Introduction

As a legal system evolves, it is usual for it to borrow concepts, principles, methodologies and institutional arrangements from other legal systems. Hersch Lauterpacht's early work has shown that analogies from domestic private law played a distinct part in the formative stages of modern international law.[1] For one, domestic analogies were influential on classical State theory. As States became the legal persons *par excellence* in the emerging international order, their position was assimilated to that of individuals in domestic systems, as reflected in the writings of some of the 'founding fathers' of international law. For Christian Wolff, '[n]ations are regarded as individual free persons living in a state of nature'.[2] Emmerich de Vattel, credited as the scholar who disseminated the view that '[t]he law of the nations is the law of sovereigns',[3] postulated the equality among nations in the following terms:

> '[s]ince men are naturally equal, and a perfect equality prevails in their rights and obligations, as equally proceeding from nature – Nations composed of men, and considered as so many free persons living together in a state of nature, are naturally equal, and inherit from nature the same obligations and rights. Power or weakness does not in this respect produce any difference. A dwarf is as much a man as a giant; a small republic is no less a sovereign state than the most powerful kingdom.[4]

[1] H. Lauterpacht, *Private Law Sources and Analogies of International Law* (Archon Books, 1937).
[2] C. Wolff, *The Law of Nations Treated According to a Scientific Method* (Oxford: Clarendon Press, 1934), p. 9, §2.
[3] E. de Vattel, *The Law of Nations* (Indianapolis: Liberty Fund, 2009), p. 85, §11.
[4] Ibid., p. 75, §18. Vattel's conception of nation, similar to Wolff's, is as follows: 'Nations being composed of men naturally free and independent, and who, before the establishment of civil societies, lived together in the state of nature, – nations, or sovereign states, are to be considered as so many free persons living together in the state of nature'; ibid., p. 68, §4.

This assumption influenced how various subfields of international law took shape, notably the law of treaties, the law of territory and the law of responsibility, each borrowing rules and structures from contract law, tort law or property law, as the case may be.[5] The view that States are analogous to individuals is nowadays rightly dismissed,[6] with States no longer being viewed as ontological realities but rather as socio-legal constructs established to regulate life within a political community.[7] Yet, many of the system's foundations date back to the time when that view was in vogue. The acceptance of 'general principles of law' recognised by the nations as a source of international law attests to the continuing – albeit restricted – role of domestic law analogies in the identification of international rules.[8]

If the growth and diversification of international law has seen the relevance of domestic law analogies wane, it now invites the drawing of analogies of a different character. As the international legal system becomes more robust through the intensification of multilateral cooperation and treaty-making, the completion of influential codification projects and the accumulation of judgments and awards by international courts and tribunals, the opportunity arises for greater recourse to *systemic* analogies, drawn from existing rules and principles of public international law itself. The emergence of international organizations in the 19th century is a case in point.[9] As intergovernmental institutions

[5] Lauterpacht, *Private Law Sources*, pp. 297–303. It should be noted that Lauterpacht's defence of private law analogies was justified not by a facile assimilation of States to individuals, but by the sense that it was 'in the approximation to the analogous general rules of private law that we see embodied the principles of legal justice and of international progress' (at xi).

[6] See, e.g., H. Thirlway, 'Concepts, principles, rules and analogies: international and municipal legal reasoning' (2002) 294 RdC 265 and J. Waldron, 'Are sovereigns entitled to the benefit of the international rule of law?' (2011) 22 EJIL 315.

[7] For an account of this paradigm shift, R. Portmann, *Legal Personality in International Law* (Cambridge: Cambridge University Press, 2010), pp. 139–46. It has been thus suggested that contemporary international law calls for a public law approach rather than private law analogies: B. Kingsbury and M. Donaldson, 'From bilateralism to publicness in international law' in Fastenrath and others (eds.), *From Bilateralism to Community Interest* (Oxford: Oxford University Press, 2011), pp. 83–86.

[8] Art. 38(1)(c), Statute of the International Court of Justice. See L. Siorat, *Le Problème des Lacunes en Droit International: Contribution à l'Étude des Sources du Droit et de la Fonction Judiciaire* (Paris: Librairie Générale de Droit et de Jurisprudence, 1958), pp. 344–45.

