The Organization for the Prohibition of Chemical Weapons (OPCW):

Is a culture of legality possible?

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Introduction:

On 21 April 2002, the Organisation for the Prohibition of Chemical Weapons (OPCW) dismissed its Director-General, Jose Bustani. The decision, taken by the Organization's plenary body, the Conference of the States Parties, was a culmination of months of growing antagonism and hostility between the United States and the Director-General himself. The episode is significant in the development of international institutional law for a number of reasons.[2] For the purposes of this paper, it provides a basis to discuss whether, and if so how, some sort of culture of legality could be introduced into an inter-governmental organization dealing with arms control.

The paper starts by describing the decisions involved in the dismissal of Mr Bustani. I go on to show that despite quite detailed provisions in the governing treaty making provision for dispute resolution between states and between states and the Organisation, in practice these provisions have proved to be a wholly ineffective means of ensuring that decisions taken by the OPCW are lawful.[3] While this is due in part to the voting thresholds required to trigger any particular dispute resolution mechanism, I argue that the more fundamental cause is the lack of a culture of legality within the Organization. I explore some of the reasons why this ought to be a cause for concern.

I go on to identify two possible means of promoting such a culture. My first suggestion is to create a Legal Advisory Board as a subsidiary body of the Conference of the States Parties. Using the already existing Scientific Advisory Board of the OPCW as a blueprint, I explore the possibility of instituting some sort of in-house legal advisory function. The second proposal involves considering ways in which the role of the Secretariat's Legal Adviser might be strengthened and to what effect. I conclude by noting that neither option (together or separately) constitutes a complete remedy, nor would they have prevented the dismissal of Mr Bustani. However, if

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[2] See for example, Klabbers, 'The *Bustani* Case before the ILOAT: Constitutionalism in Disguise?' 53 *ICLQ* (2004) 455.

[3] The Organisation is created by Article VIII of the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction 1993, reprinted in (1993) 32 *ILM* 800.

instituted, they might represent the first steps towards creating a culture of legality in the Organisation.

The dismissal of the Director-General:

In May 1997, at its First Session, the Conference of States Parties appointed Jose Bustani as the Director-General of the Organisation for a four-year term.[4] The Conference subsequently renewed that appointment prior to the expiry of the initial term.[5] Thus, Mr Bustani's tenure was due to run until May 2005. However, led by the United States, concerns were mounting over allegations of financial and political mismanagement.[6] The challenge to Bustani became formal in March 2002 with the introduction by the United States of a motion of no confidence in the Executive Council which failed by a vote of 17-5-18 (for-against-abstaining).[7] The United States then exercised its right pursuant to Article VIII.12(c) to request a special session of the Conference of States Parties.[8] Pursuant to that request, the Conference met in its first special session on 21 April during which the parties voted 48-7-43 to remove the Director-General.[9] His dismissal was effective immediately.

Mr Bustani subsequently challenged the decision before the International Labour Organization's Administrative Tribunal which set aside the decision on the ground that the reasons for the dismissal were "extremely vague" and was awarded damages.[10] Mr Bustani had not sought reinstatement and the Conference of the States Parties subsequently appointed Ambassador Rogelio Pfirter in his place.[11]

Problems with existing decision-making processes:

A key legal question surrounding the dismissal was whether the Council and/or the Conference had the power to dismiss the Director-General. Procedural and substantive arguments were put forward. Procedurally, it was argued that there was

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[4] *Appointment of the Director-General*, C-1/DEC.2, 13 May 1997.

[5] *Renewal of the Appointment of the Director-General*, C-V/DEC.22, 19 May 2000.

[6] Concerns are detailed in statements made by the US to the Executive Council, available at http://www.state.gov. See also Murphy 'U.S. Initiative to Oust OPCW Director-General' 96 *AJIL* (2002) 711.

[7] The Rules of Procedure of the Executive Council provides that decisions will be made by a two-thirds majority of all its members: Rule 36, *Rules of Procedure of the Executive Council*, C-I/DEC.72, 23 May 1997 reprinted in Tabassi (ed), *OPCW: The Legal Texts* (1999). 384-394. Thus, in a 41 member Council, at least 28 states must cast an affirmative vote. For a report on the vote, see Mills, 'Progress in the Hague' 56 *The CBW Conventions Bulletin*, June 2002, 7 at 8.

