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ROLE OF UNESCO'S OFFICE OF INTERNATIONAL STANDARDS AND LEGAL AFFAIRS

SUMMARY

This document provides information on the role and structure of United Nations legal offices, a summary of the legal framework governing UNESCO's Legal Office, observations regarding United Nations legal offices (e.g., size, structure, location, reporting lines, roles and responsibilities, workload and staffing, management of legal issues, role with the governing bodies) based on discussions with United Nations legal advisers, and finally on the role of UNESCO's Legal Office in relation to UNESCO conventions and other standard-setting instruments.



I. BACKGROUND

1. During the 159th and 197th sessions of the Executive Board (May 2000 and October 2015), discussions took place on the role of UNESCO's Office of International Standards and Legal Affairs ("Legal Office", "Office" or "LA") and the Legal Adviser. In July 2015, at the request of the Chairperson of the Executive Board, a note by LA on the role of the legal adviser in the UNESCO context was sent by the Director-General to the Chairperson, and subsequently shared by the Chairperson with the Bureau of the Executive Board. At the 197th session of the Executive Board, the Legal Adviser, in response to queries from Members of the Executive Board during its Rule 59 private meeting, offered to prepare a brief document on the role and function of the Legal Office, taking account also of the way other United Nations organizations, in particular the United Nations specialized agencies, are constituted and function. In this regard, it is worth noting that the Secretariat was asked to conduct a comparative study of the function of the legal adviser in other United Nations agencies at the 159th session of the Executive Board.

2. This document provides information on the role and structure of UNESCO's Legal Office. It draws on an Interoffice Memorandum from the United Nations Legal Adviser on the role and structure, independence and reporting lines of legal offices in United Nations organizations, particularly United Nations specialized agencies¹, UNESCO's legal framework (Constitution, Regulations and Rules, budget documents), the note on the role of the legal adviser in the UNESCO context referred to above, and discussions with United Nations legal advisers, particularly those of the United Nations specialized agencies.

3. Discussions with United Nations legal advisers focused on a series of questions around three main themes:

- Role, functions, structure, location and staffing of United Nations legal offices;
- Management of legal issues within the secretariat, including request-handling; and
- Role of United Nations legal offices with the governing bodies, intergovernmental and treaty bodies, and Member States.

4. This document provides information on the role and structure of United Nations legal offices (section II), a summary of the legal framework governing UNESCO's Legal Office (section III), observations regarding United Nations legal offices (e.g., size, structure, location, reporting lines, roles and responsibilities, workload and staffing, management of legal issues, role with the governing bodies) based on discussions with United Nations legal advisers (section IV), and the role of the Office in relation to UNESCO conventions and other standard-setting instruments (section V).

II. FUNCTIONS, STRUCTURE AND ROLE OF A UNITED NATIONS LEGAL OFFICE

5. The Interoffice Memorandum by the United Nations Legal Adviser describes the central role of the legal adviser in the United Nations and the specialized agencies as:

"... to provide legal advice to the secretariat and the governing bodies and thereby to contribute to the rule of law by independently interpreting the legal framework of the organisation."²

¹ United Nations Juridical Yearbook, 2003, pp 563-565, "Independence and reporting of the Legal Adviser of an agency of the United Nations system – Structure and role of the Legal Office – Specialized agencies v. subsidiary organs of the United Nations".

² Ibid, para 2.

