Introduction

From the outset, this text makes it clear that the law of international organisations is dominated by the UN and is actually best understood through a focus on that organisation. It defines and explains inter-governmentalism and the role of law in its regulation. The chapters in the new edition are not only re-ordered (with some merging), but have largely been rewritten with the insertion of a number of case studies that help to bring home how the law works within an institutional order dominated by politics. The case studies highlight the debates that surround even the most basic legal issues; for example, the furore surrounding the membership application of Palestine to join the UN, or the UN's claim to immunity in Haiti where it has been responsible for a catastrophic outbreak of cholera. There are new chapters that focus on the enforcement side of the UN, when it utilises a range of non-forcible and forcible measures. Within an IGO, such as the UN, politics is not only the dominant force but the key for achieving the goals of the UN – the maintenance of peace and security, sustainable development, human rights and environmental protection – largely through cooperation, occasionally through coercion. Nonetheless, the aim of this book is to show that law plays a significant role in curbing excesses and the abuse of power, as well as facilitating the channelling of power to achieve those purposes. The opening chapter makes it clear that law and politics can be separated but it is important to understand their relationship, an understanding that provides the method behind this book; making the book attractive to non-lawyers, but also widening the law student's horizons.

Explanation of structure

The book starts with a definition of an IGO and an explanation of the centrality of the UN to this concept. It then picks out a legal path amongst the different approaches to IGOs, thereby establishing the significance of law in the UN and other organisations. It then moves on to consider the building blocks of an IGO, namely the member states, and their uneasy relationship with an organisation they are responsible for creating. The next step is to consider the legal nature of the relationship between member states and the IGO in terms of governance with

a consideration of the claims to constitutionality of the UN Charter and other foundational documents within the UN system. The book then explores the nature of an IGO's autonomy from member states by considering the meaning and significance of international legal personality, and the nature of the powers that flow from it. The next step is to consider whether the powers of IGOs incorporate that most crucial feature of any legal order – the ability to make law – a competence which, if present, has the potential to radically change the nature of international lawmaking. The analysis then moves on to other types of power exercised by IGOs, especially the UN, in the form of both non-forcible and forcible measures, the operation of which has raised numerous questions of legality in terms of compatibility of the measures taken with the UN Charter and international law more broadly. With IGO initiatives, measures and actions increasingly impacting upon individuals as well as states, there has been greater recognition that such organisations can indeed violate international law and be responsible for such breaches. This finally leads on to a consideration of mechanisms of accountability, access to justice and remedies against the UN and other IGOs. It is at this point that the issue of organisational immunity comes into consideration.

Chapter summaries follow with the intention of providing a basic guide to the book.

Chapter 1: Inter-governmental organisations

This chapter defines and explains an IGO and argues that the UN is paradigmatic of this genre. A contrast is made with other forms of organisation, particularly the supranational integration organisation (exemplified by the European Union – EU). The chapter also defines the law of international organisations as the law governing, applicable to, and produced by, such organisations, and explains how this is best studied through a focus on the UN and related IGOs. The method used in the book is explained. This is not a complex theoretical exposition but involves different perspectives on the UN and IGOs, from international relations, to law and history, a combination that helps to explain how law and politics work within the UN. This assists the reader in understanding how to identify and apply the law, and to be able to critically evaluate the strengths and weaknesses of the law. The chapter concludes with a case study to illustrate the legal method of being able to distinguish when practice is a valid interpretation or development of the law, and when it is a breach, by considering legal aspects of that most political of powers – the veto in the Security Council.

Chapter 2: Membership, voting and funding

This chapter explores the key relationship between the IGO and its member states – a theme that runs through the book and culminates with debates about

when the UN is responsible for wrongful acts and when it is the responsibility of member states. For example: who is responsible when a UN peacekeeper from a member state illegally uses lethal force; or when a veto prevents the Security Council sending an emergency force to prevent genocide? This chapter examines the basic relationship between the UN and states in terms of membership: through admissions (including the membership crisis of the late 1940s and 1950s reviewed by the International Court in the *Admissions* cases); withdrawal, expulsion and suspension; and representation (when there are competing governments). Case studies in this chapter, including the pursuit of Palestinian membership and the consequences of the break-up of states for membership, show how the rules on membership are at the same time rudimentary and difficult to adhere to. The chapter also shows that membership of an IGO no longer guarantees full sovereign equality of member states, and that with qualified majority voting and, in some cases, weighted voting, sovereign equality becomes more and more qualified. This theme is continued with the issue of the financing of IGOs. This chapter explores how the obligation to pay, when combined with a scale of assessments that requires powerful states to pay more, produces considerable tensions within the UN and other IGOs, sometimes in the form of a refusal to pay. Can such withholding ever be lawful?

