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□吴 刚 著

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前　言

经过近五年的工作，这本双语版《国际法》终于完成了。进入21世纪，中国与国际社会的联系更加紧密，与其他国家以及国际组织的矛盾和冲突也不可避免。在和平与发展的大前提下，通过外交和法律途径和平解决国际争端是国家间处理问题的正确选择，国际法的重要作用不言而喻。也正基于此，近几年来，我国对精通英语的法律人才的需求一直居高不下。大量的国际条约文本和国际法律争端案件的裁决均是以英语为工作语言的，很难想像一个从未阅读过国际法英文文献的国际法专业学生能够胜任将来的法律工作。笔者在开设国际法双语教学的课程中发现，很难找到适合的国际法双语教材，这也促使笔者撰写这样一本教材，既是对以往教学过程的总结，也是对以后教学方向的探索。

本书的一个显著的特点就是：语言浅显易懂，言简意赅。很多英文原版法律教材篇幅冗长、语言生涩，这也令不少读者感到头痛。如果这些问题还可以通过查阅词典和法律工具书解决的话，一些源自拉丁语的国际法专业术语就使中国读者无所适从了。为了解决这一问题，本书吸取了大量英文原版国际法著述的精华，采用相对浅显易懂的语言将晦涩复杂的法律概念以深入浅出的方式呈现给读者。

笔者在教学中还发现，学生对具体案例教学要比枯燥的原理讲授更有兴趣，教学效果也更令人满意。有鉴于此，本书选择了大量国际法案例，通过实际案例分析和讨论帮助读者理解抽象国际法原理和原则。同时，本书力求避免国际法英文原版教材对英美政治、法律习惯的过分偏重，有针对性地选择与中国有关的案例和国际事件，使这本书更具中国特色、更加贴近读者。

添加大量的中文注释是本书的另一个特色。为了帮助法律专业学生和法律工作者理解文章内容，本书加入了对重点词汇和难句的中文注释。重点词汇的注释采用下划线和页边注形式，方便读者对照理解和随时查阅；而难句的翻译和注释则采用波浪线和页下注形式，方便读者自学参考。

此外，在本书的结尾，按字母顺序收录了国际法常用词汇中英文对照，以及国际条约和国际组织的中英文对照。

2005年9月初，本书初稿完成。在最后阶段，领导和同事们对这本书提出了宝贵的批评和建议。因此，从另一方面来说，这本书也算是对他们的真诚谢意。

最后，我还要感谢法律出版社众多编辑和工作人员的辛勤工作。由于水平有限，书中所出现的缺点和错误，殷切希望广大专家、学者提出批评意见。

吴　刚

2006年1月

目　录

CONTENTS

INTRODUCTION

Since the emergence of human civilization, law has been playing a central role in binding the members of the community together in their adherence to recognized values and standards. Unlike municipal (domestic) law which governs the conduct of individuals and other legal persons within a country, international law regulates the relations between nation-states and with other political entities with international personality.

International law itself can be divided into conflict of laws (or private international law), which deals with those cases in which foreign elements obtrude and foreign law is applied, and public international law (or simply termed international law), which is the subject matter of this book.

Public international law may be divided into different categories. Universal or general international law, as described, is binding upon all states, while regional or particular international law has binding force merely on a group of states linked geographically or ideologically.

One key question relating to international law is that whether it is really law. Some writers questioned the nature of international law. The English philosopher John Austin doubted about the legal status of international law in his *The Province of Jurisprudence Determined* by stating that 'laws properly so called are a species of commands... And hence it inevitably follows that the law obtaining between nations is not positive law: for every positive law is set by a given sovereign to a person or persons in a state of subjection to its author... the law obtaining between nations is law set by general opinion'. Another important argument is that comparing to domestic legal system there is no genuine legal body where law can be created and enforced on the international plane.

However, scholars on the opposite side have successfully argued that international law and municipal law are different species of law in that domestic law governs legal persons within a state and such law is derived from a legal superior, while international law operates on a different plane. S Rosenne wrote in his *Practice and Methods of International Law* that:

> International law is a law of coordination, not, as is the case of most internal law, a law of subordination. By law of coordination we mean to say that it is created and applied by its own subjects, primarily the independent states, for

their own common purposes.

