


[修訂二版]

國際公法導論

姜皇池 著



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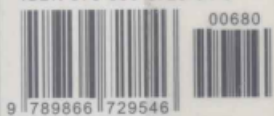
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新學林

二版序

國際法適用在國家間，歐洲國家對國際法研究與教學，源遠流長，當代歐盟國家，不論是政府部門或學術單位，對國際法學門研究，議題眾多，推陳出新，令人目不暇給。亞洲地區，日本對國際法著力最深，而近來中國崛起，參與國際事務日增，地位日隆，對國際法同樣投以強烈關注。而臺灣在國際間其獨立國家地位備受挑戰，然在與其他國際社會成員往來間，國際法仍有諸多適用機會，眾多國際會議與國家間相互往來，仍高舉國際法，言必稱「根據國際法，應當……」，臺灣處在其間，不論臺灣參與模式為何？抑或有無參與機會？同樣必須依賴國際法以捍衛本身權益。對臺灣而言，國際法重要性無庸置疑。近年來，臺灣的國際地位挑戰日益艱辛，對國際法需求更行迫切，未來需求，希望本書能夠提供學子基礎知識，以利將來深入研究。

本書雖稱修訂本，然變動甚小，主要是改正第一版部分誤植文字，此外進行小幅刪減，以及補充部分新文件與發展。至於念茲在茲的部分議題，如武力使用、爭端和平解決、人民自決等等，則僅能再期待未來可以進行完整補充。

2008年7月・台北

序

隻眼須憑自主張，紛紛藝苑漫雌黃；
矮人看戲何曾見？都是隨人道短長。
— 趙翼·讀史雜記—

撰寫通論性質教科書，通士達人或不免有所躊躇，甚或有「壯夫不為」之感，然此基礎工作，若眾人束手，無人聞問，則恐莘莘學子不易入門，徒生學習阻礙，倘因而視為畏途，止步不前，誠非國家社會之福，乃不揣簡陋，戮力以赴。

本書屬導論性教學用書，仍秉持個人纂寫《國際海洋法》教科書之理念，謹遵「寧近勿遠、寧繁勿簡、寧拙勿巧」原則，以致篇幅繁雜，自將不免見笑方家。然既作為學子入門書籍，個人寧願選擇如是，蓋可提供較完整資料，方便讀者按圖索驥，一則有所依循，復可作為槩論。又因是導論性質教科書，力求所呈現者皆為客觀陳述，至少個人是作如此觀，提供入門學生客觀立論，避免灌輸既成信念，妨礙獨立思考能力。然無可諱言，方今西方基督文明國家，仍獨霸此一領域，是以竭精殫智將所提供「客觀陳述」，基本上仍是介紹基督文明世界之觀點，若讓莘莘學子誤以為天下學問，盡萃於斯，絕非個人初衷，因而書本伊始，即引趙翼「讀史雜記」詩，與讀者相期許，更深盼讀者，能有所精進，更上一層，超越純粹吸收階段，融會貫通，於未來創設與架構自我或以全人類觀點和理論。

毋庸諱言，做為國際法導論書籍，本書並不完整，諸多部分，誠待補充。至少就國家責任法、武裝衝突法、爭端和平解決、國際組織法、國際經濟法、國際環境法、國際人權法、國際海洋法部分，應有所著墨。然考量近年來該

等領域發展，日新月異，使人目不暇給，特別是國際組織法、國際環境法、國際海洋法、國際經濟法、國際人權法、武裝衝突法等等，體系完備，卓然自立，已然另闢蹊徑，若於此通論書籍，予以處理，恐掛一漏萬，亦有未恰，是以莫敢唐突，尚待來茲。

回首教學與研究歷程，頓覺「老去光陰速可驚」！非惟於學無所長，修養磨練，同付闕如，每思及此，心驚膽顫。既愧對諸多長輩與同儕，又思國家社會，假我輩如是優渥環境，復添差赧。深感應戰戰兢兢，於教育崗位上，努力培養更多對國家社會能有所貢獻之人，誠為我輩之所能為與所應為。