Chapter 3: Legal character of the constituent treaty

This chapter discusses what makes the constituent treaty of the UN and similar IGOs different from many other treaties so that it is appropriate to use the term constitution in relation to such treaties, although the legitimacy and strength of such constitutions varies (so the UN Charter is a constitution in a stronger sense than the constituent treaties of the specialised agencies, though still in a much weaker sense than the constitutions of stable states). Separation of powers is shown not to be a feature of the UN or similar IGOs. A contrast is made with IGOs that are contractually based (NATO, for example). A discussion of the evidence in favour and against the UN Charter being seen as a constitution is followed by the debates surrounding the primacy of Charter obligations, in particular those imposed by the Security Council, by virtue of Article 103 of the Charter. Two case studies featuring judicial decisions on the primacy of UN obligations by the International Court of Justice in the *Lockerbie* cases of 1992 and 1998, and the European Court of Human Rights in the *Al-Jedda* case of 2011, serve to illustrate the controversies surrounding constitutionalism.

Chapter 4: International legal personality: the key to autonomy

This chapter addresses the legal construction that helps to answer the question of how the UN and similar IGOs are separate and autonomous i.e. independent of

member states, when member states have created IGOs and sit and vote in their organs. The reader is reminded that it is of course possible to create separate, abstract legal entities: clubs, societies, corporations, states are all abstract legal entities. In international law these issues are considered through the legal personality of the UN and similar IGOs on the international plane, in other words whether the UN is a legal subject of the international legal order, separate from the main legal subjects – states. In 1945 such an idea was still a radical one given the domination of international relations by states. This explains why the UN Charter was silent on the matter of international legal personality (although it granted the UN legal capacity in national legal orders). However, by 1949 the matter was settled in favour of the UN possessing international legal personality, with the concomitant right to bring claims against states, following the International Court's advisory opinion in the *Reparations* case.

Chapter 5: The doctrine of powers: the key to governance

The possession of international legal personality explains how the UN and similar IGOs have extensive powers separate from those rights of states (for example, the power to impose sanctions on a state or an individual, thereby creating binding duties for all states). Powers are not only those expressly granted, but also those necessary by implication and, some would argue, powers inherent in the very nature of being an autonomous legal entity on the international stage. The debate about the extent of the doctrine of legal powers is addressed through three case studies: the legality of peacekeeping (including a discussion of the *Expenses* opinion); the legality of IGOs' concerns over the continued possession of nuclear weapons by a limited number of states (including a discussion of the *Nuclear Weapons* opinions); and the legislative powers of the Security Council (focusing on Resolution 1373 of 2001).

Chapter 6: Institutional lawmaking: a new source of international law?

Although there are controversies about the UN Security Council making binding general international law, this should not disguise the fact that the UN General Assembly has been hugely influential in shaping international law since 1948 (with the Universal Declaration of Human Rights). This has occurred less through 'executive' lawmaking but, rather, through plenary organs including those in the specialised agencies. The orthodox view is that, despite a dramatic increase in the institutionalisation of norm making, the outputs of IGOs remain in accord with the traditional forms of international law produced by states (as located in Article 38 of the Statute of the International Court of Justice) either as treaty obligations, customs or general principles of law. Indeed, many resolutions have passed into customary international law, but such an analysis disregards the normative value

of the resolutions themselves, a value that more accurately reflects the autonomy of IGOs. This chapter explores institutional lawmaking in the modern era, looking in detail at the impact of General Assembly Resolutions on outer space and the Health Regulations of the World Health Organization (WHO). Both of these are shown to be international laws in their own right and that, in fact, they are paradigmatic of UN lawmaking more generally. Such an approach does not undermine the importance of states in making international law. Instead this approach enables states to create, amend and modify international law in a dynamic way that is necessary in a rapidly changing world.

Chapter 7: Sanctions

This chapter examines non-forcible measures adopted by the UN and similar IGOs in terms of their legality (constitutionality and conformity to international law), legitimacy and effectiveness. Are sanctions used to punish breaches of law by states or for wider purposes? The main focus will be Article 41 of the UN Charter, a provision that empowers the Security Council to adopt sanctions against states, although it has further developed this power to promulgate targeted sanctions against individuals and other non-state actors (NSAs). The move away from general sanctions against states, such as Rhodesia, Iraq, Serbia and Libya, is analysed, especially for their impact on the human rights of the population (for example the right to health). The applicability of human rights norms to the UN is discussed. The Security Council has, more recently, favoured targeted sanctions against individual leaders, regime elites and NSAs, such as terrorists held responsible for threats to peace but these, in turn, have raised human rights concerns, and have led to litigation before various national, regional and international courts and bodies. Intriguingly, in 2009, the Security Council responded by creating an ombudsperson to hear complaints about wrongful listing. Is this a response to human rights concerns? More importantly, does it satisfy human rights norms?