6. The Memorandum continues by clarifying that the role of the legal service in any organization is advisory and not administrative:

“... to independently assist the secretariat and its divisions, branches and sections in the day-to-day administration of their mandates and programmes through the provision of legal services. In accordance with its terms of reference, the role of any legal service is advisory. It does not administer. In other words, in accordance with their terms of reference, the day-to-day administration of the work pursuant to the applicable rules is the job of the respective branches and units. For example, the financial services administer the financial regulations and rules, the human resources management branch the staff regulations and rules, and procurement section the financial rules concerning procurement. The administration of these rules is therefore the professional responsibility of the respective staff under the supervision and guidance, as required, of their directors who are responsible for the proper functioning of their services. **The legal service comes in when there is a question with legal implications that cannot be solved by the institutional knowledge of the service concerned.**”³ [Emphasis added]

7. The Memorandum makes a number of additional key points in relation to the United Nations legal adviser, including the need for independence, a direct reporting line to the executive head of the organization, and the importance of each organization having an independent unified legal service:

“The independence of the legal adviser is an essential element in the discharge of his/her functions.⁴ ... It is in this sense that the Legal Adviser reports directly to the Director-General, i.e., that he is not under the instruction of another official who has not been appointed as legal adviser.⁵”

The 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. The reason is that an international organization needs to be consistent in its legal practices and relations and the interpretation of its rules.”⁶

III. UNESCO’s LEGAL FRAMEWORK

8. The Constitution of UNESCO establishes the purpose of the Organization⁷, and the composition and functions of its Organs – the General Conference, the Executive Board and the Secretariat⁸. The Secretariat consists of a Director-General and such staff as may be required⁹, the staff appointed by the Director-General in accordance with Staff Regulations approved by the General Conference¹⁰.

Role of the Legal Adviser and the Legal Office in UNESCO’s Approved Programme and Budget

9. The role, functions and results expected of UNESCO’s Programme Sectors and Corporate or Central Services are determined by the General Conference every two years, and set out in the Approved Programme and Budget for the biennium, the so-called C/5. The relevant text in relation to the Legal Office is set out below:

³ Ibid, para 9.

⁴ Ibid, para 2.

⁵ Ibid, para 3.

⁶ Ibid, para 7.

⁷ UNESCO Constitution, Article I (1).

⁸ UNESCO Constitution, Article III-VI.

⁹ UNESCO Constitution, Article VI (1).

¹⁰ UNESCO Constitution, Article VI (4).

“The Office of International Standards and Legal Affairs (LA) is a Corporate Service reporting directly to the Director-General. The responsibilities of the Office are:

- (i) to provide legal advice to the General Conference, the Executive Board and various meetings convened by UNESCO and to all the intergovernmental bodies established by the General Conference and the Executive Board and those established for the implementation of the conventions;
- (ii) to provide legal advice on questions arising for the Organization, from its Constitution, statutory texts and regulations, and its privileges and immunities; to provide advice on the conclusion and application of agreements with Member States or other organizations and on contracts to which the Organization is a party;
- (iii) to represent the Organization before the Administrative Tribunal of the International Labour Organization and other international tribunals or dispute resolution boards;
- (iv) to assist in the drawing up and application of international standard-setting instruments and to exercise depository functions on behalf of the Director-General in relation to international treaties; and
- (v) to serve as the secretariat of the Committee on Conventions and Recommendations of the Executive Board and of the Credentials Committee and the Legal Committee of the General Conference.

The Office will continue to protect the Organization’s interests and will continue to concentrate its efforts along two main lines:

- (i) Ensuring compliance with the Organization’s rules, regulations and procedures;
- (ii) Pursuing improvements in the legal safety of activities carried out by the Organization.”¹¹

It is worth noting that this language has been used since the 32nd session of the General Conference in 2003.

10. As indicated in the Interoffice Memorandum of the United Nations Legal Adviser, there are a number of essential elements or attributes for an effective legal office, including independence and a direct reporting line to the executive head of the organization. In relation to UNESCO, the essential attribute of a direct reporting line to the Director-General is set out clearly in the text of the Programme and Budget set out above, is set out also in the post description of the UNESCO Legal Adviser¹² and is reflected in UNESCO’s organizational chart¹³. The other essential element, a separate and independent legal office providing independent legal advice, can be seen in the post description, which makes the Legal Adviser responsible for the overall direction and management of the Office, as well as in the Approved Programme and Budget and the organizational chart.