最後，筆者學疏識淺，率爾操觚，且國際法包羅萬象，變化千端，本書自不免錯誤或淺薄，尚祈海內方家與讀者，不吝指正。

2006年2月

寫於 台北

本書使用英文略語表¹

AM.	America (n, s)
AM. J. INT'L ARB.	AMERICAN JOURNAL OF INTERNATIONAL ARBITRATION
AM. J. INT'L L.	AMERICAN JOURNAL OF INTERNATIONAL LAW
A. L. I.	American Law Institute
A. L. R.	AMERICAN LAW REPORTS
AM. U. J. INT'L L. & POC'Y	AMERICAN UNIVERSITY JOURNAL OF INTERNATIONAL LAW AND POLICY
ARB	Arbitrat (ion, ors)
AUSTRALIAN YB. INT'L L.	AUSTRALIAN YEARBOOK OF INTERNATIONAL LAW
B. C. INT'L & COMP. L. REV.	BOSTON COLLEGE INTERNATIONAL AND COMPARATIVE LAW REVIEW
BRIT. YB. INT'L L.	BRITISH YEARBOOK OF INTERNATIONAL LAW
B. U. INT'L J.	BOSTON COLLEGE INTERNATIONAL LAW JOURNAL
CAL. W. INT'L J.	CALIFORNIA WESTERN INTERNATIONAL LAW JOURNAL
CANADIAN YB. INT'L L.	CANADIAN YEARBOOK OF INTERNATIONAL LAW
CASE W. RES. J. INT'L. L.	CASE WESTERN RESERVE JOURNAL OF INTERNATIONAL LAW
CHM	Common Heritage of Mankind
COLUM. L. REV.	COLUMBIA LAW REVIEW

¹ 本略語表主要參考: R.R. CHURCHILL & A.V. LOWE, THE LAW OF THE SEA xv-xvii (3rd ed. 1999) ; THE HARVARD LAW REVIEW ASSOCIATION, THE BLUEBOOK : A UNIFORM SYSTEM OF CITATION (18th ed. 2005) 。

COLUM. J. ENVTL. L.	COLUMBIA JOURNAL OF ENVIRONMENTAL LAW
COLUMBIA J. TRANSNAT'L L.	COLUMBIA JOURNAL OF TRANSNATIONAL LAW
CONN. J. INT'L L.	CONNECTICUT JOURNAL OF INTERNATIONAL LAW
CORNELL INT'L L.J.	CORNELL INTERNATIONAL LAW JOURNAL
CSC	Continental Shelf Convention (Geneva Convention) 1958
DENV. J. INT'L L. & POL'Y	DENVER JOURNAL OF INTERNATIONAL LAW AND POLICY
Dev.	Development
ECOLOGY L. QUAR.	ECOLOGY LAW QUARTERLY
EURP. J. INT'L L.	EUROPEAN JOURNAL OF INTERNATIONAL LAW
FAO	(United Nations) Food and Agricultural Organization
FLA. J. INT'L L.	FLORIDA JOURNAL OF INTERNATIONAL LAW
FORDHAM. INT'L L. J.	FORDHAM INTERNATIONAL LAW JOURNAL
FOREIGN AFF.	FOREIGN AFFAIRS
GA. J. INT'L & COMP. L.	GEORGIA JOURNAL OF INTERNATIONAL AND COMPARATIVE LAW
GERMAN YB. INT'L L.	GERMAN YEARBOOK OF INTERNATIONAL LAW
HARV. INT'L L.J.	HARVARD INTERNATIONAL LAW JOURNAL
HARV. J. L. & PUB. POL'Y	HARVARD JOURNAL OF LAW AND PUBLIC POLICY
HASTINGS INT'L & COMP. L.	HASTINGS INTERNATIONAL AND COMPARATIVE LAW
REV.	REVIEW
HAGUE YB. INT'L L.	HAGUE YB. INT'L L.
HFC	Convention on Fishing and Conservation of the living Resources of the High Seas, 1958
HSC	(Geneva) Convention on the High Seas, 1958
IAEA	International Atomic Energy Agency
ICAO	International Civil Aviation Organization
ICES	International Council for the Exploitation of the Sea
ICJ	International Court of Justice
ICJ REPORTS	INTERNATIONAL COURT OF JUSTICE REPORTS