[8] As foreseen by Article VIII(12)(c) and Rule 6, *Rules of Procedure of the Conference*, C-I/3, 12 May 1997 reprinted in Tabassi, above n 7 at 367-383. The request received the required support of one third of states parties.

[9] A two-third majority of members "present and voting" was required: Rule 69, *Rules of Procedure of the Conference*, above, n 7. Rule 71 defines the term "Members present and voting" as "Members casting a valid affirmative or negative vote." It goes on: "Members who abstain from voting shall be regarded as not voting." Thus, in this case, a two third majority of the 55 states voting was required and the 43 states abstaining are not included in the count.

[10] *In re Bustani*, Judgment No 2232 of the International Labour Organization Administrative Tribunal (ILOAT), 16 July 2003, para. 15. For discussion, see Klabbers, above n 2.

[11] *Appointment of the Director-General*, C-SS-1/DEC.3, 25 July 2002.

nothing in the treaty or in the rules of procedure of the Conference of the States Parties to allow a vote of no confidence to be taken. Further, it was argued that because the Executive Council had been considering the matter, the Conference did not have the power to consider it.[12] Substantively, it was argued that because the treaty is silent on the issue of dismissing the Director-General, neither the Council nor the Conference was competent to take that course of action.[13] The relative force of the arguments is not relevant here. Of interest, instead, is that the political and economic force of the United States combined to exclude any real discussion of the legality of the proposed action. In 2002, the United States paid 22% of the budget of the Organisation[14] and is reported to have threatened to withhold its contribution and suspend its participation in the OPCW if Mr Bustani was not replaced.[15] The episode demonstrated that, in the face of this power, the existing mechanisms to resolve differences between the member states were wholly inadequate to deal with the situation.

The first such mechanism is a procedural provision in the Conference's Rules of Procedure whereby a Member State is able to question a pending decision. By virtue of Rule 56, a representative may "rise to a point of order" which needs to be decided immediately by the Presiding Officer.[16] That decision can only be overruled by appeal upheld by a majority of the Members present and voting. Furthermore, Rule 64 provides that "any motion calling for a decision on the competence of the Conference to adopt a proposal submitted to it shall be decided upon before a decision is taken on the proposal in question."[17]

At a more formal level, the treaty itself offers some options in dispute resolution provisions. In the most extreme cases, the jurisdiction of the International Court of Justice can be invoked. Article XIV.2 provides:

> When a dispute arises between two or more States Parties, or between one or more States Parties and the Organization, relating to the interpretation or application of this Convention, the parties concerned shall consult together with a view to the expeditious settlement of the dispute by negotiation or by other peaceful means of the parties' choice, including recourse to appropriate organs of this Convention and, by mutual consent, referral to the International Court of Justice in conformity with the Statute of the Court. The States Parties involved shall keep the Executive Council informed of actions being taken.

Paragraph 5 provides:

> The Conference and the Executive Council are separately

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[12] *In re Bustani*, above n 10, at para B.

[13] *Note by the Director-General*, C-SS-1/DG.6, 21 April 2002.

[14] Member States are assessed in accordance with the UN Scale of Assessment, adjusted to take account of different membership. See *Scale of Assessments,* C-I/DEC.75, 23 May 1997. For 2002 assessments, see *Scale of Assessments for 2002,* C-VI/DEC.20, 19 May 2001.

[15] Hart, Kuhlau & Simon, 'Chemical and Biological Weapons Developments and Arms Control' *SIPRI Yearbook* (2003), 645 at 651.

[16] *Rules of Procedure of the Conference*, above n 8.

[17] *Rules of Procedure of the Conference,* above n 8.