Role of the Legal Adviser and Legal Office – discussions in UNESCO’s governing bodies

11. One particular element of the Legal Adviser’s role – that of providing legal advice, on the one hand, to the Director-General and, on the other hand, its governing bodies – was discussed during the Rule 59 private meeting of the 197th session of the Executive Board and by the Special Committee of the Executive Board in its 159th session.

¹¹ 38 C/5 Approved Programme and Budget 2016-2017, Second biennium of the 2014-2017 quadrennium.

¹² <http://unesdoc.unesco.org/images/0022/002256/225612E.pdf>.

¹³ http://www.unesco.org/orgchart/en/ORG_vis_EN_files/png_1.htm.

12. At the 159th session of the Executive Board, the Special Committee, charged with examining the “question of the Legal Adviser of the Executive Board”¹⁴, confirmed that the Board did not need its own distinct legal adviser, that independence should be assured through other means, and proposed to contribute to this independence through an amendment to the Staff Regulations.

13. In informing the Executive Board of its conclusions, the Special Committee stated that, in the view of the majority (of the States Members of the Executive Board at the time):

“there is no need for the Executive Board to have its own Legal Adviser distinct from that of the Organization, as it would involve duplication of efforts, give rise to additional costs for the Organization and lower the status of the official concerned” (Executive Board Document 159 EX/13, paragraph 12).

14. In its decision 159 EX/Decision 4.2 (2000), the Executive Board, having “emphasized the need for the Executive Board to have recourse to independent and impartial legal advice from the Legal Adviser” requested that the “Director-General take the decisions concerning the appointment, tenure and termination of the Legal Adviser of the Organization in consultation with the Executive Board” and recommended that the General Conference “amend the Staff Regulations accordingly”.

15. In its resolution 31 C/Resolution 56 (2001), the General Conference endorsed the Executive Board’s recommendation and decided to amend Staff Regulation 4.5.3 to require that the Executive Board be consulted on the “appointment, tenure and termination of [the] Legal Adviser of the Organization”. In light of discussions during the Rule 59 private session of the 197th session of the Executive Board, in its resolution 38 C/Resolution 84 (2015), the General Conference modified Staff Regulation 4.5.3 to apply to “appointment, extension, renewal and termination”, and this not only for the Legal Adviser, but also for the Ethics Adviser and the Director of Internal Oversight.

16. It is interesting to note that UNESCO is the only United Nations organization where the executive head has to take decisions regarding the appointment, etc., of the Legal Adviser in consultation with the governing body. A requirement for such consultation is becoming increasingly common – in fact, increasingly the norm – for the Director of Internal Oversight.

17. What is clear, from the Interoffice Memorandum of the United Nations Legal Adviser and from discussions in the governing bodies of UNESCO, is the crucial importance attached to the role and capacity of the Legal Adviser to provide independent and impartial legal advice to the Organization’s three organs, that is, the General Conference, the Executive Board and the Secretariat.

Role of the Legal Adviser and Legal Office – United Nations practice

18. United Nations legal advisers, likewise, stressed the importance of an independent legal office and of a legal adviser able to provide objective and impartial legal advice on the organization’s legal framework.

19. Legal advisers of other United Nations organizations did not identify problems in this area, describing their role as to provide advice to their organization, and seeing no conflict as arising from the fact that the legal adviser may be called upon to provide advice by and to the Secretariat and the governing bodies. Most legal advisers were not aware that UNESCO had introduced a requirement that the Director-General consult the Executive Board on appointment, etc., of the Legal Adviser, and advised that there is no equivalent requirement in their organizations. On a separate matter, it is interesting to note that other United Nations organizations do not have an equivalent to Rule 59 of the Rules of Procedure of the Executive Board, in which the Director General informs the Board of certain senior appointments, promotions or renewals in a private meeting.

¹⁴ Pursuant to a request by the Executive Board in 157 EX/Decision 5.1 (1999).