ILC	International Law Commission
ILO	(United Nations) International Labour Organization
IMCO	(United Nations) Intergovernmental Maritime Consultative Organization
IMO	(United Nations) International Maritime Organization
IND. J. INT'L L.	INDIAN JOURNAL OF INTERNATIONAL LAW
IND. YB. INT'L L.	INDIAN YEARBOOK OF INTERNATIONAL LAW
IND. INT'L & COMP. L. REV.	INDIANA INTERNATIONAL AND COMPARATIVE LAW REVIEW
int'l	international
INT'L & COMP. L.Q.	INTERNATIONAL AND COMPARATIVE LAW QUARTERLY
INT'L L. MAT'L.	INTERNATIONAL LEGAL MATERIALS (United States)
INT'L L. REPORTS	INTERNATIONAL LAW REPORTS (United Kingdom)
LAW & CONTEMP. PROBS.	LAW AND CONTEMPORARY PROBLEMS
Legis.	Legislation (ion, ive)
LEIDEN J. INT'L L.	LEIDEN JOURNAL OF INTERNATIONAL L.
LOSC	United Nations Convention on the Law of the Sea, 1982
LOY. L.A. INT'L & COMP. L.J.	LOYOLA OF LOS ANGELES INTERNATIONAL AND COMPARATIVE LAW JOURNAL
MARINE POL'Y	MARINE POLICY
MELB. J. INT'L L.	MELBOURNE JOURNAL OF INTERNATIONAL LAW
MICH. J. INT'L L.	MICHIGAN JOURNAL OF INTERNATIONAL LAW
MICH. L. REV.	MICHIGAN LAW REVIEW
MOD. L. REV.	MODERN LAW REVIEW
NETH. YB. INT'L L.	NETHERLANDS YEARBOOK OF INTERNATIONAL LAW
N.Y.L. SCH. J. INT'L & COMP. L.	NEW YORK LAW SCHOOL JOURNAL OF INTERNATIONAL AND COMPARATIVE LAW
N.Y.U. J. INT'L L. & POL.	NEW YORK UNIVERSITY JOURNAL OF INTERNATIONAL LAW AND POLITICS
N.W. J. INT'L L. & BUS.	NORTHWESTERN JOURNAL OF INTERNATIONAL LAW AND BUSINESS

NORTON DAME L. REV.	NOTRE DAME LAW REVIEW
OCEAN DEV. & INT'L L.	OCEAN DEVELOPMENT AND INTERNATIONAL LAW
PCIJ	Permanent Court of International Justice
RECUEIL DES COURS	RECUEIL DE COURSE DE L'ACADÉMIE DE DROIT INTERNATINAL (THE HAGUE)
Rel.	Relations
Resol.	Resolution
Rev.	Review
RUTGERS L. J.	RUTGERS LAW JOURNAL
RUTGERS L. REV.	RUTGERS LAW REVIEW
SAN DIEGO L. REV.	SAN DIEGO LAW REVIEW
SYRACUSE J. INT'L L. & COM.	SYRACUSE JOURNAL OF INTERNATIONAL LAW AND COMMERCE
TERR. SEA J.	TERRITORIAL SEA JOURNAL
TEX. INT'L L.J.	TEXAS INTERNATIONAL LAW JOURNAL
U. CHI L. REV.	UNIVERSITY OF CHICAGO LAW REVIEW
UN	United Nations
UNCED	United Nations Conference on Environment and Development, 1992
UNCITRAL	United Nations Commission on International Trade Law
UNCLOS I	First United Nation Conference on the Law of the Sea, 1958
UNCLOS II	Second United Nations Conference on the Law of the Sea, 1960
UNCLOS III	Third United Nations Conference on the Law of the Sea, 1973-1982
UNCTAD	United Nations Conference on Trade and Development
UNEP	United Nations Environment Progrmme
UNESCO	United Nations Educational, Scientific and Cultural Organization

VAND. J. TRANSNAT'L L.	VANDERBILT JOURNAL OF TRANSNATIONAL LAW
VCCR	Vienna Convention on Consular Relations, 1963
VCDR	Vienna Convention on Diplomatic Relations, 1961
VCLT	Vienna Convention on the Law of Treaties, 1969
WASH. L. REV.	WASHINGTON LAW REVIEW
VA. J. INT'L L.	VIRGINIA JOURNAL OF INTERNATIONAL LAW
YALE J. INT'L L.	YALE JOURNAL OF INTERNATIONAL LAW
YALE J. WORLD PUB. ORD.	YALE JOURNAL OF WORLD PUBLIC ORDER
YALE L. REV.	YALE LAW REVIEW
YB.	YEARBOOK
YB. OF INT'L L. COMM.	YEARBOOK OF INTERNATIONAL LAW COMMISSION