> empowered, subject to authorization from the General Assembly of the United Nations, to request the International Court of Justice to give an advisory opinion on any legal question arising within the scope of the activities of the Organization. An agreement between the Organization and the United Nations shall be concluded for this purpose in accordance with Article VIII, paragraph 34 (a).[18]

There are options to resolve the dispute within the Organization too. Paragraph 3 and 4 provide:

> The Executive Council may contribute to the settlement of a dispute by whatever means it deems appropriate, including offering its good offices, calling upon the States Parties to a dispute to start the settlement process of their choice and recommending a time-limit for any agreed procedure.
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> The Conference shall consider questions related to disputes raised by States Parties or brought to its attention by the Executive Council. The Conference shall, as it finds necessary, establish or entrust organs with tasks related to the settlement of these disputes in conformity with Article VIII, paragraph 21 (f).

Why were none of the dispute mechanisms provided for in Article XIV or in the Rules of Procedure of the Conference pursued in an attempt to resolve the crisis? Two reasons emerge. In the first place, a closer look at all the mechanisms provided for in Article XIV reveals that they are inadequate to deal with any crisis. The inadequacies manifest themselves most obviously on a basic, procedural level. That is, in all of the review options, for the mechanism in question to be triggered, at least a simple majority of member states present and voting must agree to the review.[19]

For example, by virtue of Article XIV.2, any state objecting to how the dispute was being handled had the apparent right to challenge that in the Conference of the States Parties. However, to do this, the matter would firstly need to get onto the agenda of the Conference. By virtue of Rule 15 of the Rules of Procedure of the Conference of the States Parties, the agenda needs the approval of the Conference at the opening of the session by a simple majority of Members present and voting.[20] If this procedural hurdle was overcome and the matter was substantively debated by the Conference, a decision on the legality of the challenge would require (preferably) consensus, and failing that, a two-thirds majority of members present and voting.[21] Likewise, in an

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[18] The Agreement referred to in para. 5 was concluded in 2000 and entered into force in 2001. *Agreement Concerning the Relationship Between the United Nations and the Organisation for the Prohibition of Chemical Weapons*, A/RES/55/283, 24 September 2001.

[19] The United States avoided this threshold by instead relying on Article VIII.12(c) in calling for a Special Session of the Conference where it needed only one-third of all States Parties to agree - a course of action challenged before the ILOAT. See *In re Bustani*, above n 10, at para B. The ILOAT did not decide the issue.

[20] *Rules of Procedure of the Conference* above n 8. In fact, even to get on the provisional agenda, the Executive Council needs to approve it - see Rule 12, *Rules of Procedure of the Conference,* above n 8.

[21] Article VIII.18. This is to assume that the decision is a substantive, not procedural one. However, note also that Article VIII.18 provides in its closing sentence “When the issue arises as to whether the question is one of substance or not, that question shall be treated as a matter of substance unless otherwise decided by the Conference by the majority required for decisions on matters of substance.” See also Rule 70, *Rules of Procedure of the Conference*, above n 8.

attempt to refer to the International Court of Justice pursuant to Article XIV.2 involving a dispute between the OPCW and a State Party, a two-thirds majority is required.[22] For a referral for an Advisory Opinion, the same majority issues would prevail and that option is further complicated by Article VII of the Relationship Agreement with the UN because the referral would also be subject to the approval of the General Assembly.[23]

A second, and more fundamental, explanation for why none of the existing dispute resolution mechanisms were drawn upon in this instance concerns the complete absence of any culture of legality in the Organization. There was one attempt by by Brazil in the Executive Council to establish a Committee to examine the issue. At the same time as the United States tabled its motion of no confidence, Brazil put forward a motion to establish an extra-ordinary committee to consider the dispute.[24] Such a proposal can be seen as an attempt to trigger the "good offices" provision in Article XIV.3. That motion failed 14-17-8.[25] The Legal Adviser did present an oral opinion to the Executive Council during its deliberations, but at less than one page of text, it hardly constitutes thorough legal analysis and indeed is simply a recapitulation of the relevant terms of the treaty.[26] But apart from these two instances, there was no attempt (on the record at least) by any other states to seek thorough legal advice through the Organisation.