IV. OBSERVATIONS REGARDING LEGAL OFFICES IN UNESCO AND OTHER UNITED NATIONS AGENCIES

20. Beyond the essentials of independence and a direct reporting line to the Director-General, there is room for difference, and differences can be seen in the legal offices of different United Nations organizations.

21. Discussions with legal advisers of other agencies show that there are differences in the size of legal offices, the location and structure of the office, the role and responsibilities of the office (and whether these are set out in a specific document), whether legal advice is provided only by lawyers in the legal office or whether there are other lawyers in other parts of the organization giving advice on specific matters (e.g., employment or procurement), arrangements for the provision of legal advice (e.g., charge/attribution, intake formalities), the range of clients, and the role of the legal office with the organization's governing bodies, other intergovernmental or treaty bodies, and Member States.

Structure and function

22. Regarding the size, location and structure of legal offices of United Nations specialized agencies, clearly the best comparator with UNESCO, and in relation to the post description and reporting lines of United Nations legal advisers, the following key points emerge from discussions with them:

- The legal offices of the United Nations funds, programmes, specialized agencies, and related organizations vary in size. The smallest has one legal officer at the P5 level as legal adviser. The largest has some 100 legal officers.
 - UNESCO has 11 legal posts, including the Legal Adviser. This is smaller than most comparable United Nations organizations.
- In the overwhelming majority of United Nations organizations, the legal office is a distinct service, with the legal adviser reporting directly to the organization's executive head.
 - This is the case at UNESCO, where the Legal Office is a distinct service and the Legal Adviser reports directly to the Director-General.
- Most United Nations legal offices are divided into sections or units, with one handling general legal matters (contracts, memoranda of understanding, agreements, partnerships, name and logo, etc.), one handling administrative law (legal issues associated with human resources management and claims before the United Nations Dispute Tribunal and Appeals Tribunal, or internal appeals boards and the ILO Administrative Tribunal), and some having a third dealing with international law, governing bodies, constitutional matters, technical or advisory assistance, or other matters.
 - UNESCO's Legal Office is divided into three sections in addition to the Office of the Legal Adviser: General Legal (LA/GL); International Administrative Law (LA/AL); and UNESCO Conventions and Recommendations (LA/CR).

Role and responsibilities

23. In relation to the role, responsibilities and mandate of the legal offices, including issues raised in the United Nations Legal Adviser's Interoffice Memorandum cited in paragraph 2 above, such as the advisory role of the legal office and whether all legal advice is provided exclusively by

legal officers located in a single legal office, the following trends can be seen:

- In some United Nations organizations, the mandate, role and responsibilities of the legal office are set out in an administrative instruction or like document issued by the executive head. In others, this information is contained in programme and budget documents and/or in the post description of the organization's legal adviser.
 - At UNESCO, the role of the Legal Office was set out in DG/Note/96/35 and since then appears in the Programme and Budget each biennium as well as in the Legal Adviser's post description.
- In the majority of United Nations organizations, legal advice is centralized in a single office providing legal advice on all legal issues arising in the organization. In others, there are also legal officers in the human resources and procurement sections, although this is less common. A number of legal advisers stressed the importance of a single provider of legal services, in order to ensure consistency in the interpretation and application of the regulatory framework across the organization.
 - In addition to the Legal Office at UNESCO, there is a small group of legal officers in the Bureau of Human Resources Management Service, in the Administrative Law Unit (HRM/LEG).

Workload and staffing

24. Regarding management of legal issues in United Nations organizations, all legal advisers drew attention to the increase in workload generated by a range of factors, including an increase in partnering with private sector and civil society bodies, an increased reliance on extrabudgetary funding, strengthened due diligence requirements and measures, an increase in disputes and increased resort to arbitration, mediation and other forms of dispute settlement, including, on occasion resort to national courts in breach of United Nations privileges and immunities, and an increased resort to the legal office on matters that are not strictly legal or that do not properly fall within the purview of the legal office (e.g., on the administration or application of the Staff Regulations and Rules, Finance Regulations and Rules, procurement procedures, and requests for conclusive or determinative advice rather than legal input on matters that are, in fact, policy or operational decisions, decisions for management, or matters that require decision by Member States).