Chapter 8: Military measures

Non-forcible measures potentially put IGOs into conflict with principles of international law such as human rights. Forcible sanctions, involving the use of force organised or authorised by the UN, regional or defence organisations, raise issues of compatibility with the rules governing the use of force in international relations, which are found in the UN Charter and customary law. This chapter considers the role of IGOs in implementing and upholding those rules, necessitating an analysis of Article 2 and Chapters VII and VIII of the UN Charter, and the constituent treaties of security organisations. The different military responses undertaken by IGOs, ranging from observation and peacekeeping, to peace enforcement and war-fighting, are discussed in terms of legality and practice. The legality of

the 1991 action against Iraq is contrasted with the illegality of the 2003 invasion. The chapter considers whether there is an emerging duty upon the UN (and possibly other IGOs) to take action in response to the commission of core crimes, embodied in the idea of a Responsibility to Protect (R2P) and, arguably, practiced in Libya in 2011. The rights and duties of IGOs continue to be a theme throughout the book.

Chapter 9: Responsibility of international organisations

While the primary rules of international law are those norms applicable to IGOs in their decisions and operations, such as those rules governing the use of force or those protecting human rights, secondary rules of responsibility are concerned with the consequences of breach of those primary rules by an organisation, sometimes known as liability. In simple terms, an IGO, with international legal personality, has obligations under international law and can be held liable or responsible when it commits an internationally wrongful act in breach of those obligations. The complexity arises in determining when an IGO has itself breached international law as opposed to states or other actors who may claim to be acting on behalf of the organisation. This chapter considers the development of secondary rules of international law to cover the wrongful acts and omissions of IGOs. It analyses the Articles on Responsibility of International Organisations (ARIO) developed by the International Law Commission (ILC). The chapter focuses in particular on the weaknesses of the ARIO in distinguishing the responsibility of the UN from that of member states, something that has caused difficulties in judicial interpretation of the ARIO in the case of UN-mandated operations (made up of contingents drawn from troop contributing nations or TCNs). The chapter concludes by examining issues of attribution in the *Behrami* case before the European Court of Human Rights, a case that concerned the failure to clear cluster munitions by the Kosovo Force (KFOR) and the United Nations Mission in Kosovo (UNMIK) in Kosovo in 1999, and various cases before Dutch courts following the failure of the Dutch battalion of the United Nations Protection Force (UNPROFOR) to protect civilians in Srebrenica in 1995.

Chapter 10: Accountability, access to justice and remedies

The expectations placed upon the UN have led to a change from it being viewed as a benign, if ineffective, IGO – one that could not be expected to make a real difference – to it being seen as a source of legitimate authority for action to be taken to deal with threats to the peace and to prevent serious breach of international law. The facts that the UN and other similar IGOs are operational and that their decisions affect the lives of millions, have led to greater demands for accountability of IGOs and access to justice for victims when they have caused

harm. This chapter looks, in part, at how the primary and secondary rules of international law are upheld in different forms and mechanisms of accountability, including courts. It will be seen that non-judicial forms of accountability, although themselves underdeveloped, are more prominent than judicial forms. There are mechanisms within IGOs that attempt to ensure that IGOs are called to account politically and financially. However, there are even more serious weaknesses in terms of legal and judicial accountability. The inadequacies of the International Court of Justice (ICJ) as a constitutional court have led to victims seeking justice before regional and national courts. This chapter looks more broadly at the practicalities of accountability both at an institutional level and then at a more local level. At the institutional level, accountability is present, but is seen to be unsystematic and often ineffective. However, it is a relatively new way of looking at IGOs and so its prospects for development are assessed. At the level of access to justice the rationale for IGO immunities is critically evaluated but it is clear that immunity does not absolve IGOs from responsibility, it simply gives an organisation protection from local courts and, as a principle, is under increasing pressure to be restricted, as shown by the UN's poorly received decision to hide behind immunity to prevent it from being sued as a potential source of cholera in Haiti. The chapter concludes with an examination as to how far the UN has evolved in terms of accountability for wrongs committed by those working for it by considering sexual abuse committed by peacekeepers in the Democratic Republic of Congo. A sober assessment of the UN's responses to Haiti and the DR Congo shows that the organisation has a long way to go in terms of ensuring proper access to justice and remedies for those who have suffered loss at the hands of the UN.