

A Changing International System and Development of International Law

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Abstract: Recently the situation of international community has undergone great change. A series of incidents including the end of Cold War, the Incident of September 11th and the War in Iraq have caused great impact on and brought challenges to the international system as well as International Law. The dominance of United States as the single super power also brings uncertainty into the future of international law. Under these circumstances, this article first explores the changes in the international system and some important influencing factors, which are regarded as both causes of challenges to current international regime and international law and opportunities for new development. As for the relationship between Hegemony of United States and the future of International Law, the author acknowledges the great impact of United States' Hegemony. On the other hand, the author contends that there's a developing trend of international law with common interest of mankind as its core. However, this trend will not go forward smoothly. Then there's some study on the international legal issues in debate and development, including mainly issues such as the regime governing use of force, international protection of human rights, non-proliferation of weapons of mass destruction, and international governance mechanism tackling "State Failure". On one hand, there is the fact of United States' attempt to create new rules through unilateral acts. But there also exist challenges and restraints from most members of international community. In conclusion, these legal norms are still in the process of development, which requires the combination of opinions of varied aspects so as to establish rules of international law in conformance with the reality of contemporary world.

Key Words: International System, Hegemonic International Law, Communitarian International Law

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In the early years of the 21st century, a series of serious incidents happened, which have directly influenced and shaken the foundation of international system, including the September 11th Incident, the “War on Terror” led by the United States, etc. The whole international community is now faced with immense uncertainty. These dramatic impacts have also affected the foundation of international law which is closely connected with the constitution and evolution of the international community. One Chinese scholar had put down some words on this: “the system of international law has unprecedentedly encountered various impacts and challenges. With new practices and new theories coming out so frequently, contemporary international law turns out to be more and more questionable, arguable, and full of confusions or ambiguities. Reform seems inevitable.” In this volatile era, in order to vindicate and develop the principles, rules and institutions of international law in case the human society is subjected to “jungle law” or “state of nature” with every man being others’ enemy, the international legal scholars should be readily faced with these challenges as well as responsibilities.

I. The Change of International System and Its Influencing Factors

1. The Change in World Order of Major Powers

The United States became the single super power in the world since the end of Cold War. It has occupied unequivocally predominant economic and military power. In the meantime, the contemporary 21st century is also witnessing the remarkable resurgence of some developing countries such as China and India. This presents a wholly new situation, since for the first time in the several hundred years after the rising of western world, non-Christian countries are gradually transforming into great powers with the capability of altering world order. However, Asia’s rising powers still need more representation in key institutions at international level, for which the configuration of the UN Security Council is the most obvious example. This important body should reflect the emerging configuration of global power.^① We can acquire some experiences from the Decolonization and establishment of Newly Independent States in 1960s. Just as what Prof. Wang Tieya had said, “The impacts of Newly Independent States as a category *sui generis* on international law manifest in many of its branches. On the issue of state succession, UN International Law Commission asserted the concept of “Newly Independent States (NIS)” while preparing for the codification on the issue of Succession of States in respect of Treaties and

^① James F. Hoge, Jr., “A Global Power Shift in the Making”, *Foreign Affairs*, July/August 2004.

matters other than Treaties, which in turn led to a discrimination of these states from other newly-established states with regard to their legal consequences. As for the issue of acquisition of territories, it's generally accepted that there is a difference between the Newly Independent States and other states, since the NIS just freed from colonization have inherent sovereignty over their territories, only that this kind of sovereignty was to be attributed to the peoples on the land before the independence."^① As far as the Newly Emerging Powers are concerned, the change and development of international legal institution maybe manifest more in the areas of UN and regional collective security arrangement, as well as in the reform of rules of international economic and trade law.

2. Looming Large of the Trend of Globalization

In respect of international relations, the traditional geo-politics has been replaced by geo-economy or even global economy. Globalization deepens connections and interdependence among peoples around the world, which consequently has led to the gradual creation of global civil society. This new situation is different from the traditional one which had the sovereign states as the only dominating players in the world platform. Now we need individuals and groups representing plural interests more and more participating into the discussions of global affairs. The international community is also shifting from anarchy to global governance, which has made the international law transformed to some extent into the world law. However, the process of globalization has not enhanced equally all the peoples' freedom and welfare. In countries around the world, especially the Less Developed Countries, most of the non-elites groups are still confined by inflexible territoriality, which has made these people more susceptible to oscillation and uncertainty – a byproduct of globalization. In the process of globalization, the culture, language and religious tradition of ethnic minorities and indigenous people may suffer damages, which will deprive the rights of individuals in these groups conferred by international human rights law. This kind of situation should be reversed by more powerful measures taken by relevant governments. But it also needs the coordination of international community so as to achieve the objective of protection of the interests of various disadvantaged groups. This presents the issue of global cooperation. The factors influencing one country's disadvantaged groups lie not just inside

^① Wang Tieya, "Contemporary Trend of International Law", in *Selected Papers of Wang Tieya*, edited by Deng Zhenglai, Chinese University of Politics and Law Publishing House 2003, p.7.

that country any more. The change in global economy, politics and environment will all impose great impact on the living circumstances, means for living, as well as collective identity of these disadvantaged groups. So it has been a critical issue in the process of globalization to transmit the appeals of these disadvantaged groups to various states' governments and international organizations, and also to both maintain their original living conditions and further the constant development of these groups.