That such a decision could be taken, with its enormous constitutional and institutional ramifications far beyond the immediate effect of the dismissal, reflects the sense in the Organisation that the political realm is entirely undisturbed by any considerations of legality. In short, the political reality is that if a State Party can muster the political power to force a vote and ensure its outcome, then that same political power will block any attempts to channel the dispute through one of the envisaged mechanisms.

The only way to overcome this political reality would be to drastically lower the majority required to trigger one of the dispute resolution mechanisms. We have already seen that the threshold to reach agreement to convene a Special Session is significantly lower: one member state can request and provided one third of states parties concur, the session is convened.[27] While lowering the threshold required to trigger one of the dispute resolution mechanisms would make it easier to challenge a pending decision, it does of course need an amendment to the treaty. While Article XV allows for the treaty to be amended, this is tightly constrained given that all states have the power to veto any amendment.[28] For this reason, formal amendment is an impractical option and this paper instead explores two more incremental options. First

[22] Working on the assumption that the decision to refer is a substantive, not procedural one.

[23] Article VII.2 of the Relationship Agreement provides: "The United Nations and OPCW agree that each such request for an advisory opinion shall first be submitted to the General Assembly, which will decide upon the request in accordance with Article 96 of the Charter."

[24] Mills, 'Progress in the Hague' above n 7 at 8. Brazil's special interest in the matter is explained by the fact that Mr Bustani is Brazilian.

[25] Mills, 'Progress in The Hague' above n 7 at 8.

[26] Article VIII, paragraphs 43, 46, 47 and 49 of the treaty. The text of the Opinion is set out in *Note by the Director-General*, above n 13.

[27] Above, n 19.

[28] This veto power only extends to the provisions of the treaty itself. The amendment provisions relating to the Annexes are more nuanced: Article XV.4 and 5.

though, it is necessary to address a preliminary question and that is why it is desirable to attempt to create a culture of legality in the Organization.

Why a culture of legality in the OPCW is desirable: [29]

The questions about whether, and if so how and by whom, inter-governmental organizations should be held responsible or accountable are attracting increasing attention.[30] While the constraints of this paper do not allow consideration of these broad and fundamental questions, they form the backdrop to the more specific and focused issue of the value or otherwise of attempting to inject a culture of legality into the decision making of the OPCW.

Accountability matters because it goes to the legitimacy and therefore efficacy of the OPCW system. The *raison d'etre* of the Chemical Weapons Convention and its implementing body, the OPCW is to create a multi-lateral mechanism to eliminate existing chemical weapons and prevent future proliferation.[31] One of the lessons to be learnt from events leading up to the military action in Iraq in March 2003 is that if an arms control verification system is to have any legitimacy, it must be seen as genuinely multilateral and the decision-making process fair. Today, we are again witnessing the need for a genuinely multi-lateral and legitimate system of decision-making with the dispute between Iran and the International Atomic Energy Agency. If states are serious about eliminating chemical weapons and ensuring that they are not proliferated,[32] it makes sense to ensure that the Organisation tasked with this responsibility is as legitimate as possible. That will not by itself ensure compliance with the substantive rules, but it will make it more difficult for states to claim bias, unfairness and illegitimacy and therefore justify avoiding their obligations under the treaty.[33]

A second reason why accountability matters in the OPCW is the need to protect the sovereignty of its member states. This is of particular concern for the politically less powerful states. Within the OPCW, despite the formal equality among the Member States (there is no weighted voting for example), inequalities abound. For example, membership in the Executive Council rotates among the Member States, but in fact, the five Permanent Members of the UN Security Council have always held seats.[34] More generally, and perhaps inevitably in an inter-governmental organization, global politics are replicated in the policy-making organs – a point starkly illustrated by the Bustani dismissal. Frequently, calls for legal considerations to be taken seriously in such a politically charged environment are dismissed as being naïve. However, it is precisely because of the disparities in political power that some form of legal control

[29] For the framework of analysis, see Kingsbury, Krisch, Stewart, 'The Emergence of Global Administrative Law' 68:3 *Law and Contemporary Problems* (2005) 15, 42-52.

