
Book Reviews

Fernando Lusa Bordin. ***The Analogy between States and International Organizations***. Cambridge: Cambridge University Press, 2019. Pp. 267. £85. ISBN 9781107155558.

Fernando Lusa Bordin's book is a must-read for anyone interested in international organizations (IOs) and how they relate to states and, hence, to international law. It is a must-read too for anyone thinking about the nature and scope of general international law and, especially, the sources and subjects of international law. Not only is the monograph extremely well structured, written and argued, but one also learns a lot from the detailed discussions of various themes in the international law of treaties or international responsibility law with which the author illustrates each step of the argument. Finally, the book makes an important contribution to current debates about the nature of international legal reasoning, its techniques and the constraints that weigh on it.

In a nutshell, the book addresses the analogy between states and international organizations (understood as 'intergovernmental institutions', at 2–3, 11) and explores how this analogy has shaped the development of large parts of the international law that applies to IOs today. The analogy underpins, Bordin claims, not only much of the International Law Commission's (ILC) work on IOs (for example, the law of treaties and responsibility applicable to them) but also, more generally, the International Court of Justice's (ICJ) legal reasoning concerning the rights, duties and responsibilities of IOs under international law (at 3–8). The reason for this analogy is that general international law originally developed as the law of states. In that context and in the face of uncertainty with respect to the legal regime applicable to IOs, an analogy between states and IOs has been used to justify extending the scope of application of general international law to IOs. After more than 70 years of *de facto* (albeit covert) analogizing by the ILC and the ICJ, the book provides a timely opportunity to look back into what it regards as an 'underdeveloped and undertheorised' 'intuition' informing the ILC's and the ICJ's approach as well as to assess whether and how an analogy was, and still is, justified (at 7–8).

The author's argument is three-pronged and unfolds in the three parts of the book: (i) Bordin starts by making 'the case' for the analogy between states and IOs; (ii) discusses various 'objections' to the analogy and (iii) then explores some of its 'limits'. In the first part of the book, Bordin's case for the analogy between states and IOs proceeds in two steps. First, drawing on various legal theories, he argues that legal analogies are a technique of legal reasoning that applies in circumstances of uncertainty about the law and in order to fill gaps therein (Chapter 1). More specifically, 'analogical reasoning' is described as a 'form of systemic reasoning whereby existing rules are extended to novel situations with which they share a relevant similarity' (at 7). Analogies are generally justified by reference, among others, not only to the rule of law, legal systematicity and coherence but also to the 'treating like cases alike requirement' (at 47, 236–237). According to the author, all of this makes legal analogy a particularly important technique of reasoning in a recent and decentralized legal system such as international law (at 48, 245). He also stresses, however, that legal analogies can only be justified within the limits of a 'case-by-case' analysis of the 'relevant similarities' between the situations or entities

analogized (at 47–48, 212). Second, Bordin claims that there are two conditions for the analogy between states and IOs to be plausible and that both are actually met (Chapter 2): first, that IOs are, like the states before them, regarded by international law as legal persons or subjects and, second, that there are ‘relevant similarities’ between them. The ‘crucial relevant similarity’ (at 79) that the author mentions is the legal autonomy of states and IOs – that is, their being exempted from the jurisdiction of any other self-governing entity (at 86). The discussion of ‘counter-arguments surrounding the possibility of transposing particular rules’ to IOs is left to the next chapters (at 79).

In the second part of the book, the author addresses three ‘objections’ to the analogy between states and IOs: the alleged ‘structural differences’ between them (Chapter 3); the claimed ‘speciality’ of IOs *qua* subjects of international law (Chapter 4); and their alleged ‘layered’ nature (Chapter 5). Bordin rejects all three objections as such, even though he concedes that there are structural differences between states and IOs that may justify ‘limitations’ to the analogy in particular cases (at 104). He also concludes that the derivative nature of the personality of IOs affects their capacity to contribute to general international law-making (at 146) and that the layered nature of IOs can and should be accommodated through states’ joint or subsidiary duties in the regime of responsibility of IOs (at 184, 241).