Globalization also manifests in the change in the area of security. The weight of the so-called traditional security has fallen relatively, which was accompanied with the near disappearance of armed conflicts among major powers. On the other hand, the importance of non-traditional security is on the rise, with especially the fact that non-international armed conflicts have occupied the major part of all the armed conflicts. From 1980s to the year 2002, there were only several cases of conflicts among nations, in sharp comparison with which is the fact that armed conflicts inside a country continuously keep the number of above 30 cases annually.^① In the meantime, apart from the traditional concept of military security some new threats to security are gradually taken heed of, including transnational organized crime, proliferation of weapons of mass destruction as well as international terrorists' activities. There are some common characteristics among these new security threats, i.e., they are all committed beyond national borders, which has posed new challenges to international law traditionally linked with national borders and nationality.

3. Extensiveness of the Scope of International Actors

International organizations continue to play a great role in world affairs, gradually having the power to challenge and contain States. Recently the reform of the United Nations has aroused great interest among people around the world. Despite growing discontent over this universal organization's many discrepancies, peoples of the world still confer great hope on the UN for its role in maintaining world peace and stability as well as promoting economically and socially sustainable development. In addition, there have existed many regional organizations in the level of continental or sub-regional. The trend of regional integration has been to some extent opposite to the role of the UN. However, based on Chapter 8 of the Charter of the United Nations

^① See the Report of United Nations High-level Panel on Threats, Challenges & Change, *A More Secure World: Our Shared Responsibility*, UN Document, A/59/565, p.17.

concerning regional organizations or arrangements, the actions of these regional organizations can be made in coordination with those of the United Nations. This has provided a new direction for the UN in maintaining international peace and security, i.e., under the precondition that the UN keeps substantial control over the actions taken, it can delegate powers to or coordinate with regional organizations in respect of the cases which are more suitable for regional organizations to take actions. Especially in the process of post-conflict rebuilding, the participation of relevant regional organizations can supplement the weaknesses in capabilities of the UN in this regard. And there is also another form of emerging role of international organizations, i.e., the proliferation of specialized organizations. It has demonstrated the trend of functionalization of the development of international organizations, which is of great importance to our new world filled with lots of trans-boundary economic, social, environmental and health problems.

Apart from those Inter-Governmental Organizations mentioned above, the new century is witnessing a more and more active role of Non-Governmental Organizations (NGOs). This has brought about both positive and negative consequences. From the positive side, it can be seen that the activities of non-governmental organizations, representing interests of different groups in countries around the world and pursuing different objectives, are more and more frequent on the international platform. According to Article 71 of the UN Charter as well as Resolution 1996/31 of the Economic and Social Council (ECOSOC), a lot of NGOs have acquired the consultative status with the ECOSOC, which means that they can participate some meeting of the UN and even presenting their opinions as to matters inside their specialized organizational realm. The NGOs also have acquired similar status in some other specialized agencies. At the same time, the NGOs have participated into the proceedings of international dispute settlement bodies. They provide *amicus curia* brief on certain relevant questions, which can help the international legal forum weigh a balance among different interests. Contrarily, international terrorists groups or transnational organized criminal gangs have incurred negative impacts on orders of both international and domestic society. With the enhancing of international exchanges, movement of persons and goods, various kinds of transnational crimes have been increasing, which also have become more and more specialized and organized. This negative trend has brought great impediment for every country to effectively exercising governance and jurisdiction.

II. Hegemony of the United States and the Future of International Law

1. Hegemony of the United States and International System

Since the end of the bipolar system of the Cold War, the United States has become the only superpower in the world. It seems that the contention of the Pax Americana has got some real meaning. Yet the hegemony of the United States needs some institutional support so as to get self-sustained. The theory of Hegemonic Stability emphasizes in this respect the importance of institutional hegemony to the vindication of hegemony. It contends that the core of hegemony is “institutional arrangements for inter-state relations generally accepted by international community, accompanied also with legitimacy”. Hegemony is never a form of “ruling”, but a kind of “leadership” generally acknowledged (consented or accepted) by international community. In order to maintain the stability of international system and sustainability of the hegemonic regime, the hegemonic state will voluntarily make “strategic (self-) restraint” and a series of “assurance strategy”, which means that the hegemonic state sacrifices some contemporary interest so as to alleviate the fear of secondary or weak states for a hegemony-dominated international system, and in this way wins the compliance and cooperation of other members under the international system.^① There are three important factors included: implementing strategic restraint, constructing binding and bounding institutions, pursuing social integration so as to promote familiarity, trust, common identity and objective.^② According to the discussions made above, we can conclude that a hegemonic state is also willing and able to cooperate with other countries under one common international legal regime.