[9] When the League of Nations was established in 1919, the difficulty that commentators of the time faced in coming to terms with its legal status is exemplified by Oppenheim's article in the *Revue Générale de Droit international public*, where he concluded that the

began to interact with their members and third parties on the international plane, comparisons with States became inevitable. The question arose of whether, and to what extent, international organizations have rights, obligations and capacities similar to those vested in the State.

More than seventy years have passed since the United Nations was founded, heralding a new era for international institutions, yet there still is a fair amount of doubt regarding what international organizations are and the position that they occupy in the international legal system.[10] Because international law has been traditionally and relentlessly State-centric, a number of concepts and doctrines that were devised by States and for States do not appear to be fully transposable to international organizations.[11] On the one hand, it is commonplace to describe them as 'subjects of international law'. On the other hand, current political and legal discourse often emphasises discontinuities between the two categories of legal subjects. Indeed, at first glance, they appear to have more differences than similarities. While States are self-governing territorial communities, international organizations consist of bureaucracies set up to fulfil tasks of international cooperation. While States are free, within the bounds of international law, to pursue their development and self-realization, international organizations are established to achieve collective goals in diverse forms and fields.

In spite of the differences between States and international organizations, there has been a tendency in practice to extend to international organizations some of the solutions adopted for States. International organizations are party to treaties, maintain external relations with other entities, bring international claims, claim immunities from jurisdiction and can be held liable for internationally wrongful acts. There is no greater example of this tendency of assimilation than the two projects that the UN International Law Commission has completed with a view to identifying the general rules that apply to the treaties and responsibility of international organizations. The project concerning the law treaties, led by Professor Paul Reuter, kept the Commission busy from 1970 to

League was a *sui generis* legal person; L. Oppenheim, 'Le caractère essential de la Société des Nations' (1919) 26 RGDIP 234.

[10] J. Klabbers, *An Introduction to International Organizations* Law, 3rd edn (Cambridge: Cambridge University Press, 2015), p. 3.

[11] J. Alvarez, 'Book Review: *International Organisations and Their Exercise of Sovereign Powers* (2007) 101 AJIL 674, 678.

1982 and culminated in the adoption of the 1986 Vienna Convention on the Law of Treaties between States and International Organizations and between International Organizations.[12] The project concerning the law of responsibility was carried out from 2002 to 2011 under the special rapporteurship of Professor Giorgio Gaja, and resulted in a set of Articles on the Responsibility of International Organizations for Internationally Wrongful Acts,[13] which the UN General Assembly took note of and continues to consider periodically.[14] When the Commission carried out these projects, it relied heavily on its previous work on treaties and responsibility of States: the 1969 Vienna Convention on the Law of Treaties and the 2001 Articles on the Responsibility of States for Internationally Wrongful Acts, respectively. It extended most provisions contained in those instruments to international organizations, even in areas where practice and precedent were inexistent or inconclusive. As a result, the 1986 Vienna Convention and the 2011 Articles bear a strong resemblance to the 1969 Vienna Convention and the 2001 Articles. In the case of VCLT 1986, dispute settlement and final clauses aside, only three provisions are at variance with the text of VCLT 1969, while a handful present deviations of minor importance.[15] In contrast, the ARIO showcases greater structural and textual departures from the ARS;[16] still, in the end, meaningful variations with the regime of responsibility envisaged for States were kept to a minimum.

What lies behind this tendency of assimilation? What might be the normative basis for extending to international organizations rules that apply to States? In an oft-cited dictum, the International Court of Justice described international organizations as 'subjects of international law'

[12] Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations, 21 March 1986 (not yet in force), UN/Doc. A/CONF.129/15 (1986) 25 ILM 543.

[13] Articles on the Responsibility of International Organizations, 3 June 2011, YILC 2011/II, part two, p. 40.

[14] Most recently: UNGA Res. 72/122 (2017).

[15] The provisions substantively departing from VCLT 1969 are arts. 6, 7 and 74, the last of them a saving clause. For a general account of these changes, G. Gaja, 'A "new" Vienna Convention on Treaties between States and International Organizations or between International Organizations: a critical commentary' (1988) BYIL 253.

