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国际公法：

和平时期的解释与适用

Public International Law
Its Interpretation and
Application in Time of Peace

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谨以此书献给我的妻子和女儿

前 言

本书是《国际公法》一套两卷的上卷,其涵盖国际公法在和平时期解释与适用的相关问题。与此对应,下卷将集中讨论国际公法在武装冲突中的解释与适用问题。

在当今国际社会,国际公法是“国际法治”理念的实质内容的首要组成部分,它规范着国际秩序总体的运行,决定着国际政治权力的稳定分配和行使,支配着这一秩序中规则的创制、解释、适用、修订、废止,并通过《联合国宪章》的宪纲作用而形成一个真正意义上的法律体系。在这个体系中,中国应该怎样行为、发展,既是体系面临的重大命题,也是我国自身需要解决的实在问题。是选择性地接受其中某些规则,还是全盘接受这一体系?对具体的国际争端,应该怎样在国际法基础上做出回应、采取措施,反映出一个大国的视野、胸怀和对“国际法治”的尊重?在诸如此类问题的解答上,可以体现出国际律师(包括学院派律师——学者;实践派律师——实务工作者)的重要作用:以法律论理的形式说明回应、措施的合法性,使国家得到国际社会的尊重、理解和支持。其实,在很多情况下,只有法律的道理才是能够服人的道理。但是所有上述论理的力量,都取决于律师对这一学科的了解程度(包括语言能力)。

有关本书的特点、方法和预期效果,有以下几点说明。

首先,本书特点有两个。第一,其出发点是国际公法为实用学科,简言之,学会就可以实用。在国际实践中,政府、国际组织需要深入了解本法的内容、程序、存在的问题,以形成在法律上有说服力的政策决定,在国际社会中得到理解、接受、默认。在这一学科中,理论与实践融合一体,而且参与的实践越多,理论在思索问题时的分量就越小。实际上,对实践的反思才是理论的开始,空洞的设想是很难有生命力的。另一方面,理论的作用在于使得初学者迅速了解当今国际公法的发展态势和已有规则出现的过程、原因。跨过这一阶段之后,只有对实践(特别是细节)的把握才是在这一领域中立足、发展的根本。第二,本书包含了和平时期国际公法的解释与适用,既是向经典教科书方向的回归,也是特别考虑了在当今世界上极端局势中国际公法所发挥的、极为突出的正面作用;当然,我对于武装冲突法实践有切身体验,对写作是个不小的帮助。

其次,本书的出发点即如上所说,它的写作方法也借此成型。在讨论规则和问题时,国家实践的实例才是基本和首要的证据,所以,国际法渊源问题对于本书以至于从事本领域工作的人群来说至关重要。在此前提下可以说,学术著述有三个作用:第一,提供了决策过程中曾存在的其他看法的信息(因为该作者参与了这一过程,首先有实务经验);第二,提供了相关的实例(与该作者个人的研究和实践有关);第三,提供了合理的、有充分事实根据的评判意见。国际上权威著述在第一和第三下作用最为明显。

最后,本书既可作为教科书供学生学习,也有为研究人士用于讲述、研究的作用,同时也兼顾供实务工作参考的功能。当然,这一版主要还是顾及到教学研究作用:在每章开始都有供扩展阅读的书目;在证据选择、引用上较为严格,但同时又留下深入考察的余地,以便于进一步深究;书中附有案件索引和(书中)名词索引,方便阅读、查询;书中不少内容来自国际组织官方网站,主要原因是最新的信息往往是这些网站提供的,专著或文章均无法在更新速度、内容深度上超越这些网站,而另一个原因是网站上提供官方认可的、有权威性的实例、决定、判决、裁定等。这本书的写作只是起点,问题的解答还需要在此书基础上更上一层楼,探究更广泛的国际实践和先例。

在写作过程中,我的学生谈中正、蒋超翊、徐栋、邱雨桐帮助查找、复印了许多资料,在此对他们深表感谢;同时,对清华大学出版社李文彬编审的支持与鼓励也表示衷心感谢;对伟文盛业文化发展有限公司(Wells)表示感谢,它一直是我购书的首选代理。

