THE ANALOGY BETWEEN STATES AND INTERNATIONAL ORGANIZATIONS

This book investigates how an analogy between States and international organizations has influenced and supported the development of the law that applies to intergovernmental institutions on the international plane. That is best illustrated by the work of the International Law Commission on the treaties and responsibility of international organizations, where the Commission for the most part extended to organizations rules that had been originally devised for States. Revisiting those codification projects while also looking into other areas, the book reflects on how techniques of legal reasoning can be – and have been – used by international institutions and the legal profession to tackle situations of uncertainty, and discusses the elusive position that international organizations occupy in the international legal system. By cutting across some foundational topics of the discipline, the book makes a substantive contribution to the literature on subjects and sources of international law.

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“In this book, Dr Fernando Bordin explores an elusive but fundamental problem: How does general international law apply to international organizations? That leads him to ask, in depth and with great subtlety, the questions what international organizations are from the point of view of international law and how they fit within the international legal system. By analysing the extent to which States and international organizations can be analogised, and how that analogy has served – and can serve – as a basis to extend rules from one category to the other, Dr Bordin provides a theoretically sophisticated and doctrinally informed contribution to our thinking about the sources and subjects of international law.”

James Crawford
Judge, International Court of Justice
Emeritus Whewell Professor of International Law, University of Cambridge
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THE ANALOGY BETWEEN STATES AND INTERNATIONAL ORGANIZATIONS

FERNANDO LUSA BORDIN

University of Cambridge
To the memory of my grandmother Paulina, who did not have the chance to go past primary school but used to say that she would get at least five university degrees in the next life.
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FOREWORD

It is difficult to imagine how law could ever function without analogy. Law operates within a conceptual framework that must be at least in part fixed. When that framework evolves, it normally does so by adaptation rather than constant reinvention. It is in order to fix the framework that codifications often begin with a classification of basic concepts. ‘All the law which we use concerns persons, things or actions’, in the Institutes of Gaius, is an example. Everything the Roman lawyer encountered had to be squeezed into one of these three overarching concepts. Conceptual classifications have consequences: if, for example, in the eyes of the law, animals are ‘things’ and companies ‘persons’, it will almost inevitably follow that in regulating them the law will reify the former and anthropomorphise the latter. The analogical application of rules about things to animals (e.g., on liability of owners) in Roman law follows from the conceptual classification under that law. In a legal system based on a different framework – for instance, one where animals were classified as ‘persons’ and companies as ‘things’ – the results of the analogical extension of rules would be starkly different.

The analysis of how analogy operates in the law requires, at a minimum, doctrinal and conceptual rigour. In no small measure it also necessitates self-reflective thinking, for analogy within the boundaries of a defined conceptual framework is a habit of the mind for the lawyer – and one that the legal scholar seeking to understand how analogy works needs to interrogate.

The task is even more challenging when the law in question is public international law. There is no codification of basic concepts and categories in international law. Contemporary writing normally eschews the task of conceptual framing and classification of the entire field as a way of systematising it at the outset. Furthermore, international lawyers (or perhaps only the better ones) are also domestic lawyers. They possess a set of concepts embedded in the domestic legal system in which they received their legal education. To complicate things, following the
changes in the world of legal education and practice, a growing number of lawyers will have more than one domestic legal system of reference, and therefore more legal concepts and categories to grapple with. Self-awareness about their provenance is very important. Colleagues who display little such self-awareness and liberally infuse international law with concepts typical of their domestic legal system are a cause of regular irritation for other international lawyers.

But even those of us who strive to maintain a healthy measure of self-awareness would have to admit, lest we contradict ourselves, that in some way domestic law influences the way we approach international law. I suspect, for example, that it is no coincidence that the academic interest in constitutionalism is mainly an American and German phenomenon, which has left British international legal academia somewhat lukewarm: those who operate within a domestic legal system that is constitutionalised, if at all, only in a very idiosyncratic way, may be less attracted to the idea that international law is or ought to be constitutionalised.

The topic chosen by Dr Bordin for his first major monograph in public international law is thus replete with complex challenges. As will be clear from the first pages of this book, shunning complexity does not suit Dr Bordin’s intellectual temperament. In tackling the challenges before him methodically, Dr Bordin has produced an outstanding piece of legal scholarship that is a model of rigour and clarity. He begins with a sophisticated discussion of the role of analogy in legal reasoning, before proceeding to the key question: how do we justify the analogy between international organizations and States?

The facile objection to any case for analogy is ‘but they are different’. Of course ‘they’ are different. If ‘they’ were identical, there would not be a problem. Analogical reasoning is premised on difference and similarity. A case for analogy must begin with a careful analysis of those differences and similarities, and then advance an argument to justify the analogy and identify its proper limits. Dr Bordin’s argument in support of the analogy is thorough and thoughtful both conceptually and doctrinally. Those who disagree will have to do much better than ‘but they are different’.