Fortunately, nearly all states in the world community, the principal subjects of international law, have recognized that there is a system of legal rules regulating their conduct, and are willing to, and do, observe almost all principles of international law, although there may be violations by states sometimes. Even Saddam Hussein sought to justify the invasion of Kuwait in August 1990 on the basis of international law rather than denying the existence of an international legal system.

Regarding the enforcement of international law, states may choose various methods to enjoy their rights and enforce their obligations, since there is by far no uniform enforcement machinery. However, international rules have an imperative character once they are established. States cannot modify such rules unilaterally. It should be noted that in recent years the United Nations and its judicial organ, the International Court of Justice are regarded as the two principal bodies to enforce international law by taking political measures as well as legal judgments. In addition, it is recognized that states themselves may take self-help measures, either through diplomatic means or through the use of force in self-defense.

CHAPTER 1
HISTORICAL DEVELOPMENT

The foundations of international law were firmly based upon the birth and development of human civilization, especially influenced deeply by ancient Greek-Roman philosophical legacy and modern Western political culture and legal practice. The emergence of nation-states[1] and the conflict between rival national interests need some sort of mechanism to regulate behaviors of them.

1 民族国家(注:中世纪后期欧洲民族国家的兴起,导致不同国家利益的冲突,迫切需要一种统一的规则规范各个国家在国际领域的行为。这是现代国际法产生的重要原因。)

Early Origins

The basic concepts of international law can be traced back several thousand years, although the modern international system has just laid its foundation for only about four hundred years. One of the most representative examples that happened approximately a thousand years ago is an international treaty signed between Rameses II of Egypt and the king of the Hittites for the establishment of peace and alliance between the two kingdoms. Some other points with respect to the termination of a state of aggression and respect to each other's territorial integrity[2] were also covered in that agreement. Since then many agreements were reached between rival Middle Eastern powers aiming at creating some political alliances to contain an over-powerful empire or forming a state of subservience between the parties.

2 领土完整

It is also worthwhile to observe the Eastern culture on the practice of foreign relations. In ancient China, imperial government would always pay much attention to the harmonious relations between its constituent parts. Regulations on controlling violence and enhancing friendship were introduced. The specific tributary-states system[3], although with some serious weakness, operated for thousands of years within the Chinese Empire.

3 指古代封建社会,其他属国向中华帝国进贡的制度。

The era of ancient Greece was of great importance to the framework of modern European thought. Those numerous treaties signed by the Greek city-states set significant precedents for modern international law practice. But no sense of a world community can be traced to Greek ideology in spite of the growth of Greek colonies throughout the Mediterranean area.

The successor, Roman imperial ruling classes profoundly respected organi-

zation and the law. The need for a prospering and expanding empire and the limitedness of the *jus civile* [1] (the Roman civil law, which only applied to Roman citizens) were served by the birth and rapid growth of the *jus gentium* [2] (the Roman international law). This law provided simplified rules for governing the relationship between foreigners and between foreigners and citizens. After the narrow *jus civile* gradually gave way to the progressive *jus gentium* the latter became the common law of the Roman Empire.

1 市民法

2 万民法(国际法)

For the Romans one of the most valuable theoretical legacy taken up from the Greeks was the adoption of the idea of Natural Law. Some of Roman philosophers believed that some rules of the *jus gentium* (which was regarded as the natural law of the Roman Empire,) that were rational, logical and deeply rooted in human intelligence could be applied to any nation or any group, thus be of universal relevance. Modern international law system is based upon this very spirit of universality.

However, the way in dealing with external relations of ancient civilizations was geographically and culturally restricted. Any of these civilizations by no means had a scope for an international community constituted of states co-existing within a defined framework, which is now called the international system. And, there was no such a universal mechanism, as being commonly identified at the present time, the world order in existence.