The third and final section of the book turns to what the author refers to as the ‘limits’ to the analogy – that is, the limited material scope of the analogy and its ‘normative contestation’ when extending the scope of primary or secondary rules of international law to IOs in particular instances. He starts by arguing that the analogy can only apply outside the IO – that is, in its external relations to other IOs and to states other than its member states (Chapter 6). He next discusses some of the particular cases where the analogy between IOs and states has been contested (at 212, 236–237), as in the context of the application of the law of immunities or armed conflict to IOs or of the law of treaties or responsibility of IOs (Chapter 7).

The book’s conclusion is that, ‘for the most part’, the analogy between states and IOs with respect to the application of general international law to the latter is ‘plausible’ (at 241), albeit under two reservations. First of all, the analogy is only plausible within the limits of what follows from the structural differences between IOs and states and of the ‘layered’ nature of IOs (at 240–241), on the one hand, and within the restricted scope of the external relations of IOs with third states or subjects (at 241–242), on the other hand. Second, it is only plausible as long as we wait for practice and precedent in the area to develop further through normative contestation in particular cases (at 238).

Bordin devotes the last two pages of the book to recommend that the ILC, in its future work on IOs, recognize explicitly that it relies on analogical reasoning. He suggests that the commission should actively justify this analogy by reference to the uncertainty of the law rather than, for instance, ‘evasively stating that the ARIO lean towards “progressive development”’ (at 243). He argues, however, that the ILC’s analogizing should only be considered justified if viewed as ‘a starting point rather than a finishing line’. Finally, he recommends that international lawyers embrace the ‘principled contestation’ of the ILC’s conclusions, thereby laying the foundations for normative discussion and further institutional development in international law (at 244).

As is clear from this summarized account, the book leaves no stone unturned in the subject of international legal analogies. The author’s first monograph is simply a *tour de force*. It addresses some of the most enduring and daunting questions in international legal theory – for example, going to the material and personal scope of general international law, the foundations of international legal personality and the nature of IOs. It does this so calmly, methodically and clearly that reading always remains a pleasure while one progresses through the various controversies discussed. What characterizes the book at each step of the argument is the perfect balance between subtle legal-theoretical considerations, thorough doctrinal discussion and detailed case-law analysis. Just what one would expect, in short, from a book on international legal reasoning!

The book's argument about the role and justification of the analogy between states and IOs is perfectly convincing as it stands. Rather than provide a critique thereof, I would like to start a conversation with the author, and eventually with others, in the second half of this review, on some of the very important points made in the book. There are three issues in particular about which I would like to see more discussion in the future: the legal-theoretical framework of the argument for the legal analogy between states and IOs; the moral-political justification of that analogy; and the analogy's relevance for the development of a legitimate international institutional order.

The first set of comments I would like to make pertains to the legal-theoretical framework of the book's argument and, especially, its understanding of the role of justification in legal reasoning, including legal analogizing.

Early in the book, Bordin stresses that he does not wish to take sides in the jurisprudential opposition between legal realist or positivist and more normative or interpretive approaches to the nature of legal reasoning. He decides, however, to endorse a view that 'recognises a constructive role for analogy' while, all the same, hoping to provide common ground and a 'starting point' shared with other jurisprudential approaches (at 17–18). Later in the book, and especially in the conclusion, he reaffirms the importance of 'normative contestation', 'foundations' and 'values' in international legal reasoning (for example, at 7, note 25, 212–213, 236–237, 242). The difficulty is that some of the claims that make the core of his argument, and especially the descriptive references to positive international law therein, do not always fit the announced normative constructivism (for example, at 73–74).