However, a clear understanding of America’s supremacy in powers must be made. On one hand, its powers are unequivocal and beyond comparison, with no other country can single-handedly stand against it in respect of military powers. Yet on the other hand, it is still restricted by various factors arising from international and domestic economy and politics. Huntington has asked similar question, i.e., what explains this apparent gap between the extent of American power and the ineffectiveness of American influence? In part, the gap is a result of comparing the resources of a country with the strength of its government. Historically the United

^① Chen Dongxiao et al., *United Nations: New Agenda and New Challenges*, Shishi Publishing House, 2005, pp.47-48.

^② Charles A. Kupchan, *The End of the American Era: U.S. Foreign Policy and the Geopolitics of the Twenty-first Century*, Chinese edition, translated by Pan Zhongqi, Shanghai People’s Publishing House, 2004, p.308.

States has been a strong country with a weak government. Apart from the military, most of the resources cited as evidence of American power are not easily subject to the control of the American government.^① Although in the name of War on Terror the United States Government has strengthened its capabilities in harnessing various resources, the view of Huntington still stands to a large extent. Secondly, despite America's supremacy in military power, it still encounters great difficulty when it launches a war in the name of Humanitarian Intervention or Regime Change against certain country. This point demonstrates not only during the process of war but also in the process of rebuilding post-war orders as well as establishing a new democratic government. In the words of Keohane, international regime has influence on the information and opportunities one government may acquire. If one government doesn't live up to its promises of supporting the international regime, its credibility will be damaged. So in this way the international regime can change the assessment of national interest or options available.^② Last but not least, the importance of the so-called Two-Level Game contended by Putnam in world politics should not be ignored. The actions taken by the United States with regard to foreign affairs are influenced to a great extent by lobbying and competing activities of various interest groups.^③ During this process the NGOs can play an important role, since the interests they represent are multi-faceted, including those with the purpose of enhancing globalization and international cooperation. Therefore, the capability of the American Hegemon to enforce the so-called "unitary will" has been much exaggerated. There needs to be an objective view on that.

2. The Change of the Foundations of International Legal Community: Communitarian International Law or Hegemonic International Law

As far as the attitudes toward international law, the extreme view in the United States totally denies the legal effect and validity of international law, regarding it only as some moral lines and conducts of international comity. So the Americans "should be unashamed, unapologetic, uncompromising American constitutional hegemonists".^④ Just in contrary to this, based on the practices of United States in the War on Terror, we can see that the U.S. always made great efforts

^① Samuel P. Huntington, "The Erosion of American National Interests", *Foreign Affairs*, September/October 1997.

^② Robert Keohane, *After Hegemony: Cooperation and Discord in the World Political Economy*, Chinese edition, translated by Su Changhe et al., Shanghai People's Publishing House, 2001, p.30.

^③ Robert D. Putnam, "Diplomacy and Domestic Politics: The Logic of Two-Level Games", *International Organizations*, 42 (Summer 1988), p.427.

^④ John R. Bolton, *Is There Really "Law" in International Affairs?* 10 *Transnat'l L. & Contemp. Probs.* 1 (2000), at 48.

in vindicating the legitimacy of its using of force or other actions. It did this either through interpreting from its perspective relevant international norms or by regarding its actions as refreshing and developing those obsolete international legal rules. These efforts of formulizing or systematizing the pattern of America's dominance manifest mainly in the conception of Hegemonic International Law (HIL). It can be divided into two categories based on opinions from various international legal scholars. One is unilateral HIL. In essence, HIL jettisons or severely undervalues the formal and de facto equality of states, replacing pacts between equals grounded in reciprocity, with patron-client relationships in which clients pledge loyalty to the hegemon in exchange for security or economic sustenance. The hegemon promotes, by word and deed, new rules of law, both treaty based and customary. It is generally averse to limiting its scope of action via treaty; avoids being constrained by those treaties to which it has adhered; and disregards, when inconvenient, customary international law, confident that its breach will be hailed as a new rule.^① In the light of state practices and responses regarding it, this form of manifestation of hegemonic international law has been objected by a large number of countries, which makes it impossible to turn into new rules of international law. Compared with that, the second form referred by some scholars as "global hegemonic international law" has been equipped with more characteristics of disguise of multilateralism. It contends that the United States can transform its own hegemonic interest into the collective wills of the United Nations Security Council in the way of dominating the agenda-setting and decision-making process of the Security Council.^②

German diplomat and scholar Wilhelm Grewe in the Epilogue of his book *The Epochs of International Law* contended that there were two opposite directions for the changing foundations of international law: communitarian or hegemonic international law. In his view, against the background of the fundamental transformation in world politics that took place between 1989-91, there was a growing inclination to re-examine the basic principles of international law based on the consent of sovereign States. This re-examination took place from the perspective of an 'international community' entrusted with the preservation of the common interests of all peoples – or, in the language of several treaties, the 'common concern of humankind'.^③ Actually speaking,

^① Jose E. Alvarez, *Editorial Comment: Hegemonic International Law Revisited*, 97 A.J.I.L. 873 (2003). Also see Detlev F. Vagts, *Editorial Comments: Hegemonic International Law*, 95 A.J.I.L. 843 (2001).