[30] See for example, International Law Association, *Accountability of International Organisations*, Final Report Berlin Conference (2004) and the work of the International Law Commission on Responsibility of International Organizations reported in A/CN.4/532, 26 March 2003, A/CN.4/541, 2 April 2004 and A/CN.4/553, 13 May 2005.

[31] Article I (object and purpose of treaty) and Article VIII (creation of OPCW and its mandate).

[32] I concede that, despite the rhetoric, states have mixed and complicated reasons for agreeing to the accord in the first instance. That does not change the fact that they have established the OPCW and have tasked it with this supervisory function.

[33] See generally, Franck, *Fairness in International Law and Institutions* (1998).

[34] Article VIII.23 sets out detailed provisions regarding the rotating membership of the Council.

ought to be instituted. Contrary to the assertions that calls for due process, reasoned decision making and so on are imperialistic,[35] failure to address the political imbalances within the OPCW means that states with less political influence become bound by decisions of the OPCW over which they in fact have no control.[36] This is particularly important when we consider that the Chemical Weapons Convention and the OPCW is held out as a blueprint for future arms control agreements because lack of real participation by smaller states in the OPCW may act as a deterrent in other multilateral arms control initiatives.[37]

There are other arguments to support a culture of legality within the based on more contested ideals, such as the rule of law or democratic ideals. At the furthest end of the spectrum lies what has been termed a constitutional approach.[38] But some idea of legality or rule of law can come into play without subscribing to such a pure ideal. For example, even if the OCPW is seen as only exercising delegated authority, states may want to exercise some control over the delegation and ensure that the organization and its organs are acting within the bounds of the delegated power. More broadly, it seems unacceptable that sovereign states should have created an international organization with such broad powers of control and sanctions over them but which itself is exempted from the duty to respect its constituent treaty.

Two modest proposals for creating a sense of legality:

Turning then to the question of how, in practical terms, might a sense of legality be introduced to the OPCW. One proposal is to establish a Legal Advisory Board as a subsidiary body of the Conference of the States Parties and the second is to enhance the role of the Legal Adviser. These proposals are discussed in turn.

(a) Legal Advisory Board

There is no doubt that the OPCW has the power to create such a subsidiary body. Article VIII.21(f) provides that the Conference of States Parties shall "establish such subsidiary organs as it finds necessary for the exercise of its functions in accordance with this Convention." The OPCW's Scientific Advisory Board offers a blueprint. Its purpose is to enable the Director-General "to render specialized advice in the areas of science and technology relevant to this Convention, to the Conference, the Executive Council or States Parties."[39] The idea of the Board was to allow input into the OPCW from the scientific community to ensure that the Convention would be able to adapt and respond to scientific and technological developments.[40] Such a system is

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[35] Harlow, 'Global Administrative Law: The Quest for Principles and Values' 17(1) *European Journal of International Law* (2006), 187-214; Chimni, 'International Institutions Today: An Imperial Global State in the Making' 15(1) *European Journal of International Law* (2004), 1-37.

[36] Kingsbury, Krisch & Stewart, above n 29, at 52.

[37] Such as the Biological Weapons Convention for example, if negotiations on the Protocol were to be revived.

[38] Klabbers, above n 2.

[39] Article VIII.21(h).

[40] Lawand, 'The Scientific Advisory Board of the Organization for the Prohibition of Chemical Weapons: The Role of Science in Treaty Implementation' 40 *The CBW Conventions Bulletin*, June 1998, 1.

particularly important in light of the centrality of science and technology in the verification scheme of the treaty. The Scientific Advisory Board is an appropriate model for the Legal Advisory Board, not only because of institutional similarities (both being subsidiary bodies of the Conference) but also because law and science raise the same tensions. Science, like law, is ostensibly neutral or objective but actually cannot be separated from its political environment.