Another related difficulty is that the key passages where the moral-political justification of the legal analogy between states and IOs should be provided and discussed are very short and elliptic (at 82–85, 104–106, 235–237). In the end, the reader is left wondering what exactly should be regarded as 'relevant' in the similarity between autonomous states and IOs (for example, at 240). She is simply told that 'like cases are to be treated alike' and that the 'coherence of the legal system' depends on that analogy (at 85). This lack of clear justification of the analogy is particularly problematic if, in turn and as Bordin rightly argues, legal analogy itself endorses a 'justificatory' role in the extension of the scope of general international law to IOs (for example, at 85, 185, 212, 238). As a matter of fact, the author sometimes uses terms such as 'plausibility' of the analogy (or its 'warranting rationales'; at 79 or 82) instead of 'justification' (at 49, 236), thereby perhaps eluding this 'justification of the justification' question.

Of course, the 'normative contestation' of the legal analogy between states and IOs (once considered to be justified) is encouraged and actually discussed in the last chapter of the book as a necessary critique or 'limitation' of the analogy 'on a case-by-case basis' (at 104, 184, 212, 240). It is difficult, however, to understand why this normative contestation comes so late in the sequence of the three parts of Bordin's argument. In my view, it should have been part of the justification of the analogy in the first place. Some of the repetitions in the author's argument about the 'relevant similarity' between states and IOs in the discussion of the justification of the legal analogy in Part 1 of the book (at 82–85) and in the (equally brief) discussion of the 'significance of structural differences' in Part 2 (at 104–106) actually confirm this point. As to the discussion of the so-called 'normative contestation of the analogy' in Part 3 (at 212–213, 236–237), it is focused exclusively on the transposition of specific primary and secondary rules of international law. And it does not really address the general arguments of those who have different 'worldviews about what international organizations are or ought to be' (at 213).

There is a second set of remarks following from the latter point: it pertains to the moral-political justification of the analogy between states and IOs. As I mentioned before, Bordin remains quite elusive about the justification of the analogy between states and IOs and, more specifically, about what makes autonomous states and IOs 'relevantly similar' (at 82–85). At first, the

(fully understandable) concern invoked to justify the analogy seems to be that states should be prevented from ‘incorporating’ institutions like IOs in order to evade their international legal obligations and responsibilities (at 8–10, 83). However, surely, this is a matter of states’ own legitimacy under international law. There are other ways of making sure states abide by their international legal obligations and responsibilities than simply extending their legal regime of rights, obligations and responsibilities to IOs.

True, and as I said before, Bordin discusses various normative ‘limitations’ to the analogy between states and IOs later on in the book by referring more specifically to the ‘structural differences’ between states and IOs (territory, population and government) (at 104–106). This is where he launches what could become a discussion of the moral-political justification of the analogy. Regrettably, the discussion quickly reduces normative features of statehood into ‘structural’ ones (at 104). It then conflates statehood with (state) ‘government’ (and ‘government’ with various governmental ‘functions’) and (state) ‘sovereignty’ or ‘jurisdiction’ with ‘autonomy’ (see also at 86). In so doing, it glosses over the fundamental institutional difference between states and IOs – that is, the political one. This makes the argument blind to the relationship between state authority and sovereignty, on the one hand, and popular sovereignty and political representation, on the other hand, a relationship that sets states apart from IOs.

As a matter of fact, the only examples provided as evidence of the similarities between states and IOs with respect to those ‘structural’ features are drawn from the European Union’s (EU) context (at 83, 93, 104, 123). This should not come as a surprise, however, to the extent that the EU is to date the only IO with an internal political project and, especially, guarantees of political equality and representation of its ‘citizens’. Still, neither the member states, the EU organs, third states or IOs, for that matter, draw on analogies between the international legal regime of statehood and that of the EU when identifying and interpreting the international legal regime applicable to the EU.¹ On the contrary, the growing importance of a set of legal rules and principles that is reducible neither to EU law nor to general international law, and is actually referred to as “EU external relations law” by both EU and international lawyers, confirms this point. If the international law regime of the IO that has come closest to a state politically does not usually rely on analogies with statehood, why should we rely on such analogies when addressing other IOs?