^② Jose E. Alvarez, *Editorial Comment: Hegemonic International Law Revisited*, 97 A.J.I.L. 873 (2003).

^③ Wilhelm G. Grewe, *The Epochs of International Law*, trans. and rev. by Michael Byers (Berlin: de Gruyter 2000), p.704.

this trend started even earlier with its initial manifestation in the institution for exploring and preserving international seabed resources. On August 17th 1967, the representative of Malta's permanent mission to the United Nations presented an proposal to the UN Secretary, which demanded to add an item on the agenda of the twenty-second UN General Assembly with the name of "Declarations and Treaties on preserving for peaceful purposes international deep-seabed resources beyond the limits of national jurisdiction and using the resources for the common interests of humankind". In the interpretive memorandum annexed to it, the concept of "common heritage of mankind" was formally put out, which included the following contents: (1) no state could annex to its territory in whatever way the deep-seabed underlying the oceans beyond the limits of national jurisdiction; (2) the harnessing and economic exploitation of the deep-seabed underlying the oceans beyond the limits of national jurisdiction should be undertaken in a way compliant with the purposes and goals of the United Nations Charter; (3) the harnessing and economic exploitation of the deep-seabed underlying the oceans beyond the limits of national jurisdiction should be undertaken for the purpose of safeguarding common interests of humankind, with the net fiscal benefits accrued from these activities having to be first used to promote the development of poor countries; (4) the deep-seabed underlying the oceans beyond national jurisdiction should be preserved for peaceful purposes.^① In light of the above suggestions, the common interest of humankind can be clearly demonstrated through this new concept. After some refining work, we can discover some general factors in identifying the common interest of humankind, i.e., none of the countries having unilateral power in its occupation or disposal; with the purposes and goals of the UN Charter as guidelines; undertaken for safeguarding the interest of mankind.

In that memorandum it also said that, the suggested treaty should include in its contents the establishment of an international institution, (a) which will undertake jurisdiction over the deep-seabed beyond the limits of national jurisdiction, working as trustee of all the countries; (b) which will coordinate, surveil and control all the activities in the deep-seabed area; and (c) which will ensure the activities undergoing to be in conformity with the principles and stipulations of the

^① Wang Tieya, "On the Concept of 'Common Heritage of Mankind'", in *Chinese Yearbook of International Law* (1984), Chinese Foreign Translation Publishing House, 1984, pp.24-25.

suggested treaty.^① This also discovered an important special feature in the protection of common interest of mankind, i.e., any single country is unable to undertake responsibility to provide by itself the protection as such, which means that it should be under the coordination of an international organization vested with some kind of authority and jurisdiction. This is just what Verdross and others have referred as the institutionalization of international community. In this institutionalized international community, the Charter of the United Nations attains the status of Constitution of international community. Those scholars have also pointed out that, the international law is pure “inter-national law” before the creation of the League of Nations, which only has two kinds of functions: to delimit the scope of inter-states jurisdiction and to regulate the exchanges on the mutual basis. Yet since the 19th century, one fresh goal has been annexed to international law, which demands it to promote the cooperation of various countries with a view to pursuing common objectives of humankind.^② In the case of *Barcelona Traction*, the International Court of Justice made a historic proclamation on the obligations of States. It said that there were aspects of obligations undertaken by States, with one based on traditional mutual undertaking and the other as obligations *erga omnes*. The latter have become common concerns of all the countries due to the nature of this kind of obligations. It follows that every country has a legal and legitimate interest in ensuring the implementation of those obligations, which means naturally that any country can claim for the implementation of the obligations in due course.^③ Kant had recognized this long time ago. So he said that: “all nations originally hold a community of the soil”, and “a possible physical intercourse (*commercium*) by means of it”. He also named the right to this kind of intercourse as “cosmopolitical right (*jus cosmopoliticum*)”, “in so far as it relates to a possible union of all nations, in respect of certain laws universally regulating their intercourse with each other”.^④ In conclusion, based on the recognition of common interest of humankind, all States undertake some kind of obligations in respect of the whole human society.

According to contemporary global change and the practices of the United States, there actually exists some uncertainty in the evolving direction related to the future of international law.

^① Id. at 25.

^② A. Verdross et al., *International Law*, Chinese edition, translated by Li Haopei, the Commercial Press, 1981, p.777.