25. In this context of increased workload, most other United Nations legal offices have grown.

26. At UNESCO, the workload has increased substantially, due to all the reasons cited above. In concrete terms, the number of requests for advice per annum increases every year; it has increased by 23.5% over the last four years (1 January 2012 to 31 December 2015). The staffing of the Office has remained unchanged.

27. UNESCO's Legal Office has 11 lawyers, including the Legal Adviser, and, within this staffing, it is expected to advise on all contractual matters, including contract disputes, draft and review funding agreements, memoranda of understanding, partnership arrangements, use of the UNESCO name and logo, category 1 and 2 institutes, and goodwill ambassadors. It is expected to contribute to both the Headquarters Committee and the Contracts Committee, with many documents for review, frequently within a very short time frame, as well as advising on legal issues during Committee meetings. It is expected to advise on, and protect, the privileges and immunities of the Organization and its staff in all the countries in which UNESCO works, to support field offices, to draft and advise on host country agreements as well as on the agreements that should be in place for any meeting held outside Paris Headquarters. Negotiations on these are becoming increasingly intense and time-consuming, as Member States are less willing to accept that these are essential, notwithstanding the clearly stated requirements of UNESCO's regulatory framework.

28. The Legal Office is also expected to advise on a range of human resources issues, legacies, and the Medical Benefits Fund, and defend cases brought by staff members before the ILOAT (International Labour Organisation Administrative Tribunal) against administrative or disciplinary decisions. This last is extremely labour intensive, with most cases requiring not only drafting of a reply to the appeal but also of a surrejoinder to the staff member's rejoinder.

29. The Legal Office is also expected to provide support and advice to the Executive Board and General Conference, as well as to meetings of UNESCO treaty bodies and other intergovernmental bodies. It is expected to review many of the documents submitted to these bodies. It also assures the Secretariat of the Legal Committee and the Credentials Committee of the General Conference and the Committee on Conventions and Recommendations of the Executive Board.

30. The Legal Office also plays an important role in relation to the normative and standard-setting work of the Organization, consisting at present of over 30 conventions, over 30 recommendations and 13 declarations. It also fulfils the depositary functions for UNESCO Conventions, receiving instruments of ratification from Member States, taking note of any reservations and informing all States party to the treaty and the United Nations Secretariat through the Treaties Section of the Office of Legal Affairs.

31. The Legal Adviser and the Legal Office provide legal advice to the Secretariat, governing bodies, treaty and intergovernmental bodies, the Contracts and Headquarters Committee, and on agreements, including with Member States, interpreting and advising on the Organization's legal framework and compliance with its rules, regulations and procedures.

Management of legal issues and offices

32. In addition to many United Nations legal offices having increased their staffing, many have reviewed working methods, in order to streamline the work of the office, considering, for example, whether legal advice should be "charged" or "attributed" to requesting departments, whether a formal intake form is needed to ensure that requests for advice contain a clearly stated legal question required for the department's work, and include relevant background information and documentation. It may also be useful in a bid to ensure that issue raised with the legal office are in fact legal in nature and ones on which the advice of the legal office is required or appropriate.

33. On these issues, there are different approaches within different United Nations organizations:

- A number of legal offices have considered whether there should be a system of "charging" for legal services or "attributing" the cost of legal services to "clients" within the Organization. In general, legal advisers do not favour such an approach. However, in many cases where there has been a significant task or project requiring substantial input from the legal office, the requesting department has contributed with funding for a dedicated or extra post in the legal office.
 - The possibility of charging for services has not, to date, been examined by the UNESCO Legal Office. However, in view of the steadily increasing workload of the Office, in particular substantial additional time spent in reviewing agreements and memoranda of understanding for extrabudgetary funding and projects, consideration may need to be given to this (e.g., FITOCA, project posts).
- A small number of United Nations legal offices have introduced an "intake form", electronic or paper. The offices that have done so report a certain streamlining – better defined questions, with context, background information and documentation. Others that have contemplated it have decided against, fearing that it may discourage requests to the legal office for advice or that it may be perceived as excessively

bureaucratic.