The Scientific Advisory Board is composed of 20 members who serve "in their individual capacity as independent experts" and are selected on the basis of their scientific expertise.[41] According to the Convention, the Director-General appoints members to the Board "in consultation with States Parties".[42] However, the Conference of the States Parties placed a fetter on that appointment power when drawing up the Terms of Reference, clawing back a greater role for the Member States in appointment to the Board.[43] The terms of Reference, supplementing the treaty, stipulate that members are to be appointed "by the Director-General in consultation with States Parties from a list of nominees put forward by the States Parties".[44] Thus, it becomes evident that the appointment of the Board members was hotly contested as the Terms of Reference and Rules of Procedure were being drawn up, demonstrating the understanding among States Parties of the political significance of scientific advice. In the final analysis, the composition of the Scientific Advisory Board replicates the political balance within the OPCW itself with the Director-General using as selection criteria not only the scientific expertise and skills but also "a wide and balanced representation from the states parties".[45]

Considering these developments in the context of establishing a Legal Advisory Board, there is nothing to suggest that the same dynamics would not play out.[46] Indeed, in the case of the proposed Legal Advisory Board, the arguments for balanced regional representation are stronger because while legal cultures and understandings differ enormously between countries, scientific understandings are less open to cultural variations. Such a concession (that different political grouping would necessarily be included) is not, however, fatal to impartiality of the body. Most judicial bodies in the international legal system accommodate this type of representation.[47] The trick will be to ensure that, once the body is established, it can act independently and impartially. It is to that issue I now turn.

The function of the Scientific Advisory Board is to enable the Director-General to "render specialised advice" to the policy-making organs or Member States of the OPCW. Taken together, the various terms of the treaty, the Terms of Reference and the Rules of Procedure evince a key concern to have the Board function independently and impartially.[48] The independence of the Scientific Advisory Board

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[41] Para. 3, *Terms of Reference of the Scientific Advisory Board*, C-II/DEC.10, 5 December 1997 reprinted in Tabassi (ed), above n 7 at 486-488.

[42] Article VIII.45.

[43] Lawand, above n 40.

[44] Para. 3, *Terms of Reference of the Scientific Advisory Board*, above n 41.

[45] cf. para. 4 *Terms of Reference of the Scientific Advisory Board*, above n 41.

[46] Similar debates have taken place in the context of the membership of the Confidentiality Commission of the OPCW.

[47] Both the International Court of Justice and the International Criminal Court serve as examples.

[48] Lawand, above n 40.

is attempted by first of all having the Board reporting to the Director-General who in turn reports to the policy-making organs of the OPCW. Thus, a distance is created between the advisers and those being advised. There are also provisions in the Rules of Procedure of the Board as to how any actual or perceived conflict of interest should be handled.[49] Although such provisions are notoriously inadequate to prevent any real conflict issues, they signal that at least formal conflicts of interest are not acceptable. All of these provisions are standard in comparable bodies and ought to be replicated in any Legal Advisory Board.[50]

Paragraph 2 of the Terms of Reference sets out the role and functions of the Scientific Advisory Board. An interesting aspect is the limits on what the Board can unilaterally decide to work and on what it must be directed to work. For example, while it has a broad mandate to "assess and report on emerging technologies and new equipment which could be used on verification activities", it can only provide advice on the list of chemicals caught by the treaty if such a proposal originates with one of the States Parties.[51] Other provisions require a request by the Technical Secretariat, or the Director-General.[52] In drafting the Terms of Reference for a Legal Advisory Board, careful consideration will need to be given to its precise functions and in particular, whether those functions can be exercised unilaterally or need a request of one of the OPCW's organs. It may be useful to consider including a dispute resolution role for a Legal Advisory Board in addition to the provision of general legal advice.[53] In this way, there would be a standing body to accept referrals pursuant to Article XIV.2 which provides that the "Conference shall, as it finds necessary, establish or entrust organs with tasks related to the settlement of disputes in conformity with Article VIII.21(f)."