Of course, Bordin also addresses what he refers to as the objection to the analogy based on the ‘layered’ nature of IOs later on in the argument – that is, their being made of, and run by, states and their non-unitary nature as a result (at 147–148). This is actually the point where the pivotal political role of (member) states within IOs could be acknowledged. He disparages the question of ‘layers’, however, as being too complex and as having given rise to bad solutions through over-differentiation between states and IOs. Better, he says, to use it as a corrective once the analogy has been granted (at 184). *Ex post* fine-tuning of that kind may not be enough, however. States are not just ‘corporations’ that have the legal ‘right to incorporate’ further entities (public or private) under international law (for example, at 83–85). They are also ‘institutions’ and political ones at that: unlike any legal person, institutions endure over time, and states *qua* institutions draw legitimate authority and sovereignty from the representation relationship that they constitute between the people and its authorities. States’ rights, duties and responsibilities

¹ See, e.g., Opinion 2/13 (EU:C:2014:2454), para. 156. This is confirmed in the way in which the European Union practises general international law such as international law of treaties or international responsibility law. See, e.g., Klabbers, ‘The Reception of International Law in the EU Legal Order’, in R. Schütze and T. Tridimas (eds), *Oxford Principles of European Union Law*, vol. 1, *The European Union Legal Order* (2018) 1208; Kuijper and Paasivirta, ‘EU International Responsibility and Its Attribution: From the Inside Looking Out’, in M. Evans and P. Koutrakos (eds), *The International Responsibility of the European Union* (2013) 35.

under international law are not entirely reducible to their legal personality therefore. It is, of course, crucial to clarify how we have moved in legal history from the first legal ‘corporations’ – namely, the Catholic Church and then the state – to non-physical private entities themselves becoming incorporated (the so-called ‘corporations’ of today).² To that extent, Bordin is right to stress the need to think more carefully about those ‘rules of incorporation’ under domestic and international law (at 8–10, 82–86). However, it would be a mistake to reduce the legal and institutional discussion about states and IOs and their relations entirely to a matter of legal ‘personality’ or ‘subjecthood’.

My third and final set of remarks flows from this last point: it questions the relevance of drawing a legal analogy between states and IOs for future interpretations of international law and the development of a legitimate international institutional order. Bordin recognizes that the legal analogy between states and IOs is only plausible as the first step of a desirable and even necessary further normative discussion. As a result, the analogy may, and actually should, be criticized or even overturned once the debate has reached a level of greater maturity (at 48, 238, 242). I fear, however, that working towards a justification of the analogy before this debate takes place may be counterproductive in the current state of the international legal order. It entrenches a certain conception of statehood (and of general international law) that was developed in the 19th century. Indeed, this conception of statehood has not only tainted our understanding of the legal status of IOs through 70 (or even more) years of legal analogizing of IOs with states by the ICJ and the ILC, but it has also, to the extent that IOs have acquired powers to adjudicate on statehood in return or, at least, to interpret and mould it in other ways, locked both states’ and IOs’ legal and institutional regimes into a mutually reinforcing interpretation loop.³ If we want to question Western liberal concepts such as states’ (and IOs’) ‘autonomy’ or ‘will’, as well as overcome the utilitarian reduction of statehood to ‘government’ and of its sovereign powers to ‘functions’ that may be delegated from states to IOs, and then re-delegated from IOs to IOs, further analogies with this conception of statehood may not be the right way to go. We need more than a belated normative contestation around an analogy that is accepted to start with.