[16] A few provisions from the ARS were omitted, and some new provisions added. Among the omitted provisions are the second sentence of art. 3 ARS and arts. 5, 8, 9 and 10 on attribution of conduct. New provisions include art. 17, art. 40 and the six articles of Part V on 'Responsibility of a State in Connection with the Act of an International Organization'.

which 'as such' would be 'bound by any obligations incumbent upon them under general rules of international law'.[17] The International Criminal Tribunal for Rwanda has similarly held that 'the United Nations, as an international subject, is bound to respect rules of customary international law'.[18] The same position is found in academic commentary; in the words of a leading scholar:

> It can safely be submitted that international organizations are bound by international customary law, either on the ground that all subjects of international law are so bound, or on the ground that the member States were bound by international customary law when they created the organization and thus may be presumed to have created the organization as being so bound, or on the ground that the rules of international customary law are at the same time general principles of law to which international organizations are bound.[19]

But whether it can be 'safely' accepted that international organizations are bound by custom on the grounds offered in the quote is far from self-evident. For one, it cannot be assumed that all categories of international legal subjects are bound by customary international law in the same way, as if possession of 'international legal personality' could somehow have that effect.[20] Likewise, while the intention of member States to bind an organization to custom may be relevant for the relations taking place on the institutional plane, it cannot without more determine the law that

[17] *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt* (Advisory Opinion) [1980] ICJ Rep 73, pp. 89–90. The Court does not explain, however, what is meant by 'general rules of international law'. For a narrow reading, see J. Klabbers, 'Sources of international organizations' law: reflections on accountability' in J. d'Aspremont and S. Besson, *The Oxford Handbook on the Sources of International Law* (Oxford: Oxford University Press, 2017), pp. 993–1000.

[18] *Prosecutor v. Rwamakuba*, Case No. ICTR-98–44C-T, Decision on Appropriate Remedy (2007), para. 48.

[19] H. Schermers, 'The legal bases of international organization action' in R. Dupuy, *A Handbook on International Organizations*, 2nd edn (Dordrecht: Nijhoff, 1998), p. 402. For a similar argument, P. Sands and P. Klein (eds.), *Bowett's Law of International Institutions*, 6th edn (London: Sweet & Maxwell, 2009), pp. 463–64. The assumption that custom applies to IOs is also found in C. F. Amerasinghe, *Principles of the Institutional Law of International Organizations*, 2nd edn (Cambridge: Cambridge University Press, 2005), pp. 386–87. For a more cautious approach, only affirming the applicability of 'secondary rules' to international organizations: Klabbers, 'Sources', pp. 998–99.

[20] For example, only a few international legal regimes concern the rights, obligations and capacities of individuals, despite their progressive acceptance as subjects of international law. For an overview: K. Parlett, *The Individual in the International Legal System* (Cambridge: Cambridge University Press, 2011), in particular pp. 274–77 and 337–39.

applies between the organization and third parties on the international plane. Finally, recourse to the notion of general principles of law is a slippery slope, in that it does not quite explain the basis on which such principles would become binding on intergovernmental institutions.

A more methodologically sound approach to demonstrate that general international law applies to international organizations is to postulate that, following the arrival of organizations upon the scene, the 'rule of recognition' that makes custom and general principles of law a source of international law for States[21] has been widened so that it now covers also the corporate entities that States create.[22] The problem with this line of enquiry is that proving that such a change to the 'rule of recognition' has indeed occurred may be difficult, if not impossible, in the absence of convincing evidence that States have intended it. An alternative approach is to reject the assumption that the customary international law of States applies to international organizations, and require instead that each right, obligation and capacity of organizations on the international plane be established in the usual way, that is, through showing practice and *opinio juris* that independently confirms each of them.[23] The problem with this approach is that it is impractical: as the work of the ILC on treaties and responsibility has revealed, one may be pressed to find practice and precedent concerning international organizations that meets the demanding requirements of the test for custom formulated in the case law of the International Court.[24] The result is uncertainty whenever a question regarding the rules that apply to international organizations on the international plane is asked. If not in custom, where do we find those rules?

In this study, I consider and propose a third approach to address the question of the applicability of general international law to international organizations: the possibility of extending to organizations the rules that

[21] See, in this respect, the debate between Kelsen and Hart. While Kelsen postulates the existence of a basic norm establishing 'custom among states as a law-creating fact' (*Pure Theory of Law* [Berkeley: University of California Press, 1967], p. 323), Hart considers this statement a 'useless reduplication of the fact that a set of rules are accepted by states as binding rules' (*The Concept of Law*, 2nd edn [Oxford: Clarendon Press, 1997], p. 236).