^③ See Wolfgang Graf Vitzthum eds., *Volkerrecht*, Chinese edition, translated by Wu Yue and Mao Xiaofei, the Law Press, 2002, p.597, note 427.

^④ Immanuel Kant, *The Philosophy of Law: The Science of Right*, Chinese edition, translated by Shen Shuping, the Commercial Press, 1981, p.189.

However, just as what the concept of “systemic value”^① has articulated, which was presented by James Hsiung with a view to explaining the foundation for sustaining a *civitas maxima* breaking the bound of national boundary and ideology, globalization and the emergence of a global civil society have to a large extent changed the former state-centric systemic value, with instead concerns about individuals and the whole human community gradually becoming the developing trend. Moreover, many issues of concerns of the United States actually demonstrate the common interest or new challenges faced up by international community. So we have to treat with an objective view the claims made by the United States so as to distinguish actions to extend or enlarge its own hegemony from those complied with international rules or their righteous developments.

III. International Legal Rules in Controversy and Development

1. Legal Regimes concerning Use of Force

Article 2.4 of the Charter of the United Nations laid down the prohibition on unilateral use of force, which has been both the most important creation of international law at the end of World War II and also the rule constantly faced with challenges. Generally speaking, this clause and Article 51 of self-defense as well as Article 42 of Security Council’s power on collective security enforcing actions together constitute the legal framework on use of force, with the latter two being exceptions to the prohibition on use of force. Nevertheless, the Incident of September 11th, the Wars in Afghanistan and Iraq posed great challenges to international law. Among these there are two core issues: one is concerned with the timing for using force; and the other about the scope of using force.

As far as the timing of use of force is concerned, one worrisome trend is the ever-lowering of the threshold of using force. Two elements are responsible for this. Firstly, non-state actors are acquiring more and more military means or techniques formerly monopolized by States, which has posed unpredictable threats since these non-state actors don’t have consistent rules or usage as to using force. Secondly, with the constant upgrading of military technology and diffusion of knowledge, the use of weapons of mass destruction has become more and more like just a piece of cake, which consequently leads to potential dangers for every civilized and modernized society.

^① James C. Hsiung, *Anarchy and Order*, Chinese edition, translated by Yu Xunda and Zhang Tiejun, Zhejiang Peoples’ Publishing House, 2001, p.43.

These two elements have turned out to be the basis on which President George W. Bush framed his “preemptive strategy”. The major reason behind President Bush’s new strategy was just as what we have mentioned above. Since we cannot contain non-state actors in possession of weapons of mass destruction through the usual strategy against States of nuclear or conventional deterrence, we must take preemptive actions to prevent terrorists groups from acquiring or using weapons of mass destruction. But this preemptive strategy has substantially extended the outer reach of the traditional concept of self-defense. Strictly speaking, self-defense can only be justified under the circumstance of an actual armed attack, which was further confirmed by the International Court of Justice in the case of *Nicaragua v. United States*. In addition, it’s also generally acknowledged if there exists imminent threat of armed attack, i.e., “imminent, overwhelming, leaving no alternative and no time for deliberation”,^① the act of self-defense is justifiable. In contrast, the “preemptive strike” contended by the United States always turns out to be “preventive strike”, which means to use force in lack of sufficient evidence. This is a very dangerous step to go forward.

As for the scope of using force, there have been some new developments after the War in Afghanistan and Iraq launched by the United States. Formerly the armed counter-attack was only directed at the state initiating the war. Yet after the unprecedented terrorist attack of September 11th, President Bush declared that they will “not distinguish between terrorists and those countries supporting and harboring terrorists”. As a further explanation of Bush Doctrine, Thomas Franck also referred to the Draft on State Responsibility under discussion in the United Nations International Law Commission, contending that a state should take responsibility for the consequences caused by its acquiescence in using its territory to damage other countries. Another legal source cited by France is Resolution 1368 of United Nations Security Council expressing rage over the Incident of September 11th, which claimed that “any group supporting or harboring those terrorist attackers” was also responsible for the terrorist acts.^② However, it’s arguable whether the responsibility undertaken by this kind of states includes reprisal armed attack, which is accompanied with the difficulty encountered in making clear delimitation in relation to relevant concepts and standards. In the report of the United Nations High-level Panel on Threats,

^① Yu Mincai, *Legal Characterization of “Armed Attack”*, Journal of Law Review (FaXuePingLun), No.1, 2004, p.20.

^② Thomas M. Franck, *Editorial Comments: Terrorism and the Right of Self-Defense*, 95 A.J.I.L. 839 (2001).

Challenges & Change and Secretary-General Cofi Annan's report, the contemporary rules concerning use of force are still recognized and accepted. In the final 2005 World Summit Outcome adopted by the General Assembly, it also said that "we reaffirm that the relevant provisions of the Charter are sufficient to address the full range of threats to international peace and security".^① In conclusion, although the legal regime governing the use of force is faced up with new challenges, its core theme is still unquestionable. So the practical solution may be to insist on the basic rule while considering simultaneously some reasonable worries.