國際法基本拉丁法律辭彙²

<i>ab initio</i>	From the very beginning. 自始
<i>ad hoc</i>	for this purpose 就此目的；專案；特別
<i>alibi</i>	elsewhere (a defense that the accused was elsewhere when the offense was committed) 不在場
<i>alter ego:</i>	(Latin: "another self") An <i>alter ego</i> company is one that is not treated by its owners as a separate entity. 整體
<i>Amicus curiae</i>	A person permitted to present arguments bearing upon issues before a tribunal yet not representing the interests of any party to the proceedings. 法院之友
<i>animus</i>	An intention, a state of mind. 主觀意願
<i>animus occupandi:</i>	(Latin: "intention to take possession of or seize") Legal rule that in order for a state to claim title to a territory, the state must intend to exercise sovereign powers therein. 占有意思
<i>arguendo</i>	for the purpose of argument 假設
<i>a titre de souverain</i>	(French: "under the authority of a sovereign") Legal rule that certain activities must be done by a sovereign state and not by private persons. 以主權者為之
<i>aut judicare aut dedere</i>	(Latin: "either adjudicate or extradite") A rule, common to anti-terrorism treaties, that requires a contracting state either to

² http://en.wikipedia.org/wiki/List_of_legal_Latin_terms

	prosecute an alleged offender who is within its territory or to extradite the offender to another contracting state for prosecution there. An example of the rule can be found in the Draft Code of Crimes against the Peace and Security of Mankind. 不審判即引渡
<i>avulsion</i>	(From Latin <i>avell</i> : "to pull from") The sudden and abrupt change in the border between two lands, without change in ownership. 沖積地
<i>bona fidei</i>	Of good faith; in good faith. 善意
<i>casus belli</i>	an act justifying war 戰爭理由
<i>caveat</i>	(Latin: let him beware); a warning 警告 A formal notice or warning given by a party interested to a court, judge, or ministerial officer against the performance of certain acts within his power and jurisdiction.
<i>comitas</i>	(Latin: "courteousness") 睦誼
<i>comitas gentium</i>	(Latin: "the courteousness of nations") 國際睦誼
<i>compétence de la compétence</i>	(French: "competence as to [one's own] competence") The ability of a court to determine its own jurisdiction or authority to hear an issue or a case. The International Court of Justice has such competence pursuant to Article 36(6) of the Statute of Court. 法庭管轄權
<i>compromis</i>	A special agreement between states to submit a particular issue; French: "compromise"; from Latin <i>compromittere</i> "to make a mutual promise to abide by the decision of an arbiter.") A special agreement between parties defining the scope of a dispute they are referring to international arbitration or for judicial settlement before an international court. 特定協議
<i>conflict of laws</i>	Or, private international law. A part of the municipal law of each state which provides rules for deciding cases involving foreign factual elements, for example, a contract made abroad. 衝突法
<i>Corpus Juris Civilis</i>	(Latin: "body of civil law.") Codification of Roman law completed about 534 A.D. at the order of Emperor Justinian, that selected, arranged, and condensed the ancient laws. 市民法整體

<i>crimina juris gentium</i>	(Latin: "crimes against the law of nations.") Crimes for which international customary law imposes criminal responsibility on individuals and for which all states may punish an offender. These include crimes against humanity and crimes against peace. See the Draft Code of Crimes against the Peace and Security of Mankind. 萬國公罪
<i>culpa</i>	(Latin: "fault or guilt") The civil law or Roman law term employed by lawyers from non-common law countries to refer to negligence, lack of reasonable care. 惡意
<i>de facto</i>	(Latin: "in fact") in the point of fact; actual; existing in fact; having effect even though not formally or legally recognized 事實上 <i>de facto</i> marriage: a marriage in which the parties live together as husband and wife under color or validity but which is defective for reasons of form, etc.
<i>de gratia</i>	of grace or favour, by favour. <i>De speciali gratia</i> , of special grace or favour. 基於恩給考量
<i>de jure</i>	(Latin: "by right" or "by law") as a matter of law; existing by right or according to law. 法律上
<i>de lege ferenda</i> (<i>de lax ferenda</i>)	Relating to the law as it should be if the rules were changed to accord with good policy. 應然法
<i>de lege lata</i> (<i>de lax lata</i>)	Relating to the law as it is. The principle that a court should decide based on actual law and not how it thinks that the law ought to be. 實然法
<i>de novo</i>	anew; afresh; a second time 全新 <i>A venire de novo</i> is a writ of summoning a jury for the second trial of a case which has been sent back from above for a new trial.
<i>derelicto</i>	(Latin: "derelict") Abandoned 拋棄
<i>dicta</i>	A statement, remark, or observation. The lesser propositions of law stated by tribunals or by individual members of tribunals; propositions not directed to the principal matters in issue. 法官傍論