

# CONTENTS

|  |      |
|--|------|
| <i>Foreword</i>  | xi   |
| <i>Acknowledgements</i>  | xiv  |
| <i>Table of Cases</i>  | xvi  |
| <i>Select Table of Key Documents</i>   | xx   |
| <i>List of Abbreviations</i>   | xxii |
| <b>Introduction</b>  | 1    |
| <b>PART I The Case for an Analogy</b>  | 13   |
| <b>1 Analogy in International Legal Reasoning</b>                                      | 15   |
| 1.1 The Normative Case for Analogy in Legal Reasoning                                  | 17   |
| 1.1.1 A Jurisprudential Divide   | 17   |
| 1.1.2 The Structure of Analogical Reasoning  | 18   |
| 1.1.3 Systematicity, Formal Justice and the Rule of Law                                | 20   |
| 1.1.4 Challenging Analogies  | 24   |
| 1.2 Analogy in International Legal Reasoning   | 26   |
| 1.2.1 The Systematicity of International Law   | 28   |
| 1.2.2 Completeness of the System and the <i>Lotus</i> Closure Rule                     | 31   |
| 1.3 Analogy in the Codification and Progressive Development of International Law       | 35   |
| 1.3.1 Systemic Codification by Analogy   | 35   |
| 1.3.2 Analogy as a Method in the Projects on Treaties and Responsibility of IOs        | 39   |
| 1.3.3 The Ripeness Objection   | 43   |
| 1.4 Concluding Remarks   | 47   |
| <b>2 The Foundations of the Analogy between States and International Organizations</b> | 49   |
| 2.1 International Organizations as a Category of International Legal Subjects          | 50   |
| 2.1.1 Two Conceptions of the Status of International Organizations                     | 53   |
| 2.1.1.1 The Two Conceptions in the Work of the ILC                                     | 55   |
| 2.1.1.2 Weighing the Conceptions   | 59   |



|  |         |  |            |
|--|---------|--|------------|
|  | 2.1.1.3 | The Importance of Taking a Position  | 66         |
|  | 2.1.2   | In Search of a Unifying Principle  | 68         |
|  | 2.1.2.1 | Attempts to Define 'International Organization'                              | 68         |
|  | 2.1.2.2 | International Legal Personality as a Unifying Principle?                     | 72         |
|  | 2.1.2.3 | International Legal Autonomy as a Unifying Principle                         | 75         |
| 2.2                                      |         | The Relevant Similarity between States and International Organizations       | 79         |
|  | 2.2.1   | Legal Autonomy and the Capacity to Operate on the International Plane        | 79         |
|  | 2.2.2   | Justifying the Relevant Similarity   | 82         |
| 2.3                                      |         | Concluding Remarks   | 85         |
| <b>PART II Objections to the Analogy</b> |         |  | <b>87</b>  |
| <b>3</b>                                 |         | <b>Structural Differences between States and International Organizations</b> | <b>89</b>  |
|  | 3.1     | 'International Organizations Have No Territory'                              | 89         |
|  | 3.2     | 'International Organizations Have No Population'                             | 92         |
|  | 3.3     | 'International Organizations Have No Centralised Government'                 | 96         |
|  | 3.3.1   | Representation and Attribution of Conduct                                    | 96         |
|  | 3.3.2   | Silence and the Acquisition and Loss of Rights                               | 99         |
|  | 3.4     | Assessing the Significance of Structural Differences                         | 104        |
| <b>4</b>                                 |         | <b>International Organizations as 'Special Subjects'</b>                     | <b>107</b> |
|  | 4.1     | Different Rules for Different International Organizations?                   | 108        |
|  | 4.1.1   | Universal and Regional Organizations   | 109        |
|  | 4.1.2   | Regional Integration Organizations   | 111        |
|  | 4.1.3   | The Challenge of Establishing Subcategories                                  | 114        |
|  | 4.2     | International Organizations as 'Derivative Subjects' of International Law    | 116        |
|  | 4.2.1   | International Organizations and the Formation of Custom                      | 118        |
|  | 4.2.2   | International Organizations and the Formation of Peremptory Norms            | 124        |
|  | 4.2.3   | International Organizations and Law-Making Treaties                          | 126        |
|  | 4.3     | International Organizations as Subjects with Limited Competence              | 128        |
|  | 4.3.1   | The Case for a Wide-Reaching Principle of Speciality                         | 131        |
|  | 4.3.2   | Speciality and the Observance and Invalidity of Treaties                     | 134        |
|  | 4.3.3   | Speciality and Responsibility for <i>Ultra Vires</i> Conduct                 | 138        |
|  | 4.3.4   | The Proper Scope of the Principle of Speciality                              | 140        |