2. International Protection of Human Rights

As far as international protection of human rights is concerned, there are two opposite but mutually complementary evolving directions. On the one hand, there is a growing trend of internationalization and universalization in respect of rights conferred on peoples around the globe and their protection. On the other hand, with the undertaking of more and more personal liability under international law, individuals are not purely undertakers of rights and obligations in domestic law any more.

Firstly, as far as an individual's rights are concerned, according to traditional international law, it's one state's domestic affairs how the state treats its nationals or persons without nationality, which is not concerned with any other country or international organization. The only particular case is for aliens with other countries' nationalities, the treatment of whom will be subjected to their own nation states' diplomatic protection. But this protection is regarded as right of the state, not of the individuals. And it's totally under a state's discretion whether to claim this right or not. However, after the creation of the Charter of the United Nations, the situation has changed a lot. So Lauterpacht believed that: the stipulations of the Charter as regards human rights were the main theme running through it. In the words of the Charter, rules on human rights occupied a conspicuous position. And all the member countries of the United Nations had undertaken legal obligations to act in accordance with the purposes of the Charter.^② The legal obligations referred by Lauterpacht were mainly concerned with Article 55 and 56 stipulation the obligations of states to protect human rights. Article 56 demands every state "take unilateral or joint actions in cooperation with the United Nations with a view to promoting the respect for human rights and

^① UNGA Resolution A/Res/60/1, 16 September 2005.

^② H. Lauterpacht, "State Sovereignty and Human Rights", in *Western Theories of Human Rights*, edited by Shen Zongling and Huang Nansen, Sichuan Peoples' Publishing House, 1994, p.513.

basic freedom”, which has been interpreted broadly as the obligation undertaken by every state to protect human rights domestically. Under the circumstances of consistent violation of human rights in large scales, the United Nations Subcommittee for Protection and Promotion of Human Rights can accept complaints from individuals and investigate the relevant situations. When the situation is serious enough to constitute a threat to international peace and security, the Security Council will make deliberation on the situation, and then take actions according to Chapter 7 of the Charter. Considering this, Louis Sohn pointed out that: the Universal Declaration of Human Rights was integrated into the Charter...which had turned into a component of the constitutional structure of the international community.^① So contemporary international law demonstrates dual characteristics. Inherently it's still law among nations. Yet at the same time it's evolving into a law of humankind, which will take into account of both the human nature of sociability and individuality.^②

Secondly, in respect of the international liabilities of individual persons, the foremost conspicuous demonstration was the Nuremberg and Tokyo trial against war criminals of the Axis countries after World War II. These two tribunals also triggered the debate on whether individual persons were subjects of international law. Since in these tribunals, individual persons were involved into them as defendants, which naturally followed that they have *locus standi* in international tribunals. The international liability of individual person focuses on his international obligations. Yet as a succession of the combination of rights and obligations in domestic law, it also includes some relevant rules in relation to the rights of the defendants, including right to a council, right to a fair trial, etc. In spite of that, the international liability of individual person is still mainly concerned with the liability of individual persons for violating international regulations, which manifests through the definitions of international crimes and the jurisdictional delimitation between international criminal tribunals and domestic courts. Article 6 of the 1945 Charter of the International Military Tribunal mandated the following crimes as actionable before international criminal tribunals: crime against peace – planning, preparing, initiating or enforcing an aggressive war, war crimes, and crime against humanity – murder, genocide, dislocation of civilians during war time and other actions against humanity as well as relevant racial, political or

^① See Thomas Burgenthal, *International Human Rights Law*, Chinese edition, translated by Pan Weihuang and Gu Shirong, Chinese Social Science Press, 1995, p.20.

^② A. Verdross et al., *op. cit.*, p.2.

religious persecution.^① In the judgments made by the Nuremberg International Military Tribunal against major war criminals, it reaffirmed that: “The very essence of the Charter is that individuals have international duties which transcend the national obligations of obedience imposed by the individual state. He who violates the laws of war cannot obtain immunity while acting in pursuance of the authority of the state if the state in authorizing action moves outside its competence under international law.”^② As of 1998, during the process of drafting of the Statute of International Court of Justice in Rome, most countries agreed that the initial working period of the Court should be focused on those substantially serious crimes in violation of international humanitarian law. It followed with the distinction between the core crimes and the treaty crimes. The core crimes include genocide, war crimes, crime against humanity, and crime of aggression. Because of their seriousness and substantial threat to human existence, these crimes become the most important components of international crimes.