[22] A variation of this argument can be found in F. Seyersted, *Common Law of International Organizations* (Nijhoff, Leiden, 2008), p. 57.

[23] This is the view implied, for example, in M. Wood, 'Do international organizations enjoy immunity under customary international law?' (2013) 10 IOLR 287.

[24] E.g., *North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany /Netherlands)* [1969] ICJ Rep 33, paras. 74–75.

apply to States by analogy. This approach assumes neither that organizations are *ipso jure* bound by custom nor that custom cannot apply to them unless there is independent proof of practice and *opinio juris*. It rather treats the question as a situation of uncertainty: an extensive gap in the international legal system that emerged together with international organizations. It then ponders how analogical reasoning, a form of systemic reasoning whereby existing rules are extended to novel situations with which they share a relevant similarity, may help in dealing with that situation of uncertainty.[25]

It seems that the idea of an analogy between States and international organizations has been part and parcel of the development of the law that applies to the external relations of international organizations over the past few decades. The intuition that permeates the work of the ILC, relevant judicial decisions and accounts offered by many commentators is that, for all their differences, there is no reason to distinguish between the two categories of international legal subjects when it comes to the application of certain rules of general international law. That intuition, however, has been kept beneath the surface. Underdeveloped and undertheorised, it has caused some eyebrows to raise and attracted a fair share of criticism.[26] Is it plausible to analogise between States and international organizations, given the many differences that exist between self-governing territorial communities and bureaucracies set up to pursue myriad goals of international cooperation? Even if it is, to what extent can that analogy justify extending the rules of States to international organizations?

[25] The idea that States and organizations may be analogous for certain purposes has been explored in one form or another in the literature: see e.g., Seyersted, *Common Law*, pp. 396 and 400 and K. Daugirdas, 'How and why international law binds international organizations' (2016) 57 *Harvard International Law Journal* 325, 357–58 (suggesting an analogy between international organizations and 'new states'). But a full investigation of the value, foundations, objections and limits of that analogy is lacking.

[26] See e.g., J. Wouters and J. Odermatt, 'Are all international organizations created equal?' (2012) 9 IOLR 7; V.J. Proulx, 'An uneasy transition? Linkages between the law of State responsibility and the law governing the responsibility of international organizations' in M. Ragazzi, *The Responsibility of International Organizations*; and G. Hafner, 'Is the topic of responsibility of international organizations ripe for codification? Some critical remarks' in U. Fastenrath and others (eds.), *From Bilateralism to Community Interest* (Oxford: Oxford University Press, 2011).

My argument is that because international organizations and States are legally autonomous entities operating on the international plane, reasoning by analogy can provide a general justification for making propositions about the content of the public international law that applies to international organizations. As such, it constitutes a method for filling, on a provisional basis, the gap that arose with the arrival of those organizations upon the international scene.

By reflecting on the role of the analogy between States and international organizations in the shaping of the law of international organizations, this study makes a contribution to the elucidation of two fundamental issues. The first is how techniques of legal reasoning can be – and have been – used by international institutions and the legal profession to tackle uncertainty and advance the law in a legal system where the making and application of the law remains radically decentralised. The second concerns the position that international organizations occupy in that system and the character of the right that States seem to enjoy, under an implicit international rule of incorporation, to establish new subjects of international law possessing separate legal personality. Those are issues that the ILC for the most part overlooked in its work on treaties and responsibility, and deliberately so. But facing them is essential to appraise – and even to apply – provisions contained in instruments such as VCLT 1986 and the ARIO. Whenever courts, arbitral tribunals, governments and international institutions rely on or criticise a rule proposed on the basis of analogy, they must be able to take a stance as to whether or not this rule may be invoked under international law as it now stands. This is not possible without an understanding of the structure, function and value of analogical reasoning in general, and of the assumptions underlying the analogy between States and international organizations in particular.