在此也对家人的支持和关爱表示感谢,特别是我的父母与岳父母。

贾兵兵

2015年春于清华大学明理楼

名词缩写索引

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- AD *Annual Digest of Public International Law Cases*, ed. by J. Williams, A. McNair, and H. Lauterpacht, Longmans, Green and Co.; 《国际公法案件年度摘编》
- AFDI *Annuaire Français de Droit International*; 《法国国际法年刊》
- AJIL *American Journal of International Law*; 《美国国际法杂志》
- BFSP *British and Foreign State Papers*; 《英国与外国政府文件》
- BYIL *British Yearbook of International Law*; 《英国国际法年刊》
- Chinese JIL
Chinese Journal of International Law, Oxford University Press;
《中国国际法杂志》, 牛津大学出版社出版
《中国国际法年刊》, 中国国际法学会主编, 中国对外翻译出版公司/法律出版社, 1982 年至今
- CMLR Common Market Law Reports
- CUP Cambridge University Press
- CYIL *Canadian Yearbook of International Law*; 《加拿大国际法年刊》
- EC The European Community
- ECHR European Court of Human Rights
- ECJ European Court of Justice
- ECR European Court Reports; 《欧洲法院报告》
- EEZ Exclusive economic zone
- EJIL *European Journal of International Law*; 《欧洲国际法杂志》
- EPIL *Encyclopedia of Public International Law*, published under the auspices of the Max Planck Institute for Comparative Public Law and International Law under the direction of Rudolf Bernhardt, Amsterdam: Elsevier, 1992—2003, 5 vols.

Enterprise

An organ of the International Seabed Authority, established by the UNCLOS; 企业部

ETS European Treaty Series; 《欧洲条约集》

EU The European Union

GATT General Agreement on Tariffs and Trade

GYIL *German Yearbook of International Law*; 《德国国际法年刊》

Ibid 上注所引

HL House of Lords

IACHR Inter-American Court of Human Rights

ICC International Criminal Court

ICJ International Court of Justice

ICLQ *International and Comparative Law Quarterly*; 《国际法与比较法季刊》

ICJ Rep.

Reports of the International Court of Justice

IDI Institut de droit international

IHL International Humanitarian Law

IJMCL *The International Journal of Marine and Coastal Law*

ILA International Law Association

ILM *International Legal Materials*; 《国际法资料》

ILR *International Law Reports*, H. Lauterpacht, E. Lauterpacht, C. Greenwood, published by the Cambridge University Press; 《国际法案例报告》, 剑桥大学出版社出版

Indian JIL

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IRRC *International Review of the Red Cross*; 《红十字国际评论》

ISA International Seabed Authority; 国际海底管理局

ITLOS The International Tribunal for the Law of the Sea

Japanese YBIL

Japanese Yearbook of International Law; 《日本国际法年刊》

JICJ

Journal of International Criminal Justice; 《国际刑事司法杂志》

LNTS

League of Nations Treaty Series; 《国际联盟条约集》

LON

The League of Nations; 国际联盟

LOS Bulletin

The Law of the Sea Bulletin, published by the Division for Ocean Affairs and the Law of the Sea, Office of Legal Affairs, the United Nations

NILR

Netherlands International Law Review; 《荷兰国际法评论》

NYIL

Netherlands Yearbook of International Law; 《荷兰国际法年刊》

ODIL

Ocean Development and International Law

OJ

公报》

Official Journal of the European Communities; 《欧洲共同体官方

OR

Official Records

OUP

Oxford University Press

Para

Paragraph; 段

PD

Probation, Divorce and Admiralty Division

RdC

Recueil des cours; 《海牙国际法学院演讲集》

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RGDIP

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UNCLOS III

The Third United Nations Conference on the Law of the Sea, 1973—1982

UNGA United Nations General Assembly

UNRIAA

United Nations Reports of International Arbitral Awards; 《联合国国际仲裁裁决报告》

UNSC UN Security Council

UNTS United Nations Treaty Series; 《联合国条约集》

US United State Supreme Court Reports

Virginia JIL

Virginia Journal of International Law; 《弗吉尼亚国际法杂志》

WLR Weekly Law Reports

YBILC Yearbook of the International Law Commission

ZaöRv *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*;
《外国公法与国际法杂志》

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