3. Mechanism for Preventing the Proliferation of Weapons of Mass Destruction

In respect of non-proliferation, the Proliferation Security Initiative (PSI) advocated by the United States has become a focus point of controversy. With the concept first presented in 2003, the PSI was formerly framed to mainly include implementation measures of participating countries to prevent weapons' proliferation in every country's territorial sea, contiguous zone and exclusive economic zone respectively. But the intention of the United States is not limited to this. Actually it intends to create new customary international law concerning maritime security through those participating countries' practices. Recently the United States has signed respectively with Panama, Liberia and Marshal Islands bilateral treaties concerning preventing proliferation at sea. In these treaties, it's said that the party other than the flag state party can visit and investigate the suspected vessels hanging the flag of the other party with the consent of the flag state. Considering that Panama and Liberia are the top two countries in the world with the largest numbers of registered vessels, the signing of bilateral treaties makes most of the vessels sailing at sea falling under the security framework of proliferation prevention sponsored by the United States. The influence and meaning of these acts cannot be underestimated. In the bilateral treaty reached with Liberia, the so-called “suspected vessels” in need of special concern refers to those

^① Wolfgang Graf Vitzthum, *op. cit.*, p.732.

^② John A. Perkins, *The Changing Foundations of International Law: From State Consent to State Responsibility*, 15 B.U. Int'l L.J. 433.

vessels for commercial or private use, which are under reasonable doubt in relation to getting involved into proliferation activities at sea. The term of “proliferation activities at sea” is defined as using vessels to transport weapons of mass destruction, delivery instruments and relevant components and materials, with the originating party or destination party as state or non-state actors of special concern in respect of proliferation. Article 4 of the bilateral agreement permits relevant mandated authority to get on board the suspected vessel. This means that when the suspected vessel claims of having nationality of either party to the agreement, the maritime security official can ask the other party to the agreement for verification of the vessel’s nationality or for the permission to visit and inspect the suspected vessel, relevant cargo and persons, and take the vessel into custody on the occasion of finding evidence of proliferation. As for obtaining of the mandate of the flag state, the agreement stipulates specifically that, the flag state can confirm or deny the nationality of the vessel; and if the requesting state doesn’t get the response after two hours, it will be regarded as an acquiescence to the visiting and inspecting activities so that the maritime security official of the requesting state is within his authority to implement these actions. Article 5 of the agreement reaffirms that respect should be paid to the basic jurisdiction of flag state over the vessels hanging its flag. Yet it also said that the flag state can assign its jurisdiction to other countries. In the agreement there are still other rules concerning mutual exchange of relevant information between the two states and prompt notification of the result of inspecting vessels.^① However, if the United States intends to extend unscrupulously this system to every vessel at open sea without relevant bilateral agreements with the flag states, the long time usage of navigation freedom at sea will surely suffer great damage. Having taken this danger into consideration, the United States is now just focused on matters within the competence of disposal conferred by international law on sovereign states.^②

At the time when the United States is striving to form a treaty network in limited scale, the United Nations Security Council has also made some efforts in this respect. On April 28th 2004, the Security Council adopted Resolution 1540 in relation to preventing the proliferation of nuclear

^① The text of the agreement is available at website of United States Department of State: <http://www.state.gov/>.

^② From the incident related to a North Korean freighter as of 2002, we can understand the ambivalent attitude of the United States on this matter. At that time, Spanish Navy intercepted a North Korean vessel carrying missiles on board. Then the government of Yemen immediately claimed to be responsible for procuring these missiles, which made the final release of the vessel. During the whole process of this incident, the navigation freedom at open sea is an important factor having been considered.

weapon, biological and chemical weapon, and their delivery instruments. Short time later, the so-called “1540 Committee” was established in accordance with this resolution. This has initiated a new direction of surveilling and preventing proliferation of weapons of mass destruction through the collective security system. This committee is composed of three sub-committees, which will review state reports presented by member states according to Resolution 1540.^① Since this committee is still in a state of initial operation, its effect and validity in relation to enhancing the international mechanism for prevention of proliferation still needs further observation.

4. “Weak State”, “Failed State” and international governance

One of lessons people learned from the Incident of September 11th is that: in a globalized world, the chaos or deficiency related to domestic order or internal governance of the “weak state” or “failed state” will have a spillover consequence so as to transmit to other countries, which has become a threat to international peace and security. In this vein, the way to tackling this kind of challenges has become a hot issue under debate. Generally speaking, the so-called “weak State” means that the government of a state is losing its capacity of implementing basic governmental functions, always accompanied with a ever-loosing social structure, but it maintains some implementing capacity which makes the government still work despite the lack of efficiency and effectiveness. In contrast, the “failed state” totally loses control over its territory, consequently becoming unable to provide security guarantee to its peoples, to maintain rule of law, human rights protection and effective governance, as well as to produce public goods such as economic growth, education and health care, etc. The nation is in a situation of collapse in respect of most decisive aspects of national ruling.^② To deal with state failure, we need not only the capability of preventing conflict and crisis management, but also the rebuilding of state institutions and governance structure. The reshaping of national identity has been another important aspect. This is especially conspicuous in some countries of Africa. The process of decolonization has united many ethnic groups into one state, but many years later these groups still cannot integrate into one complete nation-state. With the existing of conflicts and turmoil, these states again fell into the situation of anarchy and chaos. In these states, the involvement of the United Nations from all aspects is necessary for the rebuilding of their nations.