|                 |  |            |
|-----------------|--|------------|
| 4.3.5           | The Principle of Speciality, <i>Lex Specialis</i> and the Relevance of General Rules | 142        |
| 4.4             | Concluding Remarks   | 145        |
| <b>5</b>        | <b>International Organizations as ‘Layered Subjects’</b>                             | <b>147</b> |
| 5.1             | The Push towards an Analogy between Unitary and Layered Subjects                     | 149        |
| 5.1.1           | International Organizations and the Relative Effect of Treaties                      | 149        |
| 5.1.2           | International Organizations and the Principle of Independent Responsibility          | 151        |
| 5.1.2.1         | Rules on Attribution of Conduct  | 152        |
| 5.1.2.2         | Rules on Attribution of Responsibility   | 154        |
| 5.2             | Calibrating the Analogy between Unitary and Layered Subjects                         | 162        |
| 5.2.1           | Acceptance of Rights, Obligations and Responsibility                                 | 162        |
| 5.2.1.1         | Acceptance of Rights and Obligations by Member States                                | 162        |
| 5.2.1.2         | Acceptance of Rights and Obligations by Organizations                                | 169        |
| 5.2.1.3         | Acceptance of Responsibility by Member States  | 171        |
| 5.2.2           | Responsibility for Circumvention of International Obligations                        | 172        |
| 5.2.2.1         | Legal Character and Systemic Function of Provisions on Circumvention                 | 173        |
| 5.2.2.2         | The Limits of Provisions on Circumvention  | 177        |
| 5.2.3           | Enabling Organizations to Perform their International Obligations                    | 180        |
| 5.3             | Concluding Remarks   | 183        |
| <b>PART III</b> | <b>Limits of the Analogy</b>   | <b>185</b> |
| <b>6</b>        | <b>Analogy in the Relations between Organizations and Members</b>                    | <b>187</b> |
| 6.1             | Relations on the International Plane   | 188        |
| 6.1.1           | General International Law as the Applicable Law                                      | 188        |
| 6.1.2           | The Rules of the Organization as <i>Lex Specialis</i>                                | 190        |
| 6.1.3           | Membership Ties and Obligations of Cooperation                                       | 194        |
| 6.2             | Relations on the Institutional Plane   | 195        |
| 6.2.1           | The Analogy’s Breaking Point   | 195        |
| 6.2.2           | The Terms of the Relations between International Legal Orders                        | 199        |
| 6.2.2.1         | A Monistic Presumption?  | 200        |
| 6.2.2.2         | Limits of the Monistic Presumption   | 206        |
| 6.3             | Concluding Remarks   | 211        |



|       |   |     |
|-------|---|-----|
| 7     | <b>Normative Contestation of the Analogy</b>  | 212 |
| 7.1   | Contestation in the Application of 'Primary Rules' to International Organizations   | 214 |
| 7.1.1 | Law of Immunities   | 214 |
| 7.1.2 | Law of Armed Conflict   | 222 |
| 7.2   | Contestation in the Application of 'Secondary Rules' to International Organizations | 225 |
| 7.2.1 | Reservations to Treaties  | 226 |
| 7.2.2 | Countermeasures   | 230 |
| 7.2.3 | Necessity   | 233 |
| 7.2.4 | Invocation of Responsibility by an 'Interested Organization'                        | 234 |
| 7.3   | Concluding Remarks  | 235 |
|       | <b>Conclusion</b>   | 238 |
|       | <i>Bibliography</i>   | 246 |
|       | <i>Index</i>  | 258 |
|       | <i>Cambridge Studies in International and Comparative Law</i>                       | 268 |