It is in fact Dr Bordin himself who explains the three main counter-arguments to the analogy to ‘further probe’ – as he puts it – the case. A marker of truly great scholarship is how contrary lines of argument are presented and dealt with. Not only is Dr Bordin keen to do justice to contrary arguments, he develops them conscientiously before setting out his balanced and well-reasoned replies. His approach is genuinely dialectical. He engages with the antitheses to the main line of argument that
he set out at the beginning, and then proceeds to qualify and deepen his initial thesis coming, in effect, to a synthesis by the end. The concluding part of the book is where Dr Bordin develops his synthesis by focussing on the limits of the analogy and on what he describes as its normative contestation in various areas.

Before pouring praise on this book, I should have declared a conflict: I supervised the doctoral thesis from which it originates. The thesis focussed on analogy in the work of the International Law Commission on treaties and the responsibility of international organizations. The work of the International Law Commission still features prominently, together with a wide range of other materials, including State practice and judicial decisions, as well as secondary literature from international law and jurisprudence. But the book is broader, more ambitious, and has grown well beyond the excellent doctoral thesis that inspired it. It is, and reads like, a work of mature scholarship.

A lot of what passes for theory in international law today is riddled with shallow postmodernist scepticism that makes it not only inconsequential but also feeble in a doctrinal and jurisprudential sense. Dr Bordin shows that it is possible to take a complex topic and produce a serious work of rigorous legal scholarship that is original, cogently argued, theoretically sophisticated, and thoroughly relevant to the practice and development of the law.

Professor Guglielmo Verdirame
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I would also like to acknowledge an intellectual debt to two eminent scholars who had a considerable influence on how this project unfolded. The first is Professor José Alvarez, whose seminar on international organizations at New York University was not only an exceptionally stimulating educational experience, but also introduced me to some of the questions that I have set out to examine in this book. The second is Judge Giorgio Gaja, whom I had the honour and privilege of assisting in the sessions in which the International Law Commission concluded the first and second readings of the Articles on the Responsibility of International Organizations for Internationally Wrongful Acts; despite some critical comments on the output of the Commission’s work that I feel bound to make as a commentator, I have the greatest respect and admiration for his work as Special Rapporteur, as a scholar and as a judge.

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At Cambridge University Press, I owe huge thanks to my editors, Tom Randall and Elizabeth Spicer, for their patience and encouragement.

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This work could not have been undertaken, let alone completed, without the generous support of the Cambridge Overseas Trust, Sidney Sussex College, and the UK Foundation for International Uniform Law. Funding the research of young academics is a beautiful thing: these institutions have my sincerest appreciation.

The image on the cover is a crop from the mural painting ‘Titans’, by Lumen Martin Winter, which is on display at the United Nations Headquarters in New York City. The mural depicts the five continents moving the world out of darkness into light, a striking image that not only captures the idea of analogies in the similarly formed yet not identical titans, but is also a metaphor for systemic reasoning pushing international law forward – the optimistic outlook that animates this book.

I am indebted to the United Nations and Mr William Grant Winter for giving their permission for the use of the image; the people at the UN Photo Library for their solicitousness and efficiency; and Mr Lucas Welter, Ms Ana Luisa Demoraes Campos and Mr Felipe Rocha dos Santos for their help in brainstorming the cover design.
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AJIL American Journal of International Law
ARIO Articles on the Responsibility of International Organizations for
          Internationally Wrongful Acts
ARS Articles on the Responsibility of States for Internationally Wrongful Acts
BYIL British Yearbook of International Law
EJIL European Journal of International Law
EU European Union
GYIL German Yearbook of International Law
HLR Harvard Law Review
ICJ International Court of Justice
ICLQ The International and Comparative Law Quarterly
ILC International Law Commission
ILO International Labour Organization
IMF International Monetary Fund
IO International Organization
IOLR International Organizations Law Review
ITC International Tin Council
PCIJ Permanent Court of International Justice
RD Recueil des Cours de l’Académie de Droit International de la Haye
RGDIP Revue Générale de Droit International Public
UN United Nations
UNCLT Official Records of the UN Conference on the Law of Treaties between
          States and International Organizations or between International
          Organizations
UNGA United Nations General Assembly
UNSC United Nations Security Council
VCLT 1969 Vienna Convention on the Law of Treaties
VCLT 1986 Vienna Convention on the Law of Treaties between States and
          International Organizations or between International Organizations
TFEU Treaty on the Functioning of the European Union
WTO World Trade Organization
YILC Yearbook of the International Law Commission

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