The Middle Ages

The middle ages were characterized by the supreme authority of the organized Church and the strict control stemming from this religious-political mixture of command.〔1〕 But the conflicts between the religious authorities and secular ruling classes of the Holy Roman Empire[3] were predominant for much of the time. Although the results were usually in favor of the Papacy, the tide of the secularism became more and more prevailing. The legacy of Roman thought and practice was still deeply haunting the everyday life of the European Continent. With respect to the law practice, the Holy Roman legal system borrowed heavily from earlier laws and orders, including Roman legal codes and Judaic legal codes.

3 神圣罗马帝国的世俗统治阶级

On the other hand, regional interests and political rivalries would always prefer to struggle for their own benefits rather than behave under the unifying influence derived from the common cultural legacy and the same religion. The need for resolving disputes, particularly trade and mercantile issues, was

〔1〕 中世纪的代表特征是教廷至高无上的权威和政教合一政治制度的森严统治。

served by the development of some commercial and mercantile law with universal application. For instance, the *Law Merchant* [1], was universally accepted to apply to foreign trade practice. The Rhodian Sea Law and some other legal documents related to a series of commonly applied customs on the sea were widely respected and practiced by the naval powers along the Atlantic and Mediterranean coasts. These customs and practice constituted the embryonic norm of modern international trade and maritime law[2].

1 商人(习惯)法

2 现代国际贸易与海洋法的萌芽

The rise of the nation-states of England, France and Spain, in particular, characterized the process of the creation of territorially independent units, in theory, as well as in fact. This led to a higher degree of interaction between sovereign entities and thus the need to regulate such activities in a generally acceptable fashion. The pursuit of power and supremacy became overt and recognized. The Renaissance[3] provided fresh and free ways of thinking about the world and human being himself. The critical, independent, secular and humanistic thought to life brought the possibility of establishing new framework of political as well as legal system. Also at that period the great global geographical exploration brought the New World as well as new hope to the Europeans.

3 欧洲文艺复兴

Upon these new challenges and opportunities there gradually evolved a new concept of international communities constituted secular nation-states with characters of independence, sovereignty and competition, which would be.〔1〕 The relationship between man and state and between states should be redefined. The emancipation of international relations led to the emergence of the doctrine of sovereignty[4]. Jean Bodin[5], a 16-century theorist, emphasized the supremacy of sovereignty for a state should be the basis for making law within the state. The state should only subject to the laws of God and of nature rather than any law instituted by itself.

4 国家主权理论

5 简·伯丁,16世纪思想家,他认为,国家的主权是至高无上的,主权应该是一个国家制定法律的基础。国家只受自然法的限制而不受其本身制定法律的限制。

The early concept of international law was deeply rooted in the principles of Natural Law, which was part of the law of God (claimed by early Natural Law theorists). So from beginning to emerge as a separate academic field international law was inevitably impacted by the basic spirit of Natural Law.

The Emergence of Modern International Law

The embryo of modern international law can be traced back to some Spanish philosophers in the country's heydays in the fifteenth and sixteenth centuries. Francisco Vitoria (1480—1546), Professor of Theology at the University of

〔1〕 面对新的挑战和机遇,逐渐产生了一个有关国际社会的崭新概念:这个国际社会应该是由具有独立和主权特征的世俗民族国家组成的。

Salamanca, was one of the leading figures in the field. On the matter of Spanish conquest to South America he held a very progressive attitude toward the fate of the South American Indians. He maintained that the Indian peoples should be regarded as separate nations with their own legitimate interests. War should not be made against them until the cause of war was just. International law, he insisted, be based upon the universal law of nature and non-Europeans also be included within its ambit.

It didn't necessarily demonstrate that Vitoria advocated the recognition of the Indian nations as equal to the Christian states of Europe. On the contrary, he acted on behalf of the Spanish Inquisition. His theory only made a progressive step to the right direction to the modern international law.

Another influential scholar of this school in the same period was Alberico Gentili (1552—1608), a professor at Oxford. In his work *De Jure Belli*, a comprehensive study was made on the law of war and the law of treaties. He also strongly advocated the development of the secular school of thought in international law.

Hugo Grotius[1], a Dutch scholar, who was born in 1583 and later regarded as the father of international law, towers over this great era of Renaissance. He boldly, if not thoroughly, excised theology from international law. He believed that the law of nature would be still valid even if there were no God. The law of nature, he believed, should be exclusively based upon reason. He was trying to explore a fresh but comprehensive system of international law.