A regrettable aspect of the Scientific Advisory Board relates to funding – an issue which is always directly related to independence and impartiality. The treaty is silent as to the funding source but given that the members are appointed in their individual capacities, it is clear that it ought to be the OPCW, rather than their respective institutions or governments that funds attendance at the Board's meetings. The Conference, at its Second Session adopting the Board's Terms of Reference decided that "the budget of the OPCW, starting from 1998, shall contain resources adequate for travel and per diem costs associated with the annual meeting of the Scientific Advisory Board, and that any other meetings of the Scientific Advisory Board shall be held at no cost to the OPCW".[54] Thus, the OPCW will pay for only the annual meeting of the Board and in this way, the Board's independence is constrained.[55] In any Legal Advisory Board, the ideal would be for all costs (perhaps subject to some ceiling) to be borne by the Organization. If that is not possible, then at the very least, some system of disclosure of other sources of funding should be considered and in this regard, the Technological and Economic Assessment Panel, established to

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[49] Rule 7, *Rules of Procedure for the Scientific Advisory Board and Temporary Working Groups of Scientific Experts*, EC-XIII/DG.2, 20 October 1998 reprinted in Tabassi (ed), above n 7 at 489-493.

[50] Other examples are discussed in Lawand, above n 40.

[51] Para. 2(g) and (b) respectively.

[52] Paras. (d) and (e).

[53] The Scientific Advisory Board has no dispute resolution mandate. Cf. The Confidentiality Commission established by the Annex on Confidentiality.

[54] *Scientific Advisory Board,* C-II/DEC.10, 5 December 1997 at para. 3.

[55] Lawand above n 40 at 3.

provide advice to the Parties to the Montreal Protocol on Substances that Deplete the Ozone Layer, may offer a model.[56]

A final concern relates to the lack of transparency in the Scientific Advisory Board. Unless prior written approval has been obtained from the Director-General, observers are not permitted to attend meetings of the Board.[57] In a Legal Advisory Board, it would be preferable to allow observers to attend and, to allow for confidentiality or particularly sensitive issues to be discussed, to give the Director-General (or the Chair of the Advisory Board) the power to exclude them for a particular meeting. In this way, transparency would be in a better balance with accountability.

In conclusion, the structure and analogous functions of the Scientific Advisory Board would seem to be workable in the context of a Legal Advisory Board. A number of improvements could be made which are outlined above which are aimed at achieving a greater level of transparency and impartiality in the work of the Board.

(b) Enhancing the role of the Legal Adviser

The foregoing discussion signals that even a Legal Advisory Board would be a hard-fought encroachment into the States Parties' control of the OPCW. I now turn to the second and more informal proposal - enhancing the role of the Legal Adviser in the OPCW.

There are no provisions in the treaty itself either establishing or defining the role of the OPCW Legal Adviser. The institutional silence on the role and function of the Legal Adviser can be usefully compared to that of the Director-General – an office created by Article VIII.41 and to which the treaty assigns a number of tasks and responsibilities.[58] In an interview in 1999, the then Legal Adviser of the OPCW, Rodrigo Yepes-Enriquez, said he considered the main task of the Office of Legal Adviser to "ensure that the activities of the Organisation remain firmly within the legal boundaries defined by the Convention".[59] This vision of the Legal Adviser fits well with the vision of accountability offered by this paper.

The institutional silence on the role and functions of the Legal Adviser is matched by an academic silence on the roles of legal advisers in international organizations generally.[60] There is, however, growing literature and awareness about the role of national legal advisers and that work may form the basis for a thorough analysis of the role of an OPCW Legal Adviser. For example, there has been a series of meetings of Legal Advisers held under the auspices of the office of the Legal Counsel of the

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[56] Lawand, above n 40 at 3.

[57] Rule 2, *Rules of Procedure of the Scientific Advisory Board*, above n 49.

[58] For example, by virtue of Article VIII.41, the Director-General is the "chief administrative officer; he is responsible for confidentiality matters by virtue of the Annex on Confidentiality and also has responsibility for the Scientific Advisory Board (Article VIII.45).

[59] *OPCW Synthesis*, Newsletter of the OPCW, Mar-Apr 1999, 4.

[60] A notable exception is Merillat (ed), *Collection of Essays by Legal Advisers of States, Legal Advisers of International Organizations and Practitioners in the Field of International Law* (1999). See also Zacklin, 'The Role of the International Lawyer in an International Organisation' in Wickremasinghe (ed), *The International Lawyer as Practitioner* (2000) 57-68.