^① UN Press Release, SC/8265, 9 December, 2004.

^② Men Honghua and Huang Haili, “Remedial Measures in Response to State Failure – With Additional Discussion on the Strategic Nature of Sino-America Security Cooperation”, *American Studies* (MeiGuoYanJiu), No.1, 2004.

As far as “state failure” is concerned, the mechanism of “Condominium” of international community may be a practical solution.^① This is naturally a Condominium based on contemporary collective security system, with its working core being again the United Nations Charter and subsequent practices developed by the Security Council. The Condominium should first be based on the principle of sovereign equality which requires every member of international community to participate into it equally and within their capability. There has been a trusteeship regime in relation to certain special areas in the United Nations system, which was created by the simulation of mandate regime in the period of the League of Nations. This regime delegates the management of some areas with relative independence and specialty to some trustee countries. The trustee should strive to promote the advancement of indigenous political, economic and social institutions, and ensure local people to make free choice concerning future political status of this area at some appropriate time. Article 76 of the United Nations Charter stipulates that, the basic objectives of the trusteeship system is to further international peace and security; to promote the political, economic, social, and educational advancement of the inhabitants of the trust territories, and their progressive development towards self-government or independence as may be appropriate to the particular circumstances of each territory and its peoples and the freely expressed wishes of the peoples concerned, and as may be provided by the terms of each trusteeship agreement. Up to now, all the trust territories have chosen as stipulated their new political status in the way of plebiscite. It seems that the mission of the Trusteeship Council has been over.^② In the meantime, another similar institution has been established in accordance with the 2005 World Summit Outcome, i.e., the Peacebuilding Commission, which will undertake the new function of international governance.

The first major practice of governance by the United Nations originated from the 1991 Agreement on a Comprehensive Political Settlement of the Conflict in Cambodia. This Agreement established a Supreme National Council, which was composed of representatives of the contending Cambodian factions. This Supreme National Council had delegated various

^① See Tom J. Farer, *Editorial Comments: Beyond the Charter Frame: Unilateralism or Condominium?* 96 A.J.I.L. 359 (2002).

^② As regards the Trusteeship Council, one sort of opinion asks for its dissolution through revision of the Charter; and the other sort of opinion grants some new missions to it, including the surveillance and vindication of the enjoyment and realization of self-determination, the trustee for common interests of international community such as environment, the Antarctic, and outer space.

governmental functions to the United Nations, which were exercised by a UN Transitional Authority in Cambodia (UNTAC) created by the Security Council. Specifically, UNTAC was given direct control over Cambodian agencies in the areas of foreign affairs, national defense, finance, public security, and information; supervision over other agencies that could influence the outcome of elections; and the right to investigate various other government organs to determine whether they were undermining the accords and, if so, to take corrective measures.^① The United Nations has also played a great role in postconflict peacebuilding in respect of Kosovo. On June 10th, 1999, the Security Council adopted Resolution 1244, which decided on the deployment in Kosovo “under United Nations auspices, of international civil and security presences”. The security presence was to be “under unified command and control”, also authorized to use “all necessary means” to establish a safe environment and facilitate the safe return of all displaced persons. It also empowered the Secretary-General to establish “an international civil presence in Kosovo in order to provide an interim administration for Kosovo under which the people of Kosovo can enjoy substantial autonomy within the Federal Republic of Yugoslavia, and which will provide transitional administration while establishing and overseeing the development of provisional democratic self-governing institutions”. The resolution then outlined specifically the major functions of this international civil presence.^② Despite those mentioned above, it’s worthy of noting that the cooperation and coordination in respect of practice of international governance between the United Nations and relevant regional organizations is never the less important.

IV. Conclusion

In contemporary ever-changing international system, the conspicuous imbalance of major powers brings a lot of uncertainty to the future of international law. Actually speaking, in the development of international law, the hegemony of the United States will have great influence. Yet on the other hand, under the circumstances of globalization and emergence of global civil society as well as rising powers, the communitarian international law advocating for common interests of humankind will acquire more extensive support. The international law pursuing the preservation and development of human community should also be the starting basis for considering development of norms on specific areas. In conclusion, we have to consider new security threats

^① Michael J. Matheson, *United Nations Governance of Postconflict Societies*, 95 A.J.I.L 76 (2001).

^② UNSC, S/RES/1244 (1999).

and challenges facing international community, including the aggravation of terrorism, the danger of proliferation of weapons of mass destruction, acts in serious violation of human rights, and collapse of state institutions. In the meantime, we shall vindicate fundamental rules generally accepted by international community and take seriously any contention or practice intending to change relevant legal regime. Only by doing like that can the members of international community be presented with predictable and feasible rules of conduct.