- The UNESCO Legal Office has provided guidance to senior Secretariat colleagues concerning matters that should come to the Office, and will monitor requests for advice for a period before deciding whether to introduce a formal intake system.
- The degree to which United Nations legal offices provide advice on Finance and Staff Regulations and Rules, procurement procedures, Rules of Procedure of statutory bodies, and the like, depends on the structure of the legal office, whether there are legal officers or lawyers outside the legal office, and the culture or practice in the organization. In most United Nations organizations, Finance, HR and Procurement colleagues administer and apply the relevant Regulations and Rules, and seek advice from the legal office only for complex questions of interpretation, cases where their application is difficult, and for drafting of amendments or revisions. Legal advisers of other United Nations organizations confirmed that amendments to Regulations and Rules must come to the legal office for drafting, input and legal “sign-off”. Three points should be made in relation to the role of the Legal Office at UNESCO:
 - The application of relevant Regulations and Rules is for the concerned service or sector, with advice sought from the Legal Office for complex questions of interpretation or cases where their application is difficult.
 - Proposed amendments to Regulations and Rules must be reviewed by the Legal Office.
 - The Secretary of the General Conference, Executive Board, Commissions, Committees and other subsidiary organs helps the Chairperson to conduct the discussion, ensure compliance with the Rules of Procedure and assist in all procedural matters. Should serious difficulties arise in interpreting the Rules or other procedural matters, the Secretary of the General Conference, the Deputy Secretary or the Legal Adviser may be consulted. The same applies in relation to treaty bodies and intergovernmental bodies.

34. Regarding the tendency – remarked upon as increasing by United Nations legal advisers – to seek legal advice from the legal office on matters not strictly legal, or on issues where there may be a legal element but the legal office is asked to provide advice not only on the legal issue but more broadly, the legal adviser is placed in a difficult position.

35. For instance, questions on the practice of governing bodies, treaty bodies and intergovernmental bodies rely on the knowledge and information within the relevant sector. The role of the legal office is to advise on legal issues that may arise in interpretation of legal texts taking account also of any relevant practice.

36. On occasion, the legal adviser is asked to pronounce not only on legal questions, or legal elements contributing to a larger policy, management, or operational decision, but on the decision itself. On occasion, it goes further, with the legal adviser approached for definitive advice on a matter properly within the decision-making sphere of Member States. It 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.

ROLE OF THE LEGAL OFFICE IN CONVENTIONS AND OTHER STANDARD-SETTING INSTRUMENTS

37. UNESCO has a significant normative and standard-setting function, through elaboration and adoption of international conventions, recommendations and declarations. While the different instruments have a different legal genesis and effect, the coordination role of UNESCO is central and the Legal Office naturally has a role to play in addition to the role of the relevant programme sector.

38. The Legal Office fulfils the depositary function in relation to the conventions; prepares for each General Conference a report on monitoring of implementation of standard-setting instruments¹⁵, and maintains a web-based database on all standard setting instruments.

39. The programme sector provides the Secretariat function to the General Assembly of States parties to the UNESCO Conventions and meetings of their subsidiary or organs or committees. The Legal Office has a support role in providing advice on legal issues.

¹⁵ At its 33rd session, the General Conference invited the Director-General to submit to it at each of its sessions “an information document containing particulars of the standard-setting activities envisaged at UNESCO and a comprehensive report on all the Organization’s standard-setting instruments, and more particularly on the status of ratification of conventions, with comments by the Executive Board”. (33 C/Resolution 88)