1 雨果·格老秀斯，16世纪荷兰学者，被誉为"国际法之父"。他毕生探索建立一个完整的国际法理论体系。他所坚持的海洋自由理论已经成为现代国际法的一个重要的基本原则。

The idea of the freedom of the seas, one of his most enduring opinions, has become an essential principle of modern international law of the sea. Grotius emphasized that the high seas belonged to all rather than being appropriated to any single state. However, like others, Grotius' principle of freedom of the seas inevitably coincided with the political atmosphere which he was breathing that the Dutch government was enforcing a policy of free trade and establishing an expanding commercial as well as maritime empire.

2 自然法学派，这一学派学者将国际法与自然法等同起来，认为自然法是普遍的、绝对公正的、恒久不变的，否认国家在国际法实践中的作用。

After Grotius, two different schools, if not divorced from the thoughts of previous scholars, appeared.

The so-called 'naturalist' school[2] was exemplified by Samuel Pufendorf (1632—1694). He attempted to identify international law completely with the law of nature. He would not acknowledge treaties as an important part of the basis of international law. Pufendorf and other 'naturalist' scholars tried to minimize or ignore the actual practices of states. They preferred a theoretical construction of absolute values, which was apparently easy to drift away from the complexities of political reality.

3 实在法学派，这一学派学者认为国际法主要建立在习惯和条约基础上，强调现代国家实践在国际法中的唯一作用。

On the side of 'positivist' school[3], Richard Zouche (1590—1660), an Eng-

lish scholar, was one of the leading initiators, who lived at the same time as Pudendorf. In contrast to the naturalists he and other 'positivist' scholars completely dismissed Natural Law and stressed instead the importance of modern practice.

The positivist approach, derived from the legacy of the Renaissance, was concerned more with viewing events as they occurred and discussing actual problems that had arisen.

Putting this theoretical attitude into the practice of international law the positivists reinterpreted international law in terms not of concepts derived from reason but in terms of what actually happened between competing states. What states actually do was the key, not what states ought to do given basic rules of the law of nature. Agreements and customs recognized by the states were the essence of the law of nations. Positivism also shared the same viewpoints on the matter of state sovereignty with those proposed by Jean Bodin, which emphasized the supremacy of the sovereign.

In the early eighteenth century, a new doctrine of equality of states was introduced into international law that regardless how a state was, large or small, weak or powerful, it was equal to any other state in terms of sovereignty.[1] And coincidentally no matter on which side a scholar maintained, naturalist or positivist, both of the two schools insisted no interference was allowed in state's internal affairs. Every sovereign state shall respect each other's diplomatic immunity[1] and equality. The influence was expanding to the newly emerging European nation-states.

1 外交豁免

The Nineteenth Century

The era of seventeenth and eighteenth centuries greatly contributed to the evolution of modern doctrine of international law. When the world entered the new centenary the direction of international law met some changes, which was characterized by being practical, expansionist and positivist.

The Congress of Vienna[2] concluded the Napoleonic Wars[3] in Europe. The European balance of power, which was enshrined through the Congress of Vienna, became the basis of the new international order. The development of human civilizations had to be Eurocentric[4].

There are many features that marked the nineteenth century. The French revolution spread the idea of democracy throughout the European Continent. The unifications of Germany and Italy aroused fervent tides of nationalism one

2 维也纳会议。拿破仑战争结束后，为了重新划分欧洲势力范围，英国、普鲁士、俄国、奥匈帝国等于1814至1815年在维也纳召开会议。

3 拿破仑战争。指19世纪初（1803—1815）在拿破仑一世统治下的法国与其他欧洲强国的一系列战争，最后以拿破仑帝国的失败而结束。

4 以欧洲为中心的

〔1〕 18世纪早期，一种新的理论被引入国际法中。这种理论认为，国家不分大小强弱，与其他国家主权平等。（注：这一理论已被《国际法原则宣言》列为国际法七项基本原则之一，有直接的法律效力。）