An alternative approach could stem from the essential stock-taking exercise proposed in the book. It would be more critical of the analogy in the first place and not fall prey to the dangers of the separating, comparing and juxtaposing of states and IOs that come with it. This alternative reading would recognize that states and IOs are not ‘separate, but equal’, institutions. Instead, indeed, one could imagine starting anew from a more political understanding of states and of the broader ‘international institutional order’ that sustains them. On this basis, one could explore and organize the institutional continuity from states to IOs, inside out and around multiple polities or peoples, working towards a more legitimate international institutional order.⁴

Thanks to such a robust and continuous institutional account of states and IOs (but also of other public and private international institutions) within a broader international institutional order, one could hope to settle some of the ambiguities that still haunt the current theorizing of IOs. A good example of these ambiguities being entertained is the distinction between the ‘international’ and ‘institutional’ planes in the book (at 8–9). To the extent that all things

² See, e.g., Supiot, ‘État, entreprise et démocratie’, in P. Musso (ed.), *L’entreprise contre l’État?* (2017) 13.

³ See, e.g., G. Sinclair, *To Reform the World: International Organizations and the Making of Modern States* (2017); Besson, ‘International Courts and the Jurisprudence of Statehood’, 9(3–4) *Transnational Legal Theory Journal* (2019) 30.

⁴ For the detail, see Besson, ‘Sovereign States and Their International Institutional Order – Carrying Forward Dworkin’s Work on the Political Legitimacy of International Law’, 2(1) *Jus Cogens* (2020) (<https://doi.org/10.1007/s42439-020-00021-2>); S. Besson, *Reconstruire l’ordre institutionnel international* (forthcoming 2021).

in international law are also institutional and, vice-versa, that IOs are constituted of states (and, hence, clearly institutionally enmeshed with them),⁵ such distinctions only contribute to making things more indeterminate.

Further, such a continuous institutional account of states and IOs could keep at bay the dangers of functionalism in international institutional law and the risks that have long been associated with the reduction of states' political legitimate authority to governmental functions and their infinite delegation (for example, at 7, note 25, 82–83, 96). It could also help to counter arguments for the complete identification of IOs with states. Such arguments of equality (or equal autonomy) between states and IOs have indeed progressively made their way into the debate,⁶ sometimes leading to the endorsement of a further 'rule of incorporation' (to quote Bordin, at 8–10, 82–86), albeit in favour of IOs this time.⁷ The difficulty is that those who propound such claims could actually find ammunition for their arguments from the book's argument for legal analogy (for example, at 86; despite the author's intent, as confirmed by his reference to states' exclusive right to 'sovereign equality', at 146).

In sum, institutional 'continuity' rather than 'analogy' is what we should aim at in our future interpretations of general international law and the rights, duties and responsibilities of IOs. Bordin's book is truly eye opening in this respect and the best imaginable companion for a new generation of international institutional lawyers.

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doi:10.1093/ejil/chaa035

Éric David. ***Droit des organisations internationales***. Brussels: Bruylant, 2016. Pp. 829. 124€. ISBN: 9782802749028.

French literature on international law has never followed the trend, in English scholarship, of publishing textbooks on international institutional law. French-speaking authors no doubt have made crucial contributions to the discipline. However, their work has seldom taken the form of comprehensive studies akin to the well-known and regularly re-edited books that exist in the English language – with Evelyne Lagrange and Jean Marc Sorel's *Droit des organisations*

⁵ On the intimate relation between international 'law' and 'institutions', see Besson, 'Review of José Alvarez's *The Impact of International Organizations on International Law*', 30 *European Journal of International Law* (2019) 344; Raz, 'Why the State?', in N. Roughan and A. Halpin (eds), *In Pursuit of Pluralist Jurisprudence* (2017) 136; R. Collins, *The Institutional Problem in Modern International Law* (2016).

⁶ See, e.g., Dunoff, 'Is Sovereign Equality Obsolete? Understanding Twenty-First Century International Organizations', 43 *Netherlands Yearbook of International Law* (2012) 99.

⁷ For a critique, see Klabbbers, 'Transforming Institutions: Autonomous International Organizations in Institutional Theory', 6(2) *Cambridge International Law Journal* (2017) 105.