United Nations to discuss issues of common interests, including the role of Legal Advisers generally.[61] One issue facing Legal Advisers in both spheres (that is, the international and the domestic) is the inherently fraught law-policy dynamic. As one legal adviser put it while "it is clear that the principal function of the legal adviser is to advise as to the law, the adviser is also operating in an evolving political and legal system, which is under going an almost continuous process of change. This is even more so in the confined world of the law of international institutions."[62] Just as domestic lawyers need to navigate those tides, so also do their international counterparts.

In the case of Bustani's dismissal, the Legal Adviser did play a role in that he presented an oral opinion on the issue at the meeting of the Executive Council in March 2002.[63] Not surprisingly, given that the advice was rendered orally, the opinion is brief and does little more than repeat the provisions for appointment of the Director-General. Having set out the provisions of the Convention pertaining to the Director-General's appointment and independence,[64] the opinion states in its penultimate paragraph:

> There are no provisions in the Convention that foresee the termination of appointment of the Director-General during the 4-year term of appointment. In the year 2000, the Conference had the option not to renew the appointment of the Director-General. This option was not taken.

Given the seriousness of the situation, and how it goes to the independence of the organization, it is regrettable that it was not possible to allow a more reasoned and complete legal opinion prepared for the Special Session of the Conference. This is not to suggest that the ultimate outcome would have been any different, but it would have placed the internal law of the organization squarely on the agenda.

One possibility would be to amend the Rules of Procedure of the Conference to allow any Member State to request a Legal Opinion prior to any decision being made.[65] Such an option would complement and strengthen the existing mechanisms for raising concerns regarding a pending decision.[66] While this would delay a decision for a period of time, it could not ultimately prevent it. Even if the Rules of Procedure could not be amended in this way, the Director-General could adopt the practice of issuing legal advice on agenda items, as indeed happened in the case of Mr Bustani's dismissal.[67] However, even that option requires the approval of the Presiding Officer

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[61] See for example: Corell, 'Legal Advisers Meet at UN Headquarters in New York' 85 *AJIL* (1991) 371; Corell, 'Second Legal Advisers' Meeting at UN Headquarters in New York' 61/62 *Nordic Journal of International Law* (1994) 3; Corell, 'Third Legal Advisers' Meeting at UN Headquarters in New York' 87 *AJIL* (1993) 323; Mawhinney & Girtel, 'Fourth Legal Advisers' Meeting at UN Headquarters in New York' 88 *AJIL* (1994) 379; Felix, 'Fifth Legal Advisers' Meeting at UN Headquarters in New York' 89 *AJIL* (1995) 644.

[62] Zacklin, above n 60 at 61.

[63] Above, n 26.

[64] Articles 43, 46, 47 and 49.

[65] Rule 93 allows for amendment.

[66] Above, n 16 and n 17 relating to Rules 56 (points of order) and 64 (decision on competence).

[67] Rule 38, *Rules of Procedure of the Conference* provides that "The Director-General or his or her representative may, with the approval of the presiding officer, make oral or written statements to such

(the Chairman of the Conference). Alternatively, the Director-General could issue a Note outside of the confines of the Conference to all Member States annexing the legal advice. While none of these options are sufficient to prevent an "illegal" decision, they would contribute to a culture of legality in the Organization.

Conclusion – is a culture of legality possible in the OPCW?

I have used the dismissal of Mr Bustani as an example of a legally questionable decision by the OPCW but have not suggested that either of the two incremental proposals I went on to make would have prevented the same outcome. Indeed, given the political weight of the USA in that particular time and circumstance, it seems probable that Mr Bustani would have been dismissed even if his case had gone through some kind of "vetting" mechanism. It is possible, however, that his dismissal would have had a greater acceptance and that the independence of the Organisation would not have been so damaged as a consequence.

Nonetheless, we have seen that the obstacles to developing a culture of legality in the OPCW are formidable. The alternative is to accept that an inter-governmental organization has been created by the actions of sovereign states over which those same sovereign states no longer have any control.

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meetings".