Terminological Clarifications

A distinction found throughout this book contrasts the 'international plane' with the 'institutional plane'. The phrase 'international plane' refers to the realm of relations between self-governing entities where the rules of public international law apply. The phrase 'institutional plane' refers to the realm constituted and delimited by the international law of international organizations, comprising relations involving organs, members, employees and other entities under constituent instruments and other internal rules. The two phrases thus express the dividing line

between the 'total legal order' under which international organizations are established and operate when they relate to the outside world, and the 'partial legal orders' that organizations constitute as personified entities.[27] Though any terminology describing spaces that are intellectual constructs rather than geographical locations is bound to be awkward,[28] the questions addressed in this study – especially the general plausibility of analogising between States and international organizations – attract very different answers depending on whether one looks at organizations from without or from within.[29]

Another phrase that is employed here is 'general international law', in the sense that it has been used in the case law of the International Court of Justice and in the work of the International Law Commission, that is, to describe default rules of general application to be distinguished from special rules (*lex specialis*) that may be agreed or adopted in any given context.[30] I shall often favour that phrase over the related phrase 'customary international law' because it is more inclusive. While 'customary international law' is taken to mean rules deriving from the State practice and *opinio juris* of States, general international law can be used to refer not only to those rules but also to rules deriving from argument by principle and argument by analogy: it does not presuppose a fixed or rigid conception of what constitutes a valid legal proposition under

[27] I rely here on the distinction proposed by Kelsen when considering the legal personality of 'juridical persons' under the law: H. Kelsen, *General Theory of Law and State* (Cambridge: Harvard University Press, 1945), pp. 99–100.

[28] As Crawford notes, 'the "international plane" is a construct not a plane': J. Crawford (ed.), *Brownlie's Principles of Public International Law*, 8th edn (Oxford: Oxford University Press, 2012), p. 126. But he is one of many scholars to use the phrase international plane in distinction to other legal realms such as the institutional plane or the 'domestic plane'. The phrase is also found in *Reparation for Injuries Suffered in the Service of the United Nations* (Advisory Opinion) [1951] ICJ Rep 174.

[29] As Klabbers notes, '[w]hat makes the law of international organizations complicated is the fact that it involves three rather different legal relationships': 'the relationship between the organizations and its members states', 'relations between organization and staff, or relations between the various organs of the organization' and 'relations between the organization and the outside world': Klabbers, *An Introduction*, p. 3. Under the distinction adopted here, while relations between the organizations and its members can take place both on the international and institutional planes, relations concerning staff or organs take place on the institutional plane and relations between the organization and the outside world take place on the international plane.

[30] E.g., *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo* (Advisory Opinion) [2010] ICJ Rep 403; Conclusions of the Work of the Study Group on the Fragmentation of International Law, YILC 2006/II, part two, 179, footnote 976.

international law.[31] Further, 'general international law' also has the advantage of encapsulating the notions of general principles of law recognised by nations and peremptory norms (*jus cogens*).

I shall also use throughout this book terms such as 'corporate entity', 'corporate body' and 'rule of incorporation', which are far more usual in works of domestic company law than in studies of international law. The goal is to emphasise that many of the issues covered here revolve around the use by States of a distinct form of corporate personality, behind which they oftentimes purport to hide.[32] I am not of course proposing to draw analogies between rules of international law and company law, but rather to rely – loosely and for illustrative purposes – on terminology that is helpful for capturing and tackling problems that both systems share.

Finally, the phrase 'rules of the organization' is used interchangeably with 'internal law' or 'internal rules' of international organizations. As defined in VCLT 1986 and the ARIO, the 'rules of the organization' comprise 'the constituent instruments, decisions, resolutions and other acts of the international organization adopted in accordance with those instruments, and established practice of the organization'.[33]

Structure of the Book

The book is divided into three parts.

Part I makes the case for an analogy between States and international organizations. Chapter 1 considers the function and value of analogy in domestic and international legal reasoning, explaining why it is a technique to which the legal profession turns in situations in uncertainty, that is, to fill gaps in the law. Chapter 2 analyses the plausibility of an analogy between States and international organizations, which depends on two conditions being satisfied. First, international law has to admit of international organizations as a general category of legal persons to which a common set of rights, obligations and capacities apply. Second, there must be a relevant similarity between statehood and the status of international organization under international law.

[31] See the discussion in Section 1.1.4.

[32] For a study that also finds it illuminating to discuss international organizations as a case of the use of the corporate form, see I. Seidl-Hoheverden, *Corporations in and under International Law* (Cambridge: Grotius, 1987), pp. 69–93.

[33] Art. 2(d) ARIO; see also the slightly different formulation in art. 2(1)(j).