCTAD Working Party and UNCTAD Secretariat); Section 4.3.1 in this Chapter (dispute between OIOS and UNCC).

363 Section 4.4.4 in this Chapter (Commission on Narcotic Drugs).

364 Section 4.4.3 in this Chapter (Continental Shelf Commission).

specific legal standards.[365] Importantly, there is no review for external legal standards like the principle of proportionality or human rights. For example, in the opinion on the scheduling of ketamine, the Office of Legal Affairs did not analyze whether regulatory control of ketamine—an essential WHO medicine—is consistent with the human right to health, General Comment No. 14 of the Committee on Economic, Social and Cultural Rights and its 'core obligation' to provide essential drugs as defined by the WHO.[366] This is not necessarily surprising. Although the Legal Counsel is, to some extent, a functional substitute for a system of judicial review, the Legal Counsel is not a court. Opinions are brief with the longest one not more than thirteen pages,[367] and expected in a matter of days.[368] Legal Counsel review is administrative review by an international civil servant—albeit an important civil servant and results in administrative interpretations of the law, not judicial interpretations.[369]

Embodied and publicized in various documents—letters, opinions, notes and memoranda—interpretations of the Legal Counsel are not legally binding. Nevertheless they constitute a legal document. Consequently, the Committee for Programme and Coordination stressed that 'the legal interpretations provided by the Office of Legal Affairs were very important'.[370] This has also been acknowledged by the Legal Counsel: legal opinions contributed

365 See the opinions on the salary of ICJ judges and the honorarium of INCB members in Section 4.3.2.

366 'General Comment No. 14 (2000): The Right to the Highest Attainable Standard of Health (Article 12 of the International Covenant on Economic, Social and Cultural Rights)' (n 346) para 43(d) (stating that the right to health includes the core obligation to 'provide essential drugs, as from time to time defined under the WHO Action Programme on Essential Drugs'). See also Daniel Wisehart, *Drug Control and International Law* (Routledge 2018) 159–160.

367 cf 'Letter dated 25 August 2005 from the Legal Counsel, Under-Secretary-General of the United Nations for Legal Affairs, addressed to the Chairman of the Commission on the Limits of the Continental Shelf' (n 3).

368 ECOSOC 'Report of the Office of Internal Oversight Services on the In-depth Evaluation of Legal Affairs' (9 April 2002) E/AC.51/2002/5, para 6 (opinions often expected 'as soon as possible' or 'within the current session').

369 cf, in relation to the administrative interpretations by the ILO secretariat, 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.

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

to the development of international organizations law, were based on many years of practice and 'were recognized to carry legal authority'.[371] Seen this way opinions of the Legal Counsel are an 'intermediate public good' and the institution of the Legal Counsel is a body 'intended to, among other things, facilitate consultations and negotiations among member parties, monitor treaty compliance or provide other types of information'.[372] In an area of international law that generates few judicial decisions,[373] Legal Counsel opinions supply 'law'. They clarify the law, provide a frame of reference and legal infrastructure when the institutional law is doubtful, and are an embryonic nucleus of legality in the United Nations—'a system of law [that] does not amount to very much' when compared to other legal systems.[374]

371 'Provisional Summary Record of the 3398th Meeting' (n 22) 7.

372 cf Inge Kaul, Isabelle Grunberg, and Marc A Stern, 'Defining Global Public Goods' in Inge Kaul, Isabelle Grunberg, and Marc A Stern (eds), *Global Public Goods: International Cooperation in the 21st Century* (Oxford University Press 1999) 13. See also André Nollkaemper, 'International Adjudication of Global Public Goods: The Intersection of Substance and Procedure' (2012) 23 EJIL 769, 771 and 783 (describing international judicial adjudication as as an 'intermediate public good' that contribute towards 'final public goods' such as the protection of the environment or human rights).

373 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 (describing that, despite the importance of judicial decisions, international institutional law developed 'out of court', and in particular through the advisory practice of legal counsel of international organizations).

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

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.

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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

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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

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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.

Chapter 6: Concluding Remarks

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

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

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

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

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

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

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

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

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

2 UNGA 'Proposed Strategic Framework for the Period 2018-2019, Part Two: Biennial Programme Plan, Programme 6: Legal Affairs' (7 June 2016) A/71/6 (Prog. 6) and Corr. 2, paras 6.4 and 6.6 (stating that it is OLA's objective to enhance the respect for the rule of law by the principal and subsidiary organs of the UN).

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

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

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